No._____

IN THE
SUPREME COURT OF THE UNITED STATES

T.B., Petitioner,

v.

STATE OF COLORADO,

Respondent.

On Petition for Writ of Certiorari to the
Colorado Supreme Court

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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445 P.3d 1049

Editor's Note: Additions are indicated by Text and deletions by ~~Text~~.

Supreme Court of Colorado.

The PEOPLE of the State of Colorado, Respondent
IN the INTEREST OF T.B., Petitioner

Supreme Court Case No. 17SC66
|
June 17, 2019
|
Petition for Rehearing Denied August 19, 2019

Synopsis

Background: Juvenile was adjudicated delinquent, following a bench trial in the District Court, La Plata County, Jeffrey R. Wilson, J., on two counts of sexual exploitation of a child. Juvenile appealed. The Court of Appeals, 2016 WL 6123557, affirmed. Juvenile petitioned for writ of certiorari, which petition was granted.

Holdings: The Supreme Court, Marquez, J., held that:

unlawful possession of "sexually exploitative material," under statute governing the crime of sexual exploitation of a child, does not require proof that the material depicts an act or acts of sexual abuse of a child;

statute governing crime of sexual exploitation of a child does not exempt a juvenile's conduct from its reach;

nude images of teenage girls on juvenile's cell phone were for purpose of real or simulated overt sexual gratification or stimulation and, thus, qualified as "erotic nudity" needed to support adjudication of delinquency for sexual exploitation of a child; and

juvenile was a "person involved" in creation of nude images of teenage girls found on juvenile's cell phone, as required to satisfy erotic nudity requirement for his adjudication as a delinquent based on his commission of acts equivalent to sexual exploitation of a child.

Affirmed.

Gabriel, J., filed dissenting opinion in which Hart, J., joined.

***1050** *Certiorari to the Colorado Court of Appeals*, Court of Appeals Case No. 14CA1142

Attorneys and Law Firms

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En Banc

Opinion

JUSTICE MÁRQUEZ delivered the Opinion of the Court.

¶1 Sexting,[1] which includes the sending of sexually explicit digital images by cell phone, has become common in our society, especially among teenagers. Approximately one in four teenagers has received a "sext" and approximately one in seven has sent one. Sheri Madigan, et al., *Prevalence of Multiple Forms of Sexting Behavior Among Youth: A Systemic Review and Meta-analysis*, 172 JAMA Pediatrics 4, 327, 327 (2018); *see also* The National Campaign to Prevent Teen & Unplanned Pregnancy, *Sex and Tech: Results from a Survey of Teens and Young Adults* 1 (2008), available at https://perma.cc/E8PX-BEJD. In this case, a juvenile texted a picture of his erect penis to two underage girls and then repeatedly asked the girls to text him naked pictures of themselves. After initially resisting, both girls eventually complied ***1051** and texted nude selfies[2] to the juvenile. The juvenile kept these sexts on his cell phone, where they were discovered by law enforcement in 2013. The question here is whether the juvenile can be adjudicated delinquent for sexual exploitation of a child under section 18-6-403(3), C.R.S. (2018),[3] for possessing these images.

1 "Sexting" is "the sending of sexually explicit messages or images by cell phone." Sexting, *Merriam Webster* (2019), available at https://perma.cc/88GT-HEUP.

2 A "selfie" is "an image that includes oneself (often with another person or as part of a group) and is taken by oneself using a digital camera especially for posting on social networks." Selfie, *Merriam-Webster* (2019),

APPENDIX A

available at https://perma.cc/RTD2-D3EN.

[3] We cite to the current statutes because the relevant provisions have remained unchanged since 2012 except where noted in this opinion.

¶2 Under section 18-6-403(3)(b.5), a person commits sexual exploitation of a child if he knowingly "possesses or controls" any "sexually exploitative material" for any purpose. "Sexually exploitative material" includes any photograph that depicts a child engaged in "explicit sexual conduct," which includes, as relevant here, "erotic nudity." § 18-6-403(2)(e), -(2)(j), C.R.S. (2018). The statute defines "erotic nudity" as "the display" of certain intimate body parts "for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved." § 18-6-403(2)(d).

¶3 In response to growing public concern over teen sexting, the General Assembly enacted H.B. 17-1302, which took effect in January 2018. This bill created, among other lower-level offenses, the civil infraction of "exchange of a private image" by a juvenile. Under this new offense, a juvenile who knowingly possesses a sexually explicit image of another person who is at least fourteen years old or less than four years younger than the juvenile, and who reasonably believes the depicted person transmitted the image or otherwise agreed to its transmittal, commits a civil infraction punishable by a fine of up to $50 or participation in a program addressing the risks and consequences of such behavior. § 18-7-109(3)(b), -(5)(c), C.R.S. (2018). Notably, H.B. 17-1302 established that any juvenile whose behavior is limited to the elements of the civil infraction is not subject to prosecution for sexual exploitation of a child under section 18-6-403(3)(b)[4] or -(3)(b.5). § 18-6-403(3.5), C.R.S. (2018).

[4] Under subsection (3)(b), a person commits sexual exploitation of a child if he knowingly "[p]repares, arranges for, publishes, ... produces, ... makes, ... or distributes ... any sexually exploitative material." § 18-6-403(3)(b), C.R.S. (2018).

¶4 But the acts at issue here predate these changes in the law.

¶5 In 2013, officers discovered four sexually explicit selfies on the cell phone of fifteen-year-old T.B. Three images depicted seventeen-year-old E.H. nude. The other image depicted fifteen-year-old L.B. topless, with a towel wrapped around her waist. Based on T.B.'s possession of these images, the prosecution filed a petition in delinquency charging him with two counts of possession of sexually exploitative material under section 18-6-403(3)(b.5) and naming E.H. and L.B. as victims. At a bench trial, T.B. argued that the prosecution failed to prove that he knowingly possessed erotic nudity for the purpose of the overt sexual gratification of a "person involved." § 18-6-403(2)(d). The court rejected this argument and adjudicated T.B. delinquent on both counts.

¶6 T.B. challenged his adjudication on appeal, repeating his contention that the photographs did not depict erotic nudity. In addition, he argued for the first time that to avoid First Amendment concerns, the sexual exploitation statute must be read to apply only to images depicting "acts of sexual abuse," and that under this proper reading, the evidence was insufficient to convict him. He also contended that the legislature did not intend section 18-6-403 to apply to juveniles.

¶7 In a published, split ruling, the court of appeals affirmed T.B.'s adjudication. *People In Interest of T.B.*, 2016 COA 151M, —— P.3d ——. The majority concluded that T.B. was a "person involved" for the purposes of the statute, and that because the photographs he possessed were created for the purposes of his sexual gratification, sufficient evidence supported the trial court's finding that they ***1052** contained erotic nudity. *Id.* at ¶¶ 30–35. Two judges rejected T.B.'s unpreserved statutory interpretation argument, although for different reasons and applying different standards of review. *Id.* at ¶¶ 36–45; *id.* at ¶¶ 78–86 (Bernard, J., concurring). The third dissented, reasoning that the General Assembly never intended section 18-6-403 to reach consensual exchanges of images between juveniles. *Id.* at ¶¶ 87–101 (Fox, J., dissenting).

¶8 We granted T.B.'s petition for a writ of certiorari to determine the proper standard of review for an unpreserved sufficiency of the evidence claim and to review whether the court of appeals misconstrued section 18-6-403(3)(b.5) in holding the evidence was sufficient to support T.B.'s adjudication for sexual exploitation of a child.[5]

[5] We granted certiorari review of the following issues:
1. [REFRAMED] Whether the court of appeals correctly applied de novo review to the defendant's unpreserved sufficiency of the evidence challenge to his adjudication for sexual exploitation of a child.
2. [REFRAMED] Whether the court of appeals

misconstrued section 18-6-403(3)(b.5), C.R.S. (2012), in concluding that the evidence was sufficient to support the juvenile defendant's adjudication for sexual exploitation of a child.

¶9 We need not address the standard of review that applies to T.B.'s unpreserved sufficiency of the evidence claim because we reject his contention that, to avoid First Amendment concerns, section 18-6-403(3) must be read to limit sexually exploitative material to images that depict "an act or acts of sexual abuse of a child." We also reject T.B.'s arguments that the legislature must have implicitly intended in section 18-6-403 to carve out an exception for juveniles engaged in sexting behavior. We further hold that the sexually explicit content of the photos and the circumstances surrounding their creation, including T.B.'s direct solicitation of them, demonstrate they were made for the purpose of T.B.'s "overt sexual gratification." Thus, sufficient evidence supports the trial court's conclusion that the images constituted "erotic nudity" (and therefore "sexually exploitative material") for purposes of the sexual exploitation of a child statute. Accordingly, we affirm the judgment of the court of appeals upholding T.B.'s adjudication.

I. Facts and Procedural History

¶10 In September 2012, fifteen-year-old T.B. met seventeen-year-old E.H. and fifteen-year-old L.B. at a Future Farmers of America conference. T.B., E.H., and L.B. all lived in different towns. After the conference, T.B. stayed in contact with both girls by phone and text message. Both E.H. and L.B. considered themselves to be romantically involved with T.B. at different points during their correspondence.

¶11 E.H. and L.B. testified that T.B. sent each of them a selfie of his erect penis.[6] Thereafter, T.B. repeatedly asked both girls for sexually explicit pictures of themselves, badgering them until they complied with his requests. In the fall of 2012, E.H. texted T.B. three nude photographs of herself. In two of these photos, E.H. is curled up in a corner with her knees drawn up against her body; the photos depict E.H.'s face and upper torso, including her bare breasts. The third photo depicts E.H. standing near a bathroom shower, covering her breasts with one arm and revealing the profile of her nude body turned away at a slight angle. During the spring of 2013, L.B. texted T.B. one photograph of herself. In this photo, taken in a bedroom mirror, L.B. appears topless, with a towel wrapped around her waist. The focal point of the photo is L.B.'s breasts; her face is not revealed.

[6] This photograph of T.B. does not appear in the record. E.H. testified that she deleted the photograph after receiving it, and L.B. testified that she did not recall what she had done with the photograph.

¶12 After T.B.'s arrest on unrelated sexual assault charges in March 2013, police seized T.B.'s cell phone and discovered the nude photographs of E.H. and L.B. The People filed a petition in delinquency, charging T.B. with two counts of sexual exploitation of a child under section 18-6-403(3)(b.5), C.R.S. (2012), and several other counts related to the alleged sexual assault. The court granted T.B.'s request to sever the sexual exploitation counts, and a jury ultimately acquitted T.B. of the other counts.

***1053** ¶13 At his bench trial on the sexual exploitation charges, T.B. argued that the state failed to prove that the images depicted "erotic nudity" as required by section 18-6-403(3)(b.5). The court rejected this contention and found that the prosecution had proven both counts of sexual exploitation beyond a reasonable doubt. The court adjudicated T.B. delinquent, sentenced him to concurrent, two-year terms of juvenile sex offender probation, and required him to register as a sex offender.

¶14 T.B. appealed, reasserting that the evidence was insufficient to support his adjudication. First, he contended that the images did not depict erotic nudity. Second, relying on language in the legislative declaration to section 18-6-403, T.B. argued for the first time that the sexual exploitation statute must be interpreted to apply only to images that depict the sexual abuse of a child, and that under this interpretation, the evidence was insufficient to support his adjudication.

¶15 In a divided opinion, the court of appeals rejected both claims. *People In Interest of T.B.*, 2016 COA 151M, —— P.3d ——. The majority, applying factors adopted by another division of the court of appeals in *People v. Gagnon*, 997 P.2d 1278 (Colo. App. 1999), determined that sufficient evidence supported the trial court's conclusion that the photographs of E.H. and L.B. constituted erotic nudity. *Id.* at ¶¶ 30–35. The court observed that the images focused on the girls' breasts and E.H.'s pubic area and suggested a sexual coyness. *Id.* at ¶ 33. Further, the court concluded, the images were created for the overt sexual gratification of T.B., who repeatedly asked the girls for the photos after sending them a picture of his erect penis. *Id.* at ¶ 34.

¶16 As to T.B.'s new sufficiency of the evidence claim grounded in his argument that section 18-6-403(3)(b.5) applies only to images that depict the sexual abuse of a child, the panel split, producing three separate opinions. Judge Richman reviewed the unpreserved claim de novo under the standards set forth in *Dempsey v. People*, 117 P.3d 800, 807 (Colo. 2005) (reviewing the record de novo to determine whether the evidence, viewed in the light most favorable to the prosecution, was substantial and sufficient in both quantity and quality to support the defendant's guilt beyond a reasonable doubt). *Id.* at ¶¶ 18–19. He rejected T.B.'s argument for two reasons. First, he reasoned that the statute does not import the term "sexual abuse" from the legislative declaration into the definitions of "sexually exploitative material," "explicit sexual conduct," or "erotic nudity." *Id.* at ¶ 38 (citing § 18-6-403(2)(d), (e), (j)). Because the statute is unambiguous, he concluded, it is applied as written and the court need not engage in further statutory analysis by considering the legislative declaration. *Id.* at ¶¶ 38–41. Second, Judge Richman reasoned, even if the court considered the legislative declaration, T.B.'s interpretation could not prevail because a legislative declaration cannot override a statute's elements. *Id.* at ¶¶ 42–43 (citing *People v. Enea*, 665 P.2d 1026 (Colo. 1983)).

¶17 Judge Bernard specially concurred, applying plain error review to T.B.'s unpreserved sufficiency claim. *Id.* at ¶ 79 (Bernard, J., concurring). He reasoned that T.B.'s new interpretation of section 18-6-403(3)(b.5) was not obvious, and therefore declined to address it on the merits. *Id.* at ¶¶ 82–86.

¶18 Judge Fox dissented. Like Judge Richman, she reviewed T.B.'s new sufficiency claim de novo, *id.* at ¶ 92 n.4 (Fox, J., dissenting), but concluded that section 18-6-403 was not intended to reach "imprudent or irresponsible behavior by and among juveniles." *Id.* at ¶ 87. The Children's Code, Judge Fox reasoned, reflects the General Assembly's intent to "treat juveniles differently" and acknowledges that "[i]nexperience [and] less education ... make the teenager less able to evaluate the consequences of his or her conduct." *Id.* at ¶ 89 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (plurality opinion)). By contrast, she reasoned, the purpose of child pornography laws is to "prevent the abuse of children necessarily present in the making of child pornography." *Id.* at ¶ 92. Given these differing purposes, Judge Fox concluded that to charge teen sexting as sexual exploitation of a child under section 18-6-403(3)(b.5), "blatantly disregard[s] the ***1054** purpose and intent" of the statute. *Id.* at ¶ 92. Additionally, Judge Fox concluded that section 18-6-403(3)(b.5) lacks "minimal guidelines" to avoid discriminatory or arbitrary enforcement, pointing out that the male recipient of the photos in this case faced charges, whereas the female teens who produced the images and sent them faced no legal consequences. *Id.* at ¶ 93 (quoting *City of Chicago v. Morales*, 527 U.S. 41, 60, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999)).

¶19 Not long after the court of appeals issued its opinion in this case, the General Assembly enacted H.B. 17-1302. This bill sought to address juvenile sexting behavior through the creation of new, lower-level offenses of posting and possessing private images by a juvenile, and the civil infraction of exchange of a private image by a juvenile. Ch. 390, sec. 1, 2017 Colo. Sess. Laws, codified at § 18-7-109, C.R.S. (2018). The bill took effect January 1, 2018, and applies to offenses committed on or after that date.

¶20 We granted T.B.'s petition for a writ of certiorari to review the court of appeals' ruling affirming his adjudication for sexual exploitation of a child.

II. Analysis

¶21 T.B. argues that section 18-6-403(3)(b.5) does not apply to the teenage texting of nude selfies at issue here. He challenges the sufficiency of the evidence underlying his adjudication on two grounds, only one of which was preserved below. First, relying on language from the legislative declaration in section 18-6-403(1.5), C.R.S. (2018), T.B. argues that to qualify as "sexually exploitative material," an image must depict the "sexual abuse of a child." This claim was not preserved. Though T.B. makes clear that he does not claim that the statute is unconstitutional as applied to him, he nevertheless posits that his narrowed interpretation of section 18-6-403 is required to avoid First Amendment concerns. Second, resurrecting the claim he did preserve below, T.B. argues that the evidence is insufficient to support his adjudication because the photographs in his possession did not contain "erotic nudity," as defined in section 18-6-403(2)(d).

¶22 We need not address what standard of review governs T.B.'s unpreserved sufficiency claim because we reject his contention that, to avoid First Amendment concerns, section 18-6-403(3) must be read to limit sexually exploitative material to images that depict "an act or acts of sexual abuse of a child." We conclude that the "sexual

abuse" language T.B. points to from the legislative declaration does not modify the elements of the offense of sexual exploitation of a child or its associated definitional provisions, nor must we import such a limitation to avoid facial overbreadth concerns. We also reject T.B.'s contention that the legislature must have implicitly intended to carve out an exception in section 18-6-403 for a juvenile's possession of sexually exploitative materials, observing that the recent statutory changes enacted in H.B. 17-1302 bolster our conclusion that the law in effect at the time of T.B.'s conduct did not contemplate any such exception. We next examine whether the photographs in T.B.'s possession constitute "erotic nudity" under section 18-6-403(2)(d) and conclude that they do. Because the sexually explicit content of the photos and the circumstances surrounding their creation, including T.B.'s direct and repeated solicitation of them, demonstrate they were made for the purposes of T.B.'s "overt sexual gratification," we conclude the trial court properly considered them erotic nudity for purposes of the sexual exploitation statute. Accordingly, we affirm the judgment of the court of appeals upholding T.B.'s adjudication.

A. Standard of Review

¶23 We review questions of statutory interpretation de novo. *Finney v. People*, 2014 CO 38, ¶ 12, 325 P.3d 1044, 1049. In interpreting a statute, we seek to "effectuate the intent and purpose of the General Assembly." *People v. G.S.*, 2018 CO 31, ¶ 15, 416 P.3d 905, 909. We read the statute as a whole, construing its provisions consistently and in harmony with the overall statutory design. *Id.*, 416 P.3d at 910. To discern the legislature's intent, we first look to the plain language of a statutory provision. *Id.* Where the statutory language is clear, we apply the ***1055** plain and ordinary meaning of a provision. *Id.*

¶24 When assessing a sufficiency of the evidence claim, we review the record de novo to determine whether the evidence, when viewed in the light most favorable to the prosecution, was "substantial and sufficient" to support a reasonable juror's conclusion of guilt beyond a reasonable doubt. *People v. Perez*, 2016 CO 12, ¶ 9, 367 P.3d 695, 697 (quoting *Dempsey*, 117 P.3d at 807).

¶25 T.B.'s new sufficiency of the evidence claim—grounded in his interpretation of section 18-6-403(3)(b.5)—was not preserved below. We recently held in *McCoy v. People*, 2019 CO 44, ¶ 26, 442 P.3d 379, that sufficiency of the evidence claims may be raised for the first time on appeal and that appellate courts should review unpreserved sufficiency claims de novo. Here, however, the standard of review that applies to this claim makes no difference because, as discussed below, we reject his interpretation of the statute. In short, T.B.'s sufficiency claim fails regardless of whether it is reviewed de novo or under the plain error standard.

B. Section 18-6-403: The Sexual Exploitation of a Child Statute

¶26 A person commits sexual exploitation of a child, if, as relevant here, he or she knowingly "possesses or controls any sexually exploitative material for any purpose." § 18-6-403(3)(b.5).[7] Before 2018, the statute did not contain the express exception for juvenile offenders now found in section 18-6-403(3.5) (providing that a juvenile's conduct that is limited to the elements of the civil infraction of exchange of a private image by a juvenile under section 18-7-109(3) is not subject to prosecution under subsection (3)(b) (making or distributing sexually exploitative material) or (3)(b.5) (possessing or controlling such material)).

[7] Possession or control of sexually exploitative material is only one means of committing sexual exploitation of a child. Under section 18-6-403(3), a person also commits sexual exploitation of a child if he or she knowingly "causes, induces, entices, or permits a child to engage in ... explicit sexual conduct for the making of any sexually exploitative material," § 18-6-403(3)(a); "[p]repares, arranges for, publishes, ... produces, ... makes, ... or distributes ... any sexually exploitative material," § 18-6-403(3)(b); "[p]ossesses with intent to deal in, sell, or distribute ... any sexually exploitative material," § 18-6-403(3)(c); or "[c]auses, induces, entices, or permits a child to engage in ... explicit sexual conduct for the purpose of producing a performance," § 18-6-403(3)(d).

¶27 The statute defines "sexually exploitative material" to include "any photograph ... that depicts a child engaged in, participating in, observing, or being used for explicit sexual conduct." § 18-6-403(2)(j). In turn, "explicit sexual conduct" includes, as relevant here, "erotic nudity." § 18-6-403(2)(e). "Erotic nudity" means:

> *the display of the human male or female genitals or pubic area*, the undeveloped or developing genitals or pubic area of the human male or female child, *the human breasts*, or the undeveloped or developing breast area of the human child, *for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved.*

§ 18-6-403(2)(d) (emphases added).

¶28 In sum, as relevant here, a photograph constitutes "erotic nudity" (and therefore "sexually exploitative material") under section 18-6-403 if it (1) displays the breasts or pubic area of a child, (2) for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved. § 18-6-403(2)(d), (e), (j).

C. "Sexually Exploitative Material" under Section 18-6-403 Need Not Depict an Act of Sexual Abuse of a Child

¶29 T.B. contends that section 18-6-403 must be interpreted to limit "sexually exploitative materials" to images that depict "an act or acts of sexual abuse of a child." He derives this limitation from section 18-6-403(1.5), one of two legislative declaration provisions accompanying the statute.

¶30 The original legislative declaration, section 18-6-403(1), C.R.S. (2018), states that "the sexual exploitation of children constitutes a wrongful invasion of the child's right to privacy and results in social, developmental, ***1056** and emotional injury to the child[,]" and that to protect children from sexual exploitation, "it is necessary to prohibit the production of material which involves or is derived from such exploitation and to exclude all such material from the channels of trade and commerce."

¶31 In section 18-6-403(1.5), added in 1988, the General Assembly further declared that "the mere possession or control of any sexually exploitative material results in continuing victimization of our children" because "such material is a permanent record of *an act or acts of sexual abuse of child*," and that "each time such material is shown or viewed, the child is harmed." § 18-6-403(1.5) (emphasis added). Notably, this provision also states that to stop *both* the "sexual exploitation *and* abuse" of children, it is necessary to ban the possession of sexually exploitative materials. *Id.* (emphasis added). Finally, it declares that the state has a compelling interest in outlawing the possession of such material in order to "protect society as a whole" as well as "the privacy, health, and emotional welfare of its children." *Id.*

¶32 T.B. argues that the legislative declaration in section 18-6-403(1.5) narrows the substantive elements of the statute. That is, under his reading, the possession of sexually exploitative material under section 18-6-403(3)(b.5) must be limited to possession of images that depict "an act or acts of sexual abuse of a child." He contends that under this interpretation, the evidence here was insufficient to support his adjudication for sexual exploitation because the selfies of E.H. and L.B. do not depict acts of child sexual abuse.[8]

[8] T.B. does not attempt to define what constitutes "an act or acts of sexual abuse of a child."

¶33 We reject T.B.'s reading of the statute. As set forth above, section 18-6-403(3)(b.5) required the People to prove that T.B. knowingly possessed "sexually exploitative material." The statute defines "sexually exploitative material" to mean any photograph that depicts a child engaged in "explicit sexual conduct," a term that includes "erotic nudity." § 18-6-403(2)(e), (2)(j). "Erotic nudity" means the display of the pubic area or the breasts of a child "for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved." § 18-6-403(2)(d). Significantly, none of these substantive or definitional provisions in the statute incorporate the phrase, "acts of child sexual abuse," and we decline to read such a limitation into them. Indeed, we have previously held that language in the legislative declaration to the sexual exploitation statute does not "alter the elements of the crime" of sexual exploitation of a child. *People v. Enea*, 665 P.2d 1026, 1029 (Colo. 1983) (holding that proof of "social, developmental, or emotional injury to the child" referenced in the legislative declaration is not an element of the crime of sexual exploitation of a child). Although our decision in *Enea* construed an earlier version of the statute, its reasoning still holds here. Consistent with that decision, we hold that the additional legislative declaration in subsection (1.5) likewise does not narrow or otherwise modify the actual elements of the offense of

sexual exploitation of a child found in subsection (3) of the statute or its associated definitional provisions in subsection (2). In short, based on the plain language of the statute, we conclude that the unlawful possession of "sexually exploitative materials" under section 18-6-403 does not require proof that the material depicts "an act or acts of sexual abuse of a child."

¶34 We also reject T.B.'s contention that his reading of section 18-6-403(3)(b.5) is necessary to avoid constitutional infirmities. Specifically, he argues that section 18-6-403(3)(b.5) must be construed to include a "sexual abuse" element to avoid violating the First Amendment because the creation of teenage nude selfies is constitutionally protected speech to the extent that the images are neither obscene nor the product of abuse.[9] However, "the canon of constitutional avoidance has no application in the absence of statutory ambiguity." ***1057** *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 484, 121 S.Ct. 1711, 149 L.Ed.2d 722 (2001). Because the language of section 18-6-403(3)(b.5) is clear and unambiguous, we need not resort to the canon of constitutional avoidance here. *People v. Flippo*, 159 P.3d 100, 106 n.11 (Colo. 2007).[10]

9 In presenting his constitutional avoidance argument, T.B. makes clear that he does *not* claim that section 18-6-403 is unconstitutional as applied to him.

10 In any event, we rejected a facial overbreadth challenge to this statute in *People v. Batchelor*, 800 P.2d 599, 601–03 (Colo. 1990). We acknowledged in that case that depictions of child nudity, without more, are constitutionally protected expression, *id.* at 601 (citing *New York v. Ferber*, 458 U.S. 747, 765 n.18, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982)), and that statutes prohibiting child pornography must be sufficiently narrow to avoid criminalizing an intolerable range of protected expressive conduct, *id.* at 601–02 (citing *Osborne v. Ohio*, 495 U.S. 103, 112, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990)). Importantly, we observed that the statute limits "erotic nudity" (as a form of "explicit sexual conduct") to the displays of a child's breasts or pubic area that are made "for the purpose of overt sexual gratification or stimulation of one or more of the persons involved." *Id.* at 602; § 18-6-403(2)(d). We therefore concluded that section 18-6-403 is sufficiently limited to avoid concerns of facial overbreadth. *Id.* at 603.

D. Neither the Internet Luring Statute nor H.B. 17-1302 Requires a Different Outcome Here

¶35 Alternatively, T.B. claims that the General Assembly never intended section 18-6-403 to apply to his conduct in this case. He points to section 18-3-405.4, C.R.S. (2018) (the internet luring statute) to argue that the legislature must have implicitly intended in section 18-6-403 to carve out an exception for juveniles engaged in sexting behavior.

¶36 The internet luring statute criminalizes "knowing[ly] importun[ing], invit[ing], or entic[ing] through [electronic] communication" "a person who the actor knows or believes" to be under fifteen years old to expose or touch their own intimate parts or observe the actor's intimate parts. § 18-3-405.4(1). Under this statute, the actor must be at least four years older than the minor for internet luring to constitute a crime. *Id.*

¶37 T.B. argues that if the legislature recognized a close-in-age exception for juveniles in the internet luring statute, then it must have implicitly intended to create a similar exception in the sexual exploitation statute. We disagree. Section 18-6-403 contains no language purporting to create a close-in-age exception for juveniles, despite multiple amendments to the statute over the last twenty years. If anything, the comparative absence of such language in the sexual exploitation statute compels us to conclude that the legislature did not intend to establish any exception for a juvenile's conduct under this provision. *See Turbyne v. People*, 151 P.3d 563 (Colo. 2007) ("We do not add words to the statute or subtract words from it.").

¶38 The legislative declaration to the juvenile sexting bill, H.B. 17-1302, bolsters our conclusion that section 18-6-403 contained no exception for a juvenile's possession of sexually exploitative material before the enactment of that bill. The legislature expressly acknowledged that, under then-current law, "when a juvenile engages in sexting behavior, usually the only available offense with which to charge that juvenile is sexual exploitation of a child." H.B. 17-1302, § 1(1)(a). Therefore—indeed, apparently for that very reason—it was necessary to provide law enforcement with the ability to charge lower-level offenses or civil infractions as well as to provide diversionary programs that could more appropriately address juvenile sexting behavior. *Id.*, § 1(1)(b), (2).

¶39 Section 18-7-109, the new provision created by H.B. 17-1302, implements a tiered approach to a juvenile's posting, possession, or exchange of sexually explicit images of minors who are at least fourteen years old or

less than four years younger than the juvenile. Possessing a sexually explicit image of another teenager with the reasonable belief that the depicted person either transmitted the image or agreed to its transmittal (T.B.'s conduct here), now constitutes the civil infraction of "exchange of a private image."[11] § 18-7-109(3). Possessing a ***1058** sexually explicit image of another teenager without that person's permission is chargeable as a petty offense, § 18-7-109(2), C.R.S. (2018), but is a class 2 misdemeanor if the juvenile has ten or more separate images depicting three or more separate persons. § 18-7-109(5)(b). Posting a sexually explicit image of another teenager without consent is a class 2 misdemeanor, § 18-7-109(5)(a), but becomes a class 1 misdemeanor if, for example, committed with intent to coerce, intimidate or otherwise cause emotional distress to the depicted person, § 18-7-109(5)(a)(I).

[11] T.B. does not suggest that section 18-7-109 should be applied retroactively to his conduct. He also does not contend that the new statute gives rise to any equal protection claim—nor could he. In the criminal law context, Colorado's unique equal protection doctrine applies "only when 'the same conduct is proscribed in two statutes, and different criminal sanctions apply.' " *People v. Young*, 859 P.2d 814, 816 (Colo. 1993). But T.B.'s conduct was never proscribed by two different statutes at the same time. Finally, T.B. does not challenge the statute on vagueness grounds, nor does he raise any claim of selective enforcement. In fact, immediately before they testified at trial, both girls were advised of their Fifth Amendment privilege against self-incrimination and warned that they could be subject to prosecution under state or federal law for their possession of the photo of T.B.'s erect penis.

¶40 Finally, H.B. 17-1302 added subsection (3.5) to section 18-6-403, which provides that a juvenile's conduct that is limited to the elements of the petty offense of possession of a private image under section 18-7-109(2) or the civil infraction of exchange of a private image under section 18-7-109(3) is "not subject to prosecution" for sexual exploitation of a child under section 18-6-403(3)(b) (making or distributing sexually exploitative material) or section 18-6-403(3)(b.5) (possessing or controlling sexually exploitative material). This new language in section 18-6-403(3.5) further confirms our conclusion that a juvenile's conduct was prosecutable under section 18-6-403(3)(b) or -(3)(b.5) before the enactment of H.B. 17-1302, and that the statute contained no exception for a juvenile's possession of sexually exploitative material before the enactment of that bill.

¶41 In sum, T.B.'s claim that section 18-6-403 cannot be understood to apply to a juvenile's conduct is without merit. If anything, the legislative declaration to section 18-6-403 makes clear that the statute is fundamentally concerned with the "privacy, health, and emotional welfare of [the state's] children," § 18-6-403(1.5), and that the sexual exploitation of children amounts to a "wrongful invasion of the child's right to privacy, and results in social, developmental, and emotional injury to the child," § 18-6-403(1). Nothing in the legislative declarations to section 18-6-403 suggests that such harms are lessened or do not exist merely because the sexually exploitative material is made, possessed, or distributed by a juvenile rather than an adult.

E. The Images Here Constituted "Erotic Nudity"

¶42 Next, T.B. argues that the evidence was insufficient to support his adjudication because the images he possessed do not depict "erotic nudity." Again, we disagree. As discussed above, a photograph constitutes "erotic nudity" (and therefore "sexually exploitative material") under section 18-6-403 if it (1) displays the breasts or pubic area of a child, (2) "for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved." § 18-6-403(2)(d), (e), (j). T.B. does not dispute that the images in his possession display the breasts or pubic area of a child. Instead, he argues that the images do not qualify as erotic nudity because the displays were not done for the purpose of the "overt sexual gratification" of a "person involved." We disagree.

1. The Images Were "For the Purpose of Real or Simulated Overt Sexual Gratification or Stimulation"

¶43 In examining whether a photograph displaying the genitals, pubic area, or breasts of a child is "for the purpose of real or simulated overt sexual gratification or stimulation," federal case law is instructive. Under federal child pornography law, a visual depiction of a child's anus, genitals, or pubic area constitutes "sexually explicit conduct" when it is a "lascivious exhibition" of those body parts. 18 U.S.C. § 2256(2)(A)(v), -(8)(A). "Lascivious" is defined as "tending to excite lust." *Lascivious*, Black's Law Dictionary (10th ed. 2014). The

federal statute's reference to "lascivious" exhibitions is thus comparable to the language in section 18-6-403(2)(d), "for the purpose of ... sexual gratification."

***1059** ¶44 In *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), a federal court articulated a non-exhaustive list of factors to assess whether an image of a minor is "a lascivious exhibition of the genitals or pubic area": (1) whether the focal point of the image is the child's genitalia or pubic area; (2) whether the setting of the image is sexually suggestive; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the child's age; (4) whether the child is fully or partially clothed, or nude; (5) whether the image suggests sexual coyness or a willingness to engage in sexual activity; (6) whether the image is intended or designed to elicit a sexual response in the viewer. Under the *Dost* approach, not all of these factors must be present for an image to be considered lascivious; whether the image is lascivious must be based on the overall content of the depiction, taking into account the age of the child. *Id.*

¶45 Many federal and state courts have adopted these factors or some version of them,[12] including a division of our court of appeals in *Gagnon*, 997 P.2d at 1282 (using the *Dost* factors to assess whether a picture is for the purposes of real or overt sexual gratification or stimulation of one or more of the persons involved). Here, the division applied the *Dost* factors to assess whether the images possessed by T.B. were for the purpose of the sexual gratification of a person involved. *People In Interest of T.B.*, —— P.3d at ¶¶ 32–33 (citing *Gagnon*, 997 P.2d at 1281–82)

[12] Federal courts that have adopted the *Dost* factors include *United States v. Amirault*, 173 F.3d 28, 32 (1st Cir. 1999); *United States v. Rivera*, 546 F.3d 245, 250 (2d Cir. 2008); *United States v. Villard*, 885 F.2d 117, 122 (3d Cir. 1989); *Sims v. Labowitz*, 877 F.3d 171, 182 (4th Cir. 2017) (*overruled on other grounds*); *United States v. Carroll*, 190 F.3d 290, 297 (5th Cir. 1999) (*overruled on other grounds*); *United States v. Brown*, 579 F.3d 672, 680 (6th Cir. 2009); *United States v. Horn*, 187 F.3d 781, 789 (8th Cir. 1999); and *United States v. Wolf*, 890 F.2d 241, 247 (10th Cir. 1989). State courts that have also adopted some version of these factors include *Cummings v. State*, 353 Ark. 618, 629, 110 S.W.3d 272 (2003); *Illinois v. Lamborn*, 185 Ill.2d 585, 236 Ill.Dec. 764, 708 N.E. 2d 350, 354–55 (1999); *Purcell v. Kentucky*, 149 S.W.3d 382, 392 (Ken. 2004); *Massachusetts v. Rex*, 469 Mass. 36, 44 (2014); *Hood v. Mississippi*, 17 So.3d 548, 555 (Miss. 2009); *Nebraska v. Smith*, 292 Neb. 434, 463, 873 N.W.2d 169 (2016); *New Hampshire v. Lopez*, 162 N.H. 153, 156, 27 A.3d 713 (2011); *New Mexico v. Myers*, 146 N.M. 128, 135, 207 P.3d 1105 (2009); *South Dakota v. Dubois*, 2008 S.D. 15, ¶ 35, 746 N.W.2d 197 (2008); and *Utah v. Bagnes*, 2014 UT 4, ¶ 42, 322 P.3d 719 (2014).

¶46 We conclude that the *Dost* factors provide a useful general framework for analyzing whether an image is the kind the General Assembly intended to encompass within its definition of "erotic nudity" for purposes of the sexual exploitation of a child statute. Therefore, borrowing from the *Dost* factors, we hold that when assessing whether a photograph displaying the genitals, pubic area, or breasts of a child was "for the purpose of real or simulated overt sexual gratification or stimulation" under section 18-6-403(2)(d), a reviewing court should examine whether the display appears to be intended or designed to elicit a sexual response. In conducting this analysis, a court should consider:

1) whether the focal point of the depiction is on the breasts, genitals, or pubic area of the child;

2) whether the setting, pose, or attire depicted is sexually suggestive, considering the age of the child; and

3) whether the depiction appears staged to suggest a willingness to engage in sexual activity.

These factors are not exclusive, and a court may determine that an image is "for the purpose of real or simulated overt sexual gratification or stimulation" under section 18-6-403(2)(d) without satisfying all of the factors.

¶47 Applying these factors here, we conclude the photographs in this case were intended or designed to elicit a sexual response. Two of the photographs of E.H. depict her curled up, with her knees pulled in against her body and her breasts exposed. The other photograph of E.H. depicts her nude profile, and the photograph appears to have been taken in a bathroom mirror. The photograph of L.B. depicts her with a towel around her torso, with her breasts exposed.[13] ***1060** The focal point of these photos is the girls' breasts—and in the profile photo of E.H., her pubic area. The girls' poses all appear staged to be sexually suggestive. All the photos suggest a willingness to engage in sexual activity. Because the content of the photos reflect they were intended or designed to elicit a sexual response, we conclude the displays of the girls' breasts and E.H.'s pubic area were "for the purpose of real or simulated overt sexual gratification or stimulation."

[13] The court of appeals describes this photograph as depicting "L.B.'s shirt [being] pulled down below her breasts, exposing them." *T.B.*, 2016 COA 151M, ¶ 33, —— P.3d at ——. However, neither E.H. nor L.B. is wearing a shirt in any of the photographs.

2. T.B. Was a "Person Involved" for the Purposes of Section 18-6-403(2)(d)

¶48 The statutory definition of erotic nudity further requires that the sexual gratification or stimulation be of "one or more of the persons involved." § 18-6-403(2)(d). The question is whether T.B. qualifies as a "person involved" under this provision. We conclude he does.

¶49 In *People v. Batchelor*, we recognized that a person "involved" for whose sexual gratification the material is made need not be depicted in the material itself. 800 P.2d at 604. In that case, the defendant was charged with making sexually exploitative material under section 18-6-403(3)(b) for posing his sleeping nine-year-old daughter in erotic positions and taking several instant snapshots of her. *Id.* at 600, 604–05. The defendant argued that because the child victim in the photograph was not in a condition of real or simulated sexual gratification or stimulation, the photographs did not constitute erotic nudity. *Id.* at 603. We disagreed, reasoning that the statute "simply does not require that the 'real or simulated overt sexual gratification or stimulation' be depicted in the material." *Id.* at 604. Rather, the requisite overt sexual gratification "may be of any of the persons involved in the activity" and that "[t]he person (or persons) 'involved' are not always depicted in the material." *Id.*

¶50 There, we considered the defendant to be a "person involved" because he was "the maker of the photograph" and the photos were for his overt sexual gratification. *Id.* But in reaching that conclusion, we did not construe the phrase "a person involved" in section 18-6-403(2)(d) as necessarily limited to persons who physically manipulate a child subject or operate a camera. The provision contains no such express limitation. Further, we relied not simply on the fact that the defendant operated the camera, but that he posed his daughter in erotic positions. *Id.* at 605. In other words, the defendant was "involved" in creating their erotic character, the purpose of which was his own sexual gratification. *Id.*

¶51 Under our reasoning in *Batchelor*, there is no meaningful difference between a defendant who physically manipulates a child into an erotic pose and photographs her for the purpose of his own overt sexual gratification, and one who instead verbally instructs that child to assume the same erotic pose and take a nude selfie for the same purpose. In both situations, the defendant is "involved" in the creation of the resulting erotic images for the purpose of the defendant's sexual gratification.

¶52 And for that matter, in today's digital age, we discern no principled distinction between a defendant who stands in the room with a minor, directing her to pose in erotic positions for nude photographs for the defendant's overt sexual gratification, and a defendant who uses electronic media to solicit or orchestrate such photographs. A defendant can be as intimately involved with the creation of images depicting erotic nudity through a smartphone or computer as he is while standing in the room with the child. Conversations can occur in real time or near-real time through text messages and online chat services. And video and image services such as Facetime, Snapchat, and Instagram Video Chat permit real-time visual and audio communication.

¶53 Here, ample evidence in the record establishes that the photographs were made for the purpose of T.B.'s overt sexual gratification. E.H. and L.B. both testified that T.B. sent them a photo of his erect penis. Soon after that, he pestered both girls for sexually explicit pictures in response. T.B.'s personal involvement in soliciting the photos, his repeated ***1061** requests for them, and the sexual banter in the text messages accompanying those requests demonstrate that T.B.'s "overt sexual gratification" was the whole point of these text exchanges.[14] Given the content of the photos and the context in which they were created and sent to T.B., we conclude there was sufficient evidence that these nude images were "for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved" and thus constituted erotic nudity for purposes of section 18-6-403(2)(d).

[14] We emphasize that T.B. was not prosecuted for merely *asking* the girls to send him nude selfies. Our point is that T.B.'s solicitation of the photographs for his own sexual gratification further demonstrates he was a "person involved" in their creation, which goes to whether the images constituted "erotic nudity."

¶54 In sum, the sexually explicit content of the photos and the circumstances surrounding their creation, including

T.B.'s direct and repeated solicitation of them, demonstrate they were made for the purposes of T.B.'s "overt sexual gratification." Thus, we conclude that the evidence in the record, viewed in the light most favorable to the prosecution, was substantial and sufficient to support the trial court's conclusion that the photos constituted erotic nudity for purposes of the sexual exploitation statute.

III. Conclusion

¶55 We are cognizant that our holding today may strike some as unfair, especially given the recent changes in the law addressing juvenile sexting behavior. However, we must apply the law in effect at the time of T.B.'s conduct. We hold that section 18-6-403(3) need not be read to limit sexually exploitative material to images that depict "an act or acts of sexual abuse of a child." Such a limitation is neither warranted by the plain language of the statute nor required to avoid First Amendment concerns. We further hold that the sexually explicit content of the photos and the circumstances surrounding their creation, including T.B.'s repeated requests for them, demonstrate they were made for the purpose of T.B.'s "overt sexual gratification," and the trial court therefore properly considered them erotic nudity for purposes of the sexual exploitation statute. Accordingly, we affirm the judgment of the court of appeals upholding T.B.'s adjudication.

JUSTICE GABRIEL dissents, and JUSTICE HART joins in the dissent.

JUSTICE GABRIEL, dissenting.

¶56 In this juvenile delinquency proceeding, the juvenile and two teenage girls with whom he had had relationships texted nude selfies to one another. Despite the facts that sexting like this has become common in our society and that the juvenile and the girls engaged in the same conduct, the prosecution charged the juvenile (but not the girls) with conduct that, if committed by an adult, would amount to sexual exploitation of a child. The juvenile was adjudicated a delinquent, and the majority today upholds his adjudication, forever branding him as a sex offender, notwithstanding the fact that if the same acts were committed today, the juvenile would be subject to nothing more than a civil infraction. *See* § 18-7-109(3), C.R.S. (2018).

¶57 Unlike the majority, I do not believe that the prosecution established that the juvenile committed sexual exploitation of a child. Moreover, I am concerned that the majority's construction of the sexual exploitation statute gives rise to a number of constitutional infirmities.

¶58 Accordingly, I respectfully dissent.

I. Analysis

¶59 The majority has laid out the pertinent facts in this case. Accordingly, I begin by setting forth our standard of review and the applicable rules of statutory construction. I then proceed to discuss why, in my view, the juvenile has not committed sexual exploitation of a child within the meaning of the version of section 18-6-403, C.R.S. (2017), at issue here. I conclude by explaining why I believe the majority's construction of that statute creates constitutional problems.

*1062 A. Standard of Review and Principles of Statutory Construction

¶60 We review issues of statutory interpretation de novo. *Doubleday v. People*, 2016 CO 3, ¶ 19, 364 P.3d 193, 196. In construing a statute, our primary purpose is to ascertain and give effect to the legislature's intent. *Id.* To do so, we look first to the language of the statute, giving its words and phrases their plain and ordinary meanings. *Id.* We read statutory words and phrases in context, and we construe them according to the rules of grammar and common usage. *Id.*

¶61 We must also endeavor to effectuate the purpose of the legislative scheme. In doing so, we read that scheme as a whole, giving consistent, harmonious, and sensible effect to all of its parts, and we must avoid constructions that would render any words or phrases superfluous or lead to illogical or absurd results. *Id.* at ¶ 20, 364 P.3d at 196. If the statute is unambiguous, then we need look no

further. *Id.*

B. Section 18-6-403

¶62 Section 18-6-403(3)(b.5) provides that a person commits sexual exploitation of a child if, as pertinent here, he or she knowingly "[p]ossesses or controls any sexually exploitative material for any purpose."

¶63 "Sexually exploitative material" is defined as "any photograph, motion picture, video, recording or broadcast of moving visual images, print, negative, slide, or other mechanically, electronically, chemically, or digitally reproduced visual material that depicts a child engaged in, participating in, observing, or being used for explicit sexual conduct." § 18-6-403(2)(j).

¶64 "Explicit sexual conduct," in turn, means "sexual intercourse, erotic fondling, erotic nudity, masturbation, sadomasochism, or sexual excitement." § 18-6-403(2)(e).

¶65 And, pertinent here, "erotic nudity" is defined as

> the display of the human male or female genitals or pubic area, the undeveloped or developing genitals or pubic area of the human male or female child, the human breasts, or the undeveloped or developing breast area of the human child, for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved.

§ 18-6-403(2)(d).

¶66 My difference of opinion with the majority principally stems from its definition of the above-quoted phrase, "one or more of the persons involved." Relying on our opinion in *People v. Batchelor*, 800 P.2d 599 (Colo. 1990), the majority opines that the juvenile was a "person involved" within the meaning of the above-quoted definition of "erotic nudity." Maj. op. ¶¶ 49–52. The majority then concludes that substantial and sufficient evidence in the record supported the trial court's conclusion that the photos constituted erotic nudity for purposes of the sexual exploitation statute. *Id.* at ¶ 54. Because in my view the majority's conclusion is inconsistent with *Batchelor* and effectively reads the phrase "of one or more of the persons involved" out of section 18-6-403(2)(d), I respectfully disagree with that conclusion.

¶67 In *Batchelor*, 800 P.2d at 600, the defendant went into his sleeping nine-year-old daughter's bedroom, pulled her panties down, took a photo, and then changed her position and took several more photos. He was charged and convicted of one count of sexual exploitation of a child on the theory that his photographs depicted "erotic nudity" within the meaning of section 18-6-403(2)(d).

¶68 The defendant challenged his conviction, arguing that in order for material to constitute "erotic nudity," the material must depict the person photographed in a condition of real or simulated overt sexual gratification or stimulation. *Id.* at 603. We disagreed. *Id.* As pertinent here, we observed that the statute does not require that the "real or simulated overt sexual gratification or stimulation" be depicted in the material. *Id.* at 604. We further stated that (1) the "involved" person or persons "are not always depicted in the material" and (2) "if the sexual gratification is of a person not in the material, the sexual gratification of that person need not be shown in the material." *Id.* We then concluded, on the facts there before us, that "the overt sexual gratification was of ***1063** [the defendant], *the maker of the photograph*." *Id.* (emphasis added).

¶69 The majority sees no meaningful difference between the defendant's conduct in *Batchelor* and that of a person who verbally instructs a child to assume the same erotic pose and take a nude selfie for the same purpose. Maj. op. ¶ 51. Nor does the majority see a distinction between the defendant's conduct in *Batchelor* and that of a defendant who uses electronic media to solicit or orchestrate such photographs. *Id.* at ¶ 52. The majority thus concludes that substantial and sufficient evidence supported the trial court's conclusion that the photos constituted "erotic nudity" within the meaning of section 18-6-403(2)(d). *Id.* at ¶ 54. For several reasons, I disagree.

¶70 First, no evidence in this case supports the majority's suggestion that the juvenile here verbally instructed the girls involved to assume any particular erotic pose. Nor did he in any way "orchestrate" the photos at issue. The evidence shows that he did no more than request that the girls send him nude selfies.

¶71 Second, although the majority sees no material difference between the defendant's conduct in *Batchelor*

and the juvenile's conduct here, I believe that the actions are distinguishable and that the difference is dispositive.

¶72 In my view, under any definition of "person involved," one who stages and then takes photographs of a child for his or her sexual gratification (i.e., one who is the "maker" of a photograph) is "involved" in the display of the child's body. *See, e.g.*, *Involve*, Webster's Third New International Dictionary (2002) (defining "involve," in pertinent part, to mean "to draw in as a participant").

¶73 In contrast, under any potentially applicable definition of the term "involved," I do not believe that a juvenile who merely asks two girls who are not in his presence to send him nude photographs of themselves can be said to be "involved" in the displays of the girls' bodies. *See id.* In those circumstances, the juvenile did not in any way "make" the depictions, as the defendant did in *Batchelor*. Nor was he a participant in the depictions. And he did not cause the depictions to be made or stage the depictions against the girls' will or without their consent. The girls took and sent the photographs, and no one forced them to do so.

¶74 Finally, the majority's ultimate conclusion that substantial and sufficient evidence supported the juvenile's adjudication here because "the sexually explicit content of the photos and the circumstances surrounding their creation, including [the juvenile's] direct and repeated solicitation of them, demonstrate they were made for the purposes of the juvenile's 'overt sexual gratification,' " maj. op. ¶ 54, indicates that the majority has effectively read the phrase "of one or more of the persons involved" out of section 18-6-403(2)(d).

¶75 Specifically, the majority appears to read that provision to define "erotic nudity" as

> the display of the human male or female genitals or pubic area, the undeveloped or developing genitals or pubic area of the human male or female child, the human breasts, or the undeveloped or developing breast area of the human child, for the purpose of real or simulated overt sexual gratification or stimulation ~~of one or more of the persons involved~~.

or

> the display of the human male or female genitals or pubic area, the undeveloped or developing genitals or pubic area of the human male or female child, the human breasts, or the undeveloped or developing breast area of the human child, for the purpose of real or simulated overt sexual gratification or stimulation of ~~one or more of the persons involved~~ the person who solicited the material.

¶76 We, however, are not at liberty to rewrite a statute, nor may we construe it so as to render any of its terms meaningless. *See Doubleday*, ¶ 20, 364 P.3d at 196; *see also Turbyne v. People*, 151 P.3d 563, 567 (Colo. 2007) ("We do not add words to [a] statute or subtract words from it."). In my view, that is what the majority has done here.

¶77 For these reasons, I would conclude that the juvenile was not a "person involved" ***1064** in the depiction of the girls' bodies here and that therefore the evidence against him was legally insufficient to support his adjudication for sexual exploitation of a child.

C. Constitutional Concerns

¶78 Although my analysis is based on the plain language of the sexual exploitation of a child statute, I feel compelled to note that, unlike the majority's construction, my interpretation of the statute avoids constitutional infirmities. The majority's broad construction, in contrast, implicates overbreadth, vagueness, and equal protection concerns, and I briefly explain why.

¶79 "The overbreadth doctrine addresses the concern that the scope of a law may be so broad that it restricts speech protected by the First Amendment or has a chilling effect on such constitutionally protected speech." *People v. Graves*, 2016 CO 15, ¶ 12, 368 P.3d 317, 322.

¶80 In considering a facial challenge to a statute on the ground that it is overbroad, courts first must determine "whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the

overbreadth challenge must fail." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) (footnote omitted).

¶81 Here, construing section 18-6-403 so broadly as to encompass a teenager's request that another teenager send a nude selfie strikes me as potentially implicating a juvenile's right to free speech. This is particularly true here, where the conduct did not involve any sort of physical manipulation or compulsion but rather encompassed a group of teenagers doing what teenagers often—albeit perhaps foolishly—do, namely, text nude selfies to one other.

¶82 Similarly, I am concerned that the majority's reading of "person involved" is so broad as to render it meaningless, thereby creating a constitutional vagueness problem. A criminal statute is unconstitutionally vague when it "fails to give ordinary people fair notice of the conduct it punishes, or [is] so standardless that it invites arbitrary enforcement." *Johnson v. United States*, ––– U.S. ––––, 135 S. Ct. 2551, 2556, 192 L.Ed.2d 569 (2015). Thus, the vagueness doctrine requires that a criminal statute "be framed with sufficient clarity to alert all who are subject to its sanctions to the nature of the proscribed behavior and to inform them of permissible standards of conduct, that they may conduct themselves accordingly." *People v. Randall*, 711 P.2d 689, 691 (Colo. 1985).

¶83 Here, given the breadth of the majority's construction of the phrase "person involved," I fear that those subject to the statute can no longer know what conduct the statute will now be deemed to cover.

¶84 Finally, I am concerned that the majority's construction of the statute creates equal protection problems. Equal protection concerns are implicated when the prosecution selectively enforces a statute based on a prohibited standard such as race, religion, or some other arbitrary classification. *See Dean v. People*, 2016 CO 14, ¶ 14, 366 P.3d 593, 597. In addition, "[w]here two statutes provide disparate penalties for similar criminal conduct, equal protection guarantees are violated." *People v. Montoya*, 196 Colo. 111, 582 P.2d 673, 675 (1978).

¶85 Here, the juvenile and both of the girls who were involved engaged in the same conduct, yet only the juvenile was charged. For me, this raises the specter of selective enforcement of this statute based on gender. Moreover, I am troubled by the fact that, based solely on timing, a person in the juvenile's position faces either an adjudication that will brand him as a sex offender (and require him to register as such) or simply a civil penalty. To me, this vast difference in consequences presents serious equal protection concerns.

¶86 For these reasons, I would conclude that the prosecution has not established that the juvenile committed sexual exploitation of a child.

II. Conclusion

¶87 I anticipate that when many read or learn of the majority's opinion in this case, they will be surprised by the result. Although to be sure, the proper application of the law ***1065** in a given case can sometimes produce a result that some would deem counterintuitive, I do not believe that this should be such a case. In my view, under the plain language of section 18-6-403, the acts of sexting that occurred here do not constitute sexual exploitation of a child, and the juvenile should not be branded as a sex offender for having participated in such foolish—albeit not uncommon—acts. Moreover, for the reasons discussed above, I believe that the majority's interpretation of the statute creates constitutional infirmities that a proper (and narrower) construction would avoid.

¶88 For these reasons, I would reverse the judgment of the division below, and therefore I respectfully dissent.

I am authorized to state that JUSTICE HART joins in this dissent.

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Editor's Note: Additions are indicated by Text and deletions by ~~Text~~.

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Colorado Court of Appeals,
Div. VI.

The PEOPLE of the State of Colorado,
Plaintiff–Appellee,
IN the INTEREST OF T.B., Juvenile–Appellant.

Court of Appeals No. 14CA1142
|
Announced October 20, 2016
|
As Modified on Denial of Rehearing December 29, 2016

Synopsis

Background: Juvenile was adjudicated delinquent in the District Court, La Plata County, Jeffrey R. Wilson, J., on two counts of sexual exploitation of child. Juvenile appealed.

Holdings: The Court of Appeals, Richman, J., held that:

juvenile's unpreserved claim that sexual exploitation of child did not apply to nude photographs sent by text messages between juvenile and two girls over age of 14 was subject to de novo review of sufficiency of evidence;

juvenile knew that he possessed nude photographs of girls on his cell phone, as required to support adjudication of delinquency;

nude images qualified as "erotic nudity," as required to support adjudication of delinquency;

sexual exploitation of child did not require proof that nude images depicted acts of sexual abuse;

sexual exploitation of child statute did not exempt "teen sexting" from its reach;

juvenile did not have statutory right to jury trial on charges for sexual exploitation of child, following severance of counts for being aggravated juvenile offender;

prosecution for sexual exploitation of child was not motivated by discriminatory intent, in violation of equal protection; and

fact that juvenile was Caucasian male did not necessarily preclude violation of equal protection based on selective prosecution on basis of gender.

Affirmed.

Bernard, J., specially concurred, with opinion.

Fox, J., filed dissenting opinion.

La Plata County District Court No. 13JD15, Honorable Jeffrey R. Wilson, Judge

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Opinion

Opinion by JUDGE RICHMAN

***1** ¶ 1 Two teenage girls alleged that a teenage boy, the juvenile T.B., had raped them. During the investigation into those allegations, the police discovered that the juvenile had used his cell phone to solicit, to receive, and to store nude photographs of teenage girls. The police identified and confirmed the ages of two of the girls depicted in the photographs, E.H. and L.B.

¶ 2 The prosecution filed a delinquency petition that charged the juvenile with sexual assault, kidnapping, third degree assault, aggravated juvenile offender, and, based on the photographs of E.H. and L.B., two counts of sexual exploitation of a child.

¶ 3 The trial court granted the juvenile's request to sever the two sexual exploitation counts from the rest of the counts. A jury acquitted him of the sexual assault, kidnapping, third degree assault, and aggravated juvenile offender counts.

¶ 4 The court then presided over a bench trial on the sexual exploitation of a child counts. At the trial's end, the court found that the prosecution had proved, beyond a reasonable doubt, that the juvenile had committed two counts of sexual exploitation of a child, adjudicated the juvenile delinquent, sentenced him to two concurrent two-year terms of sex offender probation, and required him to register as a sex offender.

¶ 5 The juvenile appeals the court's decision to adjudicate him delinquent. We affirm.

I. Background

¶ 6 The juvenile met E.H. and L.B. at a Future Farmers of America conference in September 2012. The juvenile and L.B. were then fifteen years old, and E.H. was seventeen years old. After the conference, the juvenile stayed in touch with both girls by telephone and text messaging because they lived in different towns.

A. E.H.

¶ 7 E.H. testified during the trial that, in the fall of 2012, the juvenile had texted her photographs of his erect penis. When E.H. received them, "[she] deleted them" because she "didn't want to keep those on [her] phone."

¶ 8 The juvenile repeatedly asked her to send him nude photographs of herself. She said that "[t]he first time [she] told him no. Then after that [she] was like well, maybe after a while, and then just kind of like getting him off [her] case, and then finally [she] just gave in."

¶ 9 She sent him three nude photographs of herself. The police later recovered these photographs from his cell phone. The prosecution introduced them to the court during the bench trial.

¶ 10 E.H. added that the juvenile said that she "look[ed] good" in these photographs. He asked for more. She declined. When her mother later found out about these photographs, E.H. "was very ashamed of [herself]" and "it really crushed [E.H.] morally" because E.H. had "always tried to be the best person [that she could] be."

B. L.B.

¶ 11 L.B. testified at trial that, in the spring of 2013, the juvenile had texted her a photo of his erect penis. He proceeded to send her a series of texts asking her to send him nude pictures of herself. She eventually texted him a photograph that showed her topless. The police recovered this photograph from the juvenile's cell phone, and the prosecution introduced it to the court.

II. Sufficiency of the Evidence

¶ 12 ***2** The juvenile asserts that, for two reasons, the evidence is insufficient to support his adjudication for sexual exploitation of a child. First, he submits that the evidence did not show that the photographs of E.H. and L.B. depicted "erotic nudity," which is a necessary component of the crime of sexual exploitation of a child. Second, he contends that the statute prohibiting sexual exploitation of a child does not forbid one teenager from possessing a nude photograph of another teenager as long as both teenagers are over the age of fourteen. We disagree with both contentions.

A. Standard of Review

¶ 13 The juvenile asserted at trial that (1) nude photos do not meet the erotic nudity definition necessary to prove sexual exploitation of a child; and (2) the chain of custody was insufficient to show that the juvenile knew that he possessed the nude photographs of E.H. and L.B. on his cell phone. So, he expressly preserved his first sufficiency of the evidence contention—that under the sexual exploitation statute the photographs of E.H. and L.B. did not depict erotic nudity.

¶ 14 But the juvenile did not argue to the trial court that the sexual exploitation statute did not apply at all to defendant's conduct in this case. Thus, his second argument was not expressly preserved.

¶ 15 The juvenile and the prosecution disagree about what standard of review should apply to the juvenile's second, unpreserved, sufficiency of the evidence contention.

¶ 16 The prosecution argues that we should review this unpreserved assertion only for plain error. *See People v. McCoy*, 2015 COA 76M, ¶ 70, ––P.3d ––––, 2015 WL 3776920 (Webb, J., specially concurring) (*cert. granted* October 3, 2016); *People v. Lacallo*, 2014 COA 78, ¶¶ 12, 30–31, 338 P.3d 442.

¶ 17 The juvenile asserts that we should apply "de novo" review. *See Dempsey v. People*, 117 P.3d 800, 807 (Colo. 2005) (whether the record contains sufficient evidence to support conviction is reviewed de novo); *People v. Mantos*, 250 P.3d 586, 589 (Colo. App. 2009) (meaning of statute is a question of law subject to de novo review). But the term "de novo" describes the standard by which we determine whether an error occurred, and does not describe the test we apply to determine whether an error requires reversal. Even if plain error review applies, we determine whether an error occurred by applying the de novo review per *Dempsey*. What the juvenile apparently means by the use of this term is that if we conclude that the evidence is insufficient we must vacate the conviction, and no retrial occurs, in effect a form of "structural error." *See McCoy*, ¶ 30.

¶ 18 We recognize that there is disagreement on this court about which of these standards of review should apply in these circumstances. *See McCoy*, ¶ 68 (Webb, J., specially concurring) (citing cases showing disagreement). We are persuaded by the majority's reasoning in *McCoy*, ¶¶ 5–36, and the reasoning of the special concurrences in *Lacallo*, ¶¶ 59–73 (Román, J., concurring in part and dissenting in part), and *People v. Rediger*, 2015 COA 26, ¶ 67, ––P.3d ––––, 2015 WL 1090041 (Richman, J., specially concurring) (*cert. granted* Feb. 16, 2016), so we shall apply that reasoning in this case. *See People v. White*, 179 P.3d 58, 60–61 (Colo. App. 2007) (one division of the court of appeals is not obligated to follow the decision of another).

***3** ¶ 19 We review both contentions challenging the sufficiency of the evidence in accord with the standards set forth in *Dempsey*, 117 P.3d at 807, to determine whether the court erred. In doing so, we consider whether the relevant evidence, both direct and circumstantial, when viewed as a whole and in the light most favorable to the prosecution, was substantial and sufficient to support a conclusion by a reasonable mind that the defendant was guilty of the charge beyond a reasonable doubt. *People v. Wentling*, 2015 COA 172, ¶ 8, –– P.3d ––––, 2015 WL 7769017; *see also Clark v. People*, 232 P.3d 1287, 1291 (Colo. 2010). If we decide the court erred, we will not consider whether the error was obvious, or whether the error cast serious doubt on the reliability of the judgment of conviction. *Cf. Rediger*, ¶ 11.

B. The Sexual Exploitation of a Child Statute

¶ 20 The sexual exploitation of a child statute states, as relevant here, that

> (3) A person commits sexual exploitation of a child if, for any purpose, he or she knowingly:
>
> ...
>
> (b.5) Possesses or controls any sexually exploitative material for any purpose....

§ 18–6–403(3)(b.5), C.R.S. 2016.

¶ 21 " 'Sexually exploitative material' means any photograph ... that depicts a child engaged in, participating in, observing, or being used for explicit sexual conduct." § 18–6–403(2)(j). In this context, a child is "a person who is less than eighteen years of age." § 18–6–403(2)(a).

¶ 22 For the purposes of our analysis, the statutory definition of "explicit sexual conduct" includes "erotic nudity." § 18–6–403(2)(e).

> "Erotic nudity" means the display of the human male or female genitals or pubic area, the undeveloped or developing genitals or pubic area of the human male or female child, the human breasts, or the undeveloped or developing breast area of the human child, for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved.

§ 18–6–403(2)(d).

C. Trial Court Findings

¶ 23 When the trial court adjudicated the juvenile delinquent at the end of the bench trial, it made a series of factual findings:

- E.H. and L.B. were less than eighteen years old when they took the photographs of themselves and texted them to the juvenile.
- The juvenile knew that E.H. and L.B. were under eighteen years old.
- The juvenile knew that he had received the nude photographs; indeed, he had complimented one of the girls on her appearance.
- The juvenile possessed the nude photographs because they were on his cell phone when the police examined it.
- There was an adequate chain of custody between the police seizure of the cell phone and the copies of the photographs of the girls that the prosecution introduced as evidence partially because, during trial, the girls had identified the copies as being the photographs that they had texted to the juvenile.
- The juvenile repeatedly asked E.H. and L.B. for nude photographs after he had sent them photographs of his erect penis. The nude photographs of the girls were therefore erotic nudity.
- The juvenile was guilty, beyond a reasonable doubt, of both counts of sexual exploitation of a child.

D. The First Sufficiency of the Evidence Contention

¶ 24 We first address the juvenile's contention that the evidence was insufficient to prove that he knew that he possessed photographs depicting erotic nudity. We review the evidence de novo in the light most favorable to the prosecution, and, after doing so, we conclude that the evidence was sufficient. *See Clark*, 232 P.3d at 1291; *Dempsey*, 117 P.3d at 807.

1. Chain of Custody

¶ 25 The juvenile first contends that the chain of custody linking his cell phone and the photographs of E.H. and L.B. admitted at trial was insufficient. He argues the chain of custody was insufficient because it did not show that the photographs were accurate copies of the photographs that were on the juvenile's telephone. We are not persuaded.

***4** ¶ 26 E.H. and L.B. identified the trial photographs as copies of the ones that they had taken of themselves and that they had texted to the juvenile, using his cell phone number. E.H. also testified that the juvenile had complimented her on her photographs.

¶ 27 The evidence showed that the police had searched the juvenile's cell phone. They had found the photographs of E.H. and L.B., nude photographs of other girls, and photographs of the juvenile's erect penis. A digital forensic officer testified that the data in the juvenile's cell phone had not been tampered with and that the photographs from E.H. and L.B. had been opened and viewed.

¶ 28 Any purported deficiencies in the chain of custody, such as a lack of clarity about which police officer had made the copies of the photographs from the juvenile's cell phone, went to the weight that the trial court gave the photographs, not to their admissibility. *See People v. Moltrer*, 893 P.2d 1331, 1335 (Colo. App. 1994).

¶ 29 We conclude that this evidence established, beyond a reasonable doubt, that (1) the photographs the prosecution introduced during the bench trial were the nude photographs that E.H. and L.B. had texted to the juvenile; and (2) the defendant knew what these photographs showed and who sent them. In other words, we conclude that there was sufficient evidence to prove that the juvenile knowingly possessed the nude photographs of E.H. and L.B.

2. Erotic Nudity

¶ 30 The juvenile asserts that the photographs did not contain erotic nudity because E.H. and L.B. did not take them for their own sexual satisfaction. This contention assumes that the reference to "persons involved" in the definition of erotic nudity necessarily means the people who are displayed in the photograph. We disagree.

¶ 31 A photograph qualifies as "erotic nudity" if it meets two conditions. First, as relevant here, the photograph must depict the female genitals, pubic area, or breasts of a child. § 18–6–403(2)(d); *People v. Gagnon*, 997 P.2d 1278, 1281–82 (Colo. App. 1999). Second, the depiction in the photograph must be for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved. § 18–6–403(2)(d); *Gagnon*, 997 P.2d at 1281–82.

¶ 32 The juvenile does not dispute that the photographs met the first condition, so we turn to the second. When analyzing the second condition, we consider whether (1) the focal point of the visual depiction was on the child's breasts, genitals, or pubic area; (2) the setting of the visual depiction was sexually suggestive, such as in a place or pose generally associated with sexual activity; (3) the child was depicted in an unnatural pose, or in inappropriate attire, considering the child's age; (4) the child was fully or partially clothed, or nude; (5) the visual depiction suggested sexual coyness or a willingness to engage in sexual activity; and (6) the visual depiction appeared to be intended or designed to elicit a sexual response in the viewer. *Gagnon*, 997 P.2d at 1282.

¶ 33 The focal points of the photographs in this case were the nude breasts of E.H. and L.B. and E.H.'s pubic area. There was sufficient evidence to support the conclusion that the girls' poses were unnatural and suggestive: in one photograph, E.H. was standing in front of a mirror when she took a photograph of her nude body reflected in the mirror; in another photograph, L.B.'s shirt is pulled down below her breasts, exposing them. The photographs suggested a sexual coyness. And they appeared to be intended and designed to elicit a sexual response from the juvenile. Some of the text messages between the juvenile and L.B. further confirm the conclusion that the juvenile requested pictures of her for the purposes of sexual gratification and arousal.

***5** ¶ 34 Our supreme court has rejected the juvenile's contention that the focus of the "overt sexual gratification" component of the definition of erotic nudity could only be the persons depicted in the photographs. Rather, "[t]he person (or persons) 'involved' are not always depicted in the material" and "the sexual gratification of that person need not be shown in the material." *People v. Batchelor*, 800 P.2d 599, 604 (Colo. 1990). In other words, "if the sexual gratification is of a person not in the material, the sexual gratification of that person need not be shown in the material." *Id.* So, following the supreme court's reasoning, we conclude that, in this case, "the overt sexual gratification was of" the juvenile, who repeatedly asked the girls for the photographs after sending them a picture of his erect penis. *Id.*

¶ 35 We also disagree with the juvenile's attempt to distinguish *Batchelor* by pointing out that the defendant in that case was an adult. The age of the defendant was not a factor in the analysis of whether the sexual gratification element was met.

E. The Second Sufficiency of the Evidence Contention

¶ 36 The juvenile asserts for the first time on appeal that nude photographs taken by teenagers of themselves with no adult involvement cannot constitute "sexually exploitative materials" because they do not record any act of sexual abuse of a child. He further asserts that such photos are a constitutionally protected form of speech because they express the teenager's sexuality to the extent that they are neither obscene nor the product of sexual abuse. Finally, he suggests that "teen sexting" should only be prosecuted under a different statute, and that statute was not violated in this case.

1. Sexual Abuse of a Child

¶ 37 The juvenile argues that application of the statute to his conduct is limited to "sexually exploitative materials" that record "sexual abuse of a child." He imports this limitation from the legislative declaration to the statute, which states: "The general assembly further finds and declares that the mere possession or control of any sexually exploitative material results in continuing victimization of our children by the fact that such material is a permanent record of an act or acts of *sexual abuse of a child*...." § 18–6–403(1.5) (emphasis added). According to the juvenile, teenagers who photograph their own bodies do not sexually abuse themselves, nor do they create a permanent record of any such abuse. Thus, he

argues the evidence in this case was insufficient to support a conviction. We reject his argument for several reasons.

¶ 38 First, the plain language of the statute does not contain the phrase "sexual abuse" in its definitions of "sexually exploitative material," "explicit sexual conduct," or "erotic nudity." *See* § 18–6–403(2)(d), (e), (j). Because the statutory language is clear and unambiguous, we apply the statute as written and need not engage in further statutory analysis as urged by the juvenile. *See Bostelman v. People*, 162 P.3d 686, 689 (Colo. 2007); *People v. Vecellio*, 2012 COA 40, ¶ 14, 292 P.3d 1004.

¶ 39 When a statute is ambiguous courts may consider the legislative declaration or purpose. § 2–4–203, C.R.S. 2016. For example, in *People v. Renander*, 151 P.3d 657 (Colo. App. 2006), this court considered the legislative declaration at issue here to determine whether each offending image could be a separate chargeable offense. *Id.* at 661–62. But it did so only after finding ambiguity in the term "any." *Id.*

¶ 40 When a statute is unambiguous, courts generally apply the plain and ordinary meaning of terms without examining the legislative declaration. *See Bostelman*, 162 P.3d at 690; *Stamp v. Vail Corp.*, 172 P.3d 437, 442–43 (Colo. 2007).

¶ 41 In this case, because the statute is unambiguous, we do not consider the legislative declaration. As set forth above, the contested provisions are clear. The statute defines "sexually exploitative material" as a series of visual materials that "depict[ ] a child engaged in, participating in, observing, or being used for explicit sexual conduct." § 18–6–403(2)(j). It then defines the term "explicit sexual conduct" to include, among other things, erotic nudity. § 18–6–403(2)(e). It further defines "erotic nudity." § 18–6–403(2)(d). Because none of these definitions is ambiguous, we apply their plain and ordinary meanings. *Turbyne v. People*, 151 P.3d 563, 567 (Colo. 2007) (If the statutory language is clear, we apply the plain meaning and we do not add words to the statute.). The plain and ordinary meaning of "sexually exploitative material" does not require depictions of sexual abuse of a child. None of the definitions contains such a requirement. The legislative declaration cannot replace or amend the clear definitions of terms.

***6** ¶ 42 Second, even if we did consider the legislative declaration, the outcome remains the same because the legislative declaration cannot override a statute's elements. "To effectuate the intent of the legislature, a statute must be read and considered as a whole and should be interpreted so as to give consistent, harmonious, and sensible effect to all of its parts." *Stamp*, 172 P.3d at 444. The juvenile's edit to the language would immunize behavior otherwise criminalized under the statute. This is not consistency and harmony; it is conflict. Such emendation also risks undermining the legislative intent by excluding images deemed harmful to children. The juvenile's proposed revision also adds confusion by introducing the new undefined term of "sexual abuse of a child."

¶ 43 On this point, *People v. Enea*, 665 P.2d 1026 (Colo. 1983), is instructive. There, the supreme court rejected an attempt, like the juvenile's here, to add an element to the sexual exploitation of a child statute based on language in the legislative declaration. *Id.* at 1028–29. Though involving an earlier version of the declaration and a different provision of the statute, the supreme court's holding is equally true here: "paragraph (1) is a statement of legislative purpose. The prefatory language does not alter the elements of the crime, which are set forth in paragraph (3)." *Id.* at 1029. Similarly, here the "prefatory language" cannot alter the elements outlined in paragraph (3)(b.5) or definitions in paragraphs 2(d), (e), and (j).

¶ 44 We thus reject the juvenile's effort to import a sexual abuse of a child component into the statutory elements.

2. Constitutionally Protected Speech

¶ 45 On appeal, the juvenile further argues that nude photographs taken by teenagers of themselves are constitutionally protected speech to the extent they are neither obscene nor the product of sexual abuse. He argues that unless the statute is interpreted as he suggests, it is unconstitutional as applied to him. We conclude this argument is not properly before this court. He did not challenge the constitutionality of the statute as applied to him before the trial court. We will not assess constitutionality for the first time on appeal. *O'Quinn v. Baca*, 250 P.3d 629, 630 (Colo. App. 2010); *see also People v. Greer*, 262 P.3d 920, 936 (Colo. App. 2011) (J. Jones, J. concurring).

3. Teen Sexting

¶ 46 The juvenile also asserts a broader argument that the sexual exploitation of a child statute does not cover "teen sexting." This term refers to teenagers sending sexually explicit messages or images to one another by cell phone.

¶ 47 First, the juvenile uses the legislative declaration to argue the statute targets only adult conduct. He contends there is a meaningful difference between adult pedophiles possessing child pornography and teenagers with nude photos of their boyfriends or girlfriends. We disagree. The language of the statute covers proscribed behavior committed by teenagers involving images of other teenagers.

¶ 48 Under the statute's plain meaning, the perpetrator's age is irrelevant. Notwithstanding the dissent's valid contention that juveniles do not possess the emotional capabilities of adults, the statute does not exempt teenagers. Indeed, the Colorado criminal code contains no general exception for the criminal responsibility of teenagers. True, the Colorado juvenile code has special procedural and sentencing rules for teenagers accused of criminal misconduct. *See* §§ 19–2–104, –512, –517, –907, –908, C.R.S. 2016. But, even so, it does not immunize teenagers from responsibility, or alter the elements of crimes when committed by teenagers. In short, when it comes to responsibility, teenagers are not a protected class. Absent specific language in the statute, if a teenager's behavior satisfies the elements, a teenager is just as responsible as an adult.

***7** ¶ 49 In addition to covering perpetrators who are teenagers, the statute also specifically addresses images of teenagers. "Sexually exploitative material" includes visual material depicting a child in certain circumstances. § 18–6–403(2)(j) & (3)(b.5). A child is a person under the age of eighteen. § 18–6–403(2)(a). Most teenagers fall within the statute's definition of "child."[1] Nothing in the statute distinguishes a person possessing or controlling the visual material and the child depicted. Second, the juvenile makes a more nuanced argument that the legislature intended to carve out protection for the specific behavior of teen sexting. He relies on the legislative history and text of a different statute—the Internet child exploitation statute—which outlaws "importun[ing], invit[ing], or entic[ing]" certain conduct through, among other means, text messaging if "the actor knows or believes [the victim] to be under fifteen years of age and at least four years younger than the actor." § 18–3–405.4(1), C.R.S. 2016. The juvenile also notes that in 2009 the legislature amended both the Internet child exploitation statute and the sexual exploitation of a child statute.

[1] Although the headers in the juvenile's briefs argue the statute does not criminalize "nude 'selfies' exchanged between teenagers older than fourteen," the juvenile never articulates a reason behind this age cutoff. Our analysis does not turn on the earliest age of a teenager.

¶ 50 These are two different criminal statutes, and we do not read the applicability of one to exclude the applicability of the other. They ban different behavior, have different punishments, and address different harms. *Compare* § 18–6–403(3)(b.5), *with* § 18–3–405.4. Behavior may violate one, both, or neither of these statutes. Generally, "[i]t is up to the prosecutor to determine which crimes to charge when a person's conduct arguably violates more than one statute." *People v. Clanton*, 2015 COA 8, ¶10, 361 P.3d 1056. A different statute's legislative history does not affect our interpretation of the child exploitation statute. If anything, it is telling that the legislature did not amend the sexual exploitation of a child statute to mirror the age-focused language of the Internet child exploitation statute.

¶ 51 Although the issue of teen sexting may be a growing matter of public concern, whether it should be illegal and, if so, under what circumstances is a policy decision for the General Assembly. By affirming this conviction we do not mean to encourage prosecution of such offenses, and we urge prosecutors to continue to use discretion as to such cases. But, the sexual exploitation of a child act criminalizes teen sexting when it meets the enumerated elements of the statute. These elements are clear and unambiguous. Although the consequences for a convicted teenager may be substantial, as pointed out in the dissent, when the evidence satisfies the elements of the statute, we must apply the statute as written.

¶ 52 Accordingly, we conclude that sufficient evidence exists to support the sexual exploitation convictions. The evidence introduced at trial is sufficient to support the convictions, and the juvenile's statutory interpretation arguments are misplaced.

III. Right to a Jury Trial

¶ 53 The juvenile further contends that the court erroneously denied his statutory right to a jury trial on the sexual exploitation of a child counts after it severed them from the sexual assault, kidnapping, third degree assault,

and aggravated juvenile offender counts. He asserts that the court's decision to sever the counts deprived him of his statutory right to a jury trial, and, alternatively, that the court abused its discretion when it denied his request for a jury trial. We disagree.

A. Law

¶ 54 As is pertinent to our analysis, section 19–2–107(1), C.R.S. 2016, states:

> In any action in delinquency in which a juvenile is alleged to be an aggravated juvenile offender ... the juvenile or the district attorney may demand a trial by a jury of not more than six persons except as provided in section 19–2–601(3)(a), or the court, on its own motion, may order such a jury to try any case brought under this title....

B. Effect of Severance

***8** ¶ 55 The juvenile asserts that the trial court's decision to sever the counts in this case from the sexual assault, kidnapping, third degree assault, and aggravated juvenile offender counts deprived him of his statutory right to a jury trial on the sexual exploitation counts. Focusing on the word "action," he asserts that all the counts together constituted one action. He therefore adds that he was entitled to a jury trial under section 19–2–107(1). We disagree.

¶ 56 The juvenile took a different position in the trial court. In his motion for a jury trial on the sexual exploitation of a child counts, he stated that the severed sexual exploitation counts constituted "an action":

> While *the action* against [the juvenile] does not allege either that he is an aggravated juvenile offender or that he has committed a crime of violence for these counts, the significance of the fact that the General Assembly granted the Court discretion, to order a large number of delinquency cases to be tried to a jury, cannot be overemphasized.

(Emphasis added.)

¶ 57 We therefore conclude that the juvenile waived the contention that he now raises on appeal. *See People v. Geisick*, 2016 COA 113, ¶ 16, —– P.3d ——–, 2016 WL 4408900 (holding when a party removes an issue from a court's consideration, the party has waived the issue and we may not review it on appeal).

C. Abuse of Discretion

¶ 58 The juvenile also asserts that the trial court abused its discretion when it denied his request for a jury trial. We are not persuaded.

¶ 59 Section 19–2–107(1) provides juveniles with a statutory right to a jury trial in certain circumstances, and it allows courts—in their discretion—to empanel a jury in delinquency proceedings involving felony offenses. *People in Interest of A.B.–B.*, 215 P.3d 1205, 1207 (Colo. App. 2009).

¶ 60 We review a court's ruling on a juvenile's request for a jury trial in a delinquency proceeding for an abuse of discretion. *Id.* "Discretionary decisions will not be disturbed unless the court's action was manifestly arbitrary, unreasonable, or unfair." *Id.* at 1209 (citation omitted). Under the abuse of discretion standard, the test is not "whether we would have reached a different result but, rather, whether the trial court's decision fell within a range of reasonable options." *People v. Rhea*, 2014 COA 60, ¶ 58, 349 P.3d 280 (citation omitted).

¶ 61 The trial court denied the juvenile's motion for a jury trial without making any factual findings. We nonetheless conclude that the court did not abuse its discretion when it denied the motion because its decision fell within a range

of reasonable options. *See id.*

¶ 62 Unlike the aggravated juvenile offender count, which a jury resolved, the juvenile did not have a statutory right to a jury trial on the sexual exploitation of a child counts. So, although the court did not grant the juvenile the additional discretionary benefit of a jury trial, it did not deprive him of any rights when it denied his request.

¶ 63 As the division observed in *People in Interest of A.B.–B.*, 215 P.3d at 1209, "[i]t is true that, following trial, A.B.–B. was required to register as a sex offender and he may suffer social stigma because of this adjudication." But the division added that such consequences were "little different from those associated with many prosecutions for abuses of young children." *Id.* at 1210. Thus, the division ultimately concluded that, despite these serious consequences, the trial court did not abuse its discretion when it denied A.B.–B.'s request for a jury trial. We think that the same reasoning applies to this case.

IV. Selective Prosecution

***9** ¶ 64 The juvenile asserts that the trial court should have granted his motion to dismiss the sexual exploitation of a child charges because the prosecutor selectively prosecuted him. He asserts that the prosecutor charged him because he was male. He asks that, at a minimum, we remand the case to the trial court for further proceedings on this issue. We disagree.

A. Law

¶ 65 A prosecutor has "wide discretion in determining who[m] to prosecute for criminal activity and on what charge." *People v. Kurz*, 847 P.2d 194, 196 (Colo. App. 1992) (citing *People v. MacFarland*, 189 Colo. 363, 540 P.2d 1073 (1975)); *see also* Colo. Const. art. VI, § 13. "In the ordinary case, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *United States v. Armstrong*, 517 U.S. 456, 464, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996) (citation omitted).

¶ 66 However, equal protection requires that a decision to prosecute not be based on "an unjustifiable standard such as race, religion, or other arbitrary classification." *Id.* at 464–65, 116 S.Ct. 1480 (citation omitted); *see also People v. Gallegos*, 226 P.3d 1112, 1117 (Colo. App. 2009). "A selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." *Armstrong*, 517 U.S. at 463, 116 S.Ct. 1480.

¶ 67 The fact that some people escaped prosecution under a statute is not a denial of equal protection unless the prosecutor's selective enforcement of the statute was intentional or purposeful. *Kurz*, 847 P.2d at 196–97. A defendant must show that the alleged selective prosecution had a discriminatory effect and that it was motivated by a discriminatory purpose. *Id.* at 197. "In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present clear evidence to the contrary." *Armstrong*, 517 U.S. at 465, 116 S.Ct. 1480 (citation omitted).

B. Standard of Review

¶ 68 The parties disagree about what standard of review we should use to resolve the juvenile's selective prosecution contention. Citing *People v. Voth*, 2013 CO 61, ¶ 15, 312 P.3d 144, and *People v. Garcia*, 169 P.3d 223, 226 (Colo. App. 2007), the juvenile contends that we should review the trial court's decision for abuse of discretion because ruling on a motion to dismiss is within the trial court's discretion.

¶ 69 The prosecution responds that we should follow the majority of federal appellate courts that review such claims under the "clearly erroneous standard." *See, e.g.*, *United States v. Brantley*, 803 F.3d 1265, 1270 (11th Cir. 2015) (applying the clearly erroneous standard for factual findings and de novo standard for legal conclusions); *United States v. Taylor*, 686 F.3d 182, 197 (3d Cir. 2012) (same).

¶ 70 We do not need to resolve this disagreement because we conclude that, even if we apply an abuse of discretion standard to the trial court's decision, the court's decision to deny the juvenile's motion was not manifestly arbitrary, unreasonable, or unfair. *See People v. Rath*, 44 P.3d 1033, 1043 (Colo. 2002). And we reach that

conclusion because the trial court found, based on facts in the record, that the prosecution was not motivated by discriminatory intent when it prosecuted the juvenile for the two counts of sexual exploitation of a child.

C. Procedural History

***10** ¶ 71 After the jury acquitted the juvenile of the first four counts, he filed a motion to dismiss the sexual exploitation of a child counts. He alleged that the prosecution was selectively prosecuting him because he was male. During a hearing on the motion, the prosecutor stated:

> I want to be perfectly clear. The reason [the juvenile] is being prosecuted for these sexually [exploitative] images charges is because of the other underlying charges with which he's facing. He's alleged to have sexually assaulted—and is currently charged here and in New Mexico with sexually assaulting two of his classmates, and we have a [Rule] 404(b) witness, his half-sister, who is also making allegations that she was sexually assaulted, and this is why we have selected [the juvenile] for this particular prosecution.
>
> [Defense counsel is] correct, we do not prosecute most teenagers for possessing and distributing sexually [exploitative] images because there are a lot of kids out there making incredibly stupid decisions to take pictures of their genitalia and send them to each other. This is a—probably a larger number of people than anybody in the community cares to know about.
>
> So as a policy, no, we typically do not prosecute those cases based upon the sort of short sighted and ignorant decisions that teenagers can make. However, when people that are in [the juvenile's] situation find themselves also, as the [prosecution is] alleging, sexually assaulting his classmates, in addition to possessing these images, yes, we do think that's worth prosecution and that's why we did it.

¶ 72 After the parties and the court discussed another case brought against a juvenile male within that jurisdiction on similar charges, defense counsel stated that the prosecution had added the charges in this case because the juvenile had refused to enter a guilty plea concerning the sexual assault, kidnapping, third degree assault, and aggravated juvenile offender counts. The prosecutor responded that

> [o]ne, with respect to us filing it after the initial charges, I want to refresh everyone's recollection here, that [the prosecution was] making everybody aware that these were possible charges that we were continuing to investigate at the beginning of this case and that we may upon the conclusion of that investigation add those charges. So I guess I sort of want to set it straight that it wasn't while we're going to plead not guilty and these charges get added, but I want to go back to the fact that we have been discussing these charges from the outset.
>
> The vindictive prosecution, which was not alleged in their motion but is apparently being alleged now based upon our response, those charges go directly to what it is he's being charged with. He's being charged with sexual assault. These are sexually related charges with other teenage girls and they're being brought because we think [the juvenile's] behavior is dangerous and not for any vindictive purpose.

¶ 73 The court then denied the juvenile's selective prosecution motion. It stated:

> The case law is pretty clear that in order for there to be a problem or a constitutional problem with selective prosecution, that selective prosecution has to be based upon an unjustifiable standard such as race, religion or other arbitrary classification, it has to have a discriminatory effect, motivated by a discriminatory purpose....
>
> ***11** In this case, it's pretty clear that [the juvenile] is not [a member of a] suspect classification, [the juvenile is] a young white male, so I don't see that being a discriminatory purpose. The [prosecutor] has explained that [the juvenile] got charged with this because of the other charges he is facing, and I do remember somewhat, I assume it's [a particular prosecutor], but I do remember someone talking about the potential additional charges being filed. So at this time I'm going to deny that motion and not dismiss the case because of selective prosecution.

D. Analysis

¶ 74 The juvenile first asserts that the trial court erred when it stated that he could not be a victim of selective prosecution because he was a white male. We agree that this is a misstatement of the law. *See, e.g.*, *United States*

v. Diaz, 961 F.2d 1417, 1420 (9th Cir. 1992) ("[C]ourts ... have the authority to inquire into charging ... decisions to determine whether the prosecutor is abusing her awesome power to favor or disfavor groups defined by their *gender*, race, religion or similar characteristics." (quoting *United States v. Redondo–Lemos*, 955 F.2d 1296, 1301 (9th Cir. 1992))) (emphasis added); *cf. Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998) ("Title VII's prohibition of discrimination 'because of ... sex' protects men as well as women.") (citation omitted); *People v. Gandy*, 878 P.2d 68, 70 (Colo. App. 1994) (gender discrimination claim based on removal of male jurors was cognizable).

¶ 75 But, although the trial court made this legal mistake, we nonetheless conclude that the court did not err when it denied the juvenile's selective prosecution motion because it made factual findings that are supported by the record. The court found that (1) the prosecutor decided to add the sexual exploitation of a child counts because of the other, more serious charges that the juvenile faced; and (2) a prosecutor gave notice to the court and to the juvenile about the prospect of adding these counts as the investigation unfolded, which eventually led the police to E.H. and L.B. We conclude that the record supports these findings. *See People v. Gallegos*, 251 P.3d 1056, 1062 (Colo. 2011).

¶ 76 In other words, the trial court found that the juvenile had not established that the prosecution had acted with an impermissible discriminatory purpose. *See Kurz*, 847 P.2d at 197. And we add that our review of the record has not turned up any "clear evidence" to the contrary. *See Armstrong*, 517 U.S. at 465, 116 S.Ct. 1480.

V. Conclusion

¶ 77 The delinquency adjudication is affirmed.

JUDGE BERNARD specially concurs.

JUDGE FOX dissents.

JUDGE BERNARD, specially concurring.

¶ 78 I respectfully disagree with the majority's analysis of the second, unpreserved sufficiency-of-the-evidence contention in Parts II.A and II.E of the majority opinion. I therefore specially concur with those parts of the opinion. I concur without reservation in the rest of it.

¶ 79 I am persuaded by the majority's reasoning in *People v. Lacallo*, 2014 COA 78, ¶¶ 12, 30–31, 338 P.3d 442, the majority's reasoning in *People v. Rediger*, 2015 COA 26, ¶¶ 10–14, and the reasoning of the special concurrence in *People v. McCoy*, 2015 COA 76M, ¶ 70 (Webb, J., specially concurring). So I would apply that reasoning in this case. As a result, I would review the juvenile's second sufficiency-of-the-evidence claim for plain error.

¶ 80 Plain error review involves three questions: whether there was an error; if so, whether it was obvious; and, if so, whether the error cast serious doubt on the reliability of the judgment of conviction. *Rediger*, ¶ 11. "Where analyzing the evidence requires the preliminary interpretation of a statute" that the defendant did not raise in the trial court and that no Colorado court has decided, "the initial focus is on obviousness." *Id.* at ¶ 12. In this context, we do not address the merits of a sufficiency-of-the-evidence claim if (1) it would have been difficult to figure out the meaning of "operative statutory terms" under existing Colorado law, *id.*; or (2) the contention concerning those statutory terms did not "implicate a 'well-settled legal principle that numerous courts elsewhere have uniformly embraced,' " *id.* (quoting *Lacallo*, ¶ 31). But, even if other courts have not consistently resolved the statutory interpretation question in a particular way, a sufficiency-of-the-evidence error is nonetheless obvious if the statute is unambiguous and its terms have common and ordinary meanings. *Id.* at ¶ 13. And, if the error is obvious, we must review the sufficiency of the evidence claim de novo. *Id.*

***12** ¶ 81 To summarize, plain error analysis in the sufficiency-of-the-evidence context will only reach a different result than de novo review if three things happen: we have to interpret a statute before we move on to analyzing the evidence in the context of that statute; we have to interpret the statute because the defendant has urged us to do so for the first time on appeal; and the defendant's proposed interpretation of the statute is not obvious. *Id.* at ¶ 14. "Otherwise, whether or not review is for plain error, the analysis will start—and usually end—with examining the sufficiency of the evidence de novo." *Id.*

¶ 82 Because the first step in the analysis of this sufficiency-of-the-evidence contention is the interpretation of a statute that the juvenile did not raise in the trial court, I first focus on the obviousness prong of

the plain error test. *See id.* at ¶ 12. I conclude, for the following reasons, that the statutory interpretation upon which the juvenile relies in making his sufficiency-of-the-evidence contention was not obvious.

¶ 83 First, the juvenile's contention has never been adopted by a Colorado appellate court, and it does not "involve[ ] a well-settled legal principle that numerous courts elsewhere have uniformly embraced." *See Lacallo*, ¶ 31. Indeed, the juvenile's appellate briefs do not cite one appellate decision from any court in the United States that has adopted this contention.

¶ 84 Second, the juvenile's contention is not based on a simple and plain assertion that the sexual exploitation statute was unambiguous and that its terms had common and ordinary meanings, so a simple reading of the statute would have revealed the error. *See Rediger*, ¶ 13. Instead, his contention has a lot of moving parts, and some of them are complex.

¶ 85 The juvenile's contention analyzes the language of sexual exploitation of a child statute. It discusses the legislature's intent. It compares the sexual exploitation of a child statute to the language and the legislative history of a different statute, section 18–3–405.4, C.R.S. 2015, which addresses Internet exploitation. And, incorporating a constitutional contention, it asserts that "the creation of the texted images in this case did not involve sexual abuse of a child or criminal conduct," so the juvenile's possession of the photographs "cannot be banned without violating First Amendment guarantees."

¶ 86 So, based on my conclusion that the putative error that the juvenile identifies was not obvious, I would not address the merits of this sufficiency-of-the-evidence contention. *See Lacallo*, ¶ 32.

JUDGE FOX, dissenting.

¶ 87 I am unable to join the majority opinion—namely Parts II.E.1 and II.E.3—because, as I discuss below, our juvenile justice system and the statute at issue, targeting sexual exploitation of children, were never intended to reach imprudent or irresponsible behavior by and among juveniles. Here, a seventeen-year old and a fifteen-year old each voluntarily sent texts containing partially nude photographs (or sexts) to their then-boyfriend, T.B., who was then sixteen years old. The record does not show that T.B. forwarded or shared those photographs. And, although both teen girls also received sexts from T.B., they were not prosecuted.

I. The Juvenile Justice System's Goals Are to Rehabilitate—Not to Irreparably Brand—Juveniles

¶ 88 The General Assembly intended the Children's Code to serve the welfare of children and the best interest of society. § 19–1–102(2), C.R.S. 2016. Thus, the General Assembly recognized that juveniles who violate the law should be treated differently than adults. It therefore created a separate statutory system within the Children's Code, Article II, to handle the treatment and sentencing of juveniles who commit a delinquent act. § 19–2–102, C.R.S. 2016. Article II of the Children's Code focuses on the rehabilitation and accountability of the juvenile delinquent while protecting public safety. *Id.*; *see also Bostelman v. People*, 162 P.3d 686, 692 (Colo. 2007). Thus, the Children's Code's treatment of juveniles adjudicated delinquents should contrast with the adult criminal system, where the focus is on punishment, deterrence, and retribution. *Bostelman*, 162 P.3d at 692; *see also A.S. v. People*, 2013 CO 63, 312 P.3d 168. The goal is to help make the juvenile a productive member of society. *See* § 19–2–102(1); *accord In re Application of Gault*, 387 U.S. 1, 15–16, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) (recognizing that the juvenile system was developed in large part to facilitate the opportunity for juveniles to reform and become productive citizens).[1]

[1] Colorado, one of the first states to create a juvenile court, has a rich history in the juvenile justice realm. *See* Laoise King, *Colorado Juvenile Court History: The First Hundred Years*, 32 Colo. Law. 63 (Apr. 2003) (noting that the creation and use of juvenile courts allowed communities to recognize the humanity of children and their entitlement to justice).

***13** ¶ 89 It makes sense to treat juveniles differently. Indeed, even the United States Supreme Court recognizes that "[i]nexperience [and] less education ... make the teenager less able to evaluate the consequences of his or her conduct[.]" *Thompson v. Oklahoma*, 487 U.S. 815, 835, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (plurality opinion). It is for that reason that "juveniles are not trusted with the privileges and responsibilities of an adult" and "why their irresponsible conduct is not as morally reprehensible as that of an adult." *Id.*

¶ 90 Not infrequently, courts have relied on research

about adolescent behavior and brain development to underscore the importance of exercising discretion when prosecuting juveniles. In *Roper v. Simmons*, the Supreme Court—highlighting the research on adolescent behavior that supports the view that child offenders are less culpable and more capable of reform than adults who commit similar crimes—declared the juvenile death penalty unconstitutional. 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). In accepting the premise that adolescent offenders are less culpable, the Court cited research demonstrating that adolescents are generally more "impetuous" than adults and are thus "overrepresented statistically in virtually every category of reckless behavior." *Id.* at 569, 125 S.Ct. 1183 (citation omitted).

¶ 91 For similar reasons, the Supreme Court later held, in *Graham v. Florida*, 560 U.S. 48, 68, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), mandatory life without parole sentences for those under the age of eighteen to be unconstitutional. The Court reasoned that juveniles are less culpable than adults and, therefore, are less deserving of the most severe punishments. *Id.* This presumption that juveniles are generally less culpable than adults is based on previous and ongoing "developments in psychology and brain science" which "continue to show fundamental differences between juvenile and adult minds" in, for instance, "parts of the brain involved in behavior control." *Miller v. Alabama*, 567 U.S. ——, ——, 132 S.Ct. 2455, 2464, 183 L.Ed.2d 407 (2012) (quoting *Graham*, 560 U.S. at 68, 130 S.Ct. 2011). According to the Supreme Court, "[a]s compared to adults, juveniles have a 'lack of maturity and an underdeveloped sense of responsibility.' " *Graham*, 560 U.S. at 68, 130 S.Ct. 2011 (quoting *Roper*, 543 U.S. at 569–70, 125 S.Ct. 1183). Juveniles "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," *id.* (quoting *Roper*, 543 U.S. at 569–70, 125 S.Ct. 1183), and "they have limited 'contro[l] over their own environment' and lack the ability to extricate themselves from" harmful settings, *Miller*, 567 U.S. at ——, 132 S.Ct. at 2464 (alteration in original) (quoting *Roper*, 543 U.S. at 569, 125 S.Ct. 1183). Finally, "a child's character is not as 'well formed' as an adult's ... and his actions [are] less likely to be 'evidence of irretrievabl[e] deprav[ity].' "[2] *Id.* (alteration in original) (quoting *Roper*, 543 U.S. at 570, 125 S.Ct. 1183). Accordingly, "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Graham*, 560 U.S. at 68, 130 S.Ct. 2011 (alteration in original) (quoting *Roper*, 543 U.S. at 573, 125 S.Ct. 1183).

[2] Even justices not finding categorical Constitutional violations in these juvenile cases agree with this precept. *See Graham v. Florida*, 560 U.S. 48, 90, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (Roberts, C.J., concurring in the judgment) ("*Roper*'s conclusion that juveniles are typically less culpable than adults has pertinence beyond capital cases."); *Roper v. Simmons*, 543 U.S. 551, 599, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (O'Connor, J., dissenting) ("It is beyond cavil that juveniles as a class are generally less mature, less responsible, and less fully formed than adults, and that these differences bear on juveniles' comparative moral culpability.").

II. Protecting Children from Sexual Exploitation

***14** ¶ 92 In contrast with the rehabilitative goals of Colorado's juvenile justice system, child pornography laws are meant to prevent the sexual abuse of children necessarily present in the making of child pornography. *See* § 18–6–403(3)(b.5), C.R.S. 2016; *see also People v. White*, 656 P.2d 690, 693 (Colo. 1983) (recognizing that the sex offender laws' primary purpose is to protect the public from proven dangerous sex offenders). Sexting, in comparison, generally involves teens taking pictures of themselves, usually for their boyfriend or girlfriend, and without the exploitative circumstances that accompany the production of conventional child pornography. The sexting at issue here entailed seventeen-year-old E.H. and fifteen-year-old L.B., each voluntarily taking a photograph of herself, and sending the photograph by text to another teen, T.B.; these actions lack the exploitative element implicit in the laws prohibiting child pornography. Texting, including sexting, is not uncommon among today's teens.[3] To charge sexting between teens in these circumstances as child pornography, a prosecutor must blatantly disregard the purpose and intent of the laws enacted to protect children from the predators who would exploit them. *See, e.g.*, *Bond v. United States*, 572 U.S. ——, ——, 134 S.Ct. 2077, 2090–91, 189 L.Ed.2d 1 (2014) (condemning the attempt to prosecute a woman who placed "irritating chemicals" on her husband's mistress' door knob and mailbox under a statute criminalizing the possession and use of "chemical weapons," two actions the Court found to be "worlds apart"). Consensual teen sexting is worlds apart from a predator's sexual exploitation of a child. Criminalizing the conduct at issue here under the sexual exploitation statute—section 18–6–403(3)(b.5)—turns a

law that was intended to shield minors into a sword used against their imprudent conduct. The expansive interpretation given by the trial court, and affirmed here,[4] could just as easily have led to charges against the teen girls, the putative victims here. Surely that is not how the legislature intended section 18–6–403(3)(b.5) to be applied. *See People v. Arapahoe Cty. Court*, 74 P.3d 429, 430–31 (Colo. App. 2003) (applying the principle that the court presumes that the General Assembly intended a just and reasonable result—and thus avoids interpretations leading to unjust or absurd results—before soundly rejecting a prosecution argument that, pursuant to 18–6–403(3)(b.5), defense counsel could not possess sexually explicit photographs needed to defend the client); *see also* Stephen F. Smith, *Jail for Juvenile Child Pornographers?*, 15 Va. J. Soc. Pol'y & L. 505, 525 (2008) (pointing out that, in many states, minors can marry or engage in consensual sex and arguing that, if the law considers a minor to be old enough to engage in sex, the minor should be treated as if he or she is old enough to document his or her sexual activity).

[3] The cell phone is the most direct and most widely used mode of communication between young people. Seventy-one percent of teens own a cell phone and seventy-six percent of teens have sent text messages—in fact, of teens with cell phones, twenty-five percent of teens aged twelve to fourteen text daily and fifty-one percent of teens aged fifteen to seventeen text daily. *See* Amanda Lenhart, *Teens and Mobile Phones Over the Past 5 Years: Pew Internet Looks Back* 5, 8 (2009), available at https://perma.cc/6W77-NDZL. A survey conducted on the topic of sexting reported that twenty percent of the teens surveyed have electronically sent or posted online a nude or semi-nude picture or video of themselves. *See* The National Campaign to Prevent Teen & Unplanned Pregnancy, *Sex and Tech: Results from a Survey of Teens and Young Adults* 1 (2008), available at https://perma.cc/E8PXBEJD. Most teen sexting is sent between partners of a relationship (i.e., between boyfriend and girlfriend), or to someone the sender is interested in dating. Seventy-one percent of teen girls and sixty-seven percent of teen boys who have sexted say they sent this content to a boyfriend or girlfriend. *Id.* at 2.

[4] Like Judge Richman, I too would review T.B.'s challenges, although I come to a different result than his. *See People v. McCoy*, 2015 COA 76M, ¶ 70 (Webb, J., specially concurring); *People v. Rediger*, 2015 COA 26, ¶ 67 (Richman, J., specially concurring) (*cert. granted* Feb. 16, 2016).

¶ 93 It is well established that a statute must set "minimal guidelines to govern law enforcement" and avoid the potential for discriminatory or arbitrary enforcement. *City of Chicago v. Morales*, 527 U.S. 41, 60, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (citation omitted); *Trail Ridge Ford, Inc. v. Colo. Dealer Licensing Bd.*, 190 Colo. 82, 83–85, 543 P.2d 1245, 1246 (1975) (recognizing that where criminal or quasi-criminal sanctions are to be imposed, the threat of arbitrary enforcement of the law requires specificity). Given the incongruent application of section 18–6–403(3)(b.5) here, I must conclude that sufficient guidelines are not present. This lack of guidelines has led to a discriminatory enforcement of the conduct of T.B.—and not E.H. or L.B.—and an arbitrary enforcement of conduct that reasonable people could conclude is imprudent, but is not sexually exploitative such that the juvenile should be treated no differently than a pedophile or a distributor of child pornography. *See Arapahoe Cty. Court*, 74 P.3d at 430–31; *see also Curtiss v. People*, 2014 COA 107, ¶ 7 (rule of lenity requires courts to resolve ambiguities in the penal code in favor of a defendant's liberty interests). This statute could be misused to prosecute juvenile males differently than juvenile females, even where the juveniles may be similarly situated, depending on which gender sends or receives more sexts. *See* The National Campaign to Prevent Teen & Unplanned Pregnancy, *Sex and Tech: Results from a Survey of Teens and Young Adults* 2 (2008), available at https://perma.cc/E8PX-BEJD. The male sext recipient in this case faced charges, while the female producers and distributors faced no legal consequences.

***15** ¶ 94 In 2009, the Colorado General Assembly amended two statutes to address the sexting phenomenon. *See* Ch. 341, sec. 1, § 18–3–306, 2009 Colo. Sess. Laws 1792–93 (Internet luring of a child); Ch. 341, sec. 1, § 13–21–1002, 2009 Colo. Sess. Laws 1792 (computer dissemination of indecent material to a child). These amendments lend further support to the proposition that section 18–6–403(3)(b.5) was never intended to be used in the way it was used against T.B. Instead, the legislature intended the 2009 amendments to address texting violations when appropriate.

¶ 95 Section 18–3–306—the Internet luring of a child provision—was altered as follows:

> **18–3–306. Internet luring of a child.** (1) An actor commits internet luring of a child if the actor knowingly communicates ~~a statement~~ over a computer or computer network, telephone network, or data network or by text message or instant message to a person who the actor knows or believes is to be under fifteen years of age ~~describing~~ and, in that

> communication or in any subsequent communication by computer, computer network, telephone network, data network, text message, or instant message, describes explicit sexual conduct as defined in section 18–6–403(2)(e), and, in connection with the ~~communication~~ that description, makes a statement persuading or inviting the person to meet the actor for any purpose, and the actor is more than four years older than the person or than the age the actor believes the person to be.

Ch. 341, sec. 1, § 18–3–306, 2009 Colo. Sess. Laws 1792–93. Although this provision covers sexting, it would not apply to fifteen-year-old L.B. or to seventeen-year-old E.H. Nor would it apply to sixteen-year-old T.B., who was one year younger than E.H. and one year older than L.B.

¶ 96 During the same legislative session, section 13–21–1002, which imposes civil liability for disseminating indecent material to a child, was modified as follows:

> **13–21–1002. Computer dissemination of indecent material to a child—prohibition.** (1) A person commits computer dissemination of indecent material to a child when: (a) Knowing the character and content of the communication which, in whole or in part, depicts actual or simulated nudity, or sexual conduct, as defined in section 19–1–103(97), C.R.S., the person willfully uses a computer, computer network, telephone network, data network, or computer system allowing the input, output, examination, or transfer of computer data or computer programs from one computer to another or a text-messaging or instant-messaging system to initiate or engage in such communication with a person he or she believes to be a child[.]

Ch. 341, sec. 1, § 13–21–1002, 2009 Colo. Sess. Laws 1792. Violations of section 13–21–1002, C.R.S. 2016, result in a civil penalty "established pursuant to verdict or judgment." § 13–21–1003(1), C.R.S. 2016.

¶ 97 These legislative amendments suggest that, rather than criminalizing sexting activity by and among teens, the legislature most likely intended that civil penalties be imposed pursuant to sections 13–21–1002 and 13–21–1003. *See* Lawrence G. Walters, *How to Fix the Sexting Problem: An Analysis of the Legal and Policy Considerations for Sexting Legislation*, 9 First Amend. L. Rev. 98, 121–22 (2010).

III. T.B.'s Section 18–6–403 Adjudication Irreparably Brands Him as a Sex Offender, With all the Attendant Consequences

¶ 98 As a result of the court finding T.B. guilty of the two counts of sexual exploitation of a child under section 18–6–403(3)(b.5) for the photographs received from each teen girl, T.B.'s sentence includes these restrictions (among others):

> ***16** • T.B. was required to register as a sex offender (thereby undermining the otherwise confidential nature of juvenile proceedings).
>
> • T.B. was required to submit to and pay a fee for DNA testing.
>
> • T.B. was required to actively participate in sex offender evaluation and treatment.
>
> • T.B. was required to submit, at his expense, to psychological assessment and monitoring.
>
> • T.B. was required to create a safety plan before attending a school environment.
>
> • T.B. was restricted from the use of any Internet service, personal digital assistant devices, cell phones, and other like devices.
>
> • T.B. was restricted from dating without prior approval (and if approved, was required to disclose the most private and intimate details of that relationship).
>
> • T.B. had to submit to vehicle and residence searches.
>
> • T.B. had to avoid overnight visits away from home without prior authorization.
>
> • T.B. was required to refrain from contact with any children over the age of three without prior permission and was required to remove himself from any situation involving contact with children (even if incidental or accidental) and report that contact.
>
> • T.B. was restricted from going, absent prior approval, to parks, playgrounds, recreation centers, arcades, and pools.

¶ 99 As evidenced by T.B.'s sentence, juvenile sexting adjudications can have far-reaching adverse consequences for the juvenile, especially where, as here, the juvenile is adjudicated delinquent for an offense categorized as a

sexual offense or an offense that would require registration as a sex offender. Adjudications of delinquency for sex-related offenses can preclude the juvenile from the following:

• Retaining custody of his or her minor child (if the juvenile is already a parent, or becomes a parent while under court supervision) if a dependency court finds that return of the child to the parent presents safety or other concerns vis-a-vis the child. *See People in Interest of D.P.*, 160 P.3d 351, 353–54 (Colo. App. 2007).

• Obtaining approval as a foster or adoptive parent. *See* § 26–6–104(7)(C), C.R.S. 2016 ("The state department shall not issue a license to operate ... a foster care home [or] a residential child care facility ... if the applicant ..., an affiliate of the applicant, a person employed by the applicant, or a person who resides with the applicant ... has been convicted of ... [a]ny offenses involving unlawful sexual behavior [including those punishable under § 18–6–403.]").

• Pursuing certain occupations requiring working with children, like jobs in education, child care, and law enforcement. *See* 42 U.S.C. § 13041(c) (2012) ("Any conviction for a sex crime [or] an offense involving a child victim ... may be ground for denying employment or for dismissal of an employee in [child protective services, social services, health and mental health care, child (day) care, education, foster care, residential care, recreational or rehabilitative programs, and detention, correctional, or treatment services.]"); *see also* Dep't of Educ. Reg. 301–37, 1 Code Colo. Regs. 301–37:2260.5–R15.00(2)(o) (providing that violations of section 18–6–403(3)(b.5) and of similar laws can lead to denial, suspension or revocation of a teaching license); Dep't of Educ. Reg. 301–37, 1 Code Colo. Regs. 301–37:2260.5–R15.02(10).

***17** • Returning to normalcy, as registration makes the juvenile's name, picture, and offense available to the public, including classmates and the press.

• Pursuing higher education, obtaining employment, or enlisting in the military. *See* Robert F. Shepard, Jr., *Collateral Consequences of Juvenile Proceedings: Part II*, 15 Crim. Just. 41 (Fall 2000).[5]

• Exercising driving privileges in certain situations. Barbara Fedders, *Two Systems of Justice, and What One Lawyer Can Do*, 12 Whittier J. Child & Fam. Advoc. 25, 35 (2012); *see also* §§ 42–2–125, –126, C.R.S. 2016. For juveniles who reside in rural communities with limited public transportation, the inability to drive may translate into an inability to work.

• Having a clean slate in subsequent judicial matters. *See* Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles about the Collateral Consequences of Adjudications*, 6 Nev. L. J. 1111, 1115 (2006). For example, Colorado sentencing law permits calculations of a "prior record score" to include juvenile adjudications of delinquency. *See People v. Perez–Hernandez*, 2013 COA 160, ¶ 49, 348 P.3d 451.

• Remaining in the United States, if the juvenile is not a citizen. *See, e.g.*, *Serrato–Navarrete v. Holder*, 601 Fed.Appx. 734, 737 (10th Cir. 2015).

• Obtaining public housing, *see generally* Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities be Notified?*, 79 N.Y.U. L. Rev. 520 (2004); Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles about the Collateral Consequences of Adjudications*, 6 Nev. L. J. 1111, 1114 (2006) (noting that housing authorities routinely conduct background checks for adult applicants and may "investigate whether any member of the family unit, including a juvenile member, has been convicted of specific disqualifying offenses"), and other public benefits, including Temporary Assistance for Needy Families and food stamps, *see* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, 110 Stat. 2105, *as amended by* Balanced Budget Act of 1987, Pub. L. No. 105–33, 111 Stat. 251.

5 An increasing number of college and financial aid applications inquire into juvenile adjudications, Robert F. Shepard, Jr., *Collateral Consequences of Juvenile Proceedings: Part II*, 15 Crim. Just. 42 (Fall 2000), and certain drug offenses can make an individual ineligible for financial aid. *See* Higher Education Act of 1965, 20 U.S.C. § 1091(r) (2012). While historically juvenile adjudications have not been characterized as criminal convictions in employment applications, many applications now include specific references to juvenile adjudications. *See* Shepard, 15 Crim. Just. at 42. Juvenile adjudications of delinquency may also preclude eligibility for enlistment in the military. For example, based on the United States Army's classification system, juvenile delinquency adjudications qualify as criminal offenses. Army Reg. 601–210, ¶ 4–22(*v*) (Mar. 2013), available at https://perma.cc/U6FS-GFY5.

¶ 100 On top of state-based restrictions, the Adam Walsh Child Protection and Safety Act of 2006 specifically mandates that juveniles be included in sex offender registries. *See* 42 U.S.C. § 16911(8) (2012). The Adam Walsh Act requires states to "substantially implement" the Sex Offender Registration and Notification Act (SORNA) requirements or risk forfeiting ten percent of the funds normally received from the federal Omnibus Crime Control and Safe Streets Act of 1968. 42 U.S.C. § 16925(a) (2012). Certain SORNA classifications can result in registration for twenty-five years to life, and require in-person "show-ups" two to three times each year, while failing to register can subject the person to a maximum term of imprisonment greater than one year. 42 U.S.C. §§ 16913(e), 16915, 16916 (2012). If T.B. moves—for educational or employment opportunities—he may be required to register as a sex offender in other states pursuant to each state's SORNA-implementing legislation. *See, e.g.*, Del. Code Ann. tit. 11, § 4120(e)(1) (West 2013) (requiring registration in Delaware for violation of substantially similar sex offense laws in another state); Ohio Rev. Code Ann. § 2950.01(12) (West 2016) (same); *see also* Nicole Marie Nigrelli, Comment, *Sex Offender Registry: Is it Attacking People That Were Not Meant to Be Part of the Law?*, 4 Suffolk J. Trial & App. Advoc. 343, 345 & n.15 (1999) (noting that all states have some form of child sex offender registration requirements).

***18** ¶ 101 For all the foregoing reasons, I would reverse juvenile T.B.'s adjudication—under section 18–6–403(3)(b.5)—based on receiving sexts from his teenage girlfriends E.H. and L.B. Given this disposition, I need not address the remaining contentions.

All Citations

--- P.3d ----, 2016 WL 6123557, 2016 COA 151M

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DISTRICT COURT, LA PLATA COUNTY, COLORADO

Court Address: 1060 E. 2nd Ave.
Durango, CO 81301
970-247-2304

THE PEOPLE OF THE STATE OF COLORADO

IN THE INTEREST OF:
T[redacted] B[redacted], a Juvenile,

and Concerning:
C[redacted] B[redacted], Respondent
K[redacted] B[redacted], Respondent

COURT USE ONLY

Case No. 13JD15

Plaintiff's Attorney:
Mr. David K. Ottman, #33329
Deputy District Attorney

Juvenile's Attorneys:
Ms. Ingrid Alt, #34009
Mr. David H. Greenberg, #14781

REPORTER'S TRANSCRIPT OF COURT TRIAL

Trial in this matter was commenced on January 24, 2014, before the HONORABLE JEFFREY R. WILSON, District Court Judge, in Durango, Colorado.

at the pictures. I need to do that. I need to also read that *Gagnon* case, I guess. Does somebody have a cite for me?

MR. OTTMAN: I do, Your Honor. The *Gagnon* case is 997 P.2d 1278. *Gagnon* or *Gagnon*, it is People v. G-a-g-n-o-n, Colorado Court of Appeals, 1999. The list of factors the people were reading from fall underneath headnote six on page 1,282 of the case.

THE COURT: Okay. All right. We'll be in recess for a little bit of time, and then I'll come back and give you my verdict.

MR. OTTMAN: Thank you, Your Honor.

(A recess was taken from 2:35 p.m. to 2:50 p.m.)

THE COURT: T[redacted], do you want to stand up, please, with your attorney?

Okay. The Court has looked over its notes briefly. I remember everything that was testified to. I've looked at the evidence that was introduced, reviewed *Gagnon* and the statute.

I am going to find beyond a reasonable doubt that both Ms. H[redacted] and Ms. B[redacted] were under the age of 18 at the time the photos were taken, that Mr. B[redacted] knew that they were under 18 at that time. Whether or not the photographs were erotic nudity, it's pretty clear that these photographs were sent in response to a request from

Mr. B[redacted], and multiple requests as to Ms. H[redacted], for naked pictures after he had sent pictures of his erect penis to them. The photographs for that reason qualify as erotic nudity. He requested these pictures repeatedly. He even complimented Ms. H[redacted] after he received the photographs. Clearly, Mr. B[redacted] knew that he had received the photographs.

And as to whether or not he possessed them, they seized Mr. B[redacted]'s phone. The photos that came from the investigation by Mr. Seuss, although there wasn't an actual chain of evidence perhaps back to Mr. Cyr, they looked at the phone, they brought back -- Deputy Beyer testified that he gave the files back to the Bayfield Marshal's Office in electronic format. Those photographs were printed, and both girls advised the Court and identified those photographs as being the photographs that they had taken and sent to Mr. B[redacted].

For all those reasons, the Court's going to find beyond a reasonable doubt that Mr. B[redacted] is guilty of both counts of possessing sexually exploitative materials.

So with that, we'll need to set a sentencing, and my calendar is not working, so if I could have the attorneys come back into chambers, I know the calendar back there works.

And Mr. B[redacted], you can have a seat.

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: August 19, 2019 CASE NUMBER: 2017SC66
Certiorari to the Court of Appeals, 2014CA1142 District Court, La Plata County, 2013JD15	
Respondent: The People of the State of Colorado, **In the Interest of** **Petitioner:** T. B.	Supreme Court Case No: 2017SC66
ORDER OF COURT	

Upon consideration of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS ORDERED that said Petition shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, AUGUST 19, 2019.
JUSTICE GABRIEL would grant the petition.

APPENDIX D

Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	DATE FILED: December 29, 2016 CASE NUMBER: 2014CA1142
La Plata County 2013JD15	
Plaintiff-Appellee: The People of the State of Colorado, **In the Interest of** **Juvenile-Appellant:** T B.	Court of Appeals Case Number: 2014CA1142
OPINION MODIFIED & ORDER DENYING PETITION FOR REHEARING	

The **PETITION FOR REHEARING** filed in this appeal by:
Kathleen Anne Lord, AttorneyT B, Juvenile-Appellant

IT IS THIS DAY ORDERED that said Petition shall be, and the same hereby is, DENIED. OPINION MODIFIED AND PETITION FOR REHEARING IS **DENIED**.

Issuance of the Mandate is stayed until: January 27, 2017.

If a Petition for Certiorari is timely filed with the Supreme Court of Colorado, the stay shall remain in effect until disposition of the cause by that Court.

DATE: DECEMBER 29, 2016

BY THE COURT:

Judge Richman
Judge Bernard
Judge Fox

APPENDIX E

COLORADO COURT OF APPEALS **2016COA151M**

DATE FILED: December 29, 2016
CASE NUMBER: 2014CA1142

Court of Appeals No. 14CA1142
La Plata County District Court No. 13JD15
Honorable Jeffrey R. Wilson, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

In the Interest of T.B.,

Juvenile-Appellant.

JUDGMENT AFFIRMED

Division VI
Opinion by JUDGE RICHMAN
Bernard, J., specially concurring
Fox, J., dissenting

Opinion Modified and
Petition for Rehearing DENIED

Announced October 20, 2016

Cynthia H. Coffman, Attorney General, Kevin E. McReynolds, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Lord Law Firm, LLC, Kathleen A. Lord, Denver, Colorado, for Juvenile-Appellant

OPINION is modified as follows:

Paragraph 10 currently reads:

> E.H. added that the juvenile said that she "look[ed] good" in these photographs. He asked for more. She declined because she "was very ashamed of [herself.]" When her mother later found out about these photographs, "it really crushed [E.H.] morally" because E.H. had "always tried to be the best person [that she could] be."

Opinion now reads:

> E.H. added that the juvenile said that she "look[ed] good" in these photographs. He asked for more. She declined. When her mother later found out about these photographs, E.H. "was very ashamed of [herself]" and "it really crushed [E.H.] morally" because E.H. had "always tried to be the best person [that she could] be."

Paragraph 12 currently reads:

> The juvenile continued to text photographs to L.B. of his erect penis even after he had been arrested.

Opinion now reads:

> [paragraph deleted; subsequent paragraphs renumbered]

Paragraph 34 currently reads:

> The focal points of the photographs in this case were the nude breasts of E.H. and L.B. and E.H.'s pubic area. There was sufficient evidence to support the conclusion that the girls' poses were unnatural and suggestive: in one photograph, E.H. was standing in front of a mirror when she took a photograph of her nude body reflected in the mirror; in another photograph, L.B.'s shirt is pulled down below her breasts, exposing them. The photographs suggested a sexual coyness.

And they appeared to be intended and designed to elicit a sexual response from the juvenile. Some of the text messages between the juvenile and L.B. further confirm the conclusion that the juvenile requested pictures of her for the purposes of sexual gratification and arousal. For example, some referred to a "dirty pic" and a picture shortly after she showered. Their text message discussions included references to intercourse, like "I can probe u lol . . . Stick my d*** in u lol," "wow no love u to f*** u too," and "We're gunna f*** lol :)."

Opinion [renumbered paragraph 33] now reads:

The focal points of the photographs in this case were the nude breasts of E.H. and L.B. and E.H.'s pubic area. There was sufficient evidence to support the conclusion that the girls' poses were unnatural and suggestive: in one photograph, E.H. was standing in front of a mirror when she took a photograph of her nude body reflected in the mirror; in another photograph, L.B.'s shirt is pulled down below her breasts, exposing them. The photographs suggested a sexual coyness. And they appeared to be intended and designed to elicit a sexual response from the juvenile. Some of the text messages between the juvenile and L.B. further confirm the conclusion that the juvenile requested pictures of her for the purposes of sexual gratification and arousal.

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: September 11, 2019 CASE NUMBER: 2017SC66
Certiorari to the Court of Appeals, 2014CA1142 District Court, La Plata County, 2013JD15	
Respondent: The People of the State of Colorado, **In the Interest of** **Petitioner:** T. B.	Supreme Court Case No: 2017SC66
ORDER OF COURT	

Upon consideration of the Motion to Recall and Stay the Mandate filed in the above cause, and now being sufficiently advised in the premises,

IT IS ORDERED that said Motion to Recall and Stay the Mandate shall be, and the same hereby is, GRANTED UP TO AND INCLUDING DECEMBER 10, 2019 pursuant to C.A.R. 41(c)(3)(B). IT IS FURTHER ORDERED that the Petitioner shall provide a status update in writing on or before DECEMBER 10, 2019.

BY THE COURT, SEPTEMBER 11, 2019.

APPENDIX F

APPENDIX G: Section 18-6-403, C.R.S. (2013)

§ 18-6-403, C.R.S. (2015). Sexual exploitation of a child

(1) The general assembly hereby finds and declares: That the sexual exploitation of children constitutes a wrongful invasion of the child's right of privacy and results in social, developmental, and emotional injury to the child; that a child below the age of eighteen years is incapable of giving informed consent to the use of his or her body for a sexual purpose; and that to protect children from sexual exploitation it is necessary to prohibit the production of material which involves or is derived from such exploitation and to exclude all such material from the channels of trade and commerce.

(1.5) The general assembly further finds and declares that the mere possession or control of any sexually exploitative material results in continuing victimization of our children by the fact that such material is a permanent record of an act or acts of sexual abuse of a child; that each time such material is shown or viewed, the child is harmed; that such material is used to break down the will and resistance of other children to encourage them to participate in similar acts of sexual abuse; that laws banning the production and distribution of such material are insufficient to halt this abuse; that in order to stop the sexual exploitation and abuse of our children, it is necessary for the state to ban the possession of any sexually exploitative materials; and that the state has a compelling interest in outlawing the possession of any sexually exploitative materials in order to protect society as a whole, and particularly the privacy, health, and emotional welfare of its children.

(2) As used in this section, unless the context otherwise requires:

(a) “Child” means a person who is less than eighteen years of age.

(b) Deleted by Laws 2003, Ch. 291, § 1, eff. July 1, 2003.

(c) “Erotic fondling” means touching a person's clothed or unclothed genitals or pubic area, developing or undeveloped genitals or pubic area (if the person is a child), buttocks, breasts, or developing or undeveloped breast area (if the person is a child), for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved. “Erotic fondling” shall not be construed to include physical contact, even if affectionate, which is not for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved.

(d) “Erotic nudity” means the display of the human male or female genitals or pubic area, the undeveloped or developing genitals or pubic area of the human male or female child, the human breasts, or the undeveloped or developing breast area of the human child, for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved.

(e) “Explicit sexual conduct” means sexual intercourse, erotic fondling, erotic nudity, masturbation, sadomasochism, or sexual excitement.

(f) “Masturbation” means the real or simulated touching, rubbing, or otherwise stimulating of a person's own clothed or unclothed genitals or pubic area, developing or undeveloped genitals or

pubic area (if the person is a child), buttocks, breasts, or developing or undeveloped breast area (if the person is a child), by manual manipulation or self-induced or with an artificial instrument, for the purpose of real or simulated overt sexual gratification or arousal of the person.

(g) “Sadomasochism” means:

(I) Real or simulated flagellation or torture for the purpose of real or simulated sexual stimulation or gratification; or

(II) The real or simulated condition of being fettered, bound, or otherwise physically restrained for sexual stimulation or gratification of a person.

(h) “Sexual excitement” means the real or simulated condition of human male or female genitals when in a state of real or simulated overt sexual stimulation or arousal.

(i) “Sexual intercourse” means real or simulated intercourse, whether genital-genital, oral-genital, anal-genital, or oral-anal, between persons of the same or opposite sex, or between a human and an animal, or with an artificial genital.

(j) “Sexually exploitative material” means any photograph, motion picture, video, recording or broadcast of moving visual images, print, negative, slide, or other mechanically, electronically, chemically, or digitally reproduced visual material that depicts a child engaged in, participating in, observing, or being used for explicit sexual conduct.

(k) “Video”, “recording or broadcast”, or “motion picture” means any material that depicts a moving image of a child engaged in, participating in, observing, or being used for explicit sexual conduct.

(3) A person commits sexual exploitation of a child if, for any purpose, he or she knowingly:

(a) Causes, induces, entices, or permits a child to engage in, or be used for, any explicit sexual conduct for the making of any sexually exploitative material; or

(b) Prepares, arranges for, publishes, including but not limited to publishing through digital or electronic means, produces, promotes, makes, sells, finances, offers, exhibits, advertises, deals in, or distributes, including but not limited to distributing through digital or electronic means, any sexually exploitative material; or

(b.5) Possesses or controls any sexually exploitative material for any purpose; except that this paragraph (b.5) does not apply to peace officers or court personnel in the performance of their official duties, nor does it apply to physicians, psychologists, therapists, or social workers, so long as such persons are licensed in the state of Colorado and the persons possess such materials in the course of a bona fide treatment or evaluation program at the treatment or evaluation site; or

APPENDIX G: Section 18-6-403, C.R.S. (2013)

(c) Possesses with the intent to deal in, sell, or distribute, including but not limited to distributing through digital or electronic means, any sexually exploitative material; or

(d) Causes, induces, entices, or permits a child to engage in, or be used for, any explicit sexual conduct for the purpose of producing a performance.

(4) Deleted by Laws 2003, Ch. 274, § 1, eff. July 1, 2003.

(5)(a) Except as provided in paragraph (b) of this subsection (5), sexual exploitation of a child is a class 3 felony.

(b) Sexual exploitation of a child by possession of sexually exploitative material pursuant to paragraph (b.5) of subsection (3) of this section is a class 5 felony; except that said offense is a class 4 felony if:

(I) It is a second or subsequent offense; or

(II) The possession is of a video, recording or broadcast of moving visual images, or motion picture or more than twenty different items qualifying as sexually exploitative material.

(6) If any provision of this section or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this section which can be given effect without the invalid provision or application, and to this end the provisions of this section are declared to be severable.

Credits

Added by Laws 1979, S.B.201, § 1. Amended by Laws 1981, S.B.315, § 1; Laws 1984, H.B.1018, § 1; Laws 1988, H.B.1082, §§ 1 to 4; Laws 1988, H.B.1200, § 18; Laws 1998, Ch. 139, § 3, eff. April 21, 1998; Laws 2003, Ch. 291, § 1, eff. July 1, 2003; Laws 2006, Ch. 359, § 1, eff. July 1, 2006; Laws 2006, Ch. 362, § 7, eff. July 1, 2006; Laws 2009, Ch. 343, § 3, eff. July 1, 2009; Laws 2015, Ch. 274, § 1, eff. Aug. 5, 2015.

HOUSE BILL 17-1302

BY REPRESENTATIVE(S) Lee and Willett, Becker J., Buckner, Covarrubias, Exum, Hansen, Herod, Jackson, Kennedy, Kraft-Tharp, Landgraf, Liston, McKean, Melton, Michaelson Jenet, Navarro, Ransom, Sias, Valdez, Van Winkle, Williams D., Winter;
also SENATOR(S) Gardner and Fields, Aguilar, Cooke, Court, Crowder, Garcia, Guzman, Jahn, Kefalas, Kerr, Martinez Humenik, Merrifield, Moreno, Tate, Todd, Williams A., Zenzinger.

CONCERNING MATTERS RELATED TO SEXUALLY EXPLICIT IMAGES OF A JUVENILE, AND, IN CONNECTION THEREWITH, REQUIRING A POST-ENACTMENT REVIEW OF THE IMPLEMENTATION OF THIS ACT.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Legislative declaration. (1) The general assembly hereby finds and declares that:

(a) Currently when a juvenile engages in sexting behavior, usually the only available offense with which to charge that juvenile is sexual exploitation of a child, which is a class 3 felony;

(b) It is necessary to provide in statute the ability of all law enforcement, including district attorneys, to charge lower level offenses or

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

civil infractions in addition to providing other diversionary programs that can more appropriately address the conduct involved in cases involving sexting behavior;

(c) It is imperative that, for any offense charged or civil infraction issued, the court have the discretion to impose appropriate sanctions that are consistent with the objectives of the Colorado children's code; and

(d) In order to track and assess the efficacy of creating these new offenses and their impact on any reduction in the filing of felony charges, the impact on the number of diversion or alternative case resolution programs, the level of education provided to teens on issues related to sexting behavior, and any discernable impact on teen sexting behavior, the judicial department, school safety resource officers, and district attorneys' offices should track the number of cases, including the offenses involved, the number of juveniles who participated in the education programs provided for in this legislation, and who provided those programs.

(2) Therefore, the general assembly is creating the crimes of posting private images by a juvenile and possessing private images by a juvenile and the civil infraction of exchange of a private image by a juvenile.

SECTION 2. In Colorado Revised Statutes, 16-22-103, **amend** (5)(a) introductory portion and (5)(a)(III) as follows:

16-22-103. Sex offender registration - required - applicability - exception. (5) (a) Notwithstanding any provision of this ~~article~~ ARTICLE 22 to the contrary, if, pursuant to a motion filed by a person described in this subsection (5) or on its own motion, a court determines that the registration requirement specified in this section would be unfairly punitive and that exempting the person from the registration requirement would not pose a significant risk to the community, the court, upon consideration of the totality of the circumstances, may exempt the person from the registration requirements imposed pursuant to this section if:

(III) The offense, as charged in the first petition filed with the court, is a first offense of ~~either~~ misdemeanor unlawful sexual contact, as described in section 18-3-404; ~~C.R.S., or~~ indecent exposure, as described in section 18-7-302; ~~C.R.S.~~ OR SEXUAL EXPLOITATION OF A CHILD, AS DESCRIBED IN SECTION 18-6-403, AND THE PERSON'S CONDUCT IS LIMITED

TO THE ELEMENTS IN POSTING PRIVATE IMAGES BY A JUVENILE, AS DESCRIBED IN SECTION 18-7-109 (1), OR POSSESSING PRIVATE IMAGES BY A JUVENILE, AS DESCRIBED IN SECTION 18-7-109 (2); and

SECTION 3. In Colorado Revised Statutes, 18-6-403, **add** (3.5) and (7) as follows:

18-6-403. Sexual exploitation of a child - legislative declaration - definitions. (3.5) A JUVENILE'S CONDUCT THAT IS LIMITED TO THE ELEMENTS OF THE PETTY OFFENSE OF POSSESSION OF A PRIVATE IMAGE BY A JUVENILE, AS DESCRIBED IN SECTION 18-7-109 (2), OR LIMITED TO THE ELEMENTS OF THE CIVIL INFRACTION OF EXCHANGE OF A PRIVATE IMAGE BY A JUVENILE, AS DESCRIBED IN SECTION 18-7-109 (3), IS NOT SUBJECT TO PROSECUTION PURSUANT TO SUBSECTION (3)(b) OR (3)(b.5) OF THIS SECTION.

(7) A JUVENILE CHARGED WITH A VIOLATION OF SECTION 18-7-109 (1) IS NOT SUBJECT TO PROSECUTION FOR VIOLATION OF THIS SECTION FOR THE SAME ELECTRONIC OR DIGITAL PHOTOGRAPH, VIDEO, OR IMAGE ARISING OUT OF THE SAME CRIMINAL EPISODE.

SECTION 4. In Colorado Revised Statutes, **add** 18-7-109 as follows:

18-7-109. Posting, possession, or exchange of a private image by a juvenile - definitions - penalties. (1) A JUVENILE COMMITS THE OFFENSE OF POSTING A PRIVATE IMAGE BY A JUVENILE IF HE OR SHE, THROUGH DIGITAL OR ELECTRONIC MEANS:

(a) KNOWINGLY DISTRIBUTES, DISPLAYS, OR PUBLISHES TO THE VIEW OF ANOTHER PERSON A SEXUALLY EXPLICIT IMAGE OF A PERSON OTHER THAN HIMSELF OR HERSELF WHO IS AT LEAST FOURTEEN YEARS OF AGE OR IS LESS THAN FOUR YEARS YOUNGER THAN THE JUVENILE:

(I) WITHOUT THE DEPICTED PERSON'S PERMISSION; OR

(II) WHEN THE RECIPIENT DID NOT SOLICIT OR REQUEST TO BE SUPPLIED WITH THE IMAGE AND SUFFERED EMOTIONAL DISTRESS; OR

(III) WHEN THE JUVENILE KNEW OR SHOULD HAVE KNOWN THAT THE

DEPICTED PERSON HAD A REASONABLE EXPECTATION THAT THE IMAGE WOULD REMAIN PRIVATE; OR

(b) KNOWINGLY DISTRIBUTES, DISPLAYS, OR PUBLISHES, TO THE VIEW OF ANOTHER PERSON WHO IS AT LEAST FOURTEEN YEARS OF AGE OR IS LESS THAN FOUR YEARS YOUNGER THAN THE JUVENILE, A SEXUALLY EXPLICIT IMAGE OF HIMSELF OR HERSELF WHEN THE RECIPIENT DID NOT SOLICIT OR REQUEST TO BE SUPPLIED WITH THE IMAGE AND SUFFERED EMOTIONAL DISTRESS.

(2) A JUVENILE COMMITS THE OFFENSE OF POSSESSING A PRIVATE IMAGE BY A JUVENILE IF HE OR SHE, THROUGH DIGITAL OR ELECTRONIC MEANS, KNOWINGLY POSSESSES A SEXUALLY EXPLICIT IMAGE OF ANOTHER PERSON WHO IS AT LEAST FOURTEEN YEARS OF AGE OR IS LESS THAN FOUR YEARS YOUNGER THAN THE JUVENILE WITHOUT THE DEPICTED PERSON'S PERMISSION; EXCEPT THAT IT IS NOT A VIOLATION OF THIS SUBSECTION (2) IF THE JUVENILE:

(a) TOOK REASONABLE STEPS TO EITHER DESTROY OR DELETE THE IMAGE WITHIN SEVENTY-TWO HOURS AFTER INITIALLY VIEWING THE IMAGE; OR

(b) REPORTED THE INITIAL VIEWING OF SUCH IMAGE TO LAW ENFORCEMENT OR A SCHOOL RESOURCE OFFICER WITHIN SEVENTY-TWO HOURS AFTER INITIALLY VIEWING THE IMAGE.

(3) A JUVENILE COMMITS THE CIVIL INFRACTION OF EXCHANGE OF A PRIVATE IMAGE BY A JUVENILE IF HE OR SHE, THROUGH DIGITAL OR ELECTRONIC MEANS:

(a) KNOWINGLY SENDS A SEXUALLY EXPLICIT IMAGE OR IMAGES OF HIMSELF OR HERSELF TO ANOTHER PERSON WHO IS AT LEAST FOURTEEN YEARS OF AGE OR IS LESS THAN FOUR YEARS YOUNGER THAN THE JUVENILE, AND THE IMAGE OR IMAGES DEPICT ONLY THE SENDER AND NO OTHER PERSON AND THE SENDER REASONABLY BELIEVED THAT THE RECIPIENT HAD SOLICITED OR OTHERWISE AGREED TO THE TRANSMITTAL OF THE IMAGE OR IMAGES; OR

(b) KNOWINGLY POSSESSES A SEXUALLY EXPLICIT IMAGE OR IMAGES OF ANOTHER PERSON WHO IS AT LEAST FOURTEEN YEARS OF AGE OR IS LESS

THAN FOUR YEARS YOUNGER THAN THE JUVENILE, AND THE IMAGE OR IMAGES DEPICT ONLY THE SENDER AND NO OTHER PERSON AND THE JUVENILE REASONABLY BELIEVED THAT THE DEPICTED PERSON HAD TRANSMITTED THE IMAGE OR IMAGES OR OTHERWISE AGREED TO THE TRANSMITTAL OF THE IMAGE OR IMAGES.

(4) IT IS AN AFFIRMATIVE DEFENSE TO SUBSECTION (1), (2), OR (3) OF THIS SECTION IF A JUVENILE IS COERCED, THREATENED, OR INTIMIDATED INTO DISTRIBUTING, DISPLAYING, PUBLISHING, POSSESSING, OR EXCHANGING A SEXUALLY EXPLICIT IMAGE OF A PERSON UNDER EIGHTEEN YEARS OF AGE.

(5) (a) POSTING A PRIVATE IMAGE BY A JUVENILE IS A CLASS 2 MISDEMEANOR; EXCEPT THAT IT IS A CLASS 1 MISDEMEANOR IF:

(I) THE JUVENILE COMMITTED THE OFFENSE WITH THE INTENT TO COERCE, INTIMIDATE, THREATEN, OR OTHERWISE CAUSE EMOTIONAL DISTRESS TO THE DEPICTED PERSON; OR

(II) THE JUVENILE HAD PREVIOUSLY POSTED A PRIVATE IMAGE AND COMPLETED A DIVERSION PROGRAM OR EDUCATION PROGRAM FOR THE ACT PURSUANT TO THE PROVISIONS OF THIS SECTION OR HAD A PRIOR ADJUDICATION FOR POSTING A PRIVATE IMAGE BY A JUVENILE; OR

(III) THE JUVENILE DISTRIBUTED, DISPLAYED, OR PUBLISHED THREE OR MORE IMAGES THAT DEPICTED THREE OR MORE SEPARATE AND DISTINCT PERSONS.

(b) POSSESSING A PRIVATE IMAGE BY A JUVENILE IS A PETTY OFFENSE; EXCEPT THAT IT IS A CLASS 2 MISDEMEANOR IF THE UNSOLICITED POSSESSOR OF THE IMAGE POSSESSED TEN OR MORE SEPARATE IMAGES THAT DEPICTED THREE OR MORE SEPARATE AND DISTINCT PERSONS.

(c) EXCHANGE OF A PRIVATE IMAGE BY A JUVENILE IS A CIVIL INFRACTION AND IS PUNISHABLE BY PARTICIPATION IN A PROGRAM DESIGNED BY THE SCHOOL SAFETY RESOURCE CENTER OR OTHER APPROPRIATE PROGRAM ADDRESSING THE RISKS AND CONSEQUENCES OF EXCHANGING A SEXUALLY EXPLICIT IMAGE OF A JUVENILE OR A FINE OF UP TO FIFTY DOLLARS, WHICH MAY BE WAIVED BY THE COURT UPON A SHOWING OF INDIGENCY. IF THE JUVENILE FAILS TO APPEAR IN RESPONSE TO A CIVIL INFRACTION CITATION OR FAILS TO COMPLETE THE REQUIRED CLASS OR PAY

APPENDIX H

THE IMPOSED FEE, THE COURT MAY ISSUE AN ORDER TO SHOW CAUSE REQUIRING THE JUVENILE'S APPEARANCE IN COURT AND IMPOSE ADDITIONAL AGE-APPROPRIATE PENALTIES. THE COURT SHALL NOT ISSUE A WARRANT FOR THE ARREST OF THE JUVENILE OR IMPOSE INCARCERATION AS A PENALTY.

(d) IN ADDITION TO ANY OTHER SENTENCE THE COURT MAY IMPOSE FOR A VIOLATION OF SECTION 18-7-109 (1), THE COURT SHALL ORDER THE JUVENILE BE ASSESSED FOR SUITABILITY TO PARTICIPATE IN RESTORATIVE JUSTICE PRACTICES, IF AVAILABLE, AND, UPON A DETERMINATION OF SUITABILITY, THE COURT SHALL INFORM THE VICTIM ABOUT THE POSSIBILITY OF RESTORATIVE JUSTICE PRACTICES AS DEFINED IN SECTION 18-1-901 (3)(o.5). THE COURT SHALL NOT CONSIDER THE VICTIM'S UNWILLINGNESS TO PARTICIPATE IN RESTORATIVE JUSTICE PRACTICES WHEN DETERMINING OTHER SENTENCING OPTIONS.

(e) EACH DISTRICT ATTORNEY IS ENCOURAGED TO DEVELOP A DIVERSION PROGRAM FOR JUVENILES WHO VIOLATE THE PROVISIONS OF THIS SECTION AND OFFER THE PROGRAM TO A JUVENILE WHO IS ALLEGED TO HAVE VIOLATED THIS SECTION FOR THE FIRST TIME. IF THE JURISDICTION DOES NOT HAVE A DIVERSION PROGRAM, THE DISTRICT ATTORNEY IS ENCOURAGED TO PROVIDE ALTERNATIVE PROGRAMMING DESIGNED TO ALLOW THE JUVENILE TO AVOID ANY ADJUDICATION.

(6) THE COURT SHALL ORDER ALL RECORDS IN A JUVENILE DELINQUENCY CASE IN THE CUSTODY OF THE COURT, AND ANY RECORDS RELATED TO THE CASE AND CHARGES IN THE CUSTODY OF ANY OTHER AGENCY, PERSON, COMPANY, OR ORGANIZATION, THAT ARE RELATED TO AN OFFENSE PURSUANT TO THIS SECTION EXPUNGED WITHIN FORTY-TWO DAYS AFTER THE COMPLETION OF THE SENTENCE OR OTHER ALTERNATIVE PROGRAM.

(7) A PERSON WHO IS A VICTIM OF A VIOLATION OF SUBSECTION (1), (2), OR (3) OF THIS SECTION IS ELIGIBLE FOR COMPENSATION AND SERVICES PURSUANT TO PART 1 OF ARTICLE 4.1 OF TITLE 24.

(8) AS USED IN THIS SECTION:

(a) "JUVENILE" MEANS A PERSON UNDER EIGHTEEN YEARS OF AGE.

(b) "SEXUALLY EXPLICIT IMAGE" MEANS ANY ELECTRONIC OR DIGITAL PHOTOGRAPH, VIDEO, OR VIDEO DEPICTION OF THE EXTERNAL GENITALIA OR PERINEUM OR ANUS OR BUTTOCKS OR PUBES OF ANY PERSON OR THE BREAST OF A FEMALE PERSON.

SECTION 5. In Colorado Revised Statutes, 19-2-104, **amend** (1)(a)(I) as follows:

19-2-104. Jurisdiction. (1) Except as otherwise provided by law, the juvenile court shall have exclusive original jurisdiction in proceedings:

(a) Concerning any juvenile ten years of age or older who has violated:

(I) Any federal or state law, except nonfelony state traffic, game and fish, and parks and recreation laws or rules; the offenses specified in section 18-13-121, ~~C.R.S.,~~ concerning tobacco products; the offense specified in section 18-13-122, ~~C.R.S.,~~ concerning the illegal possession or consumption of ethyl alcohol or marijuana by an underage person or illegal possession of marijuana paraphernalia by an underage person; ~~and~~ the offenses specified in section 18-18-406 (5)(a)(I), (5)(b)(I), and (5)(b)(II), ~~C.R.S.,~~ concerning marijuana and marijuana concentrate; AND THE CIVIL INFRACTION IN SECTION 18-7-109 (3) CONCERNING EXCHANGE OF A PRIVATE IMAGE BY A JUVENILE;

SECTION 6. In Colorado Revised Statutes, 24-33.5-1803, **amend** (3)(k) and (3)(l); and **add** (3)(m) as follows:

24-33.5-1803. School safety resource center - created - duties - repeal. (3) The center has the following duties:

(k) To provide suggestions for school resource officer training to the peace officers standards and training board, pursuant to section 24-31-312; ~~and~~

(l) To provide materials and training as described in section 24-33.5-1809 to personnel in school districts and charter schools, parents, and students regarding the awareness and prevention of child sexual abuse and assault; AND

(m) BY JUNE 1, 2018, TO MAKE AVAILABLE A MODEL PROGRAM THAT CONFORMS WITH SECTION 22-1-128, REGARDING THE RISKS AND CONSEQUENCES OF SEXTING FOR SCHOOL DISTRICTS TO USE, WHICH CURRICULUM MUST INCLUDE INFORMATION INFORMING STUDENTS OF THE PROVISIONS OF SECTION 18-7-109, INCLUDING THAT, IF A STUDENT RECEIVES A SEXUALLY EXPLICIT IMAGE IN VIOLATION OF SECTION 18-7-109, THE STUDENT CAN AVOID ADJUDICATION AS A JUVENILE DELINQUENT BY TAKING REASONABLE STEPS TO EITHER DESTROY OR DELETE OR REPORT THE INITIAL VIEWING OF THE IMAGE WITHIN SEVENTY-TWO HOURS AFTER RECEIVING THE IMAGE.

SECTION 7. Accountability. Two years after this act becomes law and in accordance with section 2-2-1201, Colorado Revised Statutes, the legislative service agencies of the Colorado general assembly shall conduct a post-enactment review of the implementation of this act utilizing the information contained in the legislative declaration set forth in section 1 of this act.

SECTION 8. Effective date - applicability. This act takes effect January 1, 2018, and applies to offenses committed on or after said date.

SECTION 9. Safety clause. The general assembly hereby finds,

determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Crisanta Duran
SPEAKER OF THE HOUSE
OF REPRESENTATIVES

Kevin J. Grantham
PRESIDENT OF
THE SENATE

Marilyn Eddins
CHIEF CLERK OF THE HOUSE
OF REPRESENTATIVES

Effie Ameen
SECRETARY OF
THE SENATE

APPROVED 10:30 a.m. 6/6/17

John W. Hickenlooper
GOVERNOR OF THE STATE OF COLORADO