No. 129425

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, No. 2-21-0690
	)	
Plaintiff-Appellee,	)	There on Appeal from the Circuit
	)	Court of the Twenty-Second Judicial
v.	)	Circuit, McHenry County, Illinois,
	)	No. 19 CF 578.
	)	
KOREM M. JOHANSON,	)	The Honorable
	)	Michael E. Coppedge,
Defendant-Appellant.	)	Judge Presiding.

BRIEF OF PLAINTIFF-APPELLEE
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NATURE OF THE CASE

Following a McHenry County bench trial, defendant was found guilty of predatory criminal sexual assault of a child and sentenced to 16 years in prison and 3 years to life on mandatory supervised release (MSR). CI370.[1] The appellate court affirmed the judgment, A32, and defendant appeals from the appellate court's judgment.

ISSUE PRESENTED

The issue presented is whether the Class X felony penalty for predatory criminal sexual assault under 720 ILCS 5/11-1.40(a)(1), which prohibits a defendant from (1) touching a child with his sex organ or anus or (2) touching a child's sex organ or anus, comports with the proportionate penalties clause of the Illinois Constitution under the identical elements test because that offense does not have the same elements as aggravated criminal sexual assault under 720 ILCS 5/11-1.60(c)(1)(i), which carries a Class 2 felony penalty and prohibits a defendant from (1) having a child touch or fondle his sex organ, anus, or breast; (2) touching or fondling any part of a child's body; or (3) transferring semen onto a child's body.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315 and 602. This Court allowed leave to appeal on May 24, 2023.

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[1] Citations to defendant's appendix, the impounded common law record, the impounded report of proceedings, and defendant's opening brief appear as "A_," "CI_," "RI_," and "Def. Br. __," respectively.

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STATEMENT OF FACTS

Defendant was charged with four counts of predatory criminal sexual assault of a child for causing his eight-year-old daughter, A.J., and his five-year-old son, D.J., to touch defendant's penis with their hands and mouths. CI44-46. He was also charged with one count of aggravated criminal sexual abuse for massaging A.J.'s partially naked body for the purpose of sexual gratification or arousal. CI46. Finally, he was charged with (and pleaded guilty to) violating the Firearm Owner's Identification Card Act. CI47, 325.

Trial

D.J. and A.J.'s mom, Jamie Casas, testified that she was sitting on the couch one evening in July 2019 with her children when D.J. tried to kiss her breast. RI988. Casas told D.J. that it was inappropriate to touch people's private parts. RI988-89. D.J. responded, "Why? Daddy, lets me kiss his penis." RI989. Casas and defendant had divorced in 2018, but defendant watched D.J. and A.J. on weekday mornings while Casas was at work and occasionally hosted them overnight at his house. RI987. Two days later, Casas filed a police report, and a couple of days after that, she took A.J. to the Child Advocacy Center for an interview. RI991-92.

D.J., who was 8 years old at the time of defendant's bench trial, RI957, and A.J., who was 10, RI965, both testified. D.J. was largely unable to remember events related to the charges against his father, RI960-61, but A.J. testified that when Casas dropped her off at defendant's house to visit, A.J.

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would massage defendant's back, arms, legs, and "around his private area." RI969. She touched defendant's penis two or three times. RI978. Indeed, defendant admitted to his prison cellmate that he would have A.J. put a condom on defendant's penis and rub lotion on him. RI921-22.

Defendant testified on his own behalf. He denied ever having A.J. put a condom on him, RI1078, but admitted that A.J. touched his penis on multiple occasions. In December 2018, A.J. touched defendant's penis in the shower — contact that defendant testified A.J. initiated on her own. RI1080-81. A.J. touched defendant's penis again in July 2019. Defendant testified that he had taken off his shorts and laid down on the floor after A.J. asked to give him a massage. RI1083. The massage was like those that A.J. gave defendant almost every evening when she stayed over, with A.J. massaging defendant's legs, back, and "butt" with lotion. RI1083, 1085. Eventually, defendant turned over — so that he was lying naked on his back — and A.J. "massaged up to [his] thighs and then all of a sudden got up and ran away." RI1087. About 30 seconds later, she returned "wearing latex gloves, put[ ] lotion on the gloves, [and] touche[d] [his] testicles." *Id.* Defendant said he then put on his shorts, and A.J. continued massaging his stomach and arms. *Id.*

The trial court found defendant guilty of one count of predatory criminal sexual assault of a child based on contact between A.J.'s hand and defendant's penis. RI1152-53. The trial court found him not guilty of the

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remaining counts of predatory criminal sexual assault of a child, RI1149, 1150-51, 1153, and aggravated criminal sexual abuse for massaging A.J., RI1156. The court sentenced defendant to 16 years in prison and 3 years to life on MSR. CI370.

Appeal

On appeal, defendant argued that his Class X sentence for predatory criminal sexual assault of a child violates the proportionate penalties clause of the Illinois Constitution because predatory criminal sexual assault of a child has identical elements to aggravated criminal sexual abuse, which is sentenced as Class 2 felony. A21. The appellate court held that the two offenses do not have identical elements because the "sexual conduct" element of aggravated criminal sexual abuse "is much broader than the conduct prohibited in the predatory-criminal-sexual-assault statute." A27. The court further held that it was of no matter that defendant's conduct in this case satisfied the elements of both offenses. A27. In doing so, the court noted that *People v. Deckard*, 2020 IL App (4th) 170781-U, which held to the contrary, was wrongly decided because the relevant question when determining whether the penalty for an offense is disproportionate under the identical elements test of the proportionate penalties clause is whether the statutory elements of the offense are identical to those of another offense carrying a lesser penalty, not whether the defendant committed the offense in a particular way in the case under review. A29-30. Ultimately, the court

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concluded that the Class X penalty for predatory criminal sexual assault of a child does not violate the proportionate penalties clause, A30-31, and affirmed the trial court's judgment, A32.[2]

STANDARD OF REVIEW

The constitutionality of a statute is reviewed *de novo*. *People v. Ligon*, 2016 IL 118023, ¶ 11.

ARGUMENT

This Court should affirm the appellate court's judgment. Because predatory criminal sexual assault of a child and aggravated criminal sexual abuse do not have identical elements, the Class X penalty for predatory criminal sexual assault does not violate the proportionate penalties clause. Many acts of conduct that satisfy the sexual-conduct element of aggravated criminal sexual abuse do not satisfy the contact element of predatory criminal sexual assault of a child. Accordingly, the Class X felony penalty for predatory criminal sexual assault of a child is not unconstitutionally disproportionate because it is greater than the Class 2 felony penalty for aggravated criminal sexual abuse.

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[2] The appellate court opinion purports to affirm the judgment of the circuit court of Kane County. A32. This is a scrivener's error. Defendant was convicted in McHenry County.

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I. The Elements of Predatory Criminal Sexual Assault of a Child Are Not Identical to the Elements of Aggravated Criminal Sexual Abuse.

The Class X felony sentence for predatory criminal sexual assault of a child does not violate the proportionate penalties clause under the identical elements test. The proportionate penalties clause provides a basis to challenge the penalty provided for one offense in relation to that provided for another only if the elements of the two offenses are identical. *See People v. Sharpe*, 216 Ill. 2d 481, 519 (2005) ("this court will no longer use the proportionate penalties clause to judge a penalty in relation to the penalty for an offense with different elements"). As this Court has explained, if "the legislature determines that the exact same elements merit two different penalties, then one of these penalties has not been set in accordance with the seriousness of the offense," *id.* at 522, and the higher of the two penalties provided for that single set of elements is disproportionate, *Ligon*, 2016 IL 118023, ¶ 11.

But that principle has no application here because the elements of predatory criminal sexual assault of a child are not identical to the elements of aggravated criminal sexual abuse. For a defendant to commit predatory criminal sexual assault of a child, his contact with a child must involve either the defendant's or the child's sex organs or anuses. *See* 720 ILCS 5/11-1.40 (requiring an "act of contact, however slight, between the sex organ or anus of one person and the part of the body of another" to prove predatory criminal

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sexual assault). But a defendant can commit aggravated criminal sexual abuse without any involvement of his or the child's sex organs or anuses, for the "sexual conduct" element of aggravated criminal sexual abuse is satisfied by "any knowing touching or fondling by the victim or the accused, either directly or through clothing, of . . . any part of the body of a child under 13 years of age, or any transfer or transmission of semen by the accused upon any part of the clothed or unclothed body of the victim." 720 ILCS 5/11-0.1.

Accordingly, many interactions between a defendant and a victim may satisfy the elements of aggravated criminal sexual abuse but not the elements of predatory criminal sexual assault of a child. For example, the count of aggravated criminal sexual abuse brought against defendant in this case alleged that he massaged A.J. for sexual gratification or arousal. Had it been proved, that contact between defendant's hands and A.J.'s body would have satisfied the definition of "sexual conduct" necessary to prove aggravated criminal sexual abuse; it would have been contact between defendant's hands and the body of a child under the age of 13. But it would not have satisfied the definition of "contact" necessary to prove predatory criminal sexual assault because it would not have shown contact between defendant and A.J.'s sex organ or anus or between A.J. and defendant's sex organ or anus. Similarly, if a defendant masturbated and ejaculated onto the partially clothed body of a child, that, too, would constitute "sexual conduct," since it would be a transfer of semen onto the child's body, but it would not

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constitute predatory criminal sexual assault of a child because there was no direct contact involving the defendant's or victim's sex organ or anus. In other words, with these two offenses, the legislature did not determine "that the exact same elements merit two different penalties." *See Sharpe*, 216 Ill. 2d at 522. Therefore, the Class X felony penalty for predatory criminal sexual assault of a child does not violate the proportionate penalties clause under the identical elements test.

Contrary to defendant's assertion, *see* Def. Br. 13-14, this Court's holdings in *Ligon*, 2016 IL 118023, and *People v. Hernandez*, 2016 IL 118672, show that the offenses at issue in this case — like the statutes compared in those cases — do not share identical elements. In *Ligon*, a defendant challenged the sentencing range for aggravated vehicular hijacking under the identical elements test by comparing the elements of that offense to the elements of armed violence with a category III weapon, which carried a lesser penalty. 2016 IL 118023, ¶¶ 18-19. Aggravated vehicular hijacking requires proof that the defendant was armed with a "dangerous weapon other than a firearm." *Id.* at ¶ 18 (citing 720 ILCS 5/18-4(a)(3) (2000)). Armed violence with a category III weapon requires proof that the defendant was armed with "'a bludgeon, black-jack, slungshot, sand-bag, sand-club, metal knuckles, billy, or other dangerous weapon of like character.'" *Id.* at ¶ 19 (quoting 720 ILCS 5/33A-1(c)(3) (2000)). This Court held that the two offenses do not have identical elements because a weapon may be a dangerous weapon other than

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a firearm but not be a dangerous weapon of a like character to the various bludgeons listed as category III weapons. *Id.* at ¶ 20.

Therefore, defendant is wrong that the Court concluded that the offenses were different simply "because 'the BB gun with which defendant herein was armed *cannot* be considered a bludgeon or other dangerous weapon of like character under the armed violence statute.'" *See* Def. Br. 13-14 (quoting *Ligon*, 2016 IL 118023, ¶¶ 24-25). Instead, the offenses had different elements because it was possible for conduct to satisfy the elements of one offense but not the elements of the other. *See Ligon*, 2016 IL 118023, ¶ 20. As the Court explained, the offenses do not share identical elements because "many objects, *including* the BB gun defendant possessed in this case, satisfy the 'dangerous weapon' element of [aggravated vehicular hijacking], but not the 'Category III weapon' element of armed violence with a category III dangerous weapon." *Id.* In other words, the BB gun that the *Ligon* defendant possessed merely illustrated the point that the elements were different because objects could satisfy the elements of aggravated vehicular hijacking but not the elements of armed violence. But that point — that "not every object that qualifies as a 'dangerous weapon, other than a firearm' under section 18-4(a)(3) of the aggravated vehicular hijacking statute qualifies as a category III weapon under the armed violence statute," *id.* at ¶ 27 — would have remained the same regardless of what weapon that particular defendant had used.

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So, too, in *Hernandez*. While there the tin snips used by the defendant satisfied the element of armed robbery requiring the use of a dangerous weapon other than a firearm but not the element of armed violence requiring the use of a the category III weapon, 2016 IL 118672, ¶¶ 14-15, the Court relied on this fact not to conclude that the offenses were different but to demonstrate the dispositive legal point: "that the common-law definition of 'dangerous weapon' found in the armed robbery statute is broader than the definition of 'dangerous weapon' in the armed violence statute," *id.* at ¶ 16.

Thus, the identical elements test does not depend on the facts of a particular case or ask whether in the unique circumstances of that case, the defendant could have been convicted of either of two crimes. Rather, the identical elements test "compares identical offenses, as defined by the same legislative body," and expressed through the statutory language. *People v. Lewis*, 175 Ill. 2d 412, 421-22 (1996). Though there is a great deal of conduct — including the touching on which defendant's conviction is based in this case — that a jury reasonably could conclude constitutes both sexual conduct and contact involving the sex organ or anus of the defendant or victim, there is also a great deal of conduct — such as a defendant fondling a victim's feet for purposes of sexual gratification or arousal — that satisfies the sexual-conduct element of aggravated criminal sexual abuse, but not the contact element of predatory criminal sexual assault of a child. This fact demonstrates that the elements are not identical.

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In fact, by pointing out that contact between A.J.'s hand and defendant's penis constitutes both contact prohibited as predatory criminal sexual assault of a child and sexual conduct prohibited as aggravated criminal sexual abuse, defendant demonstrates only that aggravated criminal sexual abuse is a lesser included offense of predatory criminal sexual assault of a child in this case. *See People v. Kolton*, 219 Ill. 2d 353, 371 (2006). Unlike the question of whether two offenses are identical under the identical elements test, the question of whether one offense is a lesser included offense of another turns on a case-by-case analysis. *Id.* at 367 ("whether a particular offense is 'lesser included' is a decision which must be made on a case-by-case basis using the factual description of the charged offense in the indictment"). That is because in the lesser included context, this Court has rejected an elements-based approach, opting instead for a charging instrument approach. *Id.* at 360-61 ("After weighing the relative advantages and disadvantages of each approach, we concluded in *Novak* that 'the charging instrument approach best serves the purposes of the lesser-included offense doctrine.'" (quoting *People v. Novak*, 163 Ill. 2d 93, 112-13 (1994)). The Court noted that "the charging instrument approach 'tempers harsh mechanical theory with the facts of a particular case,' 'results in a broader range of possible lesser included offenses,' and, thus, 'supports the goal of more accurately conforming punishment to the crime actually committed.'" *Id.* at 361 (quoting *Novak*, 163 Ill. 2d at 113). But that is exactly the opposite of the

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approach this Court has taken in the proportionate penalties clause context, where the Court asks if the elements are identical. *See Lewis*, 175 Ill. 2d at 421-22.

In fact, focusing on whether the conduct alleged in a specific case could be charged under both offenses runs counter to the reasoning behind this Court's continued use of the identical elements test. As noted, the rationale behind the identical elements test is that if "the legislature determines that the *exact same elements* merit two different penalties, then one of these penalties has not been set in accordance with the seriousness of the offense," and thus is invalid. *Sharpe*, 216 Ill. 2d at 522 (emphasis added). But where the elements of one crime are more narrowly drawn than the elements of another, it is not irrational for the General Assembly to account for that difference by imposing a different penalty. Thus, because the sexual conduct element in aggravated criminal sexual abuse encompasses all kinds of conduct not encompassed by the contact element of predatory criminal sexual assault of a child, it was rational for the General Assembly to set different penalties for the two crimes. By effectively conceding that the sexual conduct element of aggravated criminal sexual abuse is not identical to the contact element of predatory criminal sexual assault of a child, *see* Def. Br. 11-12, defendant concedes that the two crimes do not violate the identical elements test and that there is no proportionate penalties violation here.

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For similar reasons, the appellate court correctly held that *Deckard* — on which defendant relies before this Court, *see* Def. Br. 15-16 — was wrongly decided. A29-30. In *Deckard*, the defendant was charged with seven counts of predatory criminal sexual assault of a child for repeatedly sexually assaulting his girlfriend's granddaughter. 2020 IL App 4th 170781-U, ¶ 2. As in this case, the defendant challenged his sentences for three of his convictions for predatory criminal sexual assault of a child because the offenses "as charged" had the same elements as aggravated criminal sexual abuse. *Id.* at ¶ 72. In the three challenged offenses, "the State charged defendant with predatory criminal sexual assault of a child when he 'patted' the sex organ of J.A. with his hand for the purpose of sexual gratification or arousal of the defendant." *Id.* at ¶ 75. The appellate court applied the charging instrument approach, reasoning that "this conduct, as alleged, also meets the elements of aggravated criminal sexual abuse," such that the defendant "was charged with the Class X felony when he could have been charged with the Class 2 felony for the same conduct as alleged in counts IV through VI." *Id.* The appellate court then concluded that "[t]he two offenses have identical elements when applied to the facts alleged." *Id.* But that is not how the identical elements test works. The appellate court's reasoning demonstrated only that under the charging instrument approach, aggravated criminal sexual abuse was a lesser included offense of predatory criminal sexual assault of a child in that case. But the charging instrument test is

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irrelevant to determining whether two offenses have identical elements under the identical elements test. *See People v. Williams*, 2015 IL 117470, ¶ 19 ("The identical elements test simply compares the elements of the two offenses to determine if the offenses are the same. This objective test does not consider the offenses as applied to an individual defendant."). Rather, the elements of an offense are defined by the governing statutory language; whether the elements of one offense are the same as those of another turns on that statutory language, not the facts alleged in a particular case. *Id.* Accordingly, *Deckard*'s reasoning and outcome are simply wrong.

This Court's opinion in *Williams* illustrates why. There, a defendant challenged the penalty for aggravated unlawful use of a weapon (AUUW) without a Firearm Owner's Identification (FOID) card, arguing that the offense had identical elements to a violation of the FOID Card Act. *Id.* at ¶ 7. The defendant in that case did not have a valid FOID Card and was arrested in a car on a public street while in possession of a firearm. *Id.* at ¶ 3. He argued that AUUW without a FOID card and the FOID Card Act "have identical elements because a person possessing a firearm while not possessing a valid FOID card violates both statutes." *Id.* at ¶ 18. This Court rejected that argument because "this is not always true." *Id.* Specifically, the Court noted, "a person can violate the FOID Card Act by possessing a firearm in his home without also having in his possession a FOID card, whereas such conduct would not violate the AUUW statute." *Id.* Accordingly, "the offense

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of AUUW based on the lack of a FOID card and a violation of the FOID Card Act do not have identical elements and thus, there can be no proportionate penalty violation." *Id.* at ¶ 21. It was wholly irrelevant to the Court's analysis that the defendant in *Williams* could have been charged with either offense because the identical elements test looks at the elements of the comparator offenses, not the offense as charged. Defendant's efforts to distinguish *Williams*, *see* Def. Br. 14-15, are unavailing because it is irrelevant that some crimes have different elements because one has an additional element — as in *Williams* — and others have different elements because an element of one overlaps, but is not identical to, an element of the other — as in *Ligon* and *Hernandez*.

Defendant's reliance on *People v. Hauschild*, 226 Ill. 2d 63 (2007), and *People v. Clemons*, 2012 IL 107821, is also misplaced, *see* Def. Br. 12-13, for those cases applied the same identical elements approach as *Ligon* and *Hernandez*, and not the charging instrument approach that defendant urges here. Both cases compared the elements of armed robbery with a firearm with the elements of armed violence (predicated on robbery) with a category I or II weapon. *Clemons*, 2012 IL 107821, ¶ 12; *Hauchild*, 226 Ill. 2d at 81-82. This Court held that *any* firearm was also a category I or II weapon for purposes of the armed violence statute. *Clemons*, 2012 IL 107821, ¶ 22; *Hauschild*, 226 Ill. 2d at 86; *see also Ligon*, 2016 IL 118023, ¶ 27 ("both *Clemons* and *Hauschild* dealt with the offense of armed robbery with a

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firearm, and firearms are included in the definition of category I and category II weapons under the armed violence statute"). Therefore, the elements of the two crimes were identical in that all the same conduct — robbery while armed with a firearm — could be charged as either armed robbery with a firearm or armed violence, predicated on robbery, with a category I or II weapon. *Clemons*, 2012 IL 107821, ¶ 22; *Hauschild*, 226 Ill. 2d at 86; *see also Ligon*, 2016 IL 118023, ¶ 27 ("the elements of the offenses therein were identical and the defendant could be charged with either armed robbery with a firearm or armed violence predicated on robbery with a category I or II weapon"). Indeed, when the Court in *Clemons* approved the continued use of the identical elements test, it noted that when applying the test "'the court relies exclusively on the express legislative pronouncements under review.'" *Clemons*, 2012 IL 107821, ¶ 46 (quoting *Lewis*, 175 Ill. 2d at 421-22).

Moreover, in *Hauschild*, this Court continued to distinguish between case-specific inquiries — "the State is not required to proceed on a lesser offense when there is evidence sufficient to convict of a greater offense" — and "the constitutional prohibition against disproportionate penalties for identical crimes." 226 Ill. 2d at 87. In doing so, the Court looked to its earlier opinion in *People v. Christy*, 139 Ill. 2d 172 (1990), to illustrate:

> "'Generally, prosecutorial discretion is a valuable aspect of the criminal justice system. In the present case, however, prosecutorial discretion will effectively nullify the aggravated kidnapping statute, as skilled State's Attorneys will usually seek the more severe sentence and, therefore, charge defendants with armed violence rather than aggravated kidnapping. An

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> ineffective aggravated kidnapping statute is not what the legislature intended when it enacted both the armed violence statute and aggravated kidnapping statutes.'"

Hauschild, 226 Ill. 2d at 87 (quoting *Lewis*, 175 Ill. 2d at 417 (quoting *Christy*, 139 Ill. 2d at 180)) (cleaned up). The statutes at issue in this case — unlike those at issue in *Christy* and *Hauschild* — do not have identical elements. As in *Christy*, in *Hauschild*, the offense of armed robbery with a category I or II weapon was effectively nullified because a prosecutor could charge *all* conduct that satisfied that offense as the more serious offense of armed robbery with a firearm. *Hauschild*, 226 Ill. 2d at 87-88. Here, unlike in *Christy* and *Hauschild*, prosecutorial discretion cannot "effectively nullify" the crime of aggravated criminal sexual abuse because not all conduct that satisfies aggravated criminal sexual abuse's sexual conduct element satisfies the requirement of predatory criminal sexual assault of a child's that contact occur involving the defendant's or victim's sex organ or anus. Indeed, the conduct that was properly charged as aggravated criminal sexual abuse in count V here could not have been charged as predatory criminal sexual assault of a child. Therefore, the reasoning of *Clemons* and *Hauschild* requires a contrary result in this case: No proportionate penalties violation occurred.

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II. If This Court Finds that the Penalty for Predatory Criminal Sexual Assault of a Child Violates Proportionate Penalties Clause Under the Identical Elements Test, Then It Will Need to Modify the Remedy from *Hauschild* and *Clemons*.

If this Court finds that the Class X felony penalty for predatory criminal sexual assault of a child statute violates the proportionate penalties clause because it is greater than the Class 2 felony penalty for aggravated criminal sexual abuse, then it will have to modify the remedy it provided in *Hauschild* and *Clemons*. Typically, when the Court has found such a violation, it has instructed the trial court to resentence the defendant under the sentencing provision in effect prior to the adoption of the unconstitutionally disproportionate sentencing provision under which the defendant was sentenced. *See Clemons*, 2012 IL 107821, ¶ 60; *see also Hauschild*, 226 Ill. 2d at 88. But such a remedy would be unworkable here because there is no prior version of the sentencing provision. When the offense of the predatory criminal sexual assault of a child was amended in 2013 to include the current "contact" element, as opposed to requiring "sexual penetration," *compare* 720 ILCS 5/11-1.60(a) (2012), *with* 720 ILCS 5/11-1.60(a) (2013), it already carried a Class X felony penalty. 720 ILCS 5/11-1.60(b) (2013). In other words, there has never been a time when defendant's conduct here violated the statute prohibiting predatory criminal sexual assault of a child that this offense did not carry a more severe penalty than the Class 2 felony penalty for aggravated criminal sexual abuse.

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Given the impossibility of sentencing defendant for predatory criminal sexual assault of a child under a more lenient prior sentencing provision, this Court should revisit the remedy it has previously provided for unconstitutional sentences under the identical elements test. Defendant argues that his conviction for predatory criminal sexual assault of a child must be vacated and a conviction entered on the uncharged offense of aggravated criminal sexual assault, Def. Br. 20, but this Court has previously rejected the remedy of resentencing on an uncharged offense. *Clemons*, 2012 IL 107821, ¶¶ 57-58. As demonstrated, however, the remedy in this Court's prior cases is unworkable here, so there is good cause to depart from the principle of *stare decisis*. *Sharpe*, 216 Ill. 2d at 520 ("[G]ood cause to depart from *stare decisis* exists when governing decisions are unworkable.").

Although the parties disagree about whether sentencing defendant to the Class X penalty for predatory criminal sexual assault violates the proportionate penalties clause, they agree that, in the event of a violation, the proper remedy here looks to the penalty provided for aggravated criminal sexual abuse. *See* Def. Br. 17. If the General Assembly has provided two different penalties for an offense, one higher and one lower, then the proportionate penalty is the lower of the two penalties. *See Ligon*, 2016 IL 118023, ¶ 11. Accordingly, the remedy when a defendant receives the higher of the two penalties for an offense should be to vacate the higher penalty and impose the lower penalty. This remedy is not novel. Indeed, this is the

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remedy that this Court provided in *Christy* when it first adopted the identical elements test. *See* 139 Ill. 2d at 174.

The Court in *Christy* was not alone in remedying a proportionate penalties violation by vacating the higher penalty and imposing the lower penalty. For example, under Kansas's "identical offense sentencing doctrine," where two crimes are identical but carry different statutory penalties, a defendant may only be sentenced using the lesser sentencing range. *See State v. Thompson*, 200 P.3d 22, 33-36 (Kan. 2009) (holding different penalties for identical crimes violates due process and remanding for resentencing under the identical crime with lesser penalty). Kansas adopted this doctrine as part of its due process jurisprudence, but its approach for remedying the alleged defect is nevertheless persuasive here; separation-of-powers principles are implicated when a court negates a legislatively imposed penalty under an identical elements analysis. The remedy that this Court announced in *Clemons* and *Hauschild* for a violation of the identical elements test should be amended in this context to ensure that the new sentence is in accord with legislative intent.

In other words, the General Assembly has determined that an appropriate penalty for the offense consisting of this particular set of elements is a Class 2 felony penalty. *See* 720 ILCS 5/1.60(g) (providing Class 2 felony penalty for aggravated criminal sexual abuse). That exercise of legislative judgment is undisturbed by the fact that another statement of

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legislative judgment — that a Class X felony penalty is also an appropriate sentence — cannot be given effect. Thus, if this Court determines that the General Assembly improperly approved two different penalties for a single offense, such that the higher of the two is unconstitutional under the proportionate penalties clause, the Court should still give effect to the legislature's intent to the extent possible by imposing the alternative lesser penalty that the General Assembly found appropriate for the offense. Any remedy that rejects *both* of the General Assembly's approved penalties to imposes a penalty less than either would violate the General Assembly's intent.

CONCLUSION

This Court should affirm the appellate court's judgment.

November 15, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 21 pages.

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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On November 15, 2023, the foregoing **Brief of Plaintiff-Appellee People of the State of Illinois** was electronically filed with the Clerk, Illinois Supreme Court, and served upon the following by way this Court's Odyssey e-filing system:

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