ISSUE BRIEF 1.4

CRIMINAL PROVISIONS

POLICY GOAL: Mistake of age is not an available defense under sex trafficking and commercial sexual exploitation of children (CSEC) laws.

A mistake of age (MOA) defense allows a defendant to escape criminal liability based on a reasonable belief that a victim was of a specified age (e.g., at least 18 years of age).[1] In some states, the defendant must prove he or she reasonably believed that the victim was not a minor; conversely, other states require the prosecution to prove that the defendant knew that the victim was a minor by making knowledge of age an element of the offense.[2] Regardless of the approach, permitting a MOA defense subverts the intention of protecting children from exploitation and creates a weakness in the laws needed to deter child sex trafficking and commercial sexual exploitation of children (CSEC). Under federal law, all children who have experienced commercial sex exploitation are recognized as sex trafficking victims. Providing a victim-centered response to these children necessitates an inability to raise a MOA defense to avoid liability for exploiting a child. As such, all state child sex trafficking and CSEC laws should clearly prohibit buyers and traffickers from asserting a MOA defense in a prosecution for those crimes.

The harm caused by buyers and traffickers is not mitigated by the offender's apparent ignorance regarding the sex trafficking or CSEC victim's age. Buyers and traffickers, not the child victims, should bear the risk of that mistake. In addition, allowing buyers and traffickers to submit evidence of an attempt to ascertain the victim's age as part of a MOA defense fails to recognize the complex reasons that a child sex trafficking victim may be deceptive about their age, including coercive tactics used by traffickers, perceived autonomy, and posting requirements on Internet advertisement sites.

Notably, this protection should extend to all minors. According to a national survey of children who experienced commercial sexual exploitation conducted by THORN, the majority of participants entered the commercial sex industry at age 15.[3] Allowing a MOA defense for buyers and traffickers engaging in CSEC will disproportionality impact these older minors in terms of their recognition as crime victims and access to justice. Further, eliminating MOA defenses will also serve the added purpose of mitigating the perpetuation of the debilitating myths surrounding victims of commercial sexual exploitation by definitively categorizing them as victims.[4]

State child sex trafficking and CSEC laws can be, and often are, written in a way that knowledge of the victim's age is not an essential element of the crime. In their decision in United States vs. Daniels, the Eleventh Circuit Court of Appeals noted that "although there is a general presumption that a knowing mens rea applies to every element in a criminal statute, cases concerned with the protection of minors are within a special context where that presumption is rebutted."[5] Through this assertion, the Court recognized that efforts to protect young people allow for a contextual approach to interpreting statutes and the intent of the law.[6] States should ensure that their sex trafficking and CSEC laws are written for the explicit purpose of protecting minors from being trafficked or exploited as well as offering full protections for those that have been trafficked or exploited. It should be clear under all possible interpretations that proof of knowledge of the age

of the victim is not required. Excluding knowledge of age as an element of the offense and eliminating MOA as an available defense ensures that sex trafficking and CSEC laws protect minors rather than offenders who are turning a blind eye to a victim's age.

DRAFTING CONSIDERATIONS: *To accomplish this policy goal, state law should…*

- Avoid making knowledge of age an element under their child sex trafficking and CSEC laws.
- Ensure child sex trafficking and CSEC laws expressly prohibit a mistake of age defense.

RELATED ISSUES:

1.1 The child sex trafficking law is expressly applicable to buyers of commercial sex with any minor under 18.

1.2 Commercial sexual exploitation of children (CSEC) laws specifically criminalize purchasing or soliciting commercial sex with any minor under 18.

1.3 Commercial sexual exploitation of children (CSEC) laws apply to traffickers and protect al minors under 18.

1.5 Use of a law enforcement decoy is not an available defense under sex trafficking and commercial sexual exploitation of children (CSEC) laws.

SUPPORTING RESOURCES:

- Demanding Justice report
- Demanding Justice Arizona
- Buyers Beware video

1 Kathleen Houck, *"Mistake of Age" as a Defense?: Looking to Legislative Evidence for the Answer*, 55 Am. Crim. L. Rev. 813, 813 (2018); *see also* Blacks Law Dictionary (11th ed. 2019) (defining "mistake-of-fact defense" as a "criminal defendant's claim that some factual error negates the mens rea necessary for a guilty verdict").
2 Houck, *supra* note 1 at 816-17.
3 Vanessa Bouché, THORN, Survivor Insights: The Role of Technology in Domestic Minor Sex Trafficking 8 (Jan 2018).
4 Richard K. James, Crisis Intervention Strategies Ch. 9 (2017).
5 United States v. Daniels, 685 F.3d 1237, 1248-89 (11th Cir. 2012).
6 *Id.*