

## 2017 ANALYSIS AND RECOMMENDATIONS

### KANSAS

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

##### *Legal Components:*

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

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

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

Kansas criminalizes child sex trafficking without regard to the use of force, fraud, or coercion. Kan. Stat. Ann. § 21-5426(b)<sup>2</sup> (Human trafficking; aggravated human trafficking) defines aggravated trafficking as

.....  
(4) recruiting, harboring, transporting, providing or obtaining, by any means, a child<sup>3</sup> knowing that the child, with or without force, fraud, threat or coercion, will be used to engage in: (A) forced labor; (B)

<sup>1</sup> This report includes legislation enacted as of August 1, 2017.

<sup>2</sup> The text of Kan. Stat. Ann. § 21-5426 cited here and elsewhere in this report includes amendments made by the enactment of Senate Bill 40 during the 2017 1st Regular Session of the Kansas Legislature (effective July 1, 2017).

<sup>3</sup> Kan. Stat. Ann. § 21-5426(h)(1) defines “child” as “a person under 18 years of age”.

involuntary servitude; or (C) sexual gratification of the defendant or another involving the exchange of anything of value; or

(5) hiring a child by giving, or offering or agreeing to give, anything of value to any person, to engage in manual or other bodily contact stimulation of the genitals or any person with the intent to arouse or gratify the sexual desires of the offender or another, sexual intercourse, sodomy or any unlawful sexual act, and the offender recklessly disregards the age of the child.

The crime is a severity level 1, person felony punishable by presumptive imprisonment for 147–165 months (recommended 155 months) and a possible fine not to exceed \$300,000.<sup>4</sup> Kan. Stat. Ann. §§ 21-5426(c)(2), 21-6804(a), 21-6611(a)(2). However, if the victim is under 14, and the offender is 18 or older, the crime becomes the off-grid person felony of aggravated human trafficking and the penalties are heightened to a mandatory<sup>5</sup> imprisonment of 25 years to life and a possible fine not to exceed \$500,000. Kan. Stat. Ann. §§ 21-5426(c)(3),

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<sup>4</sup> Unless otherwise specified, the sentences of imprisonment for all felonies provided throughout this report are based on the assumption that the defendant has no prior felony convictions, and that none of the aggravating or mitigating factors listed in Kan. Stat. Ann. § 21-6804 (Sentencing grid for nondrug crimes) or in the sentencing provisions themselves are present. A defendant with prior felony convictions may be subject to a greater minimum sentence of imprisonment. Kan. Stat. Ann. § 21-6804(a). When using the sentencing grid to determine appropriate imprisonment ranges, the vertical axis on the grid represents the severity level of the offense, and the horizontal axis on the grid represents the criminal history of the defendant. Kan. Stat. Ann. § 21-6804(c). Aggravating factors, such as using a firearm to commit a felony, result in presumptive imprisonment and an optional nonimprisonment sentence if the offense falls into a grid labeled “border box.” Kan. Stat. Ann. § 21-6804(h). A border box penalty is governed by Kan. Stat. Ann. § 6804(q), which allows the court to “impose an optional nonprison sentence.” Subsection (q) states that the “optional nonprison sentence” may be imposed instead of a presumptive sentence if the court makes certain findings, such as the fact that “an appropriate treatment program exists,” the treatment program would admit the offender within a reasonable time, or that the nonprison sentence would “serve community safety interests by promoting offender reformation.” *State v. Sidders*, 888 P.2d 409, 412 (Kan. Ct. App. 1995) further clarifies border boxes by stating, “A border box classification means the grid block is neither a presumed imprisonment box nor a presumed nonimprisonment box. The trial court may impose a nonimprisonment sentence if it finds that a reasonably available treatment program would be more appropriate than prison or nonimprisonment would serve community interests and promote offender reformation.” While the court is generally expected to impose the presumptive sentence in the sentencing guidelines, pursuant to Kan. Stat. Ann. § 21-6815(c)(2)(F)(i) (Imposition of presumptive sentence; jury requirements; departure sentencing; substantial and compelling reasons for departure; mitigating and aggravating factors), the judge may consider imposing a departure sentence if the defendant commits a “crime of extreme sexual violence,” to include: “aggravated human trafficking . . . if the victim is less than 14 years of age; or commercial sexual exploitation of a child . . . if the victim is less than 14 years of age.”

<sup>5</sup> Here and elsewhere that mandatory minimum imprisonments are mentioned in this report certain exceptions to the mandatory sentencing applies. Pursuant to Kan. Stat. Ann. § 21-6627(a)(2) (Mandatory term of imprisonment of 25 or 40 years for certain offenders; exceptions.),

The provision of subsection (a)(1) requiring a mandatory minimum term of imprisonment of not less than 25 years shall not apply if the court finds:

(A) The defendant is an aggravated habitual sex offender and sentenced pursuant to K.S.A. 2013 Supp. 21-6626, and amendments thereto; or

(B) the defendant, because of the defendant’s criminal history classification, would be subject to presumptive imprisonment pursuant to the sentencing guidelines grid for nondrug crimes and the sentencing range would exceed 300 months if the sentence established for a severity level 1 crime was imposed. In such case, the defendant is required to serve a mandatory minimum term equal to the sentence established for a severity level 1 crime pursuant to the sentencing range.

The text of Kan. Stat. Ann. § 21-6627 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 2092 and Senate Bill 40 during the 2017 1st Regular Session of the Kansas Legislature (effective July 1, 2017).

21-6627(a)(1)(A), 21-6611(a)(1). In addition to the penalties set forth above, “a person convicted under subsection (c)(2) or (c)(3) shall be fined not less than \$5,000,” and that fine “shall be remitted to the human trafficking victim assistance fund . . .” Kan. Stat. Ann. § 21-5426(c)(4).

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.*

CSEC is criminalized separately in the Kansas code through the following laws:

1. Pursuant to Kan. Stat. Ann. § 21-6422<sup>6</sup> (Commercial sexual exploitation of a child), commercial sexual exploitation of a child is knowingly:

- (1) Hiring a person younger than 18 years of age by giving, or offering or agreeing to give, anything of value to any person, to engage in a manual or other bodily contact stimulation of the genitals of any person with the intent to arouse or gratify the sexual desires of the offender or another, sexual intercourse, sodomy or any unlawful sexual act;
- (2) establishing, owning, maintaining or managing any property, whether real or personal, where sexual relations are being sold or offered for sale by a person younger than 18 years of age, or participating in the establishment, ownership, maintenance or management thereof;
- (3) permitting any property, whether real or personal, partially or wholly owned or controlled by the defendant to be used as a place where sexual relations are being sold or offered for sale by a person who is younger than 18 years of age.

Kan. Stat. Ann. § 21-6422 is as a severity level 4, person felony punishable by presumptive imprisonment for 38–43 months (recommended 41 months), a possible fine not to exceed \$300,000, and an additional fine of “not less than \$2,500 nor more than \$5,000”. Kan. Stat. Ann. §§ 21-6422(b)(1)(A), (b)(3), 21-6804(a), 21-6611(a)(2). When the victim is under 14 and the offender is 18 or older, commercial sexual exploitation of a child is punishable as an off-grid person felony with mandatory imprisonment of 25 years to life and a possible fine not to exceed \$500,000.<sup>7</sup> Kan. Stat. Ann. §§ 21-6422(b)(2), 21-6627(a)(1)(E), 21-6611(a)(1).

2. Pursuant to Kan. Stat. Ann. § 21-5510(a) (Sexual exploitation of a child), “sexual exploitation of a child” includes:

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<sup>6</sup> The text of Kan. Stat. Ann. § 21-6422 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 40 during the 2017 1st Regular Session of the Kansas Legislature (effective July 1, 2017).

<sup>7</sup> Kan. Stat. Ann. § 21-6611 provides for fines for crimes committed on or after July 1, 1993. Fines for crimes committed before July 1, 1993 are laid out in Kan. Stat. Ann. § 21-6710. Pursuant to Kan. Stat. Ann. § 21-6612,

- (a) When the law authorizes any other disposition, a fine shall not be imposed as the sole and exclusive punishment unless having regard to the nature and circumstances of the crime and to the history and character of the defendant, the court finds that the fine alone suffices for the protection of the public.
- (b) The court shall not sentence a defendant to pay a fine in addition to a sentence of imprisonment, probation or assignment to a community correctional services program unless:
  - (1) The defendant has derived a pecuniary gain from the crime; or
  - (2) the court finds that a fine is adapted to deterrence of the crime involved or to the correction of the offender.

....

(1) Employing, using, persuading, inducing, enticing or coercing a child under 18 years of age to engage in sexually explicit conduct<sup>8</sup> with the intent to promote any performance;

...

(3) being a parent, guardian or other person having custody or control of a child under 18 years of age and knowingly permitting such child to engage in, or assist another to engage in, sexually explicit conduct for any purpose described in subsection (a)(1) or (2); or

(4) promoting any performance that includes sexually explicit conduct by a child under 18 years of age, or a person whom the offender believes to be a child under 18 years of age, knowing the character and content of the performance.

A violation of Kan. Stat. Ann. § 21-5510(a)(3) is a severity level 5 felony punishable by presumptive imprisonment for 31–34 months (recommended 32 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5510(b)(1)(A), 21-6804(a), 21-6611(a)(2). Violations of Kan. Stat. Ann. § 21-5510(a)(1) and (4) are severity level 3 felonies punishable by presumptive imprisonment for 55–61 months (recommended 59 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5510(b)(1)(B),<sup>9</sup> 21-6804(a), 21-6611(a)(2). Moreover, if the offender violated (a)(1) or (a)(4), the victim is under 14, and the offender is 18 or older, then the crime is an off-grid person felony with mandatory imprisonment of 25 years to life and a possible fine not to exceed \$500,000. Kan. Stat. Ann. §§ 21-5510(b)(2), 21-6627(a)(1)(F), 21-6611(a)(1).

The following sexual offenses could also apply to cases of commercial sexual exploitation:

1. Pursuant to Kan. Stat. Ann. § 21-5508(a) (Indecent solicitation of a child),

Indecent solicitation of a child is enticing, commanding, inviting, persuading or attempting to persuade a child 14 or more years of age but less than 16 years of age to:

- (1) Commit or to submit to an unlawful sexual act; or
- (2) enter any vehicle, building, room or secluded place with intent to commit an unlawful sexual act upon or with the child.

This crime is a severity level 6, person felony with presumptive punishment of imprisonment for 17–19 months (recommended 18 months) and a possible fine not to exceed \$100,000. Kan. Stat. Ann. §§ 21-5508(c)(1), 21-6804(a); 21-6611(a)(3). The crime is raised to a severity level 5, person felony and considered aggravated when the child is under 14 and is punishable by presumptive imprisonment for 31–34 months (recommended 32 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5508(b), (c)(2), 21-6804(a), 21-6611(a)(2).

2. Pursuant to Kan. Stat. Ann. § 21-5503(a)(3) (Rape), rape includes “sexual intercourse with a child under 14.” The crime is a severity level 1, person felony punishable by presumptive imprisonment for 147–165 months (recommended 155 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5503(b)(1)(B), 21-6804(a), 21-6611(a)(2). However, when the victim is under 14 and the perpetrator is 18 or over, rape pursuant to Kan. Stat. Ann. § 21-5503(a)(3), or an “attempt, conspiracy or criminal solicitation to commit rape as defined in subsection (a)(3),” is an off-grid person felony with mandatory

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<sup>8</sup> “Sexually explicit conduct” is defined as “actual or simulated: Exhibition in the nude; sexual intercourse or sodomy, including genital-genital, oral-genital, anal-genital or oral-anal contact, whether between persons of the same or opposite sex; masturbation; sado-masochistic abuse with the intent of sexual stimulation; or lewd exhibition of the genitals, female breasts or pubic area of any person.” Kan. Stat. Ann. § 21-5510(d)(1).

<sup>9</sup> The text of Kan. Stat. Ann. § 21-5510 cited here and elsewhere in this report includes amendments made by the enactment of Senate Bill 40 during the 2017 1st Regular Session of the Kansas Legislature (effective July 1, 2017).

imprisonment of 25 years to life and a possible fine not to exceed \$500,000. Kan. Stat. Ann. §§ 21-5503(b)(2), 21-6627(a)(1)(B), 21-6611(a)(1).

3. Pursuant to Kan. Stat. Ann. § 21-5506(a) (Indecent liberties with a child), the crime of indecent liberties with a child occurs when an individual engages in the following acts with a child that is 14 or 15 years of age:

- (1) Any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child, or the offender, or both; or
- (2) soliciting<sup>10</sup> the child to engage in any lewd fondling or touching of the person of another with the intent to arouse or satisfy the sexual desires of the child, the offender or another.

A conviction under Kan. Stat. Ann. § 21-5506(a) is punishable as a severity level 5, person felony by presumptive imprisonment for 31–34 months (recommended 32 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5506(c)(1), 21-6804(a), 21-6611(a)(2).

Pursuant to Kan. Stat. Ann. § 21-5506(b),

- (b) Aggravated indecent liberties with a child is:

- (1) Sexual intercourse with a child who is 14 or more years of age but less than 16 years of age;  
.....
- (3) engaging in any of the following acts with a child who is under 14 years of age:
  - (A) Any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the offender, or both; or
  - (B) soliciting the child to engage in any lewd fondling or touching of the person of another with the intent to arouse or satisfy the sexual desires of the child, the offender or another.

A conviction under subsection (b)(1) is punishable as a severity level 3, person felony with presumptive imprisonment for 55–61 months (recommended 59 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5506(c)(2)(A), 21-6804(a), 21-6611(a)(2). A conviction under subsection (b)(3) is punishable as a severity level 3, person felony punishable by presumptive imprisonment for 55–61 months (recommended 59 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5506(c)(2)(C), 6804(a), 21-6611(a)(2). However, if the child is under 14 and the perpetrator is over 18, then a conviction under subsection (b)(3), or an “attempt, conspiracy or criminal solicitation to commit aggravated indecent liberties with a child as defined in subsection (b)(3),” is punishable as an off-grid person felony punishable by a mandatory imprisonment of 25 years to life and a possible fine not to exceed \$500,000. Kan. Stat. Ann. §§ 21-5506(c)(3), 21-6627(a)(1)(C), 21-6611(a)(1).

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

Kansas’s prostitution statute, Kan. Stat. Ann. § 21-6419 (Selling sexual relations), refers to human trafficking as an affirmative defense to a charge of selling sexual relations. Kan. Stat. Ann. § 21-6419(c) states,

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<sup>10</sup> “Solicit” or “solicitation” is defined in Kan. Stat. Ann. § 21-5111(cc) (Definitions) as “to command, authorize, urge, incite, request or advise another to commit a crime.” The definitions in Kan. Stat. Ann. § 21-5111 “shall apply when the words and phrases defined are used in this code, except when a particular context clearly requires a different meaning.”

It shall be an affirmative defense to any prosecution under this section that the defendant committed the violation of this section because such defendant was subjected to human trafficking or aggravated human trafficking, as defined by K.S.A. 2013 Supp. 21-5426, and amendments thereto, or commercial sexual exploitation of a child, as defined by section 4, and amendments thereto.

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.*

Kansas defines “Racketeering activity” as “to commit, attempt to commit, conspire to commit or to solicit, coerce or intimidate another person to commit” a series of crimes, including Kan. Stat. Ann. § 21-5426 (Human trafficking or aggravated human trafficking), § 21-5510 (Sexual exploitation of a child), § 21-5601 (Endangering a child or aggravated endangering a child), § 21-5602 (Abuse of a child), § 21-5603 (Contributing to a child’s misconduct or deprivation), § 21-6419 (Selling sexual relations), § 21-6420 (Promoting the sale of sexual relations), and § 21-6422 (Commercial sexual exploitation of a child). Kan. Stat. Ann. § 21-6328(f)(1) (Same; definitions).

Kan. Stat. Ann. § 21-6329 (Same; unlawful activities; penalty) states, “(a) It is unlawful for any covered person:

- (1) Who has received any proceeds derived, directly or indirectly, from a pattern of racketeering activity or through the collection of any unlawful debt to use recklessly or invest, whether directly or indirectly, any part of such proceeds, or the proceeds derived from the investment or use thereof, in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise;
- (2) through a pattern of racketeering activity or through the collection of an unlawful debt, to recklessly acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property; or
- (3) employed by, or associated with, any enterprise to recklessly conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt.

Pursuant to Kan. Stat. Ann. § 21-6328(b),

“Covered person” is defined as any person who:

- (1) Is a criminal street gang member or criminal street gang associate, as defined in K.S.A. 2014 Supp. 21-6313, and amendments thereto;<sup>11</sup>

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<sup>11</sup> Kansas criminalizes street gang activity under Kan. Stat. Ann. § 21-6314 (Recruiting criminal street gang membership) and § 21-6315 (Criminal street gang intimidation), however only offenses involving controlled substances qualify as predicate offenses. Pursuant to Kan. Stat. Ann. § 21-6313(c) (Criminal street gangs; definitions),

"[C]riminal street gang activity" means the commission or attempted commission of, or solicitation or conspiracy to commit, one or more person felonies, person misdemeanors, felony violations of K.S.A. 2013 Supp. 21-5701 through 21-5717 [Crimes involving controlled substances], and amendments thereto, any felony violation of any provision of the uniform controlled substances act prior to July 1, 2009, or the comparable juvenile offenses, which if committed by an adult would constitute the commission of such felonies or misdemeanors on separate occasions.

(2) has engaged in or is engaging in any conduct prohibited by K.S.A. 2014 Supp. 21-5426, and amendments thereto, human trafficking or aggravated human trafficking, or K.S.A. 2014 Supp. 21-6422, and amendments thereto, commercial sexual exploitation of a child; or  
(3) has engaged in or is engaging in any conduct prohibited by K.S.A. 2014 Supp. 21-5703, and amendments thereto, unlawful manufacturing of controlled substances, or K.S.A. 2014 Supp. 21-5705, and amendments thereto, unlawful cultivation or distribution of controlled substances.

A violation of the RICO law, or conspiracy to commit a violation is a severity level 2, person felony. Kan. Stat. Ann. § 21-6329(c). A conviction for covered conduct “through which the person derived pecuniary value, or by which the person caused personal injury or property damage or other loss, may be sentenced to pay a fine that does not exceed three times the gross value gained or three times the gross loss caused, whichever is the greater, plus court costs and the costs of investigation and prosecution, reasonably incurred.” Kan. Stat. Ann. § 21-6329(e)(1).

**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 buying sex acts with an adult and buying sex acts with a minor under 18.*
- 2.4 *Penalties for buyers of commercial sex acts with minors are as high as federal penalties.*
- 2.5 *Using the Internet or electronic communications to lure, entice, or purchase, or attempt to lure, entice, or purchase commercial sex acts with a minor is a separate crime or results in an enhanced penalty for buyers.*
- 2.6 *No age mistake defense is permitted for a buyer of commercial sex acts with any minor under 18.*
- 2.7 *Base penalties for buying sex acts with a minor under 18 are sufficiently high and not reduced for older minors.*
- 2.8 *Financial penalties for buyers of commercial sex acts with minors are sufficiently high to make it difficult for buyers to hide the crime.*
- 2.9 *Buying and possessing 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.*

Kan. Stat. Ann. § 21-5426(b)(5)<sup>12</sup> (Human trafficking; aggravated human trafficking) applies directly to buyers of sex with minors, stating,

Aggravated human trafficking is:

....

(5) hiring a child by giving, or offering or agreeing to give, anything of value to any person, to engage in manual or other bodily contact stimulation of the genitals of any person with the intent to arouse or gratify the sexual desires of the offender or another, sexual intercourse, sodomy or any unlawful sexual act, and the offender recklessly disregards the age of the child.

Kan. Stat. Ann. § 21-5426(b)(4) can also apply to buyers following federal precedent through the term “obtains.”<sup>13</sup> Pursuant to Kan. Stat. Ann. § 21-5426(b)(4), one commits aggravated human trafficking by “. . .

<sup>12</sup> See *supra* note 2.

<sup>13</sup> See *United States v. Jungers*, 702 F.3d 1066 (8th Cir. 2013). In this case, the Eighth Circuit held that the federal sex trafficking law, 18 U.S.C. § 1591 (Sex trafficking of children or by force, fraud, or coercion) applies to buyers of sex with minors. Reversing a District of South Dakota ruling that Congress did not intend the string of verbs constituting criminal conduct under 18 U.S.C. § 1591(a)(1) (“recruits, entices, harbors, transports, provides, obtains, or maintains”) to reach the conduct of buyers (*United States v. Jungers*, 834 F. Supp. 2d 930, 931 (D.S.D. 2011)), the Eighth Circuit concluded that 18 U.S.C. § 1591 does not contain “a latent exemption for purchasers” because buyers can “engage in at least some of the prohibited conduct.” *Jungers*, 702 F. 3d 1066, 1072. Congress codified *Jungers* clarifying that the federal sex trafficking law is intended to apply to buyers in the Justice for Victims of Trafficking Act (JVTA) of 2015 Pub. L. No. 114-22, 129 Stat 227), enacted on May 29, 2015. The JVTA adds the terms “patronize” and “solicit” to the list of prohibited conduct and expressly states, “section 108 of this title amends section 1591 of title 18, United States Code, to add the words ‘solicits or patronizes’ to the sex trafficking statute making absolutely clear for judges, juries, prosecutors, and law enforcement officials that criminals who purchase sexual acts from human trafficking victims may be arrested, prosecuted, and convicted as sex trafficking offenders when this is merited by the facts of a particular case.” *Id.* at Sec. 109. The Eighth Circuit decision in *United States*



recruiting, harboring, transporting, providing or obtaining,<sup>14</sup> by any means, a child knowing that the child, with or without force, fraud, threat or coercion, will be used to engage in forced labor, involuntary servitude or sexual gratification of the defendant or another involving the exchange of anything of value . . . .”

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

Kan. Stat. Ann. § 21-6422(a)(1)<sup>15</sup> (Commercial sexual exploitation of a child) applies to anyone who buys or solicits commercial sex with a minor, providing:

Commercial sexual exploitation of a child is knowingly:

- (1) Hiring a person younger than 18 years of age by giving, or offering or agreeing to give, anything of value to any person, to engage in a manual or other bodily contact stimulation of the genitals of any person with the intent to arouse or gratify the sexual desires of the offender or another, sexual intercourse, sodomy or any unlawful sexual act . . . .

Commercial sexual exploitation of a child is a severity level 4, person felony punishable by presumptive imprisonment for 38–43 months (recommended 41 months), a possible fine not to exceed \$300,000, and an additional fine of “not less than \$2,500 nor more than \$5,000.” Kan. Stat. Ann. §§ 21-6422(b)(1)(A), (b)(3), 21-6804(a), 21-6611(a)(2). When the victim is under 14 and the offender is 18 or older, the crime is punishable as an off-grid person felony by mandatory imprisonment for 25 years to life, a possible fine not to exceed \$500,000, and an additional fine of “not less than \$5,000.” Kan. Stat. Ann. §§ 21-6422(b)(2), (b)(3), 21-6627(a)(1)(E), 21-6611(a)(1).

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

The general solicitation statute, Kan. Stat. Ann. § 21-6421(a) (Buying sexual relations), only applies to buyers of commercial sex with persons over the age of 18. A buyer that solicits sex with a minor would be prosecuted under Kan. Stat. Ann. § 21-6422(a)(1)<sup>16</sup> (Commercial sexual exploitation of a child), which states,

Commercial sexual exploitation of a child is knowingly:

- . . . .
- (1) Hiring a person younger than 18 years of age by giving, or offering or agreeing to give, anything of value to any person, to engage in a manual or other bodily contact stimulation of the genitals of any person with the intent to arouse or gratify the sexual desires of the offender or another, sexual intercourse, sodomy or any unlawful sexual act.

Kan. Stat. Ann. § 21-6422(a)(1) is a severity level 4, person felony. Kan. Stat. Ann. § 21-6422(b)(1)(A).

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*v. Jungers* and the federal sex trafficking law as amended by the Justice for Victims of Trafficking Act establish persuasive authority when state courts interpret the string of verbs constituting prohibited conduct in state sex trafficking laws (in particular the term “obtains”) to the extent such interpretation does not conflict with state case law.

<sup>14</sup> “Obtain” is defined by Kan. Stat. Ann. § 21-5111(q) (Definitions) as “to bring about a transfer of interest or possession of property, whether to the offender or to another.” The definitions in Kan. Stat. Ann. § 21-5111 “shall apply when the words and phrase are used in this code, except when a particular context clearly requires a different meaning.” Kan. Stat. Ann. § 21-5111. It would seem that in this instance a different meaning applies.

<sup>15</sup> See *supra* note 6.

<sup>16</sup> See *supra* note 6.

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

A violation of Kan. Stat. Ann. § 21-5426(b)(4), (5)<sup>17</sup> (Human trafficking; aggravated human trafficking) is generally a severity level 1, person felony punishable by presumptive imprisonment for 147–165 months (recommended 155 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5426(c)(2), 21-6804(a), 21-6611(a)(2). However, if the victim is under 14 and the offender is 18 or older, the crime becomes the off-grid person felony of aggravated human trafficking and the penalties are heightened to a mandatory imprisonment of 25 years to life and a possible fine not to exceed \$500,000.<sup>18</sup> Kan. Stat. Ann. §§ 21-5426(c)(3), 21-6627(a)(1)(A), 21-6611(a)(1).

Kan. Stat. Ann. § 21-6422<sup>19</sup> (Commercial sexual exploitation of a child) also criminalizes commercial sex acts with a minor. A first conviction is a severity level 4, person felony punishable by presumptive imprisonment for 38–43 months (recommended 41 months), a possible fine not to exceed \$300,000, and an additional fine of “not less than \$2,500 nor more than \$5,000.” Kan. Stat. Ann. §§ 21-6422(b)(1)(A), (b)(3), 21-6804(a), 21-6611(a)(2). When the victim is under 14 and the offender is 18 or older, the crime is punishable as an off-grid person felony by mandatory imprisonment for 25 years to life, a possible fine not to exceed \$500,000, and an additional fine of “not less than \$5,000.” Kan. Stat. Ann. §§ 21-6422(b)(2), (b)(3), 21-6627(a)(1)(E), 21-6611(a)(1).

Pursuant to Kan. Stat. Ann. § 21-6804(j)(1) (Sentencing grid for nondrug crimes; authority and responsibility of sentencing court; presumptive disposition), “The sentence for any persistent sex offender whose current convicted crime carries a presumptive term of imprisonment shall be double the maximum duration of the presumptive imprisonment term.” For any fine for a felony or misdemeanor found in Kan. Stat. Ann. § 21-6611(a)–(b) (Fines; crimes committed on or after July 1, 1993), “the fine imposed may [alternatively] be fixed at any greater sum not exceeding double the pecuniary gain derived from the crime by the offender.” Kan. Stat. Ann. § 21-6611(c).

In comparison, if the victim is under the age of 14, a conviction under the TVPA for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the buyer has a prior conviction for a federal sex offense<sup>20</sup> against a minor. 18 U.S.C. § 3559(e)(1) (Sentencing classification of offenses). To the

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<sup>17</sup> See *supra* note 2.

<sup>18</sup> While the court is generally expected to impose the presumptive sentence in the sentencing guidelines, pursuant to Kan. Stat. Ann. § 21-6185(c)(2)(F)(i), the judge may consider imposing a departure sentence if the defendant commits a “crime of extreme sexual violence,” to include: “aggravated human trafficking . . . if the victim is less than 14 years of age; or commercial sexual exploitation of a child . . . if the victim is less than 14 years of age.”

<sup>19</sup> See *supra* note 6.

<sup>20</sup> Pursuant to 18 U.S.C. § 3559(e)(2), “federal sex offense” is defined as

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

extent buyers can be prosecuted under other federal CSEC laws,<sup>21</sup> a conviction is punishable by penalties ranging from a fine not to exceed \$250,000.

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.*

Kan. Stat. Ann. § 21-5509(a) (Electronic solicitation) states, “Electronic solicitation is, by means of communication conducted through the telephone, internet or by other electronic means, enticing or soliciting<sup>22</sup> a person, whom the offender believes to be a child, to commit or submit to an unlawful sexual act.” If the offender believes the victim to be 14 or 15, electronic solicitation is a severity level 3, person felony punishable by presumptive imprisonment for 55–61 months (recommended 59 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5509(b)(1), 21-6804(a), 21-6611(a)(2). If the offender believes the child is under 14, the crime is a severity level 1, person felony punishable by presumptive imprisonment for 147–165 months (recommended 155 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5509(b)(2), 21-6804(a), 21-6611(a)(2).

Further, Kan. Stat. Ann. § 21-6424(a)<sup>23</sup> (Unlawful use of communication facility; penalty; defenses) criminalizes the use of “any communication facility”<sup>24</sup> during the commission of certain CSEC and trafficking offenses, stating,

It shall be unlawful for any person to knowingly or intentionally use any communication facility:  
(1) In committing, causing, or facilitating the commission of any felony under K.S.A. 2016 Supp. 21-5426 [Human trafficking; aggravated human trafficking], 21-6422 [Commercial sexual exploitation of a child] or 21-6420 [Promoting the sale of sexual relations], and amendments thereto;  
(2) in any attempt to commit any conspiracy to commit, or any criminal solicitation of any felony under K.S.A. 2016 Supp. 21-5426, 21-6422 or 21-6420, and amendments thereto . . . .

Each separate use of a communication facility may be charged as a separate offense under this subsection.

A violation of Kan. Stat. Ann. 21-6424(a)(1) or (a)(2) is a severity level 7, person felony punishable by presumptive imprisonment for 11–13 months (recommended 12 months) and a possible fine not to exceed \$100,000. Kan. Stat. Ann. §§ 21-6424(b)(1), 21-6804(a), 21-6611(a)(3).

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

Kansas’s human trafficking law expressly prohibits a mistake of age defense. Kan. Stat. Ann. § 21-5426(f)(2)<sup>25</sup> (Human trafficking; aggravated human trafficking) states, “[i]t shall not be a defense to a

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<sup>21</sup> 18 U.S.C. §§ 2251A(b) (Selling or buying of children), 2251(a) (Sexual exploitation of children), 2423(a) (Transportation of a minor with intent for minor to engage in criminal sexual activity), 2422(a) (Coercion and enticement), 2252(a)(2), (a)(4) (Certain activities relating to material involving the sexual exploitation of minors).

<sup>22</sup> See *supra* note 10.

<sup>23</sup> The text of Kan. Stat. Ann. § 21-6424 cited here and elsewhere in this report includes amendments made by the enactment of Senate Bill 40 during the 2017 1st Regular Session of the Kansas Legislature (effective July 1, 2017).

<sup>24</sup> Kan. Stat. Ann. § 21-6424(c) defines “communication facility” as “any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures or sounds of all kinds and includes telephone, wire, radio, computer, computer network, beepers, pagers and all other means of communication.”

<sup>25</sup> See *supra* note 2.

charge of aggravated human trafficking, as defined in subsection (b)(4) or (5), that . . . the offender had no knowledge of the age of the victim.”

In contrast, Kan. Stat. Ann. § 21-5207(a) (Ignorance or mistake) provides, “A person’s ignorance or mistake as to a matter of either fact or law, except as provided in K.S.A. 2013 Supp. 21-5204, and amendments thereto, is a defense if it negates the existence of the culpable mental state which the statute prescribes with respect to an element of the crime.” However, Kan. Stat. Ann. § 21-5204 (Culpable mental state; exclusions) excludes mistake of age as grounds for a defense provided under Kan. Stat. Ann. § 21-5207(a). It states, “Proof of a culpable mental state does not require proof . . . that the accused had knowledge of the age of the minor, even though age is a material element of the crime with which the accused is charged.” Kan. Stat. Ann. § 21-5204(b).

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

Kansas’s buyer-applicable trafficking and CSEC offenses stagger penalties based on a minor’s age. Although penalties under the trafficking law are sufficiently high regardless of the minor’s age, penalties under the CSEC law are not.

Kan. Stat. Ann. § 21-5426(b)(4)<sup>26</sup> (Human trafficking; aggravated human trafficking) is a severity level 1, person felony punishable by presumptive imprisonment for 147–165 months (recommended 155 months). Kan. Stat. Ann. §§ 21-5426(c)(2), 21-6804(a). When the victim is under 14 and the offender is 18 or older, however, this crime is heightened to aggravated human trafficking, an off-grid person felony with a mandatory imprisonment of 25 years to life. Kan. Stat. Ann. §§ 21-5426(c)(3), 21-6627(a)(1)(A).

Pursuant to Kan. Stat. Ann. § 21-6422(b)(1)(A)<sup>27</sup> (Commercial sexual exploitation of a child), commercial sexual exploitation of a child is a Severity level 4, person felony punishable by presumptive imprisonment for 38–43 months (recommended 41 months). Kan. Stat. Ann. §§ 21-6422(b)(1)(A), (b)(3), 21-6804(a). When the victim is under 14 and the offender is 18 or older, however, the crime is punishable as an off-grid person felony by mandatory imprisonment for 25 years to life. Kan. Stat. Ann. §§ 21-6422(b)(2), (b)(3), 21-6627(a)(1)(E).

- 2.7.1 Recommendation: Amend Kan. Stat. Ann. § 21-6422 (Commercial sexual exploitation of a child) to impose substantial penalties that reflect the seriousness of the offense for any offense involving a minor under 18.

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.*

Financial penalties include fines, asset forfeiture, and restitution. A conviction under Kan. Stat. Ann. § 21-5426(b)<sup>28</sup> (Human trafficking; aggravated human trafficking) is punishable as a severity level 1, person felony by a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5426(c)(2), 21-6611(a)(2). If the victim is under 14 and the offender is 18 or older, the crime is heightened to an off-grid felony punishable by a possible fine not to exceed \$500,000.<sup>29</sup> Kan. Stat. Ann. §§ 21-5426(c)(3), 21-6611(a)(1). An additional fine of at least \$5,000 “shall be remitted to the human trafficking victim assistance fund . . . .” Kan. Stat. Ann. § 21-

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<sup>26</sup> See *supra* note 2.

<sup>27</sup> See *supra* note 6.

<sup>28</sup> See *supra* note 2.

<sup>29</sup> While the court is generally expected to impose the presumptive sentence in the sentencing guidelines, pursuant to Kan. Stat. Ann. § 21-6185(c)(2)(F)(i), the judge may consider imposing a departure sentence if the defendant commits a “crime of extreme sexual violence,” to include: “aggravated human trafficking . . . if the victim is less than 14 years of age; or commercial sexual exploitation of a child . . . if the victim is less than 14 years of age.”

5426(c)(4). Kan. Stat. Ann. § 21-6422<sup>30</sup> (Commercial sexual exploitation of a child) also varies fines based on the victim's age. If the victim is 14 years or older, a conviction is punishable by a possible fine not to exceed \$300,000 and an additional fine of "not less than \$2,500 nor more than \$5,000." Kan. Stat. Ann. §§ 21-6422(b)(1)(A), (b)(3), 21-6611(a)(2). However, if the defendant is over the age of 18 and solicited sex with a person 14 years old or younger, a conviction is punishable by a possible fine not to exceed \$500,000 and an additional fine of "not less than \$5,000." Kan. Stat. Ann. §§ 21-6422(b)(2), (b)(3), 21-6611(a)(2). A conviction under Kan. Stat. Ann. § 21-5508(a) (Indecent solicitation of a child) involving a 14 or 15 year old child, is a severity level 6, person felony punishable by a possible fine not to exceed \$100,000. Kan. Stat. Ann. §§ 21-5508(a), (c)(1), 21-6611(a)(3). If the victim is under 14, the crime is heightened to a severity level 5, person felony punishable by a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5508(b), (c)(2), 21-6611(a)(2).

For any fine for a felony or misdemeanor found in Kan. Stat. Ann. § 21-6611(a), (b) (Fines; crimes committed on or after July 1, 1993), "the fine imposed may [alternatively] be fixed at any greater sum not exceeding double the pecuniary gain derived from the crime by the offender." Kan. Stat. Ann. § 21-6611(c).

Pursuant to Kan. Stat. Ann. § 60-4104(p)–(dd) (Covered offenses and conduct giving rise to forfeiture), violations of Kan. Stat. Ann. § 21-5426 (Human trafficking; aggravated human trafficking), § 21-6422 (Commercial sexual exploitation of a child), § 21-5508 (Indecent solicitation of a child; aggravated indecent solicitation of a child), and § 21-5510 (Sexual exploitation of a child) give rise to mandatory, civil asset forfeiture. Pursuant to Kan. Stat. Ann. § 60-4105 (Property subject to forfeiture), property subject to forfeiture includes the following:

....

(b) except as otherwise provided by law, all property, of every kind, including, but not limited to, cash and negotiable instruments and the whole of any lot or tract of land . . . that is either:

(1) Furnished or intended to be furnished by any person in an exchange that constitutes conduct giving rise to forfeiture; or

(2) used or intended to be used in any manner to facilitate conduct giving rise to forfeiture . . .

(c) all proceeds of any conduct giving rise to forfeiture;

(d) all property of every kind, including, but not limited to, cash and negotiable instruments derived from or realized through any proceeds which were obtained directly or indirectly from the commission of an offense listed in K.S.A. 60-4104, and amendments thereto;

....

Seizure of forfeitable property is governed by Kan. Stat. Ann. § 60-4107 (Seizure of property). Forfeiture may be accomplished by an *in rem* proceeding pursuant to Kan. Stat. Ann. § 60-4113 (In rem proceedings) or an *in personam* proceeding pursuant to Kan. Stat. Ann. § 60-4114 (In personam proceedings). Kan. Stat. Ann. § 60-4117 (Disposition of forfeited property; use of proceeds of sale) governs the disposition of forfeited property and states, in part:

(a) When property is forfeited under this act, the law enforcement agency may:

(1) Retain such property for official use or transfer the custody or ownership to any local, state or federal agency, subject to any lien preserved by the court;

(2) destroy or use for investigative or training purposes, any illegal or controlled substances and equipment or other contraband, provided that materials necessary as evidence shall be preserved;

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<sup>30</sup> See *supra* note 6.

(3) sell property which is not required by law to be destroyed and which is not harmful to the public . . . .

- . . . .
- (c) The proceeds of any sale shall be distributed in the following order of priority:
- (1) For satisfaction of any court preserved security interest or lien . . .
  - (2) thereafter, for payment of all proper expenses of the proceedings for forfeiture and disposition . . .
  - (3) reasonable attorney fees:
  - (4) repayment of law enforcement funds expended in purchasing of contraband or controlled substances, subject to any interagency agreement.
- . . . .

Pursuant to Kan. Stat. Ann. § 22-3424(d) (Judgment and sentence), a buyer convicted of commercial sex with a minor may also be required to pay restitution. Kan. Stat. Ann. § 22-3424(d)(1) states, if a defendant is found guilty and “upon request of the victim or the victim’s family and before imposing sentence, the court shall hold a hearing to establish restitution.” The court can also order a person convicted of human trafficking, aggravated human trafficking or commercial sexual exploitation of a child and amendments made to such statute prohibiting such conduct, to pay restitution to victims of such offense. Kan. Stat. Ann. § 22-3424(d)(2).

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

Possessing images of child sexual exploitation (ICSE) is criminalized under Kan. Stat. Ann. § 21-5510(a)(2) (Sexual exploitation of a child), which prohibits “possessing any visual depiction of a child under 18 years of age shown or heard engaging in sexually explicit conduct with intent to arouse or satisfy the sexual desires or appeal to the prurient interest of the offender or any other person.”<sup>31</sup> This crime is a severity level 5, person felony punishable by presumptive imprisonment for 31–34 months (recommended 32 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5510(b)(1)(A), 21-6804(a), 21-6611(a)(2).

In comparison, a federal conviction for possession of ICSE<sup>32</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>33</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>34</sup>

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<sup>31</sup> Kan. Stat. Ann. § 21-5610 (Unlawful possession of visual description of a child - elements, affirmative defense, applicability) may also apply to buyers who possess or receive ICSE, but only if the buyer is under 19 years of age. Pursuant to Kan. Stat. Ann. § 21-5610(a)–(b),

(a) Unlawful possession of a visual depiction of a child is knowingly possessing a visual depiction of a child 12 years of age or older but less than 16 years of age in a state of nudity, if committed by a person less than 19 years of age, and the possessor of such visual depiction received such visual depiction directly and exclusively from the child who is the subject of such visual depiction.

(b) Unlawful possession of a visual depiction of a child is a class B person misdemeanor.

<sup>32</sup> 18 U.S.C. §§ 2252(a)(2), (a)(4) (Certain activities relating to material involving the sexual exploitation of minors), 2252A(a)(2)–(3) (Certain activities relating to material constituting or containing child pornography), 1466A(a), (b) (Obscene visual representations of the sexual abuse of children).

<sup>33</sup> 18 U.S.C. §§ 2252(b) (stating that a conviction under subsection (a)(2) is punishable by imprisonment for 5–20 years and a fine, while a conviction under subsection (a)(4) is punishable by imprisonment up to 10 years, a fine, or both), 2252A(b)(1) (a conviction is punishable by imprisonment for 5–20 years and a fine), 1466A(a), (b) (stating that a conviction under subsection (a) is “subject to the penalties provided in section 2252A(b)(1),” imprisonment for 5–20 years and a fine, while a conviction under subsection (b) is “subject to the penalties provided in section 2252A(b)(2),” imprisonment up to 10 years, a fine, or both); *see also* 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

- 2.9.1 Recommendation: Amend Kan. Stat. Ann. § 21-5510(a)(2) (Sexual exploitation of a child) to increase penalties to reflect the seriousness of the offense.

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

Offenders are required to register pursuant to Kan. Stat. Ann. § 22-4905(a) (Registration of offender) in person within 3 days of coming into any county or jurisdiction “in which the offender resides or intends to reside, maintains employment or intends to maintain employment, or attends school or intends to attend school.” Under Kan. Stat. Ann. § 22-4902(a)(1), (2) (Definitions), “offender” includes both sex offenders and violent offenders. A “sex offender” is defined by Kan. Stat. Ann. § 22-4902(b) as

any person who:

- (1) On or after April 14, 1994, is convicted of any sexually violent crime;
- (2) On or after July 1, 2002, is adjudicated as a juvenile offender for an act which if committed by an adult would constitute the commission of a sexually violent crime, unless the court, on the record, finds that the act involved non-forcible sexual conduct, the victim was at least 14 years of age and the offender was not more than four years older than the victim;
- ....
- (4) on or after July 1, 1997, is convicted of any of the following crimes when one of the parties involved is less than 18 years of age:
  - ....
  - (D) patronizing a prostitute, as defined in . . . K.S.A. 2016 Supp. 21-6421, prior to its amendment . . . on July 1, 2013;<sup>35</sup> or
  - (E) lewd and lascivious behavior, as defined in . . . K.S.A.2016 Supp. 21-5513, and amendments thereto;
  - ....
- (6) is convicted of an attempt, conspiracy or criminal solicitation, as defined in . . . K.S.A. 2016 Supp. 21-5301, 21-5302, 21-5303, and amendments thereto, of an offense defined in this subsection; or
- (7) has been convicted of an offense that is comparable to any crime defined in this subsection, or any out of state conviction for an offense that under the laws of this state would be an offense defined in this subsection.

Several of the crimes defined as sexually violent by Kan. Stat. Ann. § 22-4902(c)<sup>36</sup> are crimes that could possibly be used to prosecute buyers of commercial sex acts with a minor. Sexually violent crimes include the following:

- (1) Rape as defined in . . . K.S.A. 2016 Supp. 21-5503, and amendments thereto;

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<sup>34</sup> 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (a)(2), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years, but if a person has a prior conviction under subsection (a)(4), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 10–20 years), 2252A(b)(1) (stating if a person has a prior conviction under subsection (a)(2), (a)(3), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 1466A(a), (b) (stating that the penalty scheme for section 2252A(b) applies); *see also* 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>35</sup> The July 1, 2013 Amendment renames the statute “buying sexual relations,” and limits its application to instances where the sexual services are provided by adults.

<sup>36</sup> The text of Kan. Stat. Ann. § 22-4902 cited here and elsewhere in this report includes amendments made by the enactment of Senate Bill 40 during the 2017 1st Regular Session of the Kansas Legislature (effective July 1, 2017).

- (2) indecent liberties with a child as defined in . . . K.S.A. 2016 Supp. 21-5506(a), and amendments thereto;
- (3) aggravated indecent liberties with a child as defined in . . . K.S.A. 2016 Supp. 21-5506(b), and amendments thereto;
- . . . .
- (6) indecent solicitation of a child as defined in . . . K.S.A. 2016 Supp. 21-5508(a), and amendments thereto.
- (7) aggravated indecent solicitation of a child as defined in . . . K.S.A. 2016 Supp. 21-5508(b), and amendments thereto;
- (8) sexual exploitation of a child as defined in . . . K.S.A. 2016 Supp. 21-5510, and amendments thereto;
- . . . .
- (11) electronic solicitation as defined in . . . K.S.A. 2016 Supp. 21-5509, and amendments thereto, committed on or after April 17, 2008;
- . . . .
- (13) aggravated human trafficking, as defined in K.S.A. 21-3447, prior to its repeal, or K.S.A. 21-5426(b), and amendments thereto, if committed in whole or in part for the purpose of the sexual gratification of the defendant or another;
- (14) commercial sexual exploitation of a child, as defined in K.S.A. 2016 Supp. 21-6422, and amendments thereto;
- . . . .
- (16) any conviction or adjudication for an offense that is comparable to a sexually violent crime as defined in this subsection, or any out of state conviction or adjudication for an offense that under the laws of this state would be a sexually violent crime as defined in this subsection;
- . . . .

Pursuant to Kan. Stat. Ann. § 22-4902(e)(1)(I), the term “violent offender” includes a person who is convicted of aggravated human trafficking under Kan. Stat. Ann. § 21-5426(b) (Human trafficking; aggravated human trafficking), on or after July 1, 1997. It also includes “any person who . . . is convicted of an attempt, conspiracy or criminal solicitation, as defined in K.S.A. 21-3301, 21-3302 or 21-3303, prior to their repeal, or K.S.A. 2016 Supp. 21-5301, 21-5302 and 21-5303, and amendments thereto . . .” Kan. Stat. Ann. § 22-4902(e)(4).

Accordingly, buyers convicted of human trafficking or CSEC offenses, along with those convicted of possessing images of child sexual exploitation (ICSE), will be required to register as sex offenders.



**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 termination of parental rights include sex trafficking or commercial sexual exploitation of children (CSEC) offenses as grounds for termination in order to prevent traffickers from exploiting their parental rights as a form of control.*
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**Legal Analysis:**

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

Traffickers of children for commercial sexual exploitation are subject to prosecution under several criminal statutes. Kan. Stat. Ann. § 21-5426(b)(4)<sup>37</sup> (Human trafficking; aggravated human trafficking), which includes human trafficking of a person under 18, is a severity level 1, person felony punishable by presumptive imprisonment for 147–165 months (recommended 155 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5426(c)(2), 21-6804(a), 21-6611(a)(2). If the victim is under 14 and the offender is 18 or older, aggravated human trafficking is an off-grid person felony with a mandatory imprisonment for 25 years and life and a possible fine not to exceed \$500,000. Kan. Stat. Ann. §§ 21-5426(c)(3), 21-6627(a)(1)(A), 21-6611(a)(1).

A trafficker may also be convicted under Kan. Stat. Ann. § 21-5510 (Sexual exploitation of a child). Kan. Stat. Ann. § 21-5510(a)(1), which includes enticing a minor to engage in sexually explicit conduct for the purpose of promoting the performance, is severity level 3 felony punishable by presumptive imprisonment for 55–61 months (recommended 59 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5510(b)(1)(B),<sup>38</sup> 21-6804(a), 21-6611(a)(2). Moreover, if the offender violated (a)(1), the victim is under 14, and the offender is 18 or older, then the crime is an off-grid person felony with mandatory imprisonment of 25 years to life and a possible fine not to exceed \$500,000. Kan. Stat. Ann. §§ 21-5510(b)(2), 21-6627(a)(1)(F), 21-6611(a)(1).

Pursuant to Kan. Stat. Ann. § 21-6804(j)(1) (Sentencing grid for nondrug crimes; authority and responsibility of sentencing court; presumptive disposition), “The sentence for any persistent sex offender whose current convicted crime carries a presumptive term of imprisonment shall be double the maximum duration of the presumptive imprisonment term.” For any fine for a felony or misdemeanor found in Kan. Stat. Ann. § 21-6611(a)–(b) (Fines; crimes committed on or after July 1, 1993), “[T]he fine imposed may [alternatively] be fixed at any greater sum not exceeding double the pecuniary gain derived from the crime by the offender.” Kan. Stat. Ann. § 21-6611(c).

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<sup>37</sup> See *supra* note 2.

<sup>38</sup> See *supra* note 9.

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

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

Creating and distributing images of child sexual exploitation (ICSE) falls under Kan. Stat. Ann. § 21-5510 (Sexual exploitation of a child), which states, in part, “(a) . . . sexual exploitation of a child is: (1) Employing, using, persuading, inducing, enticing or coercing a child under 18 years of age, or a person whom the offender believes to be a child under 18 years of age, to engage in sexually explicit conduct<sup>40</sup> with the intent to promote any performance.”<sup>41</sup> Kan. Stat. Ann. § 21-5510(a)(1). Under Kan. Stat. Ann. § 21-5510(d)(2), the term “promoting” is defined to include the following:

- . . . procuring, transmitting, distributing, circulating, presenting, producing, directing, manufacturing, issuing, publishing, displaying, exhibiting, or advertising:
  - (A) For pecuniary profit; or
  - (B) with intent to arouse or gratify the sexual desire or appeal to the prurient interest of the offender or any other person.

A violation of Kan. Stat. Ann. § 21-5510(a)(1) is a severity level 3, person felony punishable by presumptive imprisonment for 55–61 months (recommended 59 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5510(b)(1)(B),<sup>42</sup> 21-6804(a), 21-6611(a)(2). However, when the child is under 14 and the offender is 18 or older, a violation of Kan. Stat. Ann. § 21-5510(a)(1) is an off-grid person felony with mandatory imprisonment of 25 years to life and a possible fine not to exceed \$500,000. Kan. Stat. Ann. §§ 21-5510(b)(2), 21-6627(a)(1)(F), 21-6611(a)(1).

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<sup>39</sup> See *supra* note 20.

<sup>40</sup> See *supra* note 8 for the definition of sexually explicit conduct.

<sup>41</sup> Kan. Stat. Ann. § 21-5611 (Unlawful transmission of visual description of a child - elements, definitions) may also apply to traffickers who transmit ICSE, but only if the trafficker is under 19 years of age. Pursuant to Kan. Stat. Ann. § 21-5611(a)–(b),

- (a) Unlawful transmission of a visual depiction of a child is knowingly transmitting a visual depiction of a child 12 or more years of age but less than 18 years of age in a state of nudity when the offender is less than 19 years of age.
- (b) Aggravated unlawful transmission of a visual depiction of a child is:
  - (1) Knowingly transmitting a visual depiction of a child 12 or more years of age but less than 18 years of age in a state of nudity;
    - (A) With the intent to harass, embarrass, intimidate, defame or otherwise inflict emotional, psychological or physical harm;
    - (B) for pecuniary or tangible gain; or
    - (C) with the intent to exhibit or transmit such visual depiction to more than one person; and
  - (2) when the offender is less than 19 years of age.

Unlawful transmission of a visual depiction is a Class A person misdemeanor, and a subsequent conviction is a felony; aggravated unlawful transmission of a visual depiction is also a felony. Kan. Stat. Ann. § 21-5611(c).

<sup>42</sup> See *supra* note 9.

Moreover, Enacted Senate Bill 40, § 3<sup>43</sup> (Internet trading in child pornography and aggravated internet trading in child pornography) criminalizes the distribution of ICSE via the internet. Enacted Senate Bill 40, § 3(a) defines internet trading in child pornography as follows:

Except as provided in K.S.A. 2016 Supp. 21-5610 [Unlawful possession of a visual depiction of a child] and 21-5611 [Unlawful transmission of visual description of a child - elements, definitions], and amendments thereto, internet trading in child pornography is sexual exploitation of a child, as defined in K.S.A. 2016 Supp. 21- 5510(a)(2), and amendments thereto, when the offender is 18 years of age or older, and the offender knowingly causes or permits the visual depiction to be viewed, by use of any electronic device connected to the internet, by any person other than the offender or a person depicted in the visual depiction.

Internet trading in child pornography is a severity level 5, person felony punishable by presumptive imprisonment for 31–34 months (recommended 32 months) and a possible fine not to exceed \$300,000. Enacted Senate Bill 40, § 3(c)(1), Kan. Stat. Ann. §§ 21-6804(a), 21-6611(a)(2).

Additionally, Enacted Senate Bill 40, § 3(b) defines aggravated internet trading in child pornography as follows:

Except as provided in K.S.A. 2016 Supp. 21-5610 and 21-5611, and amendments thereto, aggravated internet trading in child pornography is sexual exploitation of a child, as defined in K.S.A. 2016 Supp. 21- 5510(a)(1) or (4), and amendments thereto, when the offender is 18 years of age or older and the offender knowingly causes or permits the performance to be viewed, by use of any electronic device connected to the internet, by any person other than the offender or a person depicted in the performance.

Aggravated internet trading in child pornography is a severity level 3, person felony punishable by presumptive imprisonment for 55–61 months (recommended 59 months) and a possible fine not to exceed \$300,000. Enacted Senate Bill 40, § 3(c)(2), Kan. Stat. Ann. §§ 21-6804(a), 21-6611(a)(2). When the victim is under 14 years of age, however, aggravated internet trading in child pornography is an off-grid person felony punishable by mandatory imprisonment for 25 years to life and a possible fine not to exceed \$500,000. Enacted Senate Bill 40, § 3(c)(2), Kan. Stat. Ann. §§ 21-6627(a)(1)(G),<sup>44</sup> 21-6611(a)(1).

In comparison, if the victim is under the age of 14, a conviction under the TVPA for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the trafficker has a prior conviction for a federal sex offense<sup>45</sup> against a minor. 18 U.S.C. § 3559(e)(1) (Sentencing classification of offenses). Additionally, a federal conviction for distribution of ICSE<sup>46</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>47</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>48</sup>

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<sup>43</sup> Senate Bill 40, § 3 cited here and elsewhere in this report was enacted during the 2017 1st Regular Session of the Kansas Legislature (effective July 1, 2017).

<sup>44</sup> See *supra* note 5.

<sup>45</sup> See *supra* note 20.

<sup>46</sup> 18 U.S.C. §§ 2252(a)(1), (a)(2), (a)(3) (Certain activities relating to material involving the sexual exploitation of minors), 2252A(a)(2), (a)(3) (Certain activities relating to material constituting or containing child pornography), 1466A(a) (Obscene visual representations of the sexual abuse of children).

<sup>47</sup> 18 U.S.C. §§ 2252(b) (stating that a conviction under subsection (a)(1), (a)(2), or (a)(3) is punishable by imprisonment for 5–20 years and a fine), 2252A(b)(1) (a conviction is punishable by imprisonment for 5–20 years and a fine), 1466A(a), (b) (stating that a conviction under subsection (a) is “subject to the penalties provided in

3.2.1 Recommendation: Amend Kan. Stat. Ann. § 21-5510 (Sexual exploitation of a child) and Enacted Senate Bill 40, § 3 (Internet trading in child pornography and aggravated internet trading in child pornography) to apply the enhanced penalties to all minors under 18.

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.*

Kan. Stat. Ann. § 21-5509(a) (Electronic solicitation) states, “Electronic solicitation is, by means of communication conducted through the telephone, internet or by other electronic means, enticing or soliciting<sup>49</sup> a person, whom the offender believes to be a child, to commit or submit to an unlawful sexual act.” If the offender believes the victim to be 14 or 15, electronic solicitation is a severity level 3, person felony with presumptive imprisonment for 55–61 months (recommended 59 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5509(b)(1), 21-6804(a), 21-6611(a)(2). If the offender believes the child is under 14, the crime is a severity level 1, person felony punishable by presumptive imprisonment for 147–165 months (recommended 155 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5509(b)(2), 21-6804(a), 21-6611(a)(2).

Further, Kan. Stat. Ann. § 21-6424(a)<sup>50</sup> (Unlawful use of communication facility; penalty; defenses) criminalizes the use of “any communication facility”<sup>51</sup> during the commission of certain CSEC and trafficking offenses, stating,

It shall be unlawful for any person to knowingly or intentionally use any communication facility:

(1) In committing, causing, or facilitating the commission of any felony under K.S.A. 2016 Supp. 21-5426 [Human trafficking; aggravated human trafficking], 21-6422 [Commercial sexual exploitation of a child] or 21-6420 [Promoting the sale of sexual relations], and amendments thereto;

(2) in any attempt to commit any conspiracy to commit, or any criminal solicitation of any felony under K.S.A. 2016 Supp. 21-5426, 21-6422 or 21-6420, and amendments thereto . . .

. . . .

Each separate use of a communication facility may be charged as a separate offense under this subsection.

A violation of Kan. Stat. Ann. § 21-6424(a)(1) or (a)(2) is a severity level 7, person felony punishable by presumptive imprisonment for 11–13 months (recommended 12 months) and a possible fine not to exceed \$100,000. Kan. Stat. Ann. §§ 21-6424(b)(1), 21-6804(a), 21-6611(a)(3).

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

<sup>48</sup> 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (a)(1), (a)(2), or (a)(3) or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 2252A(b)(1) (stating if a person has a prior conviction under subsection (a)(2), (a)(3), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 1466A(a), (b) (stating that the penalty scheme for section 2252A(b) applies); *see also* 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>49</sup> *See supra* note 10.

<sup>50</sup> *See supra* note 23.

<sup>51</sup> *See supra* note 24 for definition of “communication facility.”

3.4 *Financial penalties for traffickers, including asset forfeiture, are sufficiently high.*<sup>52</sup>

Traffickers face criminal and civil asset forfeiture, restitution, and fines. A conviction under Kan. Stat. Ann. § 21-5426(b)(4)<sup>53</sup> (Human trafficking; aggravated human trafficking) or § 21-5510(a)(1) (Sexual exploitation of a child), when the victim is under 14 and the offender is 18 or older, is punishable by a possible fine not to exceed \$500,000. Kan. Stat. Ann. §§ 21-5426(c)(3), 21-5510(b)(2), 21-6611(a)(1). Otherwise, a conviction under Kan. Stat. Ann. § 21-5426(b) or § 21-5510(a)(1) is punishable by a fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5426(c)(2), 21-5510(b)(1)(B),<sup>54</sup> 21-6611(a)(2).

In addition to the penalties noted above, traffickers convicted under Kan. Stat. Ann. § 21-5426(b) must pay a secondary fine of at least \$5,000, which “shall be remitted to the human trafficking victim assistance fund . . . .” Kan. Stat. Ann. § 21-5426(c)(4).

For any fine for a felony or misdemeanor found in Kan. Stat. Ann. § 21-6611(a)–(b) (Fines; crimes committed on or after July 1, 1993), “the fine imposed may [alternatively] be fixed at any greater sum not exceeding double the pecuniary gain derived from the crime by the offender.” Kan. Stat. Ann. § 21-6611(c).

Kansas’s asset forfeiture laws are applicable to traffickers who violate Kan. Stat. Ann. § 21-5426 and § 21-5510. Kan. Stat. Ann. § 60-4104(p)–(dd) (Covered offenses and conduct giving rise to forfeiture). Pursuant to Kan. Stat. Ann. § 60-4105(b)–(d) (Property subject to forfeiture), property subject to forfeiture includes the following:

. . . .

(b) except as otherwise provided by law,<sup>55</sup> all property, of every kind, including, but not limited to, cash and negotiable instruments and the whole of any lot or tract of land . . . that is either:

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<sup>52</sup> See discussion of relevant provisions *supra* Components 1.1, 1.2, and 3.1.

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

<sup>54</sup> See *supra* note 9.

<sup>55</sup> Pursuant to Kan. Stat. Ann. § 60-4106 (Exemptions),

(a) All property, including all interests in property, described in K.S.A. 60-4105, is subject to forfeiture . . . except that property specifically exempted hereunder:

(1) No real property or conveyance, or an interest therein, may be forfeited under this act unless the offense or conduct giving rise to forfeiture constitutes a felony.

(2) No conveyance used by any person as a common carrier in the transaction of business as a common carrier is subject to forfeiture under this act unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of this act.

(3) No property is subject to forfeiture under this act if the owner or interest holder acquired the property before or during the conduct giving rise to the property’s forfeiture, and such owner or interest holder:

(A) Did not know and could not have reasonably known of the act or omission or that it was likely to occur; or

(B) acted reasonably to prevent the conduct giving rise to forfeiture.

(4) No property is subject to forfeiture if the owner or interest holder acquired the property after the conduct giving rise to the property’s forfeiture, including acquisition of proceeds of conduct giving rise to forfeiture, and the owner or interest holder acquired the property in good faith, for value and was not knowingly taking part in an illegal transaction.

. . . .

(b) Notwithstanding subsection (a), property is not exempt from forfeiture, even though the owner or interest holder lacked knowledge or reason to know that the conduct giving rise to property’s forfeiture had occurred or was likely to occur, if the:

- (1) Furnished or intended to be furnished by any person in an exchange that constitutes conduct giving rise to forfeiture; or
- (2) used or intended to be used in any manner to facilitate conduct giving rise to forfeiture, including, but not limited to, any electronic device, computer, computer system, computer network or any software or data owned by the defendant which is used during the commission of an offense listed in K.S.A. 60-4104 [Covered offenses and conduct giving rise to forfeiture] and amendments thereto;
- (c) all proceeds of any conduct giving rise to forfeiture;
- (d) all property of every kind, including, but not limited to, cash and negotiable instruments derived from or realized through any proceeds which were obtained directly or indirectly from the commission of an offense listed in K.S.A. 60-4104, and amendments thereto;
- . . . .

Seizure of forfeitable property is governed by Kan. Stat. Ann. §60-4107 (Seizure of property). Forfeiture may be accomplished by an *in rem* proceeding pursuant to Kan. Stat. Ann. § 60-4113 (In rem proceedings) or an *in personam* proceeding pursuant to Kan. Stat. Ann. § 60-4114 (In personam proceedings). Kan. Stat. Ann. § 60-4117 (Disposition of forfeited property; use of proceeds of sale) governs the disposition of forfeited property and states, in part:

- (a) When property is forfeited under this act, the law enforcement agency may:
  - (1) Retain such property for official use or transfer the custody or ownership to any local, state or federal agency, subject to any lien preserved by the court;
  - (2) destroy or use for investigative or training purposes, any illegal or controlled substances and equipment or other contraband, provided that materials necessary as evidence shall be preserved;
  - (3) sell property which is not required by law to be destroyed and which is not harmful to the public;
- . . . .
- (c) The proceeds of any sale shall be distributed in the following order of priority:
  - (1) For satisfaction of any court preserved security interest or lien . . .
  - (2) thereafter, for payment of all proper expenses of the proceedings for forfeiture and disposition . . .
  - (3) reasonable attorney fees;
  - (4) repayment of law enforcement funds expended in purchasing of contraband or controlled substances, subject to any interagency agreement.

Pursuant to Kan. Stat. Ann. § 22-3424(d) (Judgment and sentence), a trafficker convicted of commercial sex with a minor may also be required to pay restitution. Kan. Stat. Ann. § 22-3424(d)(1) states, if a defendant is found guilty and “upon request of the victim or the victim’s family and before imposing sentence, the court shall hold a hearing to establish restitution.” The court can also order a person convicted of human trafficking, aggravated human trafficking or commercial sexual exploitation of a child and amendments made to such

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- . . . .
  - (2) owner or interest holder is criminally responsible for the conduct giving rise to the property’s forfeiture, whether or not there is a prosecution or conviction;
  - . . . .

statute prohibiting such conduct, to pay restitution to victims of such offense.<sup>56</sup> Kan. Stat. Ann. § 22-3424(d)(2).

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

Sex offenders are required to register pursuant to Kan. Stat. Ann. § 22-4905(a) (Registration of offender) in person within 3 days of coming into any county or jurisdiction “in which the offender resides or intends to reside, maintains employment or intends to maintain employment, or attends school or intends to attend school.” Under Kan. Stat. Ann. § 22-4902(a)(1)–(2) (Definitions), “offender” includes both sex offenders and violent offenders. A “sex offender” is defined by Kan. Stat. Ann. § 22-4902(b) as

any person who:

- (1) On or after April 14, 1994, is convicted of any sexually violent crime;
- (2) On or after July 1, 2002, is adjudicated as a juvenile offender for an act which if committed by an adult would constitute the commission of a sexually violent crime, unless the court, on the record, finds that the act involved non-forcible sexual conduct, the victim was at least 14 years of age and the offender was not more than four years older than the victim;
- ....
- (4) on or after July 1, 1997, is convicted of any of the following crimes when one of the parties involved is less than 18 years of age:
  - ....
  - (C) promoting prostitution, as defined in . . . K.S.A. 2016 Supp. 21-6420, prior to its amendment . . . on July 1, 2013.
  - ....
  - (E) lewd and lascivious behavior, as defined in . . . K.S.A. 2016 Supp. 21-5513, and amendments thereto;
  - ....
- (6) is convicted of an attempt, conspiracy or criminal solicitation, as defined in . . . K.S.A. 2016 Supp. 21-5301, 21-5302, 21-5303, and amendments thereto, of an offense defined in this subsection; or
- (7) has been convicted of an offense that is comparable to any crime defined in this subsection, or any out of state conviction for an offense that under the laws of this state would be an offense defined in this subsection.

Several of the crimes defined as sexually violent by Kan. Stat. Ann. § 22-4902(c)<sup>57</sup> may apply to traffickers. Pursuant to Kan. Stat. Ann. § 22-4902(c), these crimes include:

- ....
- (8) sexual exploitation of a child as defined in . . . K.S.A. 2016 Supp. 21-5510, and amendments thereto;
- ....
- (11) electronic solicitation as defined in . . . K.S.A. 2016 Supp. 21-5509, and amendments thereto, committed on or after April 17, 2008;

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<sup>56</sup> While the court is generally expected to impose the presumptive sentence in the sentencing guidelines, pursuant to Kan. Stat. Ann. § 21-6815(c)(2)(F)(i) (Imposition of presumptive sentence; jury requirements; departure sentencing; substantial and compelling reasons for departure; mitigating and aggravating factors), the judge may consider imposing a departure sentence if the defendant commits a “crime of extreme sexual violence,” to include: “aggravated human trafficking . . . if the victim is less than 14 years of age; or commercial sexual exploitation of a child . . . if the victim is less than 14 years of age.”

<sup>57</sup> See *supra* note 36.

....

(13) aggravated human trafficking, as defined in K.S.A. 21-3447, prior to its repeal, K.S.A. 2016 Supp. 21-5426(b), and amendments thereto, if committed in whole or in part for the purpose of the sexual gratification of the defendant or another;

....

(15) promoting the sale of sexual relations, as defined in K.S.A. 2016 Supp. 21-6420, and amendments thereto;

(16) any conviction or adjudication for an offense that is comparable to a sexually violent crime as defined in this subsection, or any out of state conviction or adjudication for an offense that under the laws of this state would be a sexually violent crime as defined in this subsection;

(17) an attempt, conspiracy or criminal solicitation, as defined in . . . K.S.A. 2016 Supp. 21-5301, 21-5302, 21-5303, and amendments thereto, of a sexually violent crime, as defined in this subsection; or

(18) any act which has been determined beyond a reasonable doubt to have been sexually motivated, unless the court, on the record, finds that the act involved nonforcible sexual conduct, the victim was at least 14 years of age and the offender was not more than four years older than the victim. As used in this paragraph, “sexually motivated” means that one of the purposes for which the defendant committed the crime was for the purpose of the defendant’s sexual gratification.

Accordingly, traffickers convicted of human trafficking or CSEC offenses, along with those convicted of creating and distributing images of child sexual exploitation (ICSE), will be required to register as sex offenders.

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

Pursuant to Kan. Stat. Ann. § 38-2269(a) (Factors to be considered in termination of parental rights), “When the child has been adjudicated to be a child in need of care, the court may terminate parental rights or appoint a permanent custodian when the court finds by clear and convincing evidence that the parent is unfit by reason of conduct or condition which renders the parent unable to care properly for a child and the conduct or condition is unlikely to change in the foreseeable future.” One of the factors a court may consider in determining fitness is “conviction of a felony and imprisonment.” Kan. Stat. Ann. § 38-2269(b)(5). Additionally, a parent or guardian may be found unfit if he or she has been “convicted of a felony in which intercourse occurred, or if a juvenile is adjudicated a juvenile offender because of an act which, if committed by an adult, would be a felony in which sexual intercourse occurred, and as a result of the sexual intercourse, a child is conceived . . .” Kan. Stat. Ann. § 38-2269(e).

Under Kan. Stat. Ann § 38-2271(a)(7) (Presumption of unfitness, when; burden of proof),

It is presumed . . . that a parent is unfit by reason of conduct or condition which renders the parent unable to fully care for a child, if the state establishes, by clear and convincing evidence, that:

....

(7) a parent has been convicted of . . . human trafficking or aggravated human trafficking, K.S.A. 21-3446 or 21-3447, prior to their repeal, or K.S.A. 2014 Supp. 21-5426, and amendments thereto . . .



**Legal Components:**

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

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

The human trafficking law may apply to facilitators. Under Kan. Stat. Ann. § 21-5426(a)<sup>58</sup> (Human trafficking; aggravated human trafficking),

Human trafficking is:

- (1) . . . the intentional recruitment, harboring, transportation, provision or obtaining of a person for labor or services, through the use of force, fraud or coercion for the purpose of subjecting the person to involuntary servitude or forced labor;
- (2) intentionally benefitting financially or by receiving anything of value from participation in a venture that the person has reason to know has engaged in acts set forth in subsection (a)(1).

Therefore, facilitators prosecuted under this provision must have reason to know that “force, fraud, threat or coercion will be used to cause the person to engage in forced labor or involuntary servitude.” Human trafficking is a severity level 2, person felony punishable by presumptive imprisonment for 109–123 months (recommended 117 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5426(c)(1), 21-6804(a), 21-6611(a)(2).

Under Kan. Stat. Ann. § 21-5426(b)(4), aggravated trafficking involves “recruiting, harboring, transporting, providing or obtaining, by any means, a child knowing that the child, with or without force, fraud, threat or coercion, will be used to engage in (A) forced labor, (B) involuntary servitude or (C) sexual gratification of the defendant or another involving the exchange of anything of value . . .” Aggravated human trafficking is a severity level 1, person felony punishable by presumptive imprisonment for 147–165 months (recommended 155 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5426(c)(2), 21-6804(a), 21-6611(a)(2). If the victim is less than 14 and the offender is 18 or older, the crime is an off-grid person felony with a mandatory imprisonment of 25 years to life and a possible fine not to exceed \$500,000. Kan. Stat. Ann. §§ 21-5426(c)(3), 21-6627(a)(1)(A), 21-6611(a)(1).

Additionally, a facilitator could be charged under Kan. Stat. Ann. § 21-6422(a)<sup>59</sup> (Commercial sexual exploitation of a child), which includes knowingly:

. . . .

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<sup>58</sup> See *supra* note 2.

<sup>59</sup> See *supra* note 6.

- (2) establishing, owning, maintaining or managing any property, whether real or personal, where sexual relations are being sold or offered for sale by a person younger than 18 years of age, or participating in the establishment, ownership, maintenance or management thereof; or
- (3) permitting any property, whether real or personal, partially or wholly owned or controlled by the defendant to be used as a place where sexual relations are being sold or offered for sale by a person who is younger than 18 years of age.

When the victim is under 14 and the offender is 18 or older, commercial sexual exploitation of a child is an off-grid person felony with a mandatory imprisonment of 25 years to life, a possible fine not to exceed \$500,000, and an additional fine of “not less than \$5,000.” Kan. Stat. Ann. §§ 21-6422(b)(2), (b)(3), 21-6627(a)(1)(E), 21-6611(a)(1). If the victim is 14–18 years of age, a violation is a severity level 4, person felony punishable by presumptive imprisonment for 38–43 months (recommended 41 months), a possible fine up to \$300,000, and an additional fine of “not less than \$2,500 nor more than \$5,000.” Kan. Stat. Ann. §§ 21-6422(b)(1)(A), (b)(3), 21-6804(a), 21-6611(a)(2). If the defendant has a prior conviction, however, it is a severity level 2, person felony, punishable by presumptive imprisonment for 109–123 months (recommended 117 months), a possible fine not to exceed \$300,000, and an additional fine of “not less than \$5,000.” Kan. Stat. Ann. §§ 21-6422(b)(1)(B), (b)(3), 21-6804(a), 21-6611(a)(2).

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.*

To the extent that Kan. Stat. Ann. § 21-5426(a)<sup>60</sup> (Human trafficking) applies to facilitators of child sex trafficking, a conviction is punishable by a possible fine up to \$300,000. Kan. Stat. Ann. §§ 21-5426(c)(1), 21-6611(a)(2). An additional fine of \$2,500–\$5,000 “shall be remitted to the human trafficking victim assistance fund . . . .” Kan. Stat. Ann. § 21-5426(c)(4).

Facilitators convicted of aggravated human trafficking face a possible fine up to \$300,000 if the victim is 14 years of age or older. Kan. Stat. Ann. §§ 21-5426(c)(2), 21-6611(a)(2). If the victim is less than 14 years of age and the offender is 18 years of age or older, facilitators face a possible fine not to exceed \$500,000. Kan. Stat. Ann. §§ 21-5426(c)(3), 21-6627(a)(1)(A), 21-6611(a)(1). An additional fine of at least \$5,000 “shall be remitted to the human trafficking victim assistance fund . . . .” Kan. Stat. Ann. § 21-5426(c)(4).

Facilitators convicted under Kan. Stat. Ann. § 21-6422(a)<sup>61</sup> (Commercial sexual exploitation of a child), face varying financial penalties. When the victim is under 14 and the offender is 18 or older, facilitators face a possible fine up to \$500,000 and an additional fine of “not less than \$5,000.” Kan. Stat. Ann. §§ 21-6422(b)(2), (b)(3), 21-6611(a)(2). However, when the victim is 14–18 years of age, a facilitator faces a possible fine not to exceed \$300,000 and an additional fine of “not less than \$2,500 nor more than \$5,000.” Kan. Stat. Ann. §§ 21-6422(b)(1)(A), (b)(3), 21-6611(a)(2).

Kansas’s asset forfeiture laws are applicable to facilitators who violate Kan. Stat. Ann. § 21-5426 (Human trafficking; aggravated human trafficking) and § 21-6422 (Commercial sexual exploitation of a child). Kan. Stat. Ann. § 60-4104(p), (aa). Pursuant to Kan. Stat. Ann. § 60-4105(b), (c), (d) (Property subject to forfeiture) property subject to forfeiture includes the following:

- . . . .
- (b) except as otherwise provided by law, all property, of every kind, including, but not limited to, cash and negotiable instruments and the whole of any lot or tract of land . . . that is either:

<sup>60</sup> See *supra* note 2.

<sup>61</sup> See *supra* note 6.

- (1) Furnished or intended to be furnished by any person in an exchange that constitutes conduct giving rise to forfeiture; or
  - (2) used or intended to be used in any manner to facilitate conduct giving rise to forfeiture . . .
  - (c) all proceeds of any conduct giving rise to forfeiture;
  - (d) all property of every kind, including, but not limited to, cash and negotiable instruments derived from or realized through any proceeds which were obtained directly or indirectly from the commission of an offense listed in K.S.A. 60-4104, and amendments thereto . . . .
- ....

Seizure of forfeitable property is governed by Kan. Stat. Ann. §60-4107 (Seizure of property). Forfeiture may be accomplished by an *in rem* proceeding pursuant to Kan. Stat. Ann. § 60-4113 (In rem proceedings) or an *in personam* proceeding pursuant to Kan. Stat. Ann. § 60-4114 (In personam proceedings). Kan. Stat. Ann. § 60-4117 (Disposition of forfeited property; use of proceeds of sale) governs the disposition of forfeited property and states, in part:

- (a) When property is forfeited under this act, the law enforcement agency may:
  - (1) Retain such property for official use or transfer the custody or ownership to any local, state or federal agency, subject to any lien preserved by the court;
  - (2) destroy or use for investigative or training purposes, any illegal or controlled substances and equipment or other contraband, provided that materials necessary as evidence shall be preserved;
  - (3) sell property which is not required by law to be destroyed and which is not harmful to the public

....
- (c) The proceeds of any sale shall be distributed in the following order of priority:
  - (1) For satisfaction of any court preserved security interest or lien . . .
  - (2) thereafter, for payment of all proper expenses of the proceedings for forfeiture and disposition
  - ...
  - (3) reasonable attorney fees:
  - (4) repayment of law enforcement funds expended in purchasing of contraband or controlled substances, subject to any interagency agreement.

Pursuant to Kan. Stat. Ann. § 22-3424(d) (Judgment and sentence), a facilitator convicted of facilitating commercial sex with a minor may also be required to pay restitution. Kan. Stat. Ann. § 22-3424(d)(1) states, if a defendant is found guilty and “upon request of the victim or the victim’s family and before imposing sentence, the court shall hold a hearing to establish restitution.” The court can also order a person convicted of human trafficking, aggravated human trafficking or commercial sexual exploitation of a child and amendments made to such statute prohibiting such conduct, to pay restitution to victims of such offense.<sup>62</sup> Kan. Stat. Ann. § 22-3424(d)(2).

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

Kan. Stat. Ann. § 21-5612<sup>63</sup> (Promoting travel for child exploitation) criminalizes child sex tourism, stating,

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<sup>62</sup> While the court is generally expected to impose the presumptive sentence in the sentencing guidelines, pursuant to Kan. Stat. Ann. § 21-6185(c)(2)(F)(i), the judge may consider imposing a departure sentence if the defendant commits a “crime of extreme sexual violence,” to include: “aggravated human trafficking . . . if the victim is less than 14 years of age; or commercial sexual exploitation of a child . . . if the victim is less than 14 years of age.”

<sup>63</sup> The text of Kan. Stat. Ann. § 21-5610 cited here and elsewhere in this report includes amendments made by the enactment of Senate Bill 40 during the 2017 1st Regular Session of the Kansas Legislature (effective July 1, 2017).

- (a) Promoting travel for child exploitation is knowingly selling or offering to sell travel services that include or facilitate travel for the purpose of any person engaging in conduct that would constitute a violation of K.S.A. 2016 Supp. 21-5426(b)(4) or (5) [Human trafficking; aggravated human trafficking], 21-5510 [Sexual exploitation of a child], [Enacted Senate Bill 40, § 3<sup>64</sup> (Internet trading in child pornography and aggravated internet trading in child pornography)], or 21-6422 [Commercial Sexual Exploitation of a child], and amendments thereto, if such conduct occurred in this state.
- (b) Promoting travel for child exploitation is a severity level 5, person felony.
- ....

A severity level 5, person felony is punishable by presumptive imprisonment for 31–34 months (recommended 32 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-6804(a), 21-6611(a)(2).

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

Promoting images of child sexual exploitation (ICSE) is criminalized under Kan. Stat. Ann. § 21-5510 (Sexual exploitation of a child), which states in part, “promoting any performance<sup>65</sup> that includes sexually explicit conduct<sup>66</sup> by a child under 18 years of age, or a person whom the offender believes to be a child under 18 years of age, knowing the character and content of the performance” is sexual exploitation of a child. Kan. Stat. Ann. § 21-5510(a)(4). Under this statute, “promoting” is defined as “procuring, transmitting, distributing, circulating, presenting, producing, directing, manufacturing, issuing, publishing, displaying, exhibiting or advertising: (A) For pecuniary profit; or (B) with intent to arouse or gratify the sexual desire or appeal to the prurient interest of the offender or any other person.” Kan. Stat. Ann. § 21-5510(d)(2).

Generally, a violation is a severity level 3, person felony punishable by presumptive imprisonment for 38–43 months (recommended 41 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5510(b)(1)(B),<sup>67</sup> 21-6804(a), 21-6611(a)(2). If, however, the victim is under 14 and the offender is 18 or older, the crime is an off-grid person felony with a mandatory imprisonment of 25 years to life and a possible fine not to exceed \$500,000. Kan. Stat. Ann. §§ 21-5510(b)(2), 21-6627(a)(1)(F), 21-6611(a)(1).

Further, promoting ICSE could be criminalized under Enacted Senate Bill 40, § 3<sup>68</sup> (Internet trading in child pornography and aggravated internet trading in child pornography), which states,

(a) Except as provided in K.S.A. 2016 Supp. 21-5610 [Unlawful possession of a visual depiction of a child] and 21-5611 [Unlawful transmission of visual description of a child - elements, definitions], and amendments thereto, internet trading in child pornography is sexual exploitation of a child, as defined in K.S.A. 2016 Supp. 21-5510(a)(2), and amendments thereto, when the offender is 18 years of age or older, and the offender knowingly causes or permits the visual depiction to be viewed, by use of any electronic device connected to the internet, by any person other than the offender or a person depicted in the visual depiction.

(b) Except as provided in K.S.A. 2016 Supp. 21-5610 and 21-5611, and amendments thereto, aggravated internet trading in child pornography is sexual exploitation of a child, as defined in K.S.A.

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<sup>64</sup> See *supra* note 43.

<sup>65</sup> “Performance” is defined to include “any film, photograph, negative, slide, book, magazine or other printed or visual medium, any audio tape recording or any photocopy, video tape, video laser disk, computer hardware, software, floppy disk or any other computer related equipment or computer generated image that contains or incorporates in any manner any film, photograph, negative, photocopy, video tape or video laser disk or any play or other live presentation.” Kan. Stat. Ann. § 21-5510(d)(3).

<sup>66</sup> See *supra* note 8 for the definition of sexually explicit conduct.

<sup>67</sup> See *supra* note 9.

<sup>68</sup> See *supra* note 43.

2016 Supp. 21- 5510(a)(1) or (4), and amendments thereto, when the offender is 18 years of age or older and the offender knowingly causes or permits the performance to be viewed, by use of any electronic device connected to the internet, by any person other than the offender or a person depicted in the performance.

....

Internet trading in child pornography is a severity level 5, person felony punishable by presumptive imprisonment for 31–34 months (recommended 32 months) and a possible fine not to exceed \$300,000. Enacted Senate Bill 40, § 3(c)(1), Kan. Stat. Ann. §§ 21-6804(a), 21-6611(a)(2). Aggravated internet trading in child pornography is a severity level 3, person felony punishable by presumptive imprisonment for 55–61 months (recommended 59 months) and a possible fine not to exceed \$300,000. Enacted Senate Bill 40, § 3(c)(2), Kan. Stat. Ann. §§ 21-6804(a), 21-6611(a)(2). When the child is under 14 years of age, however, aggravated internet trading in child pornography is an off-grid person felony punishable by mandatory imprisonment for 25 years to life and a possible fine not to exceed \$500,000. Enacted Senate Bill 40, § 3(c)(2), Kan. Stat. Ann. §§ 21-6627(a)(1)(G),<sup>69</sup> 21-6611(a)(1).

- 4.4.1 Recommendation: Amend Kan. Stat. Ann. § 21-5510 (Sexual exploitation of a child) and Enacted Senate Bill 40, § 3 (Internet trading in child pornography and aggravated internet trading in child pornography) to apply the enhanced penalties for an offense involving any minor under 18.

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<sup>69</sup> See *supra* note 5.

***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 commercial sexual exploitation of children (CSEC).*
- 5.8 *Victim-friendly procedures and protections are provided in the trial process for minors under 18.*
- 5.9 *Child sex trafficking victims may vacate delinquency adjudications and expunge related records for prostitution and other offenses arising from trafficking victimization, without a waiting period.*
- 5.10 *Victim restitution and civil remedies for victims of domestic minor sex trafficking or commercial sexual exploitation of children (CSEC) are authorized by law.*
- 5.11 *Statutes of limitations for civil and criminal actions for child sex trafficking or commercial sexual exploitation of children (CSEC) offenses are eliminated or lengthened to allow prosecutors and victims a realistic opportunity to pursue criminal action and legal remedies.*

***Legal Analysis:***

- 5.1 *Victims under the core child sex trafficking offense include all commercially sexually exploited children.<sup>70</sup>*

Kan. Stat. Ann. § 21-5426<sup>71</sup> (Human trafficking), Kansas’s human trafficking offense, includes all commercial sexual exploitation of minors. Under Kan. Stat. Ann. § 21-5426(b)(4), (5), when the victim is a minor, means of force, fraud, or coercion are not required.<sup>72</sup> In addition, the human trafficking law applies to buyers directly through the term “hires” and following federal precedent through the term “obtains,” regardless of third party control; thus, buying commercial sex with a person who is under the age of eighteen constitutes human trafficking.<sup>73</sup> Kan. Stat. Ann. § 21-5426(b)(4), (5). Consequently, the offense of human trafficking, under Kan. Stat. Ann. § 21-5426(b)(4), (5), 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. Kan. Stat. Ann. § 21-5426(b)(4), (5).

<sup>70</sup> See generally **SHARED HOPE INTERNATIONAL**, “Eliminating the Third Party Control Barrier to Identifying Juvenile Sex Trafficking Victims,” JuST Response Policy Paper (2015), [http://sharedhope.org/wp-content/uploads/2015/08/Policy-Paper\\_Eliminating-Third-Party-Control\\_Final1.pdf](http://sharedhope.org/wp-content/uploads/2015/08/Policy-Paper_Eliminating-Third-Party-Control_Final1.pdf) (discussing need to include all commercially sexually exploited children within sex trafficking definitions and corresponding need to include buyer conduct in core sex trafficking offenses regardless of whether victim is under control of a third party).

<sup>71</sup> See *supra* note 2.

<sup>72</sup> See *supra* discussion in Component 1.1.

<sup>73</sup> See *supra* discussion of buyer applicability in Component 2.1.

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

Kan. Stat. Ann. § 21-5426(f)(1)<sup>74</sup> (Human trafficking; aggravated human trafficking) expressly prohibits a defendant from asserting a defense based on the willingness of a minor to engage in the commercial sex act, stating, “[i]t shall not be a defense to a charge of aggravated human trafficking, as defined in subsection (b)(4) or (5), that: (1) The victim consented or willingly participated in the forced labor, involuntary servitude or sexual gratification of the defendant or another . . . .”

5.3 *State law prohibits the criminalization of minors under 18 for prostitution offenses.*<sup>75</sup>

Minors may be prosecuted under Kan. Stat. Ann. § 21-6419 (Selling sexual relations), but an affirmative defense is available to victims of human trafficking. Kan. Stat. Ann. § 21-6419(c).

Further, Kan. Stat. Ann. § 21-5426(e)<sup>76</sup> (Human trafficking; aggravated human trafficking) provides an affirmative defense to child sex trafficking victims charged with a trafficking offense, stating,

It shall be an affirmative defense to any prosecution under subsection (b)(4) or (5) that the defendant: (1) Was under 18 years of age at the time of the violation; and (2) committed the violation because such defendant, at the time of the violation, was subjected to human trafficking or aggravated human trafficking, as defined by this section.

5.3.1 Recommendation: Amend Kan. Stat. Ann. § 21-6419 (Selling sexual relations) to ensure that all minors are protected from criminalization for prostitution offenses.

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

**System response to child engage in commercial sex act**

A juvenile sex trafficking victim is likely to be identified as a child in need of care<sup>77</sup> and given access to a range of specialized services.

Pursuant to Kan. Stat. Ann. § 38-2231(b)(3) (Child under 18, when law enforcement officers or court services officers may take into custody; sheltering a runaway), “[a] law enforcement officer shall take a child under 18 years of age into custody when the officer: reasonably believes the child is a victim of human trafficking, aggravated human trafficking or commercial sexual exploitation of a child.” When a child has been taken into custody pursuant to this provision, Kan. Stat. Ann. § 38-2232(b)(2) (Child under 18 taken into custody) provides,

. . . the law enforcement officer shall place the child in protective custody and may deliver the child to a staff secure facility. The law enforcement officer shall contact the department of children and families

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<sup>74</sup> See *supra* note 2.

<sup>75</sup> For more information regarding recent federal legislation impacting this component see: <http://go.sharedhope.org/stateimpactmemo>.

<sup>76</sup> See *supra* note 2.

<sup>77</sup> Under Kan. Stat. Ann. § 38-2202(d)(14) (Definitions), the definition of “child in need of care” specifically includes a child who “has been subjected to an act which would constitute human trafficking or aggravated human trafficking . . . or commercial sexual exploitation of a child, . . . or has committed an act, which if committed by an adult, would constitute selling sexual relations . . . .”

to begin an assessment to determine safety, placement and treatment needs for the child. Such child shall not be placed in a juvenile detention facility or other secure facility . . . .

Once a juvenile sex trafficking victim has been referred to the Department of Children and Families (DCF), DCF assesses the child for placement, treatment, and specialized services. Pursuant to Kan. Stat. Ann. § 38-2287(a) (Child in custody, victim of certain conduct; special assessment to determine safety, placement and treatment needs),

Whenever a child is in custody, as defined in K.S.A. 2016 Supp. 38-2202, and amendments thereto, and there is a reason to believe such child has been subjected to an act which would constitute human trafficking or aggravated human trafficking . . . or commercial sexual exploitation of a child, . . . or the child committed an act which, if committed by an adult, would constitute selling of sexual relations, . . . . the court shall refer the child to the secretary for children and families for an assessment to determine safety, placement, treatment and service needs for the child. The secretary shall use a validated, evidence-based assessment tool or instrument to assess such needs and shall make appropriate recommendations to the court. The secretary shall provide only a summary of the results from the assessment tool or instrument, not the complete assessment tool or instrument.

A child may be placed in protective custody until services are in place “[i]f the secretary presents the court with a plan to provide services to a child or family which the court finds will assure the safety of the child.” Kan. Stat. Ann. § 38-2242(c)(2) (Ex parte orders of protective custody; application of determination of probable cause; period of time; placement; procedures; orders for removal of child from custody of parent, limitations).

Generally, however, Kan. Stat. Ann. § 38-2242(b)(2) states that “[n]o child shall be held in protective custody for more than 72 hours . . . unless within the 72-hour period a determination is made as to the necessity for temporary custody in a temporary custody hearing.”

Pursuant to Kan. Stat. Ann. § 38-2243(f) (Orders of temporary custody), an order for temporary custody may be entered if

(f) . . . there is probable cause to believe that the: . . . . (4) child has been subjected to human trafficking or aggravated human trafficking, as defined by K.S.A. 2016 Supp. 21-5426, and amendments thereto, or commercial sexual exploitation of a child, as defined by K.S.A. 2016 Supp. 21-6422, and amendments thereto; or (5) child committed an act which, if committed by an adult, would constitute a violation of K.S.A. 2016 Supp. 21-6419 [Selling sexual relations], and amendments thereto.<sup>78</sup>

When protective or temporary custody are necessary, Kan. Stat. Ann. § 38-2242(c)(1) and § 38-2243(g)(1) state that a child may be placed in the custody of

. . . .  
(E) a staff secure facility, notwithstanding any other provision of law, if the child has been subjected to human trafficking or aggravated human trafficking . . . or commercial sexual exploitation of a child, . . . or the child committed an act which, if committed by an adult, would constitute a violation of K.S.A. 2016 Supp. 21-6419, and amendments thereto; or

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<sup>78</sup> If the court does choose to issue an order of temporary or protective custody, “the court may also enter an order restraining any alleged perpetrator of physical, sexual, mental or emotional abuse of the child from residing in the child’s home; visiting, contacting, harassing or intimidating the child; or attempting to visit, contact, harass or intimidate the child, other family member or witness[es] . . . .” Kan. Stat. Ann. §§ 38-2242(e), 38-2243(h).



(F) the secretary, if the child is 15 years of age or younger, or 16 or 17 years of age if the child has no identifiable parental or family resources or shows signs of physical, mental, emotional or sexual abuse.

Upon disposition, a juvenile sex trafficking victim may be placed in the custody of a parent or other suitable person, a shelter facility, a youth residential facility, a staff secure facility, or the secretary of DCF until further order of the court. Kan. Stat. Ann. § 38-2255(b), (d) (Authorized dispositions; prohibitions).

As noted above, a juvenile sex trafficking victim may be placed in a staff secure facility at various points, including upon initial encounter or final disposition. Pursuant to Kan. Stat. Ann. § 65-535(b), (c) (Staff secure facility; requirements; services; rules and regulations),

(b) A staff secure facility shall provide the following services to children placed in such facility, as appropriate, for the duration of placement:

- (1) Case management;
- (2) life skills training;
- (3) health care;
- (4) mental health counseling;
- (5) substance abuse screening and treatment; and
- (6) any other appropriate services.

(c) Service providers in a staff secure facility shall be trained to counsel and assist victims of human trafficking and sexual exploitation.

## Summary

Law enforcement must refer a juvenile sex trafficking victim to DCF for assessment, and DCF must create an individualized plan for services, treatment, and placement. Placement in a staff secure facility provides a juvenile sex trafficking victim with access to service providers who are trained to meet the specialized needs of these children.

### 5.5 *Child sex trafficking is identified as a type of abuse and neglect within child protection statutes.*<sup>79</sup>

Child sex trafficking is identified as a type of abuse in Kansas’s child protection statutes. Pursuant to Kan. Stat. Ann. § 38-2202(ff) (Definitions), “sexual abuse” is defined as “any contact or interaction with a child in which the child is being used for the sexual stimulation of the perpetrator, the child or another person” and includes, but is not limited to, the following:

allowing, permitting or encouraging a child to

- (1) Be photographed, filmed or depicted in pornographic material; or
- (2) be subjected to aggravated human trafficking, as defined in K.S.A. 2016 Supp. 21-5426(b) (Human trafficking; aggravated human trafficking), and amendments thereto, if committed in whole or part for the purpose of the sexual gratification of the offender or another, or be subjected to an act which would constitute conduct proscribed by article 55 of chapter 21 of the Kansas Statutes Annotated or K.S.A. 2016 Supp. 21-6419 [Selling sexual relations] or 21-6422 [Commercial sexual exploitation of a child], and amendments thereto.

Additionally, “[p]hysical, mental or emotional abuse’ means the infliction of physical, mental or emotional harm or the causing of a deterioration of a child and may include, but shall not be limited to, maltreatment or

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<sup>79</sup> For more information regarding recent federal legislation impacting this component see: <http://go.sharedhope.org/stateimpactmemo>.

exploiting a child to the extent that the child's health or emotional well-being is endangered." Kan. Stat. Ann. § 38-2202(y).

However, a commercially sexually exploited minor may not be considered neglected. Pursuant to Kan. Stat. Ann. § 38-2202(t) "neglect" is defined as

acts or omissions by a parent, guardian or person responsible for the care of a child resulting in harm to a child, or presenting a likelihood of harm, and the acts or omissions are not due solely to the lack of financial means of the child's parents or other custodian. Neglect may include, but shall not be limited to:

- (1) Failure to provide the child with food, clothing or shelter necessary to sustain the life or health of the child;
- (2) failure to provide adequate supervision of a child or to remove a child from a situation which requires judgment or actions beyond the child's level of maturity, physical condition or mental abilities and that results in bodily injury or a likelihood of harm to the child; or
- (3) failure to use resources available to treat a diagnosed medical condition if such treatment will make a child substantially more comfortable, reduce pain and suffering, or correct or substantially diminish a crippling condition from worsening . . . .

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.*

Kan. Stat. Ann § 38-2202 (Definitions) does not require that a parent or caregiver be the perpetrator of abuse in order to find that a juvenile sex trafficking victim is a child in need of care. It states,

As used in the revised Kansas code for care of children, unless the context otherwise indicates:

. . . .

(d) "Child in need of care" means a person less than 18 years of age at the time of filing of the petition or issuance of an ex parte protective custody order pursuant to K.S.A. 2015 Supp. 38-2242, and amendments thereto, who:

- (1) Is without adequate parental care, control or subsistence and the condition is not due solely to the lack of financial means of the child's parents or other custodian;
- (2) is without the care or control necessary for the child's physical, mental or emotional health;
- (3) has been physically, mentally or emotionally abused or neglected or sexually abused .

. . .

. . . .

(14) has been subjected to an act which would constitute human trafficking or aggravated human trafficking, as defined by K.S.A. 2015 Supp. 21-5426 [Human trafficking; aggravated human trafficking], and amendments thereto, or commercial sexual exploitation of a child, as defined by K.S.A. 2015 Supp. 21-6422 [Commercial sexual exploitation of a child], and amendments thereto, or has committed an act which, if committed by an adult, would constitute selling sexual relations, as defined by K.S.A. 2015 Supp. 21-6419 [Selling sexual relations], and amendments thereto.

. . . .

(ff) "Sexual abuse" means any contact or interaction with a child in which the child is being used for the sexual stimulation of the perpetrator, the child or another person. Sexual abuse shall include, but is not limited to, allowing, permitting or encouraging a child to

- (1) Be photographed, filmed or depicted in pornographic material; or
- (2) be subjected to aggravated human trafficking, as defined in K.S.A. 2015 Supp. 21-5426(b), and amendments thereto, if committed in whole or part for the purpose of the

sexual gratification of the offender or another, or be subjected to an act which would constitute conduct proscribed by article 55 of chapter 21 of the Kansas Statutes Annotated or K.S.A 2015 Supp. 21-6419 [Selling sexual relations] or 21-6422 [Commercial sexual exploitation of a child], and any amendments thereto.

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

A child sex trafficking victim may qualify for compensation under Kansas's crime victims' compensation program. Within this program, a "victim" is defined as "a person who suffers personal injury or death as a result of: (1) criminally injurious conduct; (2) the good faith effort of any person to prevent criminally injurious conduct; or (3) the good faith effort of any person to apprehend a person suspected of engaging in criminally injurious conduct." Kan. Stat. Ann. § 74-7301(m) (Definitions). Pursuant to Kan. Stat. Ann. § 74-7301(e)(1),

"Criminally injurious conduct" means conduct that:

- (1) (A) Occurs or is attempted in this state or occurs to a person whose domicile is in Kansas who is the victim of a violent crime which occurs in another state, possession, or territory of the United States of America may make an application for compensation if:
  - (i) The crimes would be compensable had it occurred in the state of Kansas; and
  - (ii) the places the crimes occurred are states, possessions or territories of the United States of America not having eligible crime victim compensation programs;
- (B) poses a substantial threat or personal injury or death; and
- (C) either is punishable by fine, imprisonment or death or would be so punishable but for the fact that the person engaging in the conduct lacked capacity to commit the crime under the laws of this state; or

....

Pursuant to Kan. Stat. Ann. § 74-7305(b)<sup>80</sup> (Claims for compensation), in order to receive compensation a victim must file a claim with the crime victims compensation board "within two years of the reporting of the incident to law enforcement officials if the victim was less than 16 years of age and the injury or death is the result of . . ." certain crimes, including Kan. Stat. Ann. § 21-5506(a) (Indecent liberties with a child), § 21-5506(b) (Aggravated indecent liberties with a child), § 21-5508(a) (Indecent solicitation of a child), § 21-5508(b) (Aggravated indecent solicitation of a child), § 21-5510 (Sexual exploitation of a child), § 21-3446, § 21-3447, § 21-5426(b) (Human trafficking; aggravated human trafficking), and § 21-6422 (Commercial sexual exploitation of a child). However, minors aged 16 and 17 must apply within two years from the occurrence of the crime, rather than from the time in which the crime was reported to law enforcement. If the victim must testify in a "sexually violent predator commitment," a claim for compensation for mental health counseling may be filed up to two years after the testimony is given.<sup>81</sup> Kan. Stat. Ann. § 74-7305(b)(1).

Pursuant to Kan. Stat. Ann. § 74-7305(g), a victim must sustain an economic loss of at least \$100; however, child sex trafficking victims are exempt from this requirement. Kan. Stat. Ann. § 74-7305(g) states,

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<sup>80</sup> The text of Kan. Stat. Ann. § 74-7305 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 2426 and Senate Bills 40 and 101 during the 2017 1st Regular Session of the Kansas Legislature (effective July 1, 2017).

<sup>81</sup> A "sexually violent predator" is "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence." Kan. Stat. Ann. § 59-29a02(a) (Commitment of sexually violent predators; definitions).

Except in [Kan. Stat. Ann. § 21-5604(a) (Incest) or (b) (Aggravated incest)], or cases of sex offenses established in [including Kan. Stat. Ann. § 21-5503 (Rape), § 21-5506(a) (Indecent liberties with a child), § 21-5506(b) (Aggravated indecent liberties with a child), § 21-5508(a) (Indecent solicitation of a child), § 21-5508(b) (Aggravated indecent solicitation of a child), § 21-5509 (Electronic solicitation), § 21-5510 (Sexual exploitation of a child), § 21-6419 (Selling sexual relations), § 21-6420 (Promoting the sale of sexual relations), § 21-6421 (Buying sexual relations), § 21-6422 (Commercial sexual exploitation of a child), § 21-3446 (Human trafficking), and § 21-3447 (Aggravated human trafficking)] compensation may not be awarded if the economic loss is less than \$ 100.

A victim may also be ineligible for compensation if the crime victims' compensation board determines that the victim suffered damages due to "contributory misconduct" or "the victim was likely engaging in, or attempting to engage in, unlawful activity at the time of the crime upon which the claim for compensation is based . . .". Kan. Stat. Ann. § 74-7305(c)(2)–(3). Further, subsection (e) states, "Compensation may not be awarded unless the criminally injurious conduct resulting in injury or death was reported to a law enforcement officer within 72 hours after its occurrence or the board finds there was good cause for the failure to report within that time." However, Kan. Stat. Ann. § 74-7305(j) exempts child sex trafficking victims from both of these ineligibility criteria, stating,

Nothing in subsections (c)(2), (c)(3), (e) and (f) shall be construed to reduce or deny compensation to a victim of human trafficking or aggravated human trafficking, as defined in K.S.A. 2016 Supp. 21-5426, and amendments thereto, or commercial sexual exploitation of a child, as defined in K.S.A. 2016 Supp. 21-6422, and amendments thereto, who was 18 years of age or younger at the time the crime was committed and is otherwise qualified for compensation.

- 5.7.1 Recommendation: Amend Kan. Stat. Ann. § 74-7305(b) (Claims for compensation) to specifically exempt all minor victims of Kan. Stat. Ann. § 21-5426(b)(4), (5) (Human trafficking) and § 21-6422 (Commercial sexual exploitation of a child) from filing deadlines.

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

Evidence of the victims' previous sexual conduct is generally inadmissible in prosecutions for certain offenses, unless the prosecutor decides to introduce it, including Kan. Stat. Ann. § 21-5426(b) (Human trafficking; aggravated human trafficking), § 21-5506(a) (Indecent liberties with a child), § 21-5506(b) (Aggravated indecent liberties with a child), § 21-5508(a) (Indecent solicitation of a child), § 21-5508(b) (Aggravated indecent solicitation of a child), § 21-5509 (Electronic solicitation), Enacted Senate Bill 40, § 3(a), (b)<sup>82</sup> (Internet trading in child pornography and aggravated internet trading in child pornography), and § 21-5510 (Sexual exploitation of a child). Kan. Stat. Ann. § 21-5502(a)<sup>83</sup> (Evidence of complaining witness' previous sexual conduct in prosecutions for sex offenses; motions; notice). If the defense wishes the evidence to be introduced, the defense must make a motion and the judge, after reviewing the evidence in camera, will determine its relevance and admissibility. Kan. Stat. Ann. § 21-5502(b).

Pursuant to Kan. Stat. Ann. § 22-3434(a) (Videotape of testimony of child victim admissible in certain cases) children under 13 are allowed to testify via closed circuit television or by recorded testimony if the court so orders, upon motion by the attorney for any party. However, under Kan. Stat. Ann. § 22-3434(b), "The state must establish by clear and convincing evidence that to require the child who is the alleged victim to testify in open court will so traumatize the child as to prevent the child from reasonably communicating to the jury or

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<sup>82</sup> See *supra* note 43.

<sup>83</sup> The text of Kan. Stat. Ann. § 21-5502 cited here and elsewhere in this report includes amendments made by the enactment of Senate Bill 40 during the 2017 1st Regular Session of the Kansas Legislature (effective July 1, 2017).

render the child unavailable to testify.” Furthermore, “The court shall make such an individualized finding before the state is permitted to proceed under this section.” Kan. Stat. Ann. § 22-3434(b). During out-of-court testimony, the only individuals that may be present include “attorneys for the defendant, the state and the child, any person whose presence would contribute to the welfare and well-being of the child and persons necessary to operate the recording or closed-circuit equipment.” Kan. Stat. Ann. § 22-3434(c)(1).

Similarly, for cases brought under the Revised Kansas Code for Care of Children in Kan. Stat. Ann. § 38-2249(c) (Rules of evidence),

In any proceeding in which a child less than 13 years of age is alleged to have been physically, mentally or emotionally abused or neglected or sexually abused, a recording of an oral statement of the child, or of any witness less than 13 years of age, made before the proceeding began, is admissible in evidence if:

- (1) The court determines that the time, content and circumstances of the statement provide sufficient indicia of reliability;
- (2) no attorney for any party or interested party is present when the statement is made;
- (3) the recording is both visual and aural and is recorded on film, videotape or by other electronic means;
- (4) the recording equipment is capable of making an accurate recording, the operator of the equipment is competent and the recording is accurate and has not been altered;
- (5) the statement is not made in response to questioning calculated to lead the child to make a particular statement or is clearly shown to be the child’s statement and not made solely as a result of a leading or suggestive question;
- (6) every voice on the recording is identified;
- (7) the person conducting the interview of the child in the recording is present at the proceeding and is available to testify or be cross-examined by any party or interested party; and
- (8) each party or interested party to the proceeding is afforded an opportunity to view the recording before it is offered into evidence.

Law enforcement officers and government officials are prohibited from requiring or requesting a polygraph examination or similar truth telling test for anyone who is a victim of certain sex offenses, including Kan. Stat. Ann. § 21-5426 (Human trafficking; aggravated human trafficking), § 21-5503 (Rape), § 21-5506(a) (Indecent liberties with a child), § 21-5506(b) (Aggravated indecent liberties with a child), § 21-5508(a) (Indecent solicitation of a child), § 21-5508(b) (Aggravated indecent solicitation of a child), § 21-5509 (Electronic solicitation), § 21-5510 (Sexual exploitation of a child), and § 21-6420 (Promoting the sale of sexual relations), as a condition for proceeding with an investigation or for prosecuting a suspect. Kan. Stat. Ann. § 22-4614.

While the official file of proceedings are open for public inspection, under Kan. Stat. Ann. § 38-2309(b) (Court records; disclosure; preservation of records), the judge can determine that opening the official file for public inspection is not in the best interests of a juvenile who is less than 14 years of age and “[i]nformation identifying victims and alleged victims of sex offenses, as defined in article 35 of chapter 21 of the Kansas Statutes Annotated, prior to their repeal . . . or human trafficking or aggravated human trafficking, as defined in K.S.A. 21-3446 or 21-3447 . . . shall not be disclosed or open to public inspection under any circumstances.”

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.*

Kansas law does not provide a mechanism for minors to vacate delinquency adjudications related to trafficking victimization, but victims of child sex trafficking and commercial sexual exploitation may expunge records

immediately upon completion of any imposed sentence. Pursuant to Kan. Stat. Ann. § 38-2312(e)(1)<sup>84</sup> (Expungement of records; docket fee), a petition for expungement shall be granted if:

- (A) (i) The juvenile has reached 23 years of age or . . . two years have elapsed since the final discharge;
  - (ii) one year has elapsed since the final discharge for an adjudication concerning acts committed by a juvenile which, if committed by an adult, would constitute a violation of K.S.A. 2016 Supp. 21-6419 [Selling sexual relations], and amendments thereto;
  - (iii) the juvenile is a victim of human trafficking, aggravated human trafficking or commercial sexual exploitation of a child, the adjudication concerned acts committed by the juvenile as a result of such victimization, including, but not limited to, acts which, if committed by an adult, would constitute a violation of K.S.A. 2016 Supp. 21-6203 [Disorderly conduct] or 21-6419 [Selling sexual relations], and amendments thereto, and the hearing on expungement occurred on or after the date of final discharge . . . .
- (B) since the final discharge of the juvenile, the juvenile has not been convicted of a felony or of a misdemeanor other than a traffic offense or adjudicated as a juvenile offender under the revised Kansas juvenile code and no proceedings are pending seeking such a conviction or adjudication; and
- (C) the circumstances and behavior of the petitioner warrant expungement.

However, Kan. Stat. Ann. § 38-2312(b), (c) exclude certain offenses from eligibility for record expungement. Ineligible offenses include Kan. Stat. Ann. § 21-5508(a) (Indecent solicitation of a child), § 21-5510 (Sexual exploitation of a child), Enacted Senate Bill 40, § 3(a), (b)<sup>85</sup> (Internet trading in child pornography and aggravated internet trading in child pornography), and offenses mandating sex offender registration. Accordingly, a minor would be unable to expunge juvenile records related to these offenses even if the offense was committed pursuant to his or her own trafficking victimization.

- 5.9.1 Recommendation: Enact a law that allows child sex trafficking victims to vacate delinquency adjudications and expunge related records for prostitution and other offenses arising from trafficking victimization, without a waiting period.

#### 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.*

Restitution is available to victims of crime in Kansas. Under Kan. Stat. Ann. § 22-3424(d)(2)(A) (Judgment and sentence), “[t]he court shall order a person convicted of human trafficking or aggravated human trafficking, K.S.A. 21-3446 or 21-3447, prior to their repeal, or K.S.A. 2014 Supp. 21-5426, and amendments thereto, or commercial sexual exploitation of a child, K.S.A. 2014 Supp. 21-6422, and amendments thereto, to pay restitution to the victim of the offense . . . .” If, after a criminal trial, a verdict or finding of guilty occurs, “upon request of the victim or the victim’s family and before imposing sentence, the court shall hold a hearing to establish restitution.” Kan. Stat. Ann. § 22-3424(d).

Additionally, sex trafficking and CSEC victims may bring civil claims under Kan. Stat. Ann. § 60-5003 (Damages for human trafficking or commercial exploitation of a child victim). Pursuant to Kan. Stat. Ann. § 60-5003(a)–(b),

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<sup>84</sup> The text of Kan. Stat. Ann. § 38-2312 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 2426 Senate Bill 40 during the 2017 1st Regular Session of the Kansas Legislature (effective July 1, 2017).

<sup>85</sup> See *supra* note 43.

- (a) A victim of the conduct of another that would constitute conduct prohibited by K.S.A. 2014 Supp. 21-5426, and amendments thereto, human trafficking or aggravated human trafficking, or K.S.A. 2014 Supp. 21-6422, and amendments thereto, commercial sexual exploitation of a child, may bring an action in an appropriate state court against the person or persons who engaged in such conduct if the victim suffered personal or psychological injury as a result of the conduct. Such victim may seek actual damages, exemplary or punitive damages, injunctive relief and any other appropriate relief.
- (b) In an action under this section, the court shall award a prevailing plaintiff the cost of the suit, including reasonable attorney fees. A victim who is awarded under this section shall be deemed to have sustained damages of at least \$150,000.

Some domestic minor sex trafficking victims may also be able to bring a civil claim based on childhood sexual abuse. “Childhood sexual abuse” is defined as “any act committed against the person which act occurred when the person was under the age of 18 years and which act would have been a violation of” certain listed statutes, including Kan. Stat. Ann. § 21-5506 (Indecent liberties with a child), § 21-5506(b) (Aggravated indecent liberties with a child), § 21-5508(a) (Indecent solicitation of a child), § 21-5508(b) (Aggravated indecent solicitation of a child), or § 21-5510 (Sexual exploitation of a child). Kan. Stat. Ann. § 60-523(b)(2) (Limitations on actions for recovery of damages suffered as a result of childhood sexual abuse).

Victims depicted in images of child sexual exploitation (ICSE) may seek civil remedies from a buyer if the buyer is convicted of any offense listed under Chapter 21, Article 35 (Sex offenses), including indecent liberties with a child, aggravated indecent liberties with a child, indecent solicitation of a child, and aggravated indecent solicitation of a child, or under Kan. Stat. Ann. § 21-5426 (Human trafficking; aggravated human trafficking) or § 21-6422 (Commercial sexual exploitation of a child), “and any portion of such offense was used in the production of child pornography” and the victim suffered “personal or psychological injury as a result of the . . . possession of such child pornography . . .” Kan. Stat. Ann. § 60-5001(a) (Civil action for victims of child pornography).

Victims of Kan. Stat. Ann. § 21-5506 (Indecent liberties with a child), § 21-5508(a) (Indecent solicitation of a child), § 21-5508(b) (Aggravated indecent solicitation of a child), or § 21-5510 (Sexual exploitation of a child) may seek civil remedies from offenders pursuant to Kan. Stat. Ann. § 60-523(b)(2).

*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.*

For most crimes, prosecutions must generally occur within 5 years after the commission of the crime. Kan. Stat. Ann. § 21-5107(d) (Time limitations for commencement of prosecutions).

Additionally, pursuant to Kan. Stat. Ann. § 21-5107((e)(6), the period of time in which a prosecution must begin does not include a period where

whether the fact of the crime is concealed by the active act or conduct of the accused, there is substantially competent evidence to believe two or more of the following factors are present:

- (A) The victim was a child under 15 years of age at the time of the crime;
- (B) the victim was of such age or intelligence that the victim was unable to determine that the acts constituted a crime;
- (C) the victim was prevented by a parent or other legal authority from making known to law enforcement authorities the fact of the crime whether or not the parent or other legal authority is the accused; and
- (D) there is substantially competent expert testimony indicating the victim psychologically repressed such witness’ memory of the fact of the crime, and in the expert’s professional

opinion the recall of such memory is accurate and free of undue manipulation, and substantial corroborating evidence can be produced in support of the allegations contained in the complaint or information but in no event may a prosecution be commenced as provided in subsection (e)(6) later than the date the victim turns 28 years of age. Corroborating evidence may include, but is not limited to, evidence the defendant committed similar acts against other persons or evidence of contemporaneous physical manifestations of the crime.

For civil actions, an action commenced by a victim of an offense under Kan. Stat. Ann. § 21-5426 (Human trafficking; aggravated human trafficking) or § 21-6422 (Commercial sexual exploitation of a child) shall be filed “within 10 years after the later of the date on which the victim was freed from the human trafficking situation or attained 18 years of age.” Kan. Stat. Ann. § 60-5003(c) (Damages for human trafficking or commercial exploitation of child victims). Therefore, a domestic minor sex trafficking victim may bring a claim until the victim reaches the age of 28 or within 10 years of being freed from trafficking.

For all other civil actions, Kan. Stat. Ann. § 60-515(a) (Persons under legal disability) provides,

[e]xcept as provided in K.S.A. 60-523 [Limitations on actions for recovery of damages suffered as a result of childhood sexual abuse], if any person entitled to bring an action, other than for the recovery of real property or a penalty or a forfeiture, at the time the cause of action accrued or at any time during the period the statute of limitations is running, is less than 18 years of age, . . . such person shall be entitled to bring such action within one year after the person’s disability is removed, except that no such action shall be commenced by or on behalf of any person under the disability more than eight years after the time of the act giving rise to the cause of action.

Therefore, for victims of childhood sexual abuse, an action for damages may be commenced either within 3 years of the victim’s 18th birthday or “more than three years from the date the person discovers or reasonably should have discovered that the injury or illness was caused by childhood sexual abuse, whichever occurs later.” Kan. Stat. Ann. § 60-523(a).



**Legal Components:**

- 6.1 *Training on human trafficking and domestic minor sex trafficking for law enforcement is statutorily mandated or authorized.*
- 6.2 *Single party consent to audiotaping is permitted in law enforcement investigations.*
- 6.3 *Wiretapping is an available tool to investigate domestic minor sex trafficking and commercial sexual exploitation of children (CSEC).*
- 6.4 *Using a law enforcement decoy posing as a minor to investigate buying or selling of commercial sex acts is not a defense to soliciting, purchasing, or selling sex with a minor.*
- 6.5 *Using the Internet or electronic communications to investigate buyers and traffickers is a permissible investigative technique.*
- 6.6 *State law requires reporting of missing children and recovered missing children.*

**Legal Analysis:**

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

Kansas law specifies that a law enforcement officer must attend 40 hours of continuing training annually. Kan. Stat. Ann. § 74-5607a(b) (Certification for full-time and part-time law enforcement officers; annual training; provisional certificate). Pursuant to Kan. Stat. Ann. § 75-756 (Authorizing coordination of training regarding human trafficking), the Attorney General is authorized to “coordinate training regarding human trafficking for law enforcement agencies throughout Kansas.”

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

Kansas allows single party consent to audiotaping. A breach of privacy occurs when an individual “without the consent of the sender or receiver” intercepts the contents of a message sent via “telephone, telegraph, letter or other means of private communication.” Kan. Stat. Ann. § 21-6101(a)(1) (Breach of privacy).

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

Kansas specifically permits the use of wiretapping in domestic minor sex trafficking investigations. Kan. Stat. Ann. § 22-2515(a) (Same; order; application; crimes for which order may be issued; disclosure and use of contents of wire, oral or electronic communications; effect on privileged communications) authorizes wiretapping for a range of offenses including human trafficking or aggravated human trafficking, sexual exploitation of a child and commercial sexual exploitation of a child. Kan. Stat. Ann. § 22-2515(a)(20)–(24).

- 6.4 *Using a law enforcement decoy posing as a minor to investigate buying or selling of commercial sex acts is not a defense to soliciting, purchasing, or selling sex with a minor.*

While there is no law in place that explicitly prohibits a defense to prosecution based on the use of a law enforcement decoy posing as a minor, the defense would be prohibited under Kan. Stat. Ann. § 21-5509 (Electronic solicitation), which makes it a crime to “entic[e] or solicit[] a person whom the offender believes to be a child . . . .” Additionally, the CSEC offense under Kan. Stat. Ann. § 21-5510(a)(1) (Sexual exploitation of a child) applies to “a person whom the offender believes to be a child under 18 years of age.”

However, a defendant may still 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. Kan. Stat. Ann. § 21-6422<sup>86</sup> (Commercial sexual exploitation of a child) is a buyer applicable CSEC offense<sup>87</sup> that does not prohibit this defense, meaning that buyers charged for attempting to solicit or purchase sex with a minor under Kan. Stat. Ann. § 21-6422 would not be prohibited from raising a defense based on the fact that an actual minor was not involved.

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

Kan. Stat. Ann. § 21-5509 (Electronic solicitation) provides a means for law enforcement to use the internet to investigate buyers of commercial sex with minors. Under Kan. Stat. Ann. § 21-5509(a), “enticing or soliciting a person, whom the offender believes to be a child to commit an unlawful sexual act” through electronic means is a crime. Kan. Stat. Ann. § 21-5509(a). Because of the use of the language “believes to be a child,” the provision appears to allow for prosecution in cases where an officer posed as a minor online and no real child was involved.

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

Kansas law requires reporting of both missing children and recovered missing children. Pursuant to Kan. Stat. Ann. § 75-712b(a) (Same; missing and unidentified person system), “[t]he Kansas bureau of investigation shall establish a missing and unidentified person system which shall be a central repository of information received by law enforcement agencies and coroners in this state relating to persons who have been reported missing or are unidentified.” Under subsection (b), law enforcement agencies shall report all information received relating to missing persons or face a possible civil penalty not to exceed \$500. Kan. Stat. Ann. § 75-712b(b), (g). Pursuant to Kan. Stat. Ann. § 75-712c(a)(3) (Same; reports of missing persons; duties of law enforcement agencies), law enforcement officers shall enter reports of missing persons “into the missing person system of the national crime information center and the missing and unidentified person system of the Kansas bureau of investigation within two hours of receipt of the minimum data required to enter a record into such system . . . .”

Further, Kan. Stat. Ann. § 38-2289(b) (Reporting requirements) provides,

Immediately after receiving information that a child in the custody of the secretary is missing, and in no case later than 24 hours after receiving such information, the secretary shall report such information to the national center for missing and exploited children and the law enforcement agency in the jurisdiction from which the child is missing. The law enforcement officer shall enter such information into the missing person system of the national crime information center and the missing and unidentified person system of the Kansas bureau of investigation . . . .<sup>88</sup>

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<sup>86</sup> See *supra* note 6.

<sup>87</sup> See *supra* Component 2.2 for more information about Kan. Stat. Ann. § 21-6422.

<sup>88</sup> Although not specifically applicable to missing children, Kan. Stat. Ann. § 38-2289(a) also provides,

Immediately upon receiving information that a child has been identified as a victim of human trafficking, aggravated human trafficking or commercial sexual exploitation of a child, and in no case later than 24 hours after receiving such information, the secretary shall report such information to law enforcement agencies of jurisdiction.

Such reports could be used to identify missing children who are also victims of human trafficking or commercial sexual exploitation.

Additionally, “[a]ny person or entity which has legal guardianship of a person or legal custody of a person, or both, pursuant to the Kansas code for care of children . . . shall notify a law enforcement agency immediately, and in no case later than two hours, if such person is unaccounted for or if such person’s location is unknown.” Kan. Stat. Ann. § 75-712f(a) (Report of missing person required, when; notice of person’s return). Under subsection (b), “[a] person or entity required to notify a law enforcement agency pursuant to this section shall notify the law enforcement agency not later than 24 hours after the missing person returns or is located.” Kan. Stat. Ann. § 75-712f(b).

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