ELECTRONICALLY FILED SEP 09, 2026 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA
Supreme Court No. 26–0432
Wapello County No. FECR015160

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAMES E. WULFF,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR WAPELLO COUNTY
THE HON. SUSAN COLE, JUDGE

BRIEF OF APPELLEE

BRENNA BIRD
Attorney General of Iowa

LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
Louie.Sloven@ag.iowa.gov

STEVIEE GROVE
Wapello County Attorney

SCOTT HASTINGS
Assistant Wapello County Attorney

ATTORNEYS FOR PLAINTIFF–APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW 3

ROUTING STATEMENT 6

NATURE OF THE CASE 6

STATEMENT OF THE CASE 7

JURISDICTIONAL STATEMENT 11

ARGUMENT 11

I. The district court was correct that Wulff's motion to dismiss the enticement charge is foreclosed by the plain language of section 710.10(2). 11

II. Wulff's challenge to the ruling on his motion to dismiss the charge under section 728.2 is moot, because that charge was already dismissed. Moreover, even if it were not moot, he could not establish error in that ruling. 18

CONCLUSION, ... 24

REQUEST FOR NONORAL SUBMISSION 24

CERTIFICATE OF COMPLIANCE 25

TABLE OF AUTHORITIES

Federal Case

United States v. Broussard, No. 23-30126, 2024 WL 2746969 (5th Cir. May 29, 2024) 22

United States v. Scott, 884 F.2d 1163 (9th Cir. 1989) 22

State Cases

Brakke v. Iowa Dep't of Nat. Res., 897 N.W.2d 522 (Iowa 2017) 14

Homan v. Branstad, 864 N.W.2d 321 (Iowa 2015) 23

In re Doe, 855 A.2d 1100 (D.C. 2004) 16

Iowa Individual Health Benefit Reins. Ass'n v. State Univ. of Iowa, 999 N.W.2d 656 (Iowa 2023) 13, 14

Johnston v. Iowa Dep't of Transp., 958 N.W.2d 180 (Iowa 2021) 15

Lamasters v. State, 821 N.W.2d 856 (Iowa 2012) 11, 18

Lovato v. State, 901 P.2d 408 (Wyo. 1995) 22, 23

State v. Bailey, 2 N.W.3d 429 (Iowa 2024) 12

State v. Castillo, 512 N.W.2d 827 (Iowa Ct. App. 1993) 9, 10, 19, 20, 21

State v. Conkright, No. 25–0555, 2026 WL 2427666 (Iowa Ct. App. Aug. 19, 2026) 14, 15, 17

State v. Davila, 129 A.3d 1099 (N.J. Super. Ct. 2016) 22

State v. Gonzalez, 718 N.W.2d 304 (Iowa 2006) 12

State v. Guider, No. 24–1675, 2026 WL 1329705 (Iowa Ct. App. May 13, 2026) 18

State v. Lind, 37 N.W.3d 23 (Iowa 2026) 11, 15, 16, 18

State v. McClain, 20 N.W.3d 488 (Iowa 2025) 11

State v. McCullah, 787 N.W.2d 90 (Iowa 2010) 13

State v. Pagliai, 30 N.W.3d 226 (Iowa 2026) 16

State v. Quinn, 691 N.W.2d 403 (Iowa 2005) 9

State v. Scullark, 23 N.W.3d 49 (Iowa 2025) 11

State Statutes

2001 Iowa Acts ch. 17, § 3 14

2023 Iowa Acts ch. 74, §§ 1–3 15

Iowa Code § 710.10(2) 6, 9, 12, 13, 17

Iowa Code § 728.1(7)(g) 17

Iowa Code § 728.2 ..... 10, 19, 20, 21

Iowa Code § 728.12(1) 12, 17

Iowa Code § 728.15 12

Iowa Code § 814.6 11

State Rules

Iowa R. Crim. P. 2.8(2)(b)(9) 22

Wyo. R. Crim. P. 11(a)(2) 22

Other Authorities

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 132 (2012) 14

Wayne LaFave, *Substantive Criminal Law* § 11.5(a)(2) (updated Oct. 2024) 16

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Wulff thought he was propositioning a 13-year-old girl whom he met on the internet. It was really a member of Bikers Against Predators, who turned Wulff in to police. Wulff moved to dismiss the ensuing charge of enticement under section 710.10(2), because the person was neither a minor nor law enforcement. The district court overruled that motion to dismiss, because the statute criminalizes "entic[ing] or attempt[ing] to entice a person reasonably believed to be under the age of sixteen." Did it err?

II. Wulff also challenges the ruling that overruled his motion to dismiss a charge under section 728.2, for disseminating obscene material to a minor. But that charge was dismissed as part of the plea agreement. So is his challenge moot?

ROUTING STATEMENT

Wulff requests retention. *See* Def's Br. at 7. There's technically an issue of first impression here, but it is not a "substantial" one. *See* Iowa R. App. P. 6.1101(2)(c). The plain language of the statute controls. This appeal can be resolved by applying established legal principles, so transfer is appropriate. *See* Iowa R. App. P. 6.1101(3)(a).

NATURE OF THE CASE

This is James E. Wulff's direct appeal from his conviction (following a conditional guilty plea) on one charge of enticing or attempting to entice a person reasonably believed to be under the age of sixteen, a Class D felony, in violation of Iowa Code section 710.10(2) (2024).[1] He moved to dismiss the charge, because (unbeknownst to him) the person on the receiving end of his messages was neither a minor nor a law enforcement officer. But the court overruled his challenge, because section 710.10(2) is violated when the enticement is directed at "a person reasonably believed to be under the age of sixteen *including* a law enforcement officer or agent posing as a minor." *See* D0028, MTD Ruling (4/23/25), at 2–3 (quoting Iowa Code § 710.10(2)).

---

[1] Wulff was also convicted (by guilty plea) on one charge of assault on a correctional officer, an aggravated misdemeanor, in violation of Iowa Code section 708.3A; and one charge of interference with official acts, a simple misdemeanor, in violation of Iowa Code section 719.1(1)(b).

Wulff entered a conditional guilty plea. *See* D0041, Conditional Plea (12/4/25); D0052, Plea Agreement (3/5/26) (giving prosecutor's consent). Wulff was sentenced to a term of incarceration on each conviction, all set to run consecutively for an aggregate term of 7 years and 30 days. *See* D0053, Sentence (3/5/26); *accord* D0052, Plea Agreement, at 1–2.

Wulff appeals. He challenges the ruling on his motion to dismiss that enticement charge, because the person whom he enticed (or tried to entice) was neither a minor nor a law enforcement officer. But the State alleged that he enticed or attempted to entice a person whom he "reasonably believed" was under the age of sixteen, which is a violation of section 710.10(2). The plain language of the statute forecloses Wulff's challenge.

Wulff also challenges the ruling that denied his motion to dismiss a charge of disseminating obscene material to a minor (originally Count III). But that charge was subsequently dismissed. The remedy that Wulff seeks on that challenge is dismissal of an already-dismissed charge. *See* Def's Br. at 24. So his claim of error in that ruling is moot and non-reviewable.

STATEMENT OF THE CASE

In the minutes of testimony, the State alleged that Wulff had been sending pictures of his erect penis to a Facebook user who was purporting to be a thirteen-year-old girl. In reality, the account was being operated by

someone affiliated with a civilian vigilante group (Bikers Against Predators). A representative from the group reported this to Ottumwa Police. *See* D0015, Minutes (2/28/25), 6–7. When officers located Wulff and asked him about his interactions with that user, Wulff "acknowledged that he sent images of his penis to the underaged female." He also told them "that he believed the account belonged to a fifteen year old." *See id.* at 7. Later, officers obtained a search warrant, found his Facebook messages, and confirmed that Wulff had "sent multiple photos of his erect penis and genitals to the 13 year old female account." *See id.* And [Wulff] also sent her messages that would have "enticed [her] to send nude pictures to Wulff." *See id.* at 7–8.

The State charged Wulff with attempted enticement in violation of section 710.10(2) and disseminating obscene material to a minor in violation of section 728.2. *See* D0017, Trial Information (2/28/25).[2] Wulff moved to dismiss those charges. He argued that section 710.10(2) only criminalizes an attempt to entice a child or a law enforcement officer posing as a child. *See* D0021, Motion to Dismiss (3/11/25), 1–2. He also argued that section 728.2

[2] It also charged Wulff with assault on a peace officer causing injury and interference with official acts causing injury, arising out of events that occurred while officers tried to transport him to a hospital for an evaluation of suicide risk. *See id.* As part of the plea agreement, Wulff pled guilty to the assault charge and pled guilty to a lesser offense on the interference charge. Those charges/convictions are not being challenged and are not at issue in this appeal. *See generally* Def's Br. at 12–24.

lacks any language that applies to circumstances "where a Defendant is not in fact engaging with a minor." *See id.* at 2. The State resisted. It pointed out that section 710.10(2) "criminalizes attempts to entice a person reasonably believed to be under the age of sixteen." *See* D0023, Resistance (3/24/25), 2 (citing *State v. Quinn*, 691 N.W.2d 403 (Iowa 2005)). And it argued that "a person may be convicted of disseminating or exhibiting obscene material to minors even when no minor actually observes the obscene material." *See id.* at 3 (citing *State v. Castillo*, 512 N.W.2d 827 (Iowa Ct. App. 1993)).

After a hearing on the motion to dismiss, the district court ruled that the plain language of section 710.10(2) criminalizes "attempts to entice a person reasonably believed to be under the age of sixteen *including* a law enforcement officer or agent posing as a minor under the age of sixteen." *See* D0028, MTD Ruling, at 2 (quoting Iowa Code § 710.10(2), emphasis added by district court). And because the term "including" was "inclusive, not limiting," the court rejected Wulff's claim that he could only be charged under that statute if the person whom he reasonably believed to be a minor and attempted to entice was a law enforcement officer (or an actual minor). *See id.* at 2–3. It also rejected Wulff's motion to dismiss the charge under section 728.2, because sending pictures of his penis to that purported minor counted as "the exhibition of obscene material so that it can be observed by

a minor." *See id.* at 4 (quoting Iowa Code § 728.2). The court compared this to *Castillo*, in which "the offender was communicating with adult members of law enforcement, but he believed he was communicating with a minor"—and the Iowa Court of Appeals rejected a similar challenge to the conviction because the attempts to send that material to a minor had still violated "the latter portion of the statute" which "prohibits dissemination or exhibition of obscene material at a location where a minor *could* observe it." *Id.* (quoting *Castillo*, 512 N.W.2d at 829). So it denied Wulff's motion to dismiss, in toto.

After that ruling, the parties reached a plea deal. The State dismissed the obscenity charge under section 728.2. (It also amended one of the other charges down from a serious misdemeanor to a simple misdemeanor). Wulff pled guilty to attempting to entice a minor under section 710.10(2). But the parties agreed that Wulff could enter a conditional guilty plea "so that he can appeal the ruling on [his] motion to dismiss." *See* D0052, Plea Agreement; D0041, Conditional Plea; D0040, Written Guilty Plea (12/4/25), at 3.

JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction "over only conditional guilty pleas that comply with [section 814.6] and when the appellate adjudication of the reserved issue is in the interest of justice." *See* Iowa Code § 814.6. Generally, appellate adjudication of issues that the parties intended for a defendant to be able to raise on appeal is "in the interest of justice." *See State v. Scullark*, 23 N.W.3d 49, 53 (Iowa 2025); *accord State v. McClain*, 20 N.W.3d 488, 495 (Iowa 2025) ("Generally, after the State agrees to the conditional plea in district court, it should not be contesting jurisdiction on appeal."). So the State agrees with Wulff that this Court has jurisdiction.

ARGUMENT

I. The district court was correct that Wulff's motion to dismiss the enticement charge is foreclosed by the plain language of section 710.10(2).

Preservation of Error

Wulff raised this challenge below. *See* D0021, Motion to Dismiss, 1–2. The ruling that considered and rejected that challenge preserved error. *See* D0028, Ruling, 2–3; *Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

Standard of Review

Rulings on questions of statutory interpretation and on motions to dismiss charges are reviewed for "correction of errors at law." *See State v. Lind*, 37 N.W.3d 23, 27 (Iowa 2026).

Merits

On a motion to dismiss, courts "accept the facts alleged by the State in the trial information and minutes as true." *See id.* at 27–28 (quoting *State v. Bailey*, 2 N.W.3d 429, 436 (Iowa 2024). Dismissal is improper if "the facts the State has alleged charge a crime as a matter of law." *Id.* at 28 (quoting *State v. Gonzalez*, 718 N.W.2d 304, 307 (Iowa 2006)).

Wulff's argument is that the minutes fail to allege a crime because "the plain language of section 710.10(2)" limits it to apply only to scenarios where the person "reasonably believed to be a minor" is "a law enforcement officer or agent posing as a minor." *See* Def's Br. at 13–18. This argument ignores the actual text of the statute. It applies to all intent-infused attempts to entice "a person reasonably believed to be under the age of sixteen *including* a law enforcement officer or agent posing as a minor under the age of sixteen." *See* Iowa Code § 710.10(2) (emphasis added). So by its plain language, the statute applies to all attempts in which the defendant reasonably believes that they are enticing (or trying to entice) someone under the age of sixteen. That set includes—but is not limited to—situations where a law enforcement officer is "posing as a minor" and no actual minor exists. If the legislature meant to limit the scope of section 710.10(2) to *only* real minors and law enforcement sting operations, it could have done so—it knows how. *See, e.g.*, Iowa Code

§ 728.15 ("A person shall not knowingly disseminate obscene material by the use of telephones or telephone facilities to a minor or a law enforcement officer or agent posing as a minor."); *id.* at § 728.12(1) (prohibiting acts that "cause a minor or a law enforcement officer or agent posing as a minor to engage in a prohibited sexual act"). But it wrote this statute differently. It chose to preface that clause about law enforcement with a non-exhaustive term of inclusion. That evinces intent *not* to exclude attempts that are not described by that clarifying example, but still fall within the specified class of acts where an offender "reasonably believed" they were enticing a minor. *See* Iowa Code § 710.10(2). That deliberate choice to use different language confirms what was already obvious from the plain language, itself: section 710.10(2) *includes* attempts to entice undercover law enforcement agents, but it is not limited to *only* those attempts. It includes others, too.

The Iowa Court of Appeals recently considered an identical challenge to a prosecution under section 710.10 in a factually similar case. It rejected that challenge because the plain language of the statute was unambiguous.

> When interpreting statutes, a threshold question is whether the provision is ambiguous. *E.g.*, *State v. McCullah*, 787 N.W.2d 90, 94 (Iowa 2010). Our supreme court has recognized the term "'including' can have different meanings depending on context." *Iowa Individual Health Benefit Reins. Ass'n v. State Univ. of Iowa*, 999 N.W.2d 656, 665 (Iowa 2023). Based on context, it can mean either that the terms following are illustrative of the category, or it can be "an exhaustive (and

> restricted) list of the only types within a category." *Id.* (cleaned up). But, as a leading treatise notes, "[T]he word include does not ordinarily introduce an exhaustive list, while comprise … ordinarily does." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 132 (2012).
>
> We conclude section 710.10 is unambiguous in context here. The natural reading of section 710.10(2) criminalizes attempts to entice "a person reasonably believed to be under the age of sixteen" and such persons "includ[e]" but are not limited to "a law enforcement officer or agent posing as a minor under the age of sixteen." We reject Conkright's argument that the statutory language "including a law enforcement officer" creates an exclusive list. Because the full universe of covered persons under the statute is "a person reasonably believed to be under the age of sixteen" and the "including" language modifies that entire universe, Conkright's argument would place actual minor victims beyond the statute's reach. This is an absurd result the General Assembly did not intend. *See Brakke v. Iowa Dep't of Nat. Res.*, 897 N.W.2d 522, 534–40 (Iowa 2017) (generally discussing the absurdity doctrine in its multiple permutations). We see nothing in the statutory language that would exclude civilian members of Bikers Against Predators.

See State v. Conkright, No. 25–0555, 2026 WL 2427666, at *2 (Iowa Ct. App. Aug. 19, 2026). All of that is correct, and nothing in Wulff's brief overcomes that straightforward analysis of the plain text of the statute.

Conkright added that, even if there were some ambiguity to be found in the statute's text, there would still be no way to infer any intent to *limit* the statute's reach from the 2023 enactment that added the language at issue:

> Even if the statute was ambiguous, we broadly agree with the State's observation that the statutory history of the section shows a trend toward expansion—from covering only actual minors to including those reasonably believed to be minors—rather than contraction. *See* 2001 Iowa Acts ch. 17, § 3.

> We recognize our holding may invite questions as to whether the 2023 amendment was functionally surplusage. Perhaps. But the General Assembly could have reasonably wished to clarify the statute given the dearth of published authority directly on point. "[B]elt-and-suspenders caution" is a legitimate legislative endeavor to ensure an intended outcome. *Johnston v. Iowa Dep't of Transp.*, 958 N.W.2d 180, 186 (Iowa 2021) (citation omitted). And we are cognizant that legislation is sometimes prompted by adverse district-court rulings we never see. We also think the belt-and-suspenders approach makes sense given the context of the bill containing the 2023 amendment: it was part of a broader omnibus act amending multiple criminal offenses to ensure undercover officers posing as minors fell within the scope of those offenses. *See* 2023 Iowa Acts ch. 74, §§ 1–3. The General Assembly could have reasonably wanted to prevent courts drawing a negative inference from the amendment omitting section 710.10. *See* [*Lind*, 37 N.W.3d at 36] (drawing such a negative implication from the same act).
>
> In the end, we discern no error in the district court's ruling and affirm that section 710.10 reaches persons reasonably believed to be under the age of sixteen even if those persons are not undercover officers.

See Conkright, 2026 WL 2427666, at *2–3. That point about *Lind* is worth emphasizing: section 710.10(2) has the key language that was lacking in the human-trafficking statute in *Lind*, because it specifies that it applies when an offender "reasonably believes" that they are enticing a minor. *See Lind*, 37 N.W.3d at 35. This is the answer to any counterargument that this reading turns the language of the 2023 amendment into surplusage. That language is best understood as a means to ensure that section 710.10 avoided the fate of statutes like *Lind*'s that *didn't* receive this kind of polish (and ended up with a new proof-of-actual-victim requirement, as a result). *See id.* at 33–37.

Wulff's argument ends by invoking public policy concerns: "this court should avoid lay persons from taking the law into their own hands." *See* Def's Br. at 17–18. But "criminal law is purely a creature of statute," and diverging views on tradeoffs between policy priorities don't enable courts to disregard "what the legislature has created through the enacted text"—especially when the enacted text is plain and unambiguous. *See Lind*, 37 N.W.3d at 38 (citing *State v. Pagliai*, 30 N.W.3d 226, 228 (Iowa 2026)). If it were appropriate to consider policy, suffice to say that Wulff's conduct is equally dangerous and reprehensible whether the person operating the fake minor's account wears a badge or a sleeveless leather vest. *Cf.* Wayne LaFave, *Substantive Criminal Law* § 11.5(a)(2) (updated Oct. 2024) ("[I]t is clear as a matter of policy that no reason exists for exonerating the defendant because of facts unknown to him which made it impossible for him to succeed."); *In re Doe ("S.D.")*, 855 A.2d 1100, 1106 (D.C. 2004) (explaining that some attempts are criminalized and punished even when the attempt fails, because "the defendant's conduct, intent, culpability, and dangerousness are all exactly the same"). And nobody took the law into their own hands, here—the Bikers Against Predators turned the information over to local police. *Real* vigilante justice tends to occur when the law disclaims interest in stopping would-be predators—as Wulff argues it must, here. Fortunately, the plain text of section 710.10 says otherwise.

The district court was correct to reject Wulff's claim that section 710.10(2) only criminalizes an attempt to entice a person reasonably believed to be a minor if the person is a law enforcement officer/agent. The plain text of the statute is clear and unambiguous: the reach of the statute "includes" law-enforcement sting operations, non-exhaustively and non-exclusively—so it also extends to other attempts to entice an entity "reasonably believed" to be a minor. *See* Iowa Code § 710.10(2); *Conkright*, 2026 WL 2427666, at *2–3. Thus, Wulff's challenge to the district court's ruling fails.

Below, Wulff suggested that he also sought dismissal of this count on the grounds that "[his] messages at no time indicate meeting up or enticing [the purported minor] to a location." *See* D0066, MTD Transcript, 5:7–11. That argument wasn't ruled upon, and Wulff does not renew it on appeal. If preserved and renewed, it would still fail because the State alleged facts that proved enticement "with the intent to commit . . . sexual exploitation" of the purported minor. *See* Iowa Code § 710.10(2); *id.*, at § 728.12(1) (prohibiting sexual exploitation of a minor, which includes causing the minor to engage in "a prohibited sexual act" with knowledge/intent that it be photographed); *id.*, at § 728.1(7)(g) (defining "prohibited sexual act" to include "[n]udity of a minor for the purpose of arousing or satisfying the sexual desires of a person who may view a visual depiction of the nude minor"); D0015, Minutes, at 4

(alleging that Wulff asked the purported minor to send "naughty pictures" after sending her "multiple pictures of his erect penis"); *State v. Guider*, No. 24–1675, 2026 WL 1329705, at *2–3 (Iowa Ct. App. May 13, 2026) (finding evidence sufficient to support conviction for sexual exploitation when it showed defendant "requested nude photos" from minor victim). There is no need to consider that abandoned claim any further.

II. Wulff's challenge to the ruling on his motion to dismiss the charge under section 728.2 is moot, because that charge was already dismissed. Moreover, even if it were not moot, he could not establish error in that ruling.

Preservation of Error

Wulff is reprising the challenge that he raised below. *See* D0021, Motion to Dismiss, 2–3. The ruling that considered and rejected that claim preserved error. *See* D0028, Ruling, 4; *Lamasters*, 821 N.W.2d at 864.

Standard of Review

Again, rulings on statutory interpretation and rulings on motions to dismiss charges are reviewed for "correction of errors at law." *See Lind*, 37 N.W.3d at 27.

Merits

The district court ruled that, under *Castillo*, the State did not need to allege that a minor actually received the obscene material—it only needed to allege (and later prove) that the sending those images was an "exhibition of

obscene material so that it can be observed by a minor." *See* D0028, Ruling, at 4 (quoting Iowa Code § 728.2). And it noted that *Castillo* emphasized that it was not fatal to the charge that "no minor actually observed the defendant's obscene material," because *Castillo* held the statute "prohibits dissemination or exhibition of obscene material at a location where a minor *could* observe it." *See id.* (quoting *Castillo*, 512 N.W.2d at 827–29). Wulff argues that the facts alleged do not charge that offense because "it was only alleged that an adult viewed the materials in a non-public setting." *See* Def's Br. at 20–24. But it is irrelevant that an adult was the actual recipient. The State is alleging that Wulff exhibited the obscene material in Facebook messages that were sent to a profile that appeared to belong to a child. The inbox of an account that appears to belong to a child is "a location where a minor *could* observe" the obscene messages/images that Wulff sent. *See Castillo*, 512 N.W.2d at 829.

Wulff argues that *Castillo* is distinguishable because the defendant in *Castillo* "was placing the obscene material in public places," which violated the statute because "[*a*]*nyone* could find his notes and videotapes." *See* Def's Br. at 22–23. But a closer reading of *Castillo* reveals that the location of the disseminated material is a red herring. The relevant part of *Castillo* says:

> The issue defendant raises is whether Iowa Code section 728.2 is intended to apply to a defendant who, with every intention to consummate a violation, unwittingly disseminates the materials to adult police detectives, an act not prohibited by law.

> [. . .]
>
> The district court found, in response to an anonymous invitation on a cement slab near the Lime Creek Nature Trail to "leave me a blank video and I will tape myself naked for you", Mason City police officers initiated correspondence with the author in the name of a fictitious blond-haired 15–year–old by the name of David Johnson. In one note, defendant expressed hope that Johnson was "10—11—12—13—14 years old" and a desire to engage in oral sex with the youngster. While police did recruit a 15–year–old boy for the purpose of retrieving any materials left by defendant, all three items determined by the district court to constitute obscene materials were discovered by adult police officers.
>
> Defendant argues even if he intended to disseminate obscene material to a minor so it could be observed by the minor, and he took steps toward fruition of his intent, no crime was completed because "David Johnson" was not a minor, but a collection of adult police officers.
>
> [. . .]
>
> The State argues had the legislature stopped after the phrase "knowingly disseminates or exhibits obscene material to a minor", defendant's argument would be meritorious because no minor actually observed defendant's obscene material, but the latter portion of that statute prohibits dissemination or exhibition of obscene material at a location where a minor *could* observe it. We agree with the State and affirm on this issue.

Castillo, 512 N.W.2d at 528–29. The fact that the trail was a public place was not the *sine qua non* of that holding. The text of statute itself doesn't focus on location—rather, it focuses on the act of exhibiting/disseminating obscene material "so that" a minor could observe it. *See* Iowa Code § 728.2. This creates liability for a failed attempt (applicable only to those attempts that reached consummation of the actual act of exhibition or dissemination).

Castillo described the defendant's claim as an attempt to assert a defense of factual impossibility—that "no crime was completed because 'David Johnson' was not a minor, but a collection of adult police officers." *See Castillo*, 512 N.W.2d at 529. And it rejected that claim because the defendant committed the proscribed act ("exhibition of obscene material") and committed it with the proscribed specific intent ("so that it can be observed by a minor"). *See id.* (quoting Iowa Code § 728.2). This part of the statute does not require that any minor actually observe or receive the obscene material. It also doesn't add a public-location requirement. A defendant who posts obscene material in an invite-only gallery and sends an exclusive invitation to someone posing as a child commits the proscribed offense—even though, unbeknownst to him, it is not possible to cause a child to view that material by sending the invitation to the recipient whom he chose—because he has exhibited obscene material "so that it can be observed by a minor." *See* Iowa Code § 728.2. It makes no difference if that invite-only gallery is a set of prints/drawings on a wall, or a set of picture files sent to a particular user account (as the State alleged here). Indeed, the fact that the exhibition/dissemination was targeted at a person believed to be a child and sent via *private* message is clearer evidence of the proscribed specific intent to exhibit that obscene material "so that it can be observed by a minor"—to the exclusion of anybody else. *See id.*

Of course, this controversy is now academic because the charge under section 728.2 has been dismissed. The remedy that Wulff seeks is dismissal of a charge that was already dismissed. *See* Def's Br. at 24; D0053, Sentence, at 4. There is a split of authority on whether challenges to a ruling affecting a dismissed charge become moot when raised on appeal from a conditional guilty plea to other charges. Two federal courts to consider the issue found that the challenges were not moot. *See United States v. Scott*, 884 F.2d 1163, 1164–65 (9th Cir. 1989); *United States v. Broussard*, No. 23-30126, 2024 WL 2746969 (5th Cir. May 29, 2024). But the prevailing view among state courts in jurisdictions with similar rules on conditional guilty pleas supports the rule that "if a pre-trial motion only affects a dismissed count, an appeal of that pre-trial motion presents a moot, non-justiciable question"—even if there was a conditional guilty plea that purports "to preserve [a] right to appeal the pre-trial motion relating only to a dismissed count of the indictment." *See State v. Davila*, 129 A.3d 1099, 1104–06 (N.J. Super. Ct. 2016); *Lovato v. State*, 901 P.2d 408, 410–411 (Wyo. 1995).[3] The Wyoming Supreme Court explained this logic in a case with a similar posture to this one—an appeal involving challenges to multiple counts, some already dismissed:

---

[3] Like Iowa, these jurisdictions have rules on conditional guilty pleas that mirror Federal Rule of Criminal Procedure 11(a)(2). *See* Iowa R. Crim. P. 2.8(2)(b)(9); Wyo. R. Crim. P. 11(a)(2);

> [T]hree indecent liberties counts which had been filed against Appellant have been dismissed with prejudice. Our decision will not have any effect on Appellant's position as to those counts, and Appellant has not suffered an injury with respect to those counts. Appellant conditioned his guilty plea on his right to appeal from the district court's denial of his motion to dismiss. He did not specify that he wanted to include an argument in his appeal with regard to the dismissed counts. He was, therefore, afforded the benefit of his bargain when he was allowed to appeal from the motion to dismiss as to the count to which he pleaded guilty. This ruling allows us to give effect to our traditional law on justiciability and mootness without unduly limiting the plea agreement process. Accordingly, we will restrict our review in this case to the issues as they pertain to Count III.

Lovato, 901 P.2d at 411. So too, here—Wulff's conditional guilty plea did reserve his right to challenge "the ruling on [his] motion to dismiss," but it was bereft of language that specifically reserved a challenge to that ruling on the already-dismissed count. *See* D0052, Plea Agreement, at 1; D0041, Conditional Plea; D0040, Written Guilty Plea, at 3. This Court can honor that agreement by exercising jurisdiction and resolving his live challenge to the ruling that declined to dismiss the charge on which he stands convicted, which is the only challenge on which it can grant any meaningful relief. The State already agreed to dismissal of the charge under section 728.2, and the district court already entered that dismissal. So an opinion on the correctness of the pre-trial ruling on this charge would be without "force and effect with regard to the underlying controversy." *See Homan v. Branstad*, 864 N.W.2d 321, 328 (Iowa 2015). Because that ruling is moot, this Court should let it lie.

CONCLUSION,

The State respectfully requests this Court reject Wulff's first challenge, declare his second challenge moot, and affirm his conviction and sentence.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

BRENNA BIRD
Attorney General of Iowa



LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
Louie.Sloven@ag.iowa.gov

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(g) and 6.903(1)(i)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **4,768** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(i)(1).

Dated: September 9, 2026

LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
Louie.Sloven@ag.iowa.gov