AN ACT

ENTITLED, An Act to establish the procedure to forfeit personal property in child pornography, human trafficking, child solicitation or exploitation cases, and to direct money from the forfeitures.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That § 22-24A-15 be amended to read as follows:

22-24A-15. Any person who is convicted of an offense under §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive, shall forfeit to the state the person's interest in the following and no property right exists in them:

(1) Any photograph, film, videotape, book, digital media or visual depiction that has been manufactured, distributed, purchased, possessed, acquired, or received in violation of §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive;

(2) Any material, product, and equipment of any kind that is used or intended for use in manufacturing, processing, publishing, selling, possessing, or distributing any visual depiction proscribed by §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive;

(3) Any property that is used, or intended for use, as a container for property described in subdivisions (1) and (2) of this section, including any computers and digital media;

(4) Any conveyances including aircraft, vehicles, or vessels, that transport, possess, or conceal, or that is used, or intended for use, to transport, or in any manner facilitate any activity proscribed under §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive;

(5) Any book, record, and research, including microfilm, tape, and data that is used, or intended for use, in violation of §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive;

(6) Any funds or other things of value used for the purposes of unlawfully carrying out any activity proscribed by §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive;

(7) Any asset, interest, profit, income, and proceed acquired or derived from the unlawful activity proscribed by §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive.

Any property described in subdivision (1) of this section shall be deemed contraband and shall be summarily forfeited to the state. Any other property seized and forfeited shall be used to reimburse the actual costs of the criminal investigation and prosecution. Any amount over and above the amount necessary to reimburse for the investigation and prosecution shall be used to satisfy any civil judgments received by victims. All remaining proceeds from the sale of any forfeited property shall be paid into the South Dakota internet crimes against children fund.

Section 2. That chapter 22-24A be amended by adding thereto a NEW SECTION to read as follows:

Notwithstanding the provisions of subdivision 22-24A-15(4), no conveyance used by any person as a common carrier in the transaction of business as a common carrier may be forfeited under the provisions of sections 4 to 16, inclusive, of this Act, unless it appears that the owner or other person in charge of the conveyance was a consenting party or privy to a violation of this chapter.

Section 3. That chapter 22-24A be amended by adding thereto a NEW SECTION to read as follows:

Notwithstanding the provisions of subdivision 22-24A-15(4), no conveyance may be forfeited

under the provisions of sections 4 to 16, inclusive, of this Act, by reason of any act or omission established by the owner of the conveyance to have been committed or omitted by any person other than the owner while the conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any state, or while the conveyance was rented or leased from a motor vehicle dealer or a leasing or rental agency and the dealer or agency had no knowledge that the conveyance transported, possessed, or concealed child pornography or any quantity of any other property described in subdivisions 22-24A-15(1) and (2) or was being used or intended for use, to transport or in any manner facilitate the transportation, sale, receipt, possession, or concealment of said child pornography or other property.

Section 4. That chapter 22-24A be amended by adding thereto a NEW SECTION to read as follows:

Notwithstanding the provisions of subdivision 22-24A-15(4), no conveyance may be forfeited under the provisions of sections 5 to 17, inclusive, of this Act, by reason of any act omitted by a person other than an owner of the conveyance unless the owner knew or in the exercise of ordinary care should have known that the transported, possessed, or concealed child pornography or any other property described in subdivisions 22-24A-15(1) and (2), was being used or was intended for use to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of the child pornography or other related property.

Section 5. That chapter 22-24A be amended by adding thereto a NEW SECTION to read as follows:

Any property subject to forfeiture under this chapter may be seized by any law enforcement officer or designated agent of the Division of Criminal Investigation upon process issued by any court having jurisdiction over the property.

Section 6. That chapter 22-24A be amended by adding thereto a NEW SECTION to read as

follows:

Seizure of property subject to forfeiture under this chapter may be made without process issued under section 5 of this Act if:

(1) The seizure is incident to an arrest or a search under a search warrant or to an inspection under an administrative inspection warrant;

(2) The property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding under this chapter;

(3) The law enforcement officer or agent has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) The law enforcement officer or agent has probable cause to believe that the property has been used or intended to be used in violation of this chapter.

Section 7. That chapter 22-24A be amended by adding thereto a NEW SECTION to read as follows:

If a seizure pursuant to section 5 of this Act or subdivisions (1), (3) and (4) of section 6 of this Act takes place, the attorney general shall institute, within sixty days of the seizure, the proceedings pursuant to subdivision 22-24A-15(1), and section 12 or 13 of this Act.

Section 8. That chapter 22-24A be amended by adding thereto a NEW SECTION to read as follows:

No property taken or detained pursuant to § 22-24A-15 and sections 2 to 17, inclusive, of this Act, is replevinable or subject to an action in claim and delivery. However, the property is deemed to be in the custody of the attorney general, through the chief agent, subject only to the orders and decrees of the court or the official having jurisdiction of the property.

Section 9. That chapter 22-24A be amended by adding thereto a NEW SECTION to read as follows:

If property is seized under the provisions of this chapter, the chief agent may:

(1) Place the property under seal;

(2) Remove the property to a place designated by the chief agent; or

(3) Take custody of the property and remove it to an appropriate location for disposition in accordance with law.

Section 10. That chapter 22-24A be amended by adding thereto a NEW SECTION to read as follows:

Any property, as described in subdivisions 22-24A-15(4), (6) and (7) that is subject to a bona fide perfected security interest at the time of seizure of the personal property, at the time the offense was committed, and is forfeited under the provisions of sections 5 to 17, inclusive, of this Act, shall be taken by the chief agent subject to the security interest. The chief agent shall, within sixty days of the forfeiture of the property:

(1) Return the property to the possession of the secured party;

(2) Satisfy fully all indebtedness to the secured party secured by the property; or

(3) Return the property to the possession of the secured party and require the secured party to sell within sixty days of receipt of the property from the chief agent at public or private sale the property and retain all proceeds necessary to satisfy fully all indebtedness of the secured party secured by the property together with all reasonable costs of the sale and remit to the chief agent all excess proceeds within thirty days of the sale.

If the secured party knew or should have known, that the property was being used or intended for use to transport, sell, or purchase any property described in subdivisions 22-24A-15(1) and (2), the provisions of this section do not apply to the property.

Section 11. That chapter 22-24A be amended by adding thereto a NEW SECTION to read as follows:

Any forfeiture proceeding is a civil action against the property seized and the standard of proof shall be preponderance of the evidence.

Section 12. That chapter 22-24A be amended by adding thereto a NEW SECTION to read as follows:

If property described in subdivisions 22-24A-15(2), (3), (5), (6) and (7) is seized, the attorney general shall file a summons and complaint for forfeiture of the property in circuit court for the county in which the property was seized or is being held. The proceedings shall be brought in the name of the state. The complaint shall describe the property, state the property's location, state the property's present custodian, state the name of each owner if known, state the name of each party in interest if known or of legal record, and allege the essential elements of the violation that is claimed to exist. The complaint shall conclude with a prayer to enforce the forfeiture. Notice of a forfeiture proceeding shall be given to each known owner and known party in interest by serving a copy of the summons and complaint in accordance with section 13 of this Act. The procedure governing the proceedings, except as provided in this section, shall be the same as that prescribed for civil proceedings by chapter 15-6.

Section 13. That chapter 22-24A be amended by adding thereto a NEW SECTION to read as follows:

If property described in subdivision 22-24A-15(4) is seized, the attorney general shall file a summons and complaint for forfeiture of the property in circuit court of the county in which the property was seized or is being held. The proceedings shall be brought in the name of the state. The complaint shall describe the property, state the property's location, state the property's present custodian, state the name of each owner if known, state the name of each party in interest if known or of legal record, and allege the essential elements of the violation that is claimed to exist. The complaint shall conclude with a prayer to enforce the forfeiture. The procedure governing the

proceedings, except as provided by this section, shall be the same as that prescribed for civil proceedings by chapter 15-6. Notice of forfeiture proceedings shall be given to each owner and party in interest whose right, title, or interest is of record as provided in § 34-20B-70.1 or in the Department of Revenue or the Division of Aeronautics or a similar department of another state if the records are maintained in that state by serving a copy of the summons and complaint upon each known owner and known party in interest in accordance with title 15.

Section 14. That chapter 22-24A be amended by adding thereto a NEW SECTION to read as follows:

If a person as described in sections 12 or 13 of this Act is released on bail as provided by chapter 23A-43, a summons and complaint for forfeiture of the property may be served by mailing the summons and complaint by certified mail, no return receipt required, to the address left by the person upon release from confinement.

Section 15. That chapter 22-24A be amended by adding thereto a NEW SECTION to read as follows:

Within thirty days after the service of the notice pursuant to section 12 or 13 of this Act, the owner of the seized property and any other party in interest or claimant may file a verified answer to the claims described in the complaint instituting the forfeiture proceedings.

Section 16. That chapter 22-24A be amended by adding thereto a NEW SECTION to read as follows:

If at the end of thirty days after the notice has been served there is no verified answer on file, and no claimant has appeared to defend the complaint, the court shall order the disposition of the seized property as prayed for in the complaint.

Section 17. That chapter 22-24A be amended by adding thereto a NEW SECTION to read as follows:

If a verified answer is filed, the forfeiture proceedings shall be set for a trial on a day not more than one hundred eighty days from the date of the filing. Any party may demand a trial by jury for the forfeiture proceedings pursuant to subsection 15-6-38(b). At the trial, the state shall establish probable cause for instituting the forfeiture action following which any owner, party in interest, or claimant who has filed a verified answer has the burden of proving that the property seized is not subject to forfeiture under this chapter. If the court or a jury finds that the property is not subject to forfeiture under this chapter, the court shall order the property released to the owner, party in interest, or claimant according to the person's right, title, or interest. The court shall order the property forfeited if the court or a jury determines that the property was subject to forfeiture.

Section 18. That chapter 22-24A be amended by adding thereto a NEW SECTION to read as follows:

If property is forfeited under this chapter, the chief agent may:

(1) Retain the property for official use; or

(2) Sell any forfeited property that is not required to be destroyed by law and that is not harmful to the public, if the proceeds are disposed of for payment of all proper expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, advertising, and court costs.

Section 19. That § 22-24A-6 be amended to read as follows:

22-24A-6. Any person, not a citizen or resident of this state, whose actions or conduct constitute a violation of §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive, and whose actions or conduct involve a child residing in this state, or someone the person reasonably believes is a child residing in this state, is for the purpose of §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive, deemed to be transacting

business in this state and by that act:

(1) Submits to the jurisdiction of the courts of this state in any civil proceeding commenced under §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive; and

(2) Constitutes the secretary of state as agent for service of legal process in any civil proceeding commenced under §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive; and consents that service of legal process shall be made by serving a copy upon the secretary of state or by filing a copy in the secretary of state's office, and that this service shall be sufficient service if, within one day after service, notice of the service and a copy of the process are sent by registered mail by plaintiff to the person at the person's last-known address and proof of such mailing filed with the clerk of court within one day after mailing.

The service of legal process upon any person who is subject to the jurisdiction of the courts of this state, as provided in this section, may also be made by personally serving the summons upon the person outside this state with the same force and effect as though summons had been personally served within this state. The service shall be made in like manner as service within this state. No order of court is required. An affidavit of the server shall be filed stating the time, manner and place of service. The court may consider the affidavit, or any other competent proofs, in determining whether service has been properly made.

Section 20. That § 22-24A-7 be amended to read as follows:

22-24A-7. Any person, except a minor, who knowingly participates in any conduct proscribed by §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive, is liable for civil damages.

Section 21. That § 22-24A-8 be amended to read as follows:

22-24A-8. Any of the following persons may bring an action for damages caused by another person's conduct as proscribed by §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 23A-27-14.1, 22-49-1 to 22-49-3, inclusive, and 43-43B-1 to 43-43B-3, inclusive:

(1) The child;

(2) Any parent, legal guardian, or sibling of a victimized child;

(3) Any medical facility, insurer, governmental entity, employer, or other entity that funds a treatment program or employee assistance program for the child or that otherwise expended money or provided services on behalf of the child;

(4) Any person injured as a result of the willful, reckless, or negligent actions of a person who knowingly participated in conduct proscribed by §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive.

If the parent or guardian is named as a defendant in the action, the court shall appoint a special guardian to bring the action on behalf of the child.

Section 22. That § 22-24A-9 be amended to read as follows:

22-24A-9. Any person entitled to bring an action under § 22-24A-8 may seek damages from any person, except a minor, who knowingly participated in the production or in the chain of distribution of any visual depiction proscribed by §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive.

Section 23. That § 22-24A-11 be amended to read as follows:

22-24A-11. Two or more persons may join in one action under §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive, as plaintiffs if their respective actions have at least one common occurrence of

proscribed conduct under §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive, and if any portion of the period of such conduct overlaps with the period for every other plaintiff. Two or more persons may be joined in one action under §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive, as defendants if those persons are liable to at least one plaintiff.

Section 24. That § 22-24A-12 be amended to read as follows:

22-24A-12. Any person against whom a judgment has been rendered under §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive, is not eligible to exempt any property, of whatever kind, from process to levy or process to execute on the judgment. Any assets sought to satisfy a judgment under §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive, that are named in a forfeiture action or have been seized for forfeiture by any state or federal agency may not be used to satisfy a judgment unless and until the assets have been released following the conclusion of the forfeiture action or released by the agency that seized the assets.

Section 25. That § 22-24A-13 be amended to read as follows:

22-24A-13. Any action for damages under §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive, shall be commenced within six years of the time the plaintiff knew, or had reason to know, of any injury caused by violations of §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive. The knowledge of a parent, guardian, or custodian may not be imputed to the minor.

For a plaintiff, the statute of limitations under this section is tolled while any potential plaintiff

is incapacitated by minority.

Section 26. That § 22-24A-19 be amended to read as follows:

22-24A-19. The provisions of §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive, do not apply to the performance of official duties by any law enforcement officer, court employee, attorney, licensed physician, psychologist, social worker, or any person acting at the direction of a licensed physician, psychologist, or social worker in the course of a bona fide treatment or professional education program.

Section 27. That chapter 22-24A be amended by adding thereto a NEW SECTION to read as follows:

Victims of crimes as described in the provisions of §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive, are protected against loss of property through forfeiture by victim immunity as described in § 22-48-2.

Section 28. That chapter 22-24A be amended by adding thereto a NEW SECTION to read as follows:

To the extent of the interest of an owner, a thing of value is not subject to forfeiture under this chapter by reason of any act or omission that is established by the owner of the item to have been committed or omitted without the owner's knowledge or consent.

An Act to establish the procedure to forfeit personal property in child pornography, human trafficking, child solicitation or exploitation cases, and to direct money from the forfeitures.

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I certify that the attached Act originated in the

SENATE as Bill No. 25

_____
Secretary of the Senate

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_____
President of the Senate

Attest:

_____
Secretary of the Senate

_____
Speaker of the House

Attest:

_____
Chief Clerk

Senate Bill No. 25
File No. ____
Chapter No. _____

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Received at this Executive Office this _____ day of _____ ,

20____ at _____ M.

By _____
for the Governor

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The attached Act is hereby approved this _____ day of _____ , A.D., 20___

_____
Governor

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STATE OF SOUTH DAKOTA,
ss.
Office of the Secretary of State

Filed _____ , 20___
at _____ o'clock __ M.

_____
Secretary of State

By _____
Asst. Secretary of State