COLORADO COURT OF APPEALS **2015COA76M**

Court of Appeals No. 11CA1795
Boulder County District Court No. 09CR1489
Honorable M. Gwyneth Whalen, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

David Lewis McCoy,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division IV
Opinion by JUDGE FURMAN
Navarro, J., concurs
Webb, J., specially concurs

Opinion Modified and
Petitions for Rehearing DENIED

Announced June 18, 2015

Cynthia H. Coffman, Attorney General, Rebecca L. Williams, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

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OPINION is modified as follows:

The following paragraphs were added to the beginning of the "Vagueness" section that starts on page 25 of this opinion:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V; Colo. Const. art. II, § 25. The Government violates this guarantee by taking away someone's life, liberty, or property under a law so vague that it either fails to provide notice or "authorize[s] and even encourage[s] arbitrary and discriminatory enforcement." *Chicago v. Morales*, 527 U.S. 41, 56 (1999).

After we first issued our opinion in this case, the United States Supreme Court issued its opinion in *Johnson v. United States*, 576 U.S. ___, ___, 135 S. Ct. 2551, 2557 (2015). In a petition for rehearing, McCoy contends that the Court in *Johnson* altered the traditional approach to facial vagueness challenges; an approach that is currently used in Colorado. *Johnson* addressed whether the residual clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii) (2012), violated the Constitution's prohibition of vague criminal laws.

Under the ACCA, a defendant convicted of being a felon in

possession of a firearm faces more severe punishment if he has "three or more previous convictions for a 'violent felony,' a term defined to include any felony that '*involves conduct that presents a serious potential risk of physical injury to another.*'" *Johnson*, 576 U.S. at ___, 135 S. Ct. at 2555 (emphasis added) (citation omitted). The italicized words of this definition have come to be known as the ACCA's residual clause. *Id.* at ___, 135 S. Ct. at 2556.

In the eight years prior to *Johnson*, the Supreme Court decided four different challenges to the application of the residual clause of the ACCA. *See Sykes v. United States*, 564 U.S. ___, 131 S. Ct. 2267 (2011) (holding that a conviction under Indiana's vehicle flight statute is a "violent felony" as the ACCA uses that term in the residual clause); *Chambers v. United States*, 555 U.S. 122 (2009) (holding that a conviction under Illinois' failure to report for penal confinement statute is not a "violent felony" under the residual clause of the ACCA); *Begay v. United States*, 553 U.S. 137 (2008) (holding that a conviction under New Mexico's driving under the influence of alcohol statute is not a "violent felony" under the residual clause of the ACCA); *James v. United States*, 550 U.S. 192 (2007) (holding that a conviction under Florida's attempted burglary

statute is a "violent felony" under the residual clause of the ACCA), *overruled by Johnson*, 576 U.S. ___, 135 S. Ct. 2551. Each time the Court addressed this clause, it sought to establish a workable standard by which other courts could decide a challenge to its application. *See, e.g.*, *James*, 550 U.S. at 202-03 (using the "categorical approach," which looks "only to the fact of conviction and the statutory definition of the prior offense" and not to the "particular facts disclosed by the record of conviction") (citation omitted).

Under the categorical approach developed in *James*, the Court assessed "how the law defines the offense and not . . . how an individual offender might have committed it on a particular occasion." *Johnson*, 576 U.S. at ___, 135 S. Ct. at 2557. This approach was problematic, because it "ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." *Id.* at ___, 135 S. Ct. at 2557. And many of the crimes at issue could, on the face of the statute, be committed in a variety of ways, some violent and others nonviolent. *Id.* at ___, 135 S. Ct. at 2558. The Court recognized that "the failure of 'persistent efforts to establish a standard' can provide evidence of

vagueness," and therefore concluded the residual clause is vague. *Id.* at ___, 135 S. Ct. at 2558 (alteration omitted) (quoting *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 91 (1921)).

In reaching this conclusion, the Court noted that "although statements in some of our opinions could be read to suggest otherwise, our *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." *Id.* at ___, 135 S. Ct. at 2560-61. Though the Court used this reasoning to overrule its prior decisions in the ACCA line of cases following *James*, 550 U.S. 192, it did not explicitly overrule non-ACCA cases that decided vagueness challenges under the vague-in-all-its-applications standard. *See Johnson*, 576 U.S. at ___, 135 S. Ct. at 2580 n.2 (Alito, J., dissenting) (citing *Morales*, 527 U.S. at 79; *Chapman v. United States*, 500 U.S. 453, 467-68 (1991); *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982)).

Thus, courts that have addressed *Johnson* interpret it as standing for much narrower propositions than McCoy now contends. Some courts have interpreted *Johnson* as requiring that

a law be struck down as vague only after a court has persistently tried and failed to establish a workable standard. *See, e.g.*, *State v. Haywood*, 869 N.W.2d 902, 910 (Minn. Ct. App. 2015).

Other courts have applied *Johnson* only to address whether language similar to the ACCA's residual clause appearing in other federal or state provisions is vague. *United States v. Mills*, No. 3:15-CR-00055-MOC, 2015 WL 6672537, at *1 (W.D.N.C. Oct. 30, 2015); *Commonwealth v. Rezendes*, 37 N.E.3d 672, 679 (Mass. App. Ct. 2015). One court has held that although *Johnson* struck down the residual clause, it applies narrowly and does not "call into question the constitutional validity of other statutes using the term 'substantial risk.'" *State ex rel. Richardson v. Green*, 465 S.W.3d 60, 66-67 (Mo. 2015). But, *Johnson* has not been cited to hold as vague a law that is unlike the residual clause of the ACCA and subject to a single challenge. *See Johnson*, 576 U.S. at ___, 135 S. Ct. at 2558. We also decline to do so. Thus, we conclude that *Johnson* does not apply to this case.

Page 25, line 1-6 used to read:

A statute is not void for vagueness if it fairly describes the conduct that it proscribes and persons of common intelligence can

readily understand its meaning and application. *People v. Shell*, 148 P.3d 162, 172 (Colo. 2006). To succeed on a facial challenge under the vagueness doctrine, the challenger must show that the statute is incomprehensible in all its applications. *Id.*

Opinion now reads, starting on page 29:

Colorado has consistently applied the traditional vagueness doctrine: A statute is not void for vagueness if it fairly describes the conduct that it proscribes and persons of common intelligence can readily understand its meaning and application. *People v. Shell*, 148 P.3d 162, 172 (Colo. 2006); *People v. Cross*, 127 P.3d 71, 78 (Colo. 2006); *People v. Hickman*, 988 P.2d 628, 643 (Colo. 1999); *Gessler v. Grossman*, 2015 COA 62, ¶ 33; *see Dallman v. Ritter*, 225 P.3d 610, 631 (Colo. 2010). To succeed on a facial challenge under the vagueness doctrine, the challenger must show that the statute is incomprehensible in all its applications. *Morales*, 527 U.S. at 78-79; *Shell*, 148 P.3d at 172; *Hickman*, 988 P.2d at 643; *People v. Baer*, 973 P.2d 1225, 1233 (Colo. 1999); *Gessler*, ¶ 33.

Page 26, lines 7-12 of Judge Webb's special concurrence used to read:

Here, more than one-half of the majority opinion is devoted to

disagreeing with Lacallo's application of plain error, but the majority then affirms the judgment based on de novo review — a standard more favorable to defendant than plain error analysis, in some circumstances. Only a decision from our supreme court will resolve this disagreement.

It now reads:

Presumably, this disagreement will be resolved when our supreme court issues its opinion in *People v. Maestas*, (Colo. App. No. 11CA2084, Jan. 15, 2015) (not published pursuant to C.A.R. 35(f)) (*cert. granted in part* Oct. 26, 2015). Until then, however, *Lacallo* remains viable precedent. I answer the majority's attack on *Lacallo* as follows.

¶ 1 Defendant, David Lewis McCoy, appeals the judgment of conviction entered after a jury found him guilty of four counts of unlawful sexual contact. He contends, for the first time on appeal, that section 18-3-404(1)(g), C.R.S. 2014, proscribes only conduct occurring in a physician-patient relationship and as part of a medical exam or medical treatment. Under this interpretation of section 18-3-404(1)(g), he contends that the prosecution presented insufficient evidence to sustain his convictions because he is not a physician. Alternatively, he contends that the statute's plain terms are unconstitutionally overbroad and vague. Because we disagree with each of his contentions, we affirm his judgment of conviction.

I. The Charged Crime

¶ 2 The prosecution charged McCoy with unlawful sexual contact against two men, P.K. and G.M., arising out of separate incidents. According to the victims, McCoy told them that he worked in the television industry. He invited the victims to contact him if they wanted to work for him, and, eventually, they both did so. McCoy brought each victim to his home and asked them questions about their backgrounds.

¶ 3 During P.K.'s interview, McCoy asked about P.K.'s sexual history. McCoy also asked to weigh P.K. and instructed him to take off his clothes. He then checked P.K.'s pulse by touching his groin and, during that process, touched P.K.'s genitals. McCoy "assured" P.K. that he was a physician and encouraged him to relax.

¶ 4 During G.M.'s interview, McCoy asked about G.M.'s sexual fantasies. The next day, G.M. began training at McCoy's home for what he thought was work in the television industry. This training lasted about one and a half weeks. During the training, McCoy insisted on inspecting G.M.'s feet. He also checked G.M.'s pulse, touching his wrist and thigh. McCoy asked G.M. to lie on his stomach so that he could look at his back. When G.M. did so, McCoy pulled down G.M.'s underwear and "spread [his] butt open." McCoy had previously told G.M. that he was a pediatrician.

II. Sufficiency of the Evidence

¶ 5 We first consider whether the prosecution presented insufficient evidence to sustain McCoy's convictions because, as McCoy contends, section 18-3-404(1)(g), proscribes only conduct occurring in a physician-patient relationship and as part of a medical exam or medical treatment.

A. Appellate Review of Sufficiency Arguments

¶ 6 A threshold question in this case is whether a claim that raises insufficiency of the evidence for the first time on appeal is subject to plain error review. For reasons we will discuss, we disagree with the majority in *People v. Lacallo*, 2014 COA 78, and conclude that sufficiency of the evidence claims are not governed by plain error review. *See People in Interest of S.N-V.*, 300 P.3d 911, 914 (Colo. App. 2011) (one division of the court of appeals is not bound by the decision of another division (citing *People v. Wolfe*, 213 P.3d 1035, 1036 (Colo. App. 2009))).

¶ 7 Appellate review of the sufficiency of the evidence is grounded in the Due Process Clause of the Fourteenth Amendment, which "protects a defendant in a criminal case against conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" *Jackson v. Virginia*, 443 U.S. 307, 315 (1979) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)); *see Clark v. People*, 232 P.3d 1287, 1291 (Colo. 2010) (citing *Jackson*, 443 U.S. at 319). Appellate review of the sufficiency of the evidence ensures that a judgment of conviction does not violate the principle that a defendant be convicted only when each

element of the offense was proven beyond a reasonable doubt. *See Jackson*, 443 U.S. at 317-18; *People v. Heywood*, 2014 COA 99, ¶ 45 (Gabriel, J., specially concurring).

¶ 8 Although McCoy moved for judgment of acquittal in the trial court, his motion did not articulate the statutory claim he makes on appeal, which relies on his interpretation of section 18-3-404(1)(g). For this reason, the People urge us to review his sufficiency claim for plain error. By contrast, McCoy contends that plain error review is inapplicable because he was not required to preserve this argument in the trial court. We agree with McCoy.

¶ 9 Our disagreement with the People is based on the premise that appellate courts apply plain error review to claims of "error" that were forfeited, and McCoy did not forfeit our review of his sufficiency claims.

¶ 10 A criminal defendant forfeits appellate review of a trial error by not timely raising such an error in the trial court. *People v. Miller*, 113 P.3d 743, 748-49 (Colo. 2005). Our supreme court in *Miller* explained:

> In *United States v. Olano*, 507 U.S. 725, 731, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), the Supreme Court held that unpreserved

> constitutional claims are subject to plain error analysis. In so doing, the Court reaffirmed the fundamental precept governing relinquishment of unpreserved claims: "'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *Id.*

Id.

¶ 11 Colorado's plain error rule, Crim. P. 52(b), is an exception to the forfeiture doctrine and provides an appellate court a limited power to correct errors that were forfeited because they were not timely raised in the trial court. *See Olano*, 507 U.S. at 731. But, our supreme court has not held that a defendant forfeits appellate review of sufficiency claims that were not raised in the trial court. *See, e.g.*, *Morse v. People*, 168 Colo. 494, 498, 452 P.2d 3, 5 (1969).

¶ 12 In *Morse*, the defendant raised several claims for the first time on appeal. *Id.* at 497-98, 452 P.2d at 5. One of these new claims alleged that there was insufficient evidence to support his conviction. *Id.* at 498, 452 P.2d at 5. Citing "the 'contemporaneous objection' rule and the requirement that error be preserved by raising the objection with particularity in the motion for a new

trial," the court declined to address all of the new claims except one — the sufficiency claim. *Id.* (quoting *Lucero v. People*, 158 Colo. 568, 570, 409 P.2d 278, 279 (1965)). The court addressed the defendant's new sufficiency claim "on the basis of the record now before [it]." *Id.*

¶ 13 Of course, as the special concurrence here points out, the *Morse* court did not articulate an exception to the forfeiture doctrine for sufficiency claims. But, the absence of such express language does not change the analysis that the court employed. And, that analysis was not affected by the defendant's failure to raise the claim at trial.

¶ 14 Consistent with *Morse*, divisions of this court have determined that a defendant need not preserve a sufficiency of the evidence claim by moving for a judgment of acquittal. *See, e.g.*, *People v. Randell*, 2012 COA 108, ¶ 30 ("A defendant may challenge the sufficiency of the evidence on appeal without moving for a judgment of acquittal in the trial court."); *People v. Garcia*, 2012 COA 79, ¶ 35 ("[W]e reject the People's contention that Garcia failed to preserve his challenge to the sufficiency of the evidence because he did not move for a judgment of acquittal at trial."). The divisions in these

cases did not apply a plain error standard of review. *Randell*, ¶ 29; *Garcia*, ¶ 34.

¶ 15 Before the majority's opinion in *Lacallo*, over thirty years had passed since two divisions of this court applied plain error review to a sufficiency claim. *See People v. Harris*, 633 P.2d 1095, 1099 (Colo. App. 1981); *People v. Rice*, 40 Colo. App. 357, 361, 579 P.2d 647, 650 (1978). Although the *Lacallo* majority premised the application of plain error review on the reliability of *Harris* and *Rice*, *Harris* and *Rice* are in tension with the supreme court's decision in *Morse* and applied plain error review based on a preservation requirement in Crim. P. 33(a) that no longer exists. *See Lacallo*, ¶ 11 ("[W]e join with *Rice* and *Harris* in applying the plain error standard of review . . . ."). Because *Harris* and *Rice* relied on a now outdated version of Crim. P. 33(a), we discuss *Harris*, *Rice*, and Crim. P. 33(a) only to show that these cases and that rule no longer compel plain error review for sufficiency claims raised for the first time on appeal.

¶ 16 When *Harris* and *Rice* were decided, Colorado's rule governing motions for new trial, Crim. P. 33(a), required the party claiming error in the trial to "move the trial court for a new trial." Under that

rule, "[o]nly questions presented in such motion [would] be considered by the appellate court on review." *Id.* Thus, under Crim. P. 33(a), as it existed until 1985, a defendant forfeited appellate review of a claim by not raising it in a motion for new trial.

¶ 17 *Harris* and *Rice* both noted a defendant's duty to preserve appellate claims in a motion for a new trial. *Harris* relied on Crim. P. 33(a) directly to support its decision to apply plain error review: "We note that defendant failed to raise [the sufficiency claim] in his motion for a new trial. The rule is that, absent plain error, such a failure bars consideration of the issue on appeal." 633 P.2d at 1099 (citing Crim. P. 33(a) and Crim. P. 52(b)).

¶ 18 Although the *Rice* division did not cite Crim. P. 33(a), it applied plain error review primarily because the defendant failed to "reserve any assertion of error in his motion for a new trial." 40 Colo. App. at 361, 579 P.2d at 650.

¶ 19 But, Crim. P. 33(a) has not retained the preservation requirement that *Harris* and *Rice* relied on. To the contrary, now a party "need not raise all the issues it intends to raise on appeal in [a motion for a new trial] to preserve them for appellate review." Crim. P. 33(a). *Harris* and *Rice* therefore do not reflect Colorado's

contemporary preservation rules for sufficiency claims raised for the first time on appeal.

¶ 20 To be sure, Colorado's Crim. P. 29(a) allows a defendant to move for judgment of acquittal. This rule also allows the trial court to enter such a judgment. But it does not require either to do so to preserve a sufficiency claim for appellate review.

¶ 21 We recognize the broad scope of the contemporaneous objection rule, which the special concurrence points out. *See Hagos v. People*, 2012 CO 63, ¶ 14. And, we do not question that rule's vitality. *See id.* But, despite that rule, Colorado courts have reviewed sufficiency claims in the same way regardless of whether the defendant raised them at trial or for the first time on appeal. *See, e.g.*, *Morse*, 168 Colo. at 498, 452 P.2d at 5; *Randell*, ¶ 29; *Garcia*, ¶ 34.

¶ 22 Having concluded that Colorado law contains no preservation requirement for sufficiency claims, we briefly address and distinguish the reasons offered by the *Lacallo* majority to apply plain error review to such claims.

1. Federal Preservation Law

¶ 23 The *Lacallo* majority correctly noted that federal courts apply

plain error review to sufficiency claims. *Lacallo*, ¶ 13. But, unlike Colorado, federal courts require a defendant to move for judgment of acquittal under Fed. R. Crim. P. 29 to preserve a sufficiency claim. *See, e.g.*, *United States v. Delgado*, 672 F.3d 320, 328 (5th Cir. 2012) (The defendant "did not move for a judgment of acquittal under Rule 29 on the grounds that the government had not presented adequate evidence of an agreement with co-conspirators, and she therefore failed to preserve this issue for appellate review."); *United States v. Gaydos*, 108 F.3d 505, 509 (3d Cir. 1997) (The defendant "did not preserve this issue for appeal by filing a timely motion for a judgment of acquittal."); *see also United States v. Kimler*, 335 F.3d 1132, 1141 (10th Cir. 2003) (same); *United States v. Meadows*, 91 F.3d 851, 854 (7th Cir. 1996) (same); *United States v. White*, 1 F.3d 13, 17 (D.C. Cir. 1993) (same). In federal court, then, if a defendant does not move for judgment of acquittal in the trial court, he or she forfeits appellate review of a sufficiency claim. *See, e.g.*, *Meadows*, 91 F.3d at 854 (The defendant "concedes that he failed to move for a judgment of acquittal under Fed. R. Crim. P. 29, and that he therefore forfeited any challenge on appeal to the sufficiency of the evidence."); *see also Olano*, 507 U.S. at 731 (A

right "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." (internal quotation marks omitted)).

¶ 24 Conversely, as noted, Colorado appellate courts do not require defendants to raise a sufficiency claim in a motion for judgment of acquittal to avoid forfeiting appellate review of that claim. Thus, they do not review for plain error sufficiency claims raised for the first time on appeal. *See, e.g.*, *People v. Roggow*, 2013 CO 70, ¶ 13 (applying de novo review to a sufficiency claim without mentioning whether the claim was raised at trial); *Randell*, ¶ 30; *Garcia*, ¶ 35; *see also People v. Duncan*, 109 P.3d 1044, 1045 (Colo. App. 2004) ("[B]ecause a sufficiency of the evidence claim may be raised for the first time on appeal, we consider the merits of [the defendant's] argument."); *People v. Peay*, 5 P.3d 398, 400 (Colo. App. 2000) (addressing sufficiency of the evidence as to the charge of criminal impersonation despite the defendant's failure to preserve the issue in his motion for acquittal). Because federal law and Colorado law have different preservation requirements, federal opinions are, in our view, unpersuasive on this issue.

2. Other States

¶ 25 The *Lacallo* majority also relied on the fact that "many states apply a plain error standard of review to unpreserved sufficiency of the evidence claims." *Lacallo*, ¶ 14. But, as Judge Román pointed out in his dissent, many other states also "address insufficiency of the evidence claims for the first time on appeal without applying plain error review." *Id.* at ¶ 62 (Román, J., dissenting).

¶ 26 In any event, our analysis is limited to how Colorado courts have interpreted our state's preservation requirement with respect to a sufficiency claim.

3. Policies Supporting Plain Error Review

¶ 27 We also disagree with the three policy reasons that the *Lacallo* majority expressed for applying plain error review to sufficiency claims raised for the first time on appeal:

- Plain error review is reserved for "'particularly egregious errors,'" *id.* at ¶ 15 (quoting *Hagos*, ¶ 23);
- Requiring defendants to raise sufficiency issues before the trial court gives "'the court an opportunity to correct any error,'" *id.* (quoting *People v, Pahl*, 169 P.3d 169, 183 (Colo. App. 2006));
- Requiring defendants to raise sufficiency issues before the trial court "would obviate the need for the defendant to appeal any

other issue concerning that charge." *Id.* at ¶ 16.

a. *particularly egregious errors*

¶ 28 First, *Lacallo* reasoned that

> [p]lain error review reflects 'a careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed.' Plain error review allows the opportunity to reverse convictions in cases presenting particularly egregious errors, but reversals must be rare to maintain adequate motivation among trial participants to seek a fair and accurate trial the first time.

Id. at ¶ 15 (quoting *Hagos*, ¶ 23).

¶ 29 Review of a sufficiency claim does not involve the evaluation of the impact that an egregious trial error may have on the final judgment of conviction. Unlike all other structural and nonstructural trial errors, which "do[] not constitute a decision to the effect that the government has failed to prove its case," *Burks v. United States*, 437 U.S. 1, 15 (1978), when there is insufficient evidence, the conviction is vacated, and the charge is not subject to retrial. *See id.* at 18 ("[T]he Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient, the only 'just' remedy available for that court is the

direction of a judgment of acquittal.").

¶ 30 Consequently, unlike egregious trial errors, appellate review of sufficiency claims will never result in reversal. If the evidence is sufficient, then the claim fails, and the judgment is affirmed. But, if the evidence is insufficient, then the conviction is vacated and not subject to retrial. For this reason, we see no incentive for a defendant to forgo raising a sufficiency claim at trial — even one that involves a novel statutory interpretation — suffer a conviction and sentence, and raise the claim on appeal.

¶ 31 And, the method of applying plain error espoused by the *Lacallo* majority and the special concurrence here enables an appellate court to determine whether an error could have been obvious before determining whether an error occurred. If we were to reject the sufficiency claim on direct appeal under plain error review because the alleged error was not obvious at trial, the circumstances under which a Crim. P. 35(c) postconviction claim could provide relief is also not clear. If the law on which the error is based was not obvious at the time of trial, it is unlikely that a defendant could show deficient performance of trial counsel in a postconviction proceeding. By this process, questions of statutory

interpretation, such as are at issue here and in *Lacallo*, could remain unresolved indefinitely, and by this reasoning, innocent defendants could also remain in prison indefinitely. *See Jackson*, 443 U.S. at 317-18.

¶ 32 The special concurrence contends *People v. Davis*, 2015 CO 36 stands for the proposition that the supreme court applied "the plain error paradigm" to review the sufficiency of the evidence in a double jeopardy claim. We think this conflates two separate issues. Although the court reviewed the sufficiency of the evidence, it did so only to determine whether there were two factually distinct crimes in an unpreserved double jeopardy claim. *Davis*, ¶¶ 40-41. The court did not apply plain error review to a sufficiency of the evidence claim. *Id.*, ¶ 33.

b. *an opportunity to correct any error*

¶ 33 Second, the *Lacallo* majority reasoned that requiring defendants to raise sufficiency claims before the trial court "'conserve[s] judicial resources by alerting the trial court to a particular issue in order to give the court an opportunity to correct any error.'" *Lacallo*, ¶ 15 (quoting *Pahl*, 169 P.3d at 183 (addressing purpose of contemporaneous objection rule in context

of challenge to jury instructions)).

¶ 34 But, requiring a defendant to raise a sufficiency claim does not give the trial court an opportunity to correct any "error" and is not necessary to alert the court to the possibility of insufficient evidence because the purpose of the trial is to determine whether there is sufficient evidence to prove that the defendant committed a crime beyond a reasonable doubt. *See United States v. Atkinson*, 990 F.2d 501, 503 (9th Cir. 1993) (In a bench trial "[a] motion to acquit is superfluous because the plea of not guilty has brought the question of the sufficiency of the evidence to the court's attention.").

c. *obviate the need for the defendant to appeal any other issue*

¶ 35 Third, the *Lacallo* majority reasoned that "[r]aising sufficiency before the trial court conserves judicial resources because a ruling that the evidence was insufficient would obviate the need for the defendant to appeal any other issue concerning that charge." *Lacallo*, ¶ 16. We do not challenge this principle. But, the importance of ensuring that a defendant may only be convicted when each element is proven beyond a reasonable doubt, *Jackson*, 443 U.S. at 317-18, is why we disagree with the special concurrence's review of McCoy's sufficiency claim for plain error.

¶ 36 Having concluded that plain error review does not apply, we now turn to the merits of McCoy's sufficiency claim.

4. De Novo Review

¶ 37 When reviewing the sufficiency of the evidence de novo, we apply the substantial evidence test. *See Dempsey v. People*, 117 P.3d 800, 807 (Colo. 2005). Under this test, we consider whether the evidence, viewed as a whole and in the light most favorable to the prosecution, is sufficient to support a rational conclusion that the defendant is guilty of the crime charged beyond a reasonable doubt. *See id.; People v. McGlotten*, 166 P.3d 182, 188 (Colo. App. 2007). This standard requires us to give the prosecution the benefit of every inference that may fairly be drawn from the evidence. *People v. Vecellio*, 2012 COA 40, ¶ 12.

¶ 38 Where a challenge to the sufficiency of the evidence requires us to interpret a statute, our goal is to effectuate the General Assembly's intent. *People v. Davis*, 2012 COA 56, ¶ 13. To determine that intent, we start with the statute's language, giving common words and phrases their ordinary meaning. *Vecellio*, ¶ 14. We must read and consider the statute as a whole, giving consistent, harmonious, and sensible effect to all its parts. *Id.* If

the statutory language is clear and unambiguous, we will apply it as written, without resorting to further statutory analysis. *Id.*

B. Section 18-3-404(1)(g)

¶ 39 We now consider McCoy's contention that section 18-3-404(1)(g) proscribes only conduct occurring in a physician-patient relationship and as part of a medical exam or medical treatment.

¶ 40 Section 18-3-404(1)(g) provides: "Any actor who knowingly subjects a victim to any sexual contact commits unlawful sexual contact if . . . [t]he actor engages in treatment or examination of a victim for other than bona fide medical purposes or in a manner substantially inconsistent with reasonable medical practices."

¶ 41 Section 18-3-404(1)(g)'s terms are clear and unambiguous. They apply to "any actor" and are not limited to "medical professionals" or those who claim to be medical professionals. When the General Assembly has intended to restrict a crime to a specific class of actors, it has done so expressly. *See, e.g.*, § 18-3-405.5, C.R.S. 2014 (proscribing sexual assault on a client by a psychotherapist). Because section 18-3-404(1)(g) contains no such restriction, we decline to impose one. *See People v. Herrera*, 2014

COA 20, ¶ 10 (declining to "judicially impose a hearing requirement where the legislature did not").

¶ 42 McCoy's reliance on *People v. Terry*, 720 P.2d 125 (Colo. 1986), for the proposition that section 18-3-404(1)(g) applies only to acts occurring within a physician-patient relationship is misplaced. In *Terry*, the supreme court interpreted what was then section 18-3-403(1)(h), which provided, "[a]ny actor who knowingly inflicts sexual penetration or sexual intrusion on a victim commits sexual assault . . . if . . . [t]he actor engages in treatment or examination of a victim for other than bona fide medical purposes or in a manner substantially inconsistent with reasonable medical practices." *Id.* at 126. The court concluded that a chiropractor, although he was not a "physician," could be convicted under that statute because, "in enacting section 18-3-403(1)(h) the legislature intended to prevent those persons in a position of trust by dint of their professional status from taking sexual advantage of their patients." *Id.* at 128.

¶ 43 In our view, *Terry* is unpersuasive here for two reasons. First, although the court concluded a chiropractor could be convicted under similar statutory language, it did not articulate a requirement

that the actor have (or claim) any professional status or relationship with the victim. Rather, the court said, "[m]erely because one is not a 'physician' does not preclude that person from engaging in 'medical purposes.'" *Id.* Second, *Terry* involved a different statute, the sexual assault statute, which the legislature has since repealed and re-enacted with additional terms. *See* Ch. 171, sec. 18, § 18-3-402(1)(g), 2000 Colo. Sess. Laws 699; *id.* at sec. 19, 2000 Colo. Sess. Laws 700 (repealing § 18-3-403). And we presume that the legislature intended to change the law when it amended that statute. *See People v. Covington*, 19 P.3d 15, 21 (Colo. 2001).

¶ 44 Likewise, we reject McCoy's argument that the unlawful sexual contact statute proscribes only conduct that occurs during "medical treatment or a medical examination." By its plain terms, section 18-3-404(1)(g) does not limit itself to these circumstances. In contrast, under section 18-3-402(1)(g), C.R.S. 2014, an actor commits sexual assault by knowingly inflicting sexual intrusion or sexual penetration on the victim if the "actor, while purporting to offer a medical service, engages in treatment or examination of a victim for other than a bona fide medical purpose or in a manner substantially inconsistent with reasonable medical practices."

Thus, unlike section 18-3-402(1)(g), the statute before us does not require evidence showing that the actor "purport[ed] to offer a medical service."

¶ 45 Although McCoy points to section 18-3-404(1)(g)'s legislative history to support his proposed interpretation, we do not consider this history because the statute's terms are unambiguous. *Candelaria v. People*, 2013 CO 47, ¶ 12.

¶ 46 Because we have concluded that section 18-3-404(1)(g) is not limited to conduct that occurs within a physician-patient relationship, or to conduct that occurs during medical treatment or a medical examination, we do not consider McCoy's argument that the statute's "knowingly" element applies to the restrictions. Guided by the statute's plain terms, we turn to the evidence supporting McCoy's convictions.

C. The Evidence

¶ 47 We now consider whether the prosecution presented insufficient evidence to sustain McCoy's convictions. We conclude that the prosecution presented sufficient evidence to sustain McCoy's convictions under section 18-3-404(1)(g) involving both P.K. and G.M. The jury could have concluded that the victims

submitted to examinations because McCoy caused them to believe the examinations were part of a hiring process. The jury could also reasonably have concluded that McCoy examined the victims for his sexual gratification, not for bona fide medical purposes because both victims testified that McCoy touched their intimate parts while he examined them.

III. Constitutional Challenges

¶ 48 We next consider whether section 18-3-404(1)(g)'s plain terms are unconstitutionally overbroad and vague. We conclude that they are not.

A. Preservation and Standard of Review

¶ 49 Because McCoy does not challenge section 18-3-404(1)(g) as applied to his conduct, we treat his challenges as facial challenges. The parties agree that McCoy did not preserve these claims by raising them in the trial court.

¶ 50 Colorado case law does not clearly dictate whether we should address McCoy's unpreserved constitutional claims. *See People v. Allman*, 2012 COA 212, ¶ 14 ("There are two lines of authority in Colorado on this question in criminal cases."). On one hand, *People v. Cagle*, 751 P.2d 614, 619 (Colo. 1988), and its progeny assert

that it "is axiomatic that this court will not consider constitutional issues raised for the first time on appeal." *People v. Devorss*, 277 P.3d 829, 834 (Colo. App. 2011) (internal quotation marks omitted) (collecting cases). On the other hand, the supreme court and divisions of this court have discretionarily addressed unpreserved constitutional challenges. *Id.* (collecting cases).

¶ 51 Because McCoy does not challenge the statute as applied to him, we exercise our discretion to address his claims. *Cf. People v. Veren*, 140 P.3d 131, 140 (Colo. App. 2005) (Particularly when a defendant challenges a statute as applied, "it is imperative that the trial court make some factual record that indicates what causes the statute to be unconstitutional as applied.").

¶ 52 When reviewing a constitutional challenge to a statute, we presume that the statute is constitutional. *Allman*, ¶ 7. The challenging party must establish beyond a reasonable doubt that the statute is unconstitutional. *Id.*

B. Overbreadth

¶ 53 A statute is facially overbroad if, in addition to proscribing conduct that is not constitutionally protected, it sweeps into its

proscriptions a substantial amount of constitutionally protected conduct. *People v. Shepard*, 983 P.2d 1, 3 (Colo. 1999).

¶ 54 Unless a defendant alleges that a statute impinges on a fundamental right guaranteed by the First Amendment, he or she does not have standing to argue that the statute is facially overbroad. *People v. Lee*, 717 P.2d 493, 495 (Colo. 1986).

¶ 55 We conclude that McCoy lacks standing to challenge section 18-3-404(1)(g) as facially overbroad. He contends that the "statute sweeps in a broad range of non-criminal and constitutionally protected conduct." And he offers examples of conduct that, he concludes, the statute proscribes, such as a sexual role-playing scenario in which one participant pretends to be a doctor. But, he does not cite any authority establishing that the activities in his examples implicate fundamental rights.

¶ 56 Instead, he argues that *Ferguson v. People*, 824 P.2d 803 (Colo. 1992), "recognizes that intimate relationships between consenting adults are generally protected by the rights to privacy and free association." But even *Ferguson* acknowledged that "it has never been the law that consenting adults, solely by virtue of their adulthood and consent, have a constitutionally protected privacy or

associational right to engage in any type of sexual behavior of their choice under any circumstances." *Id.* at 808.

C. Vagueness

¶ 57 "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V; Colo. Const. art. II, § 25. The Government violates this guarantee by taking away someone's life, liberty, or property under a law so vague that it either fails to provide notice or "authorize[s] and even encourage[s] arbitrary and discriminatory enforcement." *Chicago v. Morales*, 527 U.S. 41, 56 (1999).

¶ 58 After we first issued our opinion in this case, the United States Supreme Court issued its opinion in *Johnson v. United States*, 576 U.S. ___, ___, 135 S. Ct. 2551, 2557 (2015). In a petition for rehearing, McCoy contends that the Court in *Johnson* altered the traditional approach to facial vagueness challenges; an approach that is currently used in Colorado. *Johnson* addressed whether the residual clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii) (2012), violated the Constitution's prohibition of vague criminal laws.

¶ 59 Under the ACCA, a defendant convicted of being a felon in possession of a firearm faces more severe punishment if he has "three or more previous convictions for a 'violent felony,' a term defined to include any felony that '*involves conduct that presents a serious potential risk of physical injury to another*.'" *Johnson*, 576 U.S. at ___, 135 S. Ct. at 2555 (emphasis added) (citation omitted). The italicized words of this definition have come to be known as the ACCA's residual clause. *Id.* at ___, 135 S. Ct. at 2556.

¶ 60 In the eight years prior to *Johnson*, the Supreme Court decided four different challenges to the application of the residual clause of the ACCA. *See Sykes v. United States*, 564 U.S. ___, 131 S. Ct. 2267 (2011) (holding that a conviction under Indiana's vehicle flight statute is a "violent felony" as the ACCA uses that term in the residual clause); *Chambers v. United States*, 555 U.S. 122 (2009) (holding that a conviction under Illinois' failure to report for penal confinement statute is not a "violent felony" under the residual clause of the ACCA); *Begay v. United States*, 553 U.S. 137 (2008) (holding that a conviction under New Mexico's driving under the influence of alcohol statute is not a "violent felony" under the residual clause of the ACCA); *James v. United States*, 550 U.S. 192

(2007) (holding that a conviction under Florida's attempted burglary statute is a "violent felony" under the residual clause of the ACCA), *overruled by Johnson*, 576 U.S. ___, 135 S. Ct. 2551. Each time the Court addressed this clause, it sought to establish a workable standard by which other courts could decide a challenge to its application. *See, e.g.*, *James*, 550 U.S. at 202-03 (using the "categorical approach," which looks "only to the fact of conviction and the statutory definition of the prior offense" and not to the "particular facts disclosed by the record of conviction") (citation omitted).

¶ 61 Under the categorical approach developed in *James*, the Court assessed "how the law defines the offense and not . . . how an individual offender might have committed it on a particular occasion." *Johnson*, 576 U.S. at ___, 135 S. Ct. at 2557. This approach was problematic, because it "ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." *Id.* at ___, 135 S. Ct. at 2557. And many of the crimes at issue could, on the face of the statute, be committed in a variety of ways, some violent and others nonviolent. *Id.* at ___, 135 S. Ct. at 2558. The Court recognized that "the failure

of 'persistent efforts to establish a standard' can provide evidence of vagueness," and therefore concluded the residual clause is vague. *Id.* at ___, 135 S. Ct. at 2558 (alteration omitted) (quoting *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 91 (1921)).

¶ 62 In reaching this conclusion, the Court noted that "although statements in some of our opinions could be read to suggest otherwise, our *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." *Id.* at ___, 135 S. Ct. at 2560-61. Though the Court used this reasoning to overrule its prior decisions in the ACCA line of cases following *James*, 550 U.S. 192, it did not explicitly overrule non-ACCA cases that decided vagueness challenges under the vague-in-all-its-applications standard. *See Johnson*, 576 U.S. at ___, 135 S. Ct. at 2580 n.2 (Alito, J., dissenting) (citing *Morales*, 527 U.S. at 79; *Chapman v. United States*, 500 U.S. 453, 467-68 (1991); *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982)).

¶ 63 Thus, courts that have addressed *Johnson* interpret it as standing for much narrower propositions than McCoy now

contends. Some courts have interpreted *Johnson* as requiring that a law be struck down as vague only after a court has persistently tried and failed to establish a workable standard. *See, e.g.*, *State v. Haywood*, 869 N.W.2d 902, 910 (Minn. Ct. App. 2015).

¶ 64 Other courts have applied *Johnson* only to address whether language similar to the ACCA's residual clause appearing in other federal or state provisions is vague. *United States v. Mills*, No. 3:15-CR-00055-MOC, 2015 WL 6672537, at *1 (W.D.N.C. Oct. 30, 2015); *Commonwealth v. Rezendes*, 37 N.E.3d 672, 679 (Mass. App. Ct. 2015). One court has held that although *Johnson* struck down the residual clause, it applies narrowly and does not "call into question the constitutional validity of other statutes using the term 'substantial risk.'" *State ex rel. Richardson v. Green*, 465 S.W.3d 60, 66-67 (Mo. 2015). But, *Johnson* has not been cited to hold as vague a law that is unlike the residual clause of the ACCA and subject to a single challenge. *See Johnson*, 576 U.S. at ___, 135 S. Ct. at 2558. We also decline to do so. Thus, we conclude that *Johnson* does not apply to this case.

¶ 65 Colorado has consistently applied the traditional vagueness doctrine: A statute is not void for vagueness if it fairly describes the

conduct that it proscribes and persons of common intelligence can readily understand its meaning and application. *People v. Shell*, 148 P.3d 162, 172 (Colo. 2006); *People v. Cross*, 127 P.3d 71, 78 (Colo. 2006); *People v. Hickman*, 988 P.2d 628, 643 (Colo. 1999); *Gessler v. Grossman*, 2015 COA 62, ¶ 33; *see Dallman v. Ritter*, 225 P.3d 610, 631 (Colo. 2010). To succeed on a facial challenge under the vagueness doctrine, the challenger must show that the statute is incomprehensible in all its applications. *Morales*, 527 U.S. at 78-79; *Shell*, 148 P.3d at 172; *Hickman*, 988 P.2d at 643; *People v. Baer*, 973 P.2d 1225, 1233 (Colo. 1999); *Gessler*, ¶ 33.

¶ 66 McCoy does not contend that the statute is incomprehensible in all applications. Indeed, he concedes that the statute is not vague as applied to medical professionals. As a result, we disagree with his claim. *See People v. Bondurant*, 2012 COA 50, ¶ 35 ("[B]ecause [the defendant] has not satisfied his burden to prove beyond a reasonable doubt that the statute is incomprehensible in all applications, his facial challenge to the statute based on ambiguity of the term 'mental condition' necessarily fails.").

IV. Conclusion

¶ 67 The judgment is affirmed.

JUDGE NAVARRO concurs.

JUDGE WEBB specially concurs.

JUDGE WEBB specially concurring.

¶ 68 Despite agreeing that the conviction should be affirmed, I write separately because plain error analysis of unpreserved sufficiency appeals continues to divide this court. *See People v. Rediger*, 2015 COA 26 (Richman, J., specially concurring); *People v. Heywood*, 2014 COA 99 (Gabriel, J., specially concurring); *People v. Lacallo*, 2014 COA 78 (Román, J., dissenting). Presumably, this disagreement will be resolved when our supreme court issues its opinion in *People v. Maestas*, (Colo. App. No. 11CA2084, Jan. 15, 2015) (not published pursuant to C.A.R. 35(f)) (*cert. granted in part* Oct. 26, 2015). Until then, however, *Lacallo* remains viable precedent. I answer the majority's attack on *Lacallo* as follows.

¶ 69 For three reasons, under *Lacallo* and *Heywood*, the vast majority of sufficiency appeals will still be decided the same way, whether or not analyzed for plain error. First, only a minority of federal courts has adopted an enhanced "obviously" insufficient requirement; *Lacallo*, ¶ 21, eschewed this question and *Heywood*, ¶ 35, rejected it. Second, plain error analysis will usually begin by examining the sufficiency of the evidence. *See Rediger*, ¶ 24 ("[W]e do not begin with the obviousness prong, . . . [i]nstead, we . . . start

by weighing the evidence to apply the first plain error requirement — error."). Third, that examination is de novo. *See id.*

¶ 70 Thus, plain error analysis would lead to a different result only where the following relatively rare circumstances converge and permit the appellate court to begin this analysis with obviousness rather than sufficiency.

- A threshold question of statutory interpretation must be answered before the sufficiency of the evidence can be determined.
- This interpretation was crafted solely by appellate counsel.
- And it fails the obviousness requirement of plain error analysis because the statute does not include common terms or its language has never been interpreted. *See id.* at ¶ 12 ("An appellate court need not address the merits of a defendant's sufficiency-of-the-evidence claim when determining the meaning of operative statutory terms 'under existing Colorado authority would [have been] difficult,' or the argument does not implicate a 'well-settled legal principle that numerous courts elsewhere have uniformly embraced.'" (quoting *Lacallo*, ¶¶ 30-31)).

I. *Morse* Does Not Preclude Plain Error Analysis.

¶ 71 The majority's disagreement with *Lacallo* begins with *Morse v. People*, 168 Colo. 494, 498, 452 P.2d 3, 5 (1969).[1] Because the separate opinions in *Lacallo* and *Heywood* did not rely on *Morse*, I address this case. The majority advances two premises: first, plain error applies only to claims that have been forfeited; and, second, plain error cannot apply to unpreserved sufficiency claims because *Morse* exempted such claims from the broad and longstanding rule that unpreserved claims are forfeited.

¶ 72 Everyone would agree with the first premise.

¶ 73 But because no express language in *Morse* supports the second premise, I reject it. *See City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 73 n.68 (Colo. 1996) ("In the absence of an explicit ruling, we do not interpret this case to overrule established precedent . . . ."). Rather than creating an exception to the forfeiture rule for sufficiency claims, our supreme court only

[1] The majority also cites *People v. Roggow*, 2013 CO 70, ¶ 13, where the supreme court "review[ed] questions relating to sufficiency of the evidence de novo." But in *Roggow*, the sufficiency contention was preserved.

considered the sufficiency issue, despite lack of preservation, after concluding that the record was sufficient to do so.

¶ 74 By way of background, "[p]erhaps no standard governing the scope of appellate review is more frequently applied than the rule that an error not raised and preserved at trial will not be considered on appeal." 4 Wayne R. LaFave et al., *Criminal Procedure* § 27.5(c) (3d ed. 2007 & Supp. 2014) (internal quotation marks omitted). Under this standard, often described as the forfeiture rule, "'a constitutional right,' or a right *of any other sort*, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *United States v. Olano*, 507 U.S. 725, 731 (1993) (emphasis added) (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)). Forfeiture "encourage[s] all trial participants to seek a fair and accurate trial the first time around." *United States v. Young*, 470 U.S. 1, 15 (1985) (internal quotation marks omitted).

¶ 75 Colorado cases far too numerous for complete citation have adhered to this rule. *See* 2 Cathy Stricklin Krendl, *Colorado Practice Series: Methods of Practice* § 35:13 (6th ed. 2014) ("The general rule concerning appellate review of claims, defenses, and

arguments is that if the claim, defense, or argument was not raised in a timely manner before the trial court, it may not be considered by the appellate court."). Consistent with *Olano*, our supreme court has said, "[f]inally, we review *all* other errors, constitutional and nonconstitutional, that were not preserved by objection for plain error." *Hagos v. People*, 2012 CO 63, ¶ 14 (emphasis added).

¶ 76 Everyone would also agree that the forfeiture rule does not bar appellate review. "[A]ll jurisdictions recognize one or more situations in which issues not raised below will be considered on appeal." LaFave, *Criminal Procedure* at § 27.5(c). In criminal cases, the most commonly applied exception — which has been codified in Colorado under Crim. P. 52(b) and its federal counterpart — is plain error. *Id.* This exception arose because "[a] rigid and undeviating judicial[]" application of the forfeiture doctrine "would be out of harmony with . . . the rules of fundamental justice." *Olano*, 507 U.S. at 731–32 (internal quotation marks omitted); *see also Young*, 470 U.S. at 15 ("The plain-error doctrine . . . tempers the blow of a rigid application of the contemporaneous-objection requirement.").

¶ 77 Appellate courts — including those in Colorado — have recognized exceptions to forfeiture other than plain error. *See*

LaFave, *Criminal Procedure* at § 27.5(c). For example, jurisdictional issues may be raised the first time on appeal and are not subject to plain error analysis. *See, e.g.*, *People v. McMurtry*, 122 P.3d 237, 241 (Colo. 2005) ("A defendant may challenge the subject matter jurisdiction of the court at any time . . . ."). Additionally, appellate courts have the "discretion to consider an issue on appeal, notwithstanding the lack of objection below, when appellate review of that issue would serve the interest of judicial economy." LaFave, *Criminal Procedure* at § 27.5(c); *see Hinojos-Mendoza v. People*, 169 P.3d 662, 667–68 (Colo. 2007) (exercising discretion to review unpreserved challenge to constitutionality of statute both facially and as applied, "particularly in light of the fact that doing so will promote efficiency and judicial economy").

¶ 78 The majority reads *Morse* as having created another exception to forfeiture for unpreserved sufficiency claims. But in reaching the merits of the sufficiency claim, the *Morse* court did not mention Crim. P. 52(b), the forfeiture rule, or any of the existing exceptions to this rule. Nor did it cite any out-of-state authority holding that sufficiency claims should be exempted.

¶ 79 Instead, the sole explanation offered in *Morse*, 168 Colo. at

498, 452 P.2d at 5, was that the sufficiency claim could be "adequately reviewed on the basis of the record." This explanation reflects only that an appellate court *may*, in the interest of judicial economy, exercise its discretion to review an unpreserved claim, *where the court can do so on the existing record*. *See, e.g.*, *People v. Allman*, 2012 COA 212, ¶ 15 ("Just as the absence of a sufficient record is a common basis for refusing to review unpreserved constitutional error, courts that have exercised their discretion to review such error have relied on the presence of a sufficiently developed record as a basis for doing so.").

¶ 80 Thus, a close reading of *Morse* does not support the majority's interpretation that it created an exception sparing unpreserved sufficiency claims from forfeiture. The supreme court has never cited *Morse* for this proposition. And while several divisions of this court have cited *Morse* concerning sufficiency claims, all but one — *People v. Saleh*, 25 P.3d 1248 (Colo. App. 2000), *rev'd*, 45 P.3d 1272 (Colo. 2002) — do so only for the proposition that such claims may be reviewed, even if unpreserved. *Lacallo* does not hold otherwise — it merely applies plain error analysis to an unpreserved sufficiency claim.

¶ 81 And because our supreme court has never held unpreserved sufficiency claims exempt from forfeiture, the language of Crim. P. 52(b) mandates applying plain error analysis to such claims when raised for the first time on appeal.[2] Under this rule, "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim. P. 52(b). This language does not support an exception for certain types of errors or claims, such as sufficiency.

¶ 82 Nor do potentially countervailing policy arguments preclude reviewing unpreserved sufficiency claims for plain error:

> The decision in *Johnson* [*v. United States*, 520 U.S. 461 (1997)] regarding the meaning of "plain error" and when error is "plain" cannot be explained, or more importantly distinguished, based on practicalities or an analysis of trial practices or judicial economy in some circumstances as contrasted to others. The Court's ruling was based, as the decision itself says it must be, on the "Rule which by its

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[2] I disagree with the majority's assertion that *Lacallo* "premised the application of plain error review on" two court of appeals cases — *People v. Harris*, 633 P.2d 1095, 1099 (Colo. App. 1981) and *People v. Rice*, 40 Colo. App. 357, 361, 579 P.2d 647, 650 (1978) — which the majority posits are no longer reliable. Although *Lacallo* cited these cases, its premise for applying plain error analysis to sufficiency claims was that Crim. P. 52(b) "does not support an exception for sufficiency claims that a defendant fails to bring 'to the attention of the court.'" *Lacallo*, ¶ 12 (quoting Crim. P. 52(b)).

> terms governs direct appeals from judgments of convictions in the federal system." That Rule is the text of Rule 52(b), nothing more, nothing less. It is worth reiterating the Court's admonition in *Johnson:* "Even less appropriate than an unwarranted expansion of the Rule would be the creation out of whole cloth of an exception to it, an exception which we have no authority to make." The Supreme Court has spoken regarding the meaning of "plain error." Unless and until it changes that view, the logic of its decision in *Johnson* should control our interpretation of "plain error" and when error is "plain" within the meaning of Rule 52(b).

United States v. Escalante-Reyes, 689 F.3d 415, 457 (5th Cir. 2012) (footnotes omitted).[3]

¶ 83 To the extent the majority suggests that the Due Process Clause requires a different result, I disagree. "Rule 52(b) does not permit exceptions based on the gravity of the asserted error." *United States v. Turrietta*, 696 F.3d 972, 976 n.9 (10th Cir. 2012); *see Puckett v. United States*, 556 U.S. 129, 135–36 (2009); *Johnson v. United States*, 520 U.S. 461, 466 (1997) ("[T]he seriousness of the error claimed does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure."). Federal courts have

[3] Crim. P. 52(b) mirrors its federal counterpart. *See Crumb v. People*, 230 P.3d 726, 731 n.5 (Colo. 2010) (looking to federal law interpreting a federal rule of criminal procedure that is similar to a Colorado rule).

uniformly rejected the assertion that sufficiency claims cannot be analyzed under plain error because of due process concerns. *Lacallo*, ¶ 13. And divisions of this court have applied plain error analysis to other constitutional issues having due process implications. *Id.* at ¶ 18 n.11; *see also People v. Rodriguez*, 914 P.2d 230, 278 n.50 (Colo. 1996) (noting exception for death penalty cases).

II. Crim. P. 29(a) and Crim. P. 33(a) Do Not Preclude Plain Error Analysis

¶ 84 Next, the majority asserts that "Colorado law contains no preservation requirement for sufficiency claims" because, under Crim. P. 33(a), "a party need not raise all the issues it intends to raise on appeal in [a motion for a new trial] to preserve them for appellate review." The majority also points out that while Crim. P. 29(a) "allows a defendant to move for judgment of acquittal . . . . [and] allows the trial court to enter such a judgment . . . it does not require either to do so to preserve a sufficiency claim for appellate review."

¶ 85 But other than as to jury instructions, no rule of criminal procedure specifies what errors must be preserved by a

contemporaneous objection. Rather, "the contemporaneous objection rule has been a bulwark of the Anglo–American Common Law for centuries." *Ex parte Medellín*, 280 S.W.3d 854, 861-62 (Tex. Crim. App. 2008). Thus, in my view, the majority's reliance on these rules to avoid plain error analysis — because a contemporaneous objection supposedly is not required — creates a false dilemma by equating the preservation requirement with a complete bar on appellate review.

¶ 86 The former version of Crim. P. 33(a) limited appellate review to those questions that were presented in a motion for a new trial. The current version of Crim. P. 33(a) removed that limitation — "The party, however, need not raise all the issues it intends to raise on appeal in such motion to preserve them for appellate review." Thus, failure to raise an issue in a Crim. P. 33(a) motion no longer precludes appellate review. But Crim. P. 33(a) does not address — nor has it ever addressed — what issues must be preserved by contemporaneous objection or whether plain error analysis applies to an issue that was not raised in the trial court. The majority does not identify a Colorado case, nor have I found one, citing Crim. P.

33(a) to avoid the contemporaneous objection rule.[4]

¶ 87 Similarly, Crim. P. 29(a) permits — but does not require — a defendant to challenge sufficiency of the evidence by motion. Yet, like Crim. P. 33(a), it does not address whether plain error analysis applies when an insufficiency claim has not been raised.

¶ 88 Given all this, a sufficiency claim no doubt can be raised for the first time on appeal. Still, based on the breadth of the forfeiture rule, I would not exempt sufficiency claims from the requirement that unless an issue has been raised in the trial court, it is forfeited and subject to plain error analysis. Inferring such an exemption would be irreconcilable with the statement in *Olano* that "a right of any other sort" may be forfeited. 507 U.S. at 731; *see also Hagos*, ¶ 14.

III. An Unpreserved Insufficiency Claim Should Be Reviewed Only for Plain Error

¶ 89 The majority offers three additional reasons for declining to use the plain error analysis employed in *Lacallo* and *Heywood*. I reject those reasons as follows.

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[4] C.R.C.P. 59(b) contains similar language that filing a motion for post-trial relief does not "limit the issues that may be raised on appeal." Still, no Colorado case has cited Rule 59(b) to avoid the contemporaneous objection rule.

A. Plain Error Analysis Is Not Limited to Trial Errors That Lead to Reversal and Retrial

¶ 90 In *Hagos*, ¶ 23, the supreme court explained that "[p]lain error review allows the opportunity to reverse convictions in cases presenting particularly egregious errors, but reversals must be rare to maintain adequate motivation among trial participants to seek a fair and accurate trial the first time." The majority posits that because "unlike egregious trial errors, appellate review of sufficiency claims will never result in reversal," plain error analysis should not apply.

¶ 91 But not all reversible errors in criminal cases lead to remand for retrial. For example:

- A double jeopardy violation also precludes retrial. *People v. Rutt*, 179 Colo. 180, 182, 500 P.2d 362, 363 (Colo. 1972). But our supreme court applies plain error where the double jeopardy claim is raised for the first time on appeal. *People v. Davis*, 2015 CO 36, ¶ 33 ("We apply the plain error standard in this instance because defense counsel did not object to the trial court's failure to merge [the defendant's] possession and distribution convictions at sentencing."); *see People v. Herron*,

251 P.3d 1190, 1193 (Colo. App. 2010) (collecting court of appeals cases). *Davis* is particularly instructive because the supreme court treated the double jeopardy issue as a "sufficiency-of-the-evidence question." *Id.* at ¶ 36. After examining the "paltry evidence" that "might" have supported the separate possession conviction, the court applied plain error analysis. It concluded that "[b]ecause *Abiodun* applies here, the trial court obviously and substantially violated [the defendant's] right to avoid double jeopardy," casting "serious doubt on the reliability of the trial court's decision to sentence [the defendant] to one year in prison for possession," and therefore the trial court "plainly erred when it failed to merge the possession conviction into the distribution conviction." *Id.* at ¶ 41.

- A speedy trial violation also results in remand for dismissal of the charges. *People v. Rosidivito*, 940 P.2d 1038, 1039 (Colo. App. 1996). Still, some federal courts review unpreserved speedy trial claims for plain error. *United States v. Rice*, 746 F.3d 1074, 1082 (D.C. Cir. 2014); *United States v. Carrasco*, 257 F.3d 1045, 1050–53 (9th Cir. 2001) (applying plain error

analysis to Speedy Trial Act claim that was not raised in a motion to dismiss in the district court).

B. Trial Counsel Could Have Been Ineffective Even If the Statutory Interpretation Was Not Obvious at the Time of Trial

¶ 92 The majority next says that if "we were to reject the sufficiency claim on direct appeal under plain error review because the alleged error was not obvious at trial, the circumstances under which a Crim. P. 35(c) postconviction claim could provide relief is also not clear." But obviousness of an error is not part of Colorado's definition of deficient performance. Rather, the definition focuses on the prevailing professional norms. *See*, *e.g.*, *People v. Walton*, 167 P.3d 163, 167-68 (Colo. App. 2007) ("The proper standard for evaluating counsel's performance, the first prong of the *Strickland* ineffective assistance test, is whether the lawyer's assistance was reasonable under prevailing professional norms considering all the circumstances of the case.").

¶ 93 Equating whether an error was obvious to a judge during trial to whether the prevailing professional norms indicate that lawyers should raise the issue conflates the roles of judges, as impartial arbiters, and lawyers, as advocates. What a judge should have seen

differs from what defense counsel should have argued.

¶ 94 As explained in *Burton v. State*, 180 P.3d 964, 968 (Alaska Ct. App. 2008):

> There are many instances where, although an attorney may be acting incompetently, the attorney's incompetence (and any accompanying injustice) will not be obvious to the trial judge — and thus there will be no plain error.

This is so because "the crucial aspect of the plain error doctrine is that it focuses on what the *judge* should or should not have done," rather than on defense counsel. *Id.* Thus, "where a defense attorney may have been acting incompetently, but the trial judge had no reason to know this," appellate refusal to recognize plain error "will not preclude the defendant's later attempt to demonstrate the trial attorney's incompetence in post-conviction relief litigation." *Id.* at 969; *see Deck v. State*, 68 S.W.3d 418, 428 (Mo. 2002) ("The ultimate determination thus, is not the propriety of the trial court's actions with regard to an alleged error, but whether defendant has suffered a genuine deprivation of his right to effective assistance of counsel, such that this Court's confidence in the

fairness of the proceedings is undermined.").[5]

C. Judicial Economy

¶ 95 The majority takes issue with *Lacallo*'s quotation from *Hagos*, ¶ 23 — "'our need to encourage all trial participants to seek a fair and accurate trial the first time around,'" *Lacallo*, ¶ 15 — for several reasons, which I address separately.

¶ 96 The majority suggests that requiring sufficiency to be raised in the trial court does not further this "first time" objective because the prosecution is already required to prove every element of the case beyond a reasonable doubt. But as noted in *Lacallo*, *id.* at ¶ 15, the trial court could allow the prosecution to reopen its case, thereby making the trial a more accurate reconstruction of the historical events relevant to guilt or innocence.

¶ 97 Next, the majority observes that a motion or other action

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[5] Because plain error analysis and ineffective assistance of counsel claims have differing burdens of proof, a conclusion that an error is not obvious does not preclude raising ineffectiveness under Crim. P. 35(c). As explained in *Hagos*, ¶ 1, "a determination that instructional error did not constitute plain error does not control a determination of prejudice under *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), because the two standards are not the same. The plain error standard requires that an error impair the reliability of the judgment of conviction to a greater degree than the *Strickland* prejudice standard."

alerting the trial court to insufficiency is unnecessary because "the purpose of the trial is to determine whether there is sufficient evidence to prove the defendant committed a crime beyond a reasonable doubt." But as discussed above in explaining the very limited circumstances under which plain error analysis would produce a different result, a defendant's not guilty plea hardly puts the trial court on notice that determining sufficiency of the evidence requires a preliminary — and wholly novel — statutory interpretation.[6]

¶ 98 Then the majority offers that because "appellate review of sufficiency claims will never result in reversals," no incentive exists "for a defendant to forgo raising a sufficiency claim at trial — even one that involves a novel statutory interpretation — suffer a conviction and sentence, and raise the claim on appeal." True, a successful sufficiency motion in the trial court and a similarly successful challenge on appeal have the same effect — dismissal of the charges. But encouraging motions in the trial court avoids the delay — during which most defendants remain incarcerated — and

[6] In *United States v. Atkinson*, 990 F.2d 501, 503 (9th Cir. 1993), cited by the majority, the defendant did not raise such a statutory interpretation argument for the first time on appeal.

saves the resources otherwise involved in an appeal. *Lacallo*, ¶ 16; *see Goods v. Pa. Bd. of Prob. & Parole*, 912 A.2d 226, 235 (Pa. 2006) ("Part of the point, at least, for requiring contemporaneous objection is to ensure a prompt, trial level resolution of cases, and to thereby avoid the time and cost of unnecessary appeals.").

¶ 99 Finally, legitimate reasons may exist why defense counsel would not raise a sufficiency argument resting on a novel statutory interpretation. For example, counsel may have decided that an unsupported statutory sufficiency argument would probably be unsuccessful and raising it would undercut counsel's credibility. *See Scott v. Mullin*, 303 F.3d 1222, 1230 n.4 (10th Cir. 2002) ("[E]very weak issue in an appellate brief or argument detracts from the attention a judge can devote to the stronger issues, and reduces appellate counsel's credibility before the court." (internal quotation marks omitted)).

IV. Preservation

¶ 100 Here, unlike in *Lacallo*, defendant at least made a general sufficiency challenge. Still, I would treat the issue as unpreserved — as does the majority — because the trial court could not possibly have understood that the sufficiency challenge rested on a statutory

interpretation argument created by appellate counsel. *See*, *e.g.*, *People v. Pahl*, 169 P.3d 169, 183 (Colo. App. 2006) (An issue is preserved where the objection sufficiently alerts "the trial court to a particular issue in order to give the court an opportunity to correct any error."). Untethered by this constraint, "[t]he only limitation upon this approach, now sanctioned by the majority, would be the creativity of appellate counsel." *State v. Jones*, 715 S.E.2d 896, 905 (N.C. Ct. App. 2011) (Steelman, J., concurring in the result).

V. Applying Plain Error Analysis

¶ 101 In most sufficiency appeals, as indicated, the analysis should begin — and will usually end — with examining the evidence. But cases where, as here, appellate counsel advances a completely new statutory interpretation argument, and then challenges sufficiency based on that interpretation, are different. Ignoring this difference disregards Crim. P. 52(b) and innumerable cases limiting new arguments on appeal to plain error analysis. *See*, *e.g.*, *People v. Padilla*, 638 P.2d 15, 17 (Colo. 1981) ("If a party fails to object to an instruction, an appellate court will not consider the issue unless the appellant can show prejudice amounting to plain error within the meaning of Crim. P. 52(b)."); *People v. Huynh*, 98 P.3d 907, 914

(Colo. App. 2004) ("However, because this argument is raised for the first time on appeal, reversal is not warranted in the absence of plain error.").

¶ 102 In *Lacallo*, the interpretation advanced by the defendant was plausible, yet undecided. No Colorado case had interpreted the operative phrase, nor had any Colorado case "provide[d] a commonly accepted definition" of the relevant terms. *Lacallo*, ¶ 29. Thus, because "determining the meaning of [the phrase] under existing Colorado authority would [have been] difficult," the division held that the alleged sufficiency error based on defendant's interpretation was not obvious, and did not examine the sufficiency of the evidence. *Id.* at ¶¶ 30, 32.

¶ 103 *Heywood* is like *Lacallo* in one way and different from it in another. Because the operative statutory terms had never been interpreted, no "previous case law would have alerted the court to the error." *Heywood*, ¶ 36 (internal quotation marks omitted). But unlike *Lacallo*, those terms had "common and ordinary meanings." *Id.* And because the defendant's interpretation conformed to those meanings, *id.*, the division held that the alleged sufficiency error based on defendant's interpretation was obvious. Then the division

examined the sufficiency of the evidence de novo.

¶ 104 To the extent that *Lacallo* and *Heywood* illustrate two different scenarios of plain error analysis in sufficiency cases, this case presents a third.

¶ 105 As in *Heywood*, the statute — section 18-3-404(1)(g), C.R.S. 2014, — is clear and unambiguous. It applies to any "actor," which, as the majority explains, "requires no real or purported professional status." And its plain language does not restrict application to a specific class of actors. But unlike in *Heywood*, the argument advanced by defendant — proving a section 18-3-404(1)(g) violation requires evidence of a physician-patient relationship — engrafts a novel requirement onto this language.

¶ 106 In fulfilling its "duty to construe statutes according to their plain meaning," a court applies the statute "as written." *In re Marriage of Chalat*, 112 P.3d 47, 54 (Colo. 2005). Because applying section 18-3-404(1)(g) as written could not have led the trial court to examine the evidence in the way that defendant challenges it on appeal, I would conclude that defendant has not met the obviousness requirement of plain error. And based on this

conclusion, I would not reach the merits of the sufficiency challenge.

VI. Conclusion

¶ 107 After following this process, I would affirm the judgment.