No. 127904

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- ANTONIO D. KIDD, Defendant-Appellant.	Appeal from the Appellate Court of Illinois, Fourth Judicial District, No. 4-19-0345. There on appeal from the Circuit Court of the Seventh Judicial Circuit, Sangamon County, Illinois, No. 17-CF-556. Honorable John M. Madonia, Judge Presiding.

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ARGUMENT

Both of Antonio D. Kidd's convictions must be reversed because Counts I and II of the indictment did not set forth every element of the offense charged.

The state argues that the unamended indictment "sufficiently alleged that [Mr. Kidd] committed predatory criminal sexual assault of a child [(PCSAC)] on two separate theories: (1) an act of sexual penetration, and (2) an act of contact for the purpose of [his] sexual gratification or arousal." (Appellee's brf. at 9; see also Appellee's brf. at 21-22.) By seeking only sufficient pleading in a case demanding strict compliance with the pleading requirements of section 111-3 the Code of Criminal Procedure of 1963 (725 ILCS 5/111-3 (2016)), the state—like the appellate court before it, see *People v. Kidd*, 2021 IL App (4th) 190345-U, ¶ 57—dismisses decades of authority clearly distinguishing between charging-instrument defects raised for the first time on appeal and charging-instrument defects raised before trial. This Court should not do the same.

Section 111-3 requires that the charging instrument "allege the commission of an offense by," among other things, "setting forth the nature and elements of the offense charged." 725 ILCS 5/111-3(a) (2016). "[T]he 'nature' and the 'elements' of an offense are distinguishable concepts, both of which must be set forth in a charging instrument." *People v. Wisslead*, 108 Ill. 2d 389, 394 (1985). The elements of an offense are those "constituent parts" of the offense "that the prosecution must prove to sustain a conviction" for that offense in any case, including—but not necessarily limited to—an act performed by the defendant (act element) and the mental state with which the act is performed by the defendant (mental-state element). Black's Law Dictionary 657 (11th ed. 2019) (defining "elements of crime"). The nature of an offense is "the type of conduct being alleged" in a particular case, *i.e.*, the specific way in which the defendant is alleged to have committed the elements of the offense in the case being brought against him. *Wisslead*, 108 Ill. 2d at 394-96.

Charging the defendant using "[t]he language of the statute can serve to apprise [him] of *both* the nature and the elements of the offense, so long as the statutory language specifies, with reasonable certainty, the type of conduct being alleged." (Emphasis in original.) *Id.* at 394. But where the statutory language involved leaves "room for wide speculation as to the type of conduct being alleged" in a particular case, the charging instrument cannot just mirror the language of the statute; it must go on to describe the specific way in which the defendant is alleged to have committed the elements of the offense with which he is being charged. *Id.* at 394-97. Differently stated:

> "Under section 111-3, the charging instrument must set forth the nature and elements of the offense charged. [Citation.] Where the statute defining the offense specifies the type of conduct prohibited, this requirement is satisfied if the charging instrument states the offense in the language of the statute. Where, however, the statute does not define or describe the act or acts constituting the offense, a charge couched in the language of the statute is insufficient. The facts which constitute the crime must be specifically set forth."

People v. Nash, 173 Ill. 2d 423, 429 (1996).

Curiously, the state cites *Nash* for the proposition that a charging instrument need not track the language of the statute defining the offense charged in order to strictly comply with the section 111-3 requirement to set forth the nature and elements of the offense charged. (Appellee's brf. at 10.) But that is not what *Nash* says. It says, rather, that the charging instrument may fail to strictly comply with the section 111-3 requirement to set forth the nature and elements of the offense charged even if the charging instrument tracks the language of the statute defining that offense. *Nash*, 173 Ill. 2d at 429. Depending on the specificity of the statutory language, the charging instrument may need to go beyond that language in order to set forth not just the elements of the offense charged but also the nature of the offense charged. *Id.*

In any event, Mr. Kidd does not argue that the indictment was defective because it did not "quot[e]" the language of the PCSAC statute or "use identical words" to those used in the PCSAC statute (Appellee's brf. at 10, 19); he instead argues that the indictment was

defective because it meaningfully departed from the language of the PCSAC statute, resulting in the indictment's omission of an element of the offense charged therein (see Appellant's brf. at 19-21). Both counts of the indictment set forth as the act element of the offense of PCSAC that Mr. Kidd "committed an act of sexual contact, however slight, with T.F." (C. 39-40/A-15–A-16), an unmistakable but incomplete attempt to plead PCSAC by an act of contact. See 720 ILCS 5/11-1.40(a) (2016) (providing that an accused may be convicted of PCSAC on proof beyond a reasonable doubt that the accused committed "an act of contact, however slight, between the sex organ or anus" of himself or the victim and any body part of the other, and proof beyond a reasonable doubt that the act of contact was for the purpose of sexual gratification or arousal of himself or the victim). And neither count of the indictment set forth any mental-state element for that offense (see C. 39-40/A-15–A-16), much less the specific intent expressly demanded by the legislature. See 720 ILCS 5/11-1.40(a) (providing, again, that to convict an accused of PCSAC on proof of an act of contact, the state also must prove that the act of contact was "for the purpose of sexual gratification or arousal of the victim or the accused"); 14A Ill. L. and Prac. Criminal Law § 28 (2022) (" 'Specific intent' exists where from the circumstances, the offender must have objectively desired the prohibited result.").

It is true that both counts of the indictment went on to set forth the nature of the PCSAC offense alleged, *i.e.*, the specific way in which Mr. Kidd was alleged to have committed "an act of sexual contact, however slight, with T.F.," with the following explanatory clause: "in that [Mr. Kidd] placed his penis in contact with the mouth of T.F." (C. 39-40/A-15–A-16). See *Wisslead*, 108 Ill. 2d at 394-96 (indicating that the nature of an offense is "the type of conduct being alleged" in a particular case); see also American Heritage Dictionary of the English Language 885 (5th ed. 2011) (defining "in that" as "[f]or the reason that"). And it is true that the state's nature-of-the-offense allegation *could have* been framed as an allegation that the act element of the offense of PCSAC was an act of sexual penetration rather than an

act of contact. See 720 ILCS 5/11-0.1 (2016) (defining " '[s]exual penetration' " to include any contact between the sex organ of one person and the mouth of another); 720 ILCS 5/11-1.40(a) (providing that an accused may be convicted of PCSAC on proof beyond a reasonable doubt that the accused committed "an act of sexual penetration"). But so too is it true that the state chose to allege as the act element of PCSAC an act of contact rather than an act of sexual penetration. (See C. 39-40/A-15–A-16.)

Perhaps the state's charging decision was strategic. After all, because the state charged Mr. Kidd with committing PCSAC by an act of contact rather than an act of sexual penetration, the jury was instructed on PCSAC by an act of contact rather than an act of sexual penetration. (C. 39-40/A-15–A-16, 304, 306; R. 1009-10.) The state thereby avoided the burden of proving beyond a reasonable doubt that Mr. Kidd's penis touched T.F.'s mouth as opposed to, *e.g.*, her cheek, her jaw, her shoulder, or some other non-intimate part of her body such that the touching could constitute an act of contact but not an act of sexual penetration. Compare 720 ILCS 5/11-0.1 (defining " '[s]exual penetration' " to include any contact between the sex organ of one person and the mouth, sex organ, or anus of another), with 720 ILCS 5/11-1.40(a) (including in prohibited acts of contact a lascivious touching of any part of the body of one person by the sex organ of another). And the state's avoidance of that burden may have made a difference in this case, insofar as (1) T.F.'s testimony was not without peculiarities and internal and external inconsistencies as described on pages 38 to 40 of Mr. Kidd's opening brief in the appellate court; (2) T.F.'s accusations against Mr. Kidd were uncorroborated as to the PCSAC offense alleged in Count II; and (3) even as to the PCSAC offense alleged in Count I, with regard to which the state presented inculpatory DNA evidence, the substance found on T.F.'s shoulder and jaw or cheek was confirmed to be semen while the substance found in or on T.F.'s mouth was not confirmed to be semen (C. 321; R. 872, 886-88, 929-30).

Or perhaps the state did not realize that any touching of a penis to a mouth, even if colloquially non-penetrative, satisfies the statutory definition of sexual penetration. Though T.F. initially reported to Ms. Carlisle, Dr. Stevens, Ms. Teich, and Ms. Johnson that Mr. Kidd put his penis "in" her mouth on the night of August 28, 2016, and/or in the early morning hours of August 29, 2016 (R. 582, 604, 665, 720-21, 839-40; State's ex. 4 at 10:44 - 11:00, 13:01 - 13:28), at trial she insisted that Mr. Kidd never put his penis "in" her mouth but instead put his penis "on" her mouth (R. 795-96, 798). And the indictment originally charged Mr. Kidd with one count of criminal sexual assault on an allegation that Mr. Kidd "committed an act of sexual penetration with T.F., in that [he] placed his penis *in* the mouth of T.F." (C. 41, emphasis added; see also C. 41; R. 15), in contrast with its PCSAC allegations that Mr. Kidd "committed an act of sexual contact, however slight, with T.F., in that [he] placed his penis *in contact with* the mouth of T.F." (C. 39-40/A-15–A-16, emphasis added).

Whatever the reason or reasons for the state's decision to charge PCSAC by an act of contact rather than an act of sexual penetration, the record leaves no doubt that the decision was indeed made, and made intentionally. At the June 18, 2018 hearing on Mr. Kidd's May 21, 2018 *pro se* motions to dismiss Counts I and II for defects in the indictment, ASA Mathew told the trial court:

> "Sex offenses in Illinois either have contact, conduct, or penetration. *We have appropriately charged Mr. Kidd with sexual contact*, which the statute allows for as predatory criminal sexual assault. I can read the statute to the court if the court doesn't have it in front of it, but it specifically says, and commits an act of contact, however slight, between the sex organ or anus of one person and the part of the body of another. And then there is a clause at the end that says, or an act of sexual penetration. *Here, he's been charged with sexual contact*."

(R. 109-10, emphases added.) Similarly, at the July 26, 2018 hearing on Mr. Kidd's June 26, 2018 *pro se* motions to dismiss Counts I and II for defects in the indictment, ASA Mathew maintained:

> "The last time that this motion was raised, I read the statute aloud for the Court. The People have included all of the necessary elements of the offense in the charging documents. I will again remind the Court that there are multiple ways

> to charge Predatory Criminal Sexual Assault. One of those ways involves an act of sexual contact. Another way involves sexual penetration. The People have chosen the most appropriate way to charge this matter, and it is -- meets all of the necessary requirements under the statute."

(R. 144.)

It was not until the morning of trial that ASA Mathew understood that the indictment did not actually "meet[] all of the necessary requirements under the statute" (R. 144), in that the indictment omitted "the language for the purpose of the sexual gratification of the Defendant or the victim" (R. 370). Having belatedly gained that understanding, and against the backdrop of her prior representations to the trial court (see R. 109-10, 144), ASA Mathew did not argue that the indictment should be read to charge PCSAC by an act of sexual penetration rather than, or in addition to, PCSAC by an act of contact. (See R. 370-76.) Instead, she acknowledged that the indictment was missing the mental-state element required by its having set forth, as the act element of the PCSAC offense alleged, an act of contact rather than an act of sexual penetration, and she sought to supply the missing element through amendment. (See R. 370-76.) The state, then, has forfeited its argument on appeal that the indictment should be read to charge PCSAC by an act of sexual penetration (Appellee's brf. at 9, 11-14). See *People v. Cruz*, 2013 IL 113399, ¶¶ 20, 25 (noting that "[g]enerally, an issue not raised in the trial court is forfeited on appeal" and holding that the state had forfeited an argument that it raised for the first time in the appellate court).

And the state's forfeiture should not be excused. Although "forfeiture is a limitation on the parties and not the court," *People v. Sophanavong*, 2020 IL 124337, ¶ 21, *reh'g denied* (Nov. 16, 2020), this Court has honored forfeiture of arguments raised for the first time on appeal that, had they been raised below, may have changed the course of the proceedings in the trial court. See, *e.g.*, *Cruz*, 2013 IL 113399, ¶¶ 1-2, 22-25 (holding the state to its forfeiture of an argument to affirm the dismissal of a petition for postconviction relief where the argument

was based on an alleged pleading deficiency that the state did not raise in the trial court, reasoning that the state's failure to raise the alleged pleading deficiency in the trial court "deprived that court of the opportunity to consider the issue" and further reasoning that the petitioner "may have been given the opportunity to correct the alleged pleading deficiency if it had been raised in a timely manner"); *cf. Hux v. Raben*, 38 Ill. 2d 223, 225 (1967) ("An appellate court should not, and will not, consider different theories or new questions, if proof might have been offered to refute or overcome them had they been presented at the trial." (Internal quotation marks omitted.)). Here, if ASA Mathew had argued that the unamended indictment should be read to charge PCSAC by an act of sexual penetration, then the jury may have been instructed as to a wholly different act element—an act of sexual penetration—than it was in the absence of such an argument. (See C. 304, 306; R. 1009-10.) On this counterfactual, it is possible that the jury would have found the state's evidence insufficient to prove beyond a reasonable doubt the act element of the offense of PCSAC, as discussed on page 4 above.

Even if this Court considers on its merits the state's forfeited argument that the indictment should be read to charge PCSAC by an act of sexual penetration, that argument must fail. The state's argument turns on an unstated proposition of law that language in a charging instrument setting forth the *nature* of the offense alleged, *i.e.*, the specific way in which the defendant is alleged to have committed the elements of the offense in the case being brought against him, see *Wisslead*, 108 Ill. 2d at 394-96, may be treated for the first time on appeal as supplanting language in a charging instrument setting forth the *elements* of the offense alleged, *i.e.*, the "constituent parts" of the offense "that the prosecution must prove to sustain a conviction" for that offense in any case, see Black's Law Dictionary, *supra*, at 657. Yet the state cites no authority that supports such a proposition. (See Appellee's brf. at 9, 11-14.) To the contrary, at least one of the cases cited by the state (Appellee's brf. at 10, 12, 14) tends to undermine its implicitly proposed proposition.

In *Nash*, the defendants were charged by criminal complaint with the offense of mob action under subsection (a)(2) of the mob action statute, which prohibited " 'the assembly of 2 or more persons to do an unlawful act.' " *Nash*, 173 Ill. 2d at 425 (quoting 720 ILCS 5/25-1(a)(2) (1992)). The complaints cited to that statutory subsection, and "the State was steadfast in its position that it was charging defendants only with violating subsection (a)(2) of the mob action statute and that the[] complaints were sufficient, as written, to charge that crime." *Id.* at 427, 430. But instead of tracking the language of subsection (a)(2), the complaints alleged that the defendants "knowingly by the use of intimidation, disturbed the public peace." *Id.* at 427. As a result, the complaints did not set forth the elements of the mob action offense charged, even though the complaints also included language setting forth as the "factual predicate" for the charge, *i.e.*, the nature of the offense alleged, " 'that while acting with others and without the authority of law, [defendants] blocked the sidewalk in an apparant [*sic*] attempt to sell drugs and promote gang activity,' " suggestive of the missing elements of the mob action offense charged. (Alterations in original.) *Id.* at 427, 429-32. This Court therefore affirmed the trial court's dismissal of the complaints on its holding that the complaints, which were challenged before trial, did not strictly comply with section 111-3(a)(3). *Id.* at 428-29, 432.

In candor to this Court, Mr. Kidd acknowledges that the *Nash* analysis appears to have been colored by concerns about the constitutionality of the mob action statute itself. See *id.* at 431-32 (noting that, "with respect to the gang activity, the State cannot punish mere advocacy or forbid, on pain of criminal punishment, assembly with others merely to advocate activity, even if that activity is criminal in nature" (citing *Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969))). But to whatever extent *Nash* speaks to a proposition that nature-of-the-offense language in a charging instrument may override elements-of-the-offense language in the instrument on an examination for strict compliance with section 111-3(a)(3), it does so only in the negative. See *Nash*, 173 Ill. 2d at 427-32.

The state also cites *People v. Thingvold*, 145 Ill. 2d 441 (1991), for a proposition of law that a "charging instrument is sufficient if proof of the allegations amounts to proof of the crime," pin-citing the case at pages 449 to 450. (Appellee's brf. at 10.) But examination of the pin-cited pages—and, indeed, the entire opinion—yields no such proposition, which seems to have been produced through an inversion of the following bit of case-specific reasoning:

> "The information failed to allege that any of defendant's actions occurred within the appropriate limitation period. As defendant explains in his brief, the State could prove exactly what it alleged in the information, that 'between December 1, 1983 and April 30, 1986, defendant engaged in a series of acts performed at different times,' without proving that any one act of solicitation occurred within the period of limitation."

Thingvold, 145 Ill. 2d at 449. For three reasons, the state's reading of *Thingvold* is wrong.

One, *Thingvold* did not involve an alleged failure of strict compliance with section 111-3(a)(3), requiring that the charging instrument "[s]et[] forth the nature and elements of the offense charged," Ill. Rev. Stat. 1989, ch. 38, ¶ 111-3(a)(3); rather, it involved an alleged failure of strict compliance with section 111-3(a)(4), requiring that the charging instrument "[s]tat[e] the date and county of the offense as definitively as may be done," Ill. Rev. Stat. 1989, ch. 38, ¶ 111-3(a)(4). See *Thingvold*, 145 Ill. 2d at 446, 448-49 (focusing on the date range alleged in the information and quoting *People v. Strait*, 72 Ill. 2d 503, 504-05 (1978), for " 'the long-established rule that if the indictment or information shows on its face that the offense was not committed within the period of limitation *facts must be averred which invoke one of the exceptions contained in the statute*' " (emphasis in original)); *Strait*, 72 Ill. 2d at 505-06 (pointing to section 111-3(a)(4) as the basis for the rule that the charging instrument either "must allege that the crime was committed at some time prior to the return of the indictment or the filing of the information and within the period fixed by the statute of limitations" or must allege "facts" that "would toll the running of the statute"). Thus, the above-quoted reasoning stands for no more than the narrow proposition that a charging instrument does not violate the *Strait* rule where proof of its date allegations constitutes proof that the offense was committed within the applicable limitations period. See *Thingvold*, 145 Ill. 2d at 449-50.

Two, section 111-3(a)(3) itself refutes the state's highly generalized proposition that a "charging instrument is sufficient if proof of the allegations amounts to proof of the crime." (Appellee's brf. at 10.) Section 111-3(a)(3), again, requires that the charging instrument "[s]et[] forth the nature *and* elements of the offense charged," 725 ILCS 5/111-3(a) (emphasis added), with " 'nature' " and " 'elements' " being "distinguishable concepts, both of which must be set forth in a charging instrument," *Wisslead*, 108 Ill. 2d at 394. The elements of an offense are all "that the prosecution must prove to sustain a conviction" for that offense in any case, see Black's Law Dictionary, *supra*, at 657. And because the prosecution need not prove the nature of an offense, the jury is not instructed thereon (see, *e.g.*, C. 304, 306; R. 1009-10), but it remains that the charging instrument must allege the nature of the offense charged. 725 ILCS 5/111-3(a); *Wisslead*, 108 Ill. 2d at 394. Even where "proof of the allegations [in a charging instrument] amounts to proof of the crime" charged (Appellee's brf. at 10), then, the charging instrument may not strictly comply with section 111-3(a)(3).

Three, reading *Thingvold* in this way would allow the state to make a deliberate decision to charge, prosecute, and convict the defendant of an offense on one theory and then retrospectively reframe the offense of conviction—for the first time on appeal—as having been on a different theory that was never before the jury. (See Appellee's brf. at 10-14.) And caselaw from the related one-act, one-crime context does not support such conflation of what the state could have charged with what it actually charged.

In *People v. Crespo*, 203 Ill. 2d 335, 337-38, 340 (2001), *as modified on denial of reh'g* (Mar. 31, 2003), the defendant challenged his conviction for aggravated battery (great bodily harm) as based on the same physical act, namely, stabbing the victim three times "in rapid succession," as his conviction for armed violence. This Court agreed with the state that each of the three stabbings was a separate physical act that "could support a separate offense." *Crespo*, 203 Ill. 2d at 342. But this Court went on to observe that the charging instrument and the state's theory at trial failed to "apportion" the offenses among the stabbings and, rather, revealed that

the state "intended to treat the conduct of the defendant as a single act." *Id.* at 343-45. Reasoning that apportionment would be "improper" on appeal, this Court vacated the defendant's conviction for aggravated battery and held that conduct cannot be treated as multiple physical acts for purposes of the one-act, one-crime rule unless the state's charging and trial decisions reflect such treatment. *Id.* at 344-46. As this Court explained,

> "the State *could have*, under our case law, charged the crime that way, and *could have* argued the case to the jury that way. The State chose not to do so, and this court cannot allow the State to change its theory of the case on appeal. It is possible that, although the jury found that all three stab wounds together constituted great bodily harm, the jury would not have considered any one of the stab wounds individually to constitute great bodily harm. This court will not invade the province of the jury and decide this question of fact."

(Emphases in original.) *Id.* at 344. So too would it invade the province of the jury to salvage on appeal an otherwise defective charging instrument by ignoring the act element that was alleged on the face of the instrument (C. 39-40/A-15–A-16), insisted upon by the state's attorney below (R. 109-10, 144), and found by a jury to have been proved beyond a reasonable doubt (see C. 304, 306, 316-17; R. 1009-10, 1018-20).

In sum, the state charged Mr. Kidd with PCSAC by an act of contact, not an act of sexual penetration. (See C. 39-40/A-15–A-16; see also R. 109-10, 144.) That being so, the state was required to allege that the act of contact was committed for the purpose of sexual gratification or arousal. See 720 ILCS 5/11-1.40(a) ("A person commits predatory criminal sexual assault of a child if that person is 17 years of age or older, and commits an act of contact, however slight, between the sex organ *** of one person and the part of the body of another *for the purpose of sexual gratification or arousal of the victim or the accused*, *** and *** the victim is under 13 years of age[.]" (Emphasis added.)); 725 ILCS 5/111-3(a) (providing that the charging instrument must allege every element of the offense charged); see also *People v. Rowell*, 229 Ill. 2d 82, 93 (2008) (indicating that a charging instrument violated section 111-3(a)(3) where it did not allege the " 'in furtherance of a single intention and design' " element of felony retail theft). And the state made no such allegation. (See C. 39-40/A-15–A-16.)

Despite acknowledging that strict compliance with section 111-3(a) was required (Appellee's brf. at 9), the state asks this Court to infer the missing mental-state element from the lone adjective "sexual," which was used in the indictment to modify the noun "contact." (Appellee's brf. at 14-21; see C. 39-40/A-15–A-16.) According to the state, the "ordinary meaning" of the adjective "sexual" is "for the purpose of sexual gratification or arousal." (Appellee's brf. at 16; see also Appellee's brf. at 21.) The state relatedly claims that Mr. Kidd "does not suggest any alternate meaning of 'sexual' that meaningfully deviates from sexual gratification or arousal and makes sense in the context of his penis making contact with T.F.'s mouth." (Appellee's brf. at 18.) The state is twice mistaken.

As Mr. Kidd has demonstrated at some length (see Appellant's brf. at 28-30; see also A-45–A-60), "sexual" has ordinary meanings that are both far broader and far narrower than "for the purpose of sexual gratification or arousal." One of its meanings is little more than an anatomical descriptor, for "sexual" may mean relating to "the sex organs and their functions." American Heritage Dictionary, *supra*, at 1606; see also XV The Oxford English Dictionary 115-16 (2d ed. 1989) ("[o]f or pertaining to the organs of sex"); Oxford English Dictionary Online, available by subscription at http://www.oed.com/view/Entry/177084 (last visited Mar. 2, 2022)/A-47 ("[r]elating to or affecting the genitals or reproductive organs"); Webster's New World College Dictionary 1332 (5th ed. 2018) ("of, characteristic of, or involving *** the organs of sex and their functions"). On this ordinary meaning, "an act of sexual contact" would mean an act of contact involving genitals, a meaning that makes perfect sense in the context of alleged penis-to-mouth contact.

The state also argues that "sexual contact is a type of sexual conduct, which by definition is for the purpose of sexual gratification or arousal." (Appellee's brf. at 16-17; see also Appellee's brf. at 21.) This appears to be an argument that the statutory definition of "sexual conduct,"

a phrase that does not appear anywhere in either the PCSAC statute, see 720 ILCS 5/11-1.40 (2016), or the indictment (see C. 39-40/A-15–A-16), somehow dictates the meaning of "sexual contact," a phrase used in the indictment though it does not appear anywhere in Article 11 of Part B of Title III of the Criminal Code of 2012. (See Appellee's brf. at 16-17; see also Appellee's brf. at 21.) To whatever extent a phrase taken from statutes that are not at issue in this case may inform the analysis of a phrase that significantly departs from the language of the statute that is at issue in this case, the state has again provided support for Mr. Kidd's arguments rather than its own. For "[s]exual conduct" is defined by statute as:

> "any knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus, or breast of the victim or the accused, or 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, for the purpose of sexual gratification or arousal of the victim or the accused."

720 ILCS 5/11-0.1. And if the adjective "sexual" had but one ordinary meaning of "for the purpose of sexual gratification or arousal," then the legislature would have had no reason to define "sexual conduct" as touching done with that specific intent.

Finally, the state argues that the missing mental-state element may be inferred from the indictment, if read "as a whole and in the context of the cited statute," because Mr. Kidd "does not propose a single plausible alternative reading of the indictment other than that [the act of contact alleged] was for his sexual gratification or arousal." (Appellee's brf. at 10, 15-18; see also Appellee's brf. at 21.) This argument, too, misses the mark. For section 111-3(a) sets forth a pleading standard for charging instruments. 725 ILCS 5/111-3(a). Where the defendant alleged a defect in the charging instrument before trial, strict compliance with that pleading standard is required on appeal. *Thingvold*, 145 Ill. 2d at 448. And the charging instrument's strict compliance *vel non* is determined without reference to the instrument's probable or even possible prejudicial effect on the defendant who was charged thereby. *Id.* Specifically as to

the section 111-3(a)(3) requirement that the charging instrument plead the "elements of the offense charged," an alleged defect is evaluated by a cold comparison of the charging instrument with the statute defining the offense charged. See, *e.g.*, *People v. Cuadrado*, 214 Ill. 2d 79, 83-84, 88 (2005) (concluding that a charging instrument failed to allege every element of the offense of solicitation of murder for hire where "[a] comparison of the [relevant] statutory provision and the charging instrument reveal[ed] the word 'procures' in the statute was replaced in the indictment by the word 'solicited' ").

The cases the state cites in supposed support of this argument are telling. (See Appellee's brf. at 10, 17-18.) One is a variance case in which the defendant did not challenge the charging instrument in the trial court below, so there—unlike here—prejudice was required to be shown. *People v. Okoro*, 2022 IL App (1st) 201254, ¶¶ 29-45. Two more did not involve a charging-instrument challenge at *any point*, whether below or on appeal, but are instead uncharged lesser-included offense cases in which this Court concluded that the mental-state element of aggravated criminal sexual abuse, *i.e.*, "for the purpose of sexual gratification or arousal," could be inferred from a charging instrument that expressly alleged an act of sexual penetration as the act element of the PCSAC offense charged. See *People v. Kennebrew*, 2013 IL 113998, ¶¶ 4, 37 (concluding that the mental-state element could be inferred where the indictment alleged that the defendant " 'committed *an act of sexual penetration* *** in that the defendant placed his finger in [the complainant's] anus' " (emphasis added and omission in original)); *People v. Kolton*, 219 Ill. 2d 353, 362, 368-71 (2006) (concluding that the mental-state element could be inferred where the indictment alleged that the defendant " 'committed *an act of sexual penetration* upon [the complainant], to wit: an intrusion of [the defendant's] finger into [the complainant's] vagina' " (emphasis added)).

Another is a case in which this Court applied the rule that "elements missing from one count of a multiple-count indictment or information may be supplied by another count," *People v. Hall*, 96 Ill. 2d 315, 320 (1982), a rule with no possible application here insofar as both PCSAC counts in the indictment were missing the required mental-state element (see C. 39-40/A-15–A-16). And the last is a United States Supreme Court case applying a federal pleading standard requiring " 'a plain, concise, and definite written statement of the essential facts constituting the offense charged.' " *U.S. v. Resendiz-Ponce*, 549 U.S. 102, 110 (2007) (quoting Fed. R. Crim. P. 7). It is evident that the standard of "full[] compli[ance] with that Rule," *Resendiz-Ponce*, 549 U.S. at 110-11, is not equivalent to the standard of strict compliance with section 111-3(a)(3)'s demand for language setting forth both the "nature" and the "elements" of the offense charged, 725 ILCS 5/111-3(a); *Wisslead*, 108 Ill. 2d at 394.

Just before concluding, the state attempts to distinguish *Cuadrado* on the basis that there, the word " 'solicited' " was substituted for the "meaningfully different" word " 'procured,' " whereas here, "there was no similar substitution" because "the same word, 'sexual,' is contained in both the indictment and the statute." (Appellee's brf. at 20-21.) According to the state, Mr. Kidd "argues that the word 'sexual' appeared in the wrong place in the indictment and suggests that the 'sexual contact' of his penis to T.F.'s mouth may not have been for the purpose of his sexual gratification or arousal." (Appellee's brf. at 21.) The state's assertions here highlight the weaknesses in its overall response. Mr. Kidd does not "suggest[] that the 'sexual contact' of his penis to T.F.'s mouth may not have been for the purpose of his sexual gratification or arousal." (Appellee's brf. at 21; see Appellant's brf. at 19-31.) On this appeal, it simply does not matter whether the contact could have been for any other purpose. All that matters is whether the indictment meaningfully departed from the language of the PCSAC statute, not by putting one word "in the wrong place in the indictment" (Appellee's brf. at 21) but by *replacing* the

particular mental-state element consciously adopted by the legislature in 2014—"for the purpose of sexual gratification or arousal of the victim or the accused," 98th Ill. Gen. Assem., House Bill 4516, 2014 Reg. Sess.—with the general adjective "sexual."

As in *Cuadrado*, the indictment's departure from the statutory language was meaningful, so the indictment was defective. (See Appellant's brf. at 28-30.) *Cuadrado* is distinguishable only as to the consequence of the charging-instrument defect. The defendant in *Cuadrado* did not challenge the indictment before trial, despite having had "ample opportunity" to do so. *Cuadrado*, 214 Ill. 2d at 88. And because the defendant "filed and argued a motion for a directed finding, alleging the State's case in chief failed to prove that she 'procured' [another] to murder [the victim]," this Court concluded that she was not prejudiced by the defective indictment. *Id.* In this case, by contrast, Mr. Kidd persistently challenged the indictment before trial, and it is the state that did not act on its ample opportunity to correct the defect. (C. 99-108, 113-19, 135-70; R. 104-27, 144, 218-19.) Notwithstanding any lack of prejudice from the defective indictment, then, Mr. Kidd is entitled to reversal of his convictions. *People v. Espinoza*, 2015 IL 118218, ¶¶ 23-24; *People v. Benitez*, 169111. 2d 245, 259 (1996).

What is more, *Cuadrado* tends to further undermine the state's implicitly proposed proposition of law, discussed on pages 7 to 8 above, that language in a charging instrument setting forth the elements of the offense alleged may be superseded by other language in the charging instrument setting forth the nature of the offense alleged. (See Appellee's brf. at 9, 11-14.) For the indictment in *Cuadrado* alleged that the defendant, " 'with the intent that the offense of first degree murder be committed, to wit: that [the victim] be killed, *solicited* [another] to commit said offense of first degree murder, pursuant to an agreement or contract for money.' " (Emphasis in original.) *Cuadrado*, 214 Ill. 2d at 84. On the state's proposition, one might have expected this Court to conclude that the indictment was not defective, despite its substitution

of "solicited" for the statutorily supplied "procured," because the explanatory clause "pursuant to an agreement or contract for money" could be read as an allegation that the defendant did not just seek to obtain, *i.e.*, solicit, see American Heritage Dictionary, *supra*, at 1666, but actually did obtain, *i.e.*, procure, see American Heritage Dictionary, *supra*, at 1405, a hit man to kill the victim.

Indeed, the state urged this Court to come to that conclusion in *Cuadrado*, making arguments not at all unlike those it makes now in Mr. Kidd's case:

> "[D]efendant's indictment meets th[e] standard [of strict compliance]. *** It is not necessary that an indictment contain all the language of the statute on the subject. [Citation.] To the contrary, an offense can be charged in the language of the statute, or by specifically alleging the facts which constitute the crime. *** The language of an indictment must be given its plain and ordinary meaning 'as read and interpreted by a reasonable person.' [Citation.]
>
> ' "[S]olicit" or "solicitation" means to command, authorize, urge, incite, request, or advise another to commit an offense.' 720 ILCS 5/2-20 (2004). Carrying this definition a step further, the solicitation of murder for hire statute provides that solicitation occurs within the meaning of the statute when one procures another to commit murder pursuant to an agreement for money or something of value. 720 ILCS 5/8-12 (a) (2004). *** [T]he pivotal distinction between the two offenses is not use of the word 'procure'; it is the question whether someone was solicited to commit murder pursuant to an agreement for money or something else of value. (5/8-1.1 (a)). If there is evidence of an agreement for money or something of value, it means of necessity that someone was procured or solicited to commit murder within the meaning of the statute regardless of which term is used."

Brief for Plaintiff-Appellee, People of the State of Illinois, Plaintiff-Appellee, v. Damaris Cuadrado, Defendant-Appellant, 2004 WL 3389809, at *28-29 (May 4, 2004). But this Court rejected the state's arguments, concluding that the indictment was defective in its replacement of the word "procured" with the word "solicited," though going on to conclude that the defective indictment did not prejudice the defendant in light of her motion for a directed finding. *Cuadrado*, 214 Ill. 2d at 88. So too should this Court reject the state's arguments in Mr. Kidd's case and conclude that the indictment was defective in its wholesale replacement of the statutory mental-state element "for the purpose of sexual gratification or arousal" with the bare adjective "sexual."

This Court long has expressed its disapproval of charging instruments that fall short of the bar set by the legislature. See, *e.g.*, *People v. Carey*, 2018 IL 121371, ¶ 22 (stating that "we do not approve of any failure to strictly comply with the clear requirements of section 111-3(a)"); *People v. Gilmore*, 63 Ill. 2d 23, 29 (1976) (stating that "we do not approve, and indeed find it difficult to understand, failure to strictly comply with the explicitly stated requirements of section 111-3(a)"). And rightly so. A charging instrument is the opening salvo in the state's exercise of its "awesome investigative and prosecutorial powers," see *Williams v. Florida*, 399 U.S. 78, 112 (1970) (Black, J., concurring in part and dissenting in part, joined by Douglas, J.), powers aimed at depriving the accused of his liberty for years, for decades, even for life. How much is it to ask a state's attorney with specialized schooling and experience in her field to look closely at the statute books before filing the charging instrument that will set such a criminal process into motion against the accused?

In this case, the defect in the indictment was so obvious that Mr. Kidd, with his eighth grade education, GED, and certificate in automotive technology (Sec. C. 19), made repeated pre-trial protests about it (C. 99-108, 113-19, 135-70; R. 104-27, 218-19). Still the state did nothing. (R. 108, 111.) The trial court backed the state in its inaction, later denied its last minute attempt to amend the indictment, and ultimately used jury instructions to try to clean up the mess. (C. 304, 306; R. 111, 145-47, 370, 374-76, 916-21, 1009; see also C. 313-14; R. 954-58, 1007, 1011.) But the jury instructions did not—could not—cure the defective charging instrument. See *Thingvold*, 145 Ill. 2d at 449-50 (indicating that jury instructions are "irrelevant" when "evaluating an information or indictment under a pretrial motion to dismiss" because it is the charging instrument itself that must strictly comply with the pleading requirements of section 111-3). And unlike cases such as *Carey* and *Gilmore*, where this Court's disapproval of charging-instrument defects was quickly followed by their excuse for lack of prejudice to the defendant, see *Carey*, 2018 IL 121371, ¶¶ 22-30, and *Gilmore*, 63 Ill. 2d at 29-31, any lack of prejudice here is no saving grace. Reversal is required.

CONCLUSION

For the foregoing reasons, Antonio D. Kidd, defendant-appellant, respectfully requests that this Court reverse both of his convictions and remand for further proceedings consistent with double jeopardy principles.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is nineteen pages.

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IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- ANTONIO D. KIDD, Defendant-Appellant.	)	Appeal from the Appellate Court of Illinois, Fourth Judicial District, No. 4-19-0345. There on appeal from the Circuit Court of the Seventh Judicial Circuit, Sangamon County, Illinois, No. 17-CF-556. Honorable John M. Madonia, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On August 23, 2022, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Springfield, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

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