No. 127904

IN THE
SUPREME COURT OF ILLINOIS

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

BRIEF OF PLAINTIFF-APPELLEE
PEOPLE OF THE STATE OF ILLINOIS

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

KATHERINE M. DOERSCH
Criminal Appeals Division Chief

ELDAD Z. MALAMUTH
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-2235
eserve.criminalappeals@ilag.gov

Counsel for Plaintiff-Appellee
People of the State of Illinois

ORAL ARGUMENT REQUESTED

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CYNTHIA A. GRANT
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NATURE OF THE CASE

Defendant appeals from the appellate court's judgment affirming his two convictions for predatory criminal sexual assault of a child in violation of 720 ILCS 5/11-1.40(a).

ISSUE PRESENTED FOR REVIEW

Whether the indictment, which charged that defendant "committed an act of sexual contact . . . with T.F. in that said defendant placed his penis in contact with the mouth of T.F.," set forth the nature and elements of predatory criminal sexual assault of a child because it alleged both (1) an act of sexual penetration and (2) an act of sexual contact.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315(a) and 612(b)(2). On January 26, 2022, this Court allowed defendant's petition for leave to appeal.

STATUTES INVOLVED

720 ILCS 5/11-1.40 states:

> (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 or anus 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, or an act of sexual penetration, and:
>
> (1) the victim is under 13 years of age.

720 ILCS 5/11-0.1 defines "sexual penetration" as:

> any contact, however slight, between the sex organ or anus of one person and an object or the sex organ, mouth, or anus of another person, or any intrusion, however slight, of any part of the body of one person . . . .

720 ILCS 5/11-0.1 also defines "sexual conduct" as:

> any knowing touching or fondling by the victim or the accused . . . 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 . . . for the purpose of sexual gratification or arousal of the victim or the accused.

725 ILCS 5/111-3 states:

> (a) A charge shall be in writing and allege the commission of an offense by:
>
> * * *
>
> (3) Setting forth the nature and elements of the offense charged.

STATEMENT OF FACTS

A. The People charged defendant with two counts of predatory criminal sexual assault of a child by alleging that defendant's penis made sexual contact with the victim's mouth.

The People charged defendant by indictment with two counts of predatory criminal sexual assault of a child.

Apart from prefatory language and the dates of the offenses, both counts were identically worded. Count I alleged that "in the County of Sangamon," between August 28, 2016, and August 29, 2016, defendant "committed the offense of PREDATORY CRIMINAL SEXUAL ASSAULT," in violation of 720 ILCS 5/11-1.40(a)(1), "in that said defendant, who was over the age of 17, committed an act of sexual contact, however slight, with T.F.,

in that said defendant placed his penis in contact with the mouth of T.F. and T.F. was under the age of 13 years old." C39.[1]

Count II alleged that "in the County of Sangamon" between July 1, 2011, and August 29, 2016, defendant "committed the offense of PREDATORY CRIMINAL SEXUAL ASSAULT," in violation of 720 ILCS 5/11-1.40(a)(1) (2012), "in that said defendant, who was over the age of 17 committed an act of sexual contact, however slight, with T.F., in that said defendant placed his penis in contact with the mouth of T.F. and T.F. was under the age of 13 years old." C40.[2]

B. The trial court denied defendant's pretrial motions to dismiss the indictment.

Defendant moved to proceed pro se, and, while admonishing him regarding his request, the trial court read the indictment to him and asked if defendant understood the charges. R83. Defendant answered, "Yes, sir," when asked whether he understood each charge. R84-85. The trial court granted defendant's request to proceed pro se and denied his request for standby counsel. R88-91.

Defendant then filed pro se motions to dismiss the indictment, alleging that "it fails to set forth the nature and element [sic] of the offense." C99

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[1] "C_," "Sup2C_," "R_," and "Def. Br. _" refer to the common law record, the supplement to the common law record, the report of proceedings, and defendant's opening brief in this case, respectively.

[2] A third and additional count of predatory criminal sexual assault of a child was immediately dismissed. C41.

(motion to dismiss Count II); *see also* C104-05 (motion to dismiss Count I). He stated that the statute requires "an act of contact or an act of sexual penetration," then asserted that "sexual penetration is the element for predatory criminal sexual assault" while "sexual contact is an element of conduct." C100.

In arguing his motions to dismiss, defendant asserted that the People were "not giving me an opportunity to (unintelligible) or to make a defense, because you're charging me with a penetration case, but accusing me of a conduct case." R109. In other words, defendant argued that the indictment alleged sexual contact instead of penetration, and only the latter was an element of the crime. The trial court denied the motion, finding that the indictment sufficiently set forth the elements of the offense because it alleged "sexual contact, however slight, between the sex organ of one person and the part of a body of the other person." R111.

Defendant moved for reconsideration, arguing that "[s]exual contact is the element of the offense of sexual abuse," rather than sexual assault. C113; R143. The trial court denied the motion, explaining that the predatory criminal sexual assault of a child statute allows for "sexual contact" to constitute the crime. R145.

Defendant also filed a pro se motion to dismiss charges, alleging that Counts I and II were defective because they failed to "allege the requisite mental state of the charged offense (that the act was done for sexual

gratification or arousal of the victim or accused)." C227-28. Although defendant was subsequently represented by counsel, he filed another pro se motion to dismiss charges, raising the same argument. C242-43. The trial court struck the pro se motions at his counsel's request and also determined that it had denied the substance of those motions. R304, 333-34, 340.

The People moved to amend the indictment to add the term "knowingly" to the charges, Sup2C8, then orally sought as well to amend the charges to include the language "for the purpose of the sexual gratification of the Defendant or the victim," R369-70. The trial court denied the motion, explaining that the additional language was unnecessary because the indictment used the phrase "sexual contact" which communicated that the contact was "for the purpose of sexual gratification or arousal." R375.

C. A jury found defendant guilty of two counts of predatory criminal sexual assault.

At trial, T.F. testified that on that Sunday night or early Monday morning, August 28 or 29, 2016, she was sleeping on the couch with her younger brother beside her. R794, 802. Also in the house were her other siblings, her mother, defendant (her mother's boyfriend), and defendant's mother. R801.

T.F. was woken by defendant's penis on her mouth. R795. Something came out of defendant's penis that tasted "disgusting." R795-96. Then defendant ran back to his room. R795. This happened multiple times that night. R808. This had also happened before, on more than one occasion.

R795-96. The other times, too, defendant put his penis on T.F.'s mouth and "stuff" came out. R799-800.

On Monday, August 29, 2016, Gaila Carlisle, T.F.'s grandmother, picked up the children around 6:00 a.m. to take them to her house to get them ready for school. R578. In the car, T.F. asked about the nature of a light white substance on her bare upper arm and said she really needed to talk to her mother; Carlisle became suspicious and told T.F. not to touch what was on her arm. R580-81, 595. She told T.F. she would take her to the hospital, where T.F. could explain what happened and where people could help her. R581. Carlisle took the other children to the school bus stop. R598. In the car on the way to hospital, T.F. told Carlisle that defendant "had put his penis in her mouth and that it tasted terrible." R582.

Dr. Janda Stevens, an emergency physician at St. John's Hospital, and Kayla Teich, a nurse, examined T.F. and prepared a sexual assault kit. R662, 667, 694. T.F. told Stevens and Teich that in the middle of the previous night, her mother's boyfriend had placed his penis in her mouth and put "sperm" into her mouth, and that this was not the first time that he had done so. R665, 667, 701, 731, 798. T.F. had a dry white substance on her shoulder and face. R668.

On September 8, 2016, Denise Johnson, a certified forensic interviewer at the Sangamon County Child Advocacy Center, interviewed T.F. R743, 819. T.F. stated that she had been sleeping on the couch with her younger

brother when defendant put his penis in her mouth and "liquidy stuff" came out. R839-40, 842. After that, defendant ran away. R843. T.F. stated that defendant had done this before, approximately 15 times. R844. The interview was recorded, and a DVD copy of the interview was admitted into evidence and played for the jury. R828-32, 849.

Nancy Finley, a sergeant in the Sangamon County Sheriff's Office, obtained a buccal swab from defendant. R746. Dr. Sangeetha Srinivasan, a forensic scientist with the Illinois State Police, testified that the swabs from the interior of T.F.'s mouth indicated the presence of semen. R887. Defendant's DNA profile was found in the swab. R893-94.

The trial court instructed the jury that to "sustain the charge of predatory criminal sexual assault of a child, the State must prove . . . that the Defendant intentionally committed an act of contact, however slight, between the sex organ of one person and the body part -- and the part of the body of another for the purposes of sexual gratification of the Defendant." 1009.

The jury found defendant guilty of both counts of predatory criminal sexual assault. C316; R1018.

In posttrial motions, defendant argued, among other matters, that the circuit court erred in denying his motions to dismiss Counts I and II of the indictment. C329, C349. On May 29, 2019, the trial court denied the motions. R1048; C24.

That same day, the trial court sentenced defendant to consecutive 25-year prison sentences. R1068.

D. The appellate court determined that the indictment set forth the elements of the offenses.

On appeal, defendant argued that Counts I and II failed to strictly comply with 725 ILCS 5/111-3(a)(3) because they failed to alleged that the alleged contact was for the purpose of sexual gratification or arousal of him or T.F. The appellate court affirmed, finding that that the indictment sufficiently set forth the elements of predatory criminal sexual assault of a child. *People v. Kidd*, 2021 IL App (4th) 190345-U, ¶ 57. The indictment alleged "an act of sexual contact," which was equivalent to "an act of contact for the purpose of sexual gratification or arousal of the accused or the victim." *Id.* The appellate court explained that the dictionary defines "sexual" as "'relation to the instincts, physiological processes, and activities connected with physical attraction or intimate physical contact between individuals.'" *Id.* (quoting the Oxford English Dictionary Online, http://www.oed.com/view/Entry/177084). Thus, "sexual contact" was by definition contact "for the purpose of sexual gratification or arousal," and the indictment strictly complied with 725 ILCS 5/111-3(a)(3). *Id.*

STANDARD OF REVIEW

This Court reviews de novo the legal issue of whether a charging instrument complied with 725 ILCS 5/111-3(a). *People v. Espinoza*, 2015 IL 118218, ¶ 15.

ARGUMENT

I. By Alleging that Defendant's Penis Made Contact with the Victim's Mouth, the Indictment Properly Charged Defendant With Predatory Criminal Sexual Assault of a Child Under Two Separate Theories.

The appellate court correctly affirmed the circuit court's order denying defendant's motion to dismiss the indictment because the charges sufficiently alleged that he committed predatory criminal sexual assault of a child on two separate theories: (1) an act of sexual penetration, and (2) an act of contact for the purpose of defendant's sexual gratification or arousal. *See* 720 ILCS 5/11-1.40(a).

Illinois law codifies in 725 ILCS 5/111-3 a defendant's "right to be informed of the nature and cause of criminal accusations made against him." *Espinoza*, 2015 IL 118218, ¶ 15. Because defendant challenged the indictment before trial, it was required to strictly comply with section 111-3(a), *Espinoza*, 2015 IL 118218, ¶¶ 15, 24, by providing (1) the name of the offense charged, (2) the statutory provision violated, (3) the nature and elements of the offense, (4) the date and county of the offense, and (5) the name of the accused, 725 ILCS 5/111-3(a). Defendant does not dispute that the indictment satisfied requirements (1), (2), (4), and (5); he contends only that the indictment did not set forth "the nature and elements of the offense charged," 725 ILCS 5/111-3(a)(3).[3]

[3] In the appellate court, defendant claimed that Count II did not sufficiently specify the date of the offense, but he has forfeited the argument by not

An indictment is sufficient if it "specifies the type of conduct prohibited." *People v. Nash*, 173 Ill. 2d 423, 429 (1996); *see also People v. Thingvold*, 145 Ill. 2d 441, 449-50 (1991) (charging instrument is sufficient if proof of the allegations amounts to proof of the crime). "[T]his requirement is satisfied if the charging instrument states the offense in the language of the statute." *Nash*, 173 Ill. 2d at 429. But while the indictment may track the language of the statute, it need not use identical words. *Id.* Indeed, this Court does not require quotation of the language of a statute or rule for strict compliance as a general rule. *See*, *e.g.*, *People v. Gorss*, 2022 IL 126464, ¶ 29 (to strictly comply with requirement that counsel set forth compliance with Rule 604(d), certificate's language "need not be identical" to rule). Instead, the "facts which constitute the crime must be specifically set forth." *Nash*, 173 Ill. 2d at 429.

Courts "consider the plain and ordinary meaning of the language in the indictment as read and interpreted by a reasonable person." *People v. Okoro*, 2022 IL App (1st) 201254, ¶ 35, petition for leave to appeal pending in Case No. 128406. "A charging instrument is to be read as a whole, and where a statute is cited in a count, the statute and count are to be read together." *Id.*; *see also People v. Hall*, 96 Ill. 2d 315, 324 (1982) (indictments read as a whole).

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pressing it before this Court in his petition for leave to appeal or in his opening brief. Ill. S. Ct. Rs. 341(h)(7), 612(b)(9); *People v. McCarty*, 223 Ill. 2d 109, 122 (2006).

Applying these principles, the indictment sufficiently set forth the elements of predatory criminal sexual assault of a child in two separate ways. The statute is violated if an adult commits against a child victim either (1) "an act of sexual penetration," or (2) "an act of contact, however slight, between the sex organ or anus 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." 720 ILCS 5/11-1.40(a). "'Sexual penetration' means any contact, however slight, between the sex organ or anus of one person and an object or the sex organ, mouth, or anus of another person." 720 ILCS 5/11-0.1.

Here, the facts set forth in the indictment, that defendant placed his penis in contact with T.F.'s mouth, alleged an "act of sexual penetration." Second, the charges set forth the elements of predatory criminal sexual assault on the alternate theory of "an act of contact," even though they did not specifically include the language that it was done for the purpose of sexual gratification or arousal. The meaning was clear from the plain and ordinary meaning of "sexual contact," the statutory definition of "sexual conduct," and reading the indictment as a whole and in the context of the cited statute.

A. The indictment set forth the elements of predatory criminal sexual assault of a child based on an "act of sexual penetration."

The indictment set forth the facts necessary to establish all the elements of predatory criminal sexual assault of a child through sexual

penetration: that defendant was over 17 years old, T.F. was under 13 years old, and defendant placed his penis in contact with T.F.'s mouth. C39-40. Thus, the indictment sufficiently charged defendant with that crime. *Nash*, 173 Ill. 2d at 429.

Section 11-1.40(a) provides that an adult commits predatory criminal sexual assault of a child if he "commits an act . . . of sexual penetration" with a child, 720 ILCS 5/11-1.40(a), and "sexual penetration" "means any contact, however slight, between the sex organ or anus of one person and an object or the sex organ, mouth, or anus of another person," 720 ILCS 5/11-0.1. Here, the indictment alleged that defendant "committed . . . an act of sexual contact . . . in that said defendant placed his penis in contact with the mouth of T.F." C39; *see also* C40 (same language for Count II). That is, the indictment alleged that defendant made contact, however slight, between his sex organ and T.F.'s mouth. That is sexual penetration. 720 ILCS 5/11-0.1. Indeed, defendant knew the acts alleged constituted sexual penetration, as he asserted in arguing his pro se pretrial motions to dismiss the charges that the People were "charging [him] with a penetration case." R109. And where an indictment alleges sexual penetration, it has set forth the necessary elements of predatory criminal sexual assault.

The People did not need to further allege that the contact between defendant's penis and T.F.'s mouth was for the purpose of sexual gratification or arousal. 720 ILCS 5/11-1.40(a)(1). Defendant's argument to the contrary

ignores the definition of sexual penetration. Defendant correctly notes that there are "two alternative courses" for proving predatory criminal sexual assault — an "act of contact" and an "act of sexual penetration." *See* Def. Br. 21-22. But "sexual penetration" may consist solely of an "act of contact." 720 ILCS 5/11-0.1. To constitute penetration, such contact must be of a specific and limited type. *Compare* 720 ILCS 5/11-0.1 (defining sexual penetration as "any contact, however slight, between the sex organ or anus of one person and an object or the sex organ, mouth, or anus of another person"), *with* 720 ILCS 5/11-1.40(a) (providing that predatory criminal sexual assault may be predicated on "an act of contact, however slight, between the sex organ or anus of one person and the *part of the body* of another for the purpose of sexual gratification or arousal") (emphasis added).

Where the alleged contact amounts to penetration, there is no additional requirement that the People further allege that the act was for the purpose of defendant's sexual gratification or arousal or allege any particular mental state. *See* Def. Br. 26 ("[The People] could have charged [defendant] with committing PCSAC by an act of sexual penetration and omitted any mental-state element from the indictment."). In fact, such intent is implicit in the act itself. *People v. Kolton*, 219 Ill. 2d 353, 370 (2006) (because "acts of 'sexual penetration' are inherently sexual in nature," "when defining 'sexual penetration,' it was not necessary for the legislature to explicitly state that the acts must be done intentionally or knowingly and 'for the purpose of

sexual gratification or arousal'"); *People v. Shelton*, 42 Ill. 2d 490, 494-95 (1969) ("Although the information here omits the word 'knowingly,' the acts it does allege could not have been performed unless they were done 'knowingly.'").

Accordingly, because the contact alleged in the indictment amounted to sexual penetration, the People did not to specify that defendant did so for the purpose of his sexual gratification.

Furthermore, the absence of the phrase "sexual penetration" is not a defect because the indictment set forth the specific facts that constitute the crime. Rather than use the words "sexual penetration," the indictment simply incorporated the language defining sexual penetration in 720 ILCS 5/11-0.1. In short, the indictment did not need to allege that defendant was charged with "sexual penetration" because it charged facts that constitute sexual penetration. Here, the indictment charged all essential elements of the offense of predatory criminal sexual assault of a child and thus strictly complied with section 111-3. *Nash*, 173 Ill. 2d at 429. This Court should affirm on this basis alone.

B. The indictment set forth the elements of predatory criminal sexual assault of a child based on a contact for the purpose of defendant's sexual gratification or arousal.

In addition, the indictment sufficiently set forth the elements of predatory criminal sexual assault of a child under the second theory based on "an act of contact."

The predatory criminal sexual assault statute prohibits (in addition to any act of sexual penetration) "any contact, however slight, between the sex organ or anus 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." 720 ILCS 5/11-1.40(a).

Here, each charge alleged that defendant "committed an act of sexual contact, however slight, with T.F., in that said defendant placed his penis in contact with the mouth of T.F." C39-40. T.F.'s mouth was a "part of [her] body." *See* 720 ILCS 5/11-1.40(a). The charges alleged that defendant's penis "made contact" with her mouth. And the indictment made clear that defendant's penis made contact with T.F.'s mouth for the purpose of sexual gratification or arousal because the charges both set forth that the inherently sexual act was "*sexual* contact." C39-40 (emphasis added).

The "sexual gratification language" in the statute is intended to prevent criminal charges based on touching that may "occur accidentally or unintentionally." *People v. Terrell*, 132 Ill. 2d 178, 210 (1989). As defendant recognizes, the legislative history confirms that the clause "for the purpose of sexual gratification or arousal of the victim or the accused" was a "technical change to clean up a concern . . . about innocent conduct being criminalized." 98th Ill. Gen. Assem., House Proceedings, Apr. 3, 2014, at 114 (statement of Representative McAsey) (cited Def. Br. 24). Here, by stating that defendant "committed an act of sexual contact, however slight, with T.F., in that said

defendant placed his penis in contact with the mouth of T.F.," C39-40, the indictment set forth that the contact of defendant's penis to T.F.'s mouth was not accidental or unintentional but for sexual gratification or arousal. The meaning was clear from the plain and ordinary meaning of "sexual contact," the statutory definition of "sexual conduct," and reading the indictment as a whole and in the context of the cited statute.

As the appellate court explained, the plain and ordinary meaning of "sexual contact" refers to contact that is not accidental but instead for sexual gratification or arousal. The appellate court cited a dictionary that defines "sexual" as in "'relation to the instincts, physiological processes, and activities connected with physical attraction or intimate physical contact between individuals." *Kidd*, 2021 IL App (4th) 190345-U, ¶ 57 (quoting the Oxford English Dictionary Online, www.oed.com/view/Entry/177084). While defendant asserts that the exact definition the appellate court cited no longer appears online, he concedes that multiple definitions are "similar" and that such definitions would satisfy the statute. Def. Br. 28-29. Thus, the ordinary meaning of the term "sexual contact" is contact "for the purpose of sexual gratification or arousal," and the indictment strictly complied with 725 ILCS 5/111-3(a)(3). *Kidd*, 2021 IL App (4th) 190345-U, ¶ 57.

Statutory definitions also make clear that "sexual contact" is for the purposes of sexual gratification or arousal. "Sexual conduct," a related term, "means any knowing touching or fondling by the victim or the accused . . . 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 . . . for the purpose of sexual gratification or arousal of the victim or the accused." 720 ILCS 5/11-0.1. These terms overlap: making contact is a type of conduct. *See* 720 ILCS 5/2-4 ("'Conduct' means an act or a series of acts, and the accompanying mental state."); *see also Kolton*, 219 Ill. 2d at 369 ("The type of touching alleged in defendant's indictment, *i.e.*, an intrusion of [defendant's] finger into [C.S.'s] vagina,[] clearly falls within the definition of 'sexual conduct.'"). Thus, sexual contact is a type of sexual conduct, which by definition is for the purpose of sexual gratification or arousal.

Moreover, the indictment is read as a whole and in the context of the cited statute. *Okoro*, 2022 IL App (1st) 201254, ¶ 35; *see also Hall*, 96 Ill. 2d at 324. In this case, the indictment alleged that defendant made "sexual contact" between his penis — his sex organ — and T.F.'s mouth. The "element — that a defendant acted 'for the purpose of sexual gratification' — is something that is typically inferred from the circumstances used to prove the alleged act." *Kolton*, 219 Ill. 2d at 371. Acts that constitute sexual penetration, including contacting another's mouth with defendant's penis, "are inherently sexual in nature, and, because of their inherently sexual nature, the acts described in the definition of 'sexual penetration' can be neither unintentional nor inadvertent." *Id.* at 370; *see also id.* at 371 ("Although defendant's indictment did not specify that the acts attributed to

defendant were done 'for the purpose of sexual gratification,' this purpose could reasonably be inferred."); *People v. Kennebrew*, 2013 IL 113998, ¶ 37 ("Because sexual penetration was alleged, we can infer that the act was done with the purpose of sexual gratification or arousal."). Defendant does not propose a single plausible alternative reading of the indictment other than that it was for his sexual gratification or arousal.

Defendant instead argues that the indictment did not set forth that his sexual contact of his penis to T.F.'s mouth was for the purpose of sexual gratification or arousal because "sexual" has multiple meanings. Def. Br. 28-30. But "sexual" can have multiple meanings regardless of whether the indictment tracks the language of the statute exactly. The other words, too, including gratification and arousal, can have multiple meanings. Courts, however, will interpret "sexual gratification or arousal" to have its plain and ordinary meaning whether the term is in a statute or an indictment. *Okoro*, 2022 IL App (1st) 201254, ¶ 35; *Hall*, 96 Ill. 2d 315. So too do courts interpret "sexual contact" in an indictment as having its plain and ordinary meaning reading the indictment as a whole. *Okoro*, 2022 IL App (1st) 201254, ¶ 35. Defendant 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 sexual contact with T.F.'s mouth. The meaning in the indictment of "sexual contact" between defendant's penis and T.F.'s, an act inherently sexual in nature, was clearly for the purpose of

defendant's sexual gratification or arousal and not for the purpose of the other potential meanings of "sexual" defendant offers.

At its core, defendant's argument implicitly asserts that the indictment's language must track precisely the language of the statute. In other words, defendant's argument would be the same if the indictment charged that he contacted T.F.'s mouth with his penis for the purpose of sexual satisfaction and stimulation instead of "for the purpose of sexual gratification or arousal." But he points to no case so holding. Indeed, the contrary is true. *Nash*, 173 Ill. 2d 423, 429

Defendant makes the same mistake when he argues that the indictment did not strictly comply with section 111-3 because it was "defective." Def. Br. 30. In support, he asserts that the trial court's decision to use the statutory language in the jury instruction demonstrates that the indictment was defective because otherwise "the trial court would have had no reason to instruct the jury using the statutory language instead of the indictment language." Def. Br. 30-31. But the trial court was simply following the Illinois Pattern Jury Instructions. *See* I.P.I. – Criminal 11.103. The pattern instruction "shall be used, unless the court determines that it does not accurately state the law." Ill. S. Ct. R. 451(a). The trial court's use of the pattern instruction complied with this Court's rules and constitutes no evidence that the indictment was defective.

Defendant is also incorrect to think that *People v. Cuadrado*, 214 Ill. 2d 79 (2005), demonstrates that the indictment was defective. *See* Def. Br. 30. There, the defendant failed to challenge the indictment before trial, and this Court held that his challenge to the indictment for the first time on appeal failed for lack of prejudice. The indictment charged that the defendant "solicited" another to commit murder, while the statute required that the defendant "procure" another to commit the offense. *Id.* at 88. Although the terms had different meanings, the defendant's motions filed during trial demonstrated she was aware the People needed to prove procurement. *Id.* As defendant points out, the Court described the substitution of the word "solicited" for the word "procured" as the indictment's "only deficiency." *Id. see also* Def. Br. 20, 27-28. From this, defendant argues that *Cuadrado* stands for the proposition that the "charging instrument fails to allege every element of the offense charged where it meaningfully departs from the language of the statute defining that offense." Def. Br. 20.

But in that case, the words used were meaningfully different. A defendant had to do more than solicit (ask) another to commit the murder; the defendant had to procure (obtain) another to do so. *See People v. Catuara*, 358 Ill. 414, 416 (1934) ("In general parlance and as well by definitions by lexicographers the word 'procure' means 'to obtain,' 'to get.'"). Solicitation, in contrast, did not require the defendant to have successfully

obtained another to commit the crime. *See* 720 ILCS 5/2-20 ("'Solicit' or 'solicitation' means to command, authorize, urge, incite, request, or advise another to commit an offense."). Thus, the indictment there misstated the procurement element of the crime, instead substituting solicitation, which constitutes a wholly different crime.

Here, by contrast, there was no similar substitution, much less one that misstated an element. Indeed, the same word, "sexual," is contained in both the indictment and the statute. Defendant simply 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. But as discussed above, the plain and ordinary meaning of the words, including as used by this Court; the statutory definition of "sexual conduct"; and reading the indictment as a whole confirm that when the indictment charged defendant with sexual contact, it was for the purpose of his sexual gratification or arousal. *See also United States v. Resendiz-Ponce*, 549 U.S. 102, 107-108 (2007) (indictment was sufficient because of the way word was used "in common parlance" and "in the law for centuries"). The indictment set forth the elements of predatory criminal sexual assault of a child via sexual contact.

Thus, the charges alleged that defendant committed predatory criminal sexual assault of a child on two separate theories: (1) that defendant placed his penis in contact with T.F.'s mouth alleged an "act of

sexual penetration"; and (2) that the "act of contact" between defendant's penis and T.F.'s mouth was sexual — i.e., not accidental but for the purpose of his sexual gratification or arousal.

CONCLUSION

This Court should affirm the judgment of the appellate court.

July 19, 2022

Respectfully submitted,

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

KATHERINE M. DOERSCH
Criminal Appeals Division Chief

ELDAD Z. MALAMUTH
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(773) 590-7973
eserve.criminalappeals@ilag.gov

Counsel for Plaintiff-Appellee
People of the State of Illinois

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, and the certificate of service, is 22 pages.

/s/ Eldad Z. Malamuth
ELDAD Z. MALAMUTH
Assistant Attorney General

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

PROOF OF FILING AND SERVICE

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 July 19, 2022, the foregoing **Brief of Plaintiff-Appellee People of the State of Illinois** was at the same time (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy from my e-mail address to the e-mail addresses of the persons named below:

Catherine Hart, Deputy Defender
Amy J. Kemp, Assistant Appellate Defender
Office of the State Appellate Defender
400 West Monroe Street
Springfield, Illinois 62704
4thdistrict.eserve@osad.state.il.us

David J. Robinson, Chief Deputy Director
State's Attorneys Appellate Prosecutor
725 South Second Street
Springfield, Illinois 62704
4thdistrict@ilsaap.org

Daniel Wright
State's Attorney of Sangamon County
200 South 9th Street, Suite 402
Springfield, Illinois 62701
chandler.chapman@co.sangamon.il.us

/s/ Eldad Z. Malamuth
ELDAD Z. MALAMUTH
Assistant Attorney General