

2018 ANALYSIS AND RECOMMENDATIONS

SOUTH DAKOTA

FRAMEWORK ISSUE 1: CRIMINALIZATION OF DOMESTIC MINOR SEX TRAFFICKING

Legal Components:

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

Legal Analysis¹:

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

South Dakota criminalizes human trafficking without regard to the use of force, fraud, or coercion when the victim is a minor. Specifically, S.D. Codified Laws § 22-49-1 (Human trafficking prohibited) states,

No person may recruit, harbor, transport, provide, receive, or obtain, by any means, another person knowing that force, fraud, or coercion will be used to cause the person to engage in prostitution, forced labor, or involuntary servitude. No person may benefit financially or by receiving anything of value from participation in a venture that has engaged in acts set forth in this section. Any violation of this section constitutes the crime of human trafficking. If the victim is under eighteen years of age, the crime of human trafficking need not involve force, fraud, or coercion.

¹ This report includes legislation enacted as of August 1, 2018.

Under S.D. Codified Laws § 22-49-2² (First degree human trafficking—Felony), first degree human trafficking is a Class 2 felony, which occurs when the human trafficking act defined in S.D. Codified Laws § 22-49-1:

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

Further, “any attempt to commit a violation of [S.D. Codified Laws § 22-49-2] against a victim who is a minor is punishable in the same manner as the completed violation.” S.D. Codified Laws § 22-49-2.

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

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

Under S.D. Codified Laws § 22-49-4 (Penalty for hiring or attempting to hire someone to engage in sexual activity for a fee), “[i]t is a Class 6 felony for a person to hire or attempt to hire another person for a fee to engage in sexual activity,³ as defined in S.D. Codified Laws § 22-23-1.1 [Sexual activity defined], if the person knew or should have known the other person was being forced to engage in the activity through human trafficking.”

A Class 2 felony is punishable by imprisonment up to 25 years and a possible fine of \$50,000.⁴ S.D. Codified Laws § 22-6-1(5) (Felony classes and penalties—Restitution—Habitual criminal sentences). A Class 4 felony is punishable by imprisonment up to 10 years and a possible fine of \$20,000. S.D. Codified Laws § 22-6-1(7). A Class 6 felony is punishable by imprisonment up to 2 years, a fine of \$4,000, or both. S.D. Codified Laws § 22-6-1(9).

² The text of S.D. Codified Laws § 22-49-2 cited here and elsewhere in this report includes amendments made by the enactment of Senate Bill 64 during the 2018 Regular Session of the South Dakota Legislature (effective July 1, 2018).

³ S.D. Codified Laws § 22-23-1.1 (Sexual activity defined) states “[a]s used in this chapter the term, sexual activity, references both sexual penetration . . . and sexual contact”

⁴ S.D. Codified Laws § 22-6-1.2 (Minimum sentence for subsequent felony convictions for a sex crime) states, “If an adult has a previous conviction for a felony sex crime as defined by § 22-24B-1, any subsequent felony conviction for a sex crime as defined by subdivisions 22-24B-1(1) to (15), inclusive, and (19) shall result in a minimum sentence of imprisonment equal to the maximum term allowable under § 22-6-1, up to twenty-five years. The court may suspend a portion of the prison sentence required under this section.” See discussion of “sex crime” pursuant to S.D. Codified Laws § 22-24B-1 *infra* Component 2.10.

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

The following law criminalizes CSEC in South Dakota:

1. S.D. Codified Laws § 22-23-2 (Promotion of prostitution) identifies commercial sexual activity as a separate and distinct offense from general sexual offenses. S.D. Codified Laws § 22-23-2 states,

Any person who:

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

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

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

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

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

S.D. Codified Laws § 22-23-1.2 (Affirmative defense of compulsion) refers to South Dakota’s human trafficking statute by providing trafficking victims with an affirmative defense to prostitution charges. S.D. Codified Laws § 22-23-1.2 states,

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

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 Dakota has not enacted a racketeering statute. However, under S.D. Codified Laws Chapter 22-10A (Street Gang Activity), sentences for violent crimes are intensified when committed as part of a “[p]attern of street gang activity,” defined as “the commission, attempted commission, or solicitation by any member or members of a street gang of two or more felony or violent misdemeanor offenses on separate occasions within a three-year period for the purpose of furthering gang activity.” S.D. Codified Laws §§ 22-10A-1(3), 22-10A-02.⁵ This would include sex trafficking and CSEC offenses, but can only be used in sentencing members of street gangs consisting of three or more individuals identified as a group. S.D. Codified Laws § 22-10A-1(1).

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

⁵ Pursuant to S.D. Codified Laws § 22-10A-2 (Reclassification of offense if part of street gang activity) states, “The penalty for conviction of any offense shall be reclassified to the next highest classification in the penalty schedule if the commission of such offense is part of a pattern of street 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.*

S.D. Codified Laws § 22-49-1 (Human trafficking prohibited) applies to buyers of sex with minors following federal precedent through the term “obtain.”⁶ S.D. Codified Laws § 22-49-1 states,

No person may recruit, harbor, transport, provide, receive, or obtain, by any means, another person knowing that force, fraud, or coercion will be used to cause the person to engage in prostitution, forced labor, or involuntary servitude If the victim is under 18 years of age, the crime of human trafficking need not involve force, fraud, or coercion.

⁶ See *United States v. Jungers*, 702 F.3d 1066 (8th Cir. 2013). In this case, the Eighth Circuit held that the federal sex trafficking law, 18 U.S.C. § 1591 (Sex trafficking of children or by force, fraud, or coercion) applies to buyers of sex with minors. Reversing a District of South Dakota ruling that Congress did not intend the string of verbs constituting criminal conduct under 18 U.S.C. § 1591(a)(1) (“recruits, entices, harbors, transports, provides, obtains, or maintains”) to reach the conduct of buyers (*United States v. Jungers*, 834 F. Supp. 2d 930, 931 (D.S.D. 2011)), the Eighth Circuit concluded that 18 U.S.C. § 1591 does not contain “a latent exemption for purchasers” because buyers can “engage in at least some of the prohibited conduct.” *Jungers*, 702 F. 3d 1066, 1072. Congress codified *Jungers* clarifying that the federal sex trafficking law is intended to apply to buyers in the Justice for Victims of Trafficking Act (JVTA) of 2015 Pub. L. No. 114-22, 129 Stat 227), enacted on May 29, 2015. The JVTA adds the terms “patronize” and “solicit” to the list of prohibited conduct and expressly states, “section 108 of this title amends section 1591 of title 18, United States Code, to add the words ‘solicits or patronizes’ to the sex trafficking statute making absolutely clear for judges, juries, prosecutors, and law enforcement officials that criminals who purchase sexual acts from human trafficking victims may be arrested, prosecuted, and convicted as sex trafficking offenders when this is merited by the facts of a particular case.” *Id.* at Sec. 109. The Eighth Circuit decision in *United States v. Jungers* and the federal sex trafficking law as amended by the Justice for Victims of Trafficking Act establish persuasive authority when state courts interpret the string of verbs constituting prohibited conduct in state sex trafficking laws (in particular the term “obtains”) to the extent such interpretation does not conflict with state case law.

Buyers may also be prosecuted under S.D. Codified Laws § 22-49-4 (Penalty for hiring or attempting to hire someone to engage in sexual activity for a fee), which states, “[i]t is a Class 6 felony for a person to hire or attempt to hire another person for a fee to engage in sexual activity, as defined in § 22-23-1.1 [Sexual activity defined], if the person knew or should have known the other person was being forced to engage in the activity through human trafficking.” To be convicted of this offense, however, a buyer of commercial sex with a minor must know that the minor is a victim of human trafficking.

2.1.1 Recommendation: Amend S.D. Codified Laws § 22-49-1 (Human trafficking prohibited) to clarify that buyer conduct is included as a violation of S.D. Codified Laws §§ 22-49-1 (Human trafficking prohibited), 22-49-2 (First degree human trafficking—Felony), and 22-49-3 (Second degree human trafficking—Felony).

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

South Dakota’s CSEC law does not criminalize purchasing sex with a minor. While S.D. Codified Laws § 22-24A-5(1) (Solicitation of a minor) establishes a Class 4 felony when a person 18 or older “(1) Solicits a minor,⁷ or someone the person reasonably believes is a minor, to engage in a prohibited sexual act,” the lack of an express reference to commercial sexual activity makes it uncertain whether the offense can be applied to buyers of sex acts with a minor.⁸

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

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

South Dakota law distinguishes between soliciting sex acts with a minor under 16 and soliciting sex acts with an adult by creating a distinct offense. Specifically, S.D. Codified Laws § 22-24A-5 (Solicitation of a minor) creates a Class 4 felony where an individual who is 18 or older:

- (1) Solicits a minor, or someone the person reasonably believes is a minor, to engage in a prohibited sexual act; or
- (2) Knowingly compiles or transmits by means of a computer; or prints, publishes or reproduces by other computerized means; or buys, sells, receives, exchanges or disseminates, any notice, statement or advertisement of any minor’s name, telephone number, place of residence, physical characteristics or other descriptive or identifying information for the purpose of soliciting a minor or someone the person reasonably believes is a minor to engage in a prohibited sexual act.

⁷ S.D. Codified Law § 22-24A-2(3) (Definitions) defines “minor” as any person under the age of 18.

⁸ S.D. Codified Laws § 22-24A-2(16) defines “prohibited sexual act” as “actual or simulated sexual intercourse, sadism, masochism, sexual bestiality, incest, masturbation, or sadomasochistic abuse; actual or simulated exhibition of the genitals, the pubic or rectal area, or the bare feminine breasts, in a lewd or lascivious manner; actual physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse or gratify the sexual desire of either party; defecation or urination for the purpose of creating sexual excitement in the viewer; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. The term includes encouraging, aiding, abetting or enticing any person to commit any such acts as provided in this subdivision. The term does not include a mother’s breast-feeding of her baby.”

Accordingly, S.D. Codified Laws § 22-24A-5 can apply to situations where a buyer solicits a minor for commercial sex. For purposes of this section, however, S.D. Codified Laws § 22-24A-4 (Solicitation of minor—Definitions) defines “minor” to include only children under 16 years of age. Further, South Dakota’s general solicitation law, S.D. Codified Laws § 22-23-9 (Hiring another to engage in sexual activity), does not differentiate between soliciting sex acts with an adult and soliciting sex acts with a minor. The statute creates a Class 1 misdemeanor for “[a]ny person who hires or attempts to hire another person for a fee to engage in sexual activity,” regardless of the victim’s age. As a result, state law provides the same penalty for soliciting older minors and adults.

2.3.1 Recommendation: Amend S.D. Codified Laws § 22-24A-5 (Solicitation of a minor) to specifically prohibit solicitation of a minor for commercial sex, and amend S.D. Codified Laws § 22-24A-4 (Solicitation of minor—Definitions) to include all minors under 18 within the definition of “minor.”

2.3.2 Recommendation: Amend S.D. Codified Laws § 22-23-9 (Hiring another to engage in sexual activity) to differentiate soliciting sex acts with a minor and soliciting sex acts with an adult by providing heightened penalties when the victim is a minor under 18.

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

When applicable to buyers, S.D. Codified Laws § 22-49-2⁹ (First degree human trafficking—Felony) states that a buyer convicted of human trafficking is guilty of a Class 2 felony, which is punishable by imprisonment up to 25 years and a possible fine of \$50,000.¹⁰ S.D. Codified Laws § 22-6-1(5) (Felony classes and penalties—Restitution—Habitual criminal sentences). Further, “any attempt to commit a violation of [S.D. Codified Laws § 22-49-2] against a victim who is a minor is punishable in the same manner as the completed violation.” S.D. Codified Laws § 22-49-2.

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

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

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

⁹ See *supra* note 2.

¹⁰ S.D. Codified Laws § 22-6-1.2 (Minimum sentence for subsequent felony convictions for a sex crime) states, “If an adult has a previous conviction for a felony sex crime as defined by § 22-24B-1, any subsequent felony conviction for a sex crime as defined by subdivisions 22-24B-1(1) to (15), inclusive, and (19) shall result in a minimum sentence of imprisonment equal to the maximum term allowable under § 22-6-1, up to twenty-five years. The court may suspend a portion of the prison sentence required under this section.” See discussion of “sex crime” pursuant to S.D. Codified Laws § 22-24B-1 *infra* Component 2.10.

In comparison, if the victim is under the age of 14, a conviction under the TVPA for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the buyer has a prior conviction for a federal sex offense¹¹ against a minor. 18 U.S.C. § 3559(e)(1). To the extent buyers can be prosecuted under other federal CSEC laws,¹² a conviction is punishable by penalties ranging from a fine not to exceed \$250,000 to life imprisonment and a fine not to exceed \$250,000.¹³

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

Under S.D. Codified Laws § 22-24A-5(2) (Solicitation of a minor), a buyer may be guilty of a Class 4 felony when the buyer “[k]nowingly compiles or transmits by means of a computer; or prints, publishes or reproduces by other computerized means; or buys, sells, receives, exchanges or disseminates, any notice, statement or advertisement of any minor’s name, telephone number, place of residence, physical characteristics or other descriptive or identifying information for the purpose of soliciting a minor or someone the person reasonably believes is a minor to engage in a prohibited sexual act.” Under this statute, whether or not a computer is used, a conviction is punishable by imprisonment up to 10 years and a possible fine of \$20,000. S.D. Codified Laws § 22-6-1(7) (Felony classes and penalties—Restitution—Habitual criminal sentences). This statute also makes it a crime to “[s]olicit[] a minor, or someone the person reasonably believes is a minor, to engage in a prohibited sexual act.” S.D. Codified Laws § 22-24A-5(1). For purposes of this statute, “solicits” is defined as “to seduce, lure, entice or persuade, or attempt to seduce, lure, entice or persuade a specific person by telephone, in person, by letter, by using a computer or any other electronic means.” S.D. Codified Laws § 22-24A-4(2) (Minor and solicit defined). “Minor,” however, is defined only to include a child 15 years of age or younger. S.D. Codified Laws § 22-24A-4(1).

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

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

¹¹ Pursuant to 18 U.S.C. § 3559(e)(2), “federal sex offense” is defined as

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

¹² 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).

¹³ 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).

under 18 years of age.

While both S.D. Codified Laws §§ 22-24A-5(2) (Solicitation of a minor) and 22-22-24.3 (Sexual exploitation of a minor) prohibit a buyer from raising a mistake of age defense for sex acts with a minor under 18 years of age, neither statute is commercial in nature, and therefore, neither clearly applies to commercial sexual activity.

2.6.1 Recommendation: Amend S.D. Codified Laws § 22-49-1 (Human trafficking prohibited) to prohibit a defense based on mistake of age in cases of commercial sexual exploitation of a minor under 18.

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

South Dakota's trafficking laws do not stagger penalties based on a minor's age, and penalties are sufficiently high. A conviction under S.D. Codified Laws § 22-49-2¹⁴ (First degree human trafficking—Felony) is a Class 2 felony punishable by imprisonment up to 25 years, while a conviction under S.D. Codified Laws § 22-49-3 (Second degree human trafficking—Felony) is a Class 4 felony punishable by imprisonment up to 10 years. S.D. Codified Laws §§ 22-49-2, 22-49-3, 22-6-1(5), (7).

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.D. Codified Laws § 22-49-2¹⁵ (First degree human trafficking—Felony) faces a fine of \$50,000. S.D. Codified Laws § 22-6-1(5) (Felony classes and penalties—Restitution—Habitual criminal sentences). S.D. Codified Laws § 22-24A-5 (Solicitation of a minor) may carry a fine of \$20,000 when the solicited minor is under 15. S.D. Codified Laws § 22-6-1(7).

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

If charged with violating any of the sexual offense laws, buyers of commercial sex with minors could receive significant financial penalties. For S.D. Codified Laws § 22-22-24.3 (Sexual exploitation of a minor) the buyer could receive a fine of \$4,000. S.D. Codified Laws § 22-6-1(9). A buyer convicted of a violating S.D. Codified Laws § 22-22-7 (Sexual contact with child under sixteen) may be punished by a maximum fine of \$30,000. S.D. Codified Laws § 22-6-1(6). If, however, the buyer was less than 5 years older than the victim and the victim was 13 or older, the crime would only carry a possible fine of \$2,000. S.D. Codified Laws §§ 22-6-2(1), 22-22-7.

A buyer may also be subject to restitution orders, at the discretion of the court. S.D. Codified Laws § 23A-28-3 (Restitution plan—Present inability to pay—Absence of pecuniary damages—Condition of parole) provides “If the sentencing court orders the defendant to the county jail, suspended imposition of sentence, suspended sentence, or probation, the court may require as a condition that the defendant . . . promptly prepare a plan of restitution, including the name and address of each victim, a specific amount of restitution to each victim, and a schedule of restitution payments.” For the purposes of restitution to crime victims, “victim” is defined as including “any person . . . who has suffered pecuniary damages¹⁶ as a result of the defendant’s criminal

¹⁴ See *supra* note 2.

¹⁵ See *supra* note 2.

¹⁶ S.D. Codified Laws § 23A-28-2 (Definition of terms) defines “pecuniary damages” as, “all damages which a victim could recover against the defendant in a civil action arising out of the same facts or event, except punitive damages and damages for pain and suffering, mental anguish, and loss of consortium. Without limitation, the term includes damages for wrongful death.”

activities . . .” S.D. Codified Laws § 23A-28-2(5). “Criminal activities” is defined as “any crime [excluding petty offenses] for which there is a plea of guilty or verdict of guilty upon which a judgment of conviction may be rendered and any other crime committed after June 30, 1979, which is admitted by the defendant, whether or not prosecuted.” S.D. Codified Laws § 23A-28-2(2). Moreover, South Dakota’s state policy is that “restitution shall be made by each violator of the criminal laws to the victims of the violator’s criminal activities to the extent that the violator is reasonably able to do so.” S.D. Codified Laws § 23A-28-1.

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

A buyer is also subject to mandatory, criminal asset forfeiture under S.D. Codified Laws § 22-24A-15 (Person convicted forfeits certain property interests—Distribution of seized assets) when found guilty of certain crimes. Crimes allowing for asset forfeiture include, “22-24A-1 to 22-24A-20 [including sale of child pornography; possession, manufacture, or distribution of child pornography; solicitation of minor], inclusive, [or] 22-24B-1 [“Sex crime” defined], 22-49-1 to 22-49-3 [Human trafficking], inclusive . . .”¹⁷ S.D. Codified Laws § 22-24A-15. Therefore, those buyers convicted of violations of § 22-24A-3 (Possession, manufacture, or distribution of child pornography), § 22-24A-5 (Solicitation of a minor), § 22-22-24.3 (Sexual exploitation of a minor), § 22-22-7 (Sexual contact with child under sixteen), § 22-49-1 (Human trafficking prohibited), § 22-49-2 (First degree human trafficking—Felony), § 22-49-3 (Second degree human trafficking—Felony) and the age-neutral patronizing offense under § 22-23-9 (Hiring another to engage in sexual activity) would be subject to asset forfeiture. S.D. Codified Laws §§ 22-24A-15, 22-24B-1.

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

- (1) Any photograph, film, videotape, book, digital media or visual depiction that has been manufactured, distributed, purchased, possessed, acquired, or received in violation of §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive;
- (2) Any material, product, and equipment of any kind that is used or intended for use in manufacturing, processing, publishing, selling, possessing, or distributing any visual depiction proscribed by §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive;
- (3) Any property that is used, or intended for use, as a container for property described in subdivisions (1) and (2) of this section, including any computers and digital media;
- (4) Any conveyances including aircraft, vehicles, or vessels, that transport, possess, or conceal, or that is used, or intended for use, to transport, or in any manner facilitate any activity proscribed under §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive;¹⁸

¹⁷ See discussion of “sex crime” pursuant to S.D. Codified Laws § 22-24B-1 *infra* Component 2.10.

¹⁸ Exceptions to § 22-24A-15(4) include:

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

- (5) Any book, record, and research, including microfilm, tape, and data that is used, or intended for use, in violation of §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive;
- (6) Any funds or other things of value used for the purposes of unlawfully carrying out any activity proscribed by §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, 43-43B-1 to 43-43B-3, inclusive, and 22-23-2, 22-23-8, and 22-23-9; and
- (7) Any asset, interest, profit, income, and proceed acquired or derived from the unlawful activity proscribed by §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, 43-43B-1 to 43-43B-3, inclusive, and 22-23-2, 22-23-8, and 22-23-9.

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

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

Under S.D. Codified Laws § 22-24A-3(3) (Possession, manufacture, or distribution of child pornography), a person who “[k]nowingly possesses, distributes, or otherwise disseminates any visual depiction of a minor engaging in a prohibited sexual act, or in the simulation of such an act” is guilty of a Class 4 felony. This crime is punishable by imprisonment up to 10 years and a possible fine of \$20,000. S.D. Codified Laws § 22-6-1(7) (Felony classes and penalties—Restitution—Habitual criminal sentences). A subsequent conviction within 15 years is a Class 3 felony punishable by imprisonment up to 15 years and a possible fine of \$30,000. S.D. Codified Laws §§ 22-24A-3, 22-6-1(6). A person convicted of this crime also faces several financial penalties including asset forfeiture and civil damages. S.D. Codified Laws §§ 22-24A-7, 22-24A-15, 22-24B-1(5).¹⁹

Pursuant to S.D. Codified Laws § 22-24A-15 (Property subject to forfeiture), offenders convicted under S.D.

S.D. Codified Laws § 23A-49-3 (Stolen and leased conveyances not subject to forfeiture—Exception) states,

[N]o conveyance may be forfeited under the provisions of this chapter, by reason of any act or omission established by the owner of the conveyance to have been committed or omitted by any person other than the owner while the conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any state, or while the conveyance was rented or leased from a motor vehicle dealer or a leasing or rental agency and the dealer or agency had no knowledge that the conveyance was being used or intended for use, to transport or in any manner facilitate the commission of any crime in the chapters listed in § 23A-49-20.

S.D. Codified Laws § 23A-49-4 (Conveyance not subject to forfeiture for acts or omissions of nonowner—Exception) states,

[N]o conveyance may be forfeited under the provisions of this chapter, by reason of any act committed or omitted by a person other than an owner of the conveyance unless the owner knew or in the exercise of ordinary care should have known that the conveyance was being used or was intended for use to facilitate the commission of any crime in the chapters listed in § 23A-49-20.

¹⁹ See discussion *supra* Component 2.8.

Codified Laws § 22-24-3(3) are subject to the forfeiture of any property²⁰ used in the commission of the crime.

In comparison, a federal conviction for possession of images of child sexual exploitation (ICSE)²¹ is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.²² Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.²³

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

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

- (1) Rape as set forth in § 22-22-1;
- (2) Felony sexual contact with a minor under sixteen as set forth in § 22-22-7 if committed by an

²⁰ Under S.D. Codified Laws § 22-24A-15, property subject to forfeiture includes:

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

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

²² 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).

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

adult;

.....

(5) Possessing, manufacturing, or distributing child pornography as set forth in § 22-24A-3;

(6) Sale of child pornography as set forth in § 22-24A-1;

(7) Sexual exploitation of a minor as set forth in § 22-22-24.3;

(8) Kidnapping, as set forth in § 22-19-1, if the victim of the criminal act is a minor;

(9) Promotion of prostitution of a minor as set forth in subdivision 22-23-2(2);

.....

(12) Solicitation of a minor as set forth in § 22-24A-5;

.....

(15) An attempt, conspiracy, or solicitation to commit any of the crimes listed in this section;

.....

(17) Any federal crime . . . that would constitute a sex crime under federal law;

(18) Any crime committed in another state if that state also requires that anyone convicted of that crime register as a sex offender in that state;

.....

(21) First degree human trafficking as set forth in § 22-49-2 if the victim is a minor; or

(22) Second degree human trafficking as set forth in § 22-49-3 involving the prostitution of a minor.

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.

A conviction under S.D. Codified Laws § 22-49-3 (Second degree human trafficking—Felony) is a Class 4 felony, punishable by imprisonment up to 10 years and a possible fine of \$20,000. S.D. Codified Laws § 22-6-1(7) (Felony classes and penalties—Restitution—Habitual criminal sentences). This offense occurs when a person:

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

A conviction under S.D. Codified Laws § 22-49-2²⁴ (First degree human trafficking—Felony) is a Class 2 felony, punishable by imprisonment up to 25 years and a possible fine of \$50,000. This offense occurs when the human trafficking act defined in S.D. Codified Laws § 22-49-1 (Human trafficking prohibited):

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

Further, “any attempt to commit a violation of [S.D. Codified Laws § 22-49-2] against a victim who is a minor is punishable in the same manner as the completed violation.” S.D. Codified Laws § 22-49-2.

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

²⁴ See *supra* note 2.

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

- (1) Solicits another person to patronize a prostitute;
- (2) Procures a prostitute for a patron;
- (3) Transports a person into or within this state to engage in prostitution, or procures or pays for transportation for that purpose;
- (4) Knowingly permits a place owned, managed, supervised, or controlled by himself or herself, alone, or in association with others, to be regularly used for prostitution or the promotion of prostitution, or fails to make reasonable effort to abate such use by ejecting the tenant, notifying law enforcement authorities, or using other legally available means; or
- (5) Solicits, receives, or agrees to receive any benefit for doing or agreeing to do anything prohibited by this section;

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

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

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA) for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the trafficker has a prior conviction for a federal sex offense²⁵ 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.*

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

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

²⁵ See *supra* note 11 for the definition of “federal sex offense.”

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

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

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 offense²⁶ against a minor. 18 U.S.C. § 3559(e)(1). Additionally, a federal conviction for distribution of images of child sexual exploitation (ICSE)²⁷ is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.²⁸ Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.²⁹

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

A person 18 or older violates S.D. Codified Laws § 22-24A-5(2) (Solicitation of a minor) when he or she “[k]nowingly compiles or transmits by means of a computer; or prints, publishes or reproduces by other computerized means; or buys, sells, receives, exchanges or disseminates, any notice, statement or advertisement of any minor’s name, telephone number, place of residence, physical characteristics or other descriptive or identifying information for the purpose of soliciting a minor or someone the person reasonably believes is a minor to engage in a prohibited sexual act.” This is a Class 4 felony punishable by imprisonment up to 10 years and a possible fine of \$20,000. S.D. Codified Laws §§ 22-24A-5, 22-6-1(7). S.D. Codified Laws § 22-24A-5(1) creates a Class 4 felony when a person 18 or older “(1) solicits³⁰ a minor, or someone the person

²⁶ See *supra* note 11 for the definition of “federal sex offense.”

²⁷ 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).

²⁸ 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).

²⁹ 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).

³⁰ “Solicit” is defined in S.D. Codified Laws § 22-24A-4 as “to seduce, lure, entice or persuade, or attempt to seduce, lure, entice or persuade a specific person by telephone, in person, by letter, by using a computer or any other

reasonably believes is a minor, to engage in a prohibited sexual act.” This crime is punishable by imprisonment up to 10 years and a possible fine of \$20,000. S.D. Codified Laws § 22-6-1(7) (Felony classes and penalties—Restitution—Habitual criminal sentences).

In either case, “minor” is defined to include a child 15 years of age or younger. S.D. Codified Laws § 22-24A-4(1) (Minor and solicit defined).

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

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

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

Traffickers may be subject to restitution orders, at the discretion of the court. S.D. Codified Laws § 23A-28-3 (Restitution plan—Present inability to pay—Absence of pecuniary damages—Condition of parole) provides “If the sentencing court orders the defendant to the county jail, suspended imposition of sentence, suspended sentence, or probation, the court may require as a condition that the defendant . . . promptly prepare a plan of restitution, including the name and address of each victim, a specific amount of restitution to each victim, and a schedule of restitution payments.” For the purposes of restitution to crime victims, “victim” is defined as including “any person . . . who has suffered pecuniary damages³¹ as a result of the defendant’s criminal activities . . .” S.D. Codified Laws § 23A-28-2(5). “Criminal activities” is defined as “any crime [excluding petty offenses] for which there is a plea of guilty or verdict of guilty upon which a judgment of conviction may be rendered and any other crime committed after June 30, 1979, which is admitted by the defendant, whether or not prosecuted.” S.D. Codified Laws § 23A-28-2(2). Moreover, South Dakota’s state policy is that “restitution shall be made by each violator of the criminal laws to the victims of the violator’s criminal activities to the extent that the violator is reasonably able to do so.” S.D. Codified Laws § 23A-28-1.

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

A trafficker is subject to mandatory criminal asset forfeiture under S.D. Codified Laws § 22-24A-15 (Person convicted forfeits certain property interests—Distribution of seized assets) when found guilty of certain crimes. Crimes allowing for asset forfeiture include, “§§ 22-19A-1 [Stalking], 22-24A-1 to 22-24A-20 [including sale of child pornography; possession, manufacture, or distribution of child pornography; solicitation of minor], inclusive, 22-24B-1 [“Sex crime” defined] . . .” Therefore, those traffickers convicted of § 22-24A-3

electronic means.”

³¹ See *supra* note 16.

(Possession, manufacture, or distribution of child pornography), § 22-24A-5 (Solicitation of a minor), § 22-22-24.3 (Sexual exploitation of a minor), §§ 22-49-1 (Human trafficking prohibited) to 22-49-3 (Second degree human trafficking—Felony), § 22-22-7 (Sexual contact with child under sixteen), § 22-23-2 (Promotion of prostitution) and § 22-23-8 (Solicitation or procurement of prostitute for patron) would be subject to asset forfeiture. S.D. Codified Laws §§ 22-24A-15, 22-24B-1.

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

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

Pursuant to S.D. Codified Laws § 23A-49-7 (Seizure of property by court process), “any property subject to forfeiture under this chapter may be seized by any law enforcement officer or designated agent of the Division of Criminal Investigation upon process issued by any court having jurisdiction over the property.” Moreover, seizures can be made without process under S.D. Codified Laws § 23A-49-8 (Seizure of property without court process) if:

- (1) The seizure is incident to an arrest or a search under a search warrant or to an inspection under an administrative inspection warrant;
- (2) The property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding under this chapter;
- (3) The law enforcement officer or agent has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or
- (4) The law enforcement officer or agent has probable cause to believe that the property has been used or intended to be used in violation of crimes in the chapters listed in § 23A-49-20.

Additionally, under S.D. Codified Laws § 23A-49-11 (Attorney general action with respect to seized property),

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

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

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

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

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

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

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

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.*

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

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

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

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

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

Legal Components:

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

Legal Analysis:

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

South Dakota’s human trafficking law applies to facilitators and generally creates a Class 4 felony for any person who “[b]enefits financially or by receiving anything of value from participation in a venture that has engaged in acts set forth in this section.” S.D. Codified Laws § 22-49-3(2). S.D. Codified Laws § 22-49-2³² (First degree human trafficking—Felony) creates a Class 2 felony for human trafficking in the first degree when the crime “(1) Involves committing or attempting to commit kidnaping; (2) Involves a victim under the age of eighteen years; (3) Involves prostitution or procurement for prostitution; or (4) Results in the death of a victim.” When these elements are involved, the crime is punishable by imprisonment up to 25 years and a possible fine of \$50,000. S.D. Codified Laws § 22-6-1(5) (Felony classes and penalties—Restitution—Habitual criminal sentences). Further, “any attempt to commit a violation of [S.D. Codified Laws § 22-49-2] against a victim who is a minor is punishable in the same manner as the completed violation.” S.D. Codified Laws § 22-49-2.

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

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

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

A facilitator may be subject to restitution orders at the discretion of the court. S.D. Codified Laws § 23A-28-3 (Restitution plan—Present inability to pay—Absence of pecuniary damages—Condition of parole) provides “If

³² See *supra* note 2.

the sentencing court orders the defendant to the county jail, suspended imposition of sentence, suspended sentence, or probation, the court may require as a condition that the defendant . . . promptly prepare a plan of restitution, including the name and address of each victim, a specific amount of restitution to each victim, and a schedule of restitution payments.” For the purposes of restitution to crime victims, “victim” is defined as including “any person . . . who has suffered pecuniary damages³³ as a result of the defendant’s criminal activities . . .” S.D. Codified Laws § 23A-28-2(5). “Criminal activities” is defined as “any crime [excluding petty offenses] for which there is a plea of guilty or verdict of guilty upon which a judgment of conviction may be rendered and any other crime committed after June 30, 1979, which is admitted by the defendant, whether or not prosecuted.” S.D. Codified Laws § 23A-28-2(2). Moreover, South Dakota’s state policy is that “restitution shall be made by each violator of the criminal laws to the victims of the violator’s criminal activities to the extent that the violator is reasonably able to do so.” S.D. Codified Laws § 23A-28-1.

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

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

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

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

³³ See *supra* note 16.

- subdivisions (1) and (2) of this section, including any computers and digital media;
- (4) Any conveyances including aircraft, vehicles, or vessels, that transport, possess, or conceal, or that is used, or intended for use, to transport, or in any manner facilitate any activity proscribed under §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive;
- (5) Any book, record, and research, including microfilm, tape, and data that is used, or intended for use, in violation of §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive;
- (6) Any funds or other things of value used for the purposes of unlawfully carrying out any activity proscribed by §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, 43-43B-1 to 43-43B-3, inclusive, and 22-23-2, 22-23-8, and 22-23-9; and
- (7) Any asset, interest, profit, income, and proceed acquired or derived from the unlawful activity proscribed by §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, 43-43B-1 to 43-43B-3, inclusive, and 22-23-2, 22-23-8, and 22-23-9.

Pursuant to S.D. Codified Laws § 23A-49-7, “any property subject to forfeiture under this chapter may be seized by any law enforcement officer or designated agent of the Division of Criminal Investigation upon process issued by any court having jurisdiction over the property.” Moreover, seizures can be made without process under S.D. Codified Laws § 23A-49-8 (Seizure of property without court process) if:

- (1) The seizure is incident to an arrest or a search under a search warrant or to an inspection under an administrative inspection warrant;
- (2) The property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding under this chapter;
- (3) The law enforcement officer or agent has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or
- (4) The law enforcement officer or agent has probable cause to believe that the property has been used or intended to be used in violation of the crimes in the chapters listed in § 23A-49-20.

Under S.D. Codified Laws § 23A-49-11 (Attorney general action with respect to seized property),

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

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

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

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

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

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

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

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

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

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

Legal Components:

- 5.1 *Victims under the core child sex trafficking offense include all commercially sexually exploited children.*
- 5.2 *The state sex trafficking statute expressly prohibits a defendant from asserting a defense based on the willingness of a minor under 18 to engage in the commercial sex act.*
- 5.3 *State law prohibits the criminalization of minors under 18 for prostitution offenses.*
- 5.4 *State law provides a non-punitive avenue to specialized services through one or more points of entry.*
- 5.5 *Child sex trafficking is identified as a type of abuse and neglect within child protection statutes.*
- 5.6 *The definition of “caregiver” or another related term in the child welfare statutes is not a barrier to a sex trafficked child accessing the protection of child welfare.*
- 5.7 *Crime victims’ compensation is specifically available to a child victim of sex trafficking or CSEC.*
- 5.8 *Victim-friendly procedures and protections are provided in the trial process for minors under 18.*
- 5.9 *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.³⁴*

S.D. Codified Laws § 22-49-1 (Human trafficking prohibited), South Dakota’s core human trafficking offense, includes all commercial sexual exploitation of minors. Under S.D. Codified Laws § 22-49-1, means of force, fraud, or coercion are not required when the victim is a minor.³⁵ In addition, S.D. Codified Laws § 22-49-1 applies to a buyer of commercial sex with a minor through use of the term “obtain,” regardless of third party control.³⁶ S.D. Codified Laws § 22-49-1. Finally, the offense of human trafficking does not require that a trafficker or controlling third party be identified. Consequently, South Dakota’s human trafficking offense includes any child who is bought for sex, regardless of whether force, fraud, or coercion is used, regardless of whether a buyer exploited the youth without a trafficker’s involvement, and regardless of whether the victim identifies a trafficker. S.D. Codified Laws § 22-49-1.

- 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.*

South Dakota prohibits a defendant from asserting a defense based on the willingness of a minor to engage in certain acts, but not sex trafficking. Specifically, S.D. Codified Laws § 22-24A-3 (Possession, manufacture, or

³⁴ See generally SHARED HOPE INTERNATIONAL, “Eliminating the Third Party Control Barrier to Identifying Juvenile Sex Trafficking Victims,” JuST Response Policy Paper (2015), http://sharedhope.org/wp-content/uploads/2015/08/Policy-Paper_Eliminating-Third-Party-Control_Final1.pdf (discussing need to include 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).

³⁵ See *supra* discussion in Component 1.1.

³⁶ See *supra* discussion of buyer applicability in Component 2.1.

distribution of child pornography), § 22-24A-5 (Solicitation of a minor), and § 22-22-24.3 (Sexual exploitation of a minor) all explicitly state that “[c]onsent to performing these proscribed acts [or “a prohibited sexual act”] by a minor or a minor’s parent, guardian, or custodian . . . is not a defense to a charge of violating this section.”

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

5.3 *State law prohibits the criminalization of minors under 18 for prostitution offenses.*³⁷

In South Dakota, older minors are not protected from criminalization for prostitution offenses. S.D. Codified Laws § 22-23-1 (Prostitution) states, “Any person aged sixteen years or older who engages in or offers to engage in sexual activity for a fee is guilty of prostitution.” Accordingly, state law only prohibits the criminalization of minors under 16 for prostitution offenses. A conviction under S.D. Codified Laws § 22-23-1 is punishable as a Class 1 misdemeanor.

S.D. Codified Laws § 22-23-1.2 (Affirmative defense to compulsion) does, however, provide trafficking victims with an affirmative defense, stating,

. . . if the defendant proves by a preponderance of the evidence that the defendant is a victim of human trafficking under chapter 22-49 or that the defendant committed the act only under compulsion by another person who, by implicit or explicit threat, created a reasonable apprehension in the mind of the defendant that if the defendant did not commit the act, the person would inflict bodily harm upon the defendant.

- 5.3.1 Recommendation: Amend state law to ensure that all minors are protected from criminalization for prostitution offenses.³⁸

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

Juvenile sex trafficking victims under 16 years of age are not subject to delinquency charges for prostitution.³⁹ However, South Dakota law does not provide an avenue to specialized services.

- 5.4.1 Recommendation: Enact a protective response for all juvenile sex trafficking victims under 18 years of age that provides an avenue to specialized services and a mandatory mechanism to prevent delinquency adjudications.

³⁷ For more information regarding recent federal legislation impacting this component see: <http://go.sharedhope.org/stateimpactmemo>.

³⁸ 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 (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).

³⁹ See *supra* Component 5.3 for provisions concerning the non-criminalization of minors for prostitution offenses.

5.5 *Child sex trafficking is identified as a type of abuse and neglect⁴⁰ within child protection statutes.⁴¹*

A child sex trafficking victim will not be considered abused or neglected under S.D. Codified Laws § 26-8A-2(8) (Abused or neglected child defined). While S.D. Codified Laws § 26-8A-2(8) includes “sexual exploitation” within the definition of abuse and neglect, South Dakota’s human trafficking, prostitution, and CSEC statutes are not specifically enumerated. S.D. Codified Laws § 26-8A-2(8) states a child is abused or neglected when the child “is subject to sexual abuse, sexual molestation, or sexual exploitation⁴² by the child’s parent, guardian, custodian, or any other person responsible for the child’s care.”

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

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

S.D. Codified Laws § 26-8A-2(8) (Abused or neglected child defined) requires fault by the “child’s parent, guardian, custodian, or any other person responsible for the child’s care.” South Dakota law does not define “person responsible for the child’s care” but defines “custodian” as “any foster parent, employee of a public or private residential home or facility, other person legally responsible for a child’s welfare in a residential setting, or person providing in-home or out-of-home care⁴³; for purposes of this definition, out-of-home care means any day care as defined in §§ 26-6-14 [Categories of activities for which license may be issued],⁴⁴ 26-6-14.1

⁴⁰ S.D. Codified Laws § 26-8A-2 states,

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

-
- (3) Whose environment is injurious to the child's welfare;
-
- (5) Who is homeless, without proper care, or not domiciled with the child's parent, guardian, or custodian through no fault of the child's parent, guardian, or custodian;
- (6) Who is threatened with substantial harm;
-

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

⁴² S.D. Codified Laws §§ 26-7A-1 (Definitions) and 26-8A-2 do not define “sexual exploitation.” However, for purposes of the criminal code, “[a] person is guilty of sexual exploitation of a minor if the person causes or knowingly permits a minor to engage in an activity or the simulation of an activity that: (1) Is harmful to minors; (2) Involves nudity; or (3) Is obscene.” S.D. Codified Laws § 22-22-24.3.

⁴³ S.D. Codified Laws § 26-8A-2 states,

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

-
- (3) Whose environment is injurious to the child's welfare;
-
- (5) Who is homeless, without proper care, or not domiciled with the child's parent, guardian, or custodian through no fault of the child's parent, guardian, or custodian;
- (6) Who is threatened with substantial harm;
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⁴⁴ S.D. Codified Laws § 26-6-14 licenses a child welfare agency for activities that include, among other things, the

[“Family day care” defined], and 26-6-14.8 [Unregistered family day care].”⁴⁵ S.D. Codified Laws § 26-7A-1(11).

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

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

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

Under the Crime Victims’ Compensation Program, a “victim” is defined as including “any person who suffers personal injury⁴⁶ or death as a direct result of: (a) A crime, including a federal crime occurring in this state” S.D. Codified Laws § 23A-28B-1(12)(a) (Definition of terms). A “crime” includes “conduct that occurs or is attempted in this state, including that arising from domestic violence and acts of terrorism, as defined in 18 U.S.C § 2331 as of January 1, 1997, which conduct results in personal injury or death and is punishable as a felony or misdemeanor, or would be so punishable except that the person engaging in the conduct lacked the capacity to commit the crime under the laws of this state” S.D. Codified Laws § 23A-28B-1(3).

Although a victim who has “[e]ngaged in conduct which substantially contributed to the infliction of the victim’s injury or death or engaged in conduct which the victim should have reasonably foreseen could lead to the injury or death” is barred from receiving compensation, South Dakota law carves out an exception for trafficking victims under S.D. Codified Laws § 23A-28B-25(2)(a)⁴⁷ (Circumstances not permitting compensation), stating that this ineligibility criteria “does not apply to any victim defined in subsections 23A-28B-1(12)(b) and (c) or to any victim of: a sex offense under chapter 22-22; human trafficking under chapter 22-49; domestic abuse under § 25-10-1; child abuse, neglect, or exploitation under § 26-8A-2; or abuse, neglect, or exploitation of an elder or an adult with a disability under chapter 22-46.”

following:

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

⁴⁵ This definition applies to chapters 26-7A [Juvenile court], 26-8A [Protection of children from abuse or neglect], 26-8B [Children in need of supervision], and 26-8C [Delinquent children].

⁴⁶ “Personal injury” is defined in S.D. Codified Laws § 23A-28B-1(11) as “actual bodily harm or emotional distress.”

⁴⁷ The text of S.D. Codified Laws § 23A-28B-25 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 1160 during the 2018 Regular Session of the South Dakota Legislature (effective July 1, 2018).

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

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

Lastly, a crime victim is not eligible for compensation if he or she "[c]ommitted or otherwise participated in a crime which caused or contributed to the victim's injury or death." S.D. Codified Laws § 23A-28B-25(2)(b). Since domestic minor sex trafficking victims are often involved in prostitution, which contributed to their injury, they could become ineligible under this requirement.

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

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

South Dakota law provides several victim-friendly criminal justice procedures that may extend to child sex trafficking victims, but the state no longer has "rape shield" laws.⁴⁸

One victim friendly criminal justice procedure available to child sex trafficking victims under the age of 12 is the ability to testify via closed circuit television. S.D. Codified Laws § 26-8A-30 (Testimony of child by closed circuit television). S.D. Codified Laws § 26-8A-30 states, "In any proceeding in which a child under the age of twelve . . . is describing any act of sexual contact or rape performed with or on the child by another, or describing any act of physical abuse or neglect of the child by another, or any act of physical abuse or neglect of another child, or any act constituting a crime of violence as defined in § 22-1-2 [Definitions] committed against the child or another child, the court or any party may move to allow that the testimony of the child be taken in a room other than the courtroom and televised at the same time to the courtroom by closed circuit television equipment."⁴⁹

If a minor victim of rape under S.D. Codified Laws § 22-22-1, incest under S.D. Codified Laws § 22-22A-2, or sexual contact under S.D. Codified Laws § 22-22-7 makes a request to have her name and information

⁴⁸ The state "rape shield" law under S.D. Codified Laws § 23A-22-15 (Evidence of victim's prior sexual conduct in sex offence prosecutions) was repealed by House Bill 1063. H.B. 87th Leg. Assemb., Leg. Sess. (S.D. 2012) (effective July 1, 2012).

⁴⁹ This section may, however, only apply to offenses under Title 26.

suppressed, “the court shall order that the name of the minor and the specific details of the alleged acts be suppressed,” as long as there is a “compelling interest after consideration of [certain] factors.” S.D. Codified Laws § 23A-6-22.1. These provisions could leave victims of child sex trafficking in prosecutions under S.D. Codified Laws Chapter 22-49 (Human trafficking), § 22-23-2 (Promotion of prostitution), § 22-23-8 (Solicitation or procurement of prostitute for patron), § 22-24A-1 (Sale of child pornography), and § 22-24A-3 (Possession, manufacture, or distribution of child pornography) unprotected by these provisions.

In addition, S.D. Codified Laws § 23A-12-9 (Videotape of young sex crime victim’s testimony at preliminary hearing or deposition) provides,

If a defendant has been charged with a violation of subdivision 22-22-1(1), (5), or (6) [Rape] or § 22-22-7 [Sexual contact with child under sixteen], where the victim is less than sixteen years of age, the prosecuting attorney or defense attorney may apply for an order that the victim’s testimony at the preliminary hearing or at a deposition, in addition to being stenographically recorded, be recorded and preserved on videotape.

Further, S.D. Codified Laws § 23A-12-9 states,

If at the time of trial the court finds that the victim is otherwise unavailable within the meaning of § 19-16-29, or that such testimony would in the opinion of the court be substantially detrimental to the well-being of the victim, the court may admit the videotape of the victim’s testimony at the preliminary hearing or deposition as former testimony under § 19-16-30.

Since offenses under S.D. Codified Laws Chapter 22-49 (Human trafficking), § 22-23-2 (Promotion of prostitution), § 22-23-8 (Solicitation or procurement of prostitute for patron), § 22-24A-1 (Sale of child pornography), and § 22-24A-3 (Possession, manufacture, or distribution of child pornography) are not included within Chapter 22-22 (Sex offenses), these victims do not receive the protection of the victim-friendly criminal justice procedures outlined above under S.D. Codified Laws § 23A-12-9.

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

mandatory victim right, and in most circumstances victims could be denied the opportunity to offer their victim impact testimony.

- 5.8.1 Recommendation: Enact a law that prohibits evidence of a testifying sex-trafficked minor victim's prior sexual conduct from being introduced during prosecutions of CSEC and trafficking offenses.
- 5.8.2 Recommendation: Amend S.D. Codified Laws §§ 23A-6-22.1 (Suppression of names of minor victims of certain sexual offenses) and 23A-12-9 (Videotape of young sex crime victim's testimony at preliminary hearing or deposition) to allow protections for victims of offenses under S.D. Codified Laws Chapter 22-49 (Human trafficking) when the victim is a minor subjected to commercial sex under S.D. Codified Laws §§ 22-23-2 (Promotion of prostitution), 22-23-8 (Solicitation or procurement of prostitute for patron), 22-24A-1 (Sale of child pornography), or 22-24A-3 (Possession, manufacture, or distribution of child pornography).
- 5.8.3 Recommendation: Amend S.D. Codified Laws §§ 23A-27-1.1 (Victim's oral impact statement to court before sentence imposed—Response of defendant—Victim defined) and 23A-27-1.3 to require that victims of CSEC and trafficking offenses be permitted to give victim impact testimony.

5.9 *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.*

South Dakota law allows child sex trafficking victims to expunge juvenile records and vacate delinquency adjudications related to their victimization; however, this protection is only available after a child turns 18. Similarly, juvenile records may only be sealed after a waiting period.⁵⁰

Regarding expungement and vacatur, S.D. Codified Laws § 26-7A-115.1⁵¹ (Expungement of delinquency record of victim of human trafficking or sexual exploitation) states,

A person over the age of eighteen may petition a court for the expungement of a delinquency adjudication record that resulted from that person being a victim of human trafficking, as defined in § 22-49-1, or sexual exploitation, as defined in § 22-22-24.3. An expungement under this section vacates the underlying delinquency proceeding.

Accordingly, this protection applies to any offense related to the child's victimization, but only after the child turns 18. As such, an exploited child may face collateral consequences associated with having accessible juvenile records during that waiting period.

⁵⁰ If a minor has not been adjudicated delinquent, related records may be expunged under S.D. Codified Laws § 23A-3-27 (Motion for expungement of arrest record), which allows for a motion of expungement,

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

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

⁵¹ The text of S.D. Codified Laws § 26-7A-115.1 cited here and elsewhere in this report includes amendments made by the enactment of Senate Bill 67 during the 2018 Regular Session of the South Dakota Legislature (effective July 1, 2018).

Regarding the sealing of juvenile records, S.D. Codified Laws § 26-7A-115 (Sealing records in action involving delinquent child—Inspection) states,

In any action involving a delinquent child, the records and files of the court may be sealed by a court order issued on the court's own motion or on the petition of the child or the child's parents. However, no such petition may be filed and considered by the court until after one year from the date of the child's unconditional release from the court's jurisdiction or the discharge of the child by the Department of Corrections, whichever date is later.

The sealing of the records may occur if, at the hearing, all the following are satisfied:

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

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

Because S.D. Codified Laws § 26-7A-115 mandates a minimum one year waiting period and allows records to be unsealed by certain individuals, child sex trafficking victims may face collateral consequences associated with having accessible juvenile records during that timeframe or until the record can be expunged under S.D. Codified Laws § 26-7A-115.1.

- 5.9.1 Recommendation: Amend S.D. Codified Laws § 26-7A-115.1 (Expungement of delinquency record of victim of human trafficking) to remove the waiting period for vacating delinquency adjudications and expunging related records.

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

A child sex trafficking victim may receive restitution at the discretion of the court. S.D. Codified Laws § 23A-28-3 (Restitution plan—Present inability to pay—Absence of pecuniary damages—Condition of parole) provides “If the sentencing court orders the defendant to the county jail, suspended imposition of sentence, suspended sentence, or probation, the court may require as a condition that the defendant . . . promptly prepare a plan of restitution, including the name and address of each victim, a specific amount of restitution to each victim, and a schedule of restitution payments.” For the purposes of restitution to crime victims, “victim” is defined as including “any person . . . who has suffered pecuniary damages⁵² as a result of the defendant’s criminal activities . . .” S.D. Codified Laws § 23A-28-2(5). “Criminal activities” is defined as “any crime [excluding petty offenses] for which there is a plea of guilty or verdict of guilty upon which a judgment of conviction may be rendered and any other crime committed after June 30, 1979, which is admitted by the defendant, whether or not prosecuted.” S.D. Codified Laws § 23A-28-2(2). Moreover, South Dakota’s state

⁵² See *supra* note 16.

policy is that “restitution shall be made by each violator of the criminal laws to the victims of the violator’s criminal activities to the extent that the violator is reasonably able to do so.” S.D. Codified Laws § 23A-28-1.

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

Additionally, certain victims of commercial sexual exploitation may be eligible for civil remedies. Under S.D. Codified Laws § 22-24A-7 (Civil liability for sexual offense), “Any person, except a minor, who knowingly participates in any conduct proscribed by §§ 22-19A-1 [Stalking], 22-24A-1 to 22-24A-20 [Sale of child pornography; solicitation of a minor; possession, manufacture, and distribution of child pornography], inclusive, 22-24B-1 [“Sex crime” defined],⁵³ 22-41-1 to 22-49-3, inclusive [Human trafficking] . . . is liable for civil damages.” Further, S.D. Codified Laws § 20-9-46 (Wrongful human trafficking) creates a civil cause of action for “victim[s] of human trafficking pursuant to chapter 22-49, or any federal human trafficking offense.”

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

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

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

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.*

Regarding civil actions, S.D. Codified Laws § 22-24A-13 (Civil liability for sexual offense—Statute of limitations) states, “Any action for damages under §§ 22-19A-1 [Stalking], 22-24A-1 to 22-24A-20, inclusive [Sale of child pornography; possession, manufacture, or distribution of child pornography; solicitation of minor], 22-24B-1 [“Sex crime” defined],⁵⁴ 22-49-1 to 22-49-3, inclusive [Human trafficking], 23A-27-14.1 [Teacher certification], and 43-

⁵³ See discussion of “sex crime” pursuant to S.D. Codified Laws § 22-24B-1 *supra* Component 2.10.

⁵⁴ See discussion of “sex crime” pursuant to S.D. Codified Laws § 22-24B-1 *supra* Component 2.10.

43B-1 to 43-43B-3 [Computer programs], inclusive, shall be commenced within six years of the time the plaintiff knew, or had reason to know, of any injury caused by violations of [these offenses].” When the plaintiff is a minor, the statute of limitations is tolled until the minor reaches 18. S.D. Codified Laws § 22-24A-13.

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

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

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 required or authorized.*

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

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

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

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

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

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

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

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

- 6.4 *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.*

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

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

Despite the prohibition in S.D. Codified Laws § 22-24A-5, a defendant may be able to assert a defense based on a law enforcement decoy posing as a minor to investigate other buyer-applicable offenses through reverse sting operations, which are the most likely situations in which a defendant would try to use such a defense.

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

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

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

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

If a missing child report is made to law enforcement, then “the law enforcement agency shall gather

readily available information about the missing child and integrate such information into the national crime information center computer within twelve hours following the making of the report. The law enforcement agency shall make reasonable efforts to acquire additional information about the missing child following the transmittal of the initially available information and promptly integrate any additional information acquired into such computer systems.” S.D. Codified Laws § 26-17-2 (Missing child report—Entry into national crime information center computer).

Because S.D. Codified Laws § 26-17-2 requires law enforcement to “promptly integrate any additional information acquired” on the missing child, the statute appears broad enough to encompass a requirement that law enforcement report located missing children.

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