

# PROTECTED INNOCENCE INITIATIVE

Creating A Uniform Standard Across States to Combat Domestic Minor Sex Trafficking



## ANALYSIS AND RECOMMENDATIONS SOUTH DAKOTA

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

#### *Legal Components:*

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

#### *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.*

All sex trafficking is a Class 2 felony. The South Dakota legislature passed, and the governor signed, South Dakota's human trafficking law in March 2011. S.B. 176 § 1, 86th Leg. Assemb., Reg. Sess. (S.D. 2011) states, "No person may recruit, harbor, transport, provide, or obtain, by any means, another person knowing that force, fraud, or coercion will be used to cause the person to engage in prostitution, forced labor, or involuntary servitude. Nor may any person benefit financially or by receiving anything of value from participation in a venture that has engaged in acts set forth in this section. Any violation of this section constitutes the crime of human trafficking."

Pursuant to S.B. 176 § 2, 86th Leg. Assemb., Reg. Sess. (S.D. 2011), human trafficking in the first degree is a Class 2 felony, and it occurs when the human trafficking acts in section 1:

<sup>1</sup> Unless otherwise specified, all references to South Dakota statutes were taken from South Dakota Codified Laws (LEXIS through the 2010 101st First Sess.) and all federal statutes were taken from United States Code (LEXIS through PL 112-54, approved 11/12/11).

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

Human trafficking in the second degree is a Class 4 felony and occurs when a person does either of the following:

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

- 1.1.1 Recommendation: Amend S.B. 176, 86th Leg. Assemb., Reg. Sess. (S.D. 2011) to eliminate the requirement to prove force, fraud, or coercion in the trafficking of minors.
- 1.1.2 Recommendation: Expand the forms of exploitation beyond just prostitution to include sexual performance and pornography as forms of sex trafficking.<sup>2</sup>

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

The following laws criminalize CSEC in South Dakota:

1. S.D. Codified Laws § 22-23-2 (Promotion of prostitution) creates a crime when an individual does any of the following: “(1) Encourages, induces, procures, or otherwise purposely causes another to become or remain a prostitute; (2) Promotes the prostitution of a minor; or (3) Promotes the prostitution of his or her spouse, child, ward, or other dependent person.” This crime is a Class 5 felony punishable by imprisonment up to 5 years and a possible fine of \$10,000. S.D. Codified Laws §§ 22-23-2, 22-6-1(8).
2. S.D. Codified Laws § 22-22-24.3 (Sexual exploitation of minor) creates a felony when an individual “causes or knowingly permits a minor to engage in an activity or the simulation of an activity that: (1) Is harmful to minors; (2) Involves nudity; or (3) Is obscene.” A first violation is a Class 6 felony punishable by imprisonment up to 2 years, a fine of \$4,000, or both. S.D. Codified Laws §§ 22-22-24.3, 22-6-1(9). A subsequent violation within 15 years is a Class 5 felony punishable by imprisonment up to 5 years and a possible fine of \$10,000. S.D. Codified Laws §§ 22-22-24.3, 22-6-1(8).
3. S.D. Codified Laws § 22-24A-5(1) (Solicitation of minor) creates a Class 4 felony when a person 18 or older “(1) Solicits<sup>3</sup> a minor, or someone the person reasonably believes is a minor, to engage in a prohibited sexual act.” Under S.D. Codified Laws § 22-24A-4, “minor” is defined as someone 15 or

<sup>2</sup> Subsequent recommendations in this report that discuss referring prosecutions to the trafficking statute are predicated upon the recommendations contained in Section 1.1 being previously or simultaneously implemented.

<sup>3</sup> “Solicit” is defined in S.D. Codified Laws § 22-24A-4 as “to seduce, lure, entice or persuade, or attempt to seduce, lure, entice or persuade a specific person by telephone, in person, by letter, by using a computer or any other electronic means.”

younger.<sup>4</sup> This crime is punishable by imprisonment up to 10 years and a possible fine of \$20,000. S.D. Codified Laws § 22-6-1(7).

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

1. Under S.D. Codified Laws § 22-22-7 (Sexual contact with child under sixteen), an individual over 16 is guilty of a Class 3 felony if the individual “knowingly engages in sexual contact with another person, other than that person’s spouse if the other person is under the age of sixteen years.” This crime is punishable by imprisonment up to 15 years and a possible fine of \$30,000. S.D. Codified Laws § 22-6-1(6). The crime is only a Class 1 misdemeanor if the victim is 13 or older and the perpetrator is “less than five years older than the victim,” which is punishable by imprisonment in the county jail up to 1 year, a fine of \$2,000, or both. S.D. Codified Laws §§ 22-6-2(1), 22-22-7.

1.2.1 Recommendation: Raise the age of a minor in all CSEC statutes to 18 years and refer to S.B. 176, 86th Leg. Assemb., Reg. Sess. (S.D. 2011), the trafficking of persons statute, for any case involving a commercial sex act.

1.3 *CSEC or prostitution statutes refer to the sex trafficking statute to identify the commercially sexually exploited minor as a trafficking victim.*

South Dakota’s CSEC statutes do not refer to the human trafficking law.

1.3.1 Recommendation: Amend S.D. Codified Laws § 22-23-2 (Promotion of prostitution) where the victim is a minor under 18, § 22-22-24.3 (Sexual exploitation of minor), and § 22-24A-5 (Solicitation of minor) where the act solicited is a commercial sex act to refer to S.B. 176, 86th Leg. Assemb., Reg. Sess. (S.D. 2011), the trafficking of persons law, to clarify that minors involved in these crimes are human trafficking victims.

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<sup>4</sup> S.D. Codified Laws § 22-24A-2(3) (Definitions) defines “minor” as “any person under the age of eighteen years” for purposes of S.D. Codified Laws §§ 22-24A-1 to 22-24A-20 “inclusive.” However, S.D. Codified Laws § 22-24A-4 (Solicitation of minor—Definitions) defines minor as noted above for purposes of S.D. Codified Laws § 22-22-24.5. S.D. Codified Laws § 22-22-24.5 was transferred to S.D. Codified Laws § 22-24A-5, which likely means that the more specific definition in S.D. Codified Laws § 22-24A-4 trumps the general one in S.D. Codified Laws § 22-24A-2(3).

**Legal Components:**

- 2.1 *The state sex trafficking law can be applied to buyers of commercial sex acts with a victim of domestic minor sex trafficking.*
- 2.2 *Buyers of commercial sex acts with a minor can be prosecuted under CSEC laws.*
- 2.3 *Solicitation of prostitution laws differentiate between buying sex acts with an adult and buying sex acts with a minor under 18.*
- 2.4 *Penalties for buyers of commercial sex acts with minors are as high as federal penalties.*
- 2.5 *Using the Internet 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 are sufficiently high for all minors under 18 and not reduced for older minors.*
- 2.8 *Financial penalties for buyers of commercial sex acts with minors are sufficiently high to make it difficult for buyers to hide the crime.*
- 2.9 *Buying and possessing child pornography carries penalties as high as similar federal offenses.*
- 2.10 *Convicted buyers of commercial sex acts with minors and child pornography are required to register as sex offenders.*

**Legal Analysis:**

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

S.B. 176, 86th Leg. Assemb., Reg. Sess. (S.D. 2011) (Human trafficking) states in part, “No person may recruit, harbor, transport, provide, or obtain, by any means, another person knowing that force, fraud, or coercion will be used to cause the person to engage in prostitution, forced labor, or involuntary servitude.” S.B. 176, 86th Leg. Assemb., Reg. Sess. (S.D. 2011) might apply to buyers of sex with victims of domestic minor sex trafficking through the term “obtain.” Federal prosecutors, under the Trafficking Victims Protection Act (TVPA),<sup>5</sup> have applied the crime of human trafficking to attempted buyers of commercial sex with minors by charging that the buyers attempted to “obtain”<sup>6</sup> a person under 18 to engage in commercial sex.<sup>7</sup> It is unsettled whether the courts will uphold this interpretation of the TVPA. It is arguable, therefore, that the term “obtain” in South Dakota’s trafficking statute may be similarly applied, and could, therefore, implicate buyers under S.B. 176, 86th Leg. Assemb., Reg. Sess. (S.D. 2011). Even if applied, however, the placement of the word “obtain” in S.B. 176, 86th Leg. Assemb., Reg. Sess. (S.D. 2011), requires the buyer know that force, fraud, or coercion will be used in the commission of the crime. This requirement makes it less likely that S.B. 176, 86th Leg. Assemb., Reg. Sess. (S.D. 2011) would be applicable against buyers.

- 2.1.1 Recommendation: Amend S.B. 176, 86th Leg. Assemb., Reg. Sess. (S.D. 2011) to clarify that the law applies to buyers of sex with minors and eliminate the requirement that buyers of commercial sex with minors must “know” of the force, fraud, or coercion occurring in the trafficking situation.

<sup>5</sup> Trafficking Victims Protection Act (TVPA) of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1466 (codified in scattered sections of 18 and 22 U.S.C.).

<sup>6</sup> 18 U.S.C. 1591(a).

<sup>7</sup> See, e.g., Indictment at 1, United States v. Oflyng, No. 09-00084-01-CR-W-SOW (W.D. Mo. Mar. 10, 2009); see also News Release, U.S. Department of Justice, Office of the United States Attorney for the Western District of Missouri, Human Trafficking Rescue Project, Operation Guardian Angel, Final Defendant Pleads Guilty to Sex Trafficking of a Child, (Dec. 18, 2009), <http://www.justice.gov/usao/mow/news2009/mikoloyck.ple.htm>.

## 2.2 *Buyers of commercial sex acts with a minor can be prosecuted under CSEC laws.*

S.D. Codified Laws § 22-24A-5(1) (Solicitation of minor) creates a Class 4 felony when a person 18 or older “(1) Solicits a minor,<sup>8</sup> or someone the person reasonably believes is a minor, to engage in a prohibited sexual act.” A “prohibited sexual act” may include commercial sexual exploitation, such as prostitution and live or recorded sexual performance.<sup>9</sup> “Solicit” is defined as “to seduce, lure, entice or persuade, or attempt to seduce, lure, entice or persuade a specific person by telephone, in person, by letter, by using a computer or any other electronic means.” S.D. Codified Laws § 22-24A-4(2).

Several sexual offense laws that are not specifically commercial in nature could also apply to buyers, including S.D. Codified Laws § 22-22-7 (Sexual contact with child under sixteen) and S.D. Codified Laws § 22-22-24.3 (Sexual exploitation of minor).<sup>10</sup>

- 2.2.1 Recommendation: Amend S.D. Codified Laws § 22-24A-5 (Solicitation of minor) to direct the crime of commercial sexual exploitation of a minor to S.B. 176, 86th Leg. Assemb., Reg. Sess. (S.D. 2011) (Human trafficking).

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

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

S.D. Codified Laws § 22-24A-5 (Solicitation of minor) can apply to situations of purchase of commercial sex acts with a minor under 16<sup>11</sup> by creating a Class 4 felony when an individual who is 18 or older “(1) Solicits a minor, or someone the person reasonably believes is a minor, to engage in a prohibited sexual act; or (2) Knowingly compiles or transmits by means of a computer; or prints, publishes or reproduces by other computerized means; or buys, sells, receives, exchanges or disseminates, any notice, statement or advertisement of any minor’s name, telephone number, place of residence, physical characteristics or other descriptive or identifying information for the purpose of soliciting a minor or someone the person reasonably believes is a minor to engage in a prohibited sexual act,” where the “prohibited sexual act” is a commercial sex act.

- 2.3.1 Recommendation: Amend S.D. Codified Laws § 22-24A-5 (Solicitation of minor) and § 22-23-9 (Hiring another to engage in sexual activity) to specify that a minor involved in prostitution is a victim of trafficking pursuant to S.B. 176, 86th Leg. Assemb., Reg. Sess. (S.D. 2011) (Human trafficking) and refer cases of solicitation of a minor under 18 for commercial sexual activity to S.B. 176, 86th Leg. Assemb., Reg. Sess. (S.D. 2011) (Human trafficking) for prosecution.

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<sup>8</sup> See *supra* note 4.

<sup>9</sup> S.D. Codified Laws § 22-24A-2(16) defines “prohibited sexual act” as “actual or simulated sexual intercourse, sadism, masochism, sexual bestiality, incest, masturbation, or sadomasochistic abuse; actual or simulated exhibition of the genitals, the pubic or rectal area, or the bare feminine breasts, in a lewd or lascivious manner; actual physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse or gratify the sexual desire of either party; defecation or urination for the purpose of creating sexual excitement in the viewer; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. The term includes encouraging, aiding, abetting or enticing any person to commit any such acts as provided in this subdivision. The term does not include a mother’s breast-feeding of her baby.”

<sup>10</sup> See discussion of relevant provisions *supra* Section 1.2.

<sup>11</sup> See *supra* note 4.

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

Although unlikely, if applicable to buyers, S.B. 176 § 2, 86th Leg. Assemb., Reg. Sess. (S.D. 2011) states that a buyer convicted of human trafficking is guilty of a Class 2 felony, which is punishable by imprisonment up to 25 years and a possible fine of \$50,000.<sup>12</sup> S.D. Codified Laws § 22-6-1(5).

S.D. Codified Laws § 22-24A-5(1) (Solicitation of minor) makes it a Class 4 felony when a person 18 or older “(1) Solicits a minor,<sup>13</sup> or someone the person reasonably believes is a minor, to engage in a prohibited sexual act,” which could include forms of CSEC. This crime is punishable by imprisonment up to 10 years and a possible fine of \$20,000. S.D. Codified Laws § 22-6-1(7).

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

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

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>14</sup> against a minor. 18 U.S.C. § 3559(e)(1). To the extent buyers can be prosecuted under other federal CSEC laws,<sup>15</sup> a conviction is punishable by penalties ranging from a fine not to exceed \$250,000 to life imprisonment and a fine not to exceed \$250,000.<sup>16</sup>

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<sup>12</sup> S.D. Codified Laws § 22-6-1.2 (Minimum sentence for subsequent felony convictions for a sex crime) states, “If an adult has a previous conviction for a felony sex crime as defined by § 22-24B-1, any subsequent felony conviction for a sex crime as defined by subdivisions 22-24B-1(1) to (15), inclusive, and (19) shall result in a minimum sentence of imprisonment equal to the maximum term allowable under § 22-6-1, up to twenty-five years. The court may suspend a portion of the prison sentence required under this section.” See discussion of “sex crime” pursuant to S.D. Codified Laws § 22-24B-1 *infra* Section 2.10.

<sup>13</sup> See *supra* note 4.

<sup>14</sup> Pursuant to 18 U.S.C. § 3559(e)(2), “federal sex offense” is defined as

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

<sup>15</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>16</sup> 18 U.S.C. §§ 2251A(b) (conviction punishable by imprisonment for 30 years to life and a fine), 2251(e) (conviction punishable by imprisonment for 15–30 years and a fine), 2423(a) (conviction punishable by imprisonment for 10 years to life and a fine), 2422(a) (conviction punishable by a fine, imprisonment up to 20 years, or both), 2252(a)(2), (4) (stating that a conviction under subsection (a)(2) is punishable by imprisonment for 5–20 years and a fine, while a conviction under subsection (a)(4) is punishable by imprisonment up to 10 years, a fine, or both); see also 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

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

Under S.D. Codified Laws § 22-24A-5(2) (Solicitation of minor), a buyer may be guilty of a Class 4 felony when the buyer “[k]nowingly compiles or transmits by means of a computer; or prints, publishes or reproduces by other computerized means; or buys, sells, receives, exchanges or disseminates, any notice, statement or advertisement of any minor’s [under 16] name, telephone number, place of residence, physical characteristics or other descriptive or identifying information for the purpose of soliciting a minor or someone the person reasonably believes is a minor to engage in a prohibited sexual act.” Under this statute, whether or not a computer is used, a conviction is punishable by imprisonment up to 10 years and a possible fine of \$20,000. S.D. Codified Laws § 22-6-1(7). This statute also makes it a crime to “[s]olicit[] a minor, or someone the person reasonably believes is a minor, to engage in a prohibited sexual act.” S.D. Codified Laws § 22-24A-5(1). In this statute, “solicits” is defined as “to seduce, lure, entice or persuade, or attempt to seduce, lure, entice or persuade a specific person by telephone, in person, by letter, by using a computer or any other electronic means.” S.D. Codified Laws § 22-24A-4(2).

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

Both S.D. Codified Laws § 22-24A-5 (Solicitation of minor) and S.D. Codified Laws § 22-22-24.3 (Sexual exploitation of minor) state that “mistake as to the minor’s age is not a defense to a charge of violating this section,” thus preventing these buyers from asserting a mistake of age defense. S.D. Codified Laws § 22-23-9 (Hiring another to engage in sexual activity) is age-neutral, rendering the mistake of age defense inapplicable.

2.6.1 Recommendation: Amend 2011 S.D. S.B. 176 (Human trafficking) to prohibit a defense based on mistake of age in cases of commercial sexual exploitation of a minor under 18.

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

A violation of S.D. Codified Laws § 22-24A-5 (Solicitation of minor), which may apply to soliciting commercial sex acts, is punishable as a Class 4 felony by imprisonment up to 10 years and a possible fine of \$20,000. S.D. Codified Laws § 22-6-1(7). However, under S.D. Codified Laws § 22-24A-4, “minor” is defined as someone 15 or younger.<sup>17</sup>

A conviction under S.D. Codified Laws § 22-22-7 (Sexual contact with child under sixteen) is punishable as a Class 3 felony by imprisonment up to 15 years and a possible fine of \$30,000. S.D. Codified Laws § 22-6-1(6). If, however, the buyer was less than 5 years older than the victim and the victim was 13 or older, the crime would only be a Class 1 misdemeanor with possible imprisonment in the county jail for 1 year, a fine of \$2,000, or both. S.D. Codified Laws §§ 22-6-2(1), 22-22-7. This crime does not apply to minors between 16 and 18.

2.7.1 Recommendation: Amend S.D. Codified Laws § 22-24A-5 (Solicitation of minor) to increase the age of a minor to under 18.

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<sup>17</sup> See *supra* note 4.

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.*

If a buyer can be found guilty of human trafficking in the first degree under S.B. 176 § 2(3), 86th Leg. Assemb., Reg. Sess. (S.D. 2011), which includes sex trafficking, then the crime may be punishable by a fine of \$50,000. S.D. Codified Laws § 22-6-1(5). S.D. Codified Laws § 22-24A-5 (Solicitation of minor) may carry a fine of \$20,000 when the solicited minor is under 16. S.D. Codified Laws § 22-6-1(7).

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

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

A buyer may also be subject to asset forfeiture under S.D. Codified Laws § 22-24A-15 (Civil liability for sexual offense—Forfeiture of property upon conviction) when found guilty of certain crimes. Crimes allowing for asset forfeiture include, “22-24A-1 to 22-24A-20 [including sale of child pornography; possession, manufacture, or distribution of child pornography; solicitation of minor], inclusive, [or] 22-24B-1 [Sex crimes] . . .”<sup>18</sup> S.D. Codified Laws § 22-24A-15. Therefore, those buyers convicted of violations of § 22-24A-3 (Possession, manufacture, or distribution of child pornography), § 22-24A-5 (Solicitation of minor), § 22-22-24.3 (Sexual exploitation of minor), and § 22-22-7 (Sexual contact with child under sixteen) would be subject to asset forfeiture. S.D. Codified Laws §§ 22-24A-15, 22-24B-1.

Pursuant to S.D. Codified Laws § 22-24A-15 (Civil liability for sexual offense—Forfeiture of property upon conviction), property subject to forfeiture includes the following:

- (1) Any photograph, film, videotape, book, digital media or visual depiction that has been manufactured, distributed, purchased, possessed, acquired, or received in violation of [the statutes listed above];
- (2) Any material, product, and equipment of any kind that is used or intended for use in manufacturing, processing, publishing, selling, possessing, or distributing any visual depiction proscribed by [the statutes listed above];
- (3) Any property that is used, or intended for use, as a container for property described in subdivisions (1) and (2) of this section, including any computers and digital media;
- (4) Any conveyances including aircraft, vehicles, or vessels, that transport, possess, or conceal, or that is used, or intended for use, to transport, or in any manner facilitate the transportation, sale, receipt, possession or concealment of any visual depiction proscribed under [the statutes listed above],
- (5) Any book, record, and research, including microfilm, tape, and data that is used, or intended for use, in violation of [the statutes listed above];
- (6) Any funds or other things of value used for the purposes of unlawfully purchasing, attempting to purchase, distributing, or attempting to acquire or distribute any visual depiction proscribed by [the statutes listed above];

<sup>18</sup> See discussion of “sex crime” pursuant to S.D. Codified Laws § 22-24B-1 *infra* Section 2.10.

(7) Any asset, interest, profit, income, and proceed acquired or derived from the unlawful sale or purchase, attempted sale or purchase, distribution, or attempted distribution of any visual depiction proscribed by [the statutes listed above].

S.D. Codified Laws § 22-24A-15 states that property from part (1) is forfeited to the state. Regarding the use of the other listed property, S.D. Codified Laws § 22-24A-15 states that “[a]ny amount over and above the amount necessary to reimburse for the investigation and prosecution shall be used to satisfy any civil judgments.”

Under S.D. Codified Laws § 22-24A-7 (Offenses creating liability), a person who commits violations of any of the following is also liable for civil damages: “§§ 22-19A-1 [Stalking], 22-24A-1 to 22-24A-20 [including sale of child pornography; possession, manufacture, or distribution of child pornography; solicitation of minor], inclusive, 22-24B-1 [“Sex crime” defined], 23A-27-14.1 [Teacher certification], and 43-43B-1 to 43-43B-3 [Unlawful use of computer system, software, or data], inclusive.” The types of damages a victim may recover from the buyer pursuant to S.D. Codified Laws § 22-24A-10 (Civil liability for sexual offenses—types of damages recoverable) are,

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

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

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

In comparison, a federal conviction for possession of child pornography<sup>20</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>21</sup> Subsequent convictions, however, are punishable by

<sup>19</sup> See discussion *supra* Section 2.8.

<sup>20</sup> 18 U.S.C. §§ 2252(a)(2), (a)(4)(A) (Certain activities relating to material involving the sexual exploitation of minors), 2252A(a)(2)–(3) (Certain activities relating to material constituting or containing child pornography), 1466A(a), (b) (Obscene visual representations of the sexual abuse of children).

<sup>21</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).

imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>22</sup>

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

Pursuant to S.D. Codified Laws § 22-24B-2 (Registration of convicted sex offenders), “Any person who has been convicted for commission of a sex crime, as defined in § 22-24B-1, shall register as a sex offender.” According to S.D. Codified Laws § 22-24B-1 (“Sex crime” defined), “sex crimes” include the following:

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

2.10.1 Recommendation: Amend S.D. Codified Laws § 22-24B-1 to add S.B. 176, 86th Leg. Assemb., Reg. Sess. (S.D. 2011) (Human trafficking) to the list of sex crimes for which sex offender registration is required.

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<sup>22</sup> 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (b)(1), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years, but if a person has a prior conviction under subsection (b)(1), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 10–20 years), 2252A(b)(1) (stating if a person has a prior conviction under subsection (a)(2), (a)(3), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 1466A(a), (b) (stating that the penalty scheme for section 2252A(b) applies); *see also* 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

**Legal Components:**

- 3.1 *Penalties for trafficking a child for sexual exploitation are as high as federal penalties.*
- 3.2 *Creating and distributing child pornography carries penalties as high as similar federal offenses.*
- 3.3 *Using the Internet to lure, entice, recruit, or sell commercial sex acts with a minor is a separate crime or results in an enhanced penalty for traffickers.*
- 3.4 *Financial penalties for traffickers, including asset forfeiture, are sufficiently high.*
- 3.5 *Convicted traffickers are required to register as sex offenders.*
- 3.6 *Laws relating to termination of parental rights for certain offenses include sex trafficking or CSEC offenses in order to remove the children of traffickers from their control and potential exploitation.*

**Legal Analysis:**

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

Human trafficking in the second degree is a Class 4 felony when an individual “[r]ecruits, harbors, transports, provides, or obtains, by any means, another person knowing that force, fraud, or coercion will be used to cause the person to engage in prostitution, forced labor, or involuntary servitude.” S.B. 176 § 3, 86th Leg. Assemb., Reg. Sess. (S.D. 2011). Class 4 felonies are punishable by imprisonment up to 10 years and a possible fine of \$20,000. S.D. Codified Laws § 22-6-1(7). S.B. 176 § 2, 86th Leg. Assemb., Reg. Sess. (S.D. 2011) creates a Class 2 felony for human trafficking in the first degree when the crimes “(1) Involve committing or attempting to commit kidnaping; (2) Involve a victim under the age of sixteen years; (3) Involve prostitution or procurement for prostitution; or (4) Result in the death of a victim.” When these elements are involved, the crime is punishable by imprisonment up to 25 years and a possible fine of \$50,000. S.D. Codified Laws § 22-6-1(5).

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

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

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

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

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

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)<sup>23</sup> 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>24</sup> against a minor.

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

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

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

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

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>25</sup> against a minor. Additionally, a federal conviction for distribution of child pornography<sup>26</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>27</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>28</sup>

<sup>23</sup> See *supra* note 5.

<sup>24</sup> See *supra* note 14 for the definition of “federal sex offense.”

<sup>25</sup> See *supra* note 14 for the definition of “federal sex offense.”

<sup>26</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>27</sup> 18 U.S.C. §§ 2252(b) (stating that a conviction under subsection (a)(1), (a)(2), or (a)(3) is punishable by imprisonment for 5–20 years and a fine), 2252A(b)(1) (a conviction is punishable by imprisonment for 5–20 years and a fine), 1466A(a), (b) (stating that a conviction under subsection (a) is “subject to the penalties provided in section 2252A(b)(1),” imprisonment for 5–20 years and a fine, while a conviction under subsection (b) is “subject to the penalties provided in section 2252A(b)(2),” imprisonment up to 10 years, a fine, or both); see also 18 U.S.C.

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

A person 18 or older violates S.D. Codified Laws § 22-24A-5(2) (Solicitation of minor) when he “[k]nowingly compiles or transmits by means of a computer; or prints, publishes or reproduces by other computerized means; or buys, sells, receives, exchanges or disseminates, any notice, statement or advertisement of any minor’s name, telephone number, place of residence, physical characteristics or other descriptive or identifying information for the purpose of soliciting a minor or someone the person reasonably believes is a minor to engage in a prohibited sexual act.” This is a Class 4 felony punishable by imprisonment up to 10 years and a possible fine of \$20,000. S.D. Codified Laws §§ 22-24A-5, 22-6-1(7). S.D. Codified Laws § 22-24A-5(1) creates a Class 4 felony when a person 18 or older “(1) Solicits<sup>29</sup> a minor, or someone the person reasonably believes is a minor, to engage in a prohibited sexual act.” Under S.D. Codified Laws § 22-24A-4, “minor” is defined as someone 15 or younger. This crime is punishable by imprisonment up to 10 years and a possible fine of \$20,000. S.D. Codified Laws § 22-6-1(7).

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

A person found guilty of human trafficking in the first degree faces a possible fine of \$50,000. S.B. 176 § 2, 86th Leg. Assemb., Reg. Sess. (S.D. 2011), S.D. Codified Laws § 22-6-1(5). The crime of human trafficking in the second degree carries a possible fine of \$20,000. S.D. Codified Laws § 22-6-1(7).

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

A trafficker may be subject to asset forfeiture under S.D. Codified Laws § 22-24A-15 (Civil liability for sexual offense—Forfeiture of property upon conviction) when found guilty of certain crimes. Crimes allowing for asset forfeiture include, “§§ 22-19A-1 [Stalking], 22-24A-1 to 22-24A-20 [including sale of child pornography; possession, manufacture, or distribution of child pornography; solicitation of minor], inclusive, 22-24B-1 [Sex crimes]<sup>30</sup>. . . .” Therefore, those traffickers convicted of § 22-24A-3 (Possession, manufacture, or distribution of child pornography), § 22-24A-5 (Solicitation of a minor), § 22-22-24.3 (Sexual exploitation of minor), and § 22-22-7 (Sexual contact with child under sixteen) would be subject to asset forfeiture. S.D. Codified Laws §§ 22-24A-15, 22-24B-1.

Pursuant to S.D. Codified Laws § 22-24A-15 (Civil liability for sexual offense—Forfeiture of property upon conviction), property subject to forfeiture includes the following:

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§§ 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>28</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>29</sup> “Solicit” is defined in S.D. Codified Laws § 22-24A-4 as “to seduce, lure, entice or persuade, or attempt to seduce, lure, entice or persuade a specific person by telephone, in person, by letter, by using a computer or any other electronic means.”

<sup>30</sup> *See supra* note 18.

- (1) Any photograph, film, videotape, book, digital media or visual depiction that has been manufactured, distributed, purchased, possessed, acquired, or received in violation of [the statutes listed above];
- (2) Any material, product, and equipment of any kind that is used or intended for use in manufacturing, processing, publishing, selling, possessing, or distributing any visual depiction proscribed by [the statutes listed above];
- (3) Any property that is used, or intended for use, as a container for property described in subdivisions (1) and (2) of this section, including any computers and digital media;
- (4) Any conveyances including aircraft, vehicles, or vessels, that transport, possess, or conceal, or that is used, or intended for use, to transport, or in any manner facilitate the transportation, sale, receipt, possession or concealment of any visual depiction proscribed under [the statutes listed above];
- (5) Any book, record, and research, including microfilm, tape, and data that is used, or intended for use, in violation of [the statutes listed above];
- (6) Any funds or other things of value used for the purposes of unlawfully purchasing, attempting to purchase, distributing, or attempting to acquire or distribute any visual depiction proscribed by [the statutes listed above];
- (7) Any asset, interest, profit, income, and proceed acquired or derived from the unlawful sale or purchase, attempted sale or purchase, distribution, or attempted distribution of any visual depiction proscribed by [the statutes listed above].

Under S.D. Codified Laws § 22-24A-7 (Offenses creating liability), a person who commits violations of any of the following is also liable for civil damages: “§§ 22-19A-1 [Stalking], 22-24A-1 to 22-24A-20 [including sale of child pornography; possession, manufacture, or distribution of child pornography; solicitation of minor], inclusive, 22-24B-1 [Sex crimes] . . . .” The types of damages a victim may recover from the trafficker pursuant to S.D. Codified Laws § 22-24A-10 (Types of damages recoverable) include the following:

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

3.4.1 Recommendation: Amend the asset forfeiture law, S.D. Codified Laws § 22-24A-15 (Civil liability for sexual offense—Forfeiture of property upon conviction), to include S.B. 176 § 2, 86th Leg. Assemb., Reg. Sess. (S.D. 2011) (Human trafficking) and S.D. Codified Laws § 22-23-2 (Promotion of prostitution).

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

Pursuant to S.D. Codified Laws § 22-24B-2 (Registration of convicted sex offenders), “Any person who has been convicted for commission of a sex crime, as defined in § 22-24B-1, shall register as a sex offender.” According to S.D. Codified Laws § 22-24B-1 (“Sex crime” defined), “sex crimes” include the following:

- (1) Rape as set forth in § 22-22-1;

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

S.B. 176, 86th Leg. Assemb., Reg. Sess. (S.D. 2011) (Human trafficking) and S.D. Codified Laws § 22-23-8 (Solicitation or procurement of prostitute for patron) are not included as sex crimes requiring registration as a sex offender.

- 3.5.1 Recommendation: Amend S.D. Codified Laws §§ 22-24B-1 to include a registration requirement for S.D. Codified Laws § 22-23-8 (Solicitation or procurement of prostitute for patron) and S.B. 176, 86th Leg. Assemb., Reg. Sess. (S.D. 2011) (Human trafficking) when the crime involves a minor sex trafficking victim used in a commercial sex act.

3.6 *Laws relating to termination of parental rights for certain offenses include sex trafficking or CSEC offenses in order to remove the children of traffickers from their control and potential exploitation.*

S.B. 176, 86th Leg. Assemb., Reg. Sess. (S.D. 2011) (Human trafficking) and most CSEC crimes are not specifically mentioned as establishing grounds for terminating parental rights. However, for children in the dependency system as a result of being removed from the home due to abuse or neglect, S.D. Codified Laws § 26-8A-26 (Termination of parental rights—Alternative Dispositions—permanency review for children in foster care) states in part, “If an adjudicated, abused, or neglected child whose parental rights have not been terminated has been in the custody of the Department of Social Services and it appears at a dispositional or review hearing that all reasonable efforts have been made to rehabilitate the family, that the conditions which led to the removal of the child still exist, and there is little likelihood that those conditions will be remedied so the child can be returned to the custody of the child’s parents, the court shall affirmatively find that good cause exists for termination of the parental rights of the child’s parents and the court shall enter an order terminating parental rights.” Additionally, under S.D. Codified Laws § 26-8A-26.1 (Termination of parental rights), “the court may find that good cause exists for termination of parental rights of a parent who,” among other things,

- (1) Committed a crime defined in § 22-16-4 [Murder in the first degree], 22-16-7 [Murder in the second degree], 22-16-15 [Manslaughter in the first degree], 22-16-20 [Manslaughter in the second degree], 22-22-1[Rape], 22-22-24.3 [Sexual exploitation of minor], 22-22A-2 [Incest], 22-22A-3 [Aggravated incest], 26-10-1 [Abuse of or cruelty to minor], or subdivision 22-19-1(5) [Kidnapping], or committed conduct described by any of those statutes that violated the law or ordinance of another jurisdiction having elements similar to an offense described by any of those statutes;

- (2) Committed a crime defined in § 22-18-1.1 [Aggravated assault] against the child or another child of such parent, or committed conduct described by that section that violated the law or ordinance of another jurisdiction having elements similar to the offense described by that section;
- (3) Has been determined by a court by clear and convincing evidence to have subjected the child or another child to torture, sexual abuse, abandonment for at least six months, chronic physical, mental, or emotional injury, or chronic neglect if the neglect was a serious threat to the safety of the child or another child;
- (4) Is incarcerated and is unavailable to care for the child during a significant period of the child's minority, considering the child's age and the child's need for care by an adult;
- ....

3.6.1 Recommendation: Amend S.D. Codified Laws § 26-8A-26.1 (Termination of parental rights) to include as good cause for termination of parental rights the offenses of 2011 S.D. S.B. 176 (Human trafficking), S.D. Codified Laws § 22-23-2 (Promotion of prostitution) where the victim is a minor under 18, and § 22-24A-5(2) (Solicitation of minor) when the crime solicited is a commercial sex act.

## FRAMEWORK ISSUE 4: CRIMINAL PROVISIONS FOR FACILITATORS

### *Legal Components:*

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

### *Legal Analysis:*

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

South Dakota's human trafficking law applies to facilitators and generally creates a Class 4 felony for any person who "[b]enefits financially or by receiving anything of value from participation in a venture that has engaged in acts set forth in this section." S.B. 176 § 3(2), 86th Leg. Assemb., Reg. Sess. (S.D. 2011). S.B. 176 § 2, 86th Leg. Assemb., Reg. Sess. (S.D. 2011) creates a Class 2 felony for human trafficking in the first degree when the crimes "(1) Involve committing or attempting to commit kidnapping; (2) Involve a victim under the age of sixteen years; (3) Involve prostitution or procurement for prostitution; or (4) Result in the death of a victim." When these elements are involved, the crime is punishable by imprisonment up to 25 years and a possible fine of \$50,000. S.D. Codified Laws § 22-6-1(5).

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

benefit for doing or agreeing to do anything prohibited by this section.”

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

Crimes that could subject a facilitator to asset forfeiture include, “§§ 22-19A-1 [Stalking], 22-24A-1 to 22-24A-20 [including Sale of child pornography; possession, manufacture, or distribution of child pornography; solicitation of minor], inclusive, 22-24B-1[“Sex crime” defined] . . . .” S.D. Codified Laws § 22-24A-15. Sex crimes listed in S.D. Codified Laws § 22-24B-1 (“Sex crime” defined) include several relevant to facilitators, including,

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

Absent from this list are certain laws applicable to facilitators, including S.B. 176, 86th Leg. Assemb., Reg. Sess. (S.D. 2011) (Human trafficking) and S.D. Codified Laws § 22-23-8 (Solicitation or procurement of prostitute for patron).

- 4.2.1 Recommendation: Amend the asset forfeiture law, S.D. Codified Laws § 22-24B-1, to include S.B. 176, 86th Leg. Assemb., Reg. Sess. (S.D. 2011) (Human trafficking) and S.D. Codified Laws § 22-23-8 (Solicitation or procurement of prostitute for patron) as sex crimes.

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

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

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

4.4 *Promoting and selling child pornography is illegal.*

S.D. Codified Laws § 22-24A-1 (Sale of child pornography) creates a Class 6 felony when a person “sells, or displays for sale, any book, magazine, pamphlet, slide, photograph, film, or electronic or digital media image depicting a minor engaging in a prohibited sexual act, or engaging in an activity that involves nudity, or in the simulation of any such act.” This crime is punishable by imprisonment up to 2 years, a fine of \$4,000, or both. S.D. Codified Laws § 22-6-1(9).

Additionally, S.D. Codified Laws § 22-24A-3(3) (Possession, manufacture, or distribution of child pornography) creates a Class 4 felony for certain crimes including when an individual “[k]nowingly possesses, distributes, or otherwise disseminates any visual depiction of a minor engaging in a prohibited sexual act, or in the simulation of such an act.” A first time violation of this statute is punishable as a Class 4 felony by

imprisonment up to 10 years and a possible fine of \$20,000. S.D. Codified Laws § 22-6-1(7). A subsequent offense within 15 years is a Class 3 felony punishable by imprisonment up to 15 years and a possible fine of \$30,000. S.D. Codified Laws §§ 22-24A-3, 22-6-1(6).

## FRAMEWORK ISSUE 5: PROTECTIVE PROVISIONS FOR THE CHILD VICTIMS

### *Legal Components:*

- 5.1 *A victim of domestic minor sex trafficking or CSEC is defined as a victim for purposes of qualifying for crime victims' compensation and other victim benefits.*
- 5.2 *The state sex trafficking statute expressly prohibits a defendant from raising consent of the minor to the commercial sex acts as a defense.*
- 5.3 *Prostitution laws apply only to adults, making minors under 18 specifically immune from this offense.*
- 5.4 *Commercially sexually exploited children are provided with a child protection response, including specialized shelter and services, and are not detained in juvenile detention facilities.*
- 5.5 *Commercial sexual exploitation or sex trafficking is identified as a type of abuse and neglect within child protection statutes.*
- 5.6 *The definition of "caregiver" (or similar term) in the child welfare statutes is broad enough to include a trafficker who has custody or control of a child in order to bring a trafficked child into the protection of child protective services.*
- 5.7 *Crime victims' compensation is specifically available to a child victim of sex trafficking or CSEC without regard to ineligibility factors.*
- 5.8 *Victim-friendly procedures and protections are provided in the trial process for minors under 18.*
- 5.9 *Expungement or sealing of juvenile arrest or criminal records resulting from arrests or adjudications for prostitution-related offenses committed as a result of, or in the course of, the commercial sexual exploitation of a minor is available within a reasonable time after turning 18.*
- 5.10 *Victim restitution and civil remedies are authorized by law for minor victims of sex trafficking or CSEC.*
- 5.11 *Statutes of limitations for civil and criminal actions for child sex trafficking or CSEC offenses are eliminated or lengthened sufficiently to allow prosecutors and victims a realistic opportunity to pursue criminal action and legal remedies.*

### *Legal Analysis:*

- 5.1 *A victim of domestic minor sex trafficking or CSEC is defined as a victim for purposes of qualifying for crime victims' compensation and other victim benefits.*

For all provisions in Title 22 (Crimes), which contains commercial sex offenses and general sex offenses, a "victim" is defined as "any natural person against whom the defendant in a criminal prosecution has committed or attempted to commit a crime." S.D. Codified Laws § 22-1-2(53).

Similarly, for the purposes of Chapter 23A-28 (Restitution to crime victims), a "victim" is defined as "any person, as defined in subdivision 22-1-2(31),<sup>31</sup> who has suffered pecuniary damages<sup>32</sup> as a result of the

<sup>31</sup> "Person" is defined as "any natural person, unborn child, association, limited liability company, corporation, firm, organization, partnership, or society. If the term is used to designate a party whose property may be the subject of a crime or petty offense, it also includes the United States, any other country, this state, and any other state or territory of the United States, and any of their political subdivisions, agencies, or corporations." S.D. Codified Laws § 22-1-2(31).

<sup>32</sup> "Pecuniary damages" is defined in S.D. Codified Laws § 23A-28-2(3) as "all damages which a victim could recover against the defendant in a civil action arising out of the same facts or event, except punitive damages and damages for pain, suffering, mental anguish, and loss of consortium. Without limitation, the term includes damages for wrongful death."

defendant's criminal activities,<sup>33</sup> including any person who has by contract or by statute undertaken to indemnify another or to pay or provide a specified or determinable amount or benefit upon determinable contingencies." S.D. Codified Laws § 23A-28-2(5).

For the purposes of Chapter 23A-28C (Crime Victims' Act), a "victim" is defined as "any person being the direct subject of an alleged act, which would constitute a crime of violence as defined by subdivision 22-1-2(9),<sup>34</sup> simple assault between family or household members as defined in subdivision 25-10-1(2),<sup>35</sup> stalking as defined in chapter 22-19A, a violation of chapter 22-22 [Sex offenses], or a driving under the influence vehicle accident, under the laws of South Dakota or the laws of the United States." S.D. Codified Laws § 23A-28C-4.

5.1.1 Recommendation: Amend S.D. Codified Laws § 23A-28C-4 to include violations of S.B. 176 § 2, 86th Leg. Assemb., Reg. Sess. (S.D. 2011) to define "victim."

5.2 *The state sex trafficking statute expressly prohibits a defendant from raising consent of the minor to the commercial sex acts as a defense.*

South Dakota prohibits consent of the minor as a defense to committing certain crimes. Specifically, S.D. Codified Laws § 22-24A-3 (Possession, manufacture, or distribution of child pornography), S.D. Codified Laws § 22-24A-5 (Solicitation of minor), and S.D. Codified Laws § 22-22-24.3 (Sexual exploitation of minor) all explicitly state that "[c]onsent to performing these proscribed acts [or "a prohibited sexual act"] by a minor or a minor's parent, guardian, or custodian . . . is not a defense to a charge of violating this section."

5.2.1 Recommendation: Amend S.B. 176, 86th Leg. Assemb., Reg. Sess. (S.D. 2011) (Human trafficking), S.D. Codified Laws § 22-23-2(2) (Promotion of prostitution), and § 22-23-8 (Solicitation or procurement of prostitute for patron) to mirror the prohibition of a consent defense stated in S.D. Codified Laws § 22-24A-3, § 22-24A-5, and § 22-22-24.3.

5.3 *Prostitution laws apply only to adults, making minors under 18 specifically immune from this offense.*

Minors in South Dakota are not immune from prosecution for the offense of prostitution. S.D. Codified Laws § 22-23-1 (Prostitution) states, "Any person who engages in or offers to engage in sexual activity for a fee is guilty of prostitution." If convicted, minors are guilty of a Class 1 misdemeanor. S.D. Codified Laws § 22-23-1.

5.3.1 Recommendation: Add a provision to S.D. Codified Laws § 22-23-1 (Prostitution) that states that any minor found engaging in prostitution is not a criminal, but is instead a victim of human trafficking pursuant to S.B. 176, 86th Leg. Assemb., Reg. Sess. (S.D. 2011) (Human trafficking).

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<sup>33</sup> "Criminal activities" is defined in S.D. Codified Laws § 23A-28-2(2) as "any crime for which there is a plea of guilty or verdict of guilty upon which a judgment of conviction may be rendered and any other crime committed after June 30, 1979, which is admitted by the defendant, whether or not prosecuted. However, the term does not include petty offenses."

<sup>34</sup> A "crime of violence" is defined as "any of the following crimes or an attempt to commit, or a conspiracy to commit, or a solicitation to commit any of the following crimes: murder, manslaughter, rape, aggravated assault, riot, robbery, burglary in the first degree, arson, kidnapping, felony sexual contact as defined in § 22-22-7, felony child abuse as defined in § 26-10-1, or any other felony in the commission of which the perpetrator used force, or was armed with a dangerous weapon, or used any explosive or destructive device." S.D. Codified Laws § 22-1-2(9).

<sup>35</sup> Under S.D. Codified Laws § 25-10-1(2), "Family or household members" is defined as "spouses, former spouses, or persons related by consanguinity, adoption, or law, persons living in the same household, persons who have lived together, or persons who have had a child together."

5.4 *Commercially sexually exploited children are provided with a child protection response, including specialized shelter and services, and are not detained in juvenile detention facilities.*

As a commercially sexually exploited child, a minor could be charged with S.D. Codified Laws § 22-23-1 (Prostitution), and as a result be considered a delinquent child under S.D. Codified Laws § 26-8C-2 (Delinquent child defined). A delinquent child is “any child ten years of age or older who, regardless of where the violation occurred, has violated any federal, state, or local law or regulation for which there is a penalty of a criminal nature for an adult, except state or municipal hunting, fishing, boating, park, or traffic laws that are classified as misdemeanors, or petty offenses or any violation of § 35-9-2 [Purchase, possession or consumption of beverage by minor as misdemeanor] or 32-23-21 [Under the age of twenty-one—Additional offenses].”<sup>36</sup> S.D. Codified Laws § 26-8C-2.

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

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

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

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

Allegedly delinquent children may be placed on probation. Under S.D. Codified Laws § 26-8C-4 (Placement on probation without adjudication of delinquency), “If the court is satisfied that the best interests of the public, justice and child will be served, the court may, without entering an adjudication of delinquency, with consent of the child, suspend imposition of adjudication of delinquency and place the child on probation under the terms, conditions and duration required by the court. A court may revoke the suspension at any time during the probationary period and impose an adjudication of delinquency without diminishment or credit for any of the probationary period.”

Under S.D. Codified Laws § 26-8C-6 (Examination or treatment of child). “Following adjudication of a child as a delinquent child, the court may order the child to be examined or treated by a physician or a qualified mental health professional or to receive other special care and may place the child in a hospital or other suitable facility for such purposes.” S.D. Codified Laws § 26-8C-7 (Dispositional decree—

<sup>36</sup> S.D. Codified Laws § 32-23-21 (Under the age of twenty-one—Additional offenses) refers to alcohol and drug related offenses.

Alternatives—Assessment of costs) sets the dispositions alternatives available to the court. This “examination or treatment” option is also available for children adjudicated to be “a child in need of supervision.” S.D. Codified Laws § 26-8B-5 (Examination or treatment of child). On the other hand, a commercially sexually exploited child could be a “child in need of supervision,” which is defined in S.D. Codified Laws § 26-8B-2 (Child in need of supervision defined) as,

- (1) Any child of compulsory school age who is habitually absent from school without legal excuse;
- (2) Any child who has run away from home or is otherwise beyond the control of the child’s parent, guardian, or custodian;
- (3) Any child whose behavior or condition endangers the child’s own welfare or the welfare of others;
- (4) Any child who has violated any federal, state, or local law or regulation for which there is not a penalty of a criminal nature for an adult, except violations of subdivision 34-46-2(2) [Unlawful actions—Tobacco], or petty offenses; or
- (5) Any child who has violated § 35-9-2 [Purchase, possession or consumption of beverage by minor as misdemeanor] or 32-23-21[Under the age of twenty-one—Additional offenses].

Prior to a temporary custody hearing, a child alleged to be in need of supervision taken into temporary custody “shall be released to the child’s parents, guardian, or custodian unless the parents, guardian, or custodian cannot be located or in the judgment of the intake officer are not suitable to receive the child, in which case the child shall be placed in shelter.” S.D. Codified Laws § 26-8B-3. A child in need of supervision may also be held in detention not to exceed 24 hours if the parents, guardian, or custodian are unavailable or unsuitable and, pursuant to S.D. Codified Laws § 27-8B-3, one of the following conditions are satisfied:

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

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

Except in particular circumstances, such as when a child violates a court order or a juvenile correctional facility is deemed by multiple parties to be the least restrictive alternative available, children adjudicated as in need of supervision may not be placed in detention facilities. S.D. Codified Laws § 26-8B-6. Pursuant to S.D. Codified Laws § 26-8B-6 (Decree of disposition—Alternatives), the least restrictive means available must be chosen, and the possible placement options include probation, protective supervision, a rehabilitative supervised work program, an alternative education program, or a “foster home, group home, group care center, residential treatment center, or other community-based services.”

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

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

.....

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

A commercially sexually exploited child could also be taken into temporary custody without a court order, pursuant to S.D. Codified Laws § 26-7A-12 (Temporary custody without court order) if, among other things, any of the following conditions are met:

(2) If the child is abandoned or seriously endangered in the child’s surroundings or is seriously endangering others and immediate removal of the child appears to be necessary for the child’s protection or for the protection of others;

(3) If there are reasonable grounds to believe the child has run away or escaped from the child’s parents, guardian, or custodian;

(4) If the officer reasonably believes that temporary custody is warranted because there exists an imminent danger to the child’s life or safety and there is no time to apply for a court order and the child’s parents, guardian, or custodian refuse an oral request for consent to the child’s removal from their custody or the child’s parents, guardian, or custodian are unavailable . . .

.....

Pursuant to S.D. Codified Laws § 26-8A-2 (Abused or neglected child defined), an “abused or neglected child” is defined as a child who, among other things, “is subject to sexual abuse, sexual molestation, or sexual exploitation by the child’s parent, guardian, custodian, or any other person responsible for the child’s care.” S.D. Codified Laws § 26-8A-2(8). An abused or neglected child may “be placed in the temporary care of the Department of Social Services, foster care, or a shelter as designated by the court to be the least restrictive alternative for the child,” for no more than 48 hours (excluding weekends and holidays) absent the filing of a petition and a court order following a hearing. S.D. Codified Laws § 26-7A-14. However, under S.D. Codified Laws § 26-7A-16 (Temporary custody until release by order of the court), “Notwithstanding § 26-7A-14, an apparent, alleged or adjudicated abused or neglected child, child in need of supervision or delinquent child may be held in temporary custody until released by order of the court.”

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

A commercially sexually exploited child can be considered abused or neglected under S.D. Codified Laws § 26-8A-2(8) (Abused or neglected child defined), which states a child is abused or neglected when the child “is

subject to sexual abuse, sexual molestation, or sexual exploitation<sup>37</sup> by the child’s parent, guardian, custodian, or any other person responsible for the child’s care.”

5.6 *The definition of “caregiver” (or similar term) in the child welfare statutes is broad enough to include a trafficker who has custody or control of a child in order to bring a trafficked child into the protection of child protective services.*

South Dakota law defines “custodian” as “any foster parent, employee of a public or private residential home or facility, other person legally responsible for a child’s welfare in a residential setting, or person providing in-home or out-of-home care; for purposes of this definition, out-of-home care means any day care as defined in §§ 26-6-14 [Categories of activities for which license may be issued],<sup>38</sup> 26-6-14.1 [“Family day care” defined], and 26-6-14.8 [Unregistered family day care].”<sup>39</sup> S.D. Codified Laws § 26-7A-1(11).

5.6.1 Recommendation: Amend the definition of “custodian” to include a person in control and possession of a sexually exploited child to bring that child victim within the protection of Child Protective Services (CPS).

5.7 *Crime victims’ compensation is specifically available to a child victim of sex trafficking or CSEC without regard to ineligibility factors.*

Under the Crime Victims’ Compensation Program, a “victim” is defined as including “any person who suffers personal injury<sup>40</sup> or death as a direct result of: (a) A crime, including a federal crime occurring in this State.” S.D. Codified Laws § 23A-28B-1(12)(a). A “crime” includes “conduct that occurs or is attempted in this State, including that arising from domestic violence and acts of terrorism, as defined in 18 U.S.C § 2331 as of January 1, 1997, which conduct results in personal injury or death and is punishable as a felony or misdemeanor, or would be so punishable except that the person engaging in the conduct lacked the capacity to commit the crime under the laws of this State.” S.D. Codified Laws § 23A-28B-1(3).

Certain circumstances may prevent a commercially sexually exploited child from receiving crime victims’ compensation. Pursuant to S.D. Codified Laws § 23A-28B-25 (Circumstances not permitting compensation) an application must be filed for compensation within one year after the date of injury, and the crime that caused the injury must have been reported to law enforcement “within five days of its occurrence or, if the crime could not reasonably have been reported within such period, within five days of the date when a report could reasonably have been made.” S.D. Codified Laws § 23A-28B-25(1). Victims of domestic minor sex trafficking may be slow to come forward, and thus may become ineligible for crime victims’ compensation due to this requirement. However, the one year application requirement may be waived if good cause is shown. S.D. Codified Laws

<sup>37</sup> S.D. Codified Laws §§ 26-7A-1 (Definitions) and 26-8A-2 do not define “sexual exploitation.” However, for purposes of the criminal code, “[a] person is guilty of sexual exploitation of a minor if the person causes or knowingly permits a minor to engage in an activity or the simulation of an activity that: (1) Is harmful to minors; (2) Involves nudity; or (3) Is obscene.” S.D. Codified Laws § 22-22-24.3.

<sup>38</sup> S.D. Codified Laws § 26-6-14 defines a child welfare agency as including, among other things, any of the following:

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

<sup>39</sup> This definition applies to chapters 26-7A [Juvenile court], 26-8A [Protection of children from abuse or neglect], 26-8B [Children in need of supervision], and 26-8C [Delinquent children].

<sup>40</sup> “Personal injury” is defined in S.D. Codified Laws § 23A-28B-1(11) as “actual bodily harm or emotional distress.”

§ 23A-28B-25(1). Although no guidelines are given for “good cause,” it is possible that the department would consider a human trafficking victim to have “good cause” for delayed reporting.

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

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

- 5.7.1 Recommendation: Amend S.D. Codified Laws § 23A-28B-25(1) to clarify that “good cause” is shown when an individual is a victim of human trafficking as defined in S.B. 176, 86th Leg. Assemb., Reg. Sess. (S.D. 2011). Additionally, amend S.D. Codified Laws § 23A-28B-25(2), (3) to create exceptions for victims of domestic minor sex trafficking.

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

Generally, the victim-friendly criminal justice procedures do not extend to cover domestic minor sex trafficking victims. For example, S.D. Codified Laws § 23A-22-15 (Evidence of victim’s prior sexual conduct in sex offence prosecutions) states, “In prosecutions for a sex offense under chapter 22-22 [sex offenses, not including prostitution related offenses], evidence of specific instances of a victim’s prior sexual conduct shall not be admitted nor reference made thereto before the jury or jury panel, except as provided in this section.” Additionally, “The testimony of the complaining witness in a trial for a charge of a sex offense under chapter 22-22 may not, merely because of the nature of that charge, be treated in any different manner than the testimony of a complaining witness in any other criminal case.” S.D. Codified Laws § 23A-22-15.1. Also, if a minor victim of rape under S.D. Codified Laws § 22-22-1, incest under S.D. Codified Laws § 22-22A-2, or sexual contact under S.D. Codified Laws § 22-22-7 makes a request to have her name and information suppressed, “the court shall order that the name of the minor and the specific details of the alleged acts be suppressed,” as long as there is a “compelling interest after consideration of [certain] factors.” S.D. Codified Laws § 23A-6-22.1.<sup>41</sup> These provisions could leave victims of domestic minor sex trafficking in prosecutions under S.B. 176, 86th Leg. Assemb., Reg. Sess. (S.D. 2011) (Human trafficking), S.D. Codified Laws § 22-23-2 (Promotion of prostitution), S.D. Codified Laws § 22-23-8 (Solicitation or procurement of prostitute for patron), S.D. Codified Laws § 22-24A-1 (Sale of child pornography), and S.D. Codified Laws § 22-24A-3 (Possession, manufacture, or distribution of child pornography) without protection of these provisions.

In addition, under S.D. Codified Laws § 23A-12-9 (Videotape of young sex crime victim’s testimony at preliminary hearing or deposition), “If a defendant has been charged with a violation of subdivision 22-22-1(1), (5), or (6) [Rape] or § 22-22-7 [Sexual contact with child under sixteen], where the victim is less than sixteen years of age, the prosecuting attorney or defense attorney may apply for an order that the victim’s testimony at the preliminary hearing or at a deposition, in addition to being stenographically recorded, be recorded and preserved on videotape.” According to the provision, “If at the time of trial the court finds that the victim is otherwise unavailable within the meaning of § 19-16-29, or that such testimony would in the opinion of the

<sup>41</sup> All references to S.D. Codified Laws § 23A-6-22.1 incorporate amendments made by 2011 S.D. S.B. 173, which was signed by the governor on March 16, 2011.

court be substantially detrimental to the well-being of the victim, the court may admit the videotape of the victim's testimony at the preliminary hearing or deposition as former testimony under § 19-16-30." Since S.B. 176, 86th Leg. Assemb., Reg. Sess. (S.D. 2011) (Human trafficking), S.D. Codified Laws § 22-23-2 (Promotion of prostitution), S.D. Codified Laws § 22-23-8 (Solicitation or procurement of prostitute for patron), S.D. Codified Laws § 22-24A-1 (Sale of child pornography), and S.D. Codified Laws § 22-24A-3 (Possession, manufacture, or distribution of child pornography) are not included within Chapter 22-22 (Sex offenses), these victims do not receive the protection of the victim-friendly criminal justice procedures outlined above.

One victim friendly criminal justice procedure available to domestic minor sex trafficking victims under the age of 12 is the ability to testify via closed circuit television. S.D. Codified Laws § 26-8A-30. S.D. Codified Laws § 26-8A-30 (Testimony of child by closed circuit television) states, "In any proceeding in which a child under the age of twelve . . . is describing any act of sexual contact or rape performed with or on the child by another, or describing any act of physical abuse or neglect of the child by another, or any act of physical abuse or neglect of another child, or any act constituting a crime of violence as defined in § 22-1-2 [Definitions] committed against the child or another child, the court or any party may move to allow that the testimony of the child be taken in a room other than the courtroom and televised at the same time to the courtroom by closed circuit television equipment."<sup>42</sup>

5.8.1 Recommendation: Amend S.D. Codified Laws § 23A-22-15 (Evidence of victim's prior sexual conduct in sex offence prosecutions), § 23A-22-15.1 (Sex offense victim's testimony treated as that of other complainants), § 23A-6-22.1 (Suppression of names of minor victims of certain sexual offenses), and § 23A-12-9 (Videotape of young sex crime victim's testimony at preliminary hearing or deposition) to allow protections for victims of S.B. 176, 86th Leg. Assemb., Reg. Sess. (S.D. 2011) (Human trafficking) when the victim is a minor subjected to commercial sex under S.D. Codified Laws § 22-23-2 (Promotion of prostitution), § 22-23-8 (Solicitation or procurement of prostitute for patron), § 22-24A-1 (Sale of child pornography), or § 22-24A-3 (Possession, manufacture, or distribution of child pornography).

5.9 *Expungement or sealing of juvenile arrest or criminal records resulting from arrests or adjudications for prostitution-related offenses committed as a result of, or in the course of, the commercial sexual exploitation of a minor is available within a reasonable time after turning 18.*

General expungement statutes allow for a motion of expungement one year after the arrest of an individual, "if no accusatory instrument was filed, or at any time after an acquittal." S.D. Codified Laws § 23A-3-27. At this point, "The court may enter an order of expungement if satisfied that the ends of justice and the best interest of the public as well as the defendant or the arrested person will be served by the entry of the order." S.D. Codified Laws § 23A-3-30.

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

(1) The delinquent child has not been adjudicated as a delinquent under this chapter or chapter 26-8C since the termination of the court's jurisdiction of the child or the discharge of the child by the department of corrections;

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<sup>42</sup> This section may, however, only apply to offenses under title 26.

- (2) No proceeding involving the delinquent child concerning a felony, a sexual contact offense, a misdemeanor involving moral turpitude or a petition under this chapter or chapter 26-8C is pending or is being instituted against the child; and
- (3) The rehabilitation of the delinquent child has been attained to the satisfaction of the court.

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

*5.10 Victim restitution and civil remedies are authorized by law for minor victims of sex trafficking or CSEC.*

A domestic minor sex trafficking victim may be able to receive restitution. S.D. Codified Laws § 23A-28-3 (Restitution plan—Present inability to pay—Absence of pecuniary damages—Condition of parole). For the purposes of restitution to crime victims, “victim” is defined as including “any person . . . who has suffered pecuniary damages<sup>43</sup> as a result of the defendant’s criminal activities . . .” S.D. Codified Laws § 23A-28-2(5). “Criminal activities” is defined as “any crime [excluding petty offenses] for which there is a plea of guilty or verdict of guilty upon which a judgment of conviction may be rendered and any other crime committed after June 30, 1979, which is admitted by the defendant, whether or not prosecuted.” S.D. Codified Laws § 23A-28-2(2). Moreover, South Dakota’s state policy is that “restitution shall be made by each violator of the criminal laws to the victims of the violator’s criminal activities to the extent that the violator is reasonably able to do so.” S.D. Codified Laws § 23A-28-1.

Some specific allotments of restitution are provided for minor victims of certain sex offenses, not including S.B. 176, 86th Leg. Assemb., Reg. Sess. (S.D. 2011) (Human trafficking) or S.D. Codified Laws § 22-23-2 (Promotion of prostitution). Under S.D. Codified Laws § 23A-28-12 (Medical, psychological or psychiatric treatment of minor victim), “Anyone convicted under § 26-10-1 [Abuse of or cruelty to minor as felony], 22-22-7 [Sexual contact with child under sixteen] . . . or subdivision 22-22-1(1) or (5) [Rape], shall be required as part of the sentence imposed by the court to pay all or part of the cost of any necessary medical, psychological, or psychiatric treatment, or foster care of the minor resulting from the act or acts for which the defendant is convicted.”

Additionally, certain victims of commercial sexual exploitation may be eligible for civil remedies. Under S.D. Codified Laws § 22-24A-7 (Civil liability for sexual offense), “Any person, except a minor, who knowingly participates in any conduct proscribed by §§ 22-19A-1 [Stalking], 22-24A-1 to 22-24A-20 [Sale of child pornography; solicitation of a minor; possession, manufacture, and distribution of child pornography], inclusive, 22-24B-1 [“Sex crime” defined]<sup>44</sup> . . . is liable for civil damages.”

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

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

<sup>43</sup> See *supra* note 32.

<sup>44</sup> See *supra* note 18.

(5) Disbursements.

- 5.10.1 Recommendation: Amend S.D. Codified Laws § 22-24B-1 (“Sex crime” defined) to include S.B. 176, 86th Leg. Assemb., Reg. Sess. (S.D. 2011) (Human trafficking) when the victim is a minor under the age of 18 used in a commercial sex act.

5.11 *Statutes of limitations for civil and criminal actions for child sex trafficking or CSEC offenses are eliminated or lengthened sufficiently to allow prosecutors and victims a realistic opportunity to pursue criminal action and legal remedies.*

S.D. Codified Laws § 22-24A-13 (Civil liability for sexual offense—Statute of limitations) states, “Any action for damages under §§ 22-19A-1 [Stalking], 22-24A-1 to 22-24A-20, inclusive [Sale of child pornography; possession, manufacture, or distribution of child pornography; solicitation of minor], 22-24B-1 [“Sex crime” defined],<sup>45</sup> 23A-27-14.1 [Teacher certification], and 43-43B-1 to 43-43B-3 [Computer programs], inclusive, shall be commenced within six years of the time the plaintiff knew, or had reason to know, of any injury caused by violations of [these offenses].” When the plaintiff is a minor, the statute of limitations is tolled until the minor reaches 18. S.D. Codified Laws § 22-24A-13.

For most criminal actions, including CSEC and domestic minor sex trafficking violations, S.D. Codified Laws § 23A-42-2 specifies that there is a seven year statute of limitations.

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<sup>45</sup> See *supra* note 18.

**Legal Components:**

- 6.1 *Training on human trafficking and domestic minor sex trafficking for law enforcement is statutorily mandated.*
- 6.2 *Single party consent to audiotaping is permitted in law enforcement investigations.*
- 6.3 *Domestic minor sex trafficking investigations may use wiretapping to investigate the crime.*
- 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 to investigate buyers and traffickers is a permissible investigative technique.*
- 6.6 *Law enforcement and child welfare agencies are mandated to promptly report missing and recovered children.*

**Legal Analysis:**

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

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

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

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

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

- 6.3 *Domestic minor sex trafficking investigations may use wiretapping to investigate the crime.*

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

- 6.3.1 Recommendation: Amend S.D. Codified Laws § 23A-35A-2 (Where interception of

communication may be ordered) to include S.B. 176, 86th Leg. Assemb., Reg. Sess. (S.D. 2011) (Human trafficking), S.D. Codified Laws § 22-23-2(2) (Promotion of prostitution), § 22-24A-3 (Possession, manufacture, or distribution of child pornography), § 22-23-8 (Solicitation or procurement of prostitute for patron) when a minor is involved, and § 22-23-9 (Hiring another to engage in sexual activity) when a minor is involved.

6.4 *Using a law enforcement decoy 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.*

Law enforcement may investigate domestic minor sex trafficking under S.D. Codified Laws § 22-24A-5 (Solicitation of minor), which makes it a crime for an individual to “[s]olicit[] a minor, or someone the person reasonably believes is a minor, to engage in a prohibited sexual act. S.D. Codified Laws § 22-24A-5(1). S.D. Consolidated Laws § 22-24A-4 defines “minor” as someone 15 or younger and “solicit” as “to seduce, lure, entice or persuade, or attempt to seduce, lure, entice or persuade a specific person by telephone, in person, by letter, by using a computer or any other electronic means.” S.D. Codified Laws § 22-24A-5 (Solicitation of a minor) further states, “The fact that an undercover operative or law enforcement officer was involved in the detection and investigation of an offense under this section does not constitute a defense to a prosecution under this section.”

6.4.1 Recommendation: Amend S.B. 176, 86th Leg. Assemb., Reg. Sess. (S.D. 2011) to include a provision permitting the use of a law enforcement decoy in investigating human trafficking for exploitation of minors through prostitution.

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

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

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

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

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

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

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