**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A19-0576**

State of Minnesota,
Respondent,

vs.

Michael Anthony Casillas,
Appellant.

**Filed June 14, 2021**
**Affirmed**
**Larkin, Judge**

Dakota County District Court
File No. 19HA-CR-17-4702

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Kathryn M. Keena, Acting Dakota County Attorney, Anna Light, Heather D. Pipenhagen, Assistant County Attorneys, Hastings, Minnesota (for respondent)

John Arechigo, Arechigo & Stokka, P.A., St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Reyes, Judge; and Slieter, Judge.

**NONPRECEDENTIAL OPINION**

**LARKIN**, Judge

On remand from the supreme court, appellant challenges his conviction under Minn. Stat. § 617.261 (2016), for nonconsensual dissemination of private sexual images. He

argues that his conviction must be reversed because Minn. Stat. § 617.261 is unconstitutionally vague. He also challenges his sentence, arguing that the district court abused its discretion by denying his motion for a downward dispositional departure. Finally, appellant asserts, for the first time on appeal, that the district court erred in calculating his criminal-history score. We affirm appellant's conviction and sentence, without addressing his challenge to the district court's calculation of his criminal-history score.

## FACTS

In 2016, appellant Michael Anthony Casillas and A.M. were involved in a romantic relationship, during which Casillas obtained A.M.'s login information to access her wireless and television provider accounts. *State v. Casillas*, 952 N.W.2d 629, 634 (Minn. 2020). After the relationship ended, Casillas used A.M.'s login information to access her other online accounts and obtained a photograph and a video that depicted A.M. engaged in sexual relations with another adult male. *Id.* Casillas texted A.M. and threatened to disseminate the photo and video. *Id.* at 634-35. Despite A.M.'s warning that "sharing the photograph and video without her consent" would be a crime, Casillas sent the video to 44 individuals and posted it online. *Id.* at 635.

Respondent State of Minnesota charged Casillas with one count of nonconsensual dissemination of private sexual images, under Minn. Stat. § 617.261. *Id.* Casillas moved to dismiss the charge, arguing that the statute was unconstitutionally overbroad, an impermissible content-based restriction, and void for vagueness. *Id.* The district court denied the motion and found Casillas guilty after holding a stipulated-facts trial. *Id.* The

district court denied Casillas's motion for a downward dispositional departure and imposed a sentence of 23 months' imprisonment.

Casillas appealed to this court, arguing that Minn. Stat. § 617.261 is unconstitutional because it is (1) "overbroad" on its face, (2) a "content-based restriction" on speech, and (3) vague on its face. He also challenged his sentence, arguing that the district court abused its discretion by denying his motion for a dispositional departure. We reversed Casillas's conviction, concluding that Minn. Stat. § 617.261 is unconstitutionally overbroad because it "proscribes a substantial amount of protected expressive conduct." *State v. Casillas*, 938 N.W.2d 74, 90-91 (Minn. App. 2019), *rev'd*, 952 N.W.2d 629 (Minn. 2020). Because the overbreadth issue was dispositive, we did not consider or decide whether Minn. Stat. § 617.261 is void for vagueness or whether the district court abused its discretion by denying Casillas's motion for a dispositional departure. *Id.* at 78 n.1.

The state sought further review in the supreme court. The supreme court granted review, reversed this court's decision, and remanded this matter "for consideration and decision of the remaining issues raised in this appeal." *Casillas*, 952 N.W.2d at 646-47. This court reinstated the appeal and invited the parties to submit supplemental briefs regarding the remaining issues. Although the parties submitted supplemental briefs, they limited their arguments to the sentencing issue and did not address Casillas's void-for-vagueness challenge.

## DECISION

### I.

Casillas contends that Minn. Stat. § 617.261 is unconstitutionally vague on its face. A vagueness challenge is grounded in the Due Process Clause. *See United States v. Williams*, 553 U.S. 285, 304, 128 S. Ct. 1830, 1845 (2008) (citing Fifth Amendment Due Process Clause). The United States Constitution provides that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Minnesota Constitution contains a similar provision. Minn. Const. art. I, § 7 ("No person shall be held to answer for a criminal offense without due process of law . . . .").

A statute that imposes criminal liability "must meet due process standards of definiteness" under the federal and state constitutions. *State v. Newstrom*, 371 N.W.2d 525, 528 (Minn. 1985). "The void-for-vagueness doctrine requires that 'a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *State v. Bussmann*, 741 N.W.2d 79, 83 (Minn. 2007) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 1858 (1983)).

> Statutes imposing criminal penalties require a higher standard of certainty. However, the vagueness doctrine is based in fairness and is not designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited. We do not expect

> mathematical certainty from the English language, and a statute that is flexible and reasonably broad will be upheld if it is clear what the statute, as a whole, prohibits. Furthermore, although there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls, that difficulty does not provide sufficient reason to hold the challenged language too vague to define a criminal offense.

*State v. Campbell*, 756 N.W.2d 263, 269 (Minn. App. 2008) (quotations and citations omitted), *review denied* (Minn. Dec. 23, 2008).

If a defendant challenges a statute on First Amendment grounds, as Casillas has done, a facial challenge is permitted. *Williams*, 553 U.S. at 304, 128 S. Ct. at 1845; *see also Campbell*, 756 N.W.2d at 269 (stating defendant may challenge statute that purports to regulate First Amendment rights, "even if the statute is neither vague nor overbroad as applied to the defendant"). The constitutionality of a statute is a question of law that we review de novo. *State v. Cox*, 798 N.W.2d 517, 519 (Minn. 2011).

Minn. Stat. § 617.261 provides:

> It is a crime to intentionally disseminate an image of another person who is depicted in a sexual act or whose intimate parts are exposed, in whole or in part, when:
>
> (1) the person is identifiable:
>
> (i) from the image itself, by the person depicted in the image or by another person; or
>
> (ii) from personal information displayed in connection with the image;
>
> (2) the actor knows or reasonably should know that the person depicted in the image does not consent to the dissemination; and
>
> (3) the image was obtained or created under circumstances in which the actor knew or reasonably should have known the person depicted had a reasonable expectation of privacy.

In reversing and remanding Casillas's case to this court, the supreme court concluded that the state has a compelling interest in solving the widespread problem of nonconsensual dissemination of so-called "revenge porn" and that Minn. Stat. § 617.261 is "narrowly tailored" and "the least restrictive means" of solving that problem. *Casillas*, 952 N.W.2d at 642-44 (finding state carried burden of showing compelling governmental interest in criminalizing such conduct "[b]ased on this broad and direct threat to its citizens' health and safety"). In so concluding, the supreme court noted that the legislature has explicitly defined the conduct that is prohibited under Minn. Stat. § 617.261. *Id.* at 643. For example, the legislature defined the relevant image as follows: "The image must be 'of another person who is depicted in a sexual act or whose intimate parts are exposed.'" *Id.* (quoting Minn. Stat. § 617.261, subd. 1). The legislature also expressly defined many of the relevant terms, such as "sexual act," "intimate parts," and "image." *Id.* (citing Minn. Stat. § 617.261, subd. 7(d)-(e), (g)). And the legislature provided that the image must be "obtained or created under circumstances in which the actor knew or reasonably should have known the person depicted had a reasonable expectation of privacy." *Id.* (quoting Minn. Stat. § 617.261, subd. 1(3)).

The supreme court also noted that Minn. Stat. § 617.261 includes the following mens rea requirement: the defendant must "intentionally" disseminate the image, which "means that a defendant must knowingly and voluntarily disseminate a private sexual image." *Id.* (citing Minn. Stat. § 617.261, subd. 1). The supreme court reasoned that "[t]his specific intent requirement further narrows the statute and keeps it from targeting broad categories of speech." *Id.* (quotation omitted). The supreme court further noted that

the statute sets forth seven exemptions, including images distributed for medical or mental health treatment, for law enforcement purposes, and for artistic, scientific, educational, and journalistic purposes. *Id.* (citing Minn. Stat. § 617.261, subd. 5(1)-(7)).

Lastly, the supreme court noted that "to be prosecuted . . . , a disseminator must act without consent" and that Minn. Stat. § 617.261 encompasses only private speech, which "is of less First Amendment concern than speech on public matters." *Id.* at 643-44 (quotation omitted). In sum, the supreme court held that "[b]ecause the statute proscribes only private speech that (1) is intentionally disseminated without consent, (2) falls within numerous statutory definitions, and (3) is outside of the seven broad exemptions," Minn. Stat. § 617.261 is narrowly tailored. *Id.* at 644.

The supreme court's analysis in *Casillas* significantly undermines Casillas's contention that Minn. Stat. § 617.261 is unconstitutionally vague. As the supreme court reasoned, that statute defines essential terms, sets forth specific exemptions, and requires a specific mens rea. *Id.* By way of comparison, in *Newstrom*, the supreme court concluded that a compulsory-school-attendance statute was unconstitutionally vague because a requirement that a parent have credentials "essentially equivalent" to a public school teacher was not defined in statute, had no common law meaning, and was not a term of art with an established meaning. 371 N.W.2d at 527-28. Because the statute did not provide parents with adequate guidance regarding whether they were breaking the law by home-schooling their children and provided "no guidance to enforcement officials limiting their discretion" to determine what conduct was prohibited, the supreme court concluded that

the statute was unconstitutionally vague. *Id.* Unlike the statute at issue in *Newstrom*, Minn. Stat. § 617.261 provides adequate guidance regarding the prohibited conduct.

When a statute "has as its purpose the prohibition of an undesirable form of conduct rather than a specific act, the definition by its very nature must be broad[,] . . . [and] if it can be determined with reasonable certainty what conduct is disapproved, the statute is not unconstitutional on that ground." *State v. Suess*, 52 N.W.2d 409, 414 (Minn. 1952); *see Dunham v. Roer*, 708 N.W.2d 552, 568 (Minn. App. 2006) (holding harassment statute was not unconstitutionally vague where no "ordinary person of reasonable understanding would be unable to determine, with reasonable certainty, what *repeated* incidents likely to have a *substantial* adverse effect on the safety, security, or privacy of another are subject to the statute"), *review denied* (Minn. Mar. 28, 2006).

A criminal statute need not be drafted "with absolute certainty or mathematical precision"; instead, "[i]t need only furnish criteria that persons of common intelligence . . . may use with reasonable [certainty] in determining its command." *Dunham*, 708 N.W.2d at 568 (quotation omitted). For example, in *Suess*, the supreme court considered whether a statute that prohibited using artificial lights for the purpose of taking "wild animals," the definition of which included "all living creatures," was unconstitutionally vague. 52 N.W.2d at 413. The *Suess* defendants proffered numerous examples of "weird" or "ridiculous" scenarios that could be criminalized by the statute, such as a farmer using a flashlight to locate a fox that raided his chicken coop, or an entomologist using a flashlight to capture a butterfly while a companion possesses a "prohibited instrumentality, whether a firearm or otherwise." *Id.*

The supreme court was not persuaded that a person of common intelligence could not understand the conduct that was prohibited by the statute at issue in *Suess*: shining big game animals, such as deer. *Id.* at 414. The supreme court explained that "[c]ourts are inclined to give reasonable and sensible construction to criminal statutes in order to determine whether the language conveys sufficiently definite warnings as to the proscribed conduct" and that it is "obvious that the statute is not aimed at the innocent act of a person protecting his property" or "lighting his path at night by the aid of a flashlight." *Id.* at 415.

Once again, the purpose of Minn. Stat. § 617.261 is to prevent the "widespread and continuously expanding" problem of nonconsensual dissemination of private sexual images, which has significant consequences for the health and reputations of victims. *Casillas*, 952 N.W.2d at 642. Given the definitions, exemptions, and mens rea set forth in Minn. Stat. § 617.261, a reasonable and sensible construction of that statute's language conveys a sufficiently definite warning of the prohibited conduct. Thus, a person of common intelligence can understand what conduct is prohibited under Minn. Stat. § 617.261.

As to the possibility of arbitrary and discriminatory enforcement, the supreme court has held that Minn. Stat. § 617.261 is narrowly tailored. *Id.* at 644. A narrowly tailored statute that specifically defines prohibited conduct leaves little room for arbitrary enforcement. *Cf. Newstrom*, 371 N.W.2d at 528 (reasoning that the legislature's failure to define "essentially equivalent" encouraged arbitrary enforcement because law enforcement was not provided guidance regarding what conduct was prohibited).

Casillas argues that Minn. Stat. § 617.261 is vague because there could be circumstances in which defendants would not have knowledge of facts that make their conduct illegal. For example, Casillas proffers a hypothetical in which a person "texts a nude or semi-nude photo of him or herself to a partner and [the] partner shows the photo to a third party" to brag, and "not to get revenge or humiliate." Casillas queries whether under those circumstances, the partner should "'reasonably have known' that the sender did not consent to the 'dissemination'" or "that the sender had a reasonable expectation of privacy."

Casillas's hypothetical does not establish that Minn. Stat. § 617.261 is unconstitutionally void. It merely demonstrates that there may be close cases in which the state must rely on circumstantial evidence to prove a charge of unlawful dissemination of private sexual images under Minn. Stat. § 617.261. *See Williams*, 553 U.S. at 305-06, 128 S. Ct. at 1846 (observing that hypotheticals advanced as examples of vagueness were really examples of close cases resolved by the requirement of proof beyond a reasonable doubt and not by the vagueness doctrine).

Casillas also argues that "[t]he rule of lenity requires a reviewing court to interpret the statute narrowly to avoid [a] due process violation." But the rule of lenity is a "canon of last resort" that applies "only when . . . we are left with an ambiguous statute." *State v. Thonesavanh*, 904 N.W.2d 432, 440 (Minn. 2017) (quotation omitted). Given the supreme court's conclusion that Minn. Stat. § 617.261 is narrowly tailored because it defines essential terms, sets forth specific exemptions, and requires a specific mens rea, we do not discern an ambiguity justifying application of the rule of lenity.

In sum, "Minnesota statutes are presumed constitutional, and [a court's] power to declare a statute unconstitutional should be exercised with extreme caution and only when absolutely necessary." *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989). "The challenger of the constitutional validity of a statute must meet the very heavy burden of demonstrating beyond a reasonable doubt that the statute is unconstitutional." *Associated Builders & Contractors v. Ventura*, 610 N.W.2d 293, 299 (Minn. 2000). Casillas has not met that burden in challenging Minn. Stat. § 617.261 as unconstitutionally vague. We therefore affirm Casillas's conviction.

**II.**

In his principal brief, Casillas argues that the district court abused its discretion by denying his motion for a downward dispositional sentencing departure and imposing a presumptive sentence of 23 months' imprisonment. That sentence is at the low end of the presumptive-sentence range. *See* Minn. Sent. Guidelines 2.B.2.a., 4.A, 5.A (2016).

This court reviews a district court's decision to grant or deny a motion for a dispositional departure for an abuse of discretion. *State v. Pegel*, 795 N.W.2d 251, 253 (Minn. App. 2011). The district court's decision to impose a guidelines sentence must be affirmed "as long as the record shows the sentencing court carefully evaluated all the testimony and information presented before making a determination." *State v. Van Ruler*, 378 N.W.2d 77, 80-81 (Minn. App. 1985). Even if substantial and compelling circumstances are present, a district court is not required to depart. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). This court will reverse a district court's refusal to depart only in a "rare case." *Id.*

Casillas argues that he is more amenable to probation than a typical offender who has seven criminal-history points because five and one-half of his criminal-history points resulted from a crime spree that occurred when he was only 21 years old. Casillas also argues that the district court failed to recognize substantial and compelling factors, including his "strong social support system," that demonstrate that he is likely to succeed on probation. At sentencing, Casillas identified additional factors such as his remorse, his amenability to probation, and his health concerns as compelling reasons for a dispositional departure. The state opposed a dispositional departure.

After hearing from counsel and Casillas, the district court acknowledged that Casillas was "in a tough spot as a young man," served his time, stayed out of trouble, and that his criminal-history score was the reason the presumptive sentence for the current offense was an executed prison sentence. But, after "read[ing] everything in connection with these sentencings," the district court was "mindful of the fact that this isn't the sort of crime that we can just move on from." The district court ultimately concluded that Casillas had not provided a basis for departure and had not demonstrated that he would be successful on probation.

The district court's statements demonstrate that the court "carefully considered" the circumstances Casillas identified in support of his request for a dispositional departure and that the court properly exercised its discretion when imposing a presumptive sentence. *Pegel*, 795 N.W.2d at 255. There being no abuse of discretion, we affirm Casillas's sentence.

## III.

In his supplemental brief on remand, Casillas challenges—for the first time on appeal—the district court's calculation of his criminal-history score. Casillas argues that the district court erred by including a custody-status point in his score because the 2019 changes to the sentencing guidelines eliminated the custody-status point for offenders who are discharged early from probation. *See State v. Robinette*, 944 N.W.2d 242, 249 (Minn. App. 2020), *review granted* (Minn. June 30, 2020). Casillas also argues that the district court improperly included multiple points for convictions that arose from a single behavioral incident. *See* Minn. Sent. Guidelines cmt. 2.B.107 (2016). The state counters that because Casillas did not raise those issues at the sentencing hearing or in his direct appeal to this court, this court should not consider them.

This court generally will not consider issues that are raised for the first time on appeal. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). But a defendant may challenge the calculation of his criminal-history score at any time because a defendant cannot waive or forfeit proper calculation of his criminal history. *See State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007); *see also* Minn. R. Crim. P. 27.03, subd. 9.

Although Casillas has not forfeited a challenge to the calculation of his criminal-history score, the scope of this remand is limited by the supreme court's directive that this court consider the issues that were raised but undecided in Casillas's direct appeal to this court. Courts have a duty "to execute the mandate of the remanding court strictly according to its terms." *Duffey v. Duffey*, 432 N.W.2d 473, 476 (Minn. App. 1988). Because Casillas did not challenge the district court's calculation of his criminal-history score in his direct

appeal to this court, that issue is beyond the scope of this remanded appeal. We therefore do not consider it. However, our refusal to do so does not prevent Casillas from initiating a challenge to his criminal-history score in district court, in accordance with the relevant legal requirements.

**Affirmed.**