SUMMARY
December 13, 2018

2018COA170M

No. 14CA505, *People v. Godinez* — Children's Code — Juvenile Court — Delinquency — Direct Filing in District Court

In this criminal appeal, a division of the court of appeals concludes that amendments made by the General Assembly in 2012 to the statute that authorizes criminal direct filing in district court against a juvenile, Ch. 128, sec. 1, § 19-2-517, 2012 Colo. Sess. Laws 439-45 (the 2012 Amendments), are not applicable to cases then pending and are only applicable to cases filed on or after the effective date of the 2012 Amendments. The division holds that (1) the 2012 Amendments did not divest the district court of jurisdiction over Godinez; (2) the 2012 Amendments are not "ameliorative, amendatory legislation" that would apply retroactively under the Colorado Supreme Court's recent holding in *People v.*

Stellabotte, 2018 CO 66, ¶ 3; and (3) the 2012 Amendments are not otherwise applicable to Godinez.

The division also concludes that the district court did not err in admitting the in-court identification of Godinez by one of the victims or certain out-of-court statements described by members of law enforcement. Relying on the Colorado Supreme Court's holdings in *Lucero v. People*, 2017 CO 49, and *Estrada-Huerta v. People*, 2017 CO 52, the division rejects Godinez's challenge to the constitutionality of his sentence.

As a matter of first impression, the dissent concludes that the 2012 Amendments constitute "ameliorative amendatory legislation" that should be applied retroactively under *Stellabotte II*. It would vacate Godinez's convictions and remand the case to the juvenile court for a transfer hearing. The dissent agrees with the majority that the identification and evidentiary rulings should be affirmed. The special concurrence agrees with the majority that Godinez's sentence is constitutional, because the division is bound by *Lucero* and *Estrada-Huerta*. But it questions the efficacy of those decisions under the analysis set forth in *Budder v. Addison*, 851 F.3d 1047, 1053 (10th Cir. 2017).

COLORADO COURT OF APPEALS

Court of Appeals No. 14CA0505
Arapahoe County District Court No. 11CR2537
Honorable John L. Wheeler, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Omar Ricardo Godinez,

Defendant-Appellant.

JUDGMENT AND SENTENCES AFFIRMED

Division VII
Opinion by JUDGE BERGER
Bernard, J., concurs
Freyre, J., concurs in part, specially concurs in part, and dissents in part

Opinion Modified and
Petition for Rehearing DENIED
Freyre, J., would GRANT for the reasons stated in the partial dissent

Announced December 13, 2018

Cynthia H. Coffman, Attorney General, Joseph G. Michaels, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Jonathan D. Reppucci, Alternate Defense Counsel, Denver, Colorado, for Defendant-Appellant

OPINION is modified as follows:

Added footnote on Page 8 reads:

[3] We read Godinez's opening brief as equating lack of statutory authority and lack of subject matter jurisdiction: "A court that acts without statutory authority to proceed lacks jurisdiction . . . ." In his petition for rehearing, Godinez argues that lack of statutory authority and lack of subject matter jurisdiction form separate bases for dismissing the charges against him. In this context, we are not able to discern a meaningful distinction between the two. To the extent that there is a difference, *see Bostelman v. People*, 162 P.3d 686, 693 (Colo. 2007), our reasons for rejecting Godinez's jurisdictional challenge apply equally to his statutory authority argument. The 2012 Amendments do not apply to the charges against Godinez, so they did not strip the prosecution or district court of statutory authority or divest the district court of subject matter jurisdiction.

Page 45, ¶ 91 currently reads:

are unconstitutional as applied to him under the Sixth and Eighth Amendments to the United States Constitution.

Opinion now reads:

are unconstitutional as applied to him under the Eighth and Fourteenth Amendments to the United States Constitution.

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Majority Opinion

Opinion Concurring in Part, Specially Concurring in Part, and Dissenting in Part

I. Introduction and Summary

¶ 1 This case requires us to decide if amendments made by the General Assembly in 2012 to the statute that authorizes criminal direct filing in district court against a juvenile, Ch. 128, sec. 1, § 19-2-517, 2012 Colo. Sess. Laws 439-45 (the 2012 Amendments), are applicable to cases then pending, or only to cases filed on or after the effective date of the 2012 Amendments.

¶ 2 A jury convicted defendant Omar Ricardo Godinez[1] of two counts of second degree kidnapping, two counts of sexual assault, and two counts of conspiracy to commit sexual assault. Godinez committed the crimes when he and some of his brothers used a deadly weapon to kidnap and forcibly sexually assault two women in two separate incidents. At the time of the crimes, Godinez was fifteen years old. The district court sentenced him to a controlling

[1] Godinez's opening and reply briefs refer to him as O.R.G., presumably because he was a juvenile at the time of the commission of the crimes of which he was convicted. The Attorney General's answer brief uses his full name. Godinez was tried and convicted as an adult, and the court imposed an adult criminal sentence. Because we uphold that judgment of conviction and sentence, there is no basis to use initials in our opinion.

term of imprisonment of thirty-two years to life in the custody of the Department of Corrections.

¶ 3 Under the law in effect at the time that Godinez committed these crimes, the district attorney had the authority to directly file the charges in district court, notwithstanding that Godinez was a juvenile at the time he committed the crimes. § 19-2-517(1)(b), C.R.S. 2011. At that time, the district attorney had the sole authority to decide whether to file the charges in adult criminal court or in juvenile court, provided that the juvenile was at least fourteen years of age. *Id.*; § 19-2-517(3)(a).

¶ 4 During the course of the district court direct-file proceedings, and well before the court entered the judgment of conviction, the General Assembly amended the direct-file statute in significant ways. First, the legislature increased the direct-filing minimum age from fourteen to sixteen, section 19-2-517(1), C.R.S. 2018; though, despite this change, a juvenile aged fourteen to fifteen may still be tried in adult court if the juvenile court transfers the case to the district court on the petition of the district attorney, section 19-2-518(1)(a), C.R.S. 2018. Second, the 2012 Amendments give a direct-filed juvenile the right to have a "reverse-transfer" hearing, at

which a district court judge, not the district attorney, makes the final decision whether to try the juvenile as an adult, or whether to proceed in juvenile court. § 19-2-517(3).

¶ 5 After the enactment of the 2012 Amendments, Godinez moved to dismiss the charges against him on the theory that the 2012 Amendments divested the district court of subject matter jurisdiction because Godinez was only fifteen years old when he allegedly committed the crimes. He also contended that the 2012 Amendments should be applied retroactively to the charges against him. The trial court denied that motion and also denied Godinez's alternative motion demanding a reverse-transfer hearing under the 2012 Amendments. Godinez appeals his judgment of conviction, including the underlying orders addressing the application of the 2012 Amendments.

¶ 6 We hold that the 2012 Amendments are not applicable to the criminal proceedings filed against Godinez. More specifically, we hold that the 2012 Amendments did not divest the district court of jurisdiction to try Godinez as an adult, nor do they apply retroactively under *People v. Stellabotte*, 2018 CO 66 (*Stellabotte II*), to impose procedural requirements not in effect when the charges

were filed. We also hold that Godinez was not entitled to a reverse-transfer hearing. We reject his claim that a victim's identification of him at trial violated his right to due process of law, as well as his claims of evidentiary error. Finally, we reject his claim that his sentences violate the Eighth Amendment. Accordingly, we affirm Godinez's convictions and sentences.

II. Facts and Procedural History

A. The Crimes

¶ 7 In 2011, a male approached the victim, S.R., from behind, held a gun to her head, and forced her into an SUV with three other male occupants. They drove her to a house, walked her through the kitchen, directed her downstairs to a basement bedroom, and told her to remove her clothes. She pleaded with them to use a condom, so one of the males left to buy condoms. They then took turns sexually assaulting her. After the assaults, she asked to use the bathroom. The person who abducted S.R. took her to the bathroom, where she was able to see his face for five minutes. She later provided information to the police that enabled a police artist to make a composite drawing of her assailant. The four males then returned S.R. to the abduction site and released her, after

threatening her with a gun and telling her not to report the incident.

¶ 8 A similar incident occurred the next month. The second victim, fifteen-year-old A.H., said a male grabbed her from behind as she walked down the street and told her not to scream. He then forced her into a gold SUV containing other males. She believed the male who abducted her was approximately her age. Although she never saw her abductor's face, she said he had "spiky" hair and a big build. They drove her to a house, took her into a basement bedroom, and told her that they "had to rape her," which they then did. She lost one earring at some point during the assaults, which the police later recovered from the same gold SUV. As in the first crime, the assailants returned her to the abduction site, threatened harm if she reported the incident, and released her.

¶ 9 A.H. immediately reported the assaults and submitted to evidence collection. She was able to identify the SUV and the house to which she had been taken. The SUV was registered to Godinez's father. Godinez and his family, including his four brothers, lived in the house where A.H. was assaulted.

¶ 10 The police located the SUV and conducted a traffic stop. The driver told the officer that he had five sons: Godinez (fifteen years old), A.G. (seventeen years old), Enrique Godinez (twenty-two years old), Ricardo Godinez-Solis (twenty-six years old), and Edgar Godinez-Solis (twenty-five years old).

B. The Prosecution and Change in Statutory Law

¶ 11 After an investigation, the police arrested Godinez (as well as some of his brothers). Under the then-applicable law, the prosecutor direct filed the charges against Godinez in district court in December 2011.

¶ 12 As described above, several months after Godinez was charged, the General Assembly amended the direct-file statute. The amendments became effective on April 20, 2012, but they do not state whether they apply prospectively or retroactively. Ch. 128, sec. 3, § 19-2-517, 2012 Colo. Sess. Laws 445.

¶ 13 Godinez moved to dismiss all the charges, contending that the 2012 Amendments divested the district court of jurisdiction over him and that they should be applied retroactively. Alternatively, Godinez requested a reverse-transfer hearing.

¶ 14 The trial court denied both the motion to dismiss and the motion for a reverse-transfer hearing in a detailed written order. The court concluded that the 2012 Amendments were intended to be prospective in their application, applicable only to offenses committed on or after their effective date.

C. Developments in Colorado Case Law

¶ 15 While this case was pending before us, the Colorado Supreme Court announced its decision in *Stellabotte II*, ¶ 3, which held that "ameliorative, amendatory legislation applies retroactively to non-final convictions under section 18-1-410(1)(f), unless the amendment contains language indicating it applies only prospectively." The Attorney General then moved us to permit the filing of supplemental briefs to address the impact, if any, of *Stellabotte II* on Godinez's appeal. Over Godinez's objection, we granted the Attorney General's motion, and both parties filed supplemental briefs. Godinez argued in his supplemental brief that "*Stellabotte* has little, if any, application to [his] central claim that

he was tried and sentenced by a court lacking in both statutory authority to proceed and subject matter jurisdiction."[2]

III. The 2012 Amendments Do Not Apply to the Charges Against Godinez

¶ 16 Godinez makes a multitude of arguments why the district court erred in refusing to apply the 2012 Amendments to the charges against him. First, he claims that the 2012 Amendments simply divested the district court of jurisdiction to try Godinez because, as discussed above, the 2012 Amendments increased the direct-filing age from fourteen to sixteen. Thus, according to Godinez, once the 2012 Amendments became effective on April 20, 2012, the district court no longer had subject matter jurisdiction to try Godinez, and, applying familiar subject matter jurisdiction law, everything thereafter is a nullity.[3]

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[2] Godinez does not completely eschew reliance on *Stellabotte II*. Rather, after arguing that *Stellabotte II* has little or no relevance to his claims on appeal, he states that "[t]o the extent that the holding in *Stellabotte* can be properly extrapolated to apply more broadly, then it provides further support for [Godinez's] claims here."

[3] We read Godinez's opening brief as equating lack of statutory authority and lack of subject matter jurisdiction: "A court that acts without statutory authority to proceed lacks jurisdiction . . . ." In his petition for rehearing, Godinez argues that lack of statutory authority and lack of subject matter jurisdiction form separate bases for dismissing the charges against him. In this context, we

¶ 17 Second, he argues that, to the extent it applies, *Stellabotte II* requires retroactive application of the 2012 Amendments. Third, he contends that both the procedural nature of the 2012 Amendments and the rule of lenity mandate that the 2012 Amendments apply to the charges against him.

¶ 18 And finally, Godinez argues that even if the arguments above are unavailing, he nevertheless was entitled to a reverse-transfer hearing under the 2012 Amendments, which the district court erroneously denied.

A. The 2012 Amendments Did Not Divest the District Court of Jurisdiction Over Godinez or the Charges Against Him

¶ 19 Relying on *Bruner v. United States*, 343 U.S. 112 (1952), Godinez contends that the 2012 Amendments divested the district court of subject matter jurisdiction on their effective date. He reasons that the district court's jurisdiction derived solely from the

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are not able to discern a meaningful distinction between the two. To the extent that there is a difference, *see Bostelman v. People*, 162 P.3d 686, 693 (Colo. 2007), our reasons for rejecting Godinez's jurisdictional challenge apply equally to his statutory authority argument. The 2012 Amendments do not apply to the charges against Godinez, so they did not strip the prosecution or district court of statutory authority or divest the district court of subject matter jurisdiction.

previous direct-file statute and that once that statute was repealed and replaced by the 2012 Amendments, the court's jurisdiction was extinguished. We reject this argument and agree with the district court that *Bruner* is distinguishable.[4]

¶ 20 Godinez argues that when the 2012 Amendments were enacted they applied with immediate effect to both pending and future cases. This argument ignores the General Assembly's statutory directive that in both criminal and civil cases, "[a] statute is presumed to be prospective in its operation." § 2-4-202, C.R.S. 2018. The presumption of prospective application applies here because the 2012 Amendments are silent as to retroactive or prospective application. Ch. 128, sec. 1, § 19-2-517, 2012 Colo. Sess. Laws 439-45.

¶ 21 "Legislation is applied prospectively when it operates on transactions that occur after its effective date, and retroactively when it operates on transactions that have already occurred or [on]

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[4] Because *Bruner* is distinguishable, we need not address whether it is a constitutional holding, which would be binding on Colorado courts, or an interpretation of federal statutory law, which would not be binding. *See People v. Spykstra*, 234 P.3d 662, 666 (Colo. 2010); *Millis v. Bd. of Cty. Comm'rs*, 626 P.2d 652, 657 (Colo. 1981).

rights and obligations that existed before its effective date." *Ficarra v. Dep't of Regulatory Agencies, Div. of Ins.*, 849 P.2d 6, 11 (Colo. 1993). It is undisputed that Godinez committed and was charged with the crimes before the enactment of the 2012 Amendments. Thus, any application of the 2012 Amendments to the charges against Godinez in district court would necessarily be retroactive. Therefore, the 2012 Amendments could only apply to the charges against Godinez under an exception to the presumption of prospective application. We conclude that no such exception applies in section III.B. below.

¶ 22 *Bruner* does not compel a different conclusion because the facts in *Bruner* differ from the facts here in key respects. In *Bruner*, a civilian firefighter at an army camp petitioned the district court for overtime compensation he claimed to be owed. *Id.* at 113. When he filed his complaint, an 1898 statute conferred concurrent jurisdiction over his claim on both the district court and the Court of Claims. *Id.* While the case was pending, Congress amended the statute to remove jurisdiction from the district court and to confer sole jurisdiction on the Court of Claims. *Id.* at 114. Moreover, it did not reserve district court jurisdiction over pending cases. *Id.*

Relying on a line of cases consistently holding that "when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law," the Supreme Court concluded that the statutory amendment divested the district court of jurisdiction over Bruner's complaint (because it placed exclusive jurisdiction in the Court of Claims) and affirmed the district court's dismissal of it. *Id.* at 116-17. Importantly, the court noted that "[t]his jurisdictional rule does not affect the general principle that a statute is not to be given retroactive effect unless such construction is required by explicit language or by necessary implication." *Id.* at 117 n.8.

¶ 23 Unlike *Bruner*, the district court's subject matter jurisdiction over fifteen-year-old defendants does not derive from the direct-file statute. Colorado's constitution confers original jurisdiction to district courts in *all* criminal cases. *See* Colo. Const. art. 6, § 9. The legislature limited this original jurisdiction by enacting the Colorado Children's Code. § 19-1-101 to -7-103, C.R.S. 2018. When Godinez committed the crimes, the Children's Code limited the district court's jurisdiction over juvenile criminal cases to juveniles between the ages of fourteen and eighteen for enumerated

crimes and circumstances. *See* § 19-2-517, C.R.S. 2011. The 2012 Amendments altered the procedures by which charges could be brought against fourteen- and fifteen-year-olds in district court. *See* Ch. 128, sec. 1, § 19-2-517, 2012 Colo. Sess. Laws 439-45.

¶ 24 Amending procedures by which jurisdiction is obtained is not the same as removing jurisdiction entirely. The 2012 Amendments did not deprive district courts of jurisdiction over fifteen-year-olds who commit crimes. Indeed, under the 2012 Amendments, district courts retain jurisdiction over fifteen-year-olds whose cases are transferred to the district court following a transfer hearing. *See* § 19-2-518, C.R.S. 2018.

¶ 25 Godinez's reliance on *Terrell v. District Court*, 164 Colo. 437, 435 P.2d 763 (1967), in contending that the district court lacked jurisdiction is also misplaced. In *Terrell*, the statutory amendment eliminating the district attorney's authority to bring charges against a juvenile in district court took place *before* the charges were filed. *Id.* at 439-40, 435 P.2d at 764. In this case, the statutory amendments took effect *after* charges had been filed in district court.

B. Neither *Stellabotte II* Nor Any Binding Colorado Precedent Authorizes the Application of the 2012 Amendments to the Charges Against Godinez

¶ 26 As discussed above, the 2012 Amendments may only apply to the charges against Godinez if they fall under an exception to the presumption of prospective application that would require their retroactive application. The supreme court in *Stellabotte II* determined that section 18-1-410(1)(f) serves as an exception to the general presumption of prospective application. § 18-1-410(1)(f), C.R.S. 2018; *Stellabotte II*, ¶ 35. In *Stellabotte II*, ¶ 6, as here, statutory amendments impacting the case against the defendant took effect after the commission of the crime and charging, but before conviction.

¶ 27 We first observe the unusual posture of this case. Both Godinez and the Attorney General eschew reliance on what appears to be the most substantial argument for application of the 2012 Amendments to Godinez's crimes. Godinez tells us that *Stellabotte II* has little or nothing to do with the issues presented in this case. The Attorney General, before the announcement of *Stellabotte II*, took the position that the court of appeals' decision in *People v. Stellabotte*, 2016 COA 106 (*Stellabotte I*), which essentially was

affirmed in *Stellabotte II*, was wrongly decided, not that it had no application to the issue before the court. After the supreme court affirmed *Stellabotte I*, the argument that it had been wrongly decided was no longer available to the Attorney General. So now the Attorney General argues that because the 2012 Amendments are not "ameliorative, amendatory legislation" within the meaning of *Stellabotte II*, ¶ 3, that case has no application here.

¶ 28 For three reasons, we conclude that the 2012 Amendments are not "ameliorative, amendatory legislation" within the meaning of *Stellabotte II*, ¶ 3.

¶ 29 First, the reach of *Stellabotte II* is not entirely clear. What is clear is that *Stellabotte II*, and all its antecedents, addressed statutes that either decreased the severity of a previously defined crime or reduced the maximum sentence that could be imposed for commission of that crime. *Stellabotte II*, ¶¶ 6, 11-29. The 2012 Amendments, which changed the procedure by which jurisdiction is apportioned between the district courts and the juvenile courts, are of a fundamentally different nature than the statutes considered in *Stellabotte II* and its antecedents. *See* Ch. 128, sec. 1, § 19-2-517, 2012 Colo. Sess. Laws 439-445; *Stellabotte II*, ¶¶ 6, 11-29.

¶ 30 By their terms, the 2012 Amendments do not reduce the severity or sentences for any of the crimes of which Godinez was convicted. Before and after the effective date of the 2012 Amendments, the crimes of which Godinez was convicted were the same classes of felonies, carrying the same sentences.

¶ 31 Recognizing this fact, Godinez argues that if the 2012 Amendments were applied to him, the case would have been required to be filed in juvenile court, not district court. And, he continues, had the proceedings remained in juvenile court and not been transferred to district court, the sentences that he faced would have been dramatically less than those that were imposed against him in district court.

¶ 32 If Godinez had been adjudicated guilty in juvenile court, he would have received a much lower sentence.[5] But it is entirely speculative to assume that his case, even applying the 2012

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[5] The maximum sentence Godinez could have faced in juvenile court was a sentence to the Department of Youth Corrections for a period not to exceed five years. *See* § 19-2-921(3)(b)(II), C.R.S. 2018. The sentence for the same crimes in adult court, as illustrated by the sentence imposed on Godinez, may amount to an effective life sentence in the custody of the Department of Corrections.

Amendments, would have remained in juvenile court. Given the extremely serious nature of the charges, and his age at the time of the crimes, it is a virtual certainty that the district attorney would have petitioned to transfer the case to district court. *See* § 19-2-518(1), C.R.S. 2018.[6] And, again considering the nature of the crimes, his age, and other factors set forth in section 19-2-518(4)(b), there is a strong possibility that his case would have been transferred to district court. Godinez's argument that he ultimately would have fared better under the 2012 Amendments founders on multiple levels of speculation.

¶ 33 Second, to determine the reach of *Stellabotte II,* we must also consider the consequences of a holding that the 2012 Amendments (or similar legislation) constitute "ameliorative, amendatory legislation."

¶ 34 Under *Stellabotte II*, if ameliorative, amendatory legislation reduces the penalty for a particular crime, it is a simple matter of

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[6] Under the 2012 Amendments, if a juvenile court transfers the case to district court, the district court has the discretion to sentence the juvenile upon conviction to the youthful offender system except when the juvenile is convicted, as in the case here, of any "sexual offense." § 19-2-517(6)(a), C.R.S. 2018.

correcting the mittimus or resentencing a defendant to reflect the reduced maximum sentence. Not so here. If Godinez is correct, and the 2012 Amendments apply retroactively, it would have ramifications that far exceed the limited effects of retroactive application addressed in *Stellabotte II*. Absent a clear statement in *Stellabotte II* that amendments changing the procedures for apportioning jurisdiction among the district and juvenile courts are included within the definition of "ameliorative, amendatory legislation," we decline to so extend *Stellabotte II*. Indeed, in addressing the reach of its decision in *Stellabotte II*, ¶ 37, the court stated that "our decision today is a narrow one." Extending the reach of *Stellabotte II* in the manner requested by Godinez would be inconsistent with the supreme court's "narrow" ruling.[7] *Id.*

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[7] The dissent argues that the supreme court only intended its holding to be narrow in the sense that it applies only to non-final convictions. And the supreme court did state that its holding would be narrow in that way. *People v. Stellabotte*, 2018 CO 66, ¶ 37. However, the fact that the supreme court chose to state one way in which its holding was narrow does not mean that its holding is otherwise all encompassing. Language in *Stellabotte II* suggests that its holding is narrow in other ways. *Id.* at ¶ 33. For instance, *Stellabotte II* states that "18–1–410(1)(f)(I) provides for retroactive application of significant change in the law to a defendant's conviction or sentence but . . . during only direct appeal, before the conviction is final." *Id.* The language not only limits the procedural

¶ 35 Third, in the end, our task, guided by supreme court precedent, is to determine whether the General Assembly intended to apply the 2012 Amendments to crimes that had been committed and charged before their enactment. Application of the 2012 Amendments to crimes that had been committed and charged before their enactment would create substantial uncertainty regarding the finality of criminal convictions, creating havoc in both the juvenile and adult criminal justice systems. Absent express language mandating that result, we refuse to attribute that unreasonable intent to the General Assembly.[8]

¶ 36 We recognize that the California Supreme Court recently held that a statute (Proposition 57) similar (at least in some respects) to

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timeframe in which the holding applies, it also limits the scope of the holding to legislation that makes a "significant change" that would apply to the defendant's "conviction or sentence." *Id.*

[8] We are, of course, aware of the supreme court's decision in *People v. Boyd*, 2017 CO 2, where the supreme court held that Amendment 64 deprived the district court of jurisdiction to try persons for certain marijuana-related crimes after the passage of that constitutional amendment. While the full reach of that decision remains to be seen, we think that it is distinguishable for a number of reasons. First, Amendment 64 was a constitutional amendment, rather than a legislative amendment to existing legislation. Second, unlike the 2012 Amendments, Amendment 64 made previously criminal conduct legal. And although Godinez cites *Boyd*, he does not present any arguments based on that case.

the 2012 Amendments applied retroactively. *People v. Superior Court*, 410 P.3d 22 (Cal. 2018). We believe that case does not support the conclusion reached by the dissent.

¶ 37 First, while the California Supreme Court is the ultimate arbiter of state law in California, we are not the ultimate arbiter of state law in Colorado. This court is instead an intermediate appellate court, bound by Colorado Supreme Court precedent. *Stellabotte II*, ¶ 37, expressly states that the decision was "a narrow one." Considering that the cases relied on in *Stellabotte II* uniformly were sentence ameliorating statutes, coupled with the supreme court's caution that the decision was "a narrow one," *id.*, we do not believe we have the authority to untether *Stellabotte II* from its present moorings.

¶ 38 Second, while the California Supreme Court concluded that the California electorate intended Proposition 57 to apply retroactively, we reach the opposite conclusion with respect to the Colorado General Assembly's intent regarding the 2012 Amendments. As discussed above, applying the 2012 Amendments retroactively would result in substantial difficulties regarding the administration of justice in Colorado. Even if we were not

constrained by the limited reach of *Stellabotte II*, we would decline to ascribe such a disruptive intent to the General Assembly.

¶ 39 Finally, *Superior Court* does not address, at all, any claimed divestiture of jurisdiction and therefore provides no support for Godinez's argument that the 2012 Amendments divested the district court of jurisdiction the moment that the 2012 Amendments became effective.

C. Neither the Alleged "Procedural" Nature of the 2012 Amendments Nor the Rule of Lenity Requires Reversal

¶ 40 We also reject Godinez's separate argument that he is entitled to retroactive application of the 2012 Amendments because they are "procedural" and therefore must be applied to convictions not yet final on appeal. Godinez relies on *People v. D.K.B.*, 843 P.2d 1326 (Colo. 1993), and *Kardoley v. Colorado State Personnel Board*, 742 P.2d 934 (Colo. App. 1987), to support this contention. Neither case controls.

¶ 41 *D.K.B.* held that those previously convicted of a crime lost the statutorily granted right to seal a conviction on the repeal of the statute granting that right. *D.K.B.*, 843 P.2d at 1332. *Kardoley* dealt with an appeal from a termination of employment decision by

a state personnel board and whether the appeal was properly brought in district court or the court of appeals. *Kardoley*, 742 P.2d at 934. Importantly, neither case involved a statutory amendment affecting an ongoing criminal prosecution.

¶ 42 As a subset of this argument (or a separate argument), Godinez contends that the statutory language is ambiguous and that under the rule of lenity he is entitled to the application of the 2012 Amendments. The rule of lenity provides that any ambiguity in a penal statute must be construed in a manner that favors the person whose liberty interests are affected by the statute. *Faulkner v. Dist. Court*, 826 P.2d 1277, 1278 (Colo. 1992). We perceive no ambiguity in the 2012 Amendments, so the rule of lenity does not apply. Further, as discussed above, Godinez's liberty interests are not impacted by the 2012 Amendments because, even after the 2012 Amendments, he could still be tried in district court or juvenile court.

¶ 43 For all of these reasons, we conclude that the 2012 Amendments do not apply to Godinez or the charges brought against him before the enactment of the 2012 Amendments.

D. Godinez was Not Entitled to a Reverse-Transfer Hearing

¶ 44 Godinez alternatively contends that he should have been afforded a reverse-transfer hearing under section 19-2-517(3). He reasons that once the 2012 Amendments became effective, and even assuming only prospective effect, he timely requested one. We reject this argument for the same reason that we rejected his jurisdictional argument.[9] The reverse-transfer hearing mechanism was part of the 2012 Amendments. Godinez does not explain why some, but not all, of the 2012 Amendments should be applied retroactively.

IV. One Victim's In-Court Identification of Godinez Did Not Violate His Constitutional Rights

¶ 45 Godinez next contends that the trial court committed reversible constitutional error when it permitted S.R. to identify him

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[9] Godinez claims his request for a reverse-transfer hearing was timely. It was not. The 2012 Amendments provide that a direct-file juvenile-defendant must request a reverse-transfer hearing "no later than the time to request a preliminary hearing," § 19-2-517(3)(a), and the Children's Code requires a juvenile to request a preliminary hearing "not later than ten days after the advisement hearing." § 19-2-705(1)(a), C.R.S. 2018. Godinez's May 2012 request for a reverse-transfer hearing came more than 120 days after his December 2011 advisement hearing, well outside the ten-day window. Thus, Godinez could only be entitled to a reverse-transfer hearing if the 2012 Amendments applied retroactively.

during trial. He claims that her in-court identification was tainted by a suggestive out-of-court identification procedure. We disagree.

A. Additional Factual Background

¶ 46 Before trial, in November 2012, Godinez moved to suppress any out-of-court or in-court identifications of him by the victims, contending that photographic arrays shown to S.R. in an attempted pre-trial identification were impermissibly suggestive. Viewing the photo arrays, S.R. pointed out Godinez's picture and said the person had similar features to and looked like one of the suspects. However, she "[j]ust didn't feel sure enough to say that's him."[10]

¶ 47 A later minute order stated, "[defendant's] motion to suppress out of court [identification] is stipulated by the People. People will stipulate that neither victim could identify [Godinez] in an out-of-court line up."

¶ 48 In a pre-trial hearing, a different prosecutor agreed with the stipulation and said that she did not intend to elicit an in-court

[10] The record does not reveal any further detail concerning the lineup procedure. The photo lineup is not part of the appellate record.

identification during trial.[11] However, because she could not predict whether the victims might spontaneously identify the defendant during the trial, she argued that she should not be precluded from questioning any witness who made such a spontaneous identification. Defense counsel did not object to this carve-out.

¶ 49 The court issued a written order stating that "the People stipulated that neither victim provided an out-of-court identification of the defendant at any time, and no testimony at trial will contradict that stipulation."

¶ 50 Before trial, in June 2013, Godinez moved in limine to preclude any in-court identifications of him by the victim, arguing that the conditions in any in-court identification would be impermissibly suggestive given that Godinez would be the only young, Hispanic male at the defense table. Following a July 2013 hearing, the court issued an order regarding all outstanding motions and denied Godinez's motion to preclude an in-court

[11] A new prosecutor replaced the original prosecutor during the course of the proceedings against Godinez, which apparently led to some confusion regarding the contents of the stipulation, but does not impact our analysis.

identification by S.R., without specifying whether it was addressing the motion to suppress, the motion in limine, or both. The court noted the parties' stipulation that no out-of-court identification had occurred and that because Godinez did "not allege that either victim ha[d] attempted to make a previous identification of the defendant which was based on impermissibly suggestive procedures, the court ha[d] no basis upon which to determine that a one-on-one, in-court identification would be the result of prior impermissibly suggestive procedure." The order stated that any in-court identification could be independently weighed by the jury, and Godinez could, of course, cross-examine any witness making such an in-court identification.

¶ 51 During S.R.'s trial testimony, the prosecutor asked a series of questions about her interaction with one of the males in the bedroom during the assault. The following colloquy occurred:

> [Prosecutor]: Could you tell if he was in the room during that time?
>
> [S.R.]: Yes.
>
> [Prosecutor]: And where was he?
>
> [S.R.]: Like now?

> [Prosecutor]: Then that night. Was he one – was that the first person who raped you?

¶ 52 Later, the prosecutor followed-up on S.R.'s "like now" remark.

> [Prosecutor]: And when you mentioned before, you said when I was asking you if you recognize him, you said right now. What did you mean by that?
>
> [S.R.]: I thought maybe you were asking me to look and see if I recognize him because – because I have really just took a glance at him and his face looks familiar like if I've seen his face somewhere. Just don't feel comfortable looking at him right now.
>
> [Prosecutor]: And when you're talking about him, I just want to be clear, are you talking about a man with a certain color shirt on?
>
> [S.R.]: Yes.
>
> [Prosecutor]: And what color shirt is that?
>
> [S.R.]: Purple.

¶ 53 The prosecutor then resumed asking S.R. about the assault. At the end of direct examination, the prosecutor said, "[n]ow, [S.R.], I know this is difficult. I'd like you to take a look to your right briefly, okay." Defense counsel objected, arguing that directing S.R. to look to her right was unduly suggestive. Counsel argued that the circumstances were unduly suggestive because the only other males in the courtroom were jurors, the advisory witness, defense

counsel, and the judge. The court overruled the objection, saying that S.R. had already indicated there was someone in the room who made her uncomfortable and that the individual was wearing purple. The prosecutor continued:

> [Prosecutor]: [S.R.], you indicated earlier that there was a certain area you were uncomfortable looking?
>
> [S.R.]: Yes.
>
> . . . .
>
> [Prosecutor]: Why is it you're uncomfortable looking in that direction?
>
> [S.R.]: Because when I did kind of glance over, something about his face looks familiar, like if I've seen him before. So it just makes me uncomfortable.
>
> . . . .
>
> [Prosecutor]: [S.R.], who did you see when you looked at the person in the purple shirt?
>
> [S.R.]: The guy who put the gun to my head because he was the most that I was – that I talked to.

¶ 54 The court later instructed the jury as follows: "Ladies and gentlemen, the parties have agreed to the existence of certain facts. You may regard those facts as proven without any further evidence.

The stipulation of the parties is as follows: [S.R.] could not identify the defendant, [Godinez], in an out-of-court lineup."

B. Standard of Review and Applicable Law

¶ 55 The constitutionality of an in-court identification procedure presents a mixed question of fact and law. *Bernal v. People*, 44 P.3d 184, 190 (Colo. 2002). We review the trial court's findings of fact for clear error and its legal conclusions de novo. *Id.*

¶ 56 "A defendant is denied due process when an in-court identification is based upon an out-of-court identification which is so suggestive as to render the in-court identification unreliable." *People v. Borghesi*, 66 P.3d 93, 103 (Colo. 2003) (citation omitted). The defense bears the initial burden of showing that the out-of-court identification procedure — here, a photo array — was impermissibly suggestive. *Id.* Upon a showing of suggestiveness, the burden then shifts to the prosecution to prove by clear and convincing evidence that, under the totality of the circumstances, the in-court identification is based on the witness's independent observations of the defendant during the crime's commission, and not the suggestive out-of-court identification. *People v. Monroe*, 925 P.2d 767, 773 (Colo. 1996). But "[f]irst-time in-court identification

of the accused by an eyewitness, absent constitutionally impermissible suggestive circumstances, does not require invocation of the independent source rule." *Id.* at 775.

¶ 57 If the independent source rule applies, the court must weigh the corrupting effect of the out-of-court identification against the following five factors:

(1) the witness's opportunity to view the perpetrator at the time of the crime;

(2) the witness's degree of attention;

(3) the accuracy of the witness's prior description of the perpetrator;

(4) the level of certainty the witness demonstrated at the confrontation; and

(5) the length of time between the crime and the confrontation.

People v. Walker, 666 P.2d 113, 119 (Colo. 1983).

¶ 58 "As long as the totality of the circumstances does not suggest a very substantial likelihood of misidentification, identification testimony will be admissible." *Borghesi*, 66 P.3d at 104; *see Neil v. Biggers*, 409 U.S. 188, 198 (1972).

¶ 59 If we conclude the court allowed a constitutionally impermissible identification, we apply the constitutional harmless error standard and determine whether the error was harmless beyond a reasonable doubt. *See People v. Martinez*, 2015 COA 37, ¶ 15 (citing *Hagos v. People*, 2012 CO 63, ¶ 11). An error is constitutionally harmless when there is no reasonable probability that the error contributed to the defendant's conviction by substantially influencing the verdict or impairing the fairness of the trial. *Hagos*, ¶ 12.

¶ 60 The exclusionary rule does not apply to in-court identifications alleged to be suggestive simply because of the typical courtroom setting. *Monroe*, 925 P.2d at 774. Instead, it is the jury's responsibility to assess the reliability of identification evidence unless there is a very substantial likelihood of misidentification. *Id.*

C. Application

1. Motion to Exclude In-Court Identification Based On Suggestive Photo Lineup

¶ 61 Godinez contends that the court erred in denying his motions to preclude any in-court identification by S.R. He asserts that (1) the ruling rested on the clearly erroneous factual premise that

Godinez had not alleged that S.R. had attempted to make a pre-trial identification in an impermissibly suggestive process; (2) the court's reliance on *Monroe* was misplaced; (3) this reliance on *Monroe* led the court to apply the wrong legal standard rather than the proper *Walker* factors; (4) the court failed to afford proper weight or give effect to the prosecution's concessions; and (5) the pre-trial photographic line-up procedure was unduly suggestive and influenced S.R.'s later in-court identification. Under the circumstances presented here, we conclude that the court did not err in allowing S.R.'s in-court identification.

¶ 62 Godinez correctly notes that contrary to what the district court said in its order, he alleged that S.R. had attempted to identify him when presented with an impermissibly suggestive photo array. While Godinez's June 2013 motion in limine did not allege impermissibly suggestive procedures during a pre-trial identification attempt, his November 2012 motion to suppress did.

¶ 63 However, the district court did not rely exclusively on its conclusion that Godinez had not alleged impermissibly suggestive pre-trial identification procedures in rejecting Godinez's motions to preclude in-court identification. The court also relied on (1) the

parties' stipulation that there had been no pre-trial identification and (2) language from *Monroe*, emphasized in the order, providing that first-time in-court identifications are not subject to the independent source rule.

¶ 64 While we do not necessarily read *Monroe* as holding that the independent source rule only applies when there is a positive identification at a suggestive out-of-court lineup, the trial court's reliance on *Monroe* did not constitute reversible error.[12] The trial court did not have before it (and we do not have before us in the appellate record) the photo lineup or other evidence supporting a finding that the photo lineup was impermissibly suggestive. Absent an appellate record supporting the conclusion that the photo lineup was impermissibly suggestive, and therefore potentially required application of the independent source doctrine under *Walker*, we cannot conclude that the trial court erred in applying *Monroe*.[13]

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[12] Our general references to pre-trial lineups include photo arrays and in-person lineups and showups.

[13] *Monroe* does not address these circumstances because the witness in *Monroe* had not participated in pre-trial identification procedures. We leave open the possibility of application of the independent source rule when a pre-trial lineup is so suggestive that it could constitutionally impair the reliability of an in-court identification, even when the witness fails to make a positive

2. In-Court Identification

¶ 65 Godinez also contends that S.R.'s in-court identification of him was impermissibly suggestive because (1) the prosecutor directed S.R. to "look to [her] right," essentially instructing her to identify him; and (2) the prosecutor's misconduct was exacerbated because Godinez was the only Hispanic male teenager in the courtroom. We reject this argument.

¶ 66 First, we disagree with Godinez's characterization of the prosecutor's conduct because it is contradicted by the record. As noted by the district court, it was S.R. who first raised her ability to make an in-court identification when she asked the question, "like now?" When the prosecutor followed up and asked what she meant by "like now," S.R. said she saw the person who assaulted her in the courtroom but did not want to look at him because she did not feel comfortable. Only then did the prosecutor ask S.R. to identify

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identification at the pre-trial lineup. The circumstances here are instructive. One of the victims, on viewing the photo lineup, thought that she recognized Godinez, but she was not sufficiently sure to make a positive identification. Logically, it is possible that even in the absence of a positive identification, a constitutionally deficient pre-trial lineup could substantially affect the in-court identification, making the independent source doctrine applicable.

who made her uncomfortable — the man with the purple shirt — and why — because he was the one who held the gun to her head. The prosecutor's comment to "look to your right," therefore, did not constitute a directive to identify Godinez but merely repeated S.R.'s earlier spontaneous directional cues.

¶ 67 Moreover, it was for the jury, not either the district court or this court, to assess the reliability of the in-court identification in light of the parties' stipulation that S.R. was unable to identify Godinez in a prior out-of-court identification procedure. Defense counsel had the opportunity to cross-examine S.R. about her prior failure to identify Godinez and did, in fact, cross-examine her about the circumstances of the in-court identification, including the fact that Godinez was the only Hispanic male teenager present in the courtroom.

¶ 68 For these reasons, we reject Godinez's challenges to the in-court identification.[14]

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[14] Because we find no constitutional error in the admission of the victim's in-court identification of Godinez, it is unnecessary for us to consider whether any error was harmless beyond a reasonable doubt. We note that, among other evidence presented at trial, the prosecutor presented compelling DNA evidence — Godinez's DNA

V. Admission of Out-of-Court Statements

¶ 69 Godinez next contends that the court violated his confrontation, fair trial, and due process rights by admitting the testimonial hearsay of four declarants. We discern no reversible error.

A. Additional Factual Background

¶ 70 During a pre-trial deposition, Detective Alan Shank testified that he and Detective Seth Robertson interviewed Edgar.[15] Edgar told the detective that (1) on October 30, he was at the house with his brothers A.G., Godinez, and Enrique; and (2) on November 6, he was home all day with his mother, father, brothers A.G. and Godinez, and two other unrelated individuals. The court admitted the detective's statements regarding what Edgar told him at trial over Godinez's hearsay and confrontation objections, finding that they were admissible as co-conspirator statements under CRE 801(d)(2)(3).

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was found on the victims' bodies. Also, an earring worn by A.H. was found in the Godinez family SUV.

[15] Detective Shank's deposition was taken because it was uncertain if he would be available at trial.

¶ 71 At trial, Detective Robertson described his interviews of A.G., A.G.'s girlfriend, and Godinez's stepmother and related those interviews to his investigation of Edgar's alibi statements. He said that A.G. told him that

- he "was primarily at his residence that night";
- he "was there with his girlfriend";
- his brothers, including Godinez, were also at the residence;
- he "went out at one point in time to get pizza"; and
- he "went to a specific pizza place and a specific area."

¶ 72 Robertson then spoke with A.G.'s girlfriend to confirm A.G.'s story, but the girlfriend denied that she was with A.G. on the dates of the offenses.

¶ 73 Finally, the prosecutor asked Robertson about his investigation of the residence. He said that Godinez's stepmother, who had been present during A.G.'s interview, refuted what A.G. had said. The court precluded the prosecutor from eliciting the stepmother's actual statements.

B. Standard of Review and Applicable Law

¶ 74 We review a trial court's evidentiary rulings for an abuse of discretion. *People v. Stewart*, 55 P.3d 107, 122 (Colo. 2002). A court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair, or based on an erroneous understanding or application of the law. *People v. Esparza-Treto*, 282 P.3d 471, 480 (Colo. App. 2011).

¶ 75 We review confrontation violations de novo. *People v. Phillips*, 2012 COA 176, ¶ 85. Reversal is required unless the error is harmless beyond a reasonable doubt. *Blecha v. People*, 962 P.2d 931, 941-42 (Colo. 1988). The parties do not dispute preservation of either the hearsay or confrontation claims.

¶ 76 Hearsay is "a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." CRE 801(c); *see People v. Huckleberry*, 768 P.2d 1235, 1241 (Colo. 1989).

¶ 77 The admission of hearsay evidence may implicate a defendant's confrontation rights under the federal and state constitutions. *See Davis v. Washington*, 547 U.S. 813, 823 (2006); *Nicholls v. People*, 2017 CO 71, ¶ 30.

¶ 78 However, the admission of nonhearsay does not implicate a defendant's confrontation rights under either the United States or Colorado Constitutions. *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004); *People v. Robinson*, 226 P.3d 1145, 1151 (Colo. App. 2009). Moreover, if statements that otherwise might constitute hearsay are offered to show why the police took particular actions as part of their investigation, they are relevant and admissible as nonhearsay. *See Robinson*, 226 P.3d at 1151-52. Indeed, police officers may testify about why they took particular actions even if their testimony "touches upon prohibited subjects." *People v. Penn*, 2016 CO 32, ¶ 32.

C. Application

1. Edgar's Statements

¶ 79 Godinez contends the court erred in admitting Edgar's statements to Detective Shank.[16] The Attorney General unpersuasively defends the trial court's ruling that the statements were not hearsay at all based on the co-conspirator exception contained in CRE 801(d)(2)(E). The problem with both the trial

[16] Godinez does not challenge the relevance of Edgar's statements to Detective Shank; therefore, we do not address that question.

court's ruling and the Attorney General's argument is that there is no trial court finding (and scant evidence to support such a finding if one had been made) that there was a separate conspiracy to cover up the crimes. Binding precedent holds that a conspiracy ends when the crimes have been committed unless the original focus of the conspiracy includes a coverup or the conspirators engage in a separate cover-up conspiracy. *See, e.g.*, *Blecha*, 962 P.2d at 938. Acceptance of the Attorney General's argument would require us to disregard these precedents.

¶ 80 More persuasively, the Attorney General argues that Edgar's statements are not hearsay because they were offered for their *falsity* rather than their *truth*. We agree with this argument.

¶ 81 If offered for the truth, Edgar's statements that he was at home all day with Godinez would have undermined the prosecution's theory that Godinez and his brothers had left the home to kidnap the victims. Instead, the record reveals that the prosecution offered Edgar's statements to prove that those statements were *false*.

¶ 82 While we have found no Colorado authority on point, in *Anderson v. United States*, 417 U.S. 211 (1974), the United States

Supreme Court held that out-of-court statements were not hearsay when "the point of the prosecutor's introducing those statements was simply to prove that the statements were made so as to establish a foundation for later showing, through other admissible evidence, that they were false." *Id.* at 220 (footnotes omitted); *see also United States v. Smith*, Nos. 94-5198, 94-5199, 1996 WL 5549, at *3 (10th Cir. 1996) (unpublished table decision); Michael H. Graham, Handbook of Federal Evidence § 801:5 (8th ed.) Westlaw (database updated Nov. 2018).

¶ 83 We may affirm the trial court's ruling on any ground supported by the record. *People v. Garcia*, 2012 COA 79, ¶ 62. We conclude that Edgar's statements were offered for their falsity, not their truth, and therefore did not constitute hearsay. It necessarily follows that the admission of those statements did not violate Godinez's confrontation rights.

¶ 84 We further conclude that even if Edgar's statements were admitted in error, any error in the admission of those statements was harmless (and with respect to the alleged confrontation violation, constitutionally harmless) because of the overwhelming evidence of Godinez's guilt. *See People v. Smith*, 77 P.3d 751, 760

(Colo. App. 2003). As discussed earlier, one of the victims positively identified Godinez as one of her assailants. While that identification was challenged both in the trial court and on appeal, the prosecution also proved that Godinez's DNA matched DNA found (1) on S.R.'s pubic area; (2) on A.H.'s anal area and neck; (3) in semen found along with A.H.'s DNA on the comforter where the victims were raped; and (4) in semen in one victim's underwear.[17] On this record, we conclude that any error in admitting these statements meets the high bar of being harmless beyond a reasonable doubt, the standard applicable for a confrontation violation. *Blecha*, 962 P.2d at 934.

2. A.G.'s and A.G.'s Girlfriend's Statements

¶ 85 Godinez next contends that the court erred when it admitted A.G.'s and his girlfriend's statements over a hearsay objection. The district court ruled that those statements were not offered for their

[17] DNA testing excluded 99.8% of other individuals, including the other Godinez family suspects, as the source of the DNA matched to Godinez in the pubic, anal, and neck areas. DNA on the comforter matched Godinez to a reasonable degree of scientific certainty. The probability of the DNA found in the semen in the underwear belonging to a southwestern Hispanic other than Godinez was one in 32 million.

truth, but for their effect on the police investigation. We agree with the district court's ruling and analysis.

¶ 86 Robertson testified that A.G.'s statements prompted him to visit area pizza restaurants to check surveillance videos and to obtain receipts in an effort to confirm or refute A.G.'s statements. A.G.'s statements also prompted him to question A.G.'s girlfriend.

¶ 87 We find no abuse of discretion in the court's admission of A.G.'s statements because they led the detective to investigate a potential alibi defense. The record shows that the prosecution did not admit the statements to prove A.G. went to a pizza restaurant, but rather to show why the detective contacted A.G.'s girlfriend. This is a proper nonhearsay purpose. *See Robinson*, 226 P.3d at 1151-52.

¶ 88 Similarly, the girlfriend's statements, refuting A.G.'s claim that he was home with her, led the detective to interview Godinez's stepmother concerning A.G.'s whereabouts on the dates of the offenses. Thus, the trial court admitted these statements for a proper nonhearsay purpose — to show why the detective decided to interview Godinez's stepmother.

3. Stepmother's Statements

¶ 89 Last, the prosecution offered the stepmother's statement to prove the falsity of A.G.'s statements. The court precluded the admission of the stepmother's specific statements and only allowed the jury to hear that she refuted A.G.'s claim of being home on the dates of the offense. Even if this evidence was erroneously admitted, it was harmless (applying either the harmless error or constitutional harmless error standards).

¶ 90 First, it was cumulative of A.G.'s girlfriend's statements properly admitted for a nonhearsay purpose. Second, A.G.'s credibility was only tangentially relevant to Godinez's defense. While we acknowledge that Godinez's presence and participation in the crimes was the central issue for the jury to decide, Godinez never endorsed an alibi defense or otherwise claimed he was with A.G. all day. Instead, the thrust of Godinez's defense was misidentification. Finally, as discussed above, Godinez's involvement was established by substantial other evidence. Thus, any error in the admission of this evidence was harmless.

VI. Constitutionality of Colorado Statutory Scheme Governing Sentencing of Juvenile Sex Offenders

¶ 91 Godinez last contends that Colorado's related sentencing statutes — section 19-2-517(1)(a) (direct-file statute); section 18-3-402(1), C.R.S. 2018 (sexual assault enhancement statute); sections 18-1.3-1001 to -1012, C.R.S. 2018 (Colorado Sex Offender Lifetime Supervision Act of 1998); sections 16-11.7-101 to -109, C.R.S. 2018, and the related Department of Corrections Admin. Reg. 700-19 (sex offender treatment statute); sections 17-2-201 to -217, C.R.S. 2018, and sections 17-22.5-101 to -407, C.R.S. 2018, (parole statutes); and sections 16-22-101 to -115, C.R.S. 2018 (sex offender registration statute) — are unconstitutional as applied to him under the Eighth and Fourteenth Amendments to the United States Constitution. He argues under *Miller v. Alabama*, 567 U.S. 460 (2012), *Graham v. Florida*, 560 U.S. 48 (2010), and *Roper v. Simmons*, 543 U.S. 551 (2005), that these statutes preclude any meaningful opportunity for release and, thus, are the functional equivalent of a lifetime sentence.

¶ 92 We reject these arguments because the Colorado Supreme Court has rejected the same or a similar argument in *Lucero v.*

People, 2017 CO 49, and we are bound by supreme court precedents.

A. Standard of Review and Applicable Law

¶ 93 We review the constitutionality of a sentence de novo. *Id.* at ¶ 13. We presume the legislature follows constitutional standards when enacting a statute. *City of Greenwood Village v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 440 (Colo. 2000). The defendant has a heavy burden to prove a statute's unconstitutionality. *People v. Allman*, 2012 COA 212, ¶ 7.

¶ 94 The Eighth Amendment prohibits cruel and unusual punishment. U.S. Const. amend. VIII. *Roper*, *Graham*, *Miller*, and *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016), recognize that children are fundamentally different from adults. "[F]or a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole" because it constitutes cruel and unusual punishment. *Graham*, 560 U.S. at 74. However, "while states must 'give defendants . . . some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation,' the Eighth Amendment 'does not require [a] State to release [a juvenile] offender during his natural

life' or to 'guarantee eventual freedom.'" *Lucero*, ¶ 17 (quoting *Graham*, 560 U.S. at 75).

¶ 95 *Graham* and *Miller* did not consider aggregate terms-of-years sentences, but our supreme court did in *Lucero*. It held that *Graham* and *Miller* only apply when a juvenile is sentenced to the specific sentence of life without the possibility of parole for a single offense. *Id.* at ¶ 15. The court later applied its holding to affirm a juvenile-defendant's aggregate sentences in a sexual assault case. *See Estrada-Huerta v. People*, 2017 CO 52, ¶ 8.

B. Application

¶ 96 Godinez was convicted of multiple offenses for which he was sentenced to imprisonment for thirty-two years to life. The parties agree that Godinez will be eligible for his first parole hearing in thirty-two years.[18]

[18] We also reject Godinez's assertion that lifetime registration as a sex offender is punitive. Several divisions of this court have rejected this precise argument, and we agree with those divisions. *See, e.g.*, *People v. Durapau*, 280 P.3d 42, 48-49 (Colo. App. 2011) ("[R]egistration is remedial, not punitive, and therefore does not unconstitutionally enhance punishment."); *see also* § 16-22-112(1), C.R.S. 2018 ("[I]t is not the general assembly's intent that the information be used to inflict retribution or additional punishment.").

¶ 97 The thrust of Godinez's contention is that his aggregate sentence is the functional equivalent of a life without parole sentence, which violates *Graham* and *Miller*. But *Lucero* explicitly rejected this "functional equivalent" argument. *Lucero*, ¶¶ 22, 24.

¶ 98 Here, like in *Lucero*, Godinez was sentenced to a term of years with the possibility of parole for multiple crimes, rather than a life without parole sentence for a single crime, as prohibited under the supreme court's reading of *Graham* and *Miller* in *Lucero*.

¶ 99 Unlike Godinez, the defendant in *Lucero* was not subject to the Colorado Sex Offender Lifetime Supervision Act of 1998 or the sex offender treatment statute. However, the supreme court explicitly extended its reasoning in *Lucero* to a juvenile-defendant's sexual assault conviction in a companion case. *Estrada-Huerta*, ¶ 8.

¶ 100 Godinez has not shown how his aggregate sentence escapes the holdings of *Lucero* and *Estrada-Huerta*. Therefore, we reject his unconstitutional as-applied challenge and affirm his sentences.

VII. Conclusion

¶ 101 The judgment of conviction and sentences are affirmed.

JUDGE BERNARD concurs.

JUDGE FREYRE concurs in part, specially concurs in part, and dissents in part.

JUDGE FREYRE, concurring in part, specially concurring in part, and dissenting in part.

¶ 102 I concur with the majority's conclusions in Parts IV and V, and I specially concur with the majority's conclusion in Part VI. I respectfully dissent from Part III.B of the majority opinion because, in my view, the 2012 Amendments to the juvenile direct-file statute constitute "ameliorative, amendatory legislation" that apply retroactively under our supreme court's holding in *People v. Stellabotte*, 2018 CO 66, ¶ 3 (*Stellabotte II*). Based on that conclusion, I would not address Godinez's jurisdictional argument (Part III.A) or his procedural argument (Part III.C).

¶ 103 Applying the amended direct-file statute to this case, I would vacate Godinez's convictions and remand the case to the juvenile court with directions to conduct a transfer hearing under section 19-2-518(1)(a), C.R.S. 2018. If, at the transfer hearing, the juvenile court determines that it would have transferred Godinez to the district court, then Godinez's convictions and sentence should be reinstated. If, at the transfer hearing, the juvenile court determines that it would not have transferred Godinez to the district court, then Godinez's convictions should be converted to juvenile

adjudications, and the juvenile court should resentence Godinez in accordance with the applicable sentencing provisions of the Children's Code.

I. Retroactivity and *Stellabotte II*

¶ 104 For many years, a debate concerning whether ameliorate legislative amendments applied prospectively or retroactively existed in conflicting cases from this court and our supreme court. The first line of cases emanated from *People v. Thomas*, 185 Colo. 395, 525 P.2d 1136 (1974), which held that the benefits of statutory amendments should be applied retroactively under section 18-1-410(1)(f), C.R.S. 2018, to all convictions not yet final, so long as the statutory language did not preclude retroactive application (*Thomas* Rule); *see Stellabotte II*, ¶¶ 16-18 (identifying the line of cases applying the *Thomas* Rule).

¶ 105 A second line of cases, beginning with *Riley v. People*, 828 P.2d 254 (Colo. 1992), held that statutory amendments were presumptively prospective under sections 2-4-202 and -303, C.R.S. 2018, and that they could only be applied retroactively if specific statutory language permitted retroactive application. *See Stellabotte II*, ¶¶ 19-21 (identifying cases modifying the *Thomas*

Rule). When statutory amendments were "silent" concerning retroactivity, the first line of cases applied the benefits of amendatory legislation retroactively, while the second line of cases did not. *See People v. Stellabotte*, 2016 COA 106, ¶¶ 44-47 (majority opinion), ¶¶ 66-70 (Dailey, J., concurring in part and dissenting in part) (*Stellabotte I*) (articulating the analysis of the first line of cases in the majority opinion and the analysis of the second line of cases in the dissent); *see also People v. Boyd*, 2015 COA 109 (same), *aff'd*, 2017 CO 2.

¶ 106 *Stellabotte II* resolved this conflict and affirmed the *Thomas* Rule and this court's decision in *Stellabotte I* while also disavowing any language in *Riley* that conflicted with the *Thomas* Rule. *Stellabotte II*, ¶¶ 3, 28. In *Stellabotte II*, our supreme court held that "ameliorative, amendatory legislation applies retroactively to non-final convictions under section 18-1-410(1)(f), unless the amendment contains language indicating it applies only prospectively." *Id.* at ¶ 3. In reaching this conclusion, the supreme court also held that section 18-1-410(1)(f) "serves as an exception to the general presumption of prospectivity that sections 2-4-202 and 2-4-303 provide." *Id.* at ¶ 35. It reasoned that the presumption of

prospectivity provided in sections 2-4-202 and -303 irreconcilably conflicted with the rule of retroactivity embodied in section 18-1-410(1)(f). *Id.* Then, applying the well-settled statutory construction rule that specific statutory provisions prevail over general statutory provisions, as set forth in section 2-4-205, C.R.S. 2018, and *Martin v. People*, 27 P.3d 846, 851 (Colo. 2001), the supreme court resolved this conflict by concluding that ameliorative legislative amendments must be applied retroactively to convictions not yet final unless the statutory language specifies prospective application. *Stellabotte II*, ¶¶ 32-33.

¶ 107 Finally, *Stellabotte II* clarified that the benefits of ameliorative amendatory legislation are "available only to those defendants whose convictions were not final when the amendment was enacted," and are not available to "anyone who has been sentenced under a provision that has since been changed." *Id.* at ¶ 37.

II. The 2012 Amendments Constitute "Ameliorative, Amendatory Legislation" Because They Mitigate Potential Penalties

A. Prerequisites to Retroactivity

¶ 108 No one disputes that Godinez's convictions were not yet final at the time the 2012 Amendments became effective, or that he was

fifteen years old at the time of the offenses and when the prosecutor filed charges. And no one disputes that the 2012 Amendments became effective on April 20, 2012, well before Godinez's convictions. *See* Ch. 128, sec. 3, § 19-2-517, 2012 Colo. Sess. Laws 445 ("Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety. Approved April 20, 2012."). Thus, Godinez's convictions were not yet final. I am not persuaded by Godinez's argument that the statute is ambiguous, and instead conclude that the plain language renders the statute effective on a date certain, and that it is "silent" on the issue of retroactivity.[1] Therefore, I see no reason to apply the rule of lenity. Instead, I believe this case turns on whether the substance of the 2012 Amendments constitutes "ameliorative, amendatory legislation" subject to retroactive application under *Stellabotte II*.

[1] Interestingly, the previous amendments to section 19-2-517 (in 2010) were not silent on retroactivity and stated that the act "shall apply to persons sentenced on or after the effective date of this act." *See* Ch. 264, sec. 7, § 18-1.3-407, 2010 Colo. Sess. Laws 1207.

¶ 109 I agree with the majority that the conflict *Stellabotte II* resolved involved legislative amendments to adult criminal statutes that lowered the class of the crime at issue and thereby lowered the possible penalty for that crime. Such amendments are undoubtedly "penalty mitigating" amendments that fall within the ambit of "ameliorative, amendatory legislation." *See Stellabotte II*, ¶¶ 3, 16. But I am not convinced that the reach of *Stellabotte II* is unclear or that the 2012 Amendments are not encompassed within the meaning of ameliorative, amendatory legislation simply because they operate differently than adult penalty statutes.

B. Juvenile Penalties Serve Different Purposes Than Adult Penalties

¶ 110 Colorado's juvenile justice system was founded on the premise that children are fundamentally different from adults. Gail B. Goodman, Comment, *Arrested Development: An Alternative to Juveniles Serving Life Without Parole in Colorado*, 78 U. Colo. L. Rev. 1059, 1065-66 (2007). In recent years, a developing body of social science research and United States Supreme Court precedent have recognized these distinct differences. *See J.D.B. v. North Carolina*, 564 U.S. 261, 273 n.5 (2011); National Institute of Mental Health,

The Teen Brain: Still Under Construction (2011), https://perma.cc/9EWF-6XZJ. Consequently, reforms to juvenile punishment have followed. In *Roper v. Simmons*, 543 U.S. 551 (2005), the Court held that the Eighth Amendment categorically bars the execution of persons who commit offenses when under the age of eighteen. Following that, in *Graham v. Florida*, 560 U.S. 48 (2010), the Court decided that the Eighth Amendment forbids the punishment of life without parole for juveniles who commit non-homicide offenses. *Miller v. Alabama*, 567 U.S. 461 (2012), determined that the Eighth Amendment forbids courts from automatically sentencing juveniles to life without parole for homicide and requires courts to consider the differences between adult and juvenile offenders. And *Montgomery v. Louisiana*, 577 U.S. __, 136 S. Ct. 718 (2016), held that *Miller* applies retroactively.

¶ 111 Against this backdrop, Colorado's General Assembly began reforming juvenile punishment. In 2006, the General Assembly abolished juvenile life without parole sentences. Ch. 228, sec. 2, § 18-1.3-401, 2006 Colo. Sess. Laws 1052. Then, in 2010, the General Assembly amended the direct-file statute to allow a juvenile's attorney an opportunity to provide mitigating information

to the prosecutor before a final decision was made to prosecute the juvenile as an adult. *See* Ch. 264, sec. 1, § 19-2-517, 2010 Colo. Sess. Laws 1202. Finally, the 2012 Amendments at issue here further curtailed the prosecution of children as adults by limiting the ages and types of crimes that could be directly filed in adult court, establishing a procedure for direct-file juveniles to petition for a reverse-transfer to juvenile court, and expanding the court's sentencing options for juveniles convicted in adult court. *See* Ch. 128, sec. 1, § 19-2-517, 2012 Colo. Sess. Laws 439-45.

¶ 112 In particular, the 2012 Amendments raised the age for direct-filing eligibility from fourteen to sixteen years, § 19-2-517(1)(a); removed several crimes from direct-file eligibility (vehicular homicide, vehicular assault, felony arson), Ch. 128, sec. 1, § 19-2-517(1), 2012 Colo. Sess. Laws 439; and limited the number of felonies for which a habitual juvenile offender could be eligible for direct filing, *id.* Moreover, section 19-2-517(1.5), C.R.S. 2018, now requires the district court to return a case to juvenile court if it fails to find probable cause, after a preliminary hearing, for the direct-file eligible crime, or if the court later dismisses the direct-file eligible crime. And, section 19-2-517(3)(b)(I)-(XI) permits a direct-file

juvenile to request a reverse-transfer hearing at which the district court must consider specific criteria in deciding whether to transfer the case to juvenile court. This procedure effectively removes direct-filing discretion from the prosecution and places it in the district court.

¶ 113 Finally, the 2012 Amendments modified the sentencing guidelines in a way that reduces the severity of many sentences for juveniles convicted in adult court. For example, section 19-2-517(6)(a)(1) no longer subjects juveniles to the mandatory minimum sentencing requirements of the crime of violence statute except for certain enumerated offenses (like class 1 felonies and sex offenses requiring indeterminate sentences). Moreover, juveniles convicted of felony offenses (like lesser offenses) that would not otherwise be eligible for direct filing may be sentenced either as juveniles or as adults. § 19-2-517(6)(b). And, juveniles convicted of only misdemeanor offenses in adult court must be transferred to the juvenile court, adjudicated juvenile delinquents, and sentenced as juveniles. § 19-2-517(6)(c).

¶ 114 When applied to Godinez, the ameliorative benefits of the 2012 Amendments become obvious. Godinez's current indeterminate life

sentence in adult prison becomes a maximum sentence of five years in the Department of Human Services, if, after a transfer hearing, a juvenile court determines his convictions should be converted to juvenile adjudications. *See* § 19-2-921(3)(b)(II), C.R.S. 2018. While I agree with the majority that there is no guarantee Godinez would be so treated, it is the possibility of less severe punishment in the juvenile system which I believe constitutes the "ameliorative benefit" that triggers retroactivity under *Stellabotte II*. *See Stellabotte*, ¶ 16 (describing the legislative amendment in *Thomas* as lowering the degree of crime and thus, "the maximum penalty he *could have received*") (emphasis added).[2] As well, I am not convinced that *Stellabotte II*'s "narrow holding" precludes retroactive application here, because the supreme court defined the parameters of "narrow" by saying relief is *not* available to "simply anyone who has been sentenced under a provision that has since been changed" and, instead, is only available "to those defendants whose

[2] This assumes the conviction is not yet final when the legislative amendment takes effect and that the statutory language does not preclude retroactive application.

convictions were not final when the amendment was enacted." *Id.* at ¶ 37.

¶ 115 I am persuaded by how other courts have analyzed the retroactivity of similar amendments in juvenile statutes. For instance, the California Supreme Court considered whether Proposition 57's juvenile law provisions applied retroactively to cases already filed in adult court before it took effect. *People v. Superior Court*, 410 P.3d 22, 24 (Cal. 2018). In that case, the prosecution charged the juvenile with sex crimes in adult court. After charges were filed, the electorate passed Proposition 57, which removed the prosecution's ability to direct-file criminal charges and, instead, required the prosecutor to commence all juvenile actions in the juvenile court. *Id.* It allowed the prosecution to request a transfer hearing to adult court, thereby transferring adult penalty discretion from the prosecution to the juvenile court. *Id.*

¶ 116 The court noted its long-standing rule that a statute which reduces the punishment for a crime applies retroactively to any case in which the judgment is not yet final. *Id.* at 26 (citing *In re Estrada*, 450 P.2d 591 (Cal. 1965)). It observed that Proposition 57 was different from the statute in *Estrada* because it did not reduce

the punishment for a specific crime. *Id.* at 27. But, it concluded that the same rationale applied, finding that "[t]he possibility of being treated as a juvenile in juvenile court — where rehabilitation is the goal — rather than being tried and sentenced as an adult can result in dramatically different and more lenient treatment." *Id.* at 24. The court recognized that the ballot materials were silent on retroactivity. *Id.* at 28. It found persuasive language requiring the act to be construed liberally and stating that the act's purpose was to stop the revolving door of crime by emphasizing rehabilitation, particularly for juveniles. *Id.* The court recognized that Proposition 57 did not "ameliorate the punishment, or possible punishment, for a particular crime[, but instead] ameliorated the possible punishment for a class of persons, namely juveniles." *Id.* at 27. The court held that Proposition 57 should be applied retroactively. *Id.* at 31[3]; *see also People ex rel. Alvarez v. Howard*, 72 N.E.3d 346 (Ill. 2016) (holding under a different retroactivity body of law that a

[3] Westlaw citing references to *Superior Court* reveal more than one hundred unpublished orders applying *Superior Court*'s holding by conditionally reversing juvenile adult convictions and remanding for transfer hearings in the juvenile court consistent with Proposition 57.

statutory amendment increasing the direct-file age from fifteen to sixteen for first degree murder and other crimes applied to a fifteen-year-old juvenile whose case was pending in adult court when the amendment took effect, and affirming the lower court's decision to transfer the case to juvenile court).

¶ 117 Accordingly, I would hold that *Stellabotte II* requires retroactive application of the 2012 Amendments to Godinez's case. I would vacate Godinez's convictions and remand the case to the juvenile court for a transfer hearing. If the juvenile court determines that Godinez should be transferred to district court, then his convictions and sentence should be reinstated. If, however, the juvenile court determines that Godinez should remain in juvenile court, then his convictions should be converted to juvenile adjudications, and the juvenile court should impose a juvenile sentence.

III. Aggregate Sentences May Be Unconstitutional

¶ 118 I specially concur in Part VI of the majority opinion and write separately here not because I disagree with the majority's analysis or its conclusion. Indeed, because this court is bound by our supreme court's precedent, I am bound by the holding in *Lucero v. People*, 2017 CO 49, ¶ 11. *See People v. Gladney*, 250 P.3d 762,

768 n.3 (Colo. App. 2010). Nevertheless, I am persuaded by the Tenth Circuit's decision in *Budder v. Addison*, 851 F.3d 1047, 1053 (10th Cir. 2017), decided shortly before *Lucero*, that aggregate life sentences for juveniles may violate the Eighth Amendment and the holding in *Graham*, 560 U.S. 48.

¶ 119 In the federal courts, when the United States Supreme Court announces that a rule applies to an entire category of offenders, it clearly establishes the law applicable within the defined contours of that category. *See Howes v. Fields*, 565 U.S. 499, 505 (2012) (holding that the court of appeals erred in concluding that the law was clearly established by a categorical rule when the Supreme Court had "repeatedly declined to adopt any categorical rule with respect to [the issue]," thereby implying that a categorical rule, if announced, would be clearly established law for all defendants who fell under the rule's purview). Therefore, factual distinctions within that category are no longer "material." *Budder*, 851 F.3d at 1055. And if the law is clearly established, the Supreme Court's rule must be applied. *Id.*

¶ 120 I am persuaded by the Tenth Circuit Court's analysis that *Graham* announced a categorical rule precluding life without the

possibility of parole for all juvenile non-homicide offenders. *See Graham*, 560 U.S. at 75. Indeed, it held that while "[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime," it must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* Thus, while I concur with the majority's conclusion, I question whether *Lucero*'s holding is constitutional based on the analysis in *Budder*.

SUMMARY
December 13, 2018

2018COA170

No. 14CA0505, *People v. Godinez* — Children's Code — Juvenile Court — Delinquency — Direct Filing in District Court

In this criminal appeal, a division of the court of appeals concludes that amendments made by the General Assembly in 2012 to the statute that authorizes criminal direct filing in district court against a juvenile, Ch. 128, sec. 1, § 19-2-517, 2012 Colo. Sess. Laws 439-45 (the 2012 Amendments), are not applicable to cases then pending and are only applicable to cases filed on or after the effective date of the 2012 Amendments. The division holds that (1) the 2012 Amendments did not divest the district court of jurisdiction over Godinez; (2) the 2012 Amendments are not "ameliorative, amendatory legislation" that would apply retroactively under the Colorado Supreme Court's recent holding in *People v.*

Stellabotte, 2018 CO 66, ¶ 3; and (3) the 2012 Amendments are not otherwise applicable to Godinez.

The division also concludes that the district court did not err in admitting the in-court identification of Godinez by one of the victims or certain out-of-court statements described by members of law enforcement. Relying on the Colorado Supreme Court's holdings in *Lucero v. People*, 2017 CO 49, and *Estrada-Huerta v. People*, 2017 CO 52, the division rejects Godinez's challenge to the constitutionality of his sentence.

As a matter of first impression, the dissent concludes that the 2012 Amendments constitute "ameliorative amendatory legislation" that should be applied retroactively under *Stellabotte II*. It would vacate Godinez's convictions and remand the case to the juvenile court for a transfer hearing. The dissent agrees with the majority that the identification and evidentiary rulings should be affirmed. The special concurrence agrees with the majority that Godinez's sentence is constitutional, because the division is bound by *Lucero* and *Estrada-Huerta*. But it questions the efficacy of those decisions under the analysis set forth in *Budder v. Addison*, 851 F.3d 1047, 1053 (10th Cir. 2017).

COLORADO COURT OF APPEALS **2018COA170**

Court of Appeals No. 14CA0505
Arapahoe County District Court No. 11CR2537
Honorable John L. Wheeler, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Omar Ricardo Godinez,

Defendant-Appellant.

JUDGMENT AND SENTENCES AFFIRMED

Division VII
Opinion by JUDGE BERGER
Bernard, J., concurs
Freyre, J., concurs in part, specially concurs in part, and dissents in part

Announced December 13, 2018

Cynthia H. Coffman, Attorney General, Joseph G. Michaels, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Jonathan D. Reppucci, Alternate Defense Counsel, Denver, Colorado, for Defendant-Appellant

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Majority Opinion

Opinion Concurring in Part, Specially Concurring in Part, and Dissenting in Part

I. Introduction and Summary

¶ 1 This case requires us to decide if amendments made by the General Assembly in 2012 to the statute that authorizes criminal direct filing in district court against a juvenile, Ch. 128, sec. 1, § 19-2-517, 2012 Colo. Sess. Laws 439-45 (the 2012 Amendments), are applicable to cases then pending, or only to cases filed on or after the effective date of the 2012 Amendments.

¶ 2 A jury convicted defendant Omar Ricardo Godinez[1] of two counts of second degree kidnapping, two counts of sexual assault, and two counts of conspiracy to commit sexual assault. Godinez committed the crimes when he and some of his brothers used a deadly weapon to kidnap and forcibly sexually assault two women in two separate incidents. At the time of the crimes, Godinez was fifteen years old. The district court sentenced him to a controlling term of imprisonment of thirty-two years to life in the custody of the Department of Corrections.

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[1] Godinez's opening and reply briefs refer to him as O.R.G., presumably because he was a juvenile at the time of the commission of the crimes of which he was convicted. The Attorney General's answer brief uses his full name. Godinez was tried and convicted as an adult, and the court imposed an adult criminal sentence. Because we uphold that judgment of conviction and sentence, there is no basis to use initials in our opinion.

¶ 3 Under the law in effect at the time that Godinez committed these crimes, the district attorney had the authority to directly file the charges in district court, notwithstanding that Godinez was a juvenile at the time he committed the crimes. § 19-2-517(1)(b), C.R.S. 2011. At that time, the district attorney had the sole authority to decide whether to file the charges in adult criminal court or in juvenile court, provided that the juvenile was at least fourteen years of age. *Id.*; § 19-2-517(3)(a).

¶ 4 During the course of the district court direct-file proceedings, and well before the court entered the judgment of conviction, the General Assembly amended the direct-file statute in significant ways. First, the legislature increased the direct-filing minimum age from fourteen to sixteen, section 19-2-517(1), C.R.S. 2018; though, despite this change, a juvenile aged fourteen to fifteen may still be tried in adult court if the juvenile court transfers the case to the district court on the petition of the district attorney, section 19-2-518(1)(a), C.R.S. 2018. Second, the 2012 Amendments give a direct-filed juvenile the right to have a "reverse-transfer" hearing, at which a district court judge, not the district attorney, makes the

final decision whether to try the juvenile as an adult, or whether to proceed in juvenile court. § 19-2-517(3).

¶ 5 After the enactment of the 2012 Amendments, Godinez moved to dismiss the charges against him on the theory that the 2012 Amendments divested the district court of subject matter jurisdiction because Godinez was only fifteen years old when he allegedly committed the crimes. He also contended that the 2012 Amendments should be applied retroactively to the charges against him. The trial court denied that motion and also denied Godinez's alternative motion demanding a reverse-transfer hearing under the 2012 Amendments. Godinez appeals his judgment of conviction, including the underlying orders addressing the application of the 2012 Amendments.

¶ 6 We hold that the 2012 Amendments are not applicable to the criminal proceedings filed against Godinez. More specifically, we hold that the 2012 Amendments did not divest the district court of jurisdiction to try Godinez as an adult, nor do they apply retroactively under *People v. Stellabotte*, 2018 CO 66 (*Stellabotte II*), to impose procedural requirements not in effect when the charges were filed. We also hold that Godinez was not entitled to a reverse-

transfer hearing. We reject his claim that a victim's identification of him at trial violated his right to due process of law, as well as his claims of evidentiary error. Finally, we reject his claim that his sentences violate the Eighth Amendment. Accordingly, we affirm Godinez's convictions and sentences.

II. Facts and Procedural History

A. The Crimes

¶ 7 In 2011, a male approached the victim, S.R., from behind, held a gun to her head, and forced her into an SUV with three other male occupants. They drove her to a house, walked her through the kitchen, directed her downstairs to a basement bedroom, and told her to remove her clothes. She pleaded with them to use a condom, so one of the males left to buy condoms. They then took turns sexually assaulting her. After the assaults, she asked to use the bathroom. The person who abducted S.R. took her to the bathroom, where she was able to see his face for five minutes. She later provided information to the police that enabled a police artist to make a composite drawing of her assailant. The four males then returned S.R. to the abduction site and released her, after

threatening her with a gun and telling her not to report the incident.

¶ 8 A similar incident occurred the next month. The second victim, fifteen-year-old A.H., said a male grabbed her from behind as she walked down the street and told her not to scream. He then forced her into a gold SUV containing other males. She believed the male who abducted her was approximately her age. Although she never saw her abductor's face, she said he had "spiky" hair and a big build. They drove her to a house, took her into a basement bedroom, and told her that they "had to rape her," which they then did. She lost one earring at some point during the assaults, which the police later recovered from the same gold SUV. As in the first crime, the assailants returned her to the abduction site, threatened harm if she reported the incident, and released her.

¶ 9 A.H. immediately reported the assaults and submitted to evidence collection. She was able to identify the SUV and the house to which she had been taken. The SUV was registered to Godinez's father. Godinez and his family, including his four brothers, lived in the house where A.H. was assaulted.

¶ 10 The police located the SUV and conducted a traffic stop. The driver told the officer that he had five sons: Godinez (fifteen years old), A.G. (seventeen years old), Enrique Godinez (twenty-two years old), Ricardo Godinez-Solis (twenty-six years old), and Edgar Godinez-Solis (twenty-five years old).

B. The Prosecution and Change in Statutory Law

¶ 11 After an investigation, the police arrested Godinez (as well as some of his brothers). Under the then-applicable law, the prosecutor direct filed the charges against Godinez in district court in December 2011.

¶ 12 As described above, several months after Godinez was charged, the General Assembly amended the direct-file statute. The amendments became effective on April 20, 2012, but they do not state whether they apply prospectively or retroactively. Ch. 128, sec. 3, § 19-2-517, 2012 Colo. Sess. Laws 445.

¶ 13 Godinez moved to dismiss all the charges, contending that the 2012 Amendments divested the district court of jurisdiction over him and that they should be applied retroactively. Alternatively, Godinez requested a reverse-transfer hearing.

¶ 14 The trial court denied both the motion to dismiss and the motion for a reverse-transfer hearing in a detailed written order. The court concluded that the 2012 Amendments were intended to be prospective in their application, applicable only to offenses committed on or after their effective date.

C. Developments in Colorado Case Law

¶ 15 While this case was pending before us, the Colorado Supreme Court announced its decision in *Stellabotte II*, ¶ 3, which held that "ameliorative, amendatory legislation applies retroactively to non-final convictions under section 18-1-410(1)(f), unless the amendment contains language indicating it applies only prospectively." The Attorney General then moved us to permit the filing of supplemental briefs to address the impact, if any, of *Stellabotte II* on Godinez's appeal. Over Godinez's objection, we granted the Attorney General's motion, and both parties filed supplemental briefs. Godinez argued in his supplemental brief that "*Stellabotte* has little, if any, application to [his] central claim that

he was tried and sentenced by a court lacking in both statutory authority to proceed and subject matter jurisdiction."[2]

III. The 2012 Amendments Do Not Apply to the Charges Against Godinez

¶ 16 Godinez makes a multitude of arguments why the district court erred in refusing to apply the 2012 Amendments to the charges against him. First, he claims that the 2012 Amendments simply divested the district court of jurisdiction to try Godinez because, as discussed above, the 2012 Amendments increased the direct-filing age from fourteen to sixteen. Thus, according to Godinez, once the 2012 Amendments became effective on April 20, 2012, the district court no longer had subject matter jurisdiction to try Godinez, and, applying familiar subject matter jurisdiction law, everything thereafter is a nullity.

¶ 17 Second, he argues that, to the extent it applies, *Stellabotte II* requires retroactive application of the 2012 Amendments. Third, he contends that both the procedural nature of the 2012 Amendments

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[2] Godinez does not completely eschew reliance on *Stellabotte II*. Rather, after arguing that *Stellabotte II* has little or no relevance to his claims on appeal, he states that "[t]o the extent that the holding in *Stellabotte* can be properly extrapolated to apply more broadly, then it provides further support for [Godinez's] claims here."

and the rule of lenity mandate that the 2012 Amendments apply to the charges against him.

¶ 18 And finally, Godinez argues that even if the arguments above are unavailing, he nevertheless was entitled to a reverse-transfer hearing under the 2012 Amendments, which the district court erroneously denied.

A. The 2012 Amendments Did Not Divest the District Court of Jurisdiction Over Godinez or the Charges Against Him

¶ 19 Relying on *Bruner v. United States*, 343 U.S. 112 (1952), Godinez contends that the 2012 Amendments divested the district court of subject matter jurisdiction on their effective date. He reasons that the district court's jurisdiction derived solely from the previous direct-file statute and that once that statute was repealed and replaced by the 2012 Amendments, the court's jurisdiction was extinguished. We reject this argument and agree with the district court that *Bruner* is distinguishable.[3]

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[3] Because *Bruner* is distinguishable, we need not address whether it is a constitutional holding, which would be binding on Colorado courts, or an interpretation of federal statutory law, which would not be binding. *See People v. Spykstra*, 234 P.3d 662, 666 (Colo. 2010); *Millis v. Bd. of Cty. Comm'rs*, 626 P.2d 652, 657 (Colo. 1981).

¶ 20 Godinez argues that when the 2012 Amendments were enacted they applied with immediate effect to both pending and future cases. This argument ignores the General Assembly's statutory directive that in both criminal and civil cases, "[a] statute is presumed to be prospective in its operation." § 2-4-202, C.R.S. 2018. The presumption of prospective application applies here because the 2012 Amendments are silent as to retroactive or prospective application. Ch. 128, sec. 1, § 19-2-517, 2012 Colo. Sess. Laws 439-45.

¶ 21 "Legislation is applied prospectively when it operates on transactions that occur after its effective date, and retroactively when it operates on transactions that have already occurred or [on] rights and obligations that existed before its effective date." *Ficarra v. Dep't of Regulatory Agencies, Div. of Ins.*, 849 P.2d 6, 11 (Colo. 1993). It is undisputed that Godinez committed and was charged with the crimes before the enactment of the 2012 Amendments. Thus, any application of the 2012 Amendments to the charges against Godinez in district court would necessarily be retroactive. Therefore, the 2012 Amendments could only apply to the charges against Godinez under an exception to the presumption of

prospective application. We conclude that no such exception applies in section III.B. below.

¶ 22 *Bruner* does not compel a different conclusion because the facts in *Bruner* differ from the facts here in key respects. In *Bruner*, a civilian firefighter at an army camp petitioned the district court for overtime compensation he claimed to be owed. *Id.* at 113. When he filed his complaint, an 1898 statute conferred concurrent jurisdiction over his claim on both the district court and the Court of Claims. *Id.* While the case was pending, Congress amended the statute to remove jurisdiction from the district court and to confer sole jurisdiction on the Court of Claims. *Id.* at 114. Moreover, it did not reserve district court jurisdiction over pending cases. *Id.* Relying on a line of cases consistently holding that "when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law," the Supreme Court concluded that the statutory amendment divested the district court of jurisdiction over Bruner's complaint (because it placed exclusive jurisdiction in the Court of Claims) and affirmed the district court's dismissal of it. *Id.* at 116-17. Importantly, the court noted that "[t]his jurisdictional rule does not affect the general principle that a

statute is not to be given retroactive effect unless such construction is required by explicit language or by necessary implication." *Id.* at 117 n.8.

¶ 23 Unlike *Bruner*, the district court's subject matter jurisdiction over fifteen-year-old defendants does not derive from the direct-file statute. Colorado's constitution confers original jurisdiction to district courts in *all* criminal cases. *See* Colo. Const. art. 6, § 9. The legislature limited this original jurisdiction by enacting the Colorado Children's Code. § 19-1-101 to -7-103, C.R.S. 2018. When Godinez committed the crimes, the Children's Code limited the district court's jurisdiction over juvenile criminal cases to juveniles between the ages of fourteen and eighteen for enumerated crimes and circumstances. *See* § 19-2-517, C.R.S. 2011. The 2012 Amendments altered the procedures by which charges could be brought against fourteen- and fifteen-year-olds in district court. *See* Ch. 128, sec. 1, § 19-2-517, 2012 Colo. Sess. Laws 439-45.

¶ 24 Amending procedures by which jurisdiction is obtained is not the same as removing jurisdiction entirely. The 2012 Amendments did not deprive district courts of jurisdiction over fifteen-year-olds who commit crimes. Indeed, under the 2012 Amendments, district

courts retain jurisdiction over fifteen-year-olds whose cases are transferred to the district court following a transfer hearing. *See* § 19-2-518, C.R.S. 2018.

¶ 25 Godinez's reliance on *Terrell v. District Court*, 164 Colo. 437, 435 P.2d 763 (1967), in contending that the district court lacked jurisdiction is also misplaced. In *Terrell*, the statutory amendment eliminating the district attorney's authority to bring charges against a juvenile in district court took place *before* the charges were filed. *Id.* at 439-40, 435 P.2d at 764. In this case, the statutory amendments took effect *after* charges had been filed in district court.

B. Neither *Stellabotte II* Nor Any Binding Colorado Precedent Authorizes the Application of the 2012 Amendments to the Charges Against Godinez

¶ 26 As discussed above, the 2012 Amendments may only apply to the charges against Godinez if they fall under an exception to the presumption of prospective application that would require their retroactive application. The supreme court in *Stellabotte II* determined that section 18-1-410(1)(f) serves as an exception to the general presumption of prospective application. § 18-1-410(1)(f), C.R.S. 2018; *Stellabotte II*, ¶ 35. In *Stellabotte II*, ¶ 6, as here,

statutory amendments impacting the case against the defendant took effect after the commission of the crime and charging, but before conviction.

¶ 27 We first observe the unusual posture of this case. Both Godinez and the Attorney General eschew reliance on what appears to be the most substantial argument for application of the 2012 Amendments to Godinez's crimes. Godinez tells us that *Stellabotte II* has little or nothing to do with the issues presented in this case. The Attorney General, before the announcement of *Stellabotte II*, took the position that the court of appeals' decision in *People v. Stellabotte*, 2016 COA 106 (*Stellabotte I*), which essentially was affirmed in *Stellabotte II*, was wrongly decided, not that it had no application to the issue before the court. After the supreme court affirmed *Stellabotte I*, the argument that it had been wrongly decided was no longer available to the Attorney General. So now the Attorney General argues that because the 2012 Amendments are not "ameliorative, amendatory legislation" within the meaning of *Stellabotte II*, ¶ 3, that case has no application here.

¶ 28 For three reasons, we conclude that the 2012 Amendments are not "ameliorative, amendatory legislation" within the meaning of *Stellabotte II*, ¶ 3.

¶ 29 First, the reach of *Stellabotte II* is not entirely clear. What is clear is that *Stellabotte II*, and all its antecedents, addressed statutes that either decreased the severity of a previously defined crime or reduced the maximum sentence that could be imposed for commission of that crime. *Stellabotte II*, ¶¶ 6, 11-29. The 2012 Amendments, which changed the procedure by which jurisdiction is apportioned between the district courts and the juvenile courts, are of a fundamentally different nature than the statutes considered in *Stellabotte II* and its antecedents. *See* Ch. 128, sec. 1, § 19-2-517, 2012 Colo. Sess. Laws 439-445; *Stellabotte II*, ¶¶ 6, 11-29.

¶ 30 By their terms, the 2012 Amendments do not reduce the severity or sentences for any of the crimes of which Godinez was convicted. Before and after the effective date of the 2012 Amendments, the crimes of which Godinez was convicted were the same classes of felonies, carrying the same sentences.

¶ 31 Recognizing this fact, Godinez argues that if the 2012 Amendments were applied to him, the case would have been

required to be filed in juvenile court, not district court. And, he continues, had the proceedings remained in juvenile court and not been transferred to district court, the sentences that he faced would have been dramatically less than those that were imposed against him in district court.

¶ 32 If Godinez had been adjudicated guilty in juvenile court, he would have received a much lower sentence.[4] But it is entirely speculative to assume that his case, even applying the 2012 Amendments, would have remained in juvenile court. Given the extremely serious nature of the charges, and his age at the time of the crimes, it is a virtual certainty that the district attorney would have petitioned to transfer the case to district court. *See* § 19-2-518(1), C.R.S. 2018.[5] And, again considering the nature of the

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[4] The maximum sentence Godinez could have faced in juvenile court was a sentence to the Department of Youth Corrections for a period not to exceed five years. *See* § 19-2-921(3)(b)(II), C.R.S. 2018. The sentence for the same crimes in adult court, as illustrated by the sentence imposed on Godinez, may amount to an effective life sentence in the custody of the Department of Corrections.

[5] Under the 2012 Amendments, if a juvenile court transfers the case to district court, the district court has the discretion to sentence the juvenile upon conviction to the youthful offender system except when the juvenile is convicted, as in the case here, of any "sexual offense." § 19-2-517(6)(a), C.R.S. 2018.

crimes, his age, and other factors set forth in section 19-2-518(4)(b), there is a strong possibility that his case would have been transferred to district court. Godinez's argument that he ultimately would have fared better under the 2012 Amendments founders on multiple levels of speculation.

¶ 33 Second, to determine the reach of *Stellabotte II,* we must also consider the consequences of a holding that the 2012 Amendments (or similar legislation) constitute "ameliorative, amendatory legislation."

¶ 34 Under *Stellabotte II*, if ameliorative, amendatory legislation reduces the penalty for a particular crime, it is a simple matter of correcting the mittimus or resentencing a defendant to reflect the reduced maximum sentence. Not so here. If Godinez is correct, and the 2012 Amendments apply retroactively, it would have ramifications that far exceed the limited effects of retroactive application addressed in *Stellabotte II*. Absent a clear statement in *Stellabotte II* that amendments changing the procedures for apportioning jurisdiction among the district and juvenile courts are included within the definition of "ameliorative, amendatory legislation," we decline to so extend *Stellabotte II*. Indeed, in

addressing the reach of its decision in *Stellabotte II*, ¶ 37, the court stated that "our decision today is a narrow one." Extending the reach of *Stellabotte II* in the manner requested by Godinez would be inconsistent with the supreme court's "narrow" ruling.[6] *Id.*

¶ 35 Third, in the end, our task, guided by supreme court precedent, is to determine whether the General Assembly intended to apply the 2012 Amendments to crimes that had been committed and charged before their enactment. Application of the 2012 Amendments to crimes that had been committed and charged before their enactment would create substantial uncertainty regarding the finality of criminal convictions, creating havoc in both the juvenile and adult criminal justice systems. Absent express

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[6] The dissent argues that the supreme court only intended its holding to be narrow in the sense that it applies only to non-final convictions. And the supreme court did state that its holding would be narrow in that way. *People v. Stellabotte*, 2018 CO 66, ¶ 37. However, the fact that the supreme court chose to state one way in which its holding was narrow does not mean that its holding is otherwise all encompassing. Language in *Stellabotte II* suggests that its holding is narrow in other ways. *Id.* at ¶ 33. For instance, *Stellabotte II* states that "18–1–410(1)(f)(I) provides for retroactive application of significant change in the law to a defendant's conviction or sentence but . . . during only direct appeal, before the conviction is final." *Id.* The language not only limits the procedural timeframe in which the holding applies, it also limits the scope of the holding to legislation that makes a "significant change" that would apply to the defendant's "conviction or sentence." *Id.*

language mandating that result, we refuse to attribute that unreasonable intent to the General Assembly.[7]

¶ 36 We recognize that the California Supreme Court recently held that a statute (Proposition 57) similar (at least in some respects) to the 2012 Amendments applied retroactively. *People v. Superior Court*, 410 P.3d 22 (Cal. 2018). We believe that case does not support the conclusion reached by the dissent.

¶ 37 First, while the California Supreme Court is the ultimate arbiter of state law in California, we are not the ultimate arbiter of state law in Colorado. This court is instead an intermediate appellate court, bound by Colorado Supreme Court precedent. *Stellabotte II*, ¶ 37, expressly states that the decision was "a narrow one." Considering that the cases relied on in *Stellabotte II* uniformly were sentence ameliorating statutes, coupled with the supreme

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[7] We are, of course, aware of the supreme court's decision in *People v. Boyd*, 2017 CO 2, where the supreme court held that Amendment 64 deprived the district court of jurisdiction to try persons for certain marijuana-related crimes after the passage of that constitutional amendment. While the full reach of that decision remains to be seen, we think that it is distinguishable for a number of reasons. First, Amendment 64 was a constitutional amendment, rather than a legislative amendment to existing legislation. Second, unlike the 2012 Amendments, Amendment 64 made previously criminal conduct legal. And although Godinez cites *Boyd*, he does not present any arguments based on that case.

court's caution that the decision was "a narrow one," *id.*, we do not believe we have the authority to untether *Stellabotte II* from its present moorings.

¶ 38 Second, while the California Supreme Court concluded that the California electorate intended Proposition 57 to apply retroactively, we reach the opposite conclusion with respect to the Colorado General Assembly's intent regarding the 2012 Amendments. As discussed above, applying the 2012 Amendments retroactively would result in substantial difficulties regarding the administration of justice in Colorado. Even if we were not constrained by the limited reach of *Stellabotte II*, we would decline to ascribe such a disruptive intent to the General Assembly.

¶ 39 Finally, *Superior Court* does not address, at all, any claimed divestiture of jurisdiction and therefore provides no support for Godinez's argument that the 2012 Amendments divested the district court of jurisdiction the moment that the 2012 Amendments became effective.

C. Neither the Alleged "Procedural" Nature of the 2012 Amendments Nor the Rule of Lenity Requires Reversal

¶ 40 We also reject Godinez's separate argument that he is entitled to retroactive application of the 2012 Amendments because they are "procedural" and therefore must be applied to convictions not yet final on appeal. Godinez relies on *People v. D.K.B.*, 843 P.2d 1326 (Colo. 1993), and *Kardoley v. Colorado State Personnel Board*, 742 P.2d 934 (Colo. App. 1987), to support this contention. Neither case controls.

¶ 41 *D.K.B.* held that those previously convicted of a crime lost the statutorily granted right to seal a conviction on the repeal of the statute granting that right. *D.K.B.*, 843 P.2d at 1332. *Kardoley* dealt with an appeal from a termination of employment decision by a state personnel board and whether the appeal was properly brought in district court or the court of appeals. *Kardoley*, 742 P.2d at 934. Importantly, neither case involved a statutory amendment affecting an ongoing criminal prosecution.

¶ 42 As a subset of this argument (or a separate argument), Godinez contends that the statutory language is ambiguous and that under the rule of lenity he is entitled to the application of the

2012 Amendments. The rule of lenity provides that any ambiguity in a penal statute must be construed in a manner that favors the person whose liberty interests are affected by the statute. *Faulkner v. Dist. Court*, 826 P.2d 1277, 1278 (Colo. 1992). We perceive no ambiguity in the 2012 Amendments, so the rule of lenity does not apply. Further, as discussed above, Godinez's liberty interests are not impacted by the 2012 Amendments because, even after the 2012 Amendments, he could still be tried in district court or juvenile court.

¶ 43 For all of these reasons, we conclude that the 2012 Amendments do not apply to Godinez or the charges brought against him before the enactment of the 2012 Amendments.

D. Godinez was Not Entitled to a Reverse-Transfer Hearing

¶ 44 Godinez alternatively contends that he should have been afforded a reverse-transfer hearing under section 19-2-517(3). He reasons that once the 2012 Amendments became effective, and even assuming only prospective effect, he timely requested one. We reject this argument for the same reason that we rejected his

jurisdictional argument.[8] The reverse-transfer hearing mechanism was part of the 2012 Amendments. Godinez does not explain why some, but not all, of the 2012 Amendments should be applied retroactively.

IV. One Victim's In-Court Identification of Godinez Did Not Violate His Constitutional Rights

¶ 45 Godinez next contends that the trial court committed reversible constitutional error when it permitted S.R. to identify him during trial. He claims that her in-court identification was tainted by a suggestive out-of-court identification procedure. We disagree.

A. Additional Factual Background

¶ 46 Before trial, in November 2012, Godinez moved to suppress any out-of-court or in-court identifications of him by the victims, contending that photographic arrays shown to S.R. in an attempted

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[8] Godinez claims his request for a reverse-transfer hearing was timely. It was not. The 2012 Amendments provide that a direct-file juvenile-defendant must request a reverse-transfer hearing "no later than the time to request a preliminary hearing," § 19-2-517(3)(a), and the Children's Code requires a juvenile to request a preliminary hearing "not later than ten days after the advisement hearing." § 19-2-705(1)(a), C.R.S. 2018. Godinez's May 2012 request for a reverse-transfer hearing came more than 120 days after his December 2011 advisement hearing, well outside the ten-day window. Thus, Godinez could only be entitled to a reverse-transfer hearing if the 2012 Amendments applied retroactively.

pre-trial identification were impermissibly suggestive. Viewing the photo arrays, S.R. pointed out Godinez's picture and said the person had similar features to and looked like one of the suspects. However, she "[j]ust didn't feel sure enough to say that's him."[9]

¶ 47 A later minute order stated, "[defendant's] motion to suppress out of court [identification] is stipulated by the People. People will stipulate that neither victim could identify [Godinez] in an out-of-court line up."

¶ 48 In a pre-trial hearing, a different prosecutor agreed with the stipulation and said that she did not intend to elicit an in-court identification during trial.[10] However, because she could not predict whether the victims might spontaneously identify the defendant during the trial, she argued that she should not be precluded from questioning any witness who made such a spontaneous identification. Defense counsel did not object to this carve-out.

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[9] The record does not reveal any further detail concerning the lineup procedure. The photo lineup is not part of the appellate record.

[10] A new prosecutor replaced the original prosecutor during the course of the proceedings against Godinez, which apparently led to some confusion regarding the contents of the stipulation, but does not impact our analysis.

¶ 49 The court issued a written order stating that "the People stipulated that neither victim provided an out-of-court identification of the defendant at any time, and no testimony at trial will contradict that stipulation."

¶ 50 Before trial, in June 2013, Godinez moved in limine to preclude any in-court identifications of him by the victim, arguing that the conditions in any in-court identification would be impermissibly suggestive given that Godinez would be the only young, Hispanic male at the defense table. Following a July 2013 hearing, the court issued an order regarding all outstanding motions and denied Godinez's motion to preclude an in-court identification by S.R., without specifying whether it was addressing the motion to suppress, the motion in limine, or both. The court noted the parties' stipulation that no out-of-court identification had occurred and that because Godinez did "not allege that either victim ha[d] attempted to make a previous identification of the defendant which was based on impermissibly suggestive procedures, the court ha[d] no basis upon which to determine that a one-on-one, in-court identification would be the result of prior impermissibly suggestive procedure." The order stated that any in-court identification could

be independently weighed by the jury, and Godinez could, of course, cross-examine any witness making such an in-court identification.

¶ 51 During S.R.'s trial testimony, the prosecutor asked a series of questions about her interaction with one of the males in the bedroom during the assault. The following colloquy occurred:

> [Prosecutor]: Could you tell if he was in the room during that time?
>
> [S.R.]: Yes.
>
> [Prosecutor]: And where was he?
>
> [S.R.]: Like now?
>
> [Prosecutor]: Then that night. Was he one – was that the first person who raped you?

¶ 52 Later, the prosecutor followed-up on S.R.'s "like now" remark.

> [Prosecutor]: And when you mentioned before, you said when I was asking you if you recognize him, you said right now. What did you mean by that?
>
> [S.R.]: I thought maybe you were asking me to look and see if I recognize him because – because I have really just took a glance at him and his face looks familiar like if I've seen his face somewhere. Just don't feel comfortable looking at him right now.

> [Prosecutor]: And when you're talking about him, I just want to be clear, are you talking about a man with a certain color shirt on?
>
> [S.R.]: Yes.
>
> [Prosecutor]: And what color shirt is that?
>
> [S.R.]: Purple.

¶ 53 The prosecutor then resumed asking S.R. about the assault. At the end of direct examination, the prosecutor said, "[n]ow, [S.R.], I know this is difficult. I'd like you to take a look to your right briefly, okay." Defense counsel objected, arguing that directing S.R. to look to her right was unduly suggestive. Counsel argued that the circumstances were unduly suggestive because the only other males in the courtroom were jurors, the advisory witness, defense counsel, and the judge. The court overruled the objection, saying that S.R. had already indicated there was someone in the room who made her uncomfortable and that the individual was wearing purple. The prosecutor continued:

> [Prosecutor]: [S.R.], you indicated earlier that there was a certain area you were uncomfortable looking?
>
> [S.R.]: Yes.
>
> . . . .

> [Prosecutor]: Why is it you're uncomfortable looking in that direction?
>
> [S.R.]: Because when I did kind of glance over, something about his face looks familiar, like if I've seen him before. So it just makes me uncomfortable.
>
> . . . .
>
> [Prosecutor]: [S.R.], who did you see when you looked at the person in the purple shirt?
>
> [S.R.]: The guy who put the gun to my head because he was the most that I was – that I talked to.

¶ 54 The court later instructed the jury as follows: "Ladies and gentlemen, the parties have agreed to the existence of certain facts. You may regard those facts as proven without any further evidence. The stipulation of the parties is as follows: [S.R.] could not identify the defendant, [Godinez], in an out-of-court lineup."

B. Standard of Review and Applicable Law

¶ 55 The constitutionality of an in-court identification procedure presents a mixed question of fact and law. *Bernal v. People*, 44 P.3d 184, 190 (Colo. 2002). We review the trial court's findings of fact for clear error and its legal conclusions de novo. *Id.*

¶ 56 "A defendant is denied due process when an in-court identification is based upon an out-of-court identification which is

so suggestive as to render the in-court identification unreliable." *People v. Borghesi*, 66 P.3d 93, 103 (Colo. 2003) (citation omitted). The defense bears the initial burden of showing that the out-of-court identification procedure — here, a photo array — was impermissibly suggestive. *Id.* Upon a showing of suggestiveness, the burden then shifts to the prosecution to prove by clear and convincing evidence that, under the totality of the circumstances, the in-court identification is based on the witness's independent observations of the defendant during the crime's commission, and not the suggestive out-of-court identification. *People v. Monroe*, 925 P.2d 767, 773 (Colo. 1996). But "[f]irst-time in-court identification of the accused by an eyewitness, absent constitutionally impermissible suggestive circumstances, does not require invocation of the independent source rule." *Id.* at 775.

¶ 57 If the independent source rule applies, the court must weigh the corrupting effect of the out-of-court identification against the following five factors:

(1) the witness's opportunity to view the perpetrator at the time of the crime;

(2) the witness's degree of attention;

(3) the accuracy of the witness's prior description of the perpetrator;

(4) the level of certainty the witness demonstrated at the confrontation; and

(5) the length of time between the crime and the confrontation.

People v. Walker, 666 P.2d 113, 119 (Colo. 1983).

¶ 58 "As long as the totality of the circumstances does not suggest a very substantial likelihood of misidentification, identification testimony will be admissible." *Borghesi*, 66 P.3d at 104; *see Neil v. Biggers*, 409 U.S. 188, 198 (1972).

¶ 59 If we conclude the court allowed a constitutionally impermissible identification, we apply the constitutional harmless error standard and determine whether the error was harmless beyond a reasonable doubt. *See People v. Martinez*, 2015 COA 37, ¶ 15 (citing *Hagos v. People*, 2012 CO 63, ¶ 11). An error is constitutionally harmless when there is no reasonable probability that the error contributed to the defendant's conviction by substantially influencing the verdict or impairing the fairness of the trial. *Hagos*, ¶ 12.

¶ 60 The exclusionary rule does not apply to in-court identifications alleged to be suggestive simply because of the typical courtroom setting. *Monroe*, 925 P.2d at 774. Instead, it is the jury's responsibility to assess the reliability of identification evidence unless there is a very substantial likelihood of misidentification. *Id.*

C. Application

1. Motion to Exclude In-Court Identification Based On Suggestive Photo Lineup

¶ 61 Godinez contends that the court erred in denying his motions to preclude any in-court identification by S.R. He asserts that (1) the ruling rested on the clearly erroneous factual premise that Godinez had not alleged that S.R. had attempted to make a pre-trial identification in an impermissibly suggestive process; (2) the court's reliance on *Monroe* was misplaced; (3) this reliance on *Monroe* led the court to apply the wrong legal standard rather than the proper *Walker* factors; (4) the court failed to afford proper weight or give effect to the prosecution's concessions; and (5) the pre-trial photographic line-up procedure was unduly suggestive and influenced S.R.'s later in-court identification. Under the

circumstances presented here, we conclude that the court did not err in allowing S.R.'s in-court identification.

¶ 62 Godinez correctly notes that contrary to what the district court said in its order, he alleged that S.R. had attempted to identify him when presented with an impermissibly suggestive photo array. While Godinez's June 2013 motion in limine did not allege impermissibly suggestive procedures during a pre-trial identification attempt, his November 2012 motion to suppress did.

¶ 63 However, the district court did not rely exclusively on its conclusion that Godinez had not alleged impermissibly suggestive pre-trial identification procedures in rejecting Godinez's motions to preclude in-court identification. The court also relied on (1) the parties' stipulation that there had been no pre-trial identification and (2) language from *Monroe*, emphasized in the order, providing that first-time in-court identifications are not subject to the independent source rule.

¶ 64 While we do not necessarily read *Monroe* as holding that the independent source rule only applies when there is a positive identification at a suggestive out-of-court lineup, the trial court's

reliance on *Monroe* did not constitute reversible error.[11] The trial court did not have before it (and we do not have before us in the appellate record) the photo lineup or other evidence supporting a finding that the photo lineup was impermissibly suggestive. Absent an appellate record supporting the conclusion that the photo lineup was impermissibly suggestive, and therefore potentially required application of the independent source doctrine under *Walker*, we cannot conclude that the trial court erred in applying *Monroe*.[12]

2. In-Court Identification

¶ 65 Godinez also contends that S.R.'s in-court identification of him was impermissibly suggestive because (1) the prosecutor directed S.R. to "look to [her] right," essentially instructing her to identify

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[11] Our general references to pre-trial lineups include photo arrays and in-person lineups and showups.

[12] *Monroe* does not address these circumstances because the witness in *Monroe* had not participated in pre-trial identification procedures. We leave open the possibility of application of the independent source rule when a pre-trial lineup is so suggestive that it could constitutionally impair the reliability of an in-court identification, even when the witness fails to make a positive identification at the pre-trial lineup. The circumstances here are instructive. One of the victims, on viewing the photo lineup, thought that she recognized Godinez, but she was not sufficiently sure to make a positive identification. Logically, it is possible that even in the absence of a positive identification, a constitutionally deficient pre-trial lineup could substantially affect the in-court identification, making the independent source doctrine applicable.

him; and (2) the prosecutor's misconduct was exacerbated because Godinez was the only Hispanic male teenager in the courtroom. We reject this argument.

¶ 66 First, we disagree with Godinez's characterization of the prosecutor's conduct because it is contradicted by the record. As noted by the district court, it was S.R. who first raised her ability to make an in-court identification when she asked the question, "like now?" When the prosecutor followed up and asked what she meant by "like now," S.R. said she saw the person who assaulted her in the courtroom but did not want to look at him because she did not feel comfortable. Only then did the prosecutor ask S.R. to identify who made her uncomfortable — the man with the purple shirt — and why — because he was the one who held the gun to her head. The prosecutor's comment to "look to your right," therefore, did not constitute a directive to identify Godinez but merely repeated S.R.'s earlier spontaneous directional cues.

¶ 67 Moreover, it was for the jury, not either the district court or this court, to assess the reliability of the in-court identification in light of the parties' stipulation that S.R. was unable to identify Godinez in a prior out-of-court identification procedure. Defense

counsel had the opportunity to cross-examine S.R. about her prior failure to identify Godinez and did, in fact, cross-examine her about the circumstances of the in-court identification, including the fact that Godinez was the only Hispanic male teenager present in the courtroom.

¶ 68 For these reasons, we reject Godinez's challenges to the in-court identification.[13]

V. Admission of Out-of-Court Statements

¶ 69 Godinez next contends that the court violated his confrontation, fair trial, and due process rights by admitting the testimonial hearsay of four declarants. We discern no reversible error.

A. Additional Factual Background

¶ 70 During a pre-trial deposition, Detective Alan Shank testified that he and Detective Seth Robertson interviewed Edgar.[14] Edgar

[13] Because we find no constitutional error in the admission of the victim's in-court identification of Godinez, it is unnecessary for us to consider whether any error was harmless beyond a reasonable doubt. We note that, among other evidence presented at trial, the prosecutor presented compelling DNA evidence — Godinez's DNA was found on the victims' bodies. Also, an earring worn by A.H. was found in the Godinez family SUV.

told the detective that (1) on October 30, he was at the house with his brothers A.G., Godinez, and Enrique; and (2) on November 6, he was home all day with his mother, father, brothers A.G. and Godinez, and two other unrelated individuals. The court admitted the detective's statements regarding what Edgar told him at trial over Godinez's hearsay and confrontation objections, finding that they were admissible as co-conspirator statements under CRE 801(d)(2)(3).

¶ 71 At trial, Detective Robertson described his interviews of A.G., A.G.'s girlfriend, and Godinez's stepmother and related those interviews to his investigation of Edgar's alibi statements. He said that A.G. told him that

- he "was primarily at his residence that night";
- he "was there with his girlfriend";
- his brothers, including Godinez, were also at the residence;
- he "went out at one point in time to get pizza"; and
- he "went to a specific pizza place and a specific area."

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[14] Detective Shank's deposition was taken because it was uncertain if he would be available at trial.

¶ 72 Robertson then spoke with A.G.'s girlfriend to confirm A.G.'s story, but the girlfriend denied that she was with A.G. on the dates of the offenses.

¶ 73 Finally, the prosecutor asked Robertson about his investigation of the residence. He said that Godinez's stepmother, who had been present during A.G.'s interview, refuted what A.G. had said. The court precluded the prosecutor from eliciting the stepmother's actual statements.

B. Standard of Review and Applicable Law

¶ 74 We review a trial court's evidentiary rulings for an abuse of discretion. *People v. Stewart*, 55 P.3d 107, 122 (Colo. 2002). A court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair, or based on an erroneous understanding or application of the law. *People v. Esparza-Treto*, 282 P.3d 471, 480 (Colo. App. 2011).

¶ 75 We review confrontation violations de novo. *People v. Phillips*, 2012 COA 176, ¶ 85. Reversal is required unless the error is harmless beyond a reasonable doubt. *Blecha v. People*, 962 P.2d 931, 941-42 (Colo. 1988). The parties do not dispute preservation of either the hearsay or confrontation claims.

¶ 76 Hearsay is "a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." CRE 801(c); *see People v. Huckleberry*, 768 P.2d 1235, 1241 (Colo. 1989).

¶ 77 The admission of hearsay evidence may implicate a defendant's confrontation rights under the federal and state constitutions. *See Davis v. Washington*, 547 U.S. 813, 823 (2006); *Nicholls v. People*, 2017 CO 71, ¶ 30.

¶ 78 However, the admission of nonhearsay does not implicate a defendant's confrontation rights under either the United States or Colorado Constitutions. *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004); *People v. Robinson*, 226 P.3d 1145, 1151 (Colo. App. 2009). Moreover, if statements that otherwise might constitute hearsay are offered to show why the police took particular actions as part of their investigation, they are relevant and admissible as nonhearsay. *See Robinson*, 226 P.3d at 1151-52. Indeed, police officers may testify about why they took particular actions even if their testimony "touches upon prohibited subjects." *People v. Penn*, 2016 CO 32, ¶ 32.

C. Application

1. Edgar's Statements

¶ 79 Godinez contends the court erred in admitting Edgar's statements to Detective Shank.[15] The Attorney General unpersuasively defends the trial court's ruling that the statements were not hearsay at all based on the co-conspirator exception contained in CRE 801(d)(2)(E). The problem with both the trial court's ruling and the Attorney General's argument is that there is no trial court finding (and scant evidence to support such a finding if one had been made) that there was a separate conspiracy to cover up the crimes. Binding precedent holds that a conspiracy ends when the crimes have been committed unless the original focus of the conspiracy includes a coverup or the conspirators engage in a separate cover-up conspiracy. *See, e.g.*, *Blecha*, 962 P.2d at 938. Acceptance of the Attorney General's argument would require us to disregard these precedents.

[15] Godinez does not challenge the relevance of Edgar's statements to Detective Shank; therefore, we do not address that question.

¶ 80 More persuasively, the Attorney General argues that Edgar's statements are not hearsay because they were offered for their *falsity* rather than their *truth*. We agree with this argument.

¶ 81 If offered for the truth, Edgar's statements that he was at home all day with Godinez would have undermined the prosecution's theory that Godinez and his brothers had left the home to kidnap the victims. Instead, the record reveals that the prosecution offered Edgar's statements to prove that those statements were *false*.

¶ 82 While we have found no Colorado authority on point, in *Anderson v. United States*, 417 U.S. 211 (1974), the United States Supreme Court held that out-of-court statements were not hearsay when "the point of the prosecutor's introducing those statements was simply to prove that the statements were made so as to establish a foundation for later showing, through other admissible evidence, that they were false." *Id.* at 220 (footnotes omitted); *see also United States v. Smith*, Nos. 94-5198, 94-5199, 1996 WL 5549, at *3 (10th Cir. 1996) (unpublished table decision); Michael H. Graham, Handbook of Federal Evidence § 801:5 (8th ed.) Westlaw (database updated Nov. 2018).

¶ 83 We may affirm the trial court's ruling on any ground supported by the record. *People v. Garcia*, 2012 COA 79, ¶ 62. We conclude that Edgar's statements were offered for their falsity, not their truth, and therefore did not constitute hearsay. It necessarily follows that the admission of those statements did not violate Godinez's confrontation rights.

¶ 84 We further conclude that even if Edgar's statements were admitted in error, any error in the admission of those statements was harmless (and with respect to the alleged confrontation violation, constitutionally harmless) because of the overwhelming evidence of Godinez's guilt. *See People v. Smith*, 77 P.3d 751, 760 (Colo. App. 2003). As discussed earlier, one of the victims positively identified Godinez as one of her assailants. While that identification was challenged both in the trial court and on appeal, the prosecution also proved that Godinez's DNA matched DNA found (1) on S.R.'s pubic area; (2) on A.H.'s anal area and neck; (3) in semen found along with A.H.'s DNA on the comforter where the victims were raped; and (4) in semen in one victim's underwear.[16]

[16] DNA testing excluded 99.8% of other individuals, including the other Godinez family suspects, as the source of the DNA matched to

On this record, we conclude that any error in admitting these statements meets the high bar of being harmless beyond a reasonable doubt, the standard applicable for a confrontation violation. *Blecha*, 962 P.2d at 934.

2. A.G.'s and A.G.'s Girlfriend's Statements

¶ 85 Godinez next contends that the court erred when it admitted A.G.'s and his girlfriend's statements over a hearsay objection. The district court ruled that those statements were not offered for their truth, but for their effect on the police investigation. We agree with the district court's ruling and analysis.

¶ 86 Robertson testified that A.G.'s statements prompted him to visit area pizza restaurants to check surveillance videos and to obtain receipts in an effort to confirm or refute A.G.'s statements. A.G.'s statements also prompted him to question A.G.'s girlfriend.

¶ 87 We find no abuse of discretion in the court's admission of A.G.'s statements because they led the detective to investigate a potential alibi defense. The record shows that the prosecution did

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Godinez in the pubic, anal, and neck areas. DNA on the comforter matched Godinez to a reasonable degree of scientific certainty. The probability of the DNA found in the semen in the underwear belonging to a southwestern Hispanic other than Godinez was one in 32 million.

not admit the statements to prove A.G. went to a pizza restaurant, but rather to show why the detective contacted A.G.'s girlfriend. This is a proper nonhearsay purpose. *See Robinson*, 226 P.3d at 1151-52.

¶ 88 Similarly, the girlfriend's statements, refuting A.G.'s claim that he was home with her, led the detective to interview Godinez's stepmother concerning A.G.'s whereabouts on the dates of the offenses. Thus, the trial court admitted these statements for a proper nonhearsay purpose — to show why the detective decided to interview Godinez's stepmother.

3. Stepmother's Statements

¶ 89 Last, the prosecution offered the stepmother's statement to prove the falsity of A.G.'s statements. The court precluded the admission of the stepmother's specific statements and only allowed the jury to hear that she refuted A.G.'s claim of being home on the dates of the offense. Even if this evidence was erroneously admitted, it was harmless (applying either the harmless error or constitutional harmless error standards).

¶ 90 First, it was cumulative of A.G.'s girlfriend's statements properly admitted for a nonhearsay purpose. Second, A.G.'s

credibility was only tangentially relevant to Godinez's defense. While we acknowledge that Godinez's presence and participation in the crimes was the central issue for the jury to decide, Godinez never endorsed an alibi defense or otherwise claimed he was with A.G. all day. Instead, the thrust of Godinez's defense was misidentification. Finally, as discussed above, Godinez's involvement was established by substantial other evidence. Thus, any error in the admission of this evidence was harmless.

VI. Constitutionality of Colorado Statutory Scheme Governing Sentencing of Juvenile Sex Offenders

¶ 91 Godinez last contends that Colorado's related sentencing statutes — section 19-2-517(1)(a) (direct-file statute); section 18-3-402(1), C.R.S. 2018 (sexual assault enhancement statute); sections 18-1.3-1001 to -1012, C.R.S. 2018 (Colorado Sex Offender Lifetime Supervision Act of 1998); sections 16-11.7-101 to -109, C.R.S. 2018, and the related Department of Corrections Admin. Reg. 700-19 (sex offender treatment statute); sections 17-2-201 to -217, C.R.S. 2018, and sections 17-22.5-101 to -407, C.R.S. 2018, (parole statutes); and sections 16-22-101 to -115, C.R.S. 2018 (sex offender registration statute) — are unconstitutional as applied to him under

the Sixth and Eighth Amendments to the United States Constitution. He argues under *Miller v. Alabama*, 567 U.S. 460 (2012), *Graham v. Florida*, 560 U.S. 48 (2010), and *Roper v. Simmons*, 543 U.S. 551 (2005), that these statutes preclude any meaningful opportunity for release and, thus, are the functional equivalent of a lifetime sentence.

¶ 92 We reject these arguments because the Colorado Supreme Court has rejected the same or a similar argument in *Lucero v. People*, 2017 CO 49, and we are bound by supreme court precedents.

A. Standard of Review and Applicable Law

¶ 93 We review the constitutionality of a sentence de novo. *Id.* at ¶ 13. We presume the legislature follows constitutional standards when enacting a statute. *City of Greenwood Village v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 440 (Colo. 2000). The defendant has a heavy burden to prove a statute's unconstitutionality. *People v. Allman*, 2012 COA 212, ¶ 7.

¶ 94 The Eighth Amendment prohibits cruel and unusual punishment. U.S. Const. amend. VIII. *Roper*, *Graham*, *Miller*, and *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016),

recognize that children are fundamentally different from adults. "[F]or a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole" because it constitutes cruel and unusual punishment. *Graham*, 560 U.S. at 74. However, "while states must 'give defendants . . . some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation,' the Eighth Amendment 'does not require [a] State to release [a juvenile] offender during his natural life' or to 'guarantee eventual freedom.'" *Lucero*, ¶ 17 (quoting *Graham*, 560 U.S. at 75).

¶ 95 *Graham* and *Miller* did not consider aggregate terms-of-years sentences, but our supreme court did in *Lucero*. It held that *Graham* and *Miller* only apply when a juvenile is sentenced to the specific sentence of life without the possibility of parole for a single offense. *Id.* at ¶ 15. The court later applied its holding to affirm a juvenile-defendant's aggregate sentences in a sexual assault case. *See Estrada-Huerta v. People*, 2017 CO 52, ¶ 8.

B. Application

¶ 96 Godinez was convicted of multiple offenses for which he was sentenced to imprisonment for thirty-two years to life. The parties

agree that Godinez will be eligible for his first parole hearing in thirty-two years.[17]

¶ 97 The thrust of Godinez's contention is that his aggregate sentence is the functional equivalent of a life without parole sentence, which violates *Graham* and *Miller*. But *Lucero* explicitly rejected this "functional equivalent" argument. *Lucero*, ¶¶ 22, 24.

¶ 98 Here, like in *Lucero*, Godinez was sentenced to a term of years with the possibility of parole for multiple crimes, rather than a life without parole sentence for a single crime, as prohibited under the supreme court's reading of *Graham* and *Miller* in *Lucero*.

¶ 99 Unlike Godinez, the defendant in *Lucero* was not subject to the Colorado Sex Offender Lifetime Supervision Act of 1998 or the sex offender treatment statute. However, the supreme court explicitly extended its reasoning in *Lucero* to a juvenile-defendant's sexual assault conviction in a companion case. *Estrada-Huerta*, ¶ 8.

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[17] We also reject Godinez's assertion that lifetime registration as a sex offender is punitive. Several divisions of this court have rejected this precise argument, and we agree with those divisions. *See, e.g.*, *People v. Durapau*, 280 P.3d 42, 48-49 (Colo. App. 2011) ("[R]egistration is remedial, not punitive, and therefore does not unconstitutionally enhance punishment."); *see also* § 16-22-112(1), C.R.S. 2018 ("[I]t is not the general assembly's intent that the information be used to inflict retribution or additional punishment.").

¶ 100 Godinez has not shown how his aggregate sentence escapes the holdings of *Lucero* and *Estrada-Huerta*. Therefore, we reject his unconstitutional as-applied challenge and affirm his sentences.

VII. Conclusion

¶ 101 The judgment of conviction and sentences are affirmed.

JUDGE BERNARD concurs.

JUDGE FREYRE concurs in part, specially concurs in part, and dissents in part.

JUDGE FREYRE, concurring in part, specially concurring in part, and dissenting in part.

¶ 102 I concur with the majority's conclusions in Parts IV and V, and I specially concur with the majority's conclusion in Part VI. I respectfully dissent from Part III.B of the majority opinion because, in my view, the 2012 Amendments to the juvenile direct-file statute constitute "ameliorative, amendatory legislation" that apply retroactively under our supreme court's holding in *People v. Stellabotte*, 2018 CO 66, ¶ 3 (*Stellabotte II*). Based on that conclusion, I would not address Godinez's jurisdictional argument (Part III.A) or his procedural argument (Part III.C).

¶ 103 Applying the amended direct-file statute to this case, I would vacate Godinez's convictions and remand the case to the juvenile court with directions to conduct a transfer hearing under section 19-2-518(1)(a), C.R.S. 2018. If, at the transfer hearing, the juvenile court determines that it would have transferred Godinez to the district court, then Godinez's convictions and sentence should be reinstated. If, at the transfer hearing, the juvenile court determines that it would not have transferred Godinez to the district court, then Godinez's convictions should be converted to juvenile

adjudications, and the juvenile court should resentence Godinez in accordance with the applicable sentencing provisions of the Children's Code.

I. Retroactivity and *Stellabotte II*

¶ 104 For many years, a debate concerning whether ameliorate legislative amendments applied prospectively or retroactively existed in conflicting cases from this court and our supreme court. The first line of cases emanated from *People v. Thomas*, 185 Colo. 395, 525 P.2d 1136 (1974), which held that the benefits of statutory amendments should be applied retroactively under section 18-1-410(1)(f), C.R.S. 2018, to all convictions not yet final, so long as the statutory language did not preclude retroactive application (*Thomas* Rule); *see Stellabotte II*, ¶¶ 16-18 (identifying the line of cases applying the *Thomas* Rule).

¶ 105 A second line of cases, beginning with *Riley v. People*, 828 P.2d 254 (Colo. 1992), held that statutory amendments were presumptively prospective under sections 2-4-202 and -303, C.R.S. 2018, and that they could only be applied retroactively if specific statutory language permitted retroactive application. *See Stellabotte II*, ¶¶ 19-21 (identifying cases modifying the *Thomas*

Rule). When statutory amendments were "silent" concerning retroactivity, the first line of cases applied the benefits of amendatory legislation retroactively, while the second line of cases did not. *See People v. Stellabotte*, 2016 COA 106, ¶¶ 44-47 (majority opinion), ¶¶ 66-70 (Dailey, J., concurring in part and dissenting in part) (*Stellabotte I*) (articulating the analysis of the first line of cases in the majority opinion and the analysis of the second line of cases in the dissent); *see also People v. Boyd*, 2015 COA 109 (same), *aff'd*, 2017 CO 2.

¶ 106 *Stellabotte II* resolved this conflict and affirmed the *Thomas* Rule and this court's decision in *Stellabotte I* while also disavowing any language in *Riley* that conflicted with the *Thomas* Rule. *Stellabotte II*, ¶¶ 3, 28. In *Stellabotte II*, our supreme court held that "ameliorative, amendatory legislation applies retroactively to non-final convictions under section 18-1-410(1)(f), unless the amendment contains language indicating it applies only prospectively." *Id.* at ¶ 3. In reaching this conclusion, the supreme court also held that section 18-1-410(1)(f) "serves as an exception to the general presumption of prospectivity that sections 2-4-202 and 2-4-303 provide." *Id.* at ¶ 35. It reasoned that the presumption of

prospectivity provided in sections 2-4-202 and -303 irreconcilably conflicted with the rule of retroactivity embodied in section 18-1-410(1)(f). *Id.* Then, applying the well-settled statutory construction rule that specific statutory provisions prevail over general statutory provisions, as set forth in section 2-4-205, C.R.S. 2018, and *Martin v. People*, 27 P.3d 846, 851 (Colo. 2001), the supreme court resolved this conflict by concluding that ameliorative legislative amendments must be applied retroactively to convictions not yet final unless the statutory language specifies prospective application. *Stellabotte II*, ¶¶ 32-33.

¶ 107 Finally, *Stellabotte II* clarified that the benefits of ameliorative amendatory legislation are "available only to those defendants whose convictions were not final when the amendment was enacted," and are not available to "anyone who has been sentenced under a provision that has since been changed." *Id.* at ¶ 37.

II. The 2012 Amendments Constitute "Ameliorative, Amendatory Legislation" Because They Mitigate Potential Penalties

A. Prerequisites to Retroactivity

¶ 108 No one disputes that Godinez's convictions were not yet final at the time the 2012 Amendments became effective, or that he was

fifteen years old at the time of the offenses and when the prosecutor filed charges. And no one disputes that the 2012 Amendments became effective on April 20, 2012, well before Godinez's convictions. *See* Ch. 128, sec. 3, § 19-2-517, 2012 Colo. Sess. Laws 445 ("Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety. Approved April 20, 2012."). Thus, Godinez's convictions were not yet final. I am not persuaded by Godinez's argument that the statute is ambiguous, and instead conclude that the plain language renders the statute effective on a date certain, and that it is "silent" on the issue of retroactivity.[1] Therefore, I see no reason to apply the rule of lenity. Instead, I believe this case turns on whether the substance of the 2012 Amendments constitutes "ameliorative, amendatory legislation" subject to retroactive application under *Stellabotte II*.

[1] Interestingly, the previous amendments to section 19-2-517 (in 2010) were not silent on retroactivity and stated that the act "shall apply to persons sentenced on or after the effective date of this act." *See* Ch. 264, sec. 7, § 18-1.3-407, 2010 Colo. Sess. Laws 1207.

¶ 109 I agree with the majority that the conflict *Stellabotte II* resolved involved legislative amendments to adult criminal statutes that lowered the class of the crime at issue and thereby lowered the possible penalty for that crime. Such amendments are undoubtedly "penalty mitigating" amendments that fall within the ambit of "ameliorative, amendatory legislation." *See Stellabotte II*, ¶¶ 3, 16. But I am not convinced that the reach of *Stellabotte II* is unclear or that the 2012 Amendments are not encompassed within the meaning of ameliorative, amendatory legislation simply because they operate differently than adult penalty statutes.

B. Juvenile Penalties Serve Different Purposes Than Adult Penalties

¶ 110 Colorado's juvenile justice system was founded on the premise that children are fundamentally different from adults. Gail B. Goodman, Comment, *Arrested Development: An Alternative to Juveniles Serving Life Without Parole in Colorado*, 78 U. Colo. L. Rev. 1059, 1065-66 (2007). In recent years, a developing body of social science research and United States Supreme Court precedent have recognized these distinct differences. *See J.D.B. v. North Carolina*, 564 U.S. 261, 273 n.5 (2011); National Institute of Mental Health,

The Teen Brain: Still Under Construction (2011), https://perma.cc/9EWF-6XZJ. Consequently, reforms to juvenile punishment have followed. In *Roper v. Simmons*, 543 U.S. 551 (2005), the Court held that the Eighth Amendment categorically bars the execution of persons who commit offenses when under the age of eighteen. Following that, in *Graham v. Florida*, 560 U.S. 48 (2010), the Court decided that the Eighth Amendment forbids the punishment of life without parole for juveniles who commit non-homicide offenses. *Miller v. Alabama*, 567 U.S. 461 (2012), determined that the Eighth Amendment forbids courts from automatically sentencing juveniles to life without parole for homicide and requires courts to consider the differences between adult and juvenile offenders. And *Montgomery v. Louisiana*, 577 U.S. __, 136 S. Ct. 718 (2016), held that *Miller* applies retroactively.

¶ 111 Against this backdrop, Colorado's General Assembly began reforming juvenile punishment. In 2006, the General Assembly abolished juvenile life without parole sentences. Ch. 228, sec. 2, § 18-1.3-401, 2006 Colo. Sess. Laws 1052. Then, in 2010, the General Assembly amended the direct-file statute to allow a juvenile's attorney an opportunity to provide mitigating information

to the prosecutor before a final decision was made to prosecute the juvenile as an adult. *See* Ch. 264, sec. 1, § 19-2-517, 2010 Colo. Sess. Laws 1202. Finally, the 2012 Amendments at issue here further curtailed the prosecution of children as adults by limiting the ages and types of crimes that could be directly filed in adult court, establishing a procedure for direct-file juveniles to petition for a reverse-transfer to juvenile court, and expanding the court's sentencing options for juveniles convicted in adult court. *See* Ch. 128, sec. 1, § 19-2-517, 2012 Colo. Sess. Laws 439-45.

¶ 112 In particular, the 2012 Amendments raised the age for direct-filing eligibility from fourteen to sixteen years, § 19-2-517(1)(a); removed several crimes from direct-file eligibility (vehicular homicide, vehicular assault, felony arson), Ch. 128, sec. 1, § 19-2-517(1), 2012 Colo. Sess. Laws 439; and limited the number of felonies for which a habitual juvenile offender could be eligible for direct filing, *id.* Moreover, section 19-2-517(1.5), C.R.S. 2018, now requires the district court to return a case to juvenile court if it fails to find probable cause, after a preliminary hearing, for the direct-file eligible crime, or if the court later dismisses the direct-file eligible crime. And, section 19-2-517(3)(b)(I)-(XI) permits a direct-file

juvenile to request a reverse-transfer hearing at which the district court must consider specific criteria in deciding whether to transfer the case to juvenile court. This procedure effectively removes direct-filing discretion from the prosecution and places it in the district court.

¶ 113 Finally, the 2012 Amendments modified the sentencing guidelines in a way that reduces the severity of many sentences for juveniles convicted in adult court. For example, section 19-2-517(6)(a)(1) no longer subjects juveniles to the mandatory minimum sentencing requirements of the crime of violence statute except for certain enumerated offenses (like class 1 felonies and sex offenses requiring indeterminate sentences). Moreover, juveniles convicted of felony offenses (like lesser offenses) that would not otherwise be eligible for direct filing may be sentenced either as juveniles or as adults. § 19-2-517(6)(b). And, juveniles convicted of only misdemeanor offenses in adult court must be transferred to the juvenile court, adjudicated juvenile delinquents, and sentenced as juveniles. § 19-2-517(6)(c).

¶ 114 When applied to Godinez, the ameliorative benefits of the 2012 Amendments become obvious. Godinez's current indeterminate life

sentence in adult prison becomes a maximum sentence of five years in the Department of Human Services, if, after a transfer hearing, a juvenile court determines his convictions should be converted to juvenile adjudications. *See* § 19-2-921(3)(b)(II), C.R.S. 2018. While I agree with the majority that there is no guarantee Godinez would be so treated, it is the possibility of less severe punishment in the juvenile system which I believe constitutes the "ameliorative benefit" that triggers retroactivity under *Stellabotte II*. *See Stellabotte*, ¶ 16 (describing the legislative amendment in *Thomas* as lowering the degree of crime and thus, "the maximum penalty he *could have received*") (emphasis added).[2] As well, I am not convinced that *Stellabotte II*'s "narrow holding" precludes retroactive application here, because the supreme court defined the parameters of "narrow" by saying relief is *not* available to "simply anyone who has been sentenced under a provision that has since been changed" and, instead, is only available "to those defendants whose convictions were not final when the amendment was enacted." *Id.* at ¶ 37.

[2] This assumes the conviction is not yet final when the legislative amendment takes effect and that the statutory language does not preclude retroactive application.

¶ 115 I am persuaded by how other courts have analyzed the retroactivity of similar amendments in juvenile statutes. For instance, the California Supreme Court considered whether Proposition 57's juvenile law provisions applied retroactively to cases already filed in adult court before it took effect. *People v. Superior Court*, 410 P.3d 22, 24 (Cal. 2018). In that case, the prosecution charged the juvenile with sex crimes in adult court. After charges were filed, the electorate passed Proposition 57, which removed the prosecution's ability to direct-file criminal charges and, instead, required the prosecutor to commence all juvenile actions in the juvenile court. *Id.* It allowed the prosecution to request a transfer hearing to adult court, thereby transferring adult penalty discretion from the prosecution to the juvenile court. *Id.*

¶ 116 The court noted its long-standing rule that a statute which reduces the punishment for a crime applies retroactively to any case in which the judgment is not yet final. *Id.* at 26 (citing *In re Estrada*, 450 P.2d 591 (Cal. 1965)). It observed that Proposition 57 was different from the statute in *Estrada* because it did not reduce the punishment for a specific crime. *Id.* at 27. But, it concluded that the same rationale applied, finding that "[t]he possibility of

being treated as a juvenile in juvenile court — where rehabilitation is the goal — rather than being tried and sentenced as an adult can result in dramatically different and more lenient treatment." *Id.* at 24. The court recognized that the ballot materials were silent on retroactivity. *Id.* at 28. It found persuasive language requiring the act to be construed liberally and stating that the act's purpose was to stop the revolving door of crime by emphasizing rehabilitation, particularly for juveniles. *Id.* The court recognized that Proposition 57 did not "ameliorate the punishment, or possible punishment, for a particular crime[, but instead] ameliorated the possible punishment for a class of persons, namely juveniles." *Id.* at 27. The court held that Proposition 57 should be applied retroactively. *Id.* at 31[3]; *see also People ex rel. Alvarez v. Howard*, 72 N.E.3d 346 (Ill. 2016) (holding under a different retroactivity body of law that a statutory amendment increasing the direct-file age from fifteen to sixteen for first degree murder and other crimes applied to a fifteen-year-old juvenile whose case was pending in adult court

[3] Westlaw citing references to *Superior Court* reveal more than one hundred unpublished orders applying *Superior Court*'s holding by conditionally reversing juvenile adult convictions and remanding for transfer hearings in the juvenile court consistent with Proposition 57.

when the amendment took effect, and affirming the lower court's decision to transfer the case to juvenile court).

¶ 117 Accordingly, I would hold that *Stellabotte II* requires retroactive application of the 2012 Amendments to Godinez's case. I would vacate Godinez's convictions and remand the case to the juvenile court for a transfer hearing. If the juvenile court determines that Godinez should be transferred to district court, then his convictions and sentence should be reinstated. If, however, the juvenile court determines that Godinez should remain in juvenile court, then his convictions should be converted to juvenile adjudications, and the juvenile court should impose a juvenile sentence.

III. Aggregate Sentences May Be Unconstitutional

¶ 118 I specially concur in Part VI of the majority opinion and write separately here not because I disagree with the majority's analysis or its conclusion. Indeed, because this court is bound by our supreme court's precedent, I am bound by the holding in *Lucero v. People*, 2017 CO 49, ¶ 11. *See People v. Gladney*, 250 P.3d 762, 768 n.3 (Colo. App. 2010). Nevertheless, I am persuaded by the Tenth Circuit's decision in *Budder v. Addison*, 851 F.3d 1047, 1053 (10th Cir. 2017), decided shortly before *Lucero*, that aggregate life

sentences for juveniles may violate the Eighth Amendment and the holding in *Graham*, 560 U.S. 48.

¶ 119 In the federal courts, when the United States Supreme Court announces that a rule applies to an entire category of offenders, it clearly establishes the law applicable within the defined contours of that category. *See Howes v. Fields*, 565 U.S. 499, 505 (2012) (holding that the court of appeals erred in concluding that the law was clearly established by a categorical rule when the Supreme Court had "repeatedly declined to adopt any categorical rule with respect to [the issue]," thereby implying that a categorical rule, if announced, would be clearly established law for all defendants who fell under the rule's purview). Therefore, factual distinctions within that category are no longer "material." *Budder*, 851 F.3d at 1055. And if the law is clearly established, the Supreme Court's rule must be applied. *Id.*

¶ 120 I am persuaded by the Tenth Circuit Court's analysis that *Graham* announced a categorical rule precluding life without the possibility of parole for all juvenile non-homicide offenders. *See Graham*, 560 U.S. at 75. Indeed, it held that while "[a] State is not required to guarantee eventual freedom to a juvenile offender

convicted of a nonhomicide crime," it must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* Thus, while I concur with the majority's conclusion, I question whether *Lucero*'s holding is constitutional based on the analysis in *Budder*.