PUBLIC

No. 20180386-SC

IN THE UTAH SUPREME COURT

THE STATE OF UTAH,
Plaintiff/Appellee

v.

MICHAEL SCOTT HATFIELD,
Defendant/Appellant.

BRIEF OF APPELLANT

Appeal from a conviction for four counts of Sexual Exploitation of a Minor, a second degree felony, in violation of Utah Code §76-5b-201 (2017), and three counts of Accessing Pornographic or Indecent Material on School Property, a class A misdemeanor, in violation of Utah Code §76-10-1235 (2017), in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable L. Douglas Hogan presiding.

Appellant is incarcerated

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INTRODUCTION

Michael Hatfield created three scrapbook pages for personal viewing. The scrapbook pages contained non-pornographic images of identifiable children that had been cut out and glued onto sheets of paper. Alongside the non-pornographic images of children were images of adult pornography that had also been cut out and glued onto the pages. On the first scrapbook page, the child and adult images did not touch or overlap. That page also contained heart stickers. On the second scrapbook page, the child and adult images were glued so that a child's hand overlapped an erect penis. And on the third scrapbook page, the child and adult images were glued so that a child's arm overlapped an erect penis that stood taller than the child on the page.

Based on Hatfield's possession of the three scrapbook pages, the State charged him with four counts of Sexual Exploitation of a Minor. Hatfield conceded that the scrapbook pages were offensive, but argued that the evidence was insufficient to support

the charges because the pages did not meet the statutory definition of child pornography or, if they did, the statutory definition of child pornography was unconstitutional under the First Amendment's overbreadth doctrine and the Due Process Clause's vagueness doctrine. The trial court rejected Hatfield's arguments. Hatfield entered no-contest pleas, as charged, under *State v. Sery*, 758 P.2d 935 (Utah Ct.App. 1988), reserving the right to raise his sufficiency of the evidence and constitutional arguments on appeal.[1]

This Court should reverse and remand with an order of dismissal. First, the State's evidence was insufficient to prove four counts of Sexual Exploitation of a Minor because, under the plain language of the statute, the three scrapbook pages did not meet the statutory definition of child pornography. Second, if the statute can be read to include the scrapbook pages within the definition of child pornography, this Court should reverse and remand with an order of dismissal under the doctrine of constitutional avoidance because such a broad reading of the statutory definition of child pornography would place the statute's constitutionality in doubt as running afoul of the First Amendment's overbreadth doctrine and the Due Process Clause's vagueness doctrine.

STATEMENT OF ISSUES, STANDARDS OF REVIEW, PRESERVATION

Issue I: Did the trial court err by holding the State's evidence was sufficient to prove four counts of Sexual Exploitation of a Minor where the State's case rested on three scrapbook pages that did not constitute child pornography as defined in Utah Code §76-5b-103(1)(c)?

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[1] Hatfield also entered no-contest pleas to three counts of Accessing Pornographic or Indecent Material on School Property, a class A misdemeanor, in violation of Utah Code §76-10-1235. Hatfield does not challenge those convictions on appeal.

Standard of Review: "When examining the sufficiency of the evidence in a criminal jury trial, [this Court will] begin with the threshold issue of statutory interpretation, which [this Court will] decide as a matter of law." *State v. Widdison*, 2000 UT App 185, ¶16, 4 P.3d 100; *see also State v. Barela*, 2015 UT 22, ¶34, 349 P.3d 676. With regard to the underlying findings of fact, this Court should apply the same standard of review as a bench trial because, in conjunction with the *Sery* plea, the trial court entered findings of fact to serve as the "factual foundation for a sufficiency of the evidence standard for the purposes of appeal." R.282-83; *see* R.128-31. "In assessing a claim that there was insufficient evidence to support a trial court's verdict," this Court will "sustain the trial court's judgment unless it is against the clear weight of the evidence, or if [the Court] reach[es] a definite and firm conviction that a mistake has been made." *State v. Briggs*, 2008 UT 83, ¶11, 199 P.3d 935 (internal quotation marks omitted).

Issue II: If the definition of child pornography in section §76-5b-103(1)(c) can be interpreted broadly to include the three scrapbook pages, does the canon of constitutional avoidance require a narrow interpretation in order to avoid constitutional concerns under the First Amendment's overbreadth doctrine and the Due Process Clause's vagueness doctrine?

Standard of Review: This Court reviews "'questions of statutory interpretation for correctness.'" *State v. Jeffs*, 2011 UT 56, ¶16, 283 P.3d 464. Likewise, "[a] constitutional challenge to a statute presents a question of law, which [this Court will] review for correctness.... When addressing such a challenge, this [C]ourt presumes that the statute is

valid, and [] resolve[s] any reasonable doubts in favor of constitutionality." *State v. Morrison*, 2001 UT 73, ¶5, 31 P.3d 547.

Preservation of Issues I and II: The issues on appeal are preserved through the motion to quash (R.79-97), the ruling denying the motion to quash (R.218-21) (attached at Addendum A), the *Sery* plea (R.125-27; 132-40; 275-83), and the trial court's findings of fact and conclusions of law, which provide the "factual foundation for a sufficiency of the evidence standard for the purposes of the appeal" (R.128-83; *see* R.225-26; 282-83) (attached at Addendum B). To the extent the constitutional avoidance argument was not specifically invoked below, it need not be. *See State v. Garcia*, 2017 UT 53, ¶52, 424 P.3d 171 ("failure to invoke the constitutional avoidance canon does not deprive us of the ability to employ that canon to interpret the statute" where defendant "preserved the statutory interpretation and insufficient evidence issues at the district court").

STATEMENT OF THE FACTS AND THE CASE

On May 2, 2017, the State charged Hatfield with seven counts of Sexual Exploitation of a Minor, a second degree felony, in violation of Utah Code §76-5b-201, and three counts of Accessing Pornographic or Indecent Material on School Property, a class A misdemeanor, in violation of Utah Code §76-10-1235. R.1-5.

On December 19, 2017, the State filed an Amended Information, reducing the number of charges to four counts of Sexual Exploitation of a Minor, and three counts of Accessing Pornographic or Indecent Material on School Property. R.74-78. The Sexual Exploitation of a Minor charges were based on Hatfield's possession of three pages contained in a homemade scrapbook kept for personal viewing. R.74-78.

On December 29, 2017, Hatfield filed a Motion to Quash Bindover, asking the court to quash the Sexual Exploitation of a Minor charges. R79-97. Hatfield argued that the Sexual Exploitation of a Minor charges should be quashed for two reasons: First, the three scrapbook pages did not meet the definition of child pornography in Utah Code §76-5b-103(1), or, second, if the three scrapbook pages were included in section 76-5b-103(1)'s definition of child pornography, the statute was unconstitutional under the First Amendment for overbreadth and the Due Process Clause for vagueness. R.79-97.

At a hearing on February 15, 2018, following briefing and oral argument, the trial court denied the motion to quash. R.98-113; 116-17; 181-226. The court reasoned that the scrapbooks pages, looking at "each page as a whole," met the definition of child pornography under section 76-5b-103(1)(c)—"The visual depiction has been created, adapted or modified to appear that an identifiable minor is engaging … in sexually explicit conduct." R.218-20. The court further reasoned that the definition of child pornography, as interpreted, did not violate the First Amendment or Due Process because the scrapbook pages "incorporated" identifiable children and, as such, could harm a child, and because the pages could have been distributed. R.220-21.

On March 8, 2018, Hatfield pleaded no contest to the counts in the Amended Information. R125-27; 132-40; 273-84. The plea was pursuant to *Sery*, wherein Hatfield reserved "the right to appeal the judgment of the Court from the hearing held on February 15th, 2018." R.135; 275-81; *see State v. Sery*, 758 P.2d 935, 938-40 (Utah Ct.App. 1988), *disagreed with on other grounds by State v. Pena*, 869 P.2d 932 (Utah 1994).

To facilitate the appeal, the trial court entered findings of fact and conclusions of law, applying the "factual foundation for a sufficiency of the evidence standard for the purposes of appeal." R.282-83; *see* R.222-26.

The trial court made the following findings of fact:

> 1. Between April 6 and April 20, 2017, in Salt Lake County, Mr. Hatfield possessed two scrapbooks in his classroom at a charter school, where he was an English teacher. One scrapbook has a gray-and-white cover.
>
> 2. The charges of Sexual Exploitation of a Minor, at issue here, are based on three pages from the gray-and-white scrapbook reviewed by the Court at the evidentiary hearing on this matter. The pages are marked in order as Exhibits 1, 2 and 3, and are located in the custody of the Utah Attorney General investigator.[2]
>
> 3. Exhibit 1, the basis for Count 1, is a scrapbook page showing a profile of an adult male, mostly clothed, but with an erect penis visible. An extended hand is cut-and-pasted onto this figure. On the other side of the page, a nude photograph of what appears to be a pre-pubescent girl standing facing frontwards is pasted onto the page. The scrapbook page is decorated with pink and red hearts.
>
> 4. Exhibit 2, the basis for Count 2[,] is a scrapbook page showing what appears to be an adult male in profile, again mostly clothed but with an erect penis visible. On the other side of the page is what appears to be a pre-pubescent girl fully clothed. Her hand is in a reaching motion and is pasted over the penis.
>
> 5. Exhibit 3, the basis for counts 3 and 4, related to a scrapbook page where photographs of two girls who are [redacted] are cut and pasted onto the page. They are fully clothed. One girl appears to be hugging something or someone. Under this image an erect male penis is cut-and-pasted. In the upper right-hand corner of the page a photo of adult heterosexual intercourse is pasted. An adult

[2] On November 14, 2018, Hatfield filed a motion to supplement the record on appeal with the State's exhibits. This Court granted the motion on December 13, 2018, and the State's exhibits are now housed at the supreme court. *See* Order, Dec. 13, 2018. The exhibits are deemed 'private.'" *See id.* This brief cites to the exhibits as State's Exh. 1, State's Exh. 2, and State's Exh. 3.

pornographic image is also pasted in the upper left-hand corner. In the bottom right-hand corner is a photograph of what appears to be a nude pre-pubescent girl standing facing frontwards.

6. Images from these exhibits are cut from adult pornography publications for the sexual images, and art and photography books for the images of children. The images of [redacted] are from [redacted]

7. None of these images, taken alone, constitute child pornography.

8. However, this Court finds that, cut-and-pasted together, the pages constitute child pornography. Specifically, the court finds that the pages are visual depictions "that have been created, adapted, or modified to appear tha[t] an identifiable minor is engaging in sexually explicit conduct," in violation of Utah Code Ann. 76-5b-103(1). The "sexually explicit conduct" is that identified in Utah Code Ann. 76-5b-103(10)(f), which is "the visual depiction of nudity or partial nudity for the purpose of causing sexual arousal of any person."

R.128-30.

The trial court made the following conclusions of law:

1. The Court concludes that the Findings of Fact do not render the statutory definitions of child pornography in Utah Code Ann. 76-5b-103(1) and 76-5b-103(10)(f) unconstitutional under the First Amendment of the U.S. Constitution.

2. The Court also concludes that the Findings of Fact do not render the statutory definitions of child pornography in Utah Code Ann. 76-5b-103(1) and 76-5b-103(10)(f) unconstitutional under the Due Process provision of the U.S. Constitution.

R.130. The relevant statutes and constitutional provisions are attached at Addendum C.

Following the guilty plea, the trial court sentenced Hatfield to four prison terms of one-to-fifteen years each, concurrent, on the Sexual Exploitation of a Minor counts. R.160-63; 261-65. The trial court closed the Accessing Pornographic or Indecent Material on School Property counts with credit for time

served. R.160-63; 261-65. The Sentence, Judgment, Commitment is attached at Addendum D. Hatfield timely appealed. R.168-69. The court of appeals certified the case to this Court for decision. R.178-79. This Court has jurisdiction under Utah Code §78A-3-102(3)(b).

SUMMARY OF THE ARGUMENT

This Court should reverse because the scrapbook pages did not constitute child pornography under section 76-5b-103(1)(c). To be child pornography, an image must depict a minor actually engaging in sexually explicit conduct, or must be created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct. At issue here is whether the scrapbook pages were created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct. Sexually explicit conduct is statutorily defined to mean, as relevant here, actual or simulated (1) nudity or partial nudity for the purposes of causing sexual arousal, (2) masturbation, or (3) fondling or touching of the genitals, pubic region, buttocks, or female breast. Simulated sexually explicit conduct must duplicate, within the perception of an average person, the appearance of an actual act of sexually explicit conduct.

This Court should hold that the scrapbook pages did not meet the definition of child pornography because they were not created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct. The plain language of the statute prohibits images that look real or seem to be true—i.e., images that make it look like an identifiable child is actually participating in the sexually explicit conduct. In other words, the statute prohibits materials that doctor images of identifiable children

realistically enough that an average person would believe the child was actually engaged in sexually explicit conduct. The scrapbook pages don't meet the definition of child pornography because they don't appear to depict an identifiable minor engaging in sexually explicit activity. The scrapbook pages are not realistic. They are rudimentary collages where non-pornographic photographs of children have been cut out and glued onto sheets of paper along side images of adult pornography. Though images in two of the scrapbook pages were glued so as to overlap, they do not constitute child pornography because the average person would not believe the children depicted were actually engaged in sexually explicit conduct. Thus, this Court should reverse and remand with an order to dismiss the Sexual Exploitation of a Minor charges.

Alternatively, if this Court rules that section 76-5b-103(1)(c) can be read broadly to encompass the scrapbook pages, this Court should reverse under the canon of constitutional avoidance because such a broad reading creates constitutional concerns under the First Amendment's overbreadth doctrine and the Due Process Clause's vagueness doctrine.

First, section 76-5b-103(1)(c) should be read narrowly to avoid placing its constitutionality under the First Amendment in doubt. Real child pornography—images that are the product of child sexual abuse—is not protected by the First Amendment. But virtual child pornography—images of child pornography that don't use real minors—is protected. This Court and the United States Supreme Court have yet to decide whether the First Amendment protects images that fall somewhere between real child pornography and virtual child pornography, such as computer-morphed images—images

of identifiable minors that have been digitally altered to make it appear that the minors are engaged in sexually explicit conduct. But cases from other jurisdictions appear to draw the line for First Amendment protection at computer-morphed images that are realistic and have been distributed or are intended for distribution. In this case, this Court should interpret section 76-5b-103(1)(c)'s definition of child pornography narrowly—to exclude the scrapbook pages at issue in this case—because the scrapbook pages could not be mistaken for real child pornography and were not distributed or intended for distribution. If the statutory definition of child pornography were read broadly to encompass the scrapbook pages, it would raise grave constitutional questions under the First Amendment.

Second, section 76-5b-103(1)(c) should be read narrowly to avoid placing its constitutionality under the Due Process Clause in doubt. A statute is void for vagueness when its prohibition is so vague as to leave an individual without knowledge of the nature of the activity that is prohibited. For example, if the criminality of an act depends on the fact finder's private sense of propriety, the Due Process guarantee of notice will be jeopardized. This Court should interpret the statutory definition of child pornography narrowly—to exclude the scrapbook pages—because a broad reading would put the constitutionality of the statute in doubt. A broad interpretation would leave an individual without knowledge of the nature of the activity that is prohibited. The criminality of a defendant's act would turn on the fact finder's private sense of the bounds of social propriety. Thus, if section 76-5b-103(1)(c) can be read broadly to encompass the

scrapbook pages, this Court should interpret it narrowly to avoid placing its constitutionality in doubt, and reverse and remand with an order to dismiss.

ARGUMENT

This Court should reverse because the scrapbook pages did not constitute child pornography as defined in section 76-5b-103(1)(c) because they did not appear to depict minors engaging in sexually explicit conduct. Alternatively, if this Court rules that section 76-5b-103(1)(c) can be read broadly to encompass the scrapbook pages, this Court should reverse under the canon of constitutional avoidance because such a broad reading creates grave constitutional concerns under the First Amendment's overbreadth doctrine and the Due Process Clause's vagueness doctrine.

I. This Court should reverse because the scrapbook pages did not constitute child pornography as defined in section 76-5b-103(1)(c) because they did not appear to depict minors engaging in sexually explicit conduct.

The trial court ruled that the three scrapbook pages constituted child pornography as defined by statute because they "are visual depictions 'that have been created, adapted, or modified to appear tha[t] an identifiable minor is engaging in sexually explicit conduct,' in violation of Utah Code Ann. 76-5b-103(1)." R.130. The court ruled that the applicable "sexually explicit conduct" was "that identified in Utah Code Ann. 76-5b-103(10)(f), which is 'the visual depiction of nudity or partial nudity for the purpose of causing sexual arousal of any person.'" R.130.

The trial court's findings of fact in support of these rulings are as follows:

> 1. "Between April 6 and April 20, 2017, in Salt Lake County, Mr. Hatfield possessed two scrapbooks in his classroom at a charter school, where he was an English teacher." R.128.

2. One of the scrapbooks contained three scrapbook pages that underlie the four charges of Sexual Exploitation of a Minor. R.129. The trial court viewed the three scrapbook pages. R.129. "The pages are marked in order as Exhibits 1, 2 and 3, and are located in the custody of the Utah Attorney General investigator." R.129. The pages are part of the record on appeal, and will be produced by Detective Longman upon request. R.129; 217.

3. "Exhibit 1, the basis for Count 1, is a scrapbook page showing a profile of an adult male, mostly clothed, but with an erect penis visible. An extended hand is cut-and-pasted onto this figure. On the other side of the page, a nude photograph of what appears to be a pre-pubescent girl standing facing frontwards is pasted onto the page. The scrapbook page is decorated with pink and red hearts." R.129.

4. "Exhibit 2, the basis for Count 2[,] is a scrapbook page showing what appears to be an adult male in profile, again mostly clothed but with an erect penis visible. On the other side of the page is what appears to be a pre-pubescent girl fully clothed. Her hand is in a reaching motion and is pasted over the penis." R.129.

5. "Exhibit 3, the basis for counts 3 and 4, related to a scrapbook page where photographs of two girls who are [redacted] are cut and pasted onto the page. They are fully clothed. One girl appears to be hugging something or someone. Under this image an erect male penis is cut-and-pasted. In the upper right-hand corner of the page a photo of adult heterosexual intercourse is pasted. An adult pornographic image is also pasted in the upper left-hand corner. In the bottom right-hand corner is a photograph of what appears to be a nude pre-pubescent girl standing facing frontwards." R.129.

6. "Images from these exhibits are cut from adult pornography publications for the sexual images, and art and photography books for the images of children. The images of [redacted] are from [redacted] R.129-30.

7. "None of these images, taken alone, constitute child pornography." R.130.

R.128-30.

This Court should reverse because the trial court was incorrect. The three scrapbook pages did not meet the statutory definition of child pornography as a matter of

law. Thus, this Court should reverse and remand with an order to dismiss the four Sexual Exploitation of a Minor counts.

As charged in this case, a person commits the crime of Sexual Exploitation of a Minor when that person "knowingly produces [or] possesses … child pornography," or "intentionally … views child pornography." Utah Code §76-5b-201(1)(a)(i)-(ii).

Child pornography is statutorily defined as follows:

> "Child pornography" means any visual depiction, including any live performance, photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where:
>
> (a) the production of the visual depiction involves the use of a minor engaging in sexually explicit conduct;
>
> (b) the visual depiction is of a minor engaging in sexually explicit conduct; or
>
> (c) the visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

Utah Code §76-5b-103(1)(a)-(c). There is no allegation that any minor depicted in the material at issue in this case actually engaged in any sexually explicit conduct. Thus, the subsection at issue here is (1)(c)—" the visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct." *Id.* §76-5b-103(1)(c); *see* R.130.

Some of the terms in the statutory definition of child pornography are defined by statute. First, "identifiable minor" is defined as a minor "who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a birthmark, or other recognizable feature." Utah Code §76-5b-103(3)(b). "[P]roof of the

actual identity of the identifiable minor is not required." *Id.* §76-5b-201(5). But it is an affirmative defense "that no person under 18 years of age was actually depicted in the visual depiction." *Id.* §76-5b-201(4).

Second, "sexually explicit conduct" is defined as follows:

> "Sexually explicit conduct" means actual or simulated:
>
> (a) sexual intercourse …;
>
> (b) masturbation;
>
> (c) bestiality;
>
> (d) sadistic or masochistic activities;
>
> (e) lascivious exhibition of the genitals, pubic region, buttocks, or female breast of any person;
>
> (f) the visual depiction of nudity or partial nudity for the purpose of causing sexual arousal of any person;
>
> (g) the fondling or touching of the genitals, pubic region, buttocks, or female breast; or
>
> (h) the explicit representation of the defecation or urination functions.

Utah Code §76-5b-103(10)(a)-(h). The trial court found that the subsection at issue here is (10)(f)—" the visual depiction of nudity or partial nudity for the purpose of causing sexual arousal of any person." *Id.* §76-5b-103(10)(f); *see* R.130.[3]

Third, "[n]udity or partial nudity" is defined as "any state of dress or undress in which the human genitals, pubic region, buttocks, or the female breast, at a point below

[3] Other subsections are discussed below at Parts I.B. and I.C. While the trial court incorrectly determined that subsection (10)(f) applied, the trial court's ruling was correct in that it did not hold that any of the other subsections applied.

the top of the areola, is less than completely and opaquely covered." Utah Code §76-5b-103(8).

Finally, "[s]imulated sexually explicit conduct" is defined to mean "a feigned or pretended act of sexually explicit conduct which duplicates, within the perception of an average person, the appearance of an actual act of sexually explicit conduct." Utah Code §76-5b-103(11).

The purpose of the Sexual Exploitation of a Minor statute is "to prohibit the production [or] possession … of materials that sexually exploit a minor … regardless of whether the materials are classified as legally obscene." *Id.* §76-5b-102(2). Our legislature has explained that such materials are "not protected by the First Amendment of the United States Constitution or by the First or Fifteenth sections of Article I of the Utah Constitution and may be prohibited." *Id.* §76-5b-102(1)(d). Further, prohibition "is necessary and justified to eliminate the market for those materials and to reduce the harm to the minor … inherent in the perpetuation of the record of the minor's … sexually exploitive activities." *Id.* §76-5b-102(1)(e).

When determining whether material "is [designed 'for the purposes of sexual arousal of any person,']" this Court has "adopted the so-called *Dost* factors." *State v. Morrison*, 2001 UT 73, ¶18 (alteration in original). The *Dost* factors are as follows:

> [first,] whether the focal point of the visual depiction is on the child's genitalia or pubic area; [second,] whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; [third,] whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of a child; [fourth,] whether the child is fully or partially clothed, or nude; [fifth,] whether the visual depiction suggests sexual coyness or a willingness to engage in sexual

> activity; [and, sixth,] whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Id.

"The *Dost* factors should not be viewed as establishing a rigid test." *Id.* They "are neither comprehensive nor necessarily applicable in every situation. Although *Dost* provides some specific, workable criteria, *there may be other factors that are equally if not more important* in determining whether a photograph [is designed 'for the purposes of sexual arousal of any person.'] The inquiry will always be case-specific." *Id.* (emphasis and alteration in original).

Because the *Dost* factors were originally designed for "determining what constitutes a 'lascivious exhibition of the genitals or pubic area," this Court clarified in *Morrison* that some of the factors are less applicable or not applicable at all when determining whether material depicts a nude or partially nude minor for the purpose of sexual arousal of any person. *Morrison*, 2001 UT 73, ¶18.

For instance, the first factor—whether the focal point of the visual depiction is on the child's genitalia or pubic area—may not be particularly helpful "to a determination that material depicts a 'nude or partially nude minor for the purpose of sexual arousal of any person'" because Utah's statute proscribes not just "'exhibition[s] of the genitals or pubic area,' but also … other depictions of 'nude or partially nude minor[s].'" *Id.* ¶20.

The fourth factor—whether the child is fully or partially clothed, or nude— is "inapplicable in determining whether a depiction is designed 'for the purpose of sexual arousal of any person.'" *Morrison*, 2001 UT 73, ¶20 n.5. This is because Utah's "statute

sets this factor forth separately by requiring the photograph depict a 'nude or partially nude minor.'" *Id.*

And "the sixth factor, i.e., whether the visual depiction is intended or designed to elicit a sexual response in the viewer, 'rather than being a separate substantive inquiry about the photographs, is useful as another way of inquiring into whether any of the other five *Dost* factors are met.'" *Id.* ¶19. "In other words, to determine whether a visual depiction is intended or designed to elicit a sexual response in the viewer, a court should consider the other five *Dost* factors." *Id.* Stated another way, the sixth factor "is a mere summation of the others, and not… a separate factor." *State v. Bagnes*, 2014 UT 4, ¶42 n.8, 322 P.3d 719.

In *Morrison*, for example, this Court applied the *Dost* factors to hold that the photograph at issue in that case "depict[ed] a nude minor 'for the purpose of sexual arousal of any person.'" *Morrison*, 2001 UT 73, ¶¶21-22. The Court held that the first factor was met because the child in the photograph was "completely nude." *Id.* ¶21. The Court held that the second factor was also met because the child was "standing on a rope web of the type commonly found on playgrounds." *Id.* ¶21. This Court explained that "a playground setting is not usually associated with sexual activity"; thus, "for a child to appear in such a setting completely nude is clearly inappropriate" and "indicative of the photograph's design to sexually arouse pedophiles." *Id.* Regarding the third factor, this Court noted that the factor was met because "the girl's weight [wa]s on one leg, thereby emphasizing her genitalia." *Id.* Finally, this Court noted that the fifth factor was met because "the child, who is looking into the camera, is obviously posed for the

photograph. The pose emphasizes the child's nudity and genitals, thereby suggesting a purpose to sexually arouse." *Id.* In addition to the *Dost* factors, this Court noted that the photograph depicted "a man, apparently nude, standing in the background." *Id.* This Court reasoned that "the presence of a nude adult" supported that the photograph was child pornography because the man's presence "tend[ed] to indicate the photograph was designed 'for the purpose of sexual arousal of any person.'" *Id.* In short, this Court determined that the photograph constituted child pornography because it depicted "a posed, nude child, in an inappropriate setting, together with a nude adult and emphasize[d] the child's genitalia." *Id.* ¶22.

In this case, considering the *Dost* factors and other aspects of the scrapbook pages, this Court should hold that the three scrapbook pages did not constitute child pornography as defined in section 76-5b-103(1)(c).

A. The first scrapbook page did not constitute child pornography.

The trial court found that first scrapbook page shows "a profile of an adult male, mostly clothed, but with an erect penis visible. An extended hand is cut-and-pasted onto this figure. On the other side of the page, a nude photograph of what appears to be a pre-pubescent girl standing facing frontwards is pasted onto the page. The scrapbook page is decorated with pink and red hearts." R.129.

This scrapbook page did not meet the definition of child pornography. First, the focal point is not on the child's genitalia or pubic area. The photograph of the child is taken from an "art and photography book[]." R.129-30. Though it depicts a nude child, it

is not pornographic. *See* R.130; *Morrison*, 2001 UT 73, ¶7 ("a depiction of a nude minor, without more, does not constitute child pornography").

Second, the setting of the photograph of the child is not sexually suggestive. The child is posed in a forward standing position for the purpose of art or photography students to study the form of a female child's body. R.129-30. Likewise, the place of the photograph is suited to artistic study and is not sexually suggestive—the photograph lacks any sexually suggestive content. It was taken for an "art or photography book[]." R.129-30.

Third, the child is not depicted in an unnatural pose, or in inappropriate attire. Nor does the visual depiction suggest sexual coyness or a willingness to engage in sexual activity. As stated above and found by the trial court, the photograph of the child is not pornographic. R.129-30. The child is posed nude for the purpose of artistic study. R.129-30. She is forward-facing and posed to permit an artist or photographer to study the form of a female child's body. R.129-30.

In short, the visual depiction of the child is not child pornography under section 76-5b-103(1)(c) because the image—taken from an art or photography book—was not intended or designed to elicit a sexual response in the viewer. R.129-30.

Pasting the photograph of the child onto a page that also contains red and pink heart decorations and a photograph of a mostly clothed adult male in profile with his erect penis visible did not transform the photograph of the child into child pornography. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 n.7 (1975) (material "must be considered as a part of the whole work").

To be child pornography, the visual depiction must have "been created, adapted, or modified *to appear that an identifiable minor is engaging in sexually explicit conduct*." Utah Code §76-5b-103(1)(c) (emphasis added). In other words, as applied here, to be child pornography, the scrapbook page must "appear that" the child in the photograph was "engaging in" "the visual depiction of nudity," whether "actual or simulated," "for the purpose of causing sexual arousal of any person." Utah Code §76-5b-103(1)(c), (10)(f).

"It is well settled that when faced with a question of statutory interpretation, our primary goal is to evince the true intent and purpose of the Legislature." *State v. Stewart*, 2018 UT 24, ¶12 (quotation marks omitted). "The best evidence of the legislature's intent is the plain language of the statute itself." *Id.* (quotation marks omitted). "We presume that the legislature used each word advisedly and read each term according to its ordinary and accepted meaning." *Id.* (quotation marks omitted). "Wherever possible, we give effect to every word of a statute, avoiding any interpretation which renders parts or words in a statute inoperative or superfluous." *Id.* (quotation marks and alteration marks omitted).

"Additionally, when interpreting statutes, we presume that the expression of one term should be interpreted as the exclusion of another, and we seek to give effect to omissions in statutory language by presuming all omissions to be purposeful." *Id.* ¶13 (quotation marks and alteration marks omitted). "However, our plain language analysis is not so limited that we only inquire into the individual words and subsections in isolation; our interpretation of a statute requires that each part or section be construed in connection

with every other part or section so as to produce a harmonious whole." *Id.* (quotation marks omitted).

"A starting point for our assessment of ordinary meaning is the dictionary." *Bagnes*, 2014 UT 4, ¶14. "The dictionary is 'useful in cataloging a range of possible meanings that a statutory term may bear.'" *Id.* "It provides 'an historical record, not necessarily all-inclusive, of the meanings which words in fact have borne.'"[4] *Id.*

The phrase "engaging in" denotes involvement. The dictionary provides the following intransitive definitions for the word "engage" or "engaging":

> 11. to occupy oneself; become involved: *to engage in business or politics.* 12. to take employment: *She engaged in her mother's business*. 13. to pledge one's word; assume an obligation: *I was unwilling to engage on such terms.* 14. to cross weapons; enter into conflict: *The armies engaged early in the morning*. 15. *Mech.* (of gears or the like) to interlock.

Webster's Unabridged Dictionary (Random House 2001), 644. Each of the definitions denotes involvement or participation, including the one that seems most applicable here: "to occupy oneself; become involved." *Id.*

The word "appear" means "1. to come into sight; become visible: *A man suddenly appeared in the doorway.* 2. to have the appearance of being; seem; look: *to appear wise.* 3. to be obvious or easily perceived; be clear or made clear by evidence: *It appears to me*

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[4] If this Court determines that "the dictionary alone is … inadequate to the task of interpretation" because "the range of possible meanings it identifies may encompass both parties' positions," this Court will look to canons of statutory construction—such as constitutional avoidance—for guidance. *Bagnes*, 2014 UT 4, ¶14. Hatfield's position is that the plain language of the statute has but one interpretation—the one proposed here. *See supra* Part I. But if this Court believes the statutory definition of child pornography has two possible interpretations—one narrow and one broad—this Court should adopt the narrow interpretation under the canon of constitutional avoidance. *See infra* Part II.

that you are right." Webster's Unabridged Dictionary (Random House 2001), 101. As applicable here, the word "appear" means "to have the appearance of being; seem; look: *to appear wise*." *Id.* It describes when something looks real or seems to be true, such as in the common phrase, "Objects in mirror are closer than they *appear*."

As used in section 76-5b-103(1)(c), then, "appear" and "engaging in" mean that it must look like or seem to be that the child is participating in the visual depiction of nudity for the purpose of causing sexual arousal.

Here, the heart decorations and the presence of an adult pornographic image on the same scrapbook page did not make it "appear" that the child was "engaging in" "the visual depiction of nudity" "for the purpose of causing sexual arousal of any person." Utah Code §76-5b-103(1)(c), (10)(f). On the contrary, the photograph of the child maintained the appearance of what it was—a non-pornographic image of a girl posed in the nude for artistic study. R.129-30. She did not appear to be posing in the nude "for the purpose of causing sexual arousal of any person." *Id.* §76-5b-103(1)(c), (10)(f). Thus, the first scrapbook page does not meet the definition of child pornography.

B. The second scrapbook page did not constitute child pornography.

The trial court found that the second scrapbook page shows "what appears to be an adult male in profile, … mostly clothed but with an erect penis visible. On the other side of the page is what appears to be a pre-pubescent girl fully clothed. Her hand is in a reaching motion and is pasted over the penis." R.129.

This scrapbook page did not meet the definition of child pornography in section 76-5b-103(1)(c). First, the focal point of the photograph of the child is not on the child's

genitalia or pubic area. The child is fully clothed, and she is not posed so as to place the focus on her genitalia or pubic area. R.129. The photograph is cut from an "art [or] photography book[]." R.129-30. As found by the trial court, the photograph did not constitute child pornography. R.130.

Second, the setting of the photograph of the child is not sexually suggestive. The child in the photograph is fully clothed and is not posed or placed in a setting associated with sexual activity. Rather, the pose and setting are appropriate to a photograph from an "art [or] photography book[]." R.129-30.

Third, the child is not depicted in an unnatural pose or in inappropriate attire. Nor does the photograph of the child suggest sexual coyness or a willingness to engage in sexual activity. As stated above and found by the trial court, the photograph of the child is not pornographic. R.129-30.

In short, the visual depiction of the child is not child pornography because the image—taken from an art or photography book—was not intended or designed to elicit a sexual response in the viewer. R.129-30.

The photograph of the child is pasted onto a page that also contains "what appears to be an adult male in profile, … mostly clothed but with an erect penis visible," and the two photographs are pasted so that the image of the child's hand "is pasted over the penis." R.129. But this placement does not transform the photograph of the child into child pornography. *See Erznoznik*, 422 U.S. at 211 n.7 (material "must be considered as a part of the whole work").

As explained above, material is not child pornography unless the visual depiction "has been created, adapted, or modified *to appear that an identifiable minor is engaging in sexually explicit conduct*." Utah Code §76-5b-103(1)(c) (emphasis added). In other words, as applied here, to be child pornography, it must "appear that" the child in the photograph was "engaging in" "the visual depiction of nudity or partial nudity," whether "actual or simulated," "for the purpose of causing sexual arousal of any person." Utah Code §76-5b-103(1)(c), (10)(f).

Here, the child in the photograph does not look like or seem to be participating in the visual depiction of nudity or partial nudity for the purpose of causing sexual arousal. *See supra* Part I.A.; Utah Code §76-5b-103(1)(c), (10)(f). The scrapbook page could not be mistaken for a depiction of a child actually touching a man's genitals. Nor does it appear to depict a child actually engaging in sexual conduct. On the contrary, the child is fully clothed. R.129-30. And the photograph seems to be what it is—a non-pornographic image of a fully clothed girl glued so that the image of the girl's hand overlaps the image of an erect penis taken from an photograph of adult pornography. R.129-30.

Nor does the scrapbook page meet any of the other acts contained in the definition of "sexually explicit conduct." The acts in the definition of "sexually explicit conduct" that could possibly encompass the scrapbook page are "actual or simulated" "masturbation," or "actual or simulated" "fondling or touching of the genitals, pubic region, buttocks, or female breast." Utah Code §76-5b-103(10)(b), (10)(g).

But the scrapbook page does not meet either of these defined acts. The child is not engaged in "actual" masturbation or fondling or touching of genitals. Utah Code §76-5b-

103(10)(b), (10)(g). Nor does the scrapbook page meet the definition of "simulated" masturbation or fondling or touching of genitals. *Id.* §76-5b-103(10)(b), (10)(g).

"'Simulated sexually explicit conduct' means a feigned or pretended act of sexually explicit conduct which duplicates, within the perception of an average person, the appearance of an actual act of sexually explicit conduct." *Id.* §76-5b-103(11). The plain language of this section requires simulated conduct to "duplicate[]" the "actual act of sexually explicit conduct" such that the "average person" would perceive "the appearance of an actual act." *Id.* §76-5b-103(11).

The word "duplicate" means to copy exactly:

> —n. 1. a copy exactly like an original. 2. anything corresponding in all respects to something else. 3. *Cards*. a duplicate game. 4. In duplicate, in two copies, esp. two identical copies: *Please type the letter in duplicate.* —v.t. 5. to make an exact copy of. 6. to do or perform again; repeat: *He duplicated his father's way of standing with his hands in his pockets.* 7. to double; make two fold. —v.i. 8. to become duplicate. —adj. 9. exactly like or corresponding to something else: *duplicate copies of a letter.* 10. consisting of or existing in two identical or corresponding parts; double. 11. *Cards*. noting a game in which each team plays a series of identical hands, the winner being the team making the best total score.

Webster's Unabridged Dictionary (Random House 2001), 607.

The word "perceive" means "to become aware of, know, or identify by means of the senses: *I perceived an object looming through the mist.* 2. To recognize, discern, envision, or understand: *I perceive a note of sarcasm in your voice. This is a nice idea but I perceive difficulties in putting it into practice*." Webster's Unabridged Dictionary (Random House 2001), 1437.

And, as explained above, the word "appear" means to look real or seem to be true. *See supra* Part I.A. Likewise, the word "appearance" refers to the way that someone or something looks or seems:

> n. 1. the act or fact of appearing, as to the eye or mind or before the public: *the unannounced appearance of dinner guests; the last appearance of Caruso in* Aida; *her first appearance at a stockholders' meeting.* 2. the state, condition, manner, or style in which a person or object appears; outward look or aspect: *a table of antique appearance; a man of noble appearance.* 3. outward show or seeming; semblance: *to avoid the appearance of coveting an honor*.

Webster's Unabridged Dictionary (Random House 2001),101.

Taken together, the plain language of the statute requires simulated conduct to copy the actual conduct so exactly that an average person would believe it to be real.

Before 2000, the word "simulated" was not defined by statute. In *State v. Jordan*, this Court looked to the Webster's New Collegiate Dictionary for guidance and interpreted "simulated" to mean "'looking or acting like,'" which this Court said was the word's "simple lay" meaning. 665 P.2d 1280, 1285 (Utah 1983). Thereafter, our legislature provided a legal definition for "simulated" sexual conduct. *See* Utah Code §76-5b-103(11). The legislature could have left the term undefined or adopted the definition set out in *Jordan*, but it did not. It required the "feigned or pretended act" to "duplicate[]"—i.e., replicate—the actual act. Utah Code §76-5b-103(11).

The scrapbook page in this case does not meet the statutory definition of simulated sexually explicit conduct. The average person would not mistake the scrapbook page for a visual depiction of actual masturbation or actual fondling or touching of the genitals. Utah Code §76-5b-103(10)(b), (10)(g), (11). On the contrary, the average person would

perceive it to be what it is—two separate photographs cut out and glued onto the same page with the non-pornographic image of a child glued so that the image of the child's hand overlays the image of a man's penis. R.129-30. Thus, the second scrapbook page does not meet the definition of child pornography.

C. The third scrapbook page did not constitute child pornography.

The trial court found that the third scrapbook page contains "photographs of two girls who are [redacted]" R.129. The photographs "are cut and pasted onto the page." R.129. The girls "are fully clothed. One girl appears to be hugging something or someone. Under this image an erect male penis is cut-and-pasted. In the upper right-hand corner of the page a photo of adult heterosexual intercourse is pasted. An adult pornographic image is also pasted in the upper left-hand corner. In the bottom right-hand corner is a photograph of what appears to be a nude pre-pubescent girl standing facing frontwards." R.129.

This scrapbook page combines elements from the first and second scrapbook pages. Like the first scrapbook page, it contains an isolated photograph of a nude child "facing frontwards." R.129. For the reasons outlined regarding the first scrapbook page, this image does not meet the definition of child pornography. *See supra* Part I.A.

Like the second scrapbook page, a non-pornographic image of a fully clothed child is glued next to an image of an erect male penis such that the girl's arm overlays the penis. R.129. For the reasons stated regarding the second scrapbook page, this pasting of two images beside each other does not constitute child pornography. *See supra* I.B. The child is fully clothed, so the child in the photograph does not "appear" to be "engaging

in" "the visual depiction of nudity, or partial nudity for the purpose of causing sexual arousal of any person." Utah Code §76-5b-103(1)(c), (10)(f). Nor does the scrapbook page meet the definition of "simulated" masturbation or fondling or touching of genitals. *Id.* §76-5b-103(10)(b), (10)(g) (11). The average person would not mistake the scrapbook page for a visual depiction of actual masturbation or actual fondling or touching of the genitals. Utah Code §76-5b-103(10)(b), (10)(g), (11). On the contrary, the average person would perceive it to be what it is—two separate photographs cut out and glued onto the same page with the non-pornographic image of a child glued so that the image of the child's arm overlays the image of an erect penis. R.129-30. Indeed, this scrapbook page is obviously not depicting an actual sexual act because the erect penis stands taller than the child on the page. R.129. Thus, for the reasons stated here and outlined more fully above, the third scrapbook page does not meet the definition of child pornography. *See supra* Parts I.A., I.B.

II. To the extent the statutory definition of child pornography can be read broadly to criminalize the scrapbook pages, this Court should interpret it narrowly under the canon of constitutional avoidance.

The trial court concluded that its ruling that the scrapbook pages constituted child pornography as defined by statute did "not render the statutory definitions of child pornography in Utah Code Ann. 76-5b-103(1) and 76-5b-103(10)(f) unconstitutional under the First Amendment" or "under the Due Process provision of the U.S. Constitution." R.130.

The trial court's conclusions regarding constitutionality were incorrect. As explained above, the plain language of section 76-5b-103(1) excludes the scrapbook

pages from the definition of child pornography as a matter of law. *See supra* Part I. But if section 76-5-103(1) can be read broadly to criminalize the three scrapbook pages, it raises both First Amendment (overbreadth) considerations and due process (void for vagueness) issues. Such a result violates the canon of constitutional avoidance.

The canon of constitutional avoidance (or constitutional doubt) states that "[a] statute should be interpreted in a way that avoids placing its constitutionality in doubt." Antonin Scalia and Bryan A. Garner, *Reading Law: the Interpretation of Legal Texts*, 247 (Thompson/West 2012). "The canon of constitutional avoidance 'comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction." *State v. Garcia*, 2017 UT 53, ¶50 n.7, 424 P.3d 171. In such a circumstance the canon states: "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909) (per White, J.); *see also Garcia*, 2017 UT 53, ¶59 (same).

In this case, if the statutory definition of child pornography can be read broadly to encompass the scrapbook pages, First Amendment and Due Process "constitutional concerns counsel against [such] an overbroad construction." *Bagnes*, 2014 UT 4, ¶35. Rather, in keeping with the canon of constitutional avoidance, this Court should adopt the narrow interpretation outlined above. *See supra* Part I.

A. A narrow reading of the statutory definition of child pornography is necessary to avoid interpreting the statute in a way that places its constitutionality in doubt under the First Amendment overbreadth doctrine.

The First Amendment commands, "Congress shall make no law ... abridging the freedom of speech." *Ashcroft v. Free Speech Coalition*, 122 S.Ct. 1389, 1398 (2002). "The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children." *Id.* at 1399. But "[t]he Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere." *Id.* at 1398. States "may pass valid laws to protect children from abuse," but "[t]he prospect of crime … by itself does not justify laws suppressing protected speech." *Id.* at 1399. Nor may a state prohibit speech "because it concerns subjects offending our sensibilities." *Id.*

Under the "First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 294 (2008). This "doctrine seeks to strike a balance between competing social costs." *Id.* "On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas." *Id.* "On the other hand, invalidating a law that in some of its applications is perfectly constitutional—particularly a law directed at conduct so antisocial that it has been made criminal—has obvious harmful effects." *Id.* Thus, the overbreadth doctrine requires "that a statute's overbreadth be substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Id.* (emphasis omitted).

Regarding child pornography, United States Supreme Court caselaw has defined the outer limits of free speech rights: real child pornography is not protected by the First Amendment and its possession and distribution may be banned, whereas virtual child pornography is protected by the First Amendment and its possession and distribution may not be banned. *See Williams*, 553 U.S. at 294, 303.

In *New York v. Ferber*, 458 U.S. 747 (1982) and *Osborne v. Ohio*, 405 U.S. 103 (1990), the Supreme Court held that a state may prohibit real child pornography—images that are "the product of child sexual abuse"—"without regard to any judgment about its content." *Ashcroft*, 122 S.Ct. at 1401; *see Ferber*, 458 U.S. at 773-74; *Osborne*, 405 U.S. at 110-11. The *Ferber* Court "upheld a prohibition on the distribution and sale of child pornography, as well as its production, because these acts were 'intrinsically related' to the sexual abuse of children in two ways": (1) "as a permanent record of a child's abuse, the continued circulation itself would harm the child who had participated," and (2) "because the traffic in child pornography was an economic motive for its production, the State had an interest in closing the distribution network." *Ashcroft*, 122 S.Ct. at 1401; *see Ferber*, 458 U.S. at 759. In short, real child pornography is not protected by the First Amendment and its possession and distribution may be banned. *See Williams*, 553 U.S. at 294 (cases like "*Ferber*, *Osborne*, and *Free Speech Coalition* … prohibit[] the possession or distribution of [real] child pornography").

By contrast, in *Ashcroft*, the Supreme Court held that states may not ban virtual child pornography—images made without the use of real children—because such a ban is overbroad under the First Amendment. *See Ashcroft*, 122 S.Ct. at 1402. *Ashcroft*

explained that virtual child pornography is different than child pornography produced using real children because it "is not 'intrinsically related' to the sexual abuse of children." *Id.* Unlike real child pornography, the harm of virtual child pornography "does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts." *Id.* "The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." *Id.* Nor are concerns that virtual child pornography may be used to entice children or may be difficult to distinguish from real child pornography. *See id.* at 1402-04. "First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought." *Id.* at 1402. In short, the possession and distribution of virtual child pornography is protected by the First Amendment. *See Williams*, 553 U.S. at 303 ("Simulated child pornography will be as available as ever, so long as it is offered and sought *as such*, and not as real child pornography.").

Though the edges of First Amendment protections regarding child pornography are well-defined, the area in between is not. For example, the *Ashcroft* Court identified "computer morphing"—"a more common and lower tech means of creating virtual images" where, "[r]ather than creating original images, pornographers can alter innocent pictures of real children so that the children appear to be engaged in sexual activity." *Ashcroft*, 122 S.Ct. at 1397. Though *Ashcroft* noted that computer morphing "implicate[s]

the interests of real children," the Court declined to decide whether "computer morphing" is protected speech under *Ashcroft* or unprotected under *Ferber*. *Id.*

Neither Utah's appellate courts nor the United States Supreme Court have addressed whether a statute that prohibits computer-morphed images violates the First Amendment. Other jurisdictions have addressed the issue and appear to draw the line for First Amendment protection where computer-morphed images are realistic and have been distributed or are intended for distribution.

For example, courts have held that images are protected speech where the computer-morphed images at issue were unrealistic and were not prepared for distribution, but instead were stored only for private possession. *See, e.g.*, *Parker v. State*, 81 So.3d 451, 453-57 (Fla. Dist. Ct. App. 2011) (images where heads of identifiable children were glued onto the bodies of nude women engaged in sexual activity did not constitute child pornography); *State v. Zidel*, 940 A.2d 255, 262-65 (N.H. 2008) (composite images where heads of identifiable children were placed on bodies of adult females engaged in sex acts were protected speech because they were stored on a CD-ROM for personal consumption and were not prepared or offered for distribution); *Commonwealth v. Rex*, 2012 WL 6178422, *4-*5 (Mass. Super. Aug. 8, 2012 (mem. op.) (attached at Addendum E), *aff'd* 11 N.E.3d 1060 (2014) (photographs cut from a National Geographic magazine and a sociology textbook and cropped so that a child's genitalia appeared more central did not constitute child pornography); *see People v. Gerber*, 126 Cal. Rptr. 3d 688, 701 (Cal. Ct. App. 2011).

By contrast, courts have held that computer-morphed images are not protected speech where the images at issue were believable and had been distributed or were prepared for distribution. *See, e.g.*, *United States v. Hotaling*, 634 F.3d 725, 729-30 (2d Cir. 2011) (holding that images where the heads of children were computer-morphed onto the bodies of nude females engaged in sex acts were not protected because they were not "mere records of the defendant's fantasies, but child pornography that implicate[d] actual minors" by identifying them by name and they were indexed, labeled, and encoded in a way "used almost exclusively for publication on the internet"); *Doe v. Boland*, 698 F.3d 877, 883-84 (6th Cir. 2012) (speech not protected where the defendant created and produced in court believable, computer-morphed images in which identifiable children appeared to be engaging in sex acts); *United States v. Bach*, 400 F.3d 622, 630-32 (8th Cir. 2005) (computer-morphed image where the face of an identifiable child was skillfully placed on the nude, suggestively posed body of another child was not protected).

In *State v. Coburn*, the Kansas Court of Appeals followed this same line of reasoning—holding that computer-morphed images could be prohibited because the realistic nature of computer-morphed images and their distribution to numerous people could harm a real child. 176 P.3d 203, 222-23 (Kan. Ct. App. 2008). Nine years later, the Kansas Court of Appeals seemed to back away from even that narrow holding. In *State v. Langston*, the Kansas Court of Appeals described Langston's argument that *Coburn* was wrongly decided as "not a trivial one." 2017 WL 4558573, *11-*12, 404 P.3d 362 (Kan. Ct. App. 2017) (attached at Addendum E). Without reaching the merits, the court said:

"A reasonable argument can be made that a statute that goes beyond the prohibition of images created by harming children through sexual exploitation or abuse to a prohibition of initially innocent images in which the children weren't harmed in making the images does infringe on constitutionally protected speech." *Id.* (citing Carissa Byrne Hessick, *The Limits of Child Pornography*, 89 Ind. L.J. 1437 (2014)).

This Court should interpret the statutory definition of child pornography narrowly—to exclude the scrapbook pages at issue in this case. As explained above, section 76-5b-103(1)(c) requires that "the visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct." Utah Code §76-5b-103(1)(c). But the scrapbook pages are rudimentary collages made by gluing photographs onto a sheet of paper. As argued above, they do not meet the definition of child pornography because they do not "appear" to depict a "child engaging in sexually explicit conduct." *Id.*; *see supra* Part I. On the contrary, they "appear" to be what they are—rudimentary collages. *See supra* Part I.

To the extent section 76-5b-103(1)(c) can be interpreted broadly to encompass homemade collages like the scrapbook pages, this Court should reject that interpretation to avoid placing the constitutionality of the statute in doubt as overbroad under the First Amendment. Real child pornography is unprotected speech because "the images are themselves the product of child sexual abuse." *Ashcroft*, 535 U.S. at 249. As explained in *Ferber*, real child pornography may be prohibited because (1) "as a permanent record of a child's abuse, the continued circulation itself would harm the child who had participated," and (2) "because the traffic in child pornography was an economic motive

for its production, the State had an interest in closing the distribution network." *Id.* In short, real child pornography can be prohibited because "the creation of the speech is itself the crime of child abuse." *Id.* at 254. Virtual child pornography, on the other hand, is protected because it "is not 'intrinsically related' to the sexual abuse of children": it "records no crime and creates no victims by its production." *Id.* at 250.

Like real child pornography, computer-morphed images "implicate the interests of real children" because identifiable children are used. *Id.* at 242. But like virtual pornography, computer-morphed images do not record actual instances of child abuse. *Id.* at 250. Courts that have held that computer-morphed images are unprotected speech have relied on the believability of the images and their ability to be distributed: Although there was no actual child abuse, the images portrayed believable images of abuse that, if distributed, could harm the child. *See, e.g.*, *Hotaling*, 634 F.3d at 729-30; *Boland*, 698 F.3d at 883-84; *Bach*, 400 F.3d at 630-32. By contrast, courts that have reviewed images that did not portray believable images of abuse and were not prepared for distribution have ruled that the speech was protected. *See, e.g.*, *Parker*, 81 So.3d at 453-57; *Zidel*, 940 A.2d at 262-65; *Rex*, 2012 WL 6178422, *4-*5.

Whether computer-morphed images are ultimately determined to be protected speech, the scrapbook pages at issue in this case are protected. This case does not involve computer-morphed images. Rather, this case involves three rudimentary scrapbook pages where innocent images of children were cut and glued onto sheets of paper next to or over images of adult pornography. *See* R.129-30. The scrapbook pages are not realistic. Nor do they create a single, digitally-morphed image which could be mistaken for a child

actually engaging in sexually explicit conduct. *See id.* On the contrary, the scrapbook is an obvious collage. The children—though identifiable—were not abused in the making of the scrapbook pages or even aware that the pages existed. And the scrapbook pages were not digitized, reproduced, or prepared or offered for distribution. *See id.* On the contrary, they were "first-generation" images for private possession that were secured so as to avoid detection, reproduction, or distribution. *See id.*

If the statutory definition of child pornography were read broadly to encompass works that are not intended for distribution and could not be mistaken for real images of abuse, it would put the statute in substantial doubt of violating the First Amendment. Such a reading would criminalize broad categories of speech such as drawing suggestive doodles in teen magazines or yearbooks; gluing adult pornography into teen magazines; creating caricatures or collages where an identifiable teen—such as a teen celebrity—is depicted engaging in conduct defined as sexually explicit; and drawing hearts or other indicia of sexual interest on a photograph of a teen celebrity whose buttocks is "less than completely and opaquely covered." Utah Code §76-5b-103(1), (7), (8), (10). People in possession of such materials "would hardly expect to face criminal charges for child pornography or sexual exploitation. And if they were so charged, they could undoubtedly maintain strong constitutional defenses under the Free Speech and Due Process Clauses." *Bagnes*, 2014 UT 4, ¶37; *see infra* Part II.B.

As this Court recognized in *Bagnes*, "[o]ur Victorian past is well behind us." *Bagnes*, 2014 UT 4, ¶36. Private parts that were formerly covered are now "flaunt[ed] or manifest[ed]" in public and "peppered across the pages of our mainstream magazines,

catalogs, newspapers, etc. (in print and online)." *Id.* In *Bagnes*, constitutional avoidance led this Court to adopt a narrow reading of the "lascivious exhibition" element in the definition of child pornography in order to avoid overbreadth and vagueness problems. *Bagnes*, 2014 UT 4, ¶36. This Court should reach a similar decision here.

In sum, if the statutory definition of child pornography can be read broadly to encompass the scrapbook pages in this case, this Court should reject that interpretation to avoid placing the constitutionality of the statute under the First Amendment in doubt. Rather, this Court should adopt the interpretation outlined above in Part I and hold that the scrapbook pages are not child pornography under Utah Code §76-5b-103(1)(c).

B. A narrow reading of the statutory definition of child pornography is necessary to avoid interpreting the statute in a way that places its constitutionality under the federal Due Process Clause in doubt.

"'[V]agueness questions are essentially procedural due process issues, i.e., whether the statute adequately notices the proscribed conduct.'" *Morrison*, 2001 UT 73, ¶13. "A statute is void for vagueness when its prohibition is so vague as to leave an individual without knowledge of the nature of the activity that is prohibited." *State v. Mattinson*, 2007 UT 7, ¶9, 152 P.3d 300. "To pass constitutional muster, statutes challenged as vague must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and provide explicit standards for those who apply it to avoid arbitrary and discriminatory enforcement." *Id.* In particular, "a statutory standard turning on subjective assessments of general impropriety would implicate constitutional concerns … of vagueness." *Bagnes*, 2014 UT 4, ¶17. "If the criminality of a defendant's act

depends on each judge's—or each jury's—private sense of the bounds of social propriety, the due process guarantee of notice will be jeopardized." *Id.*

In cases where First Amendment interests are at stake, as here, *see supra* Part II.A., "a more stringent vagueness test should apply." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982), *abrogated on other grounds as stated in Johnson v. Quattlebaum*, 664 Fed.Appx. 290, 294 n.5 (4th Cir. 2016) (unpublished) (attached at Addendum E). This is so because "[u]ncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone … than if the boundaries of the forbidden areas were clearly marked.'" *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). This is particularly true for laws purporting to regulate child pornography, which must "adequately define[]" the prohibited conduct and "suitably limit[] and describe[]" the category of forbidden sexual conduct. *Ferber*, 458 U.S. at 764.

If section 76-5b-103(1)(c) can be read broadly to criminalize the scrapbook pages at issue in this case, this Court should reject that interpretation under the canon of constitutional avoidance. The broad reading of section 76-5b-103 needed to encompass the scrapbook pages at issue in this case would place the constitutionality of the statute under the due process clause in doubt. It would create uncertainties about the boundaries of child pornography. *Bagnes*, 2014 UT 4, ¶17. It would not "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Mattinson*, 2007 UT 7, ¶9. Nor would it "provide explicit standards for those who apply it to avoid arbitrary and discriminatory enforcement." *Id.* Rather, the criminality of an act would turn on the fact finder's "private sense of the bounds of social propriety." *Bagnes*, 2014 UT 4, ¶17.

As explained above, a broad reading of section 76-5b-103 would criminalize broad categories of speech, such as drawing suggestive doodles in teen magazines or yearbooks; gluing adult pornography into teen magazines; creating caricatures or collages where a teen celebrity is depicted engaging in conduct defined as sexually explicit; and drawing hearts on a photograph of a teen celebrity whose buttocks is "less than completely and opaquely covered." Utah Code §76-5b-103(1), (7), (8), (10); *supra* Part II.A.

In other words, people could create child pornography with little more than a pencil, scissors, glue, and a teen magazine like Tiger Beat or Seventeen. The resulting work—no matter that it is rudimentary and stored for private viewing would make its possessor a felon as reviled, if not more reviled, than a person who commits actual child sexual abuse. *See, e.g.*, Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 Wash. U. L. Rev. 853, 855-64 (2011) (possession of child pornography is viewed as "a crime that is equivalent to, or worse than, the act of sexually abusing a child"); *compare* Utah Code §76-5b-103(7) *and* 76-5b-201(2) (sexual exploitation of a minor ("a person younger than 18 years of age") is a second degree felony); *with, e.g.*, Utah Code §76-5-401(3) (unlawful sexual activity with a 14 or 15 year old is a third degree felony); *id.* §76-5-401.1 (sexual abuse of a 14 or 15 year old is a class A misdemeanor); *id.* §76-5-404.1(3) (sexual abuse of a child under 14 is a second degree felony). People possessing such materials "would hardly expect to face criminal charges for child pornography or sexual exploitation. And if they were so charged, they

could undoubtedly maintain strong constitutional defenses under the Free Speech and Due Process Clauses." *Bagnes*, 2014 UT 4, ¶37.

By contrast, a narrow reading of section 76-5b-103 protects it from constitutional vagueness problems. If images that contain an identifiable minor who was not actually involved in real or simulated abuse are criminalized only where the "feigned or pretended act of sexually explicit conduct" actually "duplicates"—meaning believably replicates—sexually explicit conduct, the vagueness problems—at least as implicated in this case—are resolved. Utah Code §76-5b-103(11).[5] Such a definition would "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Mattinson*, 2007 UT 7, ¶9. It would also "provide explicit standards for those who apply it to avoid arbitrary and discriminatory enforcement," *id.*, and prevent the criminality of speech from turning on the fact finder's "private sense of the bounds of social propriety." *Bagnes*, 2014 UT 4, ¶17.

In sum, if the statutory definition of child pornography can be read broadly to encompass the scrapbook pages, this Court should reject that interpretation to avoid placing the constitutionality of the statute under the due process doctrine of vagueness in doubt. Rather, this Court should adopt the interpretation outlined above in Part I and hold that the scrapbook pages are not child pornography under Utah Code §76-5b-103(1)(c).

---

[5] Future challenges may establish that a definition of child pornography that encompasses realistic doctored images—such as computer-morphed images—may pose First Amendment and Due Process concerns. *See, e.g.*, *Langston*, 2017 WL 4558573, *11-*12; Hessick, *The Limits of Child Pornography*, 89 Ind. L.J. 1437 (2014) (arguing for "a definition of child pornography" that requires "the existence of sexual exploitation or abuse in the creation of an image").

CONCLUSION

Hatfield respectfully asks this Court to reverse and remand with an order to dismiss the four counts of Sexual Exploitation of a Minor.

SUBMITTED this 11th day of January 2019.

Lori Seppi

LORI J. SEPPI
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 11,666 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Times New Roman 13 point.

In compliance with rule 21(g), Utah Rules of Appellate Procedure, and rule 4-202.09(9)(A), Utah Code of Judicial Administration, I certify that, upon information and belief, all non-public information has been omitted from the foregoing brief of defendant/appellant.

Lori Seppi

LORI J. SEPPI

CERTIFICATE OF DELIVERY

I, LORI J. SEPPI, hereby certify that I have caused to be hand-delivered an original and seven copies of the private brief, and one copy of the public brief to the Utah Supreme Court, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and two copies of the private brief and two copies of the public brief to the Utah Attorney General's Office, 160 East 300 South, 6th Floor, PO Box 140854, Salt Lake City, Utah 84114, this 11th day of January 2019. A searchable pdf of the private and public briefs will be emailed to the Utah Supreme Court at supremecourt@utcourts.gov and to the Utah Attorney General's Office at criminalappeals@agutah.gov within 14 days, pursuant to Utah Supreme Court Standing Order No. 8.

Lori Seppi
LORI J. SEPPI

DELIVERED this _____ day of January 2019.

ADDENDUM A

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, VS. MICHAEL SCOTT HATFIELD, Defendant.	Case No. 171401406 TRANSCRIPT OF: SPECIAL SET MOTION HEARING

BEFORE THE HONORABLE L. DOUGLAS HOGAN

WEST JORDAN COURTHOUSE
8080 SOUTH REDWOOD ROAD
WEST JORDAN, Utah 84088

February 15, 2018

THE COURT: Okay. All right. That motion is granted.

All right. And you can be excused. Thank you, officer.

Okay. All right. Anything further from counsel?

MR. HOLTAN: Nothing from the State, Your Honor.

MS. CHESNUT: No, Your Honor.

THE COURT: Okay. I appreciate the effort each counsel put in to briefing this issue. It's the first time this Court has had opportunity to consider this statute and this issue. And I note that each counsel have indicated, this hasn't been something that's come up in Utah. So we don't have an on-point precedent. We've looked elsewhere for guidance.

Having had the opportunity to review it and consider the arguments that have been made, the Court is going to deny the motion to quash. I find that the arguments that have been raised by the State to be compelling, and the Court agrees with the State.

I think the images need to be looked at in their totality, and what has been, in fact, created. The -- in this particular situation, we have what has been created as a visual depiction of sexually explicit conduct. The Court particularly notes that the photos have been juxtaposed in such a way that when anyone who were to look at them would think of an illicit sexual conduct.

I think it's -- I think it's hard to not imagine illicit sexual conduct when you look at the photos as they've been arranged, and the Court is looking at them in their totality, each page as a whole, as created by the creator of that scrapbook page, and I do find that it appears to be exactly what the statute's talking about.

We've got images of an identifiable minor contained with adult -- adult -- in this case, an adult male that has an erect penis, and the children appear to be part of the presentation, as if they were there. I note that -- and I think it's clear in the arguments that each side has made. The source material did not, this is not what the original source had, but they've not been put together in a way that the Court finds to be child pornography. Okay. Is that clear? Is that clear enough?

Are there further findings that either counsel would like me to make at this point? I anticipate there may be -- if this is reviewed by an appellate court, I don't want the decision to be, we need to come back and have more findings as to any particularity about -- about what's been presented, but I think I have addressed it.

I can refer directly to the statute in question, and -- under sub C, "The visual depiction has been created, adapted or modified to appear that an identifiable minor is engaging in sexual -- in sexually explicit conduct." That is

exactly what I'm finding when I look at those images.

MS. CHESNUT: And, Your Honor, I think it might help as well for the Court to make findings regarding the constitutionality of the statute. We made both arguments, both factual and constitutional --

THE COURT: Yes.

MS. CHESNUT: -- the first amendment and due process.

THE COURT: Yes. And I'll elaborate. I think counsel did a good job of explaining the purposes for which this sort of speech has been criminalized and does not receive the protection that other speech receives.

There was quite a bit of argument made about the record that's created. There's certainly certain types of a record that are going to be much more readily distributed and available, and it would take just a fraction of a second for widespread -- widespread distribution to occur.

For instance, a digital image that's available on any sort of smart device that can be sent to the -- any list of contacts or just published to the web. That's almost immediate distribution to an untold number of people.

This image, the way that it's been possessed, obviously, we don't have instant widespread distribution capabilities. However, we're a mere one step away from that. As Mr. Holton pointed out in his argument, all it would take is a digital -- a digitalization of this scrapbook, whether it's

by a photo from a camera or a scan from a scanner, and we have the possibility of widespread distribution in a moment.

I don't think the determination about whether it's child pornography, I don't think it matters how easily it can be distributed. Whether you're at the point in time where you've got a digital image that is one click, one mouse click away from being widespread, or whether you have to go through one or two steps to get to that point, the fact that it's there, and the fact that -- the harm that we have to a child is, we've got an image that's there, that's sitting waiting for whether it's one set of eyeballs to view it, or a second set of eyeballs that was never intended to see it, once that possibility exists.

And, in fact, that's what happened here. We had eyeballs that were not the originator creator's eyeballs that ended up seeing this, and I think that the reasons we have to protect children, we have an identifiable interest, and we have identifiable children who have now been incorporated into child pornography, and I think the State has a legitimate interest in protecting those children.

MS. CHESNUT: And so the Court's conclusion is the statute's constitutional?

THE COURT: Yes, I think it's constitutional.

MS. CHESNUT: Thank you, Your Honor.

THE COURT: All right.

ADDENDUM B

Heather J. Chesnut (6934)
424 East 500 South #300
Salt Lake City, UT 84111
801-532-5444 (phone)
801-532-0330 (fax)

IN THE THIRD DISTRICT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

THE STATE OF UTAH Plaintiff. v. MICHAEL HATFIELD, Defendant.	**FINDINGS OF FACT AND CONCLUSIONS OF LAW (STIPULATED AS TO FORM)** Case No.: 171401406FS JUDGE DOUGLAS HOGAN

This case, having come before the Court on a Motion to Quash the bindover[1] for factual and legal arguments, is decided as follows: the material at issue is child pornography as a matter of fact, and this factual finding does not render the statutory definition of child pornography unconstitutional as a matter of law.

FINDINGS OF FACT

1. Between April 6 and April 20, 2017, in Salt Lake County, Mr. Hatfield possessed two scrapbooks in his classroom at a charter school, where he was an English teacher. One scrapbook has a gray-and-white cover.

1 A preliminary hearing was not held in this case, but the Motion to Quash was preserved by stipulation of the parties.

2. The charges of Sexual Exploitation of a Minor, at issue here, are based on three pages from the gray-and-white scrapbook reviewed by the Court at the evidentiary hearing on this matter. The pages are marked in order as Exhibits 1, 2 and 3, and are located in the custody of the Utah Attorney General investigator.
3. Exhibit 1, the basis for Count 1, is a scrapbook page showing a profile of an adult male, mostly clothed, but with an erect penis visible. An extended hand is cut-and-pasted onto this figure. On the other side of the page, a nude photograph of what appears to be a pre-pubescent girl standing facing frontwards is pasted onto the page. The scrapbook page is decorated with pink and red hearts.
4. Exhibit 2, the basis for Count 2 is a scrapbook page showing what appears to be an adult male in profile, again mostly clothed but with an erect penis visible. On the other side of the page is what appears to be a pre-pubescent girl fully clothed. Her hand is in a reaching motion and is pasted over the penis.
5. Exhibit 3, the basis for counts 3 and 4, relate to a scrapbook page where photographs of two girls [redacted] are cut and pasted onto the page. They are fully clothed. One girl appears to be hugging something or someone. Under this image an erect male penis is cut-and-pasted. In the upper right-hand corner of the page a photo of adult heterosexual intercourse is pasted. An adult pornographic image is also pasted in the upper left-hand corner. In the bottom right-hand corner is a photograph of what appears to be a nude pre-pubescent girl standing facing frontwards.
6. Images from these exhibits are cut from adult pornography publications for the sexual

images, and art and photography books for the images of children. The images of [redacted] are from [redacted]

7. None of these images, taken alone, constitute child pornography.
8. However, this Court finds that, cut-and-pasted together, the pages constitute child pornography. Specifically, the court finds that the pages are visual depictions "that have been created, adapted, or modified to appear than an identifiable minor is engaging in sexually explicit conduct," in violation of Utah Code Ann. 76-5b-103(1). The "sexually explicit conduct" is that identified in Utah Code Ann. 76-5b-103(10)(f), which is "the visual depiction of nudity or partial nudity for the purpose of causing sexual arousal of any person."

CONCLUSIONS OF LAW

1. The Court concludes that the Findings of Fact do not render the statutory definitions of child pornography in Utah Code Ann. 76-5b-103(1) and 76-5b-103(10)(f) unconstitutional under the First Amendment of the U.S. Constitution.
2. The Court also concludes that the Findings of Fact do not render the statutory definitions of child pornography in Utah Code Ann. 76-5b-103(1) and 76-5b-103(10)(f) unconstitutional under the Due Process provision of the U.S. Constitution.

_____END OF ORDER – SIGNATURE/DATE AT TOP OF FIRST PAGE_____

MAILED/DELIVERED a copy of the foregoing to the Salt Lake District Attorney's Office, via the court's electronic filing system, this 8th day of March, 2018.

Stacie Misner

_____

ADDENDUM C

Utah Code § 76-5b-102 (2017)

Formerly cited as UT ST § 76-5a-1

§ 76-5b-102. Legislative determinations--Purpose of chapter

(1) The Legislature of Utah determines that:

(a) the sexual exploitation of a minor is excessively harmful to the minor's physiological, emotional, social, and mental development;

(b) the sexual exploitation of a vulnerable adult who lacks the capacity to consent to sexual exploitation can result in excessive harm to the vulnerable adult's physiological, emotional, and social well-being;

(c) a minor cannot intelligently and knowingly consent to sexual exploitation;

(d) regardless of whether it is classified as legally obscene, material that sexually exploits a minor, or a vulnerable adult who does not have the capacity to consent to sexual exploitation, is not protected by the First Amendment of the United States Constitution or by the First or Fifteenth sections of Article I of the Utah Constitution and may be prohibited; and

(e) prohibition of and punishment for the distribution, possession, possession with intent to distribute, and production of materials that sexually exploit a minor, or a vulnerable adult who lacks the capacity to consent to sexual exploitation, is necessary and justified to eliminate the market for those materials and to reduce the harm to the minor or vulnerable adult inherent in the perpetuation of the record of the minor's or vulnerable adult's sexually exploitive activities.

(2) It is the purpose of this chapter to prohibit the production, possession, possession with intent to distribute, and distribution of materials that sexually exploit a minor, or a vulnerable adult who lacks capacity to consent to sexual exploitation, regardless of whether the materials are classified as legally obscene.

Credits

Laws 2011, c. 320, § 14, eff. May 10, 2011.

Utah Code § 76-5b-103 (2017)

Formerly cited as UT ST 76-5a-2

§ 76-5b-103. Definitions

As used in this chapter:

(1) "Child pornography" means any visual depiction, including any live performance, photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where:

(a) the production of the visual depiction involves the use of a minor engaging in sexually explicit conduct;

(b) the visual depiction is of a minor engaging in sexually explicit conduct; or

(c) the visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

(2) "Distribute" means the selling, exhibiting, displaying, wholesaling, retailing, providing, giving, granting admission to, or otherwise transferring or presenting child pornography or vulnerable adult pornography with or without consideration.

(3) "Identifiable minor" means a person:

(a)(i) who was a minor at the time the visual depiction was created, adapted, or modified; or

(ii) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and

(b) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a birthmark, or other recognizable feature.

(4) "Identifiable vulnerable adult" means a person:

(a)(i) who was a vulnerable adult at the time the visual depiction was created, adapted, or modified; or

(ii) whose image as a vulnerable adult was used in creating, adapting, or modifying the visual depiction; and

(b) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a birthmark, or other recognizable feature.

(5) “Lacks capacity to consent” is as defined in Subsection 76-5-111(1).

(6) “Live performance” means any act, play, dance, pantomime, song, or other activity performed by live actors in person.

(7) “Minor” means a person younger than 18 years of age.

(8) “Nudity or partial nudity” means any state of dress or undress in which the human genitals, pubic region, buttocks, or the female breast, at a point below the top of the areola, is less than completely and opaquely covered.

(9) “Produce” means:

(a) the photographing, filming, taping, directing, producing, creating, designing, or composing of child pornography or vulnerable adult pornography; or

(b) the securing or hiring of persons to engage in the photographing, filming, taping, directing, producing, creating, designing, or composing of child pornography or vulnerable adult pornography.

(10) “Sexually explicit conduct” means actual or simulated:

(a) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(b) masturbation;

(c) bestiality;

(d) sadistic or masochistic activities;

(e) lascivious exhibition of the genitals, pubic region, buttocks, or female breast of any person;

(f) the visual depiction of nudity or partial nudity for the purpose of causing sexual arousal of any person;

(g) the fondling or touching of the genitals, pubic region, buttocks, or female breast; or

(h) the explicit representation of the defecation or urination functions.

(11) “Simulated sexually explicit conduct” means a feigned or pretended act of sexually explicit conduct which duplicates, within the perception of an average person, the appearance of an actual act of sexually explicit conduct.

(12) “Vulnerable adult” is as defined in Subsection 76-5-111(1).

(13) “Vulnerable adult pornography” means any visual depiction, including any live performance, photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where:

(a) the production of the visual depiction involves the use of a vulnerable adult engaging in sexually explicit conduct;

(b) the visual depiction is of a vulnerable adult engaging in sexually explicit conduct; or

(c) the visual depiction has been created, adapted, or modified to appear that an identifiable vulnerable adult is engaging in sexually explicit conduct.

Credits

Laws 2011, c. 320, § 15, eff. May 10, 2011; Laws 2013, c. 290, § 1, eff. May 14, 2013.

Utah Code § 76-5b-201 (2017)

§ 76-5b-201. Sexual exploitation of a minor--Offenses

(1) A person is guilty of sexual exploitation of a minor:

(a) when the person:

(i) knowingly produces, possesses, or possesses with intent to distribute child pornography; or

(ii) intentionally distributes or views child pornography; or

(b) if the person is a minor's parent or legal guardian and knowingly consents to or permits the minor to be sexually exploited as described in Subsection (1)(a).

(2) Sexual exploitation of a minor is a second degree felony.

(3) It is a separate offense under this section:

(a) for each minor depicted in the child pornography; and

(b) for each time the same minor is depicted in different child pornography.

(4) It is an affirmative defense to a charge of violating this section that no person under 18 years of age was actually depicted in the visual depiction or used in producing or advertising the visual depiction.

(5) In proving a violation of this section in relation to an identifiable minor, proof of the actual identity of the identifiable minor is not required.

(6) This section may not be construed to impose criminal or civil liability on:

(a) any entity or an employee, director, officer, or agent of an entity when acting within the scope of employment, for the good faith performance of:

(i) reporting or data preservation duties required under any federal or state law; or

(ii) implementing a policy of attempting to prevent the presence of child pornography on any tangible or intangible property, or of detecting and reporting the presence of child pornography on the property;

(b) any law enforcement officer acting within the scope of a criminal investigation;

(c) any employee of a court who may be required to view child pornography during the course of and within the scope of the employee's employment;

(d) any juror who may be required to view child pornography during the course of the person's service as a juror; or

(e) any attorney or employee of an attorney who is required to view child pornography during the course of a judicial process and while acting within the scope of employment.

Credits

Laws 2011, c. 320, § 16, eff. May 10, 2011; Laws 2016, c. 116, § 1, eff. May 10, 2016.

U.S. Const. Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. amend. V

Amendment 5 - Trial and Punishment, Compensation for Takings. Ratified 12/15/1791.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Constitution Amendment XIV

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ADDENDUM D

The Order of the Court is stated below:
Dated: May 01, 2018
04:10:46 PM

At the direction of:
/s/ L DOUGLAS HOGAN
District Court Judge

by
/s/ ANTHONY HENDRICKSON
District Court Clerk

3RD DIST. COURT - WEST JORDAN
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH ATTORNEY GENERAL,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 171401406 FS
MICHAEL SCOTT HATFIELD,	:	Judge: L DOUGLAS HOGAN
Defendant.	:	Date: May 1, 2018
Custody: Salt Lake County Jail		

PRESENT
Clerk: anthonyh
Defendant Present
The defendant is in the custody of the Salt Lake County Jail
Defendant's Attorney(s): HEATHER J CHESNUT

DEFENDANT INFORMATION
Date of birth: August 20, 1958
Sheriff Office#: 400630
Audio
Tape Number: 31 Tape Count: 2:14-2:59

CHARGES
1. SEXUAL EXPLOITATION OF A MINOR - 2nd Degree Felony
Plea: No Contest - Disposition: 03/08/2018 No Contest
2. SEXUAL EXPLOITATION OF A MINOR - 2nd Degree Felony
Plea: No Contest - Disposition: 03/08/2018 No Contest
3. SEXUAL EXPLOITATION OF A MINOR - 2nd Degree Felony
Plea: No Contest - Disposition: 03/08/2018 No Contest
4. SEXUAL EXPLOITATION OF A MINOR - 2nd Degree Felony
Plea: No Contest - Disposition: 03/08/2018 No Contest
5. ACCESS PORNOGRAPHIC OR INDECENT MATERIAL ON SCHOOL PROPERTY - Class A Misdemeanor
Plea: No Contest - Disposition: 03/08/2018 No Contest
6. ACCESS PORNOGRAPHIC OR INDECENT MATERIAL ON SCHOOL PROPERTY - Class A Misdemeanor
Plea: No Contest - Disposition: 03/08/2018 No Contest
7. ACCESS PORNOGRAPHIC OR INDECENT MATERIAL ON SCHOOL PROPERTY - Class A Misdemeanor
Plea: No Contest - Disposition: 03/08/2018 No Contest

8. DEMAND FOR FORFEITURE OF PROPERTY - Not Applicable
  - Disposition: 03/08/2018 Dismissed w/ Prejudi

HEARING

Counsel requests probation be ordered in this matter and gives basis. State requests a prison commitment.

SENTENCE PRISON
Based on the defendant's conviction of SEXUAL EXPLOITATION OF A MINOR a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Based on the defendant's conviction of SEXUAL EXPLOITATION OF A MINOR a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Based on the defendant's conviction of SEXUAL EXPLOITATION OF A MINOR a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Based on the defendant's conviction of SEXUAL EXPLOITATION OF A MINOR a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

To the SALT LAKE County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE
The commitments in this matter are to run concurrent to each other. Court closes Counts 5-7 with credit for time served. Restitution is to remain open and sent to the Board of Pardons.

SENTENCE RECOMMENDATION NOTE
The court recommends that the defendant receive credit for 370 days served.

ALSO KNOWN AS (AKA) NOTE
MICHAEL HATFIELD
MICHAEL S HATFIELD

End Of Order - Signature at the Top of the First Page

Case No: 171401406 Date: May 01, 2018

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 171401406 by the method and on the date specified.

EMAIL: UTAH STATE PRISON udc-records@utah.gov
EMAIL: ADC TRANSPORT adc-transportation@slco.org

Date: 05/01/2018 /s/ ANTHONY HENDRICKSON

Deputy Court Clerk

ADDENDUM E

30 Mass.L.Rptr. 518
Superior Court of Massachusetts,
Norfolk County.

COMMONWEALTH
v.
John REX.

No. 12–049.
|
Aug. 8, 2012.

MEMORANDUM OF DECISION AND ORDER ON MOTION TO DISMISS

MITCHELL H. KAPLAN, Justice.

***1** A Norfolk County grand jury returned indictments against the defendant, John Rex, charging him with seven counts of possession of child pornography in violation of G.L.c. 272, § 29C and seven related counts of being a habitual criminal. The defendant is an inmate at MCI–Concord, and the seven photocopies of photographs on which all fourteen indictments are based were found in the defendant's cell by correctional officers during a shakedown of the cell. The case is before the court on the defendant's motion to dismiss all of the indictments under the principles set out in *Commonwealth v. McCarthy,* 385 Mass. 160, 163 (1982). The defendant argues that none of these photocopies, the source of which were a National Geographic magazine, a sociology textbook, and a naturalist catalogue published in New Jersey, could be found to constitute child pornography as defined in § 29C. The court agrees, and, for the following reasons, the motion to dismiss is allowed.

FACTS

While the district attorney presented the grand jury with evidence of the crimes that the defendant had previously been convicted of and the sentences that had been imposed for each, as well as hand drawings that were found in the defendant's possession with the photographs, and the contents of letters written by the defendant, the court does not find any of that evidence relevant to the issues raised by the pending motion. For the purposes of this motion, the defendant concedes that the grand jury heard sufficient evidence that he possessed the photocopies and that the children depicted in them were under the age of 18. The Commonwealth concedes that the sources of the photocopies that are the predicate for the indictments are: a catalogue published by Internaturally, Inc., the cover page of which identifies it as "*Naturally,* Nude Recreation & Travel; Catalog 902[1] and describes it as "New Travel Packages, Books, Videos and Magazines" (five indictments[2]); a May 2008 special edition of *National Geographic* devoted to China; and the Ninth Edition of a textbook entitled *Sociology* written by Rodney Stark, Professor of Sociology and of Comparative Religion at the University of Washington.[3]

1 The defendant points out that *Naturally* is referred to in *United States v. Various Articles of Merchandise,* 230 F.3d 649 (2nd Cir.2000) as an example of a magazine published in New Jersey that is not obscene.

2 The court has not determined which photocopy is the predicate for which indictment. It will refer to the photocopies by number: 1 through 5 will be the photocopies taken from *Naturally,* in the order that they appear in the pages of the catalogue supplied to the court; 6 will be the photocopy from the *National Geographic;* and 7 the photocopy from *Sociology.*

3 The court thanks counsel for both parties for their cooperation in limiting, through agreement, the disputed issues that must be resolved, which substantially assists the court in addressing the difficult legal/factual issues that the motion raises.

DISCUSSION

A. Introduction

The defendant is charged with a violation of § 29C. As relevant to this case, that statute provides that: "Whoever knowingly ... possesses a ... photograph or other similar visual reproduction, ... of any child whom the person knows or reasonably should know to be under the age of 18 years of age and such child is: ... (vii) depicted or portrayed in any pose, posture or setting involving lewd exhibition of the unclothed genitals, pubic area, buttocks or, if such person is female, a fully or partially developed breast of the child; with knowledge of the nature or content thereof shall be punished ...."[4]

4 There are six other types of photographs of children listed in the statute the possession of which will constitute the crime; however, the parties agree that only subsection (vii) is relevant to the photocopies at issue in this case.

When presented with a *McCarthy* motion, the court "must decide whether the grand jury were presented with sufficient evidence to support a finding of probable cause to arrest the defendant for [the offenses charged]" *Commonwealth v. Roman*, 414 Mass. 642, 643 (1993). "The evidence before the grand jury must consist of reasonably trustworthy information sufficient to warrant a reasonable or prudent person in believing that the defendant has committed the offense." *Id.* The evidence presented to the grand jury need not be sufficient to "warrant[ ] a finding of the defendant's guilt beyond a reasonable doubt. [The grand jury] needs only evidence establishing probable cause to arrest." *Id.* at 647.

***2** While that standard is, in the abstract, not difficult to articulate, the court finds that applying the *McCarthy* standards to the facts presented to the grand jury in this case to be very much like trying to fit a square peg in a round whole. Confronted with: the language of § 29C, without further definition of the terms used therein; the photocopies seized from the defendant's cell along with other inflammatory material; and evidence of the defendant's prior crimes, a grand jury might reasonably conclude that there was probable cause to believe that one or more of photocopies depicted a "lewd exhibition" of the body parts listed in the statute. A cogent argument can be made that, therefore, the *McCarthy* motion must be denied and the case proceed to trial. However, case law has provided further definition and context for the term "lewd exhibition." Moreover, a prosecution for possession of visual material requires special consideration as it addresses constitutionally protected issues of free speech. In addressing the importance of de novo review of the sufficiency of the evidence supporting a petit jury's finding that a photograph constituted child pornography, the Supreme Judicial Court commented: "Independent review is similarly appropriate in this case because photographs depicting the breast or genitals of a minor have been held to be protected by the First Amendment, as long as they are not lewd or lascivious or taken with lascivious intent." *Commonwealth v. Bean*, 435 Mass. 708, 715 (2002). The importance of judicial review seems to apply to the pretrial stage of this case as well. This prosecution is based only on the defendant's possession of photocopies of photographs taken from books and a magazine available for purchase by the public that he played no role in generating. In consequence, as discussed in this opinion, the defendant cannot be found guilty unless one or more of the photographs could be found by a jury to constitute a lewd exhibition of a child's genitalia, buttocks or breasts, as the term 'lewd exhibition' is defined in case law binding on the Superior Court. Whether the pending motion is viewed as a *McCarthy* motion or a motion in the nature of a motion in limine to preclude the Commonwealth from offering in evidence photocopies that are not relevant to the charges against him because they cannot establish his guilt under existing legal standards, it seems to this court that it is appropriate to consider whether any of the photocopies could form the predicate for a violation of § 29C, and, if they cannot, to dismiss the indictments, because a jury could not constitutionally convict the defendant for possessing these photocopies.

B. The Photocopies

The record contains photocopies 1 through 7 as well as the source material from which each photocopy was taken. See footnote 2. The photocopies are all grainy, black and white photocopies of photographs. The following is a brief description of each.

***3** 1. Photocopy 1 is an image of a nude boy, perhaps 8 or 9 years old, in profile. It is approximately 1inch by 2½ inches. The genitalia are not particularly visible. It is cropped from a photograph of a Christmas party with a dozen or so adults and children standing about.

2. Photocopy 2 is a 2 by 3 inch photograph of a man with four children standing on a rock by the sea. It has the appearance of a classic vacation photograph, although all five are nude. It appears that the adult is the father; he holds the youngest of the children (presumably his), while the other three stand nearby. The father's genitalia and two of the children's are visible, but they are clearly not the focus of the photograph.

3. Photocopy 3 is 1 by 3 inches. It depicts a boy, perhaps 6 or 7 years of age, seen from the rear. He is nude, except for gym shoes and sox. The image is cropped from a photograph of dozens of adults and children who appear to playing games or standing about. In the full photograph, the boy's image is to the side and back of this large group of people.

4. Photocopy 4 is a 1½ by 2 inch photograph of two nude boys engaged in horse play with a garden hose beside what appears to be a beach house. The genitalia of one of the boys is visible toward the bottom of the image.

5. Photocopy 5 is a 1½ by 3 inch photograph of two nude children, perhaps ages five and seven. They appear to be brother and sister. They are side by side and face the camera; the girl appears to have her arm around her brother's waist. He holds a towel. Her pubic area and his genitalia are clearly visible, but the focus of the photograph is their faces.

6. Photocopy 6 is a 2 by 3 inch cropping from a photograph in a National Geographic magazine article about China. It depicts a naked boy picking up a bicycle. The full photograph shows a boy in jeans and a t-shirt stepping up onto an old stone path and the naked boy picking up a very modern looking bicycle beside him. The caption explains that the naked boy has just come from a swim. The purpose of the photograph appears to be to illustrate the mix of ancient culture and modern ways in the village in which these boys live. The naked boy's genitalia is barely visible.

7. Photocopy 7 is a 1 by 3 inch cropping from a photograph in a sociology textbook. It shows a naked boy of 5 or 6 from the rear standing at the ocean's edge. The photograph appears on the first page of a chapter entitled: "Microsociology: Testing Interaction Theories." The full photograph show four boys of similar age but different ethnic groups about to go for a swim. It was taken in 1900. The photograph is used to compare the norm for skinny dipping in Puerto Rico at the turn of the century with the use of swim wear in the United States at the same time.

C. The Definition of Lewd Exhibition

§ 29C does not define the term "lewd exhibition." It is well settled both in federal and Massachusetts decisions that "the depiction of mere nudity is not enough to support [child pornography] conviction." See *Bean*, 435 Mass. at 715 n. 7, and cases there cited. "It is a 'lewd' exhibition of the genitals, pubic area, buttocks, or female breast that is required. In deciding whether a particular exhibition of the naked body is lewd, the courts have utilized the so-called *Dost*[5] factors as a starting point for analysis, recognizing that they are not dispositive or comprehensive, but aid to further analysis." *Commonwealth v. Sullivan*, Mass.App.Ct. No. 10–P–1869 (Decided July 30, 2012) slip op. at 4–5.

5 *United States v. Dost*, 636 F.Supp. 828, 832 (S.D.Cal.1986) aff'd sub nom. *United States v. Wiegand*, 812 F.2d 1239, 1244 (9th Cir.), cert. denied, 484 U.S. 856 (1987).

***4** The court begins its analysis by looking at *Dost* factors 2, 3, and 5, because it finds that they are obviously inapplicable to the photocopies at issue in this case.

The second *Dost* factor is: "whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity." *Id.* The small cropped and grainy photocopies that the defendant possessed have no context at all. And even if the source material is considered, none of the photos is in a setting that is in any way suggestive of sexual activity. The third factor is: "whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child." *Id.* All of the children are completely nude (one has gym shoes and sox) and none is doing something that a young child would not be expected to do. The fifth Dost factor is: "whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity." There is nothing remotely sexual in any of the photographs.

Turning to factors 1, 4, and 6, factor 4 is: "whether the child is fully or partially clothed, or nude." *Id.* In each of these photographs nudity is largely the purpose of the photograph. In the National Geographic and sociology text, the point is the matter of factness of the nudity in the culture being discussed. In the naturalist magazine people engaging in everyday activity while not wearing any clothes is, of course, the essence of the publication.

Factor 1 is: "whether the focal point of the visual depiction is on the child's genitalia or pubic area." *Id.* When considering this factor, it is important to consider that these photocopies are cropped from photographs which include much additional subject matter. Several of the photographs have multiple figures engaged in various activities. As will be discussed further below, in determining whether there has been any exploitation of children, the cropped photocopy cannot be disassociated from the source photograph. For example, exhibits 1 and 3 are snipped from scenes where dozens of nude children and adults are standing about. The fact that one could

take an innocently framed photograph and crop it so that a child's genitalia appear more central cannot transform the photograph into child pornography. In any event, even as cropped, none of the photocopies focus on genitalia or pubic areas. Indeed, in each photograph the purpose appears to be just the opposite: to capture images in which the figures are engaged in common place activities while nude thereby decoupling nudity from sexuality.

Factor 6 is: "whether the visual depiction is intended or designed to elicit a sexual response in the viewer." *Id.* The First Circuit Court of Appeals has commented that: "This is the most confusing and contentious of the *Dost* factors. Is this a subjective or objective standard, and should we be evaluating the response of an average viewer or the specific defendant in this case? Moreover, is the intent to elicit a sexual response analyzed from the perspective of the photograph's composition, or from extrinsic evidence (such as where the photograph was obtained, who the photographer was, etc.)?" *United States v. Amirault,* 173 F.3d 28, 34 (1st Cir.1999). The *Amirault* court concluded that "the focus should be on the objective criteria of the photograph's design." *Id.* at 35. Indeed the Appeals Court comments that if one considered the subjective reaction of the defendant relevant, "a sexual deviant's quirks could turn a Sears catalog into pornography." *Id.* at 34. Focusing only on the composition of the photograph itself seems particularly necessary in a case such as the instant one in which the defendant was not the photographer. The government has no admissible extrinsic evidence concerning what was in the photographer's mind when he framed the photograph. See also *United States v. Rivera,* 546 F.3d 245, 253 92d Cir.2008) ("Some of this criticism is mitigated once one distinguishes between the production of child pornography and possession. In *Dost,* the defendants were charged with having produced child pornography. It was thus logical for the Ninth Circuit to hold that the pictures were "a lascivious exhibition because the photographer arrayed it to suit his peculiar lust." *Wiegand,* 812 F.2d at 1244. It is a point of distinction that the defendants in *Amirault, Villard* and *Frabizio* were charged with having possessed (or transported) child pornography; there was no allegation that they located the victims, arranged or posed the scenes, or otherwise produced the visual depiction. The sixth *Dost* factor is not easily adapted to a possession case.")

***5** With this analysis of the sixth *Dost* factor in mind, the court considers the Commonwealth's contention in the present case that "lasciviousness" must be determined based on a "totality of the circumstances inquiry that can only be informed through the context of a trial." See Commonwealth's Opposition at 13. The Commonwealth reasons that the photocopies here at issue must be considered in a "context" that focuses on the manner in which the defendant, himself, possessed them: "how the photographs were stored or possessed, what accompanying items were discovered with the images, and whether items were altered or hand-picked." *Id.* at 14. The Commonwealth doubles down on this unique argument, i.e., that the case will turn on the manner in which the defendant possessed and reacted to the photocopies, in a supplemental memorandum in which it asserts that its position is supported by the Massachusetts Appeals Court's recent *Sullivan* decision. "In *Sullivan* the Appeals Court addressed whether the image of the naked young girl could be anything else but lewd and noted that the picture was found on a Russian photo-sharing Web site, not in a medical textbook, National Geographic pictorial, or in an art museum.... The same principles apply and hold true here. These images were not found in an art museum or in a National Geographic magazine, but rather in a locked box—the defendant's self described 'stash'—in his state prison cell." See Supplemental Opposition at 3. Of course, in this case two of the images actually did come from a National Geographic pictorial and a textbook; the others came from a naturalist magazine published in New Jersey. The Commonwealth's argument seems to be that a photograph might not be lewd in the possession of one individual who looks at it in a magazine or textbook, but become lewd when possessed by another, as established by the manner in which a defendant stored the image or what other items he looked at while viewing the image which it is illegal *for him* to possess.[6] Or, stated differently, a photograph may be lawfully possessed by one person, but a crime if handed to someone else who finds it titillating and stores it in a suggestive manner. It is this court's opinion that this cannot be the state of the law.

6 Compare *Sullivan,* slip op. at 8 ("[T]he judge could have stated more clearly that the defendant's subjective reaction to the photograph was not relevant to the jury's determination of the lewdness of the photograph itself.... In addition, both the Commonwealth and the defendant focused the jury's attention on the 'four corners' of the photograph in measuring lewdness."

The Commonwealth also argues that a cropping from a photograph that does not constitute child pornography can nonetheless be child pornography, depending on how it is cropped. For example, according to the Commonwealth when the defendant cut exhibit 3, a naked boy in profile, from a photograph of what is obviously a Christmas party attended by a crowd of nude adults and children he committed a felony. Such an interpretation of § 29 would, of course, not further the statutory purpose of this legislation: "The Legislature's purpose in enacting the statute could not be clearer: '[T]o protect children from sexual exploitation ... [by] prohibit[ing] 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.' St.1997, c. 181, § 1(1)." *Commonwealth v. Kenney,* 449 Mass. 840, 853 (2007). A child is the victim of sexual exploitation both when a pornographic photograph is taken, and, thereafter, as "[c]ontinuing victimization of children [occurs because] such material is a permanent record of an act or acts of sexual abuse of exploitation of a child and ... each time such material is viewed the child is harmed." *Id.* In consequence, the exploitation of a child occurred or did not occur when the photograph was taken, well before a snippet was cut from the photograph. The snippet cannot be the permanent record of an act of exploitation that did not occur when the photograph was taken. Again, the court is of the opinion that an individual cannot be found to have committed a felony by cutting out part of a photograph, the possession of which is not a crime.

***6** To hold otherwise would be to suggest that § 29C criminalized protected free speech. In *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 250–251 (2002), the United States Supreme Court reviewed the constitutionality of a federal statute that criminalized possession of virtual images of children engaged in sexual activity. It held that: "In contrast to the speech in *Ferber* [7], speech that itself is the record of sexual abuse, the CPPA [8] prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not intrinsically related to the sexual abuse of children, as were the materials in *Ferber,* 458 U.S., at 759.... *Ferber's* judgment about child pornography was based upon how it was made, not on what it communicated. The case reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment." By analogy, if the photograph from which the defendant cut the image was not child pornography, the defendant did not commit an act of sexual abuse of a child when he cut it out. By arguing that the measure of the crime is how the defendant reacted to the portion of the photograph that he cut, which crime the Commonwealth intends to prove by introducing evidence concerning where, how and with what the defendant kept the photocopy, the Commonwealth seeks to criminalize the defendant's thoughts and expression; such thoughts and expression are not intrinsically related to the abuse of any child. [9]

7 *New York v. Ferber,* 458 U.S. 747 (1982)

8 Child Pornography Prevention Act of 1996; 18 U.S.C. § 2251 et seq.

9 The court reads the Commonwealth's focus on the manner in which the defendant cropped, viewed and stored the photocopies to be a tacit admission that the source photographs themselves are not child pornography when the analysis is limited to a consideration of what is within the four corners of the photos. The possession of these photocopies by a prisoner may well be forbidden by Department of Correction regulations, but that cannot inform a decision as to whether possessing them violates § 29C.

ORDER

As none of photocopies 1 through 7 constitutes a "lewd exhibition" of one of the body parts of a child listed in § 29C, the defendant's motion to dismiss the fourteen indictments based upon his possession of those photocopies is ALLOWED.

All Citations

Not Reported in N.E.2d, 30 Mass.L.Rptr. 518, 2012 WL 6178422

End of Document

404 P.3d 362 (Table)
Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Richard P. LANGSTON, Appellant.

No. 115,552
|
Opinion filed October 13, 2017

Appeal from Wyandotte District Court; WESLEY K. GRIFFIN, Judge.

Attorneys and Law Firms

Kimberly Streit Vogelsberg, of Kansas Appellate Defender Office, for appellant, and Richard P. Langston, appellant pro se.

Ethan Zipf–Sigler, assistant district attorney, Mark A. Dupree, district attorney, and Derek Schmidt, attorney general, for appellee.

Before Standridge, P.J., Leben, J., and Patricia Macke Dick, District Judge, assigned.

MEMORANDUM OPINION

Leben, J.:

***1** Richard P. Langston was convicted on 20 counts of sexual exploitation of a child after officers armed with a search warrant found 20 sexually explicit images of girls on his computer. At trial, the court excluded Langston's attempt to present evidence that others had access to the

computer as well as evidence that another resident not only used the computer but also had girls' toddler underwear and a child sex doll in his bedroom. The court excluded that evidence primarily because Langston's attorney hadn't disclosed the witnesses at least 10 days in advance of trial.

But a defendant has a constitutional right to present his or her theory of defense, and this testimony was critical here to Langston's defense, which was that he didn't know these images were on the computer. Evidence that others had access to the computer, that the computer passwords were written down in plain sight, that others had used the computer without noticing the images (like Langston, he argues), and that another resident who used the computer had children's underwear and a child sex doll in his bedroom fit squarely within Langston's theory of defense. The total exclusion of this evidence violated Langston's right to a fair trial, so we reverse the district court's judgment and remand the case for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

This case began with an anonymous tip that Langston had child pornography at his apartment. Based on the tip, officers from the Kansas City, Kansas, Police Department got a warrant to search his apartment, part of a four-plex living arrangement. They seized a computer and a detached hard drive on a desk in a common area off the living room.

After the hard drive was assessed by a forensic examiner, the State charged Langston with sexual exploitation of a child for possessing images of suspected child pornography. The State ultimately tried Langston on 21 separate counts based on separate images stored on a computer hard drive.

At the start of trial, before jury selection, the court asked defense counsel how long he thought the defense case would take so that the court could give a realistic trial-length estimate to potential jurors. When defense counsel said he had five or six witnesses in addition to a defense expert, the court immediately inquired about whether the witnesses had been disclosed to the State. When the prosecutor said they had not been, the court said that "the discovery process [the] Wyandotte County District Attorney's Office utilizes that when you ask for discovery, you indicate [your witnesses] what, within 10 days?" The prosecutor then said that the defendant "didn't proceed with" a request for a copy of the State's file but argued "it's still mandated by statute that we have to know within a reasonable time prior to [trial] if there's any discovery done under the statute, which there was." The defense had separately obtained pretrial access, by court order, for its expert to examine the computer drives and images. So the prosecution

objected to all defense witnesses except the defense's expert witness, who had been disclosed before trial.

***2** The court made an initial ruling that defense counsel couldn't mention these witnesses in opening statement. The court then ordered: "So give 'em the names and see what they can do with it in the next day ...." The court postponed final ruling to see whether the State could sufficiently investigate the potential witnesses' testimony in that time frame. The parties then proceeded with jury selection.

After that, the prosecutor asked to raise further issues about potential defense witnesses. The State then objected to potential testimony from Langston's mother. Langston's attorney said she would testify that she had seen numerous people using the computers several months before the search of the apartment, knew that the passwords to access the computers were written down in the communal area, and had never seen the images at issue while she was using the computers. But the prosecutor argued that she wasn't living in town during the time period of the search and when the State would show at least some of the images were accessed. The State argued that her testimony would violate the third-party evidence rule, which generally requires some evidence connecting a third party to the crime before a defendant may offer evidence that the third party had some motive to commit the offense. Defense counsel countered that the defense expert would testify that some of the images had been downloaded while Langston's mother was still in town.

The court then asked for each attorney to separately address each of the defendant's proposed nonexpert witnesses. Ultimately, Langston's attorney said he wanted to call four other witnesses who would testify that they had seen many people using the computer:

- John Bassett, manager of the complex where Langston's apartment was part of a four-plex. Defense counsel said that he would also testify that he had witnessed other people using the computer and that the passwords were readily available.

- Gerald Mason, who counsel said would testify that he had sold the computer containing the hard drive to Langston and had downloaded family pictures for Langston. Defense counsel also said Mason would testify that he had later repaired the computer and hadn't become aware of any images of child pornography.

- Wanda Wileford, with whom Langston apparently lived for part of the time at issue. Defense counsel said that she would testify that he was living with her during some parts of the time period the State alleged he was possessing the images to establish that he didn't have access or control of the computers.

- Carl Wilson, another resident of Langston's apartment, who defense counsel said saw people other than Langston using the computer, none of whom saw pornographic images.

Langston argued that this evidence was important to his defense because it suggested that others had control of the hard drive and could have downloaded the files and that someone could use the computer without being immediately aware of the images at issue, which is what Langston claimed to have done.

The State objected to the admission of the previously undisclosed witnesses' testimony on two grounds: (1) that the late disclosure had unduly prejudiced the State because it was unable to fully investigate them; and (2) that the testimony would be inadmissible under the third-party evidence rule.

The district court focused on the defense's failure to disclose these witnesses before trial: "Just think of the magnitude of stuff you are throwing at the State, you know, right now after we've conducted [jury selection]." At another point, after defense counsel noted that there were dozens of people who had used the computer, the court said: "So you think it's okay to be able to put the blame—and that's my word, not yours—on dozens of people [with you] not ever having told the State a single name, not ever told the State or the court the requisite information of a proffer that is required by Kansas law and it's supposed to be okay? I tend to disagree." The court also asked: "Why didn't you provide those [witness names] a long, long, long time ago as Kansas law requires?" The court said it would leave the issue open for reexamination after the State presented its evidence, but emphasized that "this is absolutely too late, it is absolutely insufficient—too late an endorsement of witnesses to this magnitude."

***3** The court ultimately allowed only Mason to testify, and only about how he had sold the hard drive to Langston and downloaded family photos. The court refused to allow Mason to testify to the fact that he had never seen child pornography on the computer, concluding that this evidence was irrelevant and that Langston had failed to give proper notice of the witness to the State.

Langston also sought to implicate his former roommate, Damian Eker, who could not be located. Langston wanted to testify or introduce evidence that he had given the hard drive to Eker; that Eker had access, expertise, and opportunity to use the computers; and that police had found girls' toddler underwear and a child sex doll in Eker's bedroom. The State objected that this too was disclosed only right before trial and the late notice would be highly prejudicial; the prosecutor said detectives hadn't had an opportunity to try to track Eker down and again argued that the evidence would violate the third-party evidence rule. Langston argued that the third-party evidence rule didn't apply because there was sufficient evidence connecting Eker to the crime: Eker had the ability to exercise actual physical control over the hard drive and the expertise to download the files. The defense contended the child sex doll was evidence of Eker's motive to look at child pornography. According to a detective's affidavit, the doll was "a homemade childsize doll" wearing children's clothing, with "holes cut out where the vagina and anus would be" and with what appeared to be bodily fluids on the clothing. But the district court excluded the evidence, concluding it would violate the third-party evidence rule because Langston hadn't established a sufficient connection between Eker and the charges facing

Langston.

In presenting its case, the State called Corporal Thad Winkelman from the Shawnee County Sheriff's Department to testify about the evidence recovered on the hard drive. Winkelman had received special training as a forensic examiner in collecting, examining, and preparing digital evidence. Winkelman testified that the username on the hard drive was "Cali," which was associated with Langston. The hard drive was set up so that the "Cali" username pathway opened to a desktop with several content folders. Winkelman explained where each of the charged images was located and the date that the image was last opened or accessed. The images were found saved in several different folders and subfolders with labels including "young ones," "daddy's SP friends," "good porn pics," "XXX," and "lil ones." Winkelman testified that the hard drive also contained nonpornographic images and files linked to Langston, including family photos and videos, which were kept in a folder titled "photos of fam, faith, me and Sam."

As part of the forensic examination, Winkelman also examined the images to determine whether they had been modified in some way. In his opinion, although some of the images had been enhanced, none appeared to have had their content changed. On cross-examination, the defense asked him about pixilation in some of the images. Winkelman attributed the pixilation to the process of transferring the photos, which required compressing and decompressing the image.

The State also called Elizabeth Frazier to testify. She testified that she had gone to Langston's home multiple times to do drugs with him and had been arrested there for drug use. She stated that on a few occasions she had seen Langston on the computer looking at images of young girls with no pubic hair and small, undeveloped breasts engaging in sexual conduct. She testified that she did not report it to the authorities and had only told detectives about it after they approached her during their investigation of Langston.

***4** Detective Jackie Lynn of the Kansas City, Kansas, Police Department also testified on behalf of the State. She worked in the Child Abuse Unit at the time and was assigned to investigate an anonymous tip to the Kansas Department of Children and Families. Another officer reached out to Elizabeth Frazier because Frazier knew Langston. It was based on Frazier's information that the officers got their search warrant for Langston's apartment. Lynn testified that she was concerned because officers found toddler-sized girls underwear all over the apartment and did not believe any child was living there. On cross-examination, the defense questioned Lynn about the anonymous tip, which had alleged that Langston possessed child pornography including images of his 10–year old daughter. Lynn testified that Langston told her that he did not have a 10–year old daughter and that the information had come solely from the anonymous tip. Defense counsel also attempted to ask Lynn about a child sex doll that was found in Eker's room, but the court concluded that the testimony was irrelevant to whether Langston possessed child pornography and excluded it.

The State also called Dr. Terra Frazier, a child-abuse pediatrician, as an expert witness. She was

asked to assess the age of the people in the images found on the hard drive and had done this type of examination on other occasions. She testified that it was her expert opinion that the charged images all showed children under the age of 18, although she did note that exhibits 12, 20, 23, and 24 featured girls who were more mature and developed than the other photos.

In presenting his defense, Langston called Joseph Wilson, a managing partner of JNJ Tech, who had experience in manipulating photos as part of his work. He testified that he believed exhibits 5, 10, 17, 18, 19, and 25 had evidence of manipulation due to pixilation and other traits of the images. Wilson also testified that technology can be used to digitally manipulate photos of adults to look as if they were under the age of 18. He acknowledged that he had no previous experience in child-pornography cases and had never used age-regression technology in his work. On cross-examination, he agreed that 19 of the 21 images were not pixilated near the breast or pubic area.

Langston also testified in his own defense. He said that he had two computers—the hard drive with the challenged images was in a computer he had purchased from Gerald Mason. He said the other computer had been inherited and should have been up in his office; he said he didn't know why it was found downstairs in the common area when police searched the apartment. Langston said he had been away from the home for long periods of time in 2012 and 2013.

Langston admitted that he'd had some illegal drugs in the apartment. He said that when he saw police arrive to search the house, he gathered up drugs and other evidence of illegal activities and took off in his truck. Having left the computer hard drive with the challenged images behind, Langston sought to raise the inference that he didn't know there were illegal images on that computer. Langston specifically testified that he had no knowledge of the images and that had he known about the images, he would have removed them with the other illegal items. He also said that he had never looked at any pornographic images in front of Elizabeth Frazier. Langston said Frazier had a reason to lie because they had slept together once and had a falling out that resulted in her threatening to have him beat up.

The jury found Langston guilty of 20 of the 21 counts of sexual exploitation of a child under the age of 18. (The jury found him not guilty with respect to one specific image.) The district court sentenced Langston to serve 89 months in prison. The court's original sentence included a 24–month period for postrelease supervision, but the court later corrected that and imposed lifetime postrelease supervision in accordance with the sentencing statutes for this offense.

Langston has appealed to our court. In our decision, we will generally cite to statutory provisions as they existed at the time of Langston's offenses, though we are not aware of any change in them that would significantly affect the issues we will be addressing.

ANALYSIS

I. *The District Court Erred When It Precluded Key Evidence in Support of the Defendant's Case.*

***5** A defendant is entitled to present his or her theory of defense. Accordingly, the exclusion of evidence that is key to the defense case violates a defendant's fundamental right to a fair trial. *State v. Maestas*, 298 Kan. 765, 781, 316 P.3d 724 (2014). And while the defendant's right may be limited by rules of evidence, 298 Kan. at 781, those limits may not be applied arbitrarily or disproportionately to legitimate state interests. *Rock v. Arkansas*, 483 U.S. 44, 55–56, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). Doing so would violate a person's Sixth Amendment right to call witnesses in one's own defense. *Rock*, 483 U.S. at 52; *State v. Suter*, 296 Kan. 137, 143–44, 290 P.3d 620 (2012). An appellate court reviews a claim that a defendant was denied the constitutional right to present his or her defense independently, without any required deference to the district court. *Maestas*, 298 Kan. at 780.

To consider what might be essential to Langston's defense at trial, we must start with what the State had to prove to convict him. The State charged Langston with 21 counts of sexual exploitation of a child for possessing 21 separate images. The State had to prove that Langston possessed visual depictions of a child under 18 years old shown engaging in sexually explicit conduct—and that he did so with the intent either (1) to arouse or satisfy the sexual desires or (2) to appeal to the prurient interests of himself or another person. See K.S.A. 2012 Supp. 21-5510(a)(2). To prove that Langston possessed the materials, the State had to prove that he had either joint or exclusive control over each image "with knowledge of or intent to have such control" or that he kept them "knowingly ... in a place where [he had] some measure of access and right of control." See K.S.A. 2012 Supp. 21-5111(v).

With what the State had to prove to convict in mind, Langston's defense was straightforward: He argued that he didn't know the images were on the computer hard drive. If the jury had a reasonable doubt about whether he had that knowledge, it couldn't convict him.

In context, then, the district court's limitations on the evidence Langston could present were very significant. The State argues that Langston was still able to present his basic defense. After all, he testified that he didn't know about the images. But without corroboration from other witnesses or some key fact he might cite that would have been inconsistent with his having had knowledge of the images, his case would be quite weak. A defendant's constitutional right to present his or her defense isn't met simply by allowing the defendant to present a weak case while excluding the best evidence that could support the defense case.

The evidence Langston cites on appeal would have helped corroborate his claim that he didn't

know about the photos:

> • Two witnesses (Bassett and Wilson) would have testified that others used the computer without knowing there were illicit images accessible there. This would have made it more believable that Langston could have used the computer without having knowledge of the images.
>
> • Bassett also would have testified that the passwords needed to get access to various files and folders on the computer's hard drive—including those containing the images—were readily available. During deliberations, the jury sent several questions, including what the password was and how the password was known. Such questions would be relevant if one or more jurors wondered either how easy the password would have been to guess or whether it was available to others in the apartment. *Someone* had to have put the images on the hard drive. If the password giving access to those files was widely known or readily discoverable, that would have made it more believable that Langston had no knowledge of the images because someone else had put them there.
>
> ***6** • Langtston's own testimony that he had given the specific hard drive that contained the images at one point to Damien Eker, who then lived in the apartment, similarly showed that another person had access to the location where the illicit images were found.

It's important to keep in mind the State's duty to prove that Langston had either joint or exclusive control over each image. The situation is much like one more typically encountered by police—drugs found in a car with several occupants. If drugs are found in the center console, many facts might be relevant in deciding whether the driver, the front-seat passenger, or a back-seat passenger possessed the drugs. Was it the driver's car? Did one of the passengers often drive the car? Had anyone else driven the car recently? Was the console locked and, if so, who had access to the key? Questions like these could be relevant because simply being in possession of a car that contains drugs or having access to the drugs isn't enough to prove possession: there must be other evidence tying the defendant to the drugs to prove a criminal charge of drug possession. *State v. Rosa*, 304 Kan. 429, Syl. ¶ 3, 371 P.3d 915 (2016); *State v. Keel*, 302 Kan. 560, Syl. ¶ 2, 357 P.3d 251 (2015).

The situation here with Langston's computer is essentially the same. Under Langston's proffered evidence, many people had access to the place where the illicit images were found. We found one case similar to Langston's in the context of drug possession—*State v. Hedge*, 297 Conn. 621, 636–37, 646, 1 A.3d 1051 (2010), from the Supreme Court of Connecticut. In *Hedge*, the defendant had been stopped while driving his girlfriend's car, and officers found drugs in hidden panels in the car. The trial court excluded defendant's proffered evidence that the girlfriend had loaned the car for a significant time period (most of the week leading up to the defendant's arrest) to another man, a convicted drug dealer, including within 24 hours of the arrest. The Connecticut Supreme Court agreed with the defendant that the trial court had

violated the defendant's constitutional right to present his defense: "[T]he trial court's exclusion of the ... evidence deprived the defendant of the opportunity to present his version of the facts to the jury and to explain to the jurors who, if not him, committed the offenses ...." 297 Conn. at 637.

In Langston's case, the district court gave two reasons for excluding the testimony he offered about the access others had to these computers and Eker's potential role in placing the images there—the third-party witness rule and the timing of the defendant's identification of his trial witnesses. Neither provides a valid basis for exclusion.

The third-party-evidence rule is of limited scope and not applicable to most of the evidence at issue here. It comes into play when a defendant tries to prove that a third person—not the defendant—committed the offense the defendant is charged with. In that situation, the defendant isn't allowed to present evidence that the third person had some *motive* to commit the offense unless there is other evidence (beyond mere motive) connecting the third party to the crime. *State v. Marsh*, 278 Kan. 520, 530–31, 102 P.3d 445 (2004), *rev'd on other grounds by Kansas v. Marsh*, 548 U.S. 163, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006); see also *State v. Carr*, 300 Kan. 1, 199–203, 331 P.3d 544 (2014), *rev'd on other grounds by Kansas v. Carr*, 577 U.S. ——, 136 S. Ct. 633, 193 L. Ed. 2d 535 (2016); *State v. Hopkins*, No. 110,581, 2015 WL 1310081, at *7–9 (Kan. App. 2015) (unpublished opinion). Except for evidence related to Eker, the defense sought to present the testimony to increase the credibility of defendant's denial of knowledge that the images were on the computer hard drive at all, not to connect a specific third party to the crime. So the third-party-evidence rule wouldn't apply except potentially as to testimony about Eker.

***7** As to Eker, the combination of the evidence Langston sought to present—not only that he had given the hard drive at one time to Eker but also that Eker had girls' toddler underwear and a child sex doll in his room—was intended to suggest Eker committed the offenses. Thus, the third-party evidence rule could be applied here, potentially to exclude the evidence. But in addition to evidence of motive (the materials found in Eker's room), there also was evidence connecting Eker to the computer hard drive on which the images were found. Like the evidence against Langston, the evidence against Eker is circumstantial. But in a case in which the State is presenting a circumstantial criminal case against Langston, the defendant's right to present a defense tips the balance in favor of allowing him to present a circumstantial case against another party—given that there is evidence here beyond mere motive. By connecting Eker to this computer and hard drive, the defense essentially put Eker at the crime scene. See *State v. Burnett*, 300 Kan. 419, 432–33, 329 P.3d 1169 (2014); *Hopkins*, 2015 WL 1310081, at *7–9. See generally Schwartz and Metcalf, *Disfavored Treatment of Third–Party Guilt Evidence*, 2016 Wis. L. Rev. 337, 346–47, 397–98 (2016). We conclude that Langston's constitutional right to present his defense also required the admission of the Eker evidence.

The district court's ruling about the timing of the defendant's disclosure of witnesses is harder to

pin down. In its brief on appeal, the State doesn't provide an affirmative defense of the district court's timing ruling on its merits. Instead, the State argues that Langston hasn't shown that the timing ruling was in error; based on that, the State contends we should uphold the district court based on a failure in Langston's briefing on appeal.

In response, Langston argues that he discussed only the third-party evidence rule in his initial appellate brief because the State's timing argument in the district court was specifically tied to that rule. As Langston notes, the prosecutor told the district court that " 'because they didn't tell us until Monday morning that they were going to be pleading this third party evidence ... we've been completely deprived of any opportunity' " to rebut it. Since the State's timing argument to the district court was tied to the third-party evidence rule—and the defense squarely argued in its initial appellate brief that the third-party evidence rule didn't apply here—we agree that the defense has not waived the timing issue by a failure to brief it.

What's harder to figure out—notwithstanding that the prosecutor's timing argument to the district court was tied to the third-party-evidence rule—is what the actual basis was for the district court's ruling regarding timing. At one point, the district court appeared to tie its ruling to the cases regarding third-party evidence: "It's just ridiculous ... that [the disclosure is] this late in time. Cases in Kansas are not like that and that's not what the cases [the prosecutor cited] hold." The cases cited by the prosecutor all related to the third-party-evidence rule, which didn't apply and doesn't have a specific time standard.

More generally, there is no Kansas statute requiring that criminal defendants identify all witnesses in advance of calling them at trial. See *State v.* Coleman, 253 Kan. 335, 347, 856 P.2d 121 (1993). The criminal-discovery statute, K.S.A. 2016 Supp. 22-3212, provides only that the defense provide certain disclosures of expected testimony from *expert* witnesses if the defense makes specified requests for disclosures by the prosecution. See K.S.A. 2016 Supp. 22-3212(c). The statute also allows for other court orders, K.S.A. 2016 Supp. 22-3212(e), or agreements about disclosures by the parties, K.S.A. 2016 Supp. 22-3212(f), but the district court didn't mention any of these when it made its ruling. And while there is a statutorily required notice of alibi witnesses, K.S.A. 2016 Supp. 22-3218, most of the excluded evidence had nothing to do with an alibi (that Langston was somewhere else when the crime was committed)—it simply showed that others could have put the images on the computer.

***8** The district court referenced a "discovery process [the] Wyandotte County District Attorney's office utilizes that when you ask for discovery, you indicate [your witnesses] what, within 10 days?" But the prosecutor immediately responded that Langston's attorney hadn't proceeded with a request to copy the State's file. Even so, the prosecutor said that pretrial disclosure by the defense was "still mandated by statute that we have to know within a reasonable time prior to [trial] if there's any discovery done under the statute, which there was." The only pretrial discovery we've noted in our record is that the defense obtained pretrial access, by court order, for its expert to examine the computer hard drive and images. But that would at

most have triggered a requirement that the defense disclose its expert witness, see K.S.A. 2016 Supp. 22-3212(c), which apparently occurred.

In the defendant's reply brief, his attorney says that there was an agreed pretrial order for reciprocal discovery under which the defense did agree to provide a list of defense witnesses at least 10 days before the trial. If such an agreement was made, it's not in our record. But even if such an agreement existed and was placed in an enforceable court order, the district court still is not supposed to impose the most severe sanction—forbidding the calling of undisclosed defense witnesses—except as a last resort. Before entering such an order, the court must first consider a series of factors, known as "the *Bright* factors" after the first case to provide them, such as whether prejudice to the State can be avoided by a recess or delay in the trial. See *Coleman*, 253 Kan. at 347–51; *State v. Bright*, 229 Kan. 185, 194, 623 P.2d 917 (1981). The last of the *Bright* factors counsels that the "trial court should ... avoid imposing the severe sanction of prohibiting the calling of the witness if at all possible. This should be viewed as a last resort." 229 Kan. at 194.

The court did inquire at one point about the possibility of the State investigating these witnesses—but it did not consider a possible recess or delay of the trial. When the prosecutor responded that the detective who would normally handle any further investigation would be tied up testifying in court at trial, the court did not explore the possibility of a recess or trial delay. Instead, the court restated its view that the witness disclosures were "absolutely too late."

The State has not suggested—and our record does not show—that the district court either cited to or considered the *Bright* factors. So even if there was some enforceable requirement that the defense provide a witness list 10 days before trial, the district court's failure to consider the *Bright* factors and try to remedy the nondisclosure with some sanction short of prohibiting the testimony altogether would be an abuse of discretion. See *Coleman*, 253 Kan. at 351. We note too that at most, the defense was obligated to provide witness names, not the content of expected testimony.

In sum, the evidence at issue was quite significant to the defendant's case; the district court precluded it primarily on the basis that the defendant should have disclosed his witnesses long before trial; and the district court did not consider the *Bright* factors. Based on our review of the record, we conclude that the district court's rulings interfered with Langston's constitutional right to present his defense. We therefore reverse the defendant's convictions and remand the case for a new trial.

Although we are ordering a new trial based on our review of the first issue Langston raised on appeal, some of his other issues would be relevant to any retrial. We proceed to consider those issues.

II. *The District Court Did Not Err by Choosing Not to Instruct the Jury on the Defense of Ignorance or Mistake.*

Larson's next claim is that the district court should have given the jury an instruction about the defense of ignorance or mistake. What instructions should be given will arise again on remand, so we will address this issue.

***9** While the attorneys were discussing jury instructions with the district court, the parties agreed that the State had to prove Langston acted with a culpable mental state in committing each act of sexual exploitation of a child. That made sense—in Kansas, a culpable mental state is an essential element of every crime unless a statute plainly provides otherwise. K.S.A. 2012 Supp. 21-5202(a), (d); see *State v. Heironimus*, 51 Kan. App. 2d 841, 850, 356 P.3d 427 (2015).

Much of the time, all the State must prove is the general intent to commit the conduct that constitutes the crime. See K.S.A. 2012 Supp. 21-5202(a), (e); *State v. Howard*, 51 Kan. App. 2d 28, 47, 339 P.3d 809 (2014), *aff'd* 305 Kan. 984, 389 P.3d 1280 (2017). To prove general intent, the State need only prove that the defendant acted intentionally in the sense that the defendant was aware of what he or she was doing. 51 Kan. App. 2d at 46. If the person knew what he or she was doing and those acts constitute a crime, the defendant has knowingly committed that crime—even if the defendant didn't intend to break the law.

The district court's instructions followed the State's suggestion that it need only prove general intent: "The State must prove that the defendant committed the crime sexual exploitation of a child knowingly. A defendant acts knowingly when the defendant is aware of the nature of his conduct that the State complains about." The defense agreed to that instruction, and no issue about it has been raised in this appeal.

Langston then requested that the court instruct the jury on the defense of ignorance or mistake based on a pattern jury instruction. That instruction provides: "It is a defense in this case if by reason of ignorance or mistake the defendant did not have at the time the mental state which the statute requires as an element of the crime." PIK 4th Crim. 52.090. Langston argued that his ignorance that the images were on the computer at all meant that he couldn't have knowingly possessed them.

Langston preserved this issue for appellate review by requesting the instruction at trial, so we proceed to consider whether the instruction was legally appropriate. If so, we would then proceed to consider whether it was factually appropriate based on the evidence in this case. And if the instruction was both legally and factually appropriate—and thus should have been given but wasn't—we would then determine whether the error caused prejudice to Langston or was harmless. See *State v. Salary*, 301 Kan. 586, Syl. ¶ 1, 343 P.3d 1165 (2015).

We find no error because Langston's proposed instruction wasn't legally appropriate. The part of the offense that Langston was contesting was knowing possession of the images, something for which only general intent (knowing conduct) was required. If he possessed them, the State also had to show he did so with the intent to arouse or satisfy sexual desires or to appeal to prurient interests. See *State v. Zabrinas*, 271 Kan. 422, 439, 24 P.3d 77 (2001). The jury was properly instructed about that too, and the intended use of the images isn't what was at issue in Langston's proposed instruction.

So what would Langston's proposed instruction have added to the jury's consideration about whether he knowingly possessed the images? Nothing. The State had to prove he knowingly possessed the images; under the instruction the court gave, Langston had to be "aware of the nature of his conduct that the State complains about"—he had to know he possessed the images.

***10** The defense of mistake of fact or ignorance is applicable when more than mere general intent (the defendant knew what physical actions he or she was taking) is at issue. For the crime of aggravated interference with parental custody, for example, a parent who took a child with her and didn't know that the child had been placed in state custody wouldn't have the specific intent required for that crime. Committing that crime requires that the defendant have the specific intent to detain or conceal a child from the lawful custodian. See *State v. Ortega*, 300 Kan. 761, 779–85, 335 P.3d 93 (2014). So in that case, the defendant must know not only the physical acts being taken (such as driving away with a child in tow) but also intend to interfere with the custody order. But the defense of mistake of fact or ignorance only applies in specific-intent crimes; it has no application to crimes like the ones Langston was charged with because—at least with respect to the possession element that Langston challenges here—only general intent had to be proved. See *State v. Diaz*, 44 Kan. App. 2d 870, 873–75, 241 P.3d 1018 (2010).

Even if we had concluded that the district court erred by failing to give the instruction, however, the error would have been harmless. If an error occurred, we assume it would have been a constitutional error since Langston argues that this instruction was necessary to the very presentation of his defense. Accordingly, for the error to be harmless, the State must show beyond a reasonable doubt that there is no possibility the error contributed to the verdict. *State v. Atkins*, 298 Kan. 592, 599, 315 P.3d 868 (2014). Even with this high burden, we find any error to have been harmless.

The court specifically instructed the jury that the State had to prove that Langston "possessed" the images. The court also instructed that possession meant having "joint or exclusive control over an item with knowledge of or intent to have such control" or "knowingly keeping some item in a place where the person has some measure of access and right of control." And the court instructed the jury that if it had any reasonable doubt as to the truth of any of the claims the State had to prove, the jury must find the defendant not guilty. The defendant's proposed

instruction really added nothing. If "by reason of ignorance or mistake the defendant did not have ... the mental state which the statute requires as an element of the crime," the instruction the defense wanted given, Langston wouldn't have known that the items were there.

As Langston's appellate lawyer puts his contention on appeal, "Here, Mr. Langston's defense was not to dispute the existence of the images; rather, he claimed ignorance of the possession." No one could dispute that the photos were on a computer to which Langston had access. Langston's defense was simple: he didn't know they were there. The court told the jury it had to find that Langston had control over the images "with knowledge of or intent to have such control" or that he "knowingly [kept them] in a place where [he had] some measure of access and right of control." In either case, the State had to prove Langston knew the images were there. We presume the jury followed those instructions, *State v. Kleypas*, 305 Kan. 224, 279, 382 P.3d 373 (2016), *cert. denied* 137 S. Ct. 1381 (2017), and we find any error on this point to have been harmless beyond a reasonable doubt.

III. *Langston Has Not Shown That the Statute Prohibiting Sexual Exploitation of a Child Is Unconstitutional*.

Langston next argues that the statute making criminal exploitation of a child illegal, K.S.A. 2012 Supp. 21-5510(a)(2), is so broadly written that it criminalizes speech protected under the First Amendment to the United States Constitution. He specifically complains that the statute reaches "virtual" child pornography, even images that might not have used an actual child in their creation.

Before we get to the substance of Langston's argument, we must consider whether he has standing, or the legal ability, to raise this issue. The State's evidence included the testimony of Corporal Thad Winkelman, who testified that none of the images appeared to have had their content digitally altered in any significant way. And a pediatrician, Dr. Terra Frazier, testified that all of the photos showed children under age 18. So Langston's claim that the statute reaches protected speech doesn't apply to his own case: he makes no claim that the State cannot outlaw sexually explicit photos of children.

***11** Normally, a party can't raise a hypothetical issue that doesn't apply to that party. But when the claim is that a statute is so broad that it interferes with First Amendment free-speech rights, there is no absolute requirement that a person attacking a statute as overbroad be directly affected. See *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973); *State v. Williams*, 299 Kan. 911, 919, 329 P.3d 400 (2014). This exception allows a litigant to challenge the statute because an overbroad statute may cause others not before the court to refrain from constitutionally protected speech even if the litigant's own rights aren't

violated. *Broadrick*, 413 U.S. at 612. We may proceed to consider his argument. *Williams*, 299 Kan. at 919.

To discuss Langston's specific arguments about why the statute is too broadly written, we need to review the statute's wording. The conduct prohibition applicable here covers visual depictions of a child engaged in sexually explicit conduct:

> "(a) Sexual exploitation of a child is:
>
> ....
>
> (2) possessing any visual depiction of a child under 18 years of age shown or heard engaging in sexually explicit conduct with intent to arouse or satisfy the sexual desires or appeal to the prurient interest of the offender or any other person." K.S.A. 2012 Supp. 21-5510(a)(2).

The statute then provides two key definitions. Langston notes that the first, defining "sexually explicit conduct," covers both actual and simulated conduct:

> " 'Sexually explicit conduct' means actual or simulated: Exhibition in the nude; sexual intercourse or sodomy, including genital-genital, oral-genital, anal-genital or oral-anal contact, whether between persons of the same or opposite sex; masturbation; sado-masochistic abuse with the intent of sexual stimulation; or lewd exhibition of the genitals, female breasts or pubic area of any person. K.S.A. 2012 Supp. 21-5510(d)(1).

Langston also points to the inclusion of digitally or computer-generated images in the statute's definition of "visual depiction":

> " '[V]isual depiction' means any photograph, film, video picture, digital or computer-generated image or picture whether made or produced by electronic, mechanical or other means." K.S.A. 2012 Supp. 21-5510(d)(5).

Based on these statutory provisions, Langston contends the statute reaches out to conduct protected under the First Amendment in two ways. First, he argues that inclusion of computer-generated images "encompasses digitally created images that appear to be a minor child but are not digital images of a real minor child." Second, he argues that inclusion of simulated acts "may include images of children digitally altered so as to merely simulate nudity without any capturing of actual child nudity." Given these broad definitional sections, he argues that the statute outlaws constitutionally protected free speech under the United States Supreme

Court's decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002). In *Ashcroft*, the Court struck down a federal statute that made illegal images that merely appeared to be of a minor engaging in sexually explicit conduct but actually didn't involve any child in their production. The Court held that the First Amendment offered no protection to "pornography produced with real children," 535 U.S. at 246, but that this federal statute went too far when it regulated "virtual pornography" that was not legally obscene. 535 U.S. at 246, 256.

We need not spend our time considering Langston's first argument, that this Kansas statute prohibits digitally created images that aren't of a real child. The State contends that the statute only reaches the visual depiction of a real child, and that's a fair reading of the statutory language. The key prohibition in the statute talks of the "visual depiction *of a child*," not of someone who appears to be a child. And while the later definition of sexually explicit conduct allows for "actual or simulated" conduct, that doesn't suggest that a *simulated child* is covered. Given the ruling in *Ashcroft* and the preference for reasonable interpretations that avoid serious constitutional challenges to a statute, interpreting this statute to cover only depictions made using a real child is quite reasonable. See *State v. Ryce*, 303 Kan. 899, 906, 368 P.3d 342 (2016); *State v. Soto*, 299 Kan. 102, 121, 322 P.3d 334 (2014).

***12** We turn then to Langston's argument that the statute's coverage of morphed images that look like children engaged in sexually explicit conduct covers protected speech. On this point, the State agrees that "non-sexualized images of real children that have been altered to make those real children look to be engaging in sexually explicit acts" are covered by the statute. The State argues that does not violate anyone's First Amendment rights, citing our court's decision in *State v. Coburn*, 38 Kan. App. 2d 1036, 1064–65, 176 P.3d 203 (2008), which concluded that this Kansas statute could constitutionally prohibit images made using real children and then altered to simulate sexually explicit conduct.

In *Coburn*, our court noted that the *Ashcroft* opinion had specifically declined to address the constitutionality of innocent photographs taken of real children that were altered so that the children appeared to be engaged in sexual activity. 38 Kan. App. 2d at 1064 (citing *Ashcroft*, 535 U.S. at 242). But our court noted that even without addressing the constitutionality of a prohibition of such images, the *Ashcroft* Court said that images like that "did 'implicate the interests of real children and are in that sense closer to the images" of child pornography it had found a state could prohibit in *New York v. Ferber*, 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982). 38 Kan. App. 2d at 1064. Our court concluded that the State's interest in protecting children sufficiently outweighed any free-speech interests and upheld application of the Kansas child-exploitation statute to photos of real children that were altered to make the children appear to be engaging in sexually explicit conduct (and meeting the other statutory requirements). 38 Kan. App. 2d at 1064–65.

Langston argues that *Coburn* was wrongly decided and asks us to reject its holding. That claim

is not a trivial one. A reasonable argument can be made that a statute that goes beyond the prohibition of images created by harming children through sexual exploitation or abuse to a prohibition of initially innocent images in which the children weren't harmed in making the images does infringe on constitutionally protected speech. See Hessick, *The Limits of Child Pornography*, 89 Ind. L.J. 1437 (2014).

To address the argument Langston has made here, though, we need not make that call. While Langston does have standing to challenge this statute on overbreadth grounds, to succeed he must show that (1) the protected activity is a significant part of the conduct the law has targeted and (2) there's no satisfactory method to sever the law's constitutional applications from its unconstitutional ones. *Dissmeyer v. State*, 292 Kan. 37, 40–41, 249 P.3d 444 (2011); see *United States v. Williams*, 553 U.S. 285, 303, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008); *Ashcroft*, 535 U.S. at 244.

Our case is unlike *Ashcroft*, where the Court noted that the statute at issue could have reached Renaissance paintings and Oscar-winning movies and the material was banned even if it did not appeal to prurient interests. 535 U.S. at 246–49. In those circumstances, the Court concluded that the statute was unconstitutionally overbroad because it "abridge[d] the freedom to engage in a substantial amount of lawful speech." 535 U.S. at 256.

Langston has not shown that the sort of situation found in *Ashcroft*, where the law targeted substantial areas of protected speech, is found here. As the *Ashcroft* Court noted, "If virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes. Few pornographers would risk prosecution for abusing real children if fictional, computerized images would suffice." 535 U.S. at 254. Yet the significant market appears to be images made through the abuse of children, not nonsexualized images of real kids that have been morphed to make them look sexually explicit.

***13** On the record before us, Langston has not shown that a significant part of the targeted conduct is protected under the First Amendment. Accordingly, he has not shown that the statute is unconstitutionally overbroad such that it cannot be enforced.

IV. *The Search Warrant Used to Search Langston's Residence Was Valid.*

In a supplemental brief, Langston argues that the search warrant for his residence was invalid. First, he argues that it didn't describe the place to be searched with sufficient particularity. The warrant had called for a search of apartment B1, while Langston lived in apartment B2. Based on the officers' briefing before the search, though, they searched the intended apartment, B2, not the one mistakenly listed in the warrant. Second, Langston argues that the affidavit supporting

the warrant wasn't sufficient to give probable cause to search his apartment.

As for the mix-up on the apartment number, an inaccuracy in the address to be searched doesn't necessarily invalidate a search warrant. The Nebraska Supreme Court upheld the warrant in a similar case in which the wrong apartment number was given but other information provided to the officer allowed the officer to find the correct place for the search. *State v. Walters*, 230 Neb. 539, 546–48, 432 N.W.2d 528 (1988). Similarly, the Washington Court of Appeals upheld a warrant when the officer who executed it had sufficient knowledge of the location to be searched to cure the address mistake found in the warrant. *State v. Bohan*, 72 Wash. App. 335, 339, 864 P.2d 26 (1993). Accord *United States v. Gamboa*, 439 F.3d 796, 806 (8th Cir. 2006).

In our case, Detective Jackie Lynn filed an affidavit in support of the warrant. She said he lived in apartment B1 instead of B2, but she also said that the apartment was accessed from the south side of the building and had the only door on the south side, lower level of the building. The officers executing the warrant were briefed based on surveillance from other officers that the apartment to be searched was on the south side of the building and to the left if one was facing the back of the building. When police carried out the warrant, they searched the correct residence, apartment B2, Langston's residence.

The Fourth Amendment does require that search warrants particularly describe the place to be searched. Our Supreme Court has held, consistent with the cases we've already noted, that for a warrant for a multiple-occupancy building, "a slight omission or inaccuracy" doesn't invalidate a warrant "where the description of the subunit is sufficient to enable the executing officer to locate the premises with reasonable certainty." *State v. Gordon*, 221 Kan. 253, 259, 559 P.2d 312 (1977). The officers executing the warrant in this case had sufficient information to get the right unit with reasonable certainty even though the apartment number was incorrect. The warrant should not be held invalid on the basis that it didn't sufficiently describe the premises to be searched.

Langston's other argument about the warrant's validity posits that police couldn't properly rely upon an informant who provided some of the information because she was unreliable. Langston didn't make this argument before the district court, and we can't consider it for the first time on appeal. See *State v. Cox*, 51 Kan. App. 2d 596, 603, 352 P.3d 580 (2015). When a defendant wants to challenge the probable-cause basis for an affidavit, and especially when he seeks to do so with a claim that some information (here, going to the reliability of the informant) was omitted, the proper course is to ask for a hearing in the district court, where the court can take evidence, if necessary, on the matter. See *State v. Mell*, 39 Kan. App. 2d 471, 487–88, 182 P.3d 1 (2008). We decline to consider this issue when raised for the first time on appeal.

V. *Because a New Trial Is Ordered, No Other Issue Requires Our Review.*

***14** In addition to the issues we have discussed so far, Langston also raises a claim that the prosecutor made improper statements in closing argument and that an aspect of his sentencing was unlawful.

As for the prosecutor's comments, one related to the possibility that some of the photos had been digitally manipulated. The comments seem consistent with our court's holding in *Coburn*, and the State has emphasized in its appellate brief that the photos must show a real child under age 18 to fit under this statute. Accordingly, it seems unlikely that the prosecutor's comment at any retrial on this topic would be outside the bounds of fair argument. The other comment related to evidence about what the anonymous tipster had said about one of the images possibly being of Langston's daughter. The parties had agreed that the State wouldn't present that information, but defense counsel brought it out when cross-examining Detective Lynn. If the defense puts the matter in evidence, it's proper to place that evidence in context during closing argument. But the defense may choose to avoid it on retrial, so we have no reason to believe the issue will arise again in closing argument.

As for sentencing, Langston argues that his sentence should have included only 24 months of postrelease supervision, not lifetime supervision. That issue obviously won't arise again unless Langston is again convicted on retrial. Our court has rejected the argument Langston is making in several cases. E.g., *State v. Herrmann*, 53 Kan. App. 2d 147, 153–54, 384 P.3d 1019 (2016), *rev. denied* 306 Kan. —— (July 25, 2017); *State v. Phillips*, No. 115,107, 2017 WL 1822383, at *1 (Kan. App. 2017) (unpublished opinion), *petition for review filed* June 5, 2017; *State v. Younkman*, No. 115,606, 2017 WL 1035473, at *2–4 (Kan. App. (2017) (unpublished opinion)), *rev. denied* 306 Kan. —— (August 31, 2017). Since some of our rulings on this point remain under review and the Kansas Supreme Court has not yet addressed the issue, we will address it in Langston's case only if it arises again after his retrial.

The district court's judgment is reversed; this case is remanded for further proceedings consistent with our opinion.

All Citations

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