IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

In the Interest of C.S., a JUVENILE,	**:**	**DOCKET NO.**
	:	
Appellee	**:**	**27 MAP 2013**
	:	
v.	**:**	
	:	**LEHIGH COUNTY**
	:	**DOCKET NO.**
COMMONWEALTH OF PA,	**:**	**CP-39-JV-447-2012**
	:	
Appellant	**:**	

BRIEF FOR APPELLEE

Commonwealth Appeal from the July 24, 2012 Order of the Honorable Robert L. Steinberg of the Lehigh County Court of Common Pleas in Case No. CP-39-JV-447-2012, Granting the Juvenile's Motion to Dismiss.

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COUNTER–STATEMENT OF THE QUESTIONS INVOLVED

Did the juvenile court err in granting the Juvenile's Motion to Dismiss based on its determination that 18 Pa.C.S.A. § 6312 was unconstitutional as applied to C.S. because it is void for vagueness?

(Answered in the negative by the court below).

COUNTER-STATEMENT OF THE CASE

On May 14, 2012, Appellee, C.S., was charged with numerous crimes, including possessing and disseminating child pornography, for posting to her Facebook page the consensual sexual acts of L.C. (age 16) and M.T. (age 17). See R.R. 79a. L.C. and M.T. willingly participated in the brief cell phone filming of a sexual act at least one year prior to C.S. being charged in the instant matter. See R.R. 78a.

The Record indicates that M.T. may have circulated and/or posted the video on the internet and was asked to delete the video by law enforcement. See R.R. 98a-100a, 103a-104a. Furthermore, evidence presented at the pre-adjudicatory hearing demonstrates that M.T. exchanged the sexually explicit video through cell phone text messaging and other electronic media. See R.R. 62a-66a, 98a-100a, 103a-104a. C.S. was one of possibly several recipients of the cell phone exchange. See R.R. 62a. C.S. then transferred the video to her Facebook page. Comments on her Facebook page suggest that the purpose of the posting was not sexual nor for profit. See R.R. 70a, 113-114a, 195-198a. When Detective Jaqueline Murray of the Allentown Police Department went to C.S.'s residence to serve the warrant, C.S. admitted posting the video on her Facebook page and immediately deleted the video in the presence of the detective and officers. See R.R. 61a, R.R. 20a.

On May 22, 2012, C.S. filed a Motion to Dismiss Petition Pursuant to 18 Pa.C.S.A. § 312(a)(2) in which C.S. argued that her conduct did not actually cause or threaten the harm or evil that the child pornography laws were enacted to prevent and, therefore, a plain reading of the statute allows the court to dismiss the charges. See R.R. 21a. On May 25, 2012, a hearing on C.S.'s Motion to Dismiss was held before the Honorable Robert L. Steinberg. Prior to the start of testimony, counsel for C.S. specified on the record that her Motion to Dismiss alleged that C.S.'s conduct should be deemed *de minimis* under 18 Pa.C.S.A. § 312(a)(2), and also that C.S. did not intend to violate the Sexual Abuse of Children laws. See R.R. 44a. Counsel for C.S. essentially argued that the indiscreet sharing of voluntarily made photos and/or videos by immature teenagers lacks the exploitative harm that the legislature and the courts have stressed minors suffer when they are used in the creation of pornographic material. See R.R. 44a-50a. The trial court granted C.S.'s motion to dismiss and this appeal followed.

SUMMARY OF ARGUMENT

The juvenile court properly granted Appellee's Motion to Dismiss and did not overstep its proper role when it determined that 18 Pa.C.S. § 6312 was unconstitutional as applied to C.S. Appellee raised the inapplicability of the child pornography laws to her conduct in her pre-adjudicatory motion and hearing. Assuming *arguendo* that the trial court raised the constitutional challenge *sua sponte*, the Court must still address the merits of the trial court opinion. Moreover, judicial economy requires courts to review substantive matters before it.

Additionally, the trial court properly held that 18 Pa.C.S. § 6312 is unconstitutionally vague as applied to C.S. A *teenager* of ordinary intelligence would not equate displaying consensual sexual images on Facebook as conduct that falls within the parameters of 18 Pa.C.S. § 6312. C.S.'s conduct does not fall within the range of actions this statute seeks to prevent and punish. Moreover, the vagueness of 18 Pa.C.S. § 6312 leads to arbitrary or discriminatory enforcement, which occurred here. The juvenile court's analysis of the statute should be affirmed.

ARGUMENT

I. The Trial Court Properly Granted C.S.'s Motion To Dismiss.

In dismissing the child pornography charges against Appellee, the trial court properly held that 18 Pa.C.S. § 6312 was unconstitutionally applied because the Sexual Abuse of Children statute was not intended to address the type of behavior for which Appellee was charged. The court raised the issue of constitutionality based upon argument contained in Appellee's pre-adjudicatory motion. Both Appellant and Appellee have had the opportunity to address the constitutional arguments.

A. The Juvenile Court Did Not Overstep Its Proper Role When It Determined That 18 Pa.C.S. § 6312 Was Unconstitutional As Applied To C.S.

1. The Court Did Not *Sua Sponte* Raise The Constitutional Application of 18 Pa.C.S. § 6312.

This Court is not precluded from considering and reviewing the instant case on the merits. Although the Commonwealth argues that the Court *sua sponte* determined that 18 Pa.C.S. § 6312 was unconstitutional as applied to C.S., Appellee, C.S., raised the inapplicability of the child pornography law to her conduct in her pre-adjudicatory motion and hearing. Although the primary basis for the motion to dismiss was that the conduct should be deemed *de minimis* under 18 Pa.C.S. § 312(a)(2), Appellee argued that she did not intend to violate the

Sexual Abuse of Children laws. Furthermore, she argued that child pornography laws were enacted to prevent the sexual abuse of children and that the indiscreet sharing of voluntarily made photos and/or videos by immature teenagers lacks the exploitative harm that the legislature and the courts have stressed minors suffer when they are used in the creation of pornographic material. See R.R. 44a-50a, 133a-138a.

In its Opinion, the trial court heavily relied on cases cited by Appellee in her Brief in Support of her Motion to Dismiss. See, e.g., R.R. 205a-207a. Although Appellee did not argue for a finding that 18 Pa.C.S. § 6312 is unconstitutionally vague, her argument below implicitly required a finding of the statute's inapplicability to her.

2. Even If The Court Raised The Constitutional Issue *Sua Sponte*, The Court Must Still Address The Merits Of The Trial Court Opinion.

If this Court determines that the trial court did, in fact, raise the constitutionality of 18 Pa.C.S. § 6312 as applied to Appellee *sua sponte,* it should nonetheless review the opinion on its merits. Although *sua sponte* consideration is disfavored, rulings of this court as well as the Superior Court leave open the question as to whether such issues must nonetheless be considered. See Pennsylvania State Association of Township Supervisors v. Thornburgh, 437 A.2d 1, 2, n. 2 (Pa. 1981), rearg. den'd (opinion in support of affirmance by O'Brien,

C.J., joined by Kauffman, J.); Snider v. Thornburgh, 436 A.2d 593, 601, n. 8 (Pa. 1981) (despite the fact that Appellants only raised an equal protection claim, justices supporting reversal considered the issue under a due process analysis "in contravention of our often reiterated principle that courts will confine their consideration to issues presented by the parties and not usurp the role of the litigants in the management of the lawsuit.") (opinion by O'Brien, C.J., fully joined by Kauffman, J., joined in pertinent part by Nix, J., joined in all except pertinent part by Larsen and Flaherty, JJ.); Commonwealth v. Murphy, 451 A.2d 514, 517, n. 3 (Pa.Super. 1982) ("[w]hile the Commonwealth's brief points out that the due process issue was raised *sua sponte* by the trial judge, the Commonwealth has not requested that we overturn the order on that basis. We may do so, however, even without their requesting it."). See also Benson v. Penn Central Transportation Company, 342 A.2d 393, 395-96 (Pa. 1975) (holding that though court did not address issues raised *sua sponte* by the trial court, they should still be preserved for appellate review "both to assure a correct disposition of the merits and to conserve judicial resources.").

Moreover, concerns for judicial economy favor review of these substantive matters. In Interest of A.P., 617 A.2d 764, 768 (Pa.Super. 1992) (citing Commonwealth v. Hoyman, 561 A.2d 756, 760 (Pa.Super. 1989)) (finding that the court should address the substantive issue raised rather than remanding the case

and to allow the filing of a new appeal). In In Interest of A.P., although the Commonwealth had not briefed the issue of A.P.'s motion to suppress, the Superior Court considered the issue on appeal. The Commonwealth asserted that the suppression issue had been quashed and was not before the court for consideration. The Superior Court found that "[t]he Commonwealth knew, or should have known, that if this Court decided the issue of the *nunc pro tunc* appeal in A.P.'s favor, judicial economy would dictate that this Court address the only substantive issue raised—the suppression issue—rather than order a remand to allow the filing of a new appeal with the resultant waste of time and judicial resources." In Interest of A.P., 617 A.2d at 768. The Superior Court held that the Commonwealth declined to address the issue at its peril. Id.

In the instant matter, the juvenile court's opinion clearly raises the void for vagueness issue, "whatever the technical propriety of so doing". Id. As such, Appellant, the Commonwealth, fully addressed this substantive issue in its Brief to this Court. See Commonwealth's Brief at 13-25. Additionally, Appellee's trial court memorandum of law included extensive discussion of the legislative purposes of child pornography legislation, social science research pertaining to sexting and child brain development, court opinions discussing child brain development and the fact that C.S. was selectively prosecuted. See R.R. 133a-137a, 140a-171a. The Commonwealth responded to these assertions in its Reply

memorandum of law. See R.R. 177a-178a. While the juvenile court did not rule specifically on Appellee's *de minimis* claim, the court dismissed the criminal case based on a due process concern, relying on the arguments Appellee posited. The issues have been fully briefed by both parties at both the trial court level as well as before this Court and the record is complete. The Court may, in the interests of judicial economy, address the merits of the juvenile court's opinion. In re B.S., 831 A.2d 151, 155 (Pa.Super. 2003). If this Court does not address the constitutionality argument now, it will simply be raised again when the case is remanded and another appeal will ensue.

B. The Juvenile Court Properly Held That 18 Pa.C.S. § 6312 is Unconstitutionally Vague As Applied to C.S.

Vaguely written statutes violate the Due Process Clause of the Fourteenth Amendment. See Commonwealth v. Davidson, 938 A.2d 198, 213 (Pa. 2007). In Pennsylvania, courts strongly presume that a statute is constitutional and will only find a statute void for vagueness if it "clearly, palpably and plainly violates the constitution." Purple Orchid, Inc. v. Pennsylvania State Police, 813 A.2d 801, 805 (Pa. 2002). The doctrine's purpose is not "to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited," Commonwealth v.

DeFrancesco, 393 A.2d 321, 327 (Pa. 1978), and therefore "the requirements of due process are satisfied if the statute in question contains reasonable standards to guide . . . prospective conduct." Commonwealth v. Burt, 415 A.2d 89, 92 (Pa. 1980).

The Pennsylvania Supreme Court has explained that "[t]he root of the vagueness doctrine is a rough idea of fairness." DeFrancesco, 393 A.2d at 327. Vagueness is found by "determining whether the statute (1) fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden and (2) whether it encourages arbitrary and erratic arrests and convictions." Commonwealth v. Skufca, 321 A.2d 889, 893 (Pa. 1974) (quoting Papachristou v. City of Jacksonville, 92 S.Ct. 839 (1972)) (internal quotation marks and alterations omitted). Vagueness is ultimately a textual question, and the two prongs are tests to determine whether the statute is vague as a textual matter. See, e.g., Commonwealth v. Mikulan, 470 A.2d 1339, 1342-43 (Pa. 1983).

A void for vagueness claim need not challenge a statute generally: a statute that is "clearly applicable" to conduct that any person would understand would violate the statute but "of questionable applicability to other conduct" may be found void for vagueness in a particular context. Fabio v. Civil Serv. Comm'n of City of Philadelphia, 414 A.2d 82, 87-88 (Pa. 1980). Also, "the specificity of a

statute must be measured against the conduct in which the party challenging the statute has engaged." Commonwealth v. Hughes, 364 A.2d 306, 309 (Pa. 1976).

Vagueness determinations in Pennsylvania are largely a question of statutory interpretation. See, e.g., Commonwealth v. Ludwig, 874 A.2d 623, 629 (Pa. 2005). Courts' discretion to find statutes vague has been limited by Pennsylvania statutes that prescribe methods of statutory interpretation. See id. For example, "[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa.C.S. § 1921(b). However, if the language is not "explicit," courts turn to other factors to ascertain the legislature's intent, including "[t]he mischief to be remedied," "other statutes upon the same or similar subjects," "consequences of a particular interpretation," and "legislative history." 1 Pa.C.S. § 1921(c).

1. Children Do Not Have Fair Notice That They Can Be Charged With Sexual Abuse of Children for Engaging in the Conduct For Which C.S. Was Charged.

Under the Due Process Clause of the Fourteenth Amendment, a statute is unconstitutionally vague if (i) its terms are "so vague that men of common intelligence must necessarily guess at its meaning," Connally v. General Constr. Co., 269 U.S. 385, 391 (1926), or (ii) it fails to provide explicit standards to those charged with its enforcement. Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972); Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S.

489, 498-99 (1982); Trojan Techs., Inc. v. Pennsylvania, 916 F.2d 903, 914 (3d Cir. 1990); see generally Gov't of the Virgin Islands v. Steven, 134 F.3d 526, 527-28 (3d Cir. 1998) ("A statute therefore meets the constitutional standard of certainty if its language conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."); Horn v. Burns and Roe, 536 F.2d 251, 254 (8th Cir. 1976) (stating that the United States Supreme Court has recognized that "a noncriminal statute is unconstitutionally vague under the due process clause of the Fifth or Fourteenth Amendments when its language does not convey sufficiently definite warning as to the proscribed conduct when measured by common understanding or practice.").

Though "[t]he root of the vagueness doctrine is a rough idea of fairness," DeFrancesco, 393 A.2d at 327, Pennsylvania courts have defined "fairness" narrowly in vagueness cases. To avoid being held void for vagueness, a statute must give "fair notice" or "fair warning" that certain conduct is illegal. Skufca, 321 A.2d at 893. In Pennsylvania void for vagueness cases, fairness is a narrow textual question: a statute either provides fair warning or is impermissibly vague. See Hughes, 364 A.2d at 310 ("Vague laws may trap the innocent by not providing fair warning."). This question "is a matter of law to be determined from the face of the statute . . . itself." Commonwealth v. Stein, 546 A.2d 36, 40 (Pa. 1988).

Pennsylvania courts apply an objective test, asking whether a statute gives fair notice from the perspective of "people of ordinary intelligence." Skufca, 321 A.2d at 893. From the perspective of this objective test for fairness, whether a statute is vague "does not depend on a particular defendant's motive or intent, what a particular defendant thought the rule or statute meant, or whether or not the defendant accurately guessed what the draftsman had actually intended." Stein, 546 A.2d at 40. Essentially, the void for vagueness doctrine is applied against the backdrop of a legal fiction that the accused was familiar with the language of the statute at the time they committed the crime. See Ludwig, 874 A.2d at 629-30.

This type of objective test is inappropriate in light of recent Supreme Court jurisprudence demanding treatment of children different from adults. In J.D.B. v. North Carolina, the U.S. Supreme Court specifically held that the "reasonable person" standard was inappropriate as applied to youth. 131 S. Ct. 2394, 2403 (2011). In J.D.B., the Court held that because the reasonable person is a legal fiction possessing the same general characteristics throughout the common law, it is only logical that a child's age is relevant to determinations of reasonableness. Id. at 2403-06. The Court stressed that age is a fact "that generates commonsense conclusions about behavior and perception." Id. at 2402. Looking back to decisions in Roper v. Simmons and Graham v. Florida, the Court stated that "our history is replete with laws and judicial recognition that children cannot be viewed

simply as miniature adults." Id. at 2404 (internal quotations and alterations omitted). The Court implicitly held that a reasonable child standard was more appropriate. Id. at 2403.

Prior to the Supreme Court's decision in J.D.B., Pennsylvania courts used only an objective test in void for vagueness cases with juvenile defendants without consideration of the defendant's minority. See In re K.A.P., 916 A.2d 1152, 1159 (Pa.Super. 2007) (considering vagueness challenge to statute governing involuntary treatment of people who commit sexual violence without reference to defendant's age) aff'd sub nom. In re K.A.P., Jr., 943 A.2d 262 (Pa. 2008); Commonwealth v. Cotto, 753 A.2d 217, 220-23 (Pa. 2000) (considering vagueness challenge to statute governing transfer to adult court without reference to defendant's minority); In re M.J.M., 858 A.2d 1259, 1267 (Pa.Super. 2004) (considering vagueness challenge to ethnic intimidation statute without reference to defendant's age). However, none of these decisions implicated laws so directly tied to age, rapidly changing technology, and the concomitant changing norms of youth culture. Moreover, no void for vagueness challenges involving juveniles have been decided in Pennsylvania since J.D.B. The trial court's opinion thus aptly applies the J.D.B. standard, holding that "the child pornography statute . . . fails to provide a *teenager* of ordinary intelligence 'fair notice.'" See R.R. 210a (emphasis added). The trial court further found that a person, even a teenager, of

ordinary intelligence would understand that possession of child pornography is illegal, but would not equate displaying these consensual sexual images on Facebook as possession of child pornography. See R.R. 207a-208a. The court held that teenagers would "be clueless that their conduct falls within the parameters of the Sexual Abuse of Children statute, Section 6312." Id. As the Supreme Court did in J.D.B., the trial court relied on principles of adolescent development and teenagers' lack of mature adult judgment in its discussion of fair notice. These principles have been repeatedly acknowledged in Supreme Court jurisprudence. See Miller v. Alabama, 132 S. Ct. 2455 (2012); Graham v. Florida, 130 S. Ct. 2011 (2010); Roper v. Simmons, 543 U.S. 551 (2005).

a. The Legislative History and Intent of Pennsylvania's Child Pornography Laws Do Not Support The Commonwealth's Interpretation of 18 Pa.C.S. § 6312 As Applied To C.S.

Child pornography laws are intended to prevent the sexual abuse of children involved in the making of child pornography. Pennsylvania's relevant child pornography statute is titled "Sexual abuse of children." 18 Pa. Cons. Stat. Ann. § 6312 (West 2012) [hereinafter "Section 6312"]. Its legislative history and interpretation by Pennsylvania courts confirm that its purpose is "plainly to protect children, end the abuse and exploitation of children, and eradicate the production and supply of child pornography." Commonwealth v. Davidson, 938 A.2d 198,

219 (Pa. 2007). Charging C.S. under the child pornography statute for posting a video that she received from her friend ignores these stated intentions. C.S. is a member of the class of persons the law is intended to protect – children. Moreover, she did not create a pornographic image or video to abuse or exploit another child. The law's intentions, through its legislative history and judicial interpretation could not be more clear.

In advocating for stricter child pornography laws, Pennsylvania legislators focused almost exclusively on the victimization of children. See H.R. Journal, 193d Gen. Assemb., 11th Sess., at 224 (Pa. 2009). Representatives Mann and Murt sponsored an amendment to Section 6312 adding language criminalizing intentional viewing of child pornography. H.R. 89, 193d Gen. Assemb., Reg. Sess. (Pa. 2009). Both Murt and Mann emphasized in their remarks to the House that Section 6312 is meant to protect children from sexual abuse. In February 2009, Representative Mann stated "it is important that we clarify and make clear to the people of Pennsylvania and make sure that it is the law that we are going to do everything we can to protect children from abuse, and particularly, in this case, from sexual abuse." H.R. Journal, 193d Gen. Assemb., 11th Sess., at 224 (Pa. 2009). At the same session, Representative Murt emphasized the victimization of children through child pornography: "As lawmakers, we have a moral responsibility to protect our children and to keep them safe from these predators.

[…] Our children are being victimized, but the individuals using the instruments of that abuse are sometimes outside the reach of the law." Id. Furthermore, in July 2009, Representative Murt expressed concern that child pornography breeds child molesters. H.R. Journal, 193d Gen. Assemb., 62d Sess., at 1402 (Pa. 2009). These remarks by the sponsors of the 2009 amendments demonstrate that the Legislature intended that Section 6312 serve as a tool to prevent the sexual abuse and exploitation of children.

Pennsylvania courts have reinforced the Legislature's intent regarding Section 6312. Davidson, 938 A.2d at 219 ("The purpose of Section 6312 is plainly to protect children, end the abuse and exploitation of children, and eradicate the production and supply of child pornography."); Commonwealth v. Diodoro, 970 A.2d 1100, 1107 (Pa. 2009) (noting compelling state interest in protecting children from sexual exploitation and seeking to curtail the production and trafficking of child pornography, "which necessarily involves such exploitation"); Commonwealth v. Baker, 24 A.3d 1006, 1036 (Pa. Super. 2011). Pennsylvania courts have also looked to the prurient intent of the photographer to determine the harm to the child. There is no evidence in the record supporting that the youth depicted in the video had prurient intent when creating the images of themselves or when sending them to others. See R.R. 63a, 76a-79a. The subjective "intent of the photographer" controls, see Savich, 716 A.2d at 1256 – the images were not

created to serve another's sexual gratification. The trial court noted that "[c]omments on her Facebook page suggest that the purpose of the posting was not sexual, but an exposé to subject L.C. to criticism."[1] See R.R. 204a. Pennsylvania courts applying Section 6312 have shown an understanding that the section is meant to prevent the victimization of children through sexual abuse and exploitation. It is not intended to be a catchall provision to punish behavior that may be otherwise motivated by ill will but not specifically within the express, prohibited purpose of the statute.[2] In the instant case, as the trial court noted, there were no victims of exploitation. See R.R. 204a.

b. Federal Child Pornography Law, Upon Which Pennsylvania's Child Pornography Law Is Based, Has Historically Been Intended to Protect Child Victims Of Sexual Abuse By Adult Perpetrators.

Federal executive authorities and courts have repeatedly asserted that child pornography laws are intended to prevent the sexual abuse and exploitation of children inherent in the creation of child pornography. The United States Supreme Court has stated that the reason possession of child pornography is prohibited is to

[1] Appellee recognizes that this is not to be condoned as a reason for posting. However, that it was motivated by unkind intentions does not make it fall within the scope of child pornography.

[2] Although the Commonwealth correctly states that under the new legislation, 18 Pa.C.S. § 6321, Appellee's acts would not be considered "sexting" they nonetheless fail to meet the criteria for possession or distribution of child pornography under Section 6312 for the foregoing reasons.

"protect the victims of child pornography . . . to destroy [the] market for the exploitative use of children." Osborne v. Ohio, 495 U.S. 103, 109 (1990) (emphasis added); Davidson, 938 A.2d at 215 (finding the purpose of Section 6312 is "plainly to protect children, end the abuse and exploitation of children, and eradicate the production and supply of child pornography"). Moreover, the Department of Justice commissioned a report on child pornography and found that laws should address four problems: child pornography creates a permanent record of sexual abuse; photographs of children engaged in sexual activity can be used as tools for further molestation of other children; photographs of children engaged in sexual practices with adults can be used as evidence against those adults in prosecution for child molestation; and harm to children creates a special interest in decreasing incentives to produce child pornography. U.S. Dept. of Justice, Att'y Gen.'s Comm'n on Pornography, Final Report, at 411-12 (1986). The Final Report explicitly equates child pornography with the sexual abuse of children: "To take child pornography more seriously is to take sexual abuse of children more seriously, and vice versa." Id. at 417. The Report strongly supports an argument that the criminalization of child pornography is meant to prevent harm to children through the sexual abuse inherent in the creation of child pornography.

The U.S. Supreme Court has further emphasized the harm to the "physiological, emotional, and mental health of the child" when categorically

exempting child pornography from the First Amendment protection that adult pornography receives. New York v. Ferber, 458 U.S. 747, 758 (1982); United States v. Goff, 501 F.3d 250, 259 (3d Cir. 2007) (citing Ferber for the harm caused to children in child pornography). In Ashcroft v. Free Speech Coal., the Court reaffirmed that the harm to children used in the production of child pornography is at the root of the Ferber exception. 535 U.S. 234, 241-42 (2002); see Stephen F. Smith, Jail for Juvenile Child Pornographers?: A Reply to Professor Leary, 15 Va. J. Soc. Pol'y & L. 505, 519 (2008). In Ferber, the Court cited the government's compelling interest in protecting children from sexual exploitation and abuse, stating "the use of children as subjects of pornographic materials is harmful to the psychological, emotional, and mental health of the child." Id. at 758. The Court also emphasized that the distribution of child pornography is intrinsically related to sexual abuse because it creates a permanent record of the abuse and perpetuates the market for production of material requiring sexual exploitation of children. Id. at 759.

The Court later rejected arguments supporting the prohibition of pornography that uses "virtual" children or adults who appear to be minors, as inconsistent with Ferber's child protection justification. Free Speech Coal., 535 U.S. at 249. The government argued that though no children were sexually abused in the making of the images, there remained a potential harm to children based on

the possibility that the images might cause pedophiles to molest children or be used by pedophiles to groom children. Id. at 251-52. The Court dismissed this as "indirect" because the harm "does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts." Id. at 250, 253. The Court characterized the interests in prohibiting child pornography as "anchored . . . in the concern for the participants [in the production], . . . the 'victims of child pornography.'" Id. at 250 (quoting Osborne, 495 U.S. at 110) (emphasis added).

In the instant case, there are no exploited victims as there are in conventional child pornography cases – the youth voluntarily filmed their action and M.T. shared the video with his peers – and any prospective harm to youth would be "indirect" injury and dependent on "unquantified potential for subsequent criminal acts," and therefore squarely outside the Ferber exception to First Amendment protection.

2. The Vagueness of 18 Pa.C.S. § 6312 Leads To Arbitrary Or Discriminatory Enforcement.

While economic regulation has generally been subjected to a less stringent vagueness test, see, e.g., Hoffman Estates, 455 U.S. at 498-99, such a relaxed standard is inappropriate where, as here, minors are threatened not with economic penalties, but with a deprivation of liberty. See, e.g., Trojan Techs., 916 F.2d at

914 (noting that the Supreme Court has "expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe."). The vagueness doctrine has been employed in the past to strike down civil sanctions authorized by overly vague statutes, and "always operates when a statute's vagueness creates the possibility that it can be applied in an arbitrary manner that infringes on such fundamental interests as First Amendment rights of speech and assembly, or the right of physical liberty." Goldy v. Beal, 429 F. Supp. 640, 648 (M.D. Pa. 1976).

The Supreme Court of Pennsylvania has similarly recognized that a statute which is so vague as to be susceptible to arbitrary enforcement or which fails to provide adequate notice is an unconstitutional violation of due process. In re William L., 383 A.2d 1228, 1231 (Pa. 1978); see also Ludwig, 874 A.2d at 628. Vague statutes violate due process by "encourag[ing] arbitrary and erratic arrests and convictions." Skufca, 321 A.2d at 893. Rather than reading the statute from a potential defendant's position, this element of the vagueness inquiry "focuses . . . on the enforcement method of the police and the court's disposition of the indictment before it." DeFrancesco, 393 A.2d at 328. Whether a statute encourages arbitrary enforcement is principally a question of whether "that legislation establish[es] minimal guidelines to govern law enforcement for, without such minimal guidelines, a criminal statute might permit a standardless sweep that

allows policemen, prosecutors, and juries to pursue their personal predilictions [*sic*]." Mikulan, 470 A.2d at 1342-43 (internal quotations omitted).

As with the first prong – whether the statute provides fair warning – this is primarily a textual inquiry, asking whether "*the language* is so broad as to permit the police unfettered discretion . . . and the courts unchecked authority." DeFrancesco, 393 A.2d at 328 (emphasis added); see also Commonwealth v. Bullock, 913 A.2d 207, 213 (Pa. 2006) ("we fail to perceive anything *in the legislation* giving rise to a substantial concern that it may be discriminatorily enforced") (emphasis added). In Commonwealth v. Asamoah, for example, the Pennsylvania Superior Court found that an anti-loitering ordinance was void for vagueness because, by failing to define "an act demonstrating the intent or desire to enter into a drug transaction," the law "impermissibly delegate[d] basic policy matters to police officers for resolution on an *ad hoc* and subjective basis." 809 A.2d 943, 948 (Pa.Super. 2002).

Though the vagueness determination is primarily textual, arbitrary or discriminatory enforcement in fact should be viewed as at least evidence of vagueness in the statute. See Park Home v. City of Williamsport, 680 A.2d 835, 839 (Pa. 1996) (discussing appellant's claim of actually arbitrary and discriminatory treatment in the context of a vagueness inquiry). The Commonwealth argues that C.S.'s lone prosecution in connection with the video

was a matter of prosecutorial discretion, protected from judicial oversight. See Commonwealth's Brief at 22 (citing Commonwealth v. Olavage, 894 A.2d 808, 811-812 (Pa.Super. 2006)). However, while "unequal application of the criminal laws *alone* does not amount to a constitutional violation," Olavage, 894 A.2d at 811 (emphasis added), unequal application of the law does amount to such a violation when it is caused by vague statutory language. See Mikulan, 470 A.2d at 1342 ("the void-for-vagueness doctrine requires that a penal statute define the criminal offense . . . in a manner that does not encourage arbitrary and discriminatory enforcement.") (quoting Kolender v. Lawson, 103 S.Ct. 1855, 1858 (1983)).

Here, the trial court correctly held that placing Appellee's behavior on the same scale as child pornography is "an overreaction by law enforcement" and that "pursuing child pornography charges against children 'encourages arbitrary and erratic arrests and convictions'." See R.R. 210a. On at least two occasions prior to C.S. being charged, L.C. contacted the Allentown Police Department because she was told that M.T. had circulated the video and/or posted the video on the Internet. See R.R. 98a-100a, 103a-104a. Allentown Police also contacted M.T. and advised him that if he had posted the video on the Internet, he needed to erase it. See R.R. 104a. M.T. denied posting the video on the Internet. Id. Although there was ample evidence suggesting that M.T. possessed the video on his cell phone and

disseminated it to other individuals, M.T. had not been re-interviewed as of May 25, 2012, the date of the hearing in this matter, and has not been charged with any criminal offenses. See R.R. 66a. C.S. was the only individual prosecuted for possessing or disseminating the video. See R.R. 210a.

CONCLUSION

WHEREFORE, for the foregoing reasons, Appellee respectfully requests this Honorable Court affirm the Trial Court's holding dismissing the charges against her and holding 18 Pa.C.S. § 6312 unconstitutional as applied.

Respectfully Submitted,

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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

In the Interest of C.S., a JUVENILE,	**:**	**DOCKET NO.**
	:	
Appellee	**:**	**27 MAP 2013**
	:	
v.	**:**	
	:	**LEHIGH COUNTY**
	:	**DOCKET NO.**
COMMONWEALTH OF PA,	**:**	**CP-39-JV-447-2012**
	:	
Appellant	**:**	

PROOF OF SERVICE

I hereby certify that I am this day serving two copies of the foregoing *Brief for Appellee* upon the person(s) in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

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