

# PROTECTED INNOCENCE CHALLENGE

STATE ACTION. NATIONAL CHANGE.

## 2015 ANALYSIS AND RECOMMENDATIONS KANSAS

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

#### *Legal Components:*

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

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

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

Kan. Stat. Ann. § 21-5426(b)(4) (Human trafficking) specifically applies to the sex trafficking of a minor and does not require that the trafficker use force, fraud, or coercion. Specifically, aggravated trafficking “involv[es] recruiting, harboring, transporting, providing or obtaining, by any means, a person under 18 years of age knowing that the person, with or without force, fraud, threat or coercion, will be used to engage in forced labor, involuntary servitude or sexual gratification of the defendant or another.” Kan. Stat. Ann. § 21-5426(b)(4). The crime is a severity level 1, person felony punishable by presumptive imprisonment for 147–165 months

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<sup>1</sup> This report includes legislation enacted as of August 1, 2015.

(recommended 155 months) and a possible fine not to exceed \$300,000.<sup>2</sup> Kan. Stat. Ann. §§ 21-5426(c)(2), 21-6804(a), 21-6611(a)(2). However, if the victim is under 14, and the offender is 18 or older, the crime becomes the off-grid person felony of aggravated human trafficking and the penalties are heightened to a mandatory<sup>3</sup> imprisonment of 25 years to life and a possible fine not to exceed \$500,000. Kan. Stat. Ann. §§ 21-5426(c)(3), 21-6627(a)(1)(A), 21-6611(a)(1).

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

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

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

(1) Giving, receiving, offering or agreeing to give, or offering or agreeing to receive anything of value to perform any of the following acts:

(A) Procuring, recruiting, inducing, soliciting, hiring or otherwise obtaining any person younger than 18 years of age to engage in sexual intercourse, sodomy or manual or other bodily

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<sup>2</sup> Unless otherwise specified, the sentences of imprisonment for all felonies provided throughout this report are based on the assumption that the defendant has no prior felony convictions, and that none of the aggravating or mitigating factors listed in Kan. Stat. Ann. § 21-6804 (Sentencing grid for nondrug crimes) or in the sentencing provisions themselves are present. A defendant with prior felony convictions may be subject to a greater minimum sentence of imprisonment. Kan. Stat. Ann. § 21-6804(a). When using the sentencing grid to determine appropriate imprisonment ranges, the vertical axis on the grid represents the severity level of the offense, and the horizontal axis on the grid represents the criminal history of the defendant. Kan. Stat. Ann. § 21-6804(c). Aggravating factors, such as using a firearm to commit a felony, result in presumptive imprisonment and an optional nonimprisonment sentence if the offense falls into a grid labeled “border box.” Kan. Stat. Ann. § 21-6804(h). A border box penalty is governed by Kan. Stat. Ann. § 6804(q), which allows the court to “impose an optional nonprison sentence.” Subsection (q) states that the “optional nonprison sentence” may be imposed instead of a presumptive sentence if the court makes certain findings, such as the fact that “an appropriate treatment program exists,” the treatment program would admit the offender within a reasonable time, or that the nonprison sentence would “serve community safety interests by promoting offender reformation.” *State v. Sidders*, 888 P.2d 409, 412 (Kan. Ct. App. 1995) further clarifies border boxes by stating, “A border box classification means the grid block is neither a presumed imprisonment box nor a presumed nonimprisonment box. The trial court may impose a nonimprisonment sentence if it finds that a reasonably available treatment program would be more appropriate than prison or nonimprisonment would serve community interests and promote offender reformation.” While the court is generally expected to impose the presumptive sentence in the sentencing guidelines, pursuant to Kan. Stat. Ann. § 21-6185(c)(2)(F)(i), the judge may consider imposing a departure sentence if the defendant commits a “crime of extreme sexual violence,” to include: “aggravated human trafficking . . . if the victim is less than 14 years of age; or commercial sexual exploitation of a child . . . if the victim is less than 14 years of age.”

<sup>3</sup> Here and elsewhere that mandatory minimum imprisonments are mentioned in this report certain exceptions to the mandatory sentencing applies. Pursuant to Kan. Stat. Ann. § 21-6627(a)(2),

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

(A) The defendant is an aggravated habitual sex offender and sentenced pursuant to K.S.A. 2011 Supp. 21-6626, and amendments thereto; or

(B) the defendant, because of the defendant’s criminal history classification, is subject to presumptive imprisonment pursuant to the sentencing guidelines grid for nondrug crimes and the sentencing range exceeds 300 months. In such case, the defendant is required to serve a mandatory minimum term equal to the sentence established pursuant to the sentencing range.

contact stimulation of the genitals of any person with the intent to arouse or gratify the sexual desires of the offender or another; or

(B) Procuring, recruiting, inducing, soliciting, hiring or otherwise obtaining a patron where there is an exchange of value, for any person younger than 18 years of age to engage in sexual intercourse, sodomy or manual or other bodily contact stimulation of the genitals of any person with the intent to arouse or gratify the sexual desires of the patron, the offender or another;

(2) establishing, owning, maintaining or managing any property, whether real or personal, where sexual relations are being sold or offered for sale by a person younger than 18 years of age, or participating in the establishment, ownership, maintenance or management thereof;

(3) permitting any property, whether real or personal, partially or wholly owned or controlled by the defendant to be used as a place where sexual relations are being sold or offered for sale by a person who is younger than 18 years of age; or

(4) procuring transportation for, paying for the transportation of or transporting any person younger than 18 years of age within this state with the intent of causing, assisting or promoting that person's engaging in selling sexual relations.

Kan. Stat. Ann. § 21-6422 is punishable as a severity level 5 felony by presumptive imprisonment for 31–34 months (recommended 32 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. § 21-6422 (b)(1)(A), (b)(2), Kan. Stat. Ann. §§ 21-6804(a), 21-6611(a)(2). When the victim is under 14 and the offender is 18 or older, commercial sexual exploitation of a child is punishable as an off-grid person felony with mandatory imprisonment of 25 years to life and a possible fine not to exceed \$500,000.<sup>4</sup> Kan. Stat. Ann. §§ 21-6627(a)(1)(E) (Mandatory term of imprisonment of 25 or 40 years for certain sex offenders; exceptions), 21-6611(a)(1) (Fines; crimes committed on or after July 1, 1993).

2. Pursuant to Kan. Stat. Ann. § 21-5510(a) (Sexual exploitation of a child),

(a) Sexual exploitation of a child is:

(1) Employing, using, persuading, inducing, enticing or coercing a child under 18 years of age to engage in sexually explicit conduct<sup>5</sup> with the intent to promote any performance;

...

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

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<sup>4</sup> Kan. Stat. Ann. § 21-6611 provides for fines for crimes committed on or after July 1, 1993. Fines for crimes committed before July 1, 1993 are laid out in Kan. Stat. Ann. § 21-6710. Pursuant to Kan. Stat. Ann. § 21-6612,

(a) When the law authorizes any other disposition, a fine shall not be imposed as the sole and exclusive punishment unless having regard to the nature and circumstances of the crime and to the history and character of the defendant, the court finds that the fine alone suffices for the protection of the public.

(b) The court shall not sentence a defendant to pay a fine in addition to a sentence of imprisonment, probation or assignment to a community correctional services program unless:

(1) The defendant has derived a pecuniary gain from the crime; or

(2) the court finds that a fine is adapted to deterrence of the crime involved or to the correction of the offender.

....

<sup>5</sup> “Sexually explicit conduct” is defined as “actual or simulated: Exhibition in the nude; sexual intercourse or sodomy, including genital-genital, oral-genital, anal-genital or oral-anal contact, whether between persons of the same or opposite sex; masturbation; sado-masochistic abuse with the intent of sexual stimulation; or lewd exhibition of the genitals, female breasts or pubic area of any person.” Kan. Stat. Ann. § 21-5510(d)(1).

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

As a severity level 5 felony, sexual exploitation of a child is punishable by presumptive imprisonment for 31–34 months (recommended 32 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5510(b)(1)(A), (B), 21-6804(a), 21-6611(a)(2). However, if the offender violated (a)(1) or (a)(4) and if the victim is under 14, and the offender is 18 or older, then the crime is an off-grid person felony with mandatory imprisonment of 25 years to life, and a possible fine not to exceed \$500,000. Kan. Stat. Ann. §§ 21-5510(b)(2), 21-6627(a)(1)(F), 21-6611(a)(1).

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

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

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

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

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

2. Pursuant to Kan. Stat. Ann. § 21-5503(a)(3) (Rape), rape includes “sexual intercourse with a child under 14.” The crime is a severity level 1, person felony punishable by presumptive imprisonment for 147–165 months (recommended 155 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5503(b)(1)(B), 21-6804(a), 21-6611(a)(2). However, when the victim is under 14 and the perpetrator is 18 or over, rape pursuant to Kan. Stat. Ann. § 21-5503(a)(3), or an “attempt, conspiracy or criminal solicitation to commit rape as defined in subsection (a)(3),” is an off-grid person felony with mandatory imprisonment of 25 years to life and a possible fine not to exceed \$500,000. Kan. Stat. Ann. §§ 21-5503(b)(2), 21-6627(a)(1)(B), 21-6611(a)(1).

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

- (1) Any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child, or the offender, or both; or
- (2) soliciting<sup>6</sup> the child to engage in any lewd fondling or touching of the person of another with the intent to arouse or satisfy the sexual desires of the child, the offender or another.

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<sup>6</sup> “Solicit” or “solicitation” is defined in Kan. Stat. Ann. § 21-5111(cc) (Definitions) as “to command, authorize, urge, incite, request or advise another to commit a crime.” The definitions in Kan. Stat. Ann. § 21-5111 “shall apply when the words and phrases defined are used in this code, except when a particular context clearly requires a different meaning.”

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

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

(b) Aggravated indecent liberties with a child is:

(1) Sexual intercourse with a child who is 14 or more years of age but less than 16 years of age;

...

(3) engaging in any of the following acts with a child who is under 14 years of age:

(A) Any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the offender, or both; or

(B) soliciting the child to engage in any lewd fondling or touching of the person of another with the intent to arouse or satisfy the sexual desires of the child, the offender or another.

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

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

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

It shall be an affirmative defense to any prosecution under this section that the defendant committed the violation of this section because such defendant was subjected to human trafficking or aggravated human trafficking, as defined by K.S.A. 2012 Supp. 21-5426, and amendments thereto, or commercial sexual exploitation of a child, as defined by section 4, and amendments thereto.

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

Kansas defines “Racketeering activity” as “to commit, attempt to commit, conspire to commit or to solicit, coerce or intimidate another person to commit” a series of crimes, including Kan. Stat. Ann. § 21-5426 (Human trafficking or aggravated human trafficking), Kan. Stat. Ann. § 21-5510 (sexual exploitation of a child), Kan. Stat. Ann. § 21-5601 (Endangering a child or aggravated endangering a child), Kan. Stat. Ann. § 21-5602 (Abuse of a child), Kan. Stat. Ann. § 21-5603 (Contributing to a child’s misconduct or deprivation), Kan. Stat. Ann. § 21-6419 (Selling sexual relations), Kan. Stat. Ann. § 21-

6420 (Promoting the sale of sexual relations), and Kan. Stat. Ann. § 21-6422 (Commercial sexual exploitation of a child). Kan. Stat. Ann. § 21-6328(f)(1)<sup>7</sup> (Same; definitions).

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

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

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

“Covered person” is defined as any person who:

- (1) Is a criminal street gang member or criminal street gang associate, as defined in K.S.A. 2014 Supp. 21-6313, and amendments thereto;<sup>8</sup>
- (2) has engaged in or is engaging in any conduct prohibited by K.S.A. 2014 Supp. 21-5426, and amendments thereto, human trafficking or aggravated human trafficking, or K.S.A. 2014 Supp. 21-6422, and amendments thereto, commercial sexual exploitation of a child; or
- (3) has engaged in or is engaging in any conduct prohibited by K.S.A. 2014 Supp. 21-5703, and amendments thereto, unlawful manufacturing of controlled substances, or K.S.A. 2014 Supp. 21-5705, and amendments thereto, unlawful cultivation or distribution of controlled substances.”

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

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<sup>7</sup> The text of Kan. Stat. Ann. § 21-6328(b) included here and elsewhere in this report includes amendments made by the enactment of S.B. No. 113 during the 86<sup>th</sup> Legislative Regular Session (2015) (effective July 1, 2015).

<sup>8</sup> Kansas criminalizes street gang activity under Kan. Stat. Ann. § 21-6314 (Recruiting criminal street gang membership) and § 21-6315 (Criminal street gang intimidation), however only offenses involving controlled substances qualify as predicate offenses. Pursuant to Kan. Stat. Ann. § 21-6313(c) (Criminal street gangs; definitions),

“[C]riminal street gang activity” means the commission or attempted commission of, or solicitation or conspiracy to commit, one or more person felonies, person misdemeanors, felony violations of K.S.A. 2011 Supp. 21-5701 through 21-5717 [Crimes involving controlled substances], and amendments thereto, any felony violation of any provision of the uniform controlled substances act prior to July 1, 2009, or the comparable juvenile offenses, which if committed by an adult would constitute the commission of such felonies or misdemeanors on separate occasions.

of investigation and prosecution, reasonably incurred.” Kan. Stat. Ann. §21-6329(e)(1) (Same; unlawful activities; penalty).

**Legal Components:**

- 2.1 *The state sex trafficking law can be applied to the 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 commercial sexual exploitation of children (CSEC) laws.*
- 2.3 *Solicitation laws differentiate buying sex acts with an adult and buying sex acts with a minor under 18.*
- 2.4 *Penalties for buyers of commercial sex acts with minors are as high as federal penalties.*
- 2.5 *Using the Internet or electronic communications to lure, entice, or purchase, or attempt to lure, entice, or purchase commercial sex acts with a minor is a separate crime or results in an enhanced penalty for buyers.*
- 2.6 *No age mistake defense is permitted for a buyer of commercial sex acts with any minor under 18.*
- 2.7 *Base penalties for buying sex acts with a minor under 18 are sufficiently high and not reduced for older minors.*
- 2.8 *Financial penalties for buyers of commercial sex acts with minors are sufficiently high to make it difficult for buyers to hide the crime.*
- 2.9 *Buying and possessing 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 the buyers of commercial sex acts with a victim of domestic minor sex trafficking.*

Kan. Stat. Ann. § 21-5426(b)(4) (Human trafficking) can apply to buyers of sex with minors following federal precedent through the term “obtain.”<sup>9</sup> Pursuant to Kan. Stat. Ann. § 21-5426(b)(4), one commits a crime of aggravated human trafficking by “. . . recruiting, harboring, transporting, providing or obtaining,<sup>10</sup> by any

<sup>9</sup> See *United States v. Jungers*, 702 F.3d 1066 (8th Cir. 2013). In this case, the Eighth Circuit held that the federal sex trafficking law, 18 U.S.C. § 1591 (Sex trafficking of children or by force, fraud, or coercion) applies to buyers of sex with minors. Reversing a District of South Dakota ruling that Congress did not intend the string of verbs constituting criminal conduct under 18 U.S.C. § 1591(a)(1) (“recruits, entices, harbors, transports, provides, obtains, or maintains”) to reach the conduct of buyers (*United States v. Jungers*, 834 F. Supp. 2d 930, 931 (D.S.D. 2011)), the Eighth Circuit concluded that 18 U.S.C. § 1591 does not contain “a latent exemption for purchasers” because buyers can “engage in at least some of the prohibited conduct.” *Jungers*, 702 F. 3d 1066, 1072. Congress codified *Jungers* clarifying that the federal sex trafficking law is intended to apply to buyers in the Justice for Victims of Trafficking Act (JVTA) of 2015 Pub. L. No. 114-22, 129 Stat 227), enacted on May 29, 2015. The JVTA adds the terms “patronize” and “solicit” to the list of prohibited conduct and expressly states, “section 108 of this title amends section 1591 of title 18, United States Code, to add the words ‘solicits or patronizes’ to the sex trafficking statute making absolutely clear for judges, juries, prosecutors, and law enforcement officials that criminals who purchase sexual acts from human trafficking victims may be arrested, prosecuted, and convicted as sex trafficking offenders when this is merited by the facts of a particular case.” *Id.* at Sec. 109. The Eighth Circuit decision in *United States v. Jungers* and the federal sex trafficking law as amended by the Justice for Victims of Trafficking Act establish persuasive authority when state courts interpret the string of verbs constituting prohibited conduct in state sex trafficking laws (in particular the term “obtains”) to the extent such interpretation does not conflict with state case law.

<sup>10</sup> “Obtain” is defined by Kan. Stat. Ann. § 21-5111(q) (Definitions) as “to bring about a transfer of interest or possession of property, whether to the offender or to another.” The definitions in Kan. Stat. Ann. § 21-5111 “shall



means, a person under 18 years of age knowing that the person, with or without force, fraud, threat or coercion, will be used to engage in forced labor, involuntary servitude or sexual gratification of the defendant or another.”

- 2.1.1 Recommendation: Amend Kan. Stat. Ann. § 21-5426 (Human trafficking) to clarify that buyer conduct is included as a violation of Kan. Stat. Ann. § 21-5426 (Human trafficking).<sup>11</sup>

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

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

- (1) Giving . . . offering or agreeing to give . . . anything of value to perform any of the following acts:  
(A) Procuring, recruiting, inducing, soliciting, hiring or otherwise obtaining any person younger than 18 years of age to engage in sexual intercourse, sodomy or manual or other bodily contact stimulation of the genitals of any person with the intent to arouse or gratify the sexual desires of the offender or another. . . .

Pursuant to Kan. Stat. Ann. § 21-6422, commercial sexual exploitation of a child is a Severity level 5, person felony for a first conviction. A Severity level 5, person felony, is punishable by presumptive imprisonment for 31–34 months (recommended 32 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-6804(a), 21-6611(a)(2). When the victim is under 14 and the offender is 18 or older, the crime is punishable as an off-grid person felony by mandatory imprisonment for 25 years to life and a possible fine not to exceed \$500,000. Section 4(b)(2), 21-6627(a)(1), (a)(1)(E), 21-6611(a)(1).

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

The general solicitation statute, Kan. Stat. Ann. § 21-6421(a) (Buying sexual relations), only applies to buyers of commercial sex with persons over the age of 18. Kan. Stat. Ann. § 21-6421. A buyer that solicits sex with a minor would be prosecuted under Kan. Stat. Ann. § 21-6422 (Commercial sexual exploitation of a child), which criminalizes “[g]iving . . . offering or agreeing to give . . . anything of value to perform any of the following acts: procuring, recruiting, inducing, soliciting, hiring or otherwise obtaining any person younger than 18 years of age to engage in sexual intercourse” a Severity level 5, person felony. Kan. Stat. Ann. § 21-6422(b)(1)(A).

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

A violation of Kan. Stat. Ann. § 21-5426(b)(4) (Human trafficking) is generally a severity level 1, person felony punishable by presumptive imprisonment for 147–165 months (recommended 155 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5426(c)(2), 21-6804(a), 21-6611(a)(2). However, if the victim is under 14 and the offender is 18 or older, the crime becomes the off-grid person felony of aggravated human

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apply when the words and phrase are used in this code, except when a particular context clearly requires a different meaning.” Kan. Stat. Ann. § 21-5111. It would seem that in this instance a different meaning applies.

<sup>11</sup> See generally SHARED HOPE INTERNATIONAL, “Eliminating the Third Party Control Barrier to Identifying Juvenile Sex Trafficking Victims,” JuST Response Policy Paper (2015), [http://sharedhope.org/wp-content/uploads/2015/08/Policy-Paper\\_Eliminating-Third-Party-Control\\_Final1.pdf](http://sharedhope.org/wp-content/uploads/2015/08/Policy-Paper_Eliminating-Third-Party-Control_Final1.pdf) (discussing need to include buyer conduct in core sex trafficking offense regardless of whether victim is under control of a third party and explaining negative impact on victims and victim-identification when buyers are excluded).

trafficking and the penalties are heightened to a mandatory imprisonment of 25 years to life and a possible fine not to exceed \$500,000.<sup>12</sup> Kan. Stat. Ann. §§ 21-5426(c)(3), 21-6627(a)(1)(A),<sup>13</sup> 21-6611(a)(1).

Kan. Stat. Ann. § 21-6422 (Commercial sexual exploitation of a child) also criminalizes commercial sex acts with a minor. Commercial sexual exploitation of a child is a Severity level 5, person felony, unless the person charged has a prior conviction for a CSEC violation. Kan. Stat. Ann. § 21-6422 (b)(1)(A). A Severity level 5, person felony, is punishable by presumptive imprisonment for 31–34 months (recommended 32 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-6804(a), 21-6611(a)(2). When the victim is under 14 and the offender is 18 or older, the crime is punishable as an off-grid person felony by mandatory imprisonment for 25 years to life and a possible fine not to exceed \$500,000, Kan. Stat. Ann. § 21-6422(b)(2); Kan. Stat. Ann. §§ 21-6627(a)(1), (a)(1)(E), 21-6611(a)(1).

Pursuant to Kan. Stat. Ann. § 21-6804(j)(1), “The sentence for any persistent sex offender whose current convicted crime carries a presumptive term of imprisonment shall be double the maximum duration of the presumptive imprisonment term.” For any fine for a felony or misdemeanor found in Kan. Stat. Ann. § 21-6611(a)–(b), “the fine imposed may [alternatively] be fixed at any greater sum not exceeding double the pecuniary gain derived from the crime by the offender.” Kan. Stat. Ann. § 21-6611(c).

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

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

Kan. Stat. Ann. § 21-5509(a) (Electronic solicitation) states, “Electronic solicitation is, by means of communication conducted through the telephone, internet or by other electronic means, enticing or soliciting<sup>16</sup> a person, whom the offender believes to be a child, to commit or submit to an unlawful sexual act.” If the

<sup>12</sup> While the court is generally expected to impose the presumptive sentence in the sentencing guidelines, pursuant to Kan. Stat. Ann. § 21-6185(c)(2)(F)(i), the judge may consider imposing a departure sentence if the defendant commits a “crime of extreme sexual violence,” to include: “aggravated human trafficking . . . if the victim is less than 14 years of age; or commercial sexual exploitation of a child . . . if the victim is less than 14 years of age.”

<sup>13</sup> See *supra* note 3.

<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> See *supra* note 6.

offender believes the victim to be 14 or 15, electronic solicitation is a severity level 3, person felony with presumptive imprisonment for 55–61 months (recommended 59 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5509(b)(1), 21-6804(a), 21-6611(a)(2). If the offender believes the child is under 14, the crime is a severity level 1, person felony punishable by presumptive imprisonment for 147–165 months (recommended 155 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5509(b)(2), 21-6804(a), 21-6611(a)(2).

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

Kan. Stat. Ann. § 21-5426 (Human trafficking), does not contain a mistake of age defense. In Kan. Stat. Ann. § 21-6422 (Commercial sexual exploitation of a child) there is no reference to a mistake of age defense. Similarly, the potentially applicable sexual offense laws, such as Kan. Stat. Ann. § 21-5508 (Indecent solicitation of a child) do not make reference to a mistake of age defense.

Pursuant to Kan. Stat. Ann. § 21-5207(a) (Ignorance or mistake), “A person’s ignorance or mistake as to a matter of either fact or law, except as provided in K.S.A. 2011 Supp. 21-5204, and amendments thereto, is a defense if it negates the existence of the culpable mental state which the statute prescribes with respect to an element of the crime.” However, Kan. Stat. Ann. § 21-5204 (Proof of culpable mental state) states, “Proof of a culpable mental state does not require proof . . . that the accused had knowledge of the age of the minor, even though age is a material element of the crime with which the accused is charged.” Kan. Stat. Ann. § 21-5204(b) (Culpable mental state; exclusions).

- 2.6.1 Recommendation: Amend Kan. Stat. Ann. § 21-5426 (Human trafficking), Kan. Stat. Ann. § 21-6422 (Commercial sexual exploitation of a child), § 21-5508 (Indecent solicitation of a child), and § 21-5509 (Electronic solicitation) to clarify that mistake of age is not a defense.

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

Some statutes applicable to buyers of commercial sex with minors have penalties that vary based on the age of the minor. Kan. Stat. Ann. § 21-5426(b)(4) (Human trafficking) is a severity level 1, person felony punishable by presumptive imprisonment for 147–165 months (recommended 155 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5426(c)(2), 21-6804(a), 21-6611(a)(2). However, if the victim is under 14 and the offender is 18 or older, this crime is heightened to aggravated human trafficking, an off-grid person felony with a mandatory imprisonment of 25 years to life and a possible fine not to exceed \$500,000. Kan. Stat. Ann. §§ 21-5426(c)(3), 21-6627(a)(1)(A), 21-6611(a)(1).

Pursuant to Kan. Stat. Ann. § 21-6422(b)(1)(A) (Commercial sexual exploitation of a child), commercial sexual exploitation of a child is a Severity level 5, person felony for a first conviction. A Severity level 5, person felony, is punishable by presumptive imprisonment for 31–34 months (recommended 32 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-6804(a), 21-6611(a)(2). When the victim is under 14 and the offender is 18 or older, the crime is punishable as an off-grid person felony by mandatory imprisonment for 25 years to life and a possible fine not to exceed \$500,000. Section 4(b)(2), 21-6627(a)(1), (a)(1)(E), 21-6611(a)(1).

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

2.8 *Financial penalties for buyers of commercial sex acts with minors are sufficiently high to make it difficult for buyers to hide the crime.*

Various fines apply to buyers of sex with minors. A conviction under Kan. Stat. Ann. § 21-5426(b) (Human trafficking) is punishable as a severity level 1, person felony by a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5426(c)(2), 21-6611(a)(2). If the victim is under 14 and the offender is 18 or older, the crime is heightened to an off-grid felony punishable by a possible fine not to exceed \$500,000.<sup>17</sup> Kan. Stat. Ann. §§ 21-5426(c)(3), 21-6611(a)(1). A conviction under Kan. Stat. Ann. § 21-6422 (Commercial sexual exploitation of a child) is punishable by a fine of “not less than \$2,500 nor more than \$5,000 unless the defendant has a prior conviction under the law, or is over the age of 18 and solicited sex with a person 14 years old or younger.” In that case, the defendant, “shall be fined not less than \$5,000.” Kan. Stat. Ann. § 21-6422(b)(3) (Commercial sexual exploitation of a child). A conviction under Kan. Stat. Ann. § 21-5508(a) (Indecent solicitation of a child) involving a 14 or 15 year old child, is a severity level 6, person felony punishable by a possible fine not to exceed \$100,000. Kan. Stat. Ann. §§ 21-5508(a), (c)(1), 21-6611(a)(3). If the victim is under 14, the crime is heightened to a severity level 5, person felony punishable by a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5508(b), (c)(2), 21-6611(a)(2).

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

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

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

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

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

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<sup>17</sup> While the court is generally expected to impose the presumptive sentence in the sentencing guidelines, pursuant to Kan. Stat. Ann. § 21-6185(c)(2)(F)(i), the judge may consider imposing a departure sentence if the defendant commits a “crime of extreme sexual violence,” to include: “aggravated human trafficking . . . if the victim is less than 14 years of age; or commercial sexual exploitation of a child . . . if the victim is less than 14 years of age.”

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

Pursuant to Kan. Stat. Ann. § 22-3424(d)<sup>18</sup> (Judgment and sentence), a buyer convicted of commercial sex with a minor may also be required to pay restitution. Kan. Stat. Ann. § 22-3424(d)(1) states, if a defendant is found guilty and “upon request of the victim or the victim’s family and before imposing sentence, the court shall hold a hearing to establish restitution.” The court can also order a person convicted of human trafficking, aggravated human trafficking or commercial sexual exploitation of a child and amendments made to such statute prohibiting such conduct, to pay restitution to victims of such offense. Kan. Stat. Ann. § 22-3424(d)(2).

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

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

In comparison, a federal conviction for possession of child pornography<sup>19</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>20</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>21</sup>

<sup>18</sup> The text of Kan. Stat. Ann. § 22-3424 included here and elsewhere in this report includes amendments made by the enactment of S.B. No. 113 during the 86<sup>th</sup> Legislative Regular Session (2015) (effective July 1, 2015).

<sup>19</sup> 18 U.S.C. §§ 2252(a)(2), (a)(4) (Certain activities relating to material involving the sexual exploitation of minors), 2252A(a)(2)–(3) (Certain activities relating to material constituting or containing child pornography), 1466A(a), (b) (Obscene visual representations of the sexual abuse of children).

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

<sup>21</sup> 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (a)(2), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years, but if a person has a prior conviction under subsection (a)(4), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 10–20 years), 2252A(b)(1) (stating if a person has a prior conviction under subsection (a)(2), (a)(3), or a list of other statutes, a

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

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

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

any person who:

- (1) On or after April 14, 1994, is convicted of any sexually violent crime ;
- (2) On or after April 14, 1994, is adjudicated as a juvenile offender for an act which if committed by an adult would constitute the commission of a sexually violent crime , unless the court, on the record, finds that the act involved non-forcible sexual conduct, the victim was at least 14 years of age and the offender was not more than four years older than the victim;
- ...
- (4) on or after May 29, 1997, is convicted of any of the following crimes when one of the parties involved is less than 18 years of age:
  - ...
  - (D) patronizing a prostitute, as defined in . . . K.S.A. 2011 Supp. 21-6421, prior to [its] amendment on July 1, 2013<sup>22</sup>.
  - (E) lewd and lascivious behavior, as defined in . . . K.S.A.2011 Supp. 21-5513, and amendments thereto;
  - ...
- (6) is convicted of an attempt, conspiracy or criminal solicitation, as defined in . . . K.S.A. 2011 Supp. 21-5301, 21-5302, 21-5303, and amendments thereto, of an offense defined in this subsection ; or
- (7) has been convicted of an offense that is comparable to any crime defined in this subsection, or any out of state conviction for an offense that under the laws of this state would be an offense defined in this subsection.

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

- (1) Rape as defined in . . . K.S.A. 2012 Supp. 21-5503, and amendments thereto;
- (2) indecent liberties with a child as defined in . . . subsection (a) of K.S.A. 2012 Supp. 21-5506, and amendments thereto ;
- (3) aggravated indecent liberties with a child as defined in . . . subsection (b) of K.S.A. 2012 Supp. 21-5506, and amendments thereto;
- ...

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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>22</sup> The July 1, 2013 Amendment renames the statute “buying sexual relations,” and limits its application to instances where the sexual services are provided by adults.

(6) indecent solicitation of a child as defined in . . . K.S.A. 2012 Supp. 21-5508, and amendments thereto.

(7) aggravated indecent solicitation of a child as defined in . . . subsection(b) of K.S.A. 2012 Supp. 21-5508, and amendments thereto;

(8) sexual exploitation of a child as defined in . . . K.S.A. 2012 Supp. 21-5510, and amendments thereto;

...

(11) electronic solicitation as defined in . . . K.S.A. 2012 Supp. 21-5509, and amendments thereto, committed on or after April 17, 2008;

...

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

(14) commercial sexual exploitation of a child, as defined in section 4, and amendments thereto;

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

....

Pursuant to Kan. Stat. Ann. § 22-4902(e)(1)(I), a “violent offender” includes a person who is convicted of aggravated human trafficking under Kan. Stat. Ann. § 21-5426(b) (Human trafficking), on or after May 29, 1997. It also includes “any person who . . . is convicted of an attempt, conspiracy or criminal solicitation, as defined in K.S.A. 21-3301, 21-3302 or 21-3303, prior to their repeal, or K.S.A. 2011 Supp. 21-5301, 21-5302 and 21-5303, and amendments thereto . . .” Kan. Stat. Ann. § 22-4902(e)(4).

***Legal Components:***

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

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

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

A trafficker may also be convicted under Kan. Stat. Ann. § 21-6422 (Commercial sexual exploitation of a child). Commercial sexual exploitation of a child is a Severity level 5, person felony for a first conviction. A Severity level 5, person felony, is punishable by presumptive imprisonment for 31–34 months (recommended 32 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-6804(a), 21-6611(a)(2). When the victim is under 14 and the offender is 18 or older, the crime is punishable as an off-grid person felony by mandatory imprisonment for 25 years to life and a possible fine not to exceed \$500,000. Kan. Stat. Ann. § 21-6422(b)(2) (Commercial sexual exploitation of a child); Kan. Stat. Ann. §§ 21-6627(a)(1), (a)(1)(E), 21-6611(a)(1).

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

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA) for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the trafficker has a prior conviction for a federal sex offense<sup>23</sup> against a minor.

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<sup>23</sup> See *supra* note 14.



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

Creating and distributing child pornography falls under Kan. Stat. Ann. § 21-5510 (Sexual exploitation of a child) which states, in part, “(a) Sexual exploitation of a child is: (1) Employing, using, persuading, inducing, enticing or coercing a child under 18 years of age to engage in sexually explicit conduct<sup>24</sup> with the intent to promote any performance.” Kan. Stat. Ann. § 21-5510(a)(1). Under Kan. Stat. Ann. § 21-5510(d)(2), the term “promoting” is defined to include the following:

procuring, transmitting, distributing, circulating, presenting, producing, directing, manufacturing, issuing, publishing, displaying, exhibiting, or advertising:

(A) For pecuniary profit; or

(B) with intent to arouse or gratify the sexual desire or appeal to the prurient interest of the offender or any other person.

Sexual exploitation of a child is a severity level 5, person felony, punishable by presumptive imprisonment for 31–34 months (recommended 32 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5510(b)(1)(B), 21-6804(a), 21-6611(a)(2). However, when the child is under 14 and the offender is 18 or older, sexual exploitation of a child is an off-grid person felony with mandatory imprisonment of 25 years to life and a possible fine not to exceed \$500,000. Kan. Stat. Ann. §§ 21-5510(b)(2), 21-6627(a)(1)(F),<sup>25</sup> 21-6611(a)(1).

In comparison, if the victim is under the age of 14, a conviction under the TVPA for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the trafficker has a prior conviction for a federal sex offense<sup>26</sup> against a minor. Additionally, a federal conviction for distribution of child pornography<sup>27</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>28</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>29</sup>

#### 3.2.1 Recommendation: Amend Kan. Stat. Ann. § 21-5510 (Sexual exploitation of a child) to apply the enhanced penalty to all minors under 18.

<sup>24</sup> See *supra* note 5 for the definition of sexually explicit conduct.

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

<sup>26</sup> See *supra* note 14.

<sup>27</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>28</sup> 18 U.S.C. §§ 2252(b) (stating that a conviction under subsection (a)(1), (a)(2), or (a)(3) is punishable by imprisonment for 5–20 years and a fine), 2252A(b)(1) (a conviction is punishable by imprisonment for 5–20 years and a fine), 1466A(a), (b) (stating that a conviction under subsection (a) is “subject to the penalties provided in section 2252A(b)(1),” imprisonment for 5–20 years and a fine, while a conviction under subsection (b) is “subject to the penalties provided in section 2252A(b)(2),” imprisonment up to 10 years, a fine, or both); *see also* 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>29</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).

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

Kan. Stat. Ann. § 21-5509(a) (Electronic solicitation) states, “Electronic solicitation is, by means of communication conducted through the telephone, internet or by other electronic means, enticing or soliciting<sup>30</sup> a person, whom the offender believes to be a child, to commit or submit to an unlawful sexual act.” If the offender believes the victim to be 14 or 15, electronic solicitation is a severity level 3, person felony with presumptive imprisonment for 55–61 months (recommended 59 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5509(b)(1), 21-6804(a), 21-6611(a)(2). If the offender believes the child is under 14, the crime is a severity level 1, person felony punishable by presumptive imprisonment for 147–165 months (recommended 155 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5509(b)(2), 21-6804(a), 21-6611(a)(2).

3.4 *Financial penalties for traffickers, including asset forfeiture, are sufficiently high.*<sup>31</sup>

Traffickers are subject to both criminal and civil forfeiture provisions, restitution, and fines for violations of Kansas’s laws. A conviction under Kan. Stat. Ann. § 21-5426(b) (Human trafficking) or Kan. Stat. Ann. § 21-6422 (Commercial sexual exploitation of a child) when the victim is under 14 and the offender is 18 or older is punishable by a possible fine not to exceed \$500,000. Kan. Stat. Ann. § 21-6422 (b)(2), Kan. Stat. Ann. §§ 21-5426(c)(3), 21-6611(a)(1). Otherwise, a conviction under Kan. Stat. Ann. § 21-5426(b) (Human trafficking) or Kan. Stat. Ann. § 21-6422 (Commercial sexual exploitation of a child) when the victim is over 14 and under 18 is punishable by a fine not to exceed \$300,000. Sec. 4(b)(1)(A), Kan. Stat. Ann. §§ 21-5426(c)(2), 21-6611(a)(2).

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

Kansas’s asset forfeiture laws are applicable to traffickers who violate Kan. Stat. Ann. § 21-5426 (Human trafficking), § 21-6422 (Commercial sexual exploitation of a child), and § 21-5510 (Sexual exploitation of a child). Kan. Stat. Ann. § 60-4104(p)–(dd) (Covered offenses and conduct giving rise to forfeiture). Pursuant to Kan. Stat. Ann. § 60-4105(b)–(d) (Property subject to forfeiture), property subject to forfeiture includes the following:

(b) except as otherwise provided by law,<sup>32</sup> all property, of every kind, including, but not limited to, cash and negotiable instruments and the whole of any lot or tract of land . . . that is either:

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

<sup>31</sup> See discussion of relevant provisions *supra* Sections 1.1, 1.2, 3.1.

<sup>32</sup> Pursuant to Kan. Stat. Ann. § 60-4106 (Exemptions),

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

- (1) No real property or conveyance, or an interest therein, may be forfeited under this act unless the offense or conduct giving rise to forfeiture constitutes a felony.
- (2) No conveyance used by any person as a common carrier in the transaction of business as a common carrier is subject to forfeiture under this act unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of this act.
- (3) No property is subject to forfeiture under this act if the owner or interest holder acquired the property before or during the conduct giving rise to the property’s forfeiture, and such owner or interest holder:

- (1) Furnished or intended to be furnished by any person in an exchange that constitutes conduct giving rise to forfeiture; or
- (2) used or intended to be used in any manner to facilitate conduct giving rise to forfeiture, including, but not limited to, any computer, computer system, computer network or any software or data owned by the defendant which is used during the commission of a violation of K.S.A. 2011 Supp. 21-6108 [Unlawful possession of scanning device or reencoder], and amendments thereto;
- (c) all proceeds of any conduct giving rise to forfeiture;
- (d) all property of every kind, including, but not limited to, cash and negotiable instruments derived from or realized through any proceeds which were obtained directly or indirectly from the commission of an offense listed in K.S.A. 60-4104, and amendments thereto;
- ....

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

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

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- (A) Did not know and could not have reasonably known of the act or omission or that it was likely to occur; or
  - (B) acted reasonably to prevent the conduct giving rise to forfeiture.
  - (4) No property is subject to forfeiture if the owner or interest holder acquired the property after the conduct giving rise to the property's forfeiture, including acquisition of proceeds of conduct giving rise to forfeiture, and the owner or interest holder acquired the property in good faith, for value and was not knowingly taking part in an illegal transaction.
  - ....
  - (b) Notwithstanding subsection (a), property is not exempt from forfeiture, even though the owner or interest holder lacked knowledge or reason to know that the conduct giving rise to property's forfeiture had occurred or was likely to occur, if the:
    - ....
    - (2) owner or interest holder is criminally responsible for the conduct giving rise to the property's forfeiture, whether or not there is a prosecution or conviction;
    - ....

Pursuant to Kan. Stat. Ann. § 22-3424(d)<sup>33</sup> (Judgment and sentence), a trafficker convicted of commercial sex with a minor may also be required to pay restitution. Kan. Stat. Ann. § 22-3424(d)(1) states, if a defendant is found guilty and “upon request of the victim or the victim’s family and before imposing sentence, the court shall hold a hearing to establish restitution.” The court can also order a person convicted of human trafficking, aggravated human trafficking or commercial sexual exploitation of a child and amendments made to such statute prohibiting such conduct, to pay restitution to victims of such offense.<sup>34</sup> Kan. Stat. Ann. § 22-3424(d)(2).

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

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

any person who:

- (1) On or after April 14, 1994, is convicted of any sexually violent crime;
- (2) On or after April 14, 1994, is adjudicated as a juvenile offender for an act which if committed by an adult would constitute the commission of a sexually violent crime, unless the court, on the record, finds that the act involved non-forcible sexual conduct, the victim was at least 14 years of age and the offender was not more than four years older than the victim;
- ...
- (4) on or after May 29, 1997, is convicted of any of the following crimes when one of the parties involved is less than 18 years of age:
  - ...
  - (D) patronizing a prostitute, as defined in . . . K.S.A. 2012 Supp. 21-6421, prior to [its] amendment on July 1, 2013.
  - (E) lewd and lascivious behavior, as defined in . . . K.S.A. 2012 Supp. 21-5513, and amendments thereto;
  - ...
- (6) is convicted of an attempt, conspiracy or criminal solicitation, as defined in . . . K.S.A. 2012 Supp. 21-5301, 21-5302, 21-5303, and amendments thereto, of an offense defined in this subsection; or (7) has been convicted of an that is comparable to any crime defined in this subsection, or any out of state conviction for an offense that under the laws of this state would be an offense defined in this subsection.

Several of the crimes defined as sexually violent by Kan. Stat. Ann. § 22-4902(c) are crimes applicable to traffickers. Pursuant to Kan. Stat. Ann. § 22-4902(c) these crimes include the following:

- (8) sexual exploitation of a child as defined in . . . K.S.A. 2012 Supp. 21-5510, and amendments thereto;
- ...
- (11) electronic solicitation as defined in . . . K.S.A. 2012 Supp. 21-5509, and amendments thereto, committed on or after April 17, 2008;

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<sup>33</sup> See *supra* note 18..

<sup>34</sup> While the court is generally expected to impose the presumptive sentence in the sentencing guidelines, pursuant to Kan. Stat. Ann. § 21-6185(c)(2)(F)(i), the judge may consider imposing a departure sentence if the defendant commits a “crime of extreme sexual violence,” to include: “aggravated human trafficking . . . if the victim is less than 14 years of age; or commercial sexual exploitation of a child . . . if the victim is less than 14 years of age.”

....

(13) aggravated human trafficking, as defined in K.S.A. 21-3447, prior to its repeal, or subsection (b) of K.S.A. 2012 Supp. 21-5426, and amendments thereto, if committed in whole or in part for the purpose of the sexual gratification of the defendant or another;

(14) commercial sexual exploitation of a child, as defined in section 4, and amendments thereto;

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

(16) an attempt, conspiracy or criminal solicitation, as defined in . . . K.S.A. 2012 Supp. 21-5301, 21-5302, 21-5303, and amendments thereto, of a sexually violent crime, as defined in this subsection; or

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

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

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

Under Kan. Stat. Ann § 38-2271(a)<sup>35</sup>,

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

....

(7) a parent has been convicted of . . . human trafficking or aggravated human trafficking, K.S.A. 21-3446 or 21-3447, prior to their repeal, or K.S.A. 2014 Supp. 21-5426, and amendments thereto, or commercial sexual exploitation of a child, K.S.A. 2014 Supp. 21-6422, and amendments thereto . . . .

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<sup>35</sup> The text of Kan. Stat. Ann. § 38-2271 included here and elsewhere in this report includes amendments made by the enactment of S.B. No. 113 during the 86<sup>th</sup> Legislative Regular Session (2015) (effective July 1, 2015).

**Legal Components:**

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

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

The human trafficking provision may apply to facilitators. Under Kan. Stat. Ann. § 21-5426(a) (Human trafficking),

Human trafficking is:

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

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

Under Kan. Stat. Ann. § 21-5426(b)(4), aggravated trafficking “involve[es] recruiting, harboring, transporting, providing or obtaining, by any means, a person under 18 years of age knowing that the person, with or without force, fraud, threat or coercion, will be used to engage in forced labor, involuntary servitude or sexual gratification of the defendant or another.” Aggravated human trafficking is a severity level 1, person felony punishable by presumptive imprisonment for 147–165 months (recommended 155 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5426(c)(2), 21-6804(a), 21-6611(a)(2). If the victim is less than 14 and the offender is 18 or older, the crime is an off-grid person felony with a mandatory imprisonment of 25 years to life and a possible fine not to exceed \$500,000. Kan. Stat. Ann. §§ 21-5426(c)(3), 21-6627(a)(1)(A),<sup>36</sup> 21-6611(a)(1).

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

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<sup>36</sup> See *supra* note 3.

- (2) establishing, owning, maintaining or managing any property, whether real or personal, where sexual relations are being sold or offered for sale by a person younger than 18 years of age, or participating in the establishment, ownership, maintenance or management thereof;
- (3) permitting any property, whether real or personal, partially or wholly owned or controlled by the defendant to be used as a place where sexual relations are being sold or offered for sale by a person who is younger than 18 years of age; or
- (4) procuring transportation for, paying for the transportation of or transporting any person younger than 18 years of age within this state with the intent of causing, assisting or promoting that person's engaging in selling sexual relations.

When the victim is under 14 and the offender is 18 or older, commercial sexual exploitation of a child is an off-grid person felony with a mandatory imprisonment of 25 years to life and a possible fine not to exceed \$500,000. Kan. Stat. Ann. § 21-6422 (b)(2), Kan. Stat. Ann. §§21-6627(a)(1)(E), 21-6611(a)(1). Where the minor victim is over 14 and under 18, it is a severity level 5, person felony, punishable by presumptive imprisonment for 31–34 months (recommended 32 months) and possible fine up to \$300,000. Kan. Stat. Ann. § 21-6422(b)(1)(A), Kan. Stat. Ann. §§ 21-5510(b)(1)(A), (B), 21-6804(a), 21-6611(a)(2). If the defendant has a prior conviction, however, it is a severity level 2, person felony, punishable by presumptive imprisonment for 109–123 months (recommended 117 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. § 21-6422(b)(1)(A), Kan. Stat. Ann. §§ 21-5426(c)(1), 21-6804(a), 21-6611(a)(2).

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

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

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

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

- a) When property is forfeited under this act, the law enforcement agency may:
  - (1) Retain such property for official use or transfer the custody or ownership to any local, state or federal agency, subject to any lien preserved by the court;
  - (2) destroy or use for investigative or training purposes, any illegal or controlled substances and equipment or other contraband, provided that materials necessary as evidence shall be preserved;

- (3) sell property which is not required by law to be destroyed and which is not harmful to the public;
- (c) The proceeds of any sale shall be distributed in the following order of priority:
  - (1) For satisfaction of any court preserved security interest or lien . . .
  - (2) thereafter, for payment of all proper expenses of the proceedings for forfeiture and disposition . .
  - (3) reasonable attorney fees;
  - (4) repayment of law enforcement funds expended in purchasing of contraband or controlled substances, subject to any interagency agreement.

Pursuant to Kan. Stat. Ann. § 22-3424(d)<sup>37</sup> (Judgment and sentence), a facilitator convicted of facilitating commercial sex with a minor may also be required to pay restitution. Kan. Stat. Ann. § 22-3424(d)(1) states, if a defendant is found guilty and “upon request of the victim or the victim’s family and before imposing sentence, the court shall hold a hearing to establish restitution.” The court can also order a person convicted of human trafficking, aggravated human trafficking or commercial sexual exploitation of a child and amendments made to such statute prohibiting such conduct, to pay restitution to victims of such offense.<sup>38</sup> Kan. Stat. Ann. § 22-3424(d)(2).

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

Kansas has no law specifically prohibiting 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 child or prostitution of a minor, if sale or travel occurs in Kansas.

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

Promoting child pornography is illegal under Kan. Stat. Ann. § 21-5510 (Sexual exploitation of a child), which states, among other things, “promoting any performance<sup>39</sup> that includes sexually explicit conduct<sup>40</sup> by a child under 18 years of age, knowing the character and content of the performance.” Kan. Stat. Ann. § 21-5510(a)(4). Under this statute, “promoting” is defined as “procuring, transmitting, distributing, circulating, presenting, producing, directing, manufacturing, issuing, publishing, displaying, exhibiting or advertising: (A) For pecuniary profit; or (B) with intent to arouse or gratify the sexual desire or appeal to the prurient interest of the offender or any other person.” Kan. Stat. Ann. § 21-5510(d)(2). Generally, violating this provision of sexual exploitation of a child is a severity level 5, person felony punishable by presumptive imprisonment for 31–34 months (recommended 32 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5510(b)(2)(A), 21-6804(a), 21-6611(a)(2). If, however, the victim is under 14 and the offender is 18 or older, the crime is an off-grid person felony with a mandatory imprisonment of 25 years to life and a possible fine not to exceed \$500,000. Kan. Stat. Ann. §§ 21-5510(b)(2), 21-6627(a)(1)(F), 21-6611(a)(1).

<sup>37</sup> See *supra* note 18.

<sup>38</sup> While the court is generally expected to impose the presumptive sentence in the sentencing guidelines, pursuant to Kan. Stat. Ann. § 21-6185(c)(2)(F)(i), the judge may consider imposing a departure sentence if the defendant commits a “crime of extreme sexual violence,” to include: “aggravated human trafficking . . . if the victim is less than 14 years of age; or commercial sexual exploitation of a child . . . if the victim is less than 14 years of age.”

<sup>39</sup> “Performance” is defined to include “any film, photograph, negative, slide, book, magazine or other printed or visual medium, any audio tape recording or any photocopy, video tape, video laser disk, computer hardware, software, floppy disk or any other computer related equipment or computer generated image that contains or incorporates in any manner any film, photograph, negative, photocopy, video tape or video laser disk or any play or other live presentation.” Kan. Stat. Ann. § 21-5510(d)(3).

<sup>40</sup> See *supra* note 5 for the definition of sexually explicit conduct.



- 4.4.1 Recommendation: Amend Kan. Stat. Ann. § 21-5510 (Sexual exploitation of a child), to apply the enhanced penalty for an offense involving any minor under 18.

**Legal Components:**

- 5.1 *Statutorily-mandated victim services define “victim” to specifically include victims of domestic minor sex trafficking or commercial sexual exploitation of children (CSEC) to ensure prompt identification and access to victims’ rights and services.*
  - 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, preventing criminalization of minors under 18 for prostitution offenses.*
  - 5.4 *State law provides a non-punitive avenue to specialized services through one or more points of entry.*
  - 5.5 *Commercial sexual exploitation is identified as a type of abuse and neglect within child protection statutes.*
  - 5.6 *The definition of “caregiver” or another related term in the child welfare statutes is not a barrier to a sex trafficked child accessing the protection of child welfare.*
  - 5.7 *Crime victims’ compensation is specifically available to a child victim of sex trafficking or commercial sexual exploitation of children (CSEC) 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 delinquency records resulting from arrests or adjudications for prostitution-related offenses committed as a result of, or in the course of, the commercial sexual exploitation of a minor is available within a reasonable time after turning 18.*
  - 5.10 *Victim restitution and civil remedies for victims of domestic minor sex trafficking or commercial sexual exploitation of children (CSEC) are authorized by law.*
  - 5.11 *Statutes of limitations for civil and criminal actions for child sex trafficking or commercial sexual exploitation of children (CSEC) offenses are eliminated or lengthened sufficiently to allow prosecutors and victims a realistic opportunity to pursue criminal action and legal remedies.*
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**Legal Analysis:**

- 5.1 *Statutorily-mandated victim services define “victim” to specifically include victims of domestic minor sex trafficking or commercial sexual exploitation of children (CSEC) to ensure prompt identification and access to victims’ rights and services.*

For the purposes of crime victims’ compensation, a “victim” is defined as “a person who suffers personal injury or death as a result of: (1) Criminally injurious conduct; (2) the good faith effort of any person to prevent criminally injurious conduct; or (3) the good faith effort of any person to apprehend a person suspected of engaging in criminally injurious conduct.” Kan. Stat. Ann. § 74-7301(m). Pursuant to Kan. Stat. Ann. § 74-7301(e), (Definitions),

“Criminally injurious conduct” means conduct that:

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

that the person engaging in the conduct lacked capacity to commit the crime under the laws of this state; . . .

. . . .

For the purpose of crime victims' bill of rights and all services mentioned therein, "victim" is defined as "any person who suffers direct or threatened physical, emotional or financial harm as the result of the commission or attempted commission of a crime against such person." Kan. Stat. Ann. § 74-7333(b).

5.1.1 Recommendation: Amend the definition of "victim" in Kan. Stat. Ann. § 74-733(b) (Bill of rights for victims of crime) to expressly include trafficking and CSEC victims.

5.1.2 Recommendation: Amend the definitions of "victim" and "criminally injurious conduct" in Kan. Stat. Ann. § 74-7301 (Crime Victims Compensation Board—definitions) to expressly include trafficking and CSEC victims.

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.*

Kan. Stat. Ann. § 21-5426 (Human trafficking), § 21-5509 (Electronic solicitation), § 21-5510 (Sexual exploitation of a child), and Kansas House Bill Kan. Stat. Ann. § 21-6422 (Commercial sexual exploitation of a child), do not refer to a defense based on consent of the minor to the commercial sex act. The code, however, does not specifically prohibit a defendant from raising such a defense.

5.2.1 Recommendation: Amend Kan. Stat. Ann. § 21-5426 (Human trafficking), § 21-5509 (Electronic solicitation), § 21-5510 (Sexual exploitation of a child), and Kan. Stat. Ann. § 21-6422 (Commercial sexual exploitation of a child) to expressly provide that consent is not a defense to each crime.

5.3 *Prostitution laws apply only to adults, preventing criminalization of minors under 18 for prostitution offenses.*

Minors may be prosecuted under Kan. Stat. Ann. § 21-6419 (Selling sexual relations), however it is an affirmative defense to the charge that the person who committed selling sexual relations was a victim of human trafficking. Kan. Stat. Ann. § 21-6419(c).

5.3.1 Recommendation: Amend Kan. Stat. Ann. § 21-6419 (Selling sexual relations) to eliminate liability for prostitution offenses for all minors under 18.

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

### **Child Identified as In Need of Care**

Pursuant to Kan. Stat. Ann. § 38-2202(d)<sup>41</sup> (Definitions),

"Child in need of care" means a person less than 18 years of age at the time of filing of the petition or issuance of an ex parte protective custody order pursuant to K.S.A. 2014 Supp. 38-2242, and amendments thereto, who:

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<sup>41</sup> The text of Kan. Stat. Ann. § 38-2202 included here and elsewhere in this report includes amendments made by the enactment of S.B. No. 113 during the 86<sup>th</sup> Legislative Regular Session (2015) (effective July 1, 2015).

- (1) Is without adequate parental care, control or subsistence and the condition is not due solely to the lack of financial means of the child's parents or other custodian;
- (2) is without the care or control necessary for the child's physical, mental or emotional health;
- (3) has been physically, mentally or emotionally abused or neglected or sexually abused;<sup>42</sup>
- (4) has been placed for care or adoption in violation of law;
- (5) has been abandoned or does not have a known living parent;
- (6) is not attending school as required by K.S.A. 72-977 or 72-1111, and amendments thereto;
- (7) except in the case of a violation of K.S.A. 41-727, K.S.A. 74-8810(j), K.S.A. 79-3321(m) or (n), or K.S.A. 2014 Supp. 21-6301(a)(14), and amendments thereto, or, except as provided in paragraph (12), does an act which, when committed by a person under 18 years of age, is prohibited by state law, city ordinance or county resolution but which is not prohibited when done by an adult;
- (8) while less than 10 years of age, commits any act which if done by an adult would constitute the commission of a felony or misdemeanor as defined by K.S.A. 2014 Supp. 21-5102, and amendments thereto;
- (9) is willfully and voluntarily absent from the child's home without the consent of the child's parent or other custodian;
- (10) is willfully and voluntarily absent at least a second time from a court ordered or designated placement, or a placement pursuant to court order, if the absence is without the consent of the person with whom the child is placed or, if the child is placed in a facility, without the consent of the person in charge of such facility or such person's designee;
- (11) has been residing in the same residence with a sibling or another person under 18 years of age, who has been physically, mentally or emotionally abused or neglected, or sexually abused;
- (12) while less than 10 years of age commits the offense defined K.S.A. 2014 Supp. 21-6301(a)(14), and amendments thereto; or
- (13) has had a permanent custodian appointed and the permanent custodian is no longer able or willing to serve.

## *I. Initial Custody*

### *a. Authority for initial custody*

Certain individuals have duties to report neglect and abuse of children including medical providers, educational provider, and social services providers. Kan. Stat. Ann. § 38-2223(a)(1) (Reporting of certain abuse or neglect of children; persons reporting; reports, made to whom; penalties; immunity from liability).

Under Kan. Stat. Ann. § 38-2231(b)(1) (Child under 18, when law enforcement officers or court services officers may take into custody; sheltering a runaway), “A law enforcement officer shall take a child under 18 years of age into custody when: (1) The law enforcement officer reasonably believes the child will be harmed if

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<sup>42</sup> “‘Physical, mental or emotional abuse’ means the infliction of physical, mental or emotional harm or the causing or a deterioration of a child and may include, but shall not be limited to, maltreatment or exploiting a child to the extent that the child’s health or emotional well-being is endangered.” Kan. Stat. Ann. § 38-2202(y) (Definitions). Additionally, “‘[s]exual abuse’ means any contact or interaction with a child in which the child is being used for the sexual stimulation of the perpetrator, the child or another person. Sexual abuse shall include allowing, permitting or encouraging a child to engage in prostitution or to be photographed, filmed or depicted in pornographic material. Sexual abuse also shall include allowing, permitting or encouraging a child to engage in aggravated human trafficking, as defined in K.S.A. 2014 Supp. 21-5426(b), and amendments thereto, if committed in whole or in part for the purpose of the sexual gratification of the offender or another.” Kan. Stat. Ann. § 38-2202(dd). *See supra* note 41.

not immediately removed from the place or residence where the child has been found.” Kan. Stat. Ann. § 38-2231(b)(1). An officer may also take a child into custody “when the officer has probable cause to believe that the child is a missing person and a verified missing person entry for the child can be found in the national crime information center missing person system” or “reasonably believes the child is a victim of human trafficking, aggravated human trafficking or commercial sexual exploitation of a child.” Kan. Stat. Ann. §§ 38-2231(b)(2), (3).

Additionally, a child may be taken into custody and care by filing a petition. Pursuant to Kan. Stat. Ann. § 38-2242(a) (Ex parte orders of protective custody), the application must include the following:

(a) The court, upon verified application, may issue ex parte an order directing that a child be held in protective custody and, if the child has not been taken into custody, an order directing that the child be taken into custody. The application shall state for each child:

- (1) The applicant’s belief that the child is a child in need of care;
- (2) that the child is likely to sustain harm if not immediately removed from the home;
- (3) that allowing the child to remain in the home is contrary to the welfare of the child; and
- (4) the facts relied upon to support the application, including efforts known to the applicant to maintain the family unit and prevent the unnecessary removal of the child from the child’s home, or the specific facts supporting that an emergency exists which threatens the safety of the child.

If the court determines there is probable cause to believe the allegations in the application are true, the court may issue an order of protective custody. Kan. Stat. Ann. § 38-2242(b)(1).

#### b. Placement

Pursuant to Kan. Stat. Ann. § 38-2232(a) (Child under 18 taken into custody), when a law enforcement officer takes a minor under 18 into custody, the officer must first attempt to deliver the child “to the custody of the child’s parent or other custodian unless there are reasonable grounds to believe that such action would not be in the best interests of the child.” Kan. Stat. Ann. § 38-2232(a). If the child is not returned to a parent or custodian, the child is to be delivered to a shelter facility or, if the child is 15 or younger or is 16 or 17 and “shows signs of physical, mental, emotional or sexual abuse,” the child should be delivered “to a facility or person designated by the secretary.” Kan. Stat. Ann. § 38-2232(a). If after a child is delivered to a shelter facility it is determined that the child will not remain in the facility but,

the child is presently alleged, but not yet adjudicated, to be a child in need of care solely pursuant to subsection (d)(9) or (d)(10)<sup>43</sup> of K.S.A. 2011 Supp. 38-2202 [runaway or truant], and amendments thereto, the law enforcement officer shall deliver the child to a juvenile detention facility or other secure facility, designated by the court, where the child shall be detained for not more than 24 hours, excluding

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<sup>43</sup> Under Kan. Stat. Ann. § 38-2202(d), “Child in need of care” means a person less than 18 years of age at the time of filing of the petition or issuance of an ex parte protective custody order pursuant to K.S.A. 2014 Supp. 38-2242, and amendments thereto, who:

....

(9) is willfully and voluntarily absent from the child's home without the consent of the child's parent or other custodian;

(10) is willfully and voluntarily absent at least a second time from a court ordered or designated placement, or a placement pursuant to court order, if the absence is without the consent of the person with whom the child is placed or, if the child is placed in a facility, without the consent of the person in charge of such facility or such person's designee;

....

*See supra* note 41.

Saturdays, Sundays, legal holidays, and days on which the office of the clerk of the court is not accessible. No child taken into custody pursuant to this code shall be placed in a juvenile detention facility or other secure facility, except as authorized by this section and by K.S.A. 2011 Supp. 38-2242 [Ex parte orders of protective custody], 38-2243 [Orders of temporary custody] and 38-2260 [Placement], and amendments thereto. Kan. Stat. Ann. § 38-2232(a).

Additionally, if a child has been taken into custody pursuant to Kan Stat. Ann. § 38-2231(b)(3), “. . . the law enforcement officer shall place the child in protective custody and may deliver the child to a staff secure facility. The law enforcement officer shall contact the department for children and families to begin an assessment to determine safety, placement and treatment needs for the child.” Kan. Stat. Ann. § 38-2232(b)(2). However, the statute also provides that, “[s]uch child shall not be placed in a juvenile detention facility or other secure facility. . . .” Kan. Stat. Ann. § 38-2232(b)(2).

## *II. Process Following Initial Custody*

Kan. Stat. Ann. § 38-2287 establishes that a child victim of human trafficking is referred to the Department for Children and Families for a placement assessment. Kan. Stat. Ann. § 38-228(a) (Child in custody, victim of certain conduct; special assessment to determine safety, placement and treatment needs) states

Whenever a child is in custody, as defined in K.S.A. 2014 Supp. 38-2202, and amendments thereto, and such child has been subjected to human trafficking or aggravated human trafficking, as defined by K.S.A. 2014 Supp. 21-5426, and amendments thereto, or commercial sexual exploitation of a child, as defined by K.S.A. 2014 Supp. 21-6422, and amendments thereto, or the child committed an act which, if committed by an adult, would constitute a violation of K.S.A. 2014 Supp. 21-6419, and amendments thereto, the court shall refer the child to the secretary of the department for children and families for an assessment to determine safety, placement and treatment needs for the child. The secretary shall use a research-based assessment tool to assess such needs and shall make appropriate recommendations to the court.

Pursuant to Kan. Stat. Ann. § 38-2242(b)(2) (Ex parte orders of protective custody), “No child shall be held in protective custody for more than 72 hours . . . unless within the 72-hour period a determination is made as to the necessity for temporary custody in a temporary custody hearing.” Additionally, under Kan. Stat. Ann. § 38-2243(f) (Orders of temporary custody),

The court may enter an order of temporary custody after determining there is probable cause to believe that the: (1) Child is dangerous to self or to others; (2) child is not likely to be available within the jurisdiction of the court for future proceedings; (3) health or welfare of the child may be endangered without further care; (4) child has been subjected to human trafficking or aggravated human trafficking, as defined by K.S.A. 2012 Supp. 21-5426, and amendments thereto, or commercial sexual exploitation of a child, as defined by section 4, and amendments thereto; or (5) child committed an act which, if committed by an adult, would constitute a violation of K.S.A. 2012 Supp. 21-6419 [Selling sexual relations], and amendments thereto.

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

### *III. Placement Process Pending Adjudication/Investigation*

Through both Kan. Stat. Ann. § 38-2242(c)(1) (Ex parte orders of protective custody) and Kan. Stat. Ann. § 38-2243(g)(1) (Orders of temporary custody), when the court determines it is necessary to order protective custody or temporary custody, the minor may be placed into the custody of one of the following:

- (A) A parent or other person having custody of the child and may enter a restraining order pursuant to [subsection (e) for Kan. Stat. Ann. § 38-2242 and] subsection (h) [for Kan. Stat. Ann. § 38-2243];
- (B) a person, other than the parent or other person having custody, who shall not be required to be licensed under article 5 of chapter 65 of the Kansas Statutes Annotated, and amendments thereto;
- (C) a youth residential facility;
- (D) a shelter facility;
- (E) a staff secure facility, notwithstanding any other provision of law, if the child has been subjected to human trafficking or aggravated human trafficking, as defined by K.S.A. 2012 Supp. 21-5426, and amendments thereto, or commercial sexual exploitation of a child, as defined by section 4, and amendments thereto, or the child committed an act which, if committed by an adult, would constitute a violation of K.S.A. 2012 Supp. 21-6419 [Selling sexual relations], and amendments thereto; or
- (F) the secretary, if the child is 15 years of age or younger, or 16 or 17 years of age if the child has no identifiable parental or family resources or shows signs of physical, mental, emotional or sexual abuse.

### *IV. Adjudication or Referral to Alternate Process*

Pursuant to Kan. Stat. Ann. § 38-2251(c) (Adjudication), “[a] final adjudication or dismissal shall be entered within 60 days from the date of the filing of the petition, unless good cause for a continuance is shown on the record.”

Additionally, as an alternative to adjudication and pursuant to Kan. Stat. Ann. § 38-2252 (Predispositional alternative; placement with person other than child's parent; conference; recommendations; immunity),

- (a) Before placement pursuant to this code of a child with a person other than the child's parent, the secretary, the court or the court services officer, at the direction of the court, may convene a conference of persons determined by the court, the secretary or the court services officer to have a potential interest in determining a placement which is in the best interests of the child. Such persons shall be given any information relevant to the determination of the placement of the child, including the needs of the child and any other information that would be helpful in making a placement in the best interests of the child. After presentation of the information, such persons shall be permitted to discuss and recommend to the secretary or the court services officer the person or persons with whom it would be in the child's best interest to be placed. Unless the secretary or the court services officer determines that there is good cause to place the child with a person other than as recommended, the child shall be placed in accordance with the recommendations.

### *V. Outcomes*

At a dispositional hearing under Kan. Stat. Ann. § 38-2253 (Dispositional hearing; purpose; time), several dispositions are possible. Pursuant to Kan. Stat. Ann. § 38-2255 (Authorized dispositions), the child may be placed with the parent or removed from the custody of the parent and custody awarded to “a relative of the child or to a person with whom the child has close emotional ties . . . to any other suitable person, to or, if the child is

15 years of age or younger, or 16 or 17 years of age if the child has no identifiable parental or family resources or shows signs of physical, mental, emotional or sexual abuse, to the secretary.” Kan. Stat. Ann. § 38-2255(b), (c), (d). Additionally, a child that is a victim of domestic minor sex trafficking may be held in a staff secured facility. Kan. Stat. Ann. § 38-2255(d).

The procedures for a permanency hearing are set out in Kan. Stat. Ann. § 38-2264, which states

- (a) A permanency hearing is a proceeding conducted by the court or by a citizen review board for the purpose of determining progress toward accomplishment of a permanency plan as established by K.S.A. 2011 Supp. 38-2263, and amendments thereto.
- (b) The court or a citizen review board shall hear and the court shall determine whether and, if applicable, when the child will be:
  - (1) Reintegrated with the child's parents;
  - (2) placed for adoption;
  - (3) placed with a permanent custodian; or
  - (4) if the secretary has documented compelling reasons why it would not be in the child's best interests for a placement in one of the placements pursuant to paragraphs (1), (2) or (3) placed in another planned permanent arrangement.

Additionally, pursuant to Kan. Stat. Ann. § 38-2242(2), a child may only be placed in protective custody until services are in place “[i]f the secretary presents the court with a plan to provide services to a child or family which the court finds will assure the safety of the child.” Additionally, pursuant to the same statute,

When the child is placed in the temporary custody of the secretary and the child has been subjected to human trafficking or aggravated human trafficking, as defined by K.S.A. 2012 Supp. 21-5426, and amendments thereto, or commercial sexual exploitation of a child, as defined by section 4, and amendments thereto, or the child committed an act which, if committed by an adult, would constitute a violation of K.S.A. 2012 Supp. 21-6419 [Selling sexual relations], and amendments thereto, the secretary shall have the discretionary authority to place the child in a staff secure facility, notwithstanding any other provision of law. . . .

### **Child Identified as a Juvenile Offender**

Alternatively, a domestic minor sex trafficking victim could potentially be considered a “juvenile offender,” which includes “a person who commits an offense while 10 or more years of age but less than 18 years of age which if committed by an adult would constitute the commission of a felony or misdemeanor . . . .” Kan. Stat. Ann. § 38-2302(n) (Definitions). Therefore, if a domestic minor sex trafficking victim is convicted of Kan. Stat. Ann. § 21-6419 (Selling sexual relations), the victim could be considered a juvenile offender.

#### ***I. Initial Custody***

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

Pursuant to Kan. Stat. Ann. § 38-2330(a) (Juvenile taken into custody),

- (a) A law enforcement officer may take a juvenile into custody when:
  - (1) Any offense has been or is being committed in the officer's view;
  - (2) the officer has a warrant commanding that the juvenile be taken into custody;
  - (3) the officer has probable cause to believe that a warrant or order commanding that the juvenile be taken into custody has been issued in this state or in another jurisdiction for an act committed therein;



- (4) the officer has probable cause to believe that the juvenile is committing or has committed an act which, if committed by an adult, would constitute:
  - (A) A felony; or
  - (B) a misdemeanor and: (i) The juvenile will not be apprehended or evidence of the offense will be irretrievably lost unless the juvenile is immediately taken into custody; or (ii) the juvenile may cause injury to self or others or damage to property or may be injured unless immediately taken into custody;
- (5) the officer has probable cause to believe that the juvenile has violated an order for electronic monitoring as a term of probation; or
- (6) the officer receives a written statement (c) [in which the juvenile has violated the condition of the juvenile's release

b. Placement

After taking the juvenile into custody, the officer shall take the juvenile to an "intake and assessment worker"<sup>44</sup> if the jurisdiction has one or "before the court for proceedings in accordance with this code . . ." Kan. Stat. Ann. § 38-2330(d)(1). If the court is closed, the juvenile may be taken to "to a court services officer, a juvenile intake and assessment worker, a juvenile detention facility or youth residential facility which the court or the commissioner shall have designated," but the child will only be taken to a juvenile detention center if certain criteria are met. Kan. Stat. Ann. § 38-2330(d)(1). Kan. Stat. Ann. § 38-2331(a) (Criteria for detention of juvenile in detention facility) states,

(a) If no prior order removing a juvenile from the juvenile's home pursuant to K.S.A. 2011 Supp. 38-2334 or 38-2335, and amendments thereto, has been made, the court shall not enter an order removing a juvenile from the custody of a parent pursuant to this section unless the court first finds probable cause that:

- (1) (A) The juvenile is likely to sustain harm if not immediately removed from the home;
- (B) allowing the juvenile to remain in home is contrary to the welfare of the juvenile; or
- (C) immediate placement of the juvenile is in the juvenile's best interest; and
- (2) reasonable efforts have been made to maintain the family unit and prevent the unnecessary removal of the juvenile from the juvenile's home or that an emergency exists which threatens the safety of the juvenile. The court shall state the basis for each finding in writing.

Pursuant to Kan. Stat. Ann § 75-7023(e) (Juvenile intake and assessment system; confidentiality of records; information collected; dispositional alternatives; custody of child; conditions of release),

After completion of the intake and assessment process for such child, the intake and assessment worker may:

- (1) Release the child to the custody of the child's parent, other legal guardian or another appropriate adult if the intake and assessment worker believes that it would be in the best interest of the child and it would not be harmful to the child to do so.
- (2) Conditionally release the child to the child's parent, other legal guardian or another appropriate adult if the intake and assessment worker believe that if the conditions are met, it would be in the child's best interest to release the child to such child's parent, other legal guardian or appropriate

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<sup>44</sup> Kan. Stat. Ann. § 38-2302(m) defines "[j]uvenile intake and assessment worker" as "a responsible adult authorized to perform intake and assessment services as part of the intake and assessment system established pursuant to K.S.A. 75-7023 [Juvenile intake and assessment system; confidentiality of records; information collected; dispositional alternatives; custody of child; conditions of release], and amendments thereto."

adult; and the intake worker has reason to believe that it might be harmful to the child to release the child to such child's parents, other legal guardian or another appropriate adult without imposing the conditions. The conditions may include, but not be limited to:

- (A) Participation of the child in counseling;
  - (B) participation of members of the child's family in counseling;
  - (C) participation by the child, members of the child's family and other relevant persons in mediation;
  - (D) provision of inpatient treatment for the child;
  - (E) referral of the child and the child's family to the secretary for children and families for services and the agreement of the child and family to accept and participate in the services offered;
  - (F) referral of the child and the child's family to available community resources or services and the agreement of the child and family to accept and participate in the services offered;
  - (G) requiring the child and members of the child's family to enter into a behavioral contract which may provide for regular school attendance among other requirements; or
  - (H) any special conditions necessary to protect the child from future abuse or neglect.
- (3) Deliver the child to a shelter facility or a licensed attendant care center along with the law enforcement officer's written application. The shelter facility or licensed attendant care facility shall then have custody as if the child had been directly delivered to the facility by the law enforcement officer pursuant to K.S.A. 2011 Supp. 38-2232, and amendments thereto.
- (4) Refer the child to the county or district attorney for appropriate proceedings to be filed or refer the child and family to the secretary for children and families for investigations in regard to the allegations.
- (5) Make recommendations to the county or district attorney for appropriate proceeding to be filed or refer the child and family to the secretary for children and families for investigations in regard to the allegations.

## *II. Process Following Initial Custody*

Pursuant to Kan. Stat. Ann. § 38-2343 (Detention hearing; waiver; notice; attorney for juvenile; procedure; removal from custody of parent; audio-video communications), "...the juvenile shall not remain in detention for more than 48 hours . . . unless the court determines after hearing, within the 48-hour period, that further detention is necessary because detention is warranted in light of all relevant factors . . . ." Additionally, "If the juvenile is in custody on the basis of a new offense which would be a felony or misdemeanor if committed by an adult and no prior judicial determination of probable cause has been made, the court shall determine whether there is probable cause to believe that the juvenile has committed the alleged offense." Kan. Stat. Ann. § 38-2343(1).

A juvenile may continue to be held in a detention facility, pursuant to a ruling at the detention hearing, if taken into custody pursuant to Kan. Stat. Ann. § 38-2330(c) or (d) (Juvenile taken into custody), and Kan. Stat. Ann. § 38-2331 (Criteria for detention of juvenile in detention facility) if one of the following has occurred:

- (b)(1) There is oral or written verification that the juvenile is a fugitive sought for an offense in another jurisdiction, that the juvenile is currently an escapee from a juvenile detention facility or that the juvenile has absconded from a placement that is court ordered or designated by the juvenile justice authority.
- (2) There is probable cause that the juvenile has committed an offense which if committed by an adult would constitute a felony or any crime described in article 55 of chapter 21 of the Kansas Statutes Annotated, or K.S.A. 2011 Supp. 21-6419 through 21-6421 [Prostitution statutes], and amendments thereto.

- (3) The juvenile has been adjudicated for a nonstatus offense and is awaiting final court action on that offense.
  - (4) The juvenile has a record of failure to appear in court or there is probable cause to believe that the juvenile will flee the jurisdiction of the court.
  - (5) The juvenile has a history of violent behavior toward others.
  - (6) The juvenile exhibited seriously assaultive or destructive behavior or self-destructive behavior at the time of being taken into custody.
  - (7) The juvenile has a record of adjudication or conviction of one or more offenses which if committed by an adult would constitute a felony.
  - (8) The juvenile is a juvenile offender who has been expelled from placement in a nonsecure facility as a result of the current alleged offense.
  - (9) The juvenile has been taken into custody by any court services officer, juvenile community corrections officer or other person authorized to supervise juveniles subject to this code pursuant to subsection (b) of K.S.A. 2011 Supp. 38-2330, and amendments thereto.
  - (10) The juvenile has violated probation or conditions of release.
  - (c) No person 18 years of age or more shall be placed in a juvenile detention center.
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### *III. Placement Process Pending Adjudication/Investigation*

Pursuant to Kan. Stat. Ann. § 38-2343 (Detention hearing; waiver; notice; attorney for juvenile; procedure; removal from custody of parent; audio-video communications), a child may be detained in a juvenile detention facility, “[i]f the court finds the juvenile is dangerous to self or others,” or “the juvenile is not likely to appear for further proceedings.” However, under Kan. Stat. Ann. § 38-2343(4), [i]n the absence of the necessary findings, the court shall order the juvenile released or placed in temporary custody.”

### *IV. Adjudication or Referral to Alternate Process*

The adjudication procedures are specified in Kan. Stat. Ann. § 38-2356, which states

- (a) If the court finds that the evidence fails to prove an offense charged or a lesser included offense as defined in subsection (b) of K.S.A. 2011 Supp. 21-5109, and amendments thereto, the court shall enter an order dismissing the charge.
  - (b) If the court finds that the juvenile committed the offense charged or a lesser included offense as defined in subsection (b) of K.S.A. 2011 Supp. 21-5109, and amendments thereto, the court shall adjudicate the juvenile to be a juvenile offender and may issue a sentence as authorized by this code.
  - (c) If the court finds that the juvenile committed the acts constituting the offense charged or a lesser included offense as defined in subsection (b) of K.S.A. 2011 Supp. 21-5109, and amendments thereto, but is not responsible because of mental disease or defect, the juvenile shall not be adjudicated as a juvenile offender and shall be committed to the custody of the secretary for aging and disability services and placed in a state hospital. The juvenile's continued commitment shall be subject to annual review in the manner provided by K.S.A. 22-3428a, and amendments thereto, for review of commitment of a defendant suffering from mental disease or defect, and the juvenile may be discharged or conditionally released pursuant to that section. The juvenile also may be discharged or conditionally released in the same manner and subject to the same procedures as provided by K.S.A. 22-3428, and amendments thereto, for discharge of or granting conditional release to a defendant found suffering from mental disease or defect. If the juvenile violates any conditions of an order of conditional release, the juvenile shall be subject to contempt proceedings and returned to custody as provided by K.S.A. 22-3428b, and amendments thereto.
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## V. *Outcomes*

Sentencing alternatives exist for victims of domestic minor sex trafficking that enter the system as juvenile offenders. Pursuant to Kan. Stat. Ann. § 38-2361<sup>45</sup> (Sentencing alternatives),

(a) Upon adjudication as a juvenile offender pursuant to K.S.A. 2014 Supp. 38-2356, and amendments thereto, modification of sentence pursuant to K.S.A. 2014 Supp. 38-2367, and amendments thereto, or violation of a condition of sentence pursuant to K.S.A. 2014 Supp. 38-2368, and amendments thereto, and subject to K.S.A. 2014 Supp. 38-2365(a), and amendments thereto, the court may impose one or more of the following sentencing alternatives. In the event that any sentencing alternative chosen constitutes an order authorizing or requiring removal of the juvenile from the juvenile's home and such findings either have not previously been made or the findings are not or may no longer be current, the court shall make determinations as required by K.S.A. 2014 Supp. 38-2334 and 38-2335, and amendments thereto.

(1) Place the juvenile on probation through court services or community corrections for a fixed period, subject to terms and conditions the court deems appropriate consistent with juvenile justice programs in the community.

(2) Order the juvenile to participate in a community based program available in such judicial district subject to the terms and conditions the court deems appropriate. This alternative shall not be ordered with the alternative in paragraph (12) and when ordered with the alternative in paragraph (10) shall constitute a recommendation. Requirements pertaining to child support may apply if custody is vested with other than a parent.

(3) Place the juvenile in the custody of a parent or other suitable person, subject to terms and conditions consistent with juvenile justice programs in the community. This alternative shall not be ordered with the alternative in paragraph (10) or (12). Requirements pertaining to child support may apply if custody is vested with other than a parent.

(4) Order the juvenile to attend counseling, educational, mediation or other sessions, or to undergo a drug evaluation pursuant to subsection (b).

....

(9) Place the juvenile under a house arrest program administered by the court pursuant to K.S.A. 2014 Supp. 21-6609, and amendments thereto.

(10) Place the juvenile in the custody of the secretary of corrections as provided in K.S.A. 2014 Supp. 38-2365, and amendments thereto. This alternative shall not be ordered with the alternative in paragraph (3) or (12). Except for a mandatory drug and alcohol evaluation, when this alternative is ordered with alternatives in paragraphs (2), (4) and (9), such orders shall constitute a recommendation by the court. Requirements pertaining to child support shall apply under this alternative.

(11) Commit the juvenile to a sanctions house for a period no longer than 28 days subject to the provisions of subsection (g).

(12) Commit the juvenile directly to the custody of the secretary of corrections for a period of confinement in a juvenile correctional facility and a period of aftercare pursuant to K.S.A. 2014 Supp. 38-2369, and amendments thereto. The provisions of K.S.A. 2014 Supp. 38-2365, and amendments thereto, shall not apply to juveniles committed pursuant to this provision . . . . This alternative may be ordered with the alternative in paragraph (7). . . .

The discharge procedures for juveniles are set out in Kan. Stat. Ann. § 38-2376(a) (Same; discharge from commitment; notification), which states

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<sup>45</sup> The text of Kan. Stat. Ann. § 38-2361 included here and elsewhere in this report includes amendments made by the enactment House Bill 2336 during the 86<sup>th</sup> Legislative Regular Session (2015) (effective Apr. 16, 2015).

When a juvenile offender has reached the age of 23 years, has been convicted as an adult while serving a term of incarceration at a juvenile correctional facility, or has completed the prescribed terms of incarceration at a juvenile correctional facility, together with any conditional release following the program, the juvenile shall be discharged by the commissioner from any further obligation under the commitment unless the juvenile was sentenced pursuant to an extended jurisdiction juvenile prosecution upon court order and the commissioner transfers the juvenile to the custody of the secretary of corrections. The discharge shall operate as a full and complete release from any obligations imposed on the juvenile offender arising from the offense for which the juvenile offender was committed.

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

Commercial sexual exploitation is identified as a type of abuse in Kansas's child protection statutes. Specifically, "sexual abuse" is defined as "any contact or interaction with a child in which the child is being used for the sexual stimulation of the perpetrator, the child or another person" and includes "allowing, permitting or encouraging a child to engage in the sale of sexual relations or commercial sexual exploitation of a child, or to be photographed, filmed or depicted in pornographic material. Sexual abuse also shall include allowing, permitting or encouraging a child to engage in aggravated human trafficking, as defined in K.S.A. 2014 Supp. 21-5426(b), and amendments thereto, if committed in whole or part for the purpose of the sexual gratification of the offender or another." Kan. Stat. Ann. § 38-2202(dd)<sup>46</sup> (Definitions). Additionally, "[p]hysical, mental or emotional abuse" means the infliction of physical, mental or emotional harm or the causing of a deterioration of a child and may include, but shall not be limited to, maltreatment or exploiting a child to the extent that the child's health or emotional well-being is endangered." Kan. Stat. Ann. § 38-2202(y).

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

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

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

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

Kansas law does not contain a definition that would cover traffickers in custody or in control of a child. However, Kan. Stat. Ann § 38-2202 (Definitions) does not require that a parent or caregiver be the perpetrator of abuse in order to find that a juvenile sex trafficking victim is a child in need of care. It states,

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<sup>46</sup> See *supra* note 41.

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

....

(d) "Child in need of care" means a person less than 18 years of age at the time of filing of the petition or issuance of an ex parte protective custody order pursuant to K.S.A. 2014 Supp. 38-2242, and amendments thereto, who:

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

....

(dd) "Sexual abuse" means any contact or interaction with a child in which the child is being used for the sexual stimulation of the perpetrator, the child or another person. Sexual abuse also shall include allowing, permitting or encouraging a child to engage in the sale of sexual relations or commercial sexual exploitation of a child, or to be photographed, filmed or depicted in pornographic material. Sexual abuse also shall include allowing, permitting or encouraging a child to engage in aggravated human trafficking, as defined in K.S.A. 2014 Supp. 21-5426(b), and amendments thereto, if committed in whole or part for the purpose of the sexual gratification of the offender or another.

*5.7 Crime victims' compensation is specifically available to a child victim of sex trafficking or commercial sexual exploitation of children (CSEC) without regard to ineligibility factors.*

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

"Criminally injurious conduct" means conduct that:

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

....

Pursuant to Kan. Stat. Ann. § 74-7305(b)<sup>47</sup> (Claims for compensation), in order to receive compensation a victim must file a claim with the crime victims compensation board "within two years of the reporting of the

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<sup>47</sup> The text of Kan. Stat. Ann. § 74-7305 included here and elsewhere in this report includes amendments made by the enactment of S.B. No. 113 during the 86<sup>th</sup> Legislative Regular Session (2015) (effective July 1, 2015).

incident to law enforcement officials if the victim was less than 16 years of age and the injury or death is the result of any of . . .” certain listed crimes, including Kan. Stat. Ann. § 21-5506(a) (Indecent liberties with a child), § 21-5506(b) (Aggravated indecent liberties with a child), § 21-5508(a) (Indecent solicitation of a child), § 21-5508(b) (Aggravated indecent solicitation of a child), § 21-5510 (Sexual exploitation of a child), § 21-3446 or § 21-5426(a) (Human trafficking), § 21-3447 or § 21-5426(b) (Aggravated human trafficking), and § 21-6422 (Commercial sexual exploitation of a child).

Because the extended period for filing a claim only applies to specific crimes where the victim is under 16, minors aged 16 and 17 and victims of non-listed offenses have only two years from the occurrence of the crime to apply for victims compensation. If the victim must testify in a “sexually violent predator commitment,” a claim for compensation for mental health counseling may be filed up to two years after the testimony is given.<sup>48</sup> Kan. Stat. Ann. § 74-7305(b)(6).

A victim may become ineligible for compensation if the crime victims compensation board determines that the victim suffered damages due to “contributory misconduct” or “the victim was likely engaging in, or attempting to engage in, unlawful activity at the time of the crime upon which the claim for compensation is based . . .” although, victims of domestic abuse or sexual assault may not have their awards reduced due to this latter provision. Kan. Stat. Ann. § 74-7305(c)(2)–(3). Additionally, under subsection (e), “Compensation may not be awarded unless the criminally injurious conduct resulting in injury or death was reported to a law enforcement officer within 72 hours after its occurrence or the board finds there was good cause for the failure to report within that time.” Finally, under subsection (g), “Except in [Kan. Stat. Ann. § 21-5604(a) (Incest) or (b) (Aggravated incest)], or cases of sex offenses established in [including Kan. Stat. Ann. § 21-5503 (Rape), § 21-5506(a) (Indecent liberties with a child), § 21-5506(b) (Aggravated indecent liberties with a child), § 21-5508(a) (Indecent solicitation of a child), § 21-5508(b) (Aggravated indecent solicitation of a child), § 21-5509 (Electronic solicitation), § 21-5510 (Sexual exploitation of a child), § 21-6419 (Selling sexual relations), § 21-6420 (Promoting the sale of sexual relations), § 21-6421 (Buying sexual relations), § 21-6422 (Commercial sexual exploitation of a child), § 21-3446 (Human trafficking), and § 21-3447 (Aggravated human trafficking) compensation may not be awarded if the economic loss is less than \$ 100.”

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

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

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

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<sup>48</sup> A “sexually violent predator” is “any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence.” Kan. Stat. Ann. § 59-29a02(a).

Pursuant to Kan. Stat. Ann. § 22-3434(a) (Videotape of testimony of child victim admissible in certain cases) children under 13 are allowed to testify via closed circuit television or by recorded testimony if the court so orders, upon motion by the attorney for any party. However, under Kan. Stat. Ann. § 22-3434(b), “The state must establish by clear and convincing evidence that to require the child who is the alleged victim to testify in open court will so traumatize the child as to prevent the child from reasonably communicating to the jury or render the child unavailable to testify.” Furthermore, “The court shall make such an individualized finding before the state is permitted to proceed under this section.” Kan. Stat. Ann. § 22-3434(b). During out-of-court testimony, the only individuals that may be present include “attorneys for the defendant, the state and the child, any person whose presence would contribute to the welfare and well-being of the child and persons necessary to operate the recording or closed-circuit equipment.” Kan. Stat. Ann. § 22-3434(c)(1).

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

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

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

Law enforcement officers and government officials are prohibited from requiring or requesting a polygraph examination or similar truth telling test for anyone who is a victim of certain sex offenses, including Kan. Stat. Ann. § 21-5426 (Human trafficking; aggravated human trafficking), § 21-5503 (Rape), § 21-5506(a) (Indecent liberties with a child), § 21-5506(b) (Aggravated indecent liberties with a child), § 21-5508(a) (Indecent solicitation of a child), § 21-5508(b) (Aggravated indecent solicitation of a child), § 21-5509 (Electronic solicitation), § 21-5510 (Sexual exploitation of a child), § 21-6420 (Promoting the sale of sexual relations), and § 21-6421 (Buying sexual relations), as a condition for proceeding with an investigation or for prosecuting a suspect. Kan. Stat. Ann. § 22-4614.<sup>49</sup>

While the official file of proceedings are open for public inspection, under Kan. Stat. Ann. § 38-2309(b)<sup>50</sup> (Court records; disclosure; preservation of records), the judge can determine that opening the official file for

<sup>49</sup> The text of Kan. Stat. Ann. § 22-4614 included here and elsewhere in this report includes amendments made by the enactment of S.B. No. 113 during the 86<sup>th</sup> Legislative Regular Session (2015) (effective July 1, 2015).

<sup>50</sup> The text of Kan. Stat. Ann. § 38-2309 included here and elsewhere in this report includes amendments made by the enactment of S.B. No. 113 during the 86<sup>th</sup> Legislative Regular Session (2015) (effective July 1, 2015).



public inspection is not in the best interests of a juvenile who is less than 14 years of age and “[i]nformation identifying victims and alleged victims of sex offenses, as defined in article 35 of chapter 21 of the Kansas Statutes Annotated, prior to their repeal . . . or human trafficking or aggravated human trafficking, as defined in K.S.A. 21-3446 or 21-3447. . . shall not be disclosed or open to public inspection under any circumstances.”

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

Kan. Stat. Ann. §21-6614(b) (Expungement of certain convictions, arrest records and diversion agreements), provides qualified availability of expungement for prostitution offenses, requiring proof of force or threat of harm. Kan. Stat. Ann. §21-6614(b) states,

(b) Any person convicted of prostitution, as defined in K.S.A. 21- 3512, prior to its repeal, convicted of a violation of K.S.A. 2014 Supp. 21- 6419 [Selling sexual relations], and amendments thereto, or who entered into a diversion agreement in lieu of further criminal proceedings for such violation, may petition the convicting court for the expungement of such conviction or diversion agreement and related arrest records if:

- (1) One or more years have elapsed since the person satisfied the sentence imposed or the terms of a diversion agreement or was discharged from probation, a community correctional services program, parole, post release supervision, conditional release or a suspended sentence; and
- (2) such person can prove they were acting under coercion caused by the act of another. For purposes of this subsection, “coercion” means: Threats of harm or physical restraint against any person; a scheme, plan or pattern intended to cause a person to believe that failure to perform an act would result in bodily harm or physical restraint against any person; or the abuse or threatened abuse of the legal process.

Additionally, individuals who are convicted of a misdemeanor or a class D or E felony, may generally petition for the crime to be expunged from that person’s record “if three or more years have elapsed since the person: (A) [s]atisfied the sentence imposed; or (B) was discharged from probation, a community correctional services program, parole, postrelease supervision, conditional release or a suspended sentence.” Kan. Stat. Ann. § 21-6614(a)<sup>51</sup>.

Expungement is also available to domestic minor sex trafficking victims under the Juvenile Justice Code, which states, “Except as provided in subsection (b) [expungement not permitted for certain offenses] and (c) [expungement not permitted for those required to register as sex offenders], any records or files specified in this code concerning a juvenile may be expunged upon application to a judge of the court of the county in which the records or files are maintained.” Kan. Stat. Ann. § 38-2312(a) (Expungement of records; docket fee). An application must be made for expungement. Kan. Stat. Ann. § 38-2312 (a). Pursuant to Kan. Stat. Ann. § 38-2312(e)(1)(A),

After hearing, the court shall order the expungement of the records and files if the court finds that:

- (A)(i) The juvenile has reached 23 years of age or that two years have elapsed since the final discharge; or (ii) one year has elapsed since the final discharge for an adjudication concerning acts committed by a juvenile which, if committed by an adult, would constitute a violation of K.S.A. 2014 Supp. 21–6419 (Selling sexual relations), and amendments thereto..

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<sup>51</sup> The text of Kan. Stat. Ann. § 21-6614 included here and elsewhere in this report includes amendments made by the enactment of H.B. No. 2159, 2005 during the 86<sup>th</sup> Legislative Regular Session (2015) (effective July 1, 2015).

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

Restitution is available to victims of crime in Kansas. Under Kan. Stat. Ann. § 22-3424(d)(2)(A)<sup>52</sup> (Judgment and sentence), “[t]he court shall order a person convicted of human trafficking or aggravated human trafficking, K.S.A. 21-3446 or 21-3447, prior to their repeal, or K.S.A. 2014 Supp. 21-5426, and amendments thereto, or commercial sexual exploitation of a child, K.S.A. 2014 Supp. 21-6422, and amendments thereto, to pay restitution to the victim of the offense . . . .” If, after a criminal trial, a verdict or finding of guilty occurs, “upon request of the victim or the victim’s family and before imposing sentence, the court shall hold a hearing to establish restitution.” Kan. Stat. Ann. § 22-3424(d).

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

Victims of the conduct of another that would constitute conduct prohibited by Kan. Stat. Ann § 21-5426 (Human trafficking; aggravated human trafficking) and its amendments or Kan. Stat. Ann § 21-6422 (Commercial sexual exploitation of a child) and its amendments, can bring action in an appropriate state court against the person or persons who engaged in such conduct if the victims suffered personal or psychological injuries as a result of the conduct. Victims can seek actual damages, exemplary or punitive damages, injunctive relief and any other appropriate relief. Kan. Stat. Ann § 21-5501(1)<sup>53</sup>.

Victims of child pornography may seek civil remedies from a buyer, if the buyer is convicted of any offense listed under Chapter 21, Article 35 (Sex offenses), including indecent liberties with a child, aggravated indecent liberties with a child, indecent solicitation of a child, and aggravated indecent solicitation of a child, or under Kan. Stat. Ann. § 21-5426 (Human trafficking), § 21-3447 (Aggravated human trafficking), or § 21-6422 (Commercial sexual exploitation of a child), “and any portion of such offense was used in the production of child pornography” and the victim suffered “personal or psychological injury as a result of the . . . possession of such child pornography . . . .” Kan. Stat. Ann. § 60-5001(a)<sup>54</sup>.

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

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

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

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<sup>52</sup> See *supra* note 18.

<sup>53</sup> The text of Kan. Stat. Ann. § 21-5501(1) included here and elsewhere in this report includes amendments made by the enactment of S.B. No. 113 during the 86<sup>th</sup> Legislative Regular Session (2015) (effective July 1, 2015).

<sup>54</sup> The text of Kan. Stat. Ann. § 60-5001 included here and elsewhere in this report includes amendments made by the enactment of S.B. No. 113 during the 86<sup>th</sup> Legislative Regular Session (2015) (effective July 1, 2015).

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

- (6) whether the fact of the crime is concealed by the active act or conduct of the accused, there is substantially competent evidence to believe two or more of the following factors are present:
- (A) The victim was a child under 15 years of age at the time of the crime;
  - (B) the victim was of such age or intelligence that the victim was unable to determine that the acts constituted a crime;
  - (C) the victim was prevented by a parent or other legal authority from making known to law enforcement authorities the fact of the crime whether or not the parent or other legal authority is the accused; and
  - (D) there is substantially competent expert testimony indicating the victim psychologically repressed such witness' memory of the fact of the crime, and in the expert's professional opinion the recall of such memory is accurate and free of undue manipulation, and substantial corroborating evidence can be produced in support of the allegations contained in the complaint or information but in no event may a prosecution be commenced as provided in subsection (e)(6) later than the date the victim turns 28 years of age. Corroborating evidence may include, but is not limited to, evidence the defendant committed similar acts against other persons or evidence of contemporaneous physical manifestations of the crime.

For civil actions, an action commenced by a victim of an offense under Kan. Stat. Ann. § 21-5426 (Human trafficking) or Ken. Stat. Ann. § 21-6422 (Commercial sexual exploitation of a child) shall be filed "within 10 years after the later of the date on which the victim was freed from the human trafficking situation or attained 18 years of age." Ken. Stat. Ann. § 21-5501(c)<sup>55</sup>. Therefore, a domestic minor sex trafficking victim may bring a claim until the victim reaches the age of 28 or within 10 years of being freed from trafficking.

For all other civil actions, except as provided in K.S.A. 60-523, if any person entitled to bring an action, other than for the recovery of real property or a penalty or a forfeiture, at the time the cause of action accrued or at any time during the period the statute of limitations is running, is less than 18 years of age, . . . such person shall be entitled to bring such action within one year after the person's disability is removed, except that no such action shall be commenced by or on behalf of any person under the disability more than eight years after the time of the act giving rise to the cause of action." Kan. Stat. Ann. § 60-515(a). Therefore, for victims of childhood sexual abuse, an action for damages may be commenced either within 3 years of the victim's 18th birthday or ". . . more than three years from the date the person discovers or reasonably should have discovered that the injury or illness was caused by childhood sexual abuse, whichever occurs later." Kan. Stat. Ann. § 60-523(a).

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<sup>55</sup> See *supra* note 53.

**Legal Components:**

- 6.1 *Training on human trafficking and domestic minor sex trafficking for law enforcement is statutorily mandated or authorized.*
  - 6.2 *Single party consent to audio-taping is permitted in law enforcement investigations.*
  - 6.3 *Wiretapping is an available tool to investigate domestic minor sex trafficking.*
  - 6.4 *Using a law enforcement posing as a minor to investigate buying or selling of commercial sex acts is not a defense to soliciting, purchasing, or selling sex with a minor.*
  - 6.5 *Using the Internet or electronic communications to investigate buyers and traffickers is a permissible investigative technique.*
  - 6.6 *Law enforcement and child welfare agencies are mandated to promptly report missing and recovered children.*
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**Legal Analysis:**

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

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

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

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

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

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

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

While there is no law in place that explicitly permits the use of a decoy by law enforcement for the purpose of investigating prostitution or sex trafficking cases, decoys appear to be permitted under Kan. Stat. Ann. § 21-5509 (Electronic solicitation) through the use of the term “believes to be a child.” Additionally, the CSEC offense under Kan. Stat. Ann. § 21-5510(a)(1) (Sexual exploitation of a child) applies to “a person whom the offender believes to be a child under 18 years of age.”

However, Kan. Stat. Ann. § 21-5208 (Entrapment) states,

A person is not guilty of a crime if such person's criminal conduct was induced or solicited by a public officer or such officer's agent for the purposes of obtaining evidence to prosecute such person, unless:

- (a) The public officer or such officer's agent merely afforded an opportunity or facility for committing the crime in furtherance of a criminal purpose originated by such person or a co-conspirator; or
- (b) The crime was of a type which is likely to occur and recur in the course of such person's business, and the public officer or such officer's agent in doing the inducing or soliciting did not mislead such person into believing such person's conduct to be lawful.

Therefore, if the decoy "merely afforded an opportunity or facility for committing the crime," it is possible that a police officer could utilize a decoy in domestic minor sex trafficking cases. Kan. Stat. Ann. § 21-5208(a).

- 6.4.1 Recommendation: Enact a law explicitly permitting the use of a decoy to investigate domestic minor sex trafficking related crimes.

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

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

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

Pursuant to Kan. Stat. Ann. § 75-712b(a) (Same; missing and unidentified person system), "[t]he Kansas bureau of investigation shall establish a missing and unidentified person system which shall be a central repository of information received by law enforcement agencies and coroners in this state relating to persons who have been reported missing or are unidentified." Under subsection (b), law enforcement agencies shall report all information received relating to missing persons or face a possible civil penalty not to exceed \$500. Kan. Stat. Ann. § 75-712b(b), (g). Pursuant to Kan. Stat. Ann. § 75-712c(a) (Same; reports of missing persons; duties of law enforcement agencies), law enforcement officers shall immediately enter reports of missing persons "into the missing person system of the national crime information center and the missing and unidentified person system of the Kansas bureau of investigation." Additionally, "[a]ny person or entity which has legal guardianship of a person or legal custody of a person, or both, pursuant to the Kansas code for care of children . . . shall notify a law enforcement agency immediately, and in no case later than two hours, if such person is unaccounted for or if such person's location is unknown." Kan. Stat. Ann. § 75-712f(a). Under subsection (b), "[a] person or entity required to notify a law enforcement agency pursuant to this section shall notify the law enforcement agency not later than 24 hours after the missing person returns or is located." Kan. Stat. Ann. § 75-712f(b).

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