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G.R. No. 247348 – *Christian Cadajas y Cabias v. People of the Philippines*

Promulgated:

November 16, 2021

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CONCURRING OPINION

LAZARO-JAVIER, *J.*:

Prefatory

The evidence **proved beyond reasonable doubt** that petitioner is **guilty** of **child pornography** as defined and penalized by Section 4(c)(2)[1] of Republic Act No. 10175[2] (RA 10175) in relation to Sections 4(a),[3] 3(b)[4] and (c)(5)[5] of Republic Act No. 9775 (RA 9775).[6]

RA 9775 criminalizes **child pornography**, or the *creation of any visual and/or audio* ***representation of a child lasciviously exhibiting*** *the latter's genitals, buttocks, breasts, pubic area, and/or anus* to **prevent children** from being hired, employed, used, **persuaded**, **induced**, or **coerced** to **create** or **produce pornographic** materials. It addresses the **power imbalance** between children and adults.

By using the words ***persuade*** and ***induce*** as criminal modes of perpetrating **child pornography**, RA 9775 speaks **not only** to the **prevention** of **actual** and **explicit sexual exploitation** or **abuse** of

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[1] Section 4. Cybercrime Offenses. — The following acts constitute the offense of cybercrime punishable under this Act x x x (c) Content-related Offenses x x x (2) Child Pornography. — The unlawful or prohibited acts defined and punishable by Republic Act No. 9775 or the Anti-Child Pornography Act of 2009, committed through a computer system: Provided, That the penalty to be imposed shall be (1) one degree higher than that provided for in Republic Act No. 9775.

[2] An Act Defining Cybercrime, Providing for the Prevention, Investigation, Suppression and the Imposition of Penalties Therefor and for Other Purposes [CYBER CRIME PREVENTION ACT OF 2012].

[3] Section 4. Unlawful or Prohibited Acts. - It shall be **unlawful for any person**: (a) To hire, employ, **use, persuade, induce** or coerce a child **to perform in the creation** or production of any form of **child pornography** x x x.

[4] Section 3. Definition of Terms. – x x x (b) "Child pornography" refers to **any representation**, whether visual, audio, or written combination thereof, by electronic, mechanical, digital, optical, magnetic or any other means, **of child engaged or involved in real or simulated explicit sexual activities** x x x.

[5] (c) **"Explicit Sexual Activity"** includes actual or simulated – x x x (5) **lascivious exhibition of the genitals**, buttocks, **breasts, pubic area** and/or anus x x x.

[6] An Act Defining the Crime of Child Pornography, Prescribing Penalties Therefor and for Other Purposes [ANTI-CHILD PORNOGRAPHY ACT OF 2009].

children, **but also** to their **protection** from **"explicit sexual activities"**[7] with adults, **with** or **without evidence** of **exploitation** or **abuse**. This is because the **power imbalance** and its consequences **deem** *"explicit sexual activities"* between an adult and a **child** to be *always* **inherently harmful** and *always* **inherently exploitative**. Our law **treats children differently** from adults precisely because they are **immature, impulsive,** and **lack judgment**. The Court **must** recognize and treat the crime of **child pornography** with these considerations in mind.

Thus, this crime involves *not only* child pornography **as a business** or **practice** *but also* child pornography **as a result** of coercion, **persuasion,** or **inducement** arising from romantic relationships though the pornographic material be only **originally intended** for the coercer's or inducer's private viewing. RA 9775 makes **no distinction** between them as regards their **criminal** nature – both are criminal **child pornography**.

This **definition** of **child pornography** and the **intent** behind its criminalization are **reflected** in the **elements** of this crime: (1) the complainant is a **child**; and (2) the complainant was **victimized** by **persuading, inducing,** or coercing them[8] to **perform** in the **creation** or production of **any form of child pornography**. Note that the second element is about **persuasion, inducement,** or **coercion** and **not about *consent* per se**. Where the **consent** is the **effect** of **persuasion, inducement,** or **coercion**, the **consent** is a mere **ostensible consent** that the law **does not recognize** and which **does not exempt one from criminal liability**.[9]

RA 9775 defines a **child** as someone regardless of gender affiliation or non-affiliation who is below 18 years of age. Indisputably, the **complainant here was a child** when the subject incident happened – she was then **only 14 years old**.

The **contentious element** is whether petitioner **persuaded** or **induced** the 14-year old girl to expose her private parts on Facebook Messenger. The **issue** is **not whether** she **consented** – she might have had, **but** as the prosecution evidence showed, the **consent** was **brought about** by **petitioner's persuasion** or **inducement**.

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[7] Supra note 5.

[8] I use "them" to indicate gender neutrality, non-binary identification, and also non-affiliation.

[9] *Bangayan v. People*, G.R. No. 235610, September 16, 2020: "In explicitly stating that children deemed to be exploited in prostitution and other sexual abuse under Section 5 of R.A. 7610, refer to those who engage in sexual intercourse with a child "for money, profit, or any other consideration or due to the coercion or influence of any adult, syndicate or group," it is apparent that **the intendment of the law is to consider the condition and capacity of the child to give consent.** x x x. An individual who engages in sexual intercourse with a child, at least 12 and under 18 years of age, **and not falling under any of these circnmstances**, cannot be held liable under the provisions of R.A. 7610. x x x. 'While Malto is correct that consent is immaterial in cases under R.A. No. 7610 where the offended party is below 12 years of age, We clarify that consent of the child is material and may even be a defense in criminal cases involving violation of Section 5, Article III of R.A. No. 7610 when the offended party is 12 years old or below 18, or above 18 under special circumstances. **Such consent may be implied from the failure to prove** that the said victim engaged in sexual intercourse either due to money, profit or any other consideration or **due to the** coercion or **influence of any adult**, syndicate or group.'

My Concurrence

I concur in the *ponencia* of Justice Jhosep Y. Lopez.

First. It is **highly speculative** that the 14-year old girl **would have sent** the pornographic photos to petitioner **even without** the **conversation** that took place between them. The fact is that the **conversation** took place. It is the **window** that **elucidates** on **why** the **child pornographic** materials were uploaded by the 14-year old girl and then viewed, downloaded and saved by petitioner.

What is **further troubling** about the assumption is it is **daubed** with *perhaps unconscious* biases about **gender roles**. The **unarticulated** but nonetheless **evident** thought process is that as the 14-year old carries the **scarlet** badge of **promiscuity**, she **cannot credibly claim** that she was **induced** to create pornographic photos of herself. This is the same as the antiquated and now rejected ***deeming*** belief that a slut or a woman spouse could never be raped because she is **deemed to have consented anyway**. There are **no data** to prove that women who are active in dating circuits do **not** require inducement or persuasion as they would **automatically** create pornographic materials of themselves. There is simply **no evidence** of this correlation.

Second. When we talk about the **persuasion** or **inducement** of a child to engage in sexually inappropriate behaviour, the **degree of causation** between the creation of the pornography and *petitioner's words*, *deeds,* and *other circumstances* allegedly constituting the inducement **cannot** be in terms of **absolute causation**. This is **because** proof beyond reasonable doubt has **never been** a **standard of absolute certainty**.[10] Rather, this standard only requires **moral certainty**.[11]

For me, the **test of causation** is if there is **moral certainty** that –

- *petitioner's words*, *deeds* and *other circumstances* **played a part** in the 14-year old girl's decision-making to exhibit her private parts to him on saved photographic platforms **without which she would have decided otherwise**, and,

- there were **no proven circumstances other than** and **independent of** *petitioner's words*, *deeds,* and *other circumstances*, **which to a reasonable person would have otherwise actually led her** to create the pornographic material.

Here, through petitioner's Facebook Messenger conversations with the 14-year old girl, the prosecution was **able to prove beyond reasonable**

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[10] *Locsin Jr. v. People*, G.R. Nos. 221787 and 221800-02, January 13, 2021, quoting *People v. Tadepa*, 314 Phil. 231, 236 (1995).
[11] *Id.*

doubt the element of **persuasion** or **inducement.** Precisely, this means that it was –

- *his words*, *deeds,* and *other circumstances* which made the 14-year old girl decide to exhibit her private parts to him on saved photographic, video, and audio platforms **without which she would have not done so**; and

- there were **no proven circumstances other than** *and* **independent of** *petitioner's words*, *deeds,* and *other circumstances*, **which to a reasonable person would have otherwise actually led her** to create the pornographic material.

For one, it would **really be both off and odd** for the 14-year old girl to **just undress** and **exhibit** her private parts to petitioner and in the process **memorialize her "explicit sexual activity"** as defined in RA 9775 through the internet **for nothing** and **out-of-the-blue. No reasonable person** would believe that she was doing so for reasons other than *and* independent of petitioner's *words*, *deeds,* and *other circumstances*.

The defense justifies that the 14-year old was **not induced** by the **24 year old** petitioner to make pornographic materials of herself on account of her **romantic relationship** with him.

But this justification only **begs the question.** It assumes the **absence of inducement** by referring to the **romantic relationship** when this **amorous connection** was **precisely** the **reason why she was persuaded** or **induced**, in fact **too easily seduced**, to **bare herself** to the bone. She would not have been in **that conversation** with petitioner *were it not* for their romance. In that conversation, **he urged her to show her private parts to him**. She **obliged** him precisely because *his words*, *deeds*, and *other circumstances*, consisting of **their relationship** and **conversation, lulled**, **persuaded**, **influenced,** or **induced** her to **consent** to do as he told her.

As I have stressed, the issue is **not** about the 14-year old girl's **consent**. The **real issue** is **how that consent came about** – was there **persuasion** or **inducement** which RA 9775 mentions as the **modes** of committing child pornography? The prosecution's evidence answered this issue beyond reasonable doubt by pointing to petitioner's *words*, *deeds,* and *other circumstances* as the very consideration why she consented to make pornographic materials of herself.

The defense and the trial court as regards the charge under Republic Act No. 7610 (RA 7610) also **attempted to insulate** petitioner from what the 14-year old girl ended up doing by **portraying her** as a **slut.** The **gist** of this defense is that it was not *petitioner's words*, *deeds,* and *other circumstances* which **persuaded** or **induced** her to produce the pornographic material **but her own lust** that made her do so. We are being

asked to believe that the **devil in her drove her to create her own pornographic materials**. This thinking can be **summed up** in **four words**: "**she asked for it.**"

I **object** to the premise of these assertions that **simply because** the 14-year old girl already had 5 boyfriends, it was **already automatic** for her to **create** her own **pornographic** material to *seduce* and *please* further her reluctant boyfriend. The **unstated argument** raised by this claim is the **myth** that **this victim is "unworthy."** It is akin to the **rape myth** that **"a slut cannot be raped."** The argument here as the rape myth has **no criminological data** to support a correlation between the prior sexual activities of a victim and the impossible likelihood of becoming a victim of **pornography** or sexual assault. Prostitutes or women active in dating circles are **no less likely to become victims** of pornography (*i.e.,* they need **no inducement** or **persuasion** as they would **automatically** and **readily** create pornography) or for that matter raped, than virgins.

This myth **all the more rings true** when the victim of pornography is a **child**. There are no **data, much less, evidence** that a *curiously promiscuous* child would **lay herself bare** to a male partner **without any inducement** or **persuasion** at all more than a *virgin* child would. **Invariably**, where there are incriminating **sexual conversations** between romantic partners where the female is a **child** and the male is an **adult of considerable age gap**, as in here, there will **always** be that **originator** and **persuader** behind every lewd or pornographic portrayal from the child to the adult. As explained elsewhere:

> It is likely that **exploitation will be present in every case of sexual interference EXCEPT**, possibly, where *the offence occurs in the context of a genuine relationship of mutual respect and affection between the complainant and the accused*, where *that relationship is of some considerable duration*, and **where the age difference between complainant and accused is not significantly greater than the five-year "close-in-age" defence** created by s. 150.1(2.1) (a) (i) of the Criminal Code [of Canada].[12] [Emphasis supplied.]

Thus, there is **logic** as to why RA 9775 and RA 7610 have both **included *inducement*** and ***undue influence*** as **criminal** means to perpetrate crimes against **children** by **adults**, especially where the **adult** is **considerably older**. It is **because children** are **easy prey** for cunning adults and **children's consent** are **not automatically accepted at face-value** – their consent is actually mere **ostensible consent** that the law **does not recognize** as **fully informed** and **knowing** and **freely exercised** as in the case of adults. Their **inability** to make *fully informed* and *knowing* and *freely exercised choices* is what **sets children apart** from adults.

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[12] R v Hajar, 2016 ABCA 222 (CanLII), https://canlii.ca/t/gsn4w, retrieved on 2021-11-01 (Alberta Court of Appeal, Canada).

Third. Bangayan v. People[13] supports the *ponencia* and my discussion above on the **irrelevance** of **consent** when it is obtained through an **adult's persuasion** and **inducement** as in the present case.

Bangayan articulates a **nuanced** and **contextual** interpretation of **consent** when given by **children 12 years old** and **below 18 years of age**. Though the discussion pertains to crimes under Section 5 (b) of RA 7610 where consent could be raised as a defense (since the crimes under Section 5 (b) are mere variants of rape and acts of lasciviousness of the Revised Penal Code), I believe that ***Bangayan's*** lessons are ***in pari materia***[14] with RA 9775, and therefore instructive toward a more meaningful understanding of its provisions, especially child pornography.

I will mention below the lessons on the **contextual analysis of consent** from ***Bangayan***:

1. Children 12 years old and below 18 years of age can **legally consent** to sexual activities.

2. But **consent** is **irrelevant** where the child acted as a result of **coercion, persuasion,** or **inducement.**

3. **Difference** and **lack of difference in age** may be an **indication** of coercion, persuasion, or inducement or the **lack** of it, and may **negate** or **prove** the presence of sexual consent.

4. There is a **need to distinguish** between a child under 12 years of age and one who is between 12 years old and below 18 years of age due to the **incongruent mental capacities** and **emotional maturity** of each age group.

5. We **cannot completely rule out** the capacity of a child between 12 years old and below 18 years of age **to give consent to sexual activities.**

6. **Scientific evidence** of children's (especially teenagers') psychology and predisposition is **relevant** in establishing the presence or absence of their valid consent to their sexual activities.

7. Where the **age** of the child is **close to the threshold age of 12 years** old, the evidence must be **strictly scrutinized** to determine the alleged **presence** of the child's consent to sexual activities.

8. The emotional maturity and predisposition of a child, whose **age is close to the threshold age of 12**, may significantly differ from a child aged between **15-18 years** who may be **expected to be more**

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[13] G.R. No. 235610, September 16, 2020.

[14] *i.e.*, they relate to the same person or thing or to the same class of persons or things, or object, or cover the same specific or particular subject matter.

mature and to act with **consciousness** of the consequences of **sexual activities**.

9. The **indubitable** presence of a **family set-up** (*i.e.,* having children of their own and the sexual contact is not incidental or not exploitative) in a **community** where its standards for marrying age is **lower** than the legal age under our statutes (*i.e.,* but in no instance below 12 years old) and the **inexplicable failure** of the child to testify **against** her adult partner in the criminal case and the apparent **support** of the child for her adult partner, as in ***Bangayan***, could potentially establish **valid consent** of the child to the sexual activities between her and her adult partner.

It is clear that our criminal statutes and the current trend of our jurisprudence on the sexual activities of children endeavor to strike a **balance** between **protecting children from the harms** associated with **sexual activities with adults** (*i.e.,* to protect young people from sexual exploitation) while **allowing teenagers** to engage in **sexual experimentation** and **relationships** with close-in-age peers and **only** in very exceptional cases with adults of considerable age gap (*i.e.,* to preserve their ability to have non-exploitative sexual contact). The **important** thing to remember, though, is that **by default,** the **inherent power imbalance** between adults and children **vitiates consensual sexual relations** between them.

Of course, the **ideal** situation is for **Congress** itself to **draw** a **bright-line age of protection** of X years, *say* **16 years** as some child rights advocates have long been pushing, **but** to carve out an **X-year close-in-age exception**, *say* **5-year close-in-age exception**, for non-exploitative conduct, where the **defense of consent** would be available.

But until then, we **must enforce** our child protection laws like RA 7610 and RA 9775 **without the binary gender role biases** and **with due consideration** to scientific evidence that **age sixteen (16)** is a **reasonable choice** for the **threshold age** for ***strictly scrutinizing the evidence*** of valid consent in part because of **evidence** that **14 and 15-year old children** were being **targeted** by **on-line** and **international predators**. This assertion is **supported** by the lessons we can draw from ***Bangayan***. Similarly, as our jurisprudence had started to recognize that **age difference** is a factor in determining valid consent, we may already **recognize** also a **close-in-age exception** for **non-exploitative sexual activity** between teenagers and their peers, and **draw** a **reasonable line of age difference** for teenagers to have appropriate relationships, including sexual relationships, **with other people** including **adults** up to, in the case of a 15-year-old, **age 20**. These **age-specific** references can also be justified by the lessons imparted by ***Bangayan*** and the case law it was built on.

As I have said, the **overarching framework** is that the protection for children is not simply from **sexual exploitation** but **also** from **explicit**

sexual activity or the **invitation** to **explicit sexual activity with adults.** This protection is necessary due to the **inherent power imbalance that undermines consent**, and because of the **physical** and **psychological consequences** of explicit sexual activity between a child and an adult stemming from that imbalance.

Once the object of RA 9775 and other child protection measures is **correctly understood**, it is clear that the **explicit sexual activity** in the present case between the 24-year-old petitioner and the 14-year-old complainant **fell within the type of conduct** that this statute intends to address.

This **police power** measure in criminal law is **not unreasonable**. The means is **not overbroad** or **arbitrary** in the sense that the means used is *no longer reasonably connected* to the end goal of addressing the harm of the power imbalance between adults and children engaged in sexual activities. After all, our statutes on the protection of children from inappropriate sexual activities already **recognize categorically** the **norm** that the **capacity to consent to sexual activity** is **not merely inherent** to the individual **but also relational.**[15] A child who, we **as a community,** would accept to have **validly consented** to explicit sexual activity **with a peer**, however, **cannot validly consent** to explicit sexual activity with an adult.[16] There is an **inherent power imbalance** between adults and young people, and **adults** are **expected to decline explicit sexual activity**, in fact **even mere amorous relationships**, as a result.[17]

Affirming petitioner's conviction is to **firmly recognize** the statutory purpose of correcting *such power imbalance*. This is important because it offers **clearest protection** to children who arguably need it the most – as expressed eloquently elsewhere, "those who have already been **forced to grow up too fast by the operation of misfortune, neglect, or prior abuse.** These are the **young people for whom it will be hard to see the exploitation**, especially where *they may have initiated the sexual activity*, or *otherwise appear to exercise agency* as it occurs x x x."[18]

Clearly, as **child pornography** has been defined as a crime, Congress has evidently concluded that **explicit sexual activities** with a child 12 years old and under 18 years of age are **inherently exploitative** in their own right, **unless** as held in ***Bangayan***, "in [the criminal case], there are [truly unique and] special circumstances that reveal the presence of [valid] consent of [the child]." **Actual exploitation** is **not** a requirement for this offense since Congress has already recognized that **adult/youth explicit sexual activities** are **inherently exploitative**.

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[15] R v T.A.S., 2017 SKQB 339 (CanLII) (Sasketchawan Court of Queen's Bench, Canada) <https://canlii.ca/t/hnx2d>, retrieved on 2021-11-01, quoting Professor Janine Benedet.
[16] *Id.*
[17] *Id.*
[18] *Id.*

Defining **child pornography** this way is intended **to better protect** 12-year olds and below 18-year olds from *coercion, influence, persuasion,* and *manipulation* by adults to engage in explicit sexual activities and from the **inherent harm** to children and society flowing from **premature** explicit sexual activities.[19] This object includes **as a rule** "protecting children from themselves, their own immaturity and premature sexual activity, regardless of whether they want to engage in sexual acts or think they do"[20] because they have been **persuaded** or **induced** to be inclined to so act. This goal privileges as well the fact that "the important and potentially life-altering decision to engage in sexual activity with others must be the product of true consent by individuals capable of giving such consent."[21]

Protecting this **extremely vulnerable segment** of our society from the harm of premature sexual relations **remains a legitimate objective** of Congress – there is **no violation** of due process and the right to equal protection **to deny** an adult the constitutionally protected right **to have explicit sexual activities** even with **consenting** children. Avoiding a criminal conviction for **child pornography** is **not** a **right** *much less* a **constitutional right, but** only a **matter of defense** which has to be proved on a case-by-case basis clearly and convincingly.

In the result, it is my respectful opinion that **this case was correctly decided.** It is **not unfair** to petitioner. The purpose of **child pornography** is to **protect 12-year old and below 18-year old children** from explicit sexual activities with adults because of the inherent power imbalance between them, and the harmful impact thereof. The definition of **child pornography** does **not include** any conduct that bears **no relation** to its **purpose**, and as such, is **not arbitrary** in any parts. On the contrary, there is a **rational connection** between the purpose of this criminal law and its elements.

My conclusion does **not** depend on any of petitioner's character, particularly, those which could have affected his willingness or ability to resist the 14-year old complainant's **further reactions after he had successfully persuaded** or **induced** her to exhibit her private parts. After all, his character weakness is **not** a **mental challenge** to exempt him from criminal responsibility. He **cannot avoid criminal responsibility** by his supposed naivete, weakness, and submissiveness.

In my view, the complainant was a **victim of the very power imbalance** ascribed by the law against **child pornography**. As a 24-year old dealing with a 14-year old girl, **he should have known better**. The explicit sexual activity of her **exhibiting her private parts over the internet**, in the manner that can be downloaded and saved for her children and grandchildren to see, *as a result of petitioner's words and deeds to*

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[19] *Id.*
[20] *Id.*
[21] *Id.*

***persuade or induce** her to do so*, was **inherently exploitative**. There were **no truly unique and special circumstances** to warrant the conclusion that she validly consented, that is, consented *without* petitioner's *persuasion* or *inducement*, and that there was no exploitation. There are now **no truly unique and special circumstances** to excuse him from the consequences of his acts. Just the same, we **cannot now start excusing people** from criminal liability just because they do **not** know what the law is on the matter.

Fourth. I commiserate with petitioner as to the stiff penalties he has to face. To my mind, the penalty of *reclusion perpetua* is **grossly disproportionate** to the crime he has committed. But there are **no arguments** against the **constitutionality** of these penalties. Hence, the Court **cannot set aside** or **nullify** them. It is also **not** within our **power to change** the penalties to suit what we view as proportionate penalties. Surely though, it is **incorrect** to **acquit** petitioner simply because we do **not** agree with the penalties.

Perhaps, he and his lawyer could **start a peoples' initiative to amend** RA 9775 and RA 10175 citing the **alleged incongruities** that these statutes may have already engendered. We also can **refer this matter** to the Executive Branch and Congress for their appropriate remedial action.

Fifth. I agree with the *ponencia* that **child pornography** is ***mala in se***. **But** this does **not** make petitioner **less guilty**.

He committed the acts constituting the crime's ***actus reus***. The complainant is a 14-year old girl, a **child**. He **persuaded** or **induced** her to **exhibit her private parts**, which **she did**. The **exhibition** was **done through** their respective **computers** and over the **internet**. These are the ***actus reus*** of **child pornography**.

As regards the ***mens rea***, the intent to **abuse** or **exploit the child victim** is **not required** to prove child pornography. As I have stated earlier, abuse or exploitation is **inherent** in **child pornography** when it has been shown that petitioner **persuaded** or **induced** the child to **exhibit** their[22] **private parts**. By using the words ***persuade*** and ***induce*** as criminal modes of perpetrating **child pornography**, RA 9775 speaks **not only** to the **prevention** of **actual** and **explicit sexual exploitation** or **abuse** of children, **but also** to their **protection** from "**explicit sexual activities**" with adults, **with** or **without evidence** of **exploitation** or **abuse**.

Thus, the ***mens rea*** required is merely the **intent** to do what petitioner precisely did – to **persuade** or **induce** the 14-year old girl **to create** the child pornography. It is the ***mens rea*** to do **voluntarily** the **persuasion** or **inducement**. By simply **persuading** or **inducing** the 14-year old complainant **to exhibit her private parts** over the internet,

[22] I use "their" to indicate gender neutrality, non-binary identification, and also non-affiliation.

petitioner **had** the necessary ***mens rea*** to be convicted of **child pornography**.

Conclusion

ACCORDINGLY, I vote in favor of the *ponencia*. Consistent with my view that the penalty of *reclusion perpetua* is grossly disproportionate to his crime, I **ask the Court to refer this matter at once** to the Executive Branch and Congress for their remedial action.

AMY C. LAZARO-JAVIER
Associate Justice