No. 127683

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- JOHN T. McKOWN, Petitioner-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-19-0660. There on appeal from the Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois, No. 18-CF-136. Honorable Thomas E. Griffith, Judge Presiding.

REPLY BRIEF FOR PETITIONER-APPELLANT

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ORAL ARGUMENT REQUESTED

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ARGUMENT

I.

The creation of a handmade collage of otherwise lawful images cut from magazines cannot constitute child pornography pursuant to 720 ILCS 5/11-20.1(a)(1)(ii), where it is uncontested that no children engaged in any sex acts for the creation of such collage.

In his opening brief, John McKown argued that he had been improperly convicted of possession of child pornography under 720 ILCS 5/11-20.1(a)(1)(ii) (2018), based on a collage assembled from otherwise-lawful magazine images. (Deft Br 19-30) John asserted that a page from a magazine containing a child's likeness (an object) is not the same thing as an actual child (a human person). (Deft Br 27) John pointed to a decision of this Court which held that the statute's previous definition of a "child" was unconstitutionally overbroad. *People v. Alexander*, 204 Ill. 2d 472, 485-86 (2003). This Court struck the statute's unconstitutionally overbroad definition of "child," amending the definition to refer only to "an individual human being" of young age, and clarifying that "child pornography '[m]atter' means 'any photographic product depicting *actual human models or actors*[.]'" *Id*. at 486 (emphasis in original). As a result, the Illinois child pornography statute (720 ILCS 5/11-20.1(a) *et seq*.) does not prohibit images which are produced without photographing or otherwise recording actual human children. (Deft Br 27-30) See *id*. Nor could the phrase "actually or by simulation" in the Illinois statute expand the definition of the offense to cover instances where no reasonable viewer could believe that live human subjects actually engaged in that conduct on camera, John reasoned. (Deft Br 28) See *United States v. Williams*, 553 U.S. 285, 297 (2008).

The trial court employed similar reasoning when it found that John was not guilty of the production of child pornography. (R281-283) "[I]n this particular case, there were no children actually engaged in acts of child pornography." (R282) It then mistakenly found John guilty of the possession of child pornography, despite finding that the images in question unequivocally

did not present a record of any live sex acts, because it found the images to be "morphed." (R282-283) The appellate court took the error a step further in a published decision, holding that Illinois law prohibits any alteration of the image of a real, identifiable child to depict sexual themes. *People v. McKown*, 2021 IL App (4th) 190660, ¶ 67.

A. John's collages did not violate 720 ILLS 5/11-20 (2018), where no child was involved in sexual activity for the collages' creation.

The State argues that a magazine image of a child is legally the same as an actual child. (St Br 17-20) It concludes that John's collages constitute images which are altered to depict children engaged in simulated sexual acts, and that those collages necessarily fall within the plain meaning of the statute. (St Br 17-18) The State argues that "[u]nder the plain language of the statute, it is irrelevant whether the images of children engaged in simulated sexual acts are created by taking photographs of children in the first instance or by altering existing photographs of children." (St Br 17) However the State's argument is directly contrary to the meaning of "simulated" intercourse as defined by the United States Supreme Court. "'[S]imulated' sexual intercourse is not sexual intercourse that is merely suggested, but rather sexual intercourse that is explicitly portrayed, even though (through camera tricks or otherwise) it may not actually have occurred. The portrayal must cause a reasonable viewer to believe that the actors actually engaged in that conduct on camera." *Williams*, 553 U.S. at 297.

The State attempts to distinguish *Williams* (*id.*) in a footnote, arguing that the reference to the word "simulated" in *Williams* does not relate to the concept of morphed child pornography under the Illinois statute. (St Br 26-27) To the contrary, *Williams* directly refutes the State's misplaced argument that the "simulated sex acts" language in the Illinois statute can refer to a suggestion of sexual conduct raised by taping together two insular, lawful images. (St Br 16-17) In order to constitute "simulated" sexual intercourse, the "portrayal must cause a reasonable viewer to believe that the actors actually engaged in that conduct on camera." *Id.*

So-called "morphed" images, as contemplated by the *Ashcroft* Court, would involve the use of computer imaging software to alter images of real children so that they appeared to be engaged in sexual activity. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 242 (2002). The Court noted that such images would constitute virtual – not actual – child pornography; however the "morphing" provisions of the federal statute had not been challenged and their constitutionality was not addressed in that case. *Id*. The Illinois statute does not make any mention of "morphed" images. See 720 ILCS 5/11-20.1(a) *et seq*.

This Court, in *Alexander*, struck down an expansion of the Illinois statute's definition of "child" which was added in an attempt to encompass morphed images. "[I]t expands the definition of a 'child.' This is intended to address the issue of morphing, where they morph different parts of bodies." *Alexander*, 204 Ill. 2d at 482 (emphasis omitted). This Court compared the statute's expanded definition of a "child" to the United States Supreme Court's decisions regarding child pornography statutes, finding that the expanded definition went beyond morphing "to attack the same virtual and pandered child pornography targeted by [invalidated sections] of the CPPA." *Alexander*, 204 Ill. 2d at 483. This Court then struck the Illinois statute's expanded definition of "child" as unconstitutional, holding that henceforth "'[c]hild' means young human being; child means actual child." *Id*. at 486. The State contends that John has misrepresented the holding of *Alexander* by arguing that the Illinois statute does not refer to morphed images. (St Br 19) However, the State's argument seems to be predicated on a misapprehension of this Court's holding: the word "child" in the statute protects live human beings, not magazines. *Alexander*, 204 Ill. 2d at 486. Where the resulting image would not cause any reasonable viewer to believe that a human child engaged in the suggested activity, it cannot constitute child pornography. (Deft Br 19-33)

The State argues that the plain meaning of the word "child" necessarily encompasses morphed images, including images of children "modified to appear as if they are engaged in sexual acts." (St Br 20) In raising this argument, the State fails to acknowledge *Alexander*'s explicit definition of a child as a real human being in contrast to an animal or thing. (St Br 17-20) *Cf. Alexander*, 204 Ill. 2d at 486. The State concedes that no child was actually involved in a sex act – real or simulated – to generate any of the images in question. (St Br 17) It argues that any visual representation of a real child to which sexually explicit images are later added constitutes an image which "appears to be[] that of a person * * * under the age of 18" who "actually or by simulation engaged in" an act involving the mouth of the child and the sex organs of another person. (St Br 16) The State implicitly argues that the government's interest in protecting *pictures* of children from mistreatment is identical to its interest in protecting living, breathing children from sexual abuse. (St Br 16-20)

The first flaw in the State's argument is that a picture of a child is an inanimate "thing" while an actual child is a human person: the two are not remotely the same thing. "'Child' means 'a young person of either sex esp. between infancy and youth.'" *Alexander*, 204 Ill. 2d at 485–86. "'Person,' in turn, means 'an individual human being' or 'a human being as distinguished from an animal or thing.'" *Id*. at 486. The State's argument would effectively require this Court to set aside its holding in *Alexander* (*id*.), re-evaluate the supposed plain meaning of "child" in *Alexander*'s absence, and hold that an image of a person is legally indistinct from a living, breathing person. (St Br 16-20) In the absence of such an absurd holding, this Court would be required to hold that a child "appears to be engaged in sexual activity" based on an image which clearly does *not* show a real child engaging in sexual activity but merely raises the suggestion of sexual activity involving children. (St Br 22-24) *Cf. Williams*, 553 U.S. at 296 This Court should reject the State's remaining arguments, based on its unfounded misconstruction of the words "child" and "appears." (St Br 18-24)

B. Any construction of 720 ILCS 5/11-20.1 *et seq*. (2018) under which a defendant can be convicted although it is undisputed that no children engaged in sexual activity for the images' creation renders the statute unconstitutionally overbroad.

The State's final argument in favor of its overbroad interpretation of the words "child" and "appears" – and in defense of that interpretation's dubious constitutionality – is that the use of a real child's image in assembling a sexually suggestive collage may result in some sort of reputational or emotional harm to the child at some point in the future. (St Br 21-27) The State cites to an inapposite case which dealt with actual child pornography. (St Br 21) See *Osborne v. Ohio*, 495 U.S. 103, 116 (1990) ("That Osborne's photographs of adolescent boys in sexually explicit situations constitute child pornography hardly needs elaboration.") The State further argues that images suggesting sexual acts by minors may be used to "seduce" minors into actual sex acts. (St Br 21) It concludes that the same danger is present even when: the image is clearly fabricated, the depicted child has never been exposed to sexually explicit themes, and the child never learns that their image has been used. (St Br 21-27) The State argues that someone *could* have seen John's images, hidden in his basement though they were, and could then have photographed and disseminated the images. (St Br 26-27) "For a variety of reasons, once-private material can someday be made public," it argues. (St Br 27)

The State's arguments have previously been rejected by the United States Supreme Court. "The contention that the CPPA is necessary because pedophiles may use virtual child pornography to seduce children runs afoul of the principle that speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it." *Ashcroft*, 535 U.S. at 236. As the Court painstakingly explained in *Ferber*, child pornography statutes exist to combat the harm to children forced to engage in live sex acts while obscenity statutes combat the dissemination of materials based on their content. "[D]escriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic

or other visual reproduction of live performances, retains First Amendment protection." *New York v. Ferber*, 458 U.S. 747, 765 (1982). "*Ferber*'s judgment about child pornography was based upon how it was made, not on what it communicated." *Ashcroft*, 535 U.S. at 236.

The State argues that the prohibition of "morphed child pornography that simulates real children engaged in sexual activity" is justified by the State's interest in "broadly safeguarding the psychological well-being of children." (St Br 21-22) However, the State's generalized interest in protecting children does not apply when the defendant has not caused any child to be exposed to sexual themes. (Deft Br 24-33) "The Government, of course, may punish adults who provide unsuitable materials to children,* * * and it may enforce criminal penalties for unlawful solicitation. The precedents establish, however, that speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it." *Ashcroft*, 535 U.S. at 251–52 (internal citation omitted). The State argues that some future unknown person may commit the offense of obscenity by disseminating these images, so the images are dangerous to children and must constitute child pornography. (St Br 26-27) Such unfounded fears and leaps of logic provide insufficient basis for a broad content-based restriction on speech. "The evil in question depends upon the actor's unlawful conduct, conduct defined as criminal quite apart from any link to the speech in question. This establishes that the speech ban is not narrowly drawn." *Id*. at 252.

The State cites to *Lamborn*, a case involving nude photographs of actual children (which the defendant argued did not include a lewd exhibition), as support for its argument that wholly fictional collages cause emotional harm to children. (St Br 23) *People v. Lamborn*, 185 Ill. 2d 585, 589-90 (1999). It additionally cites to *Ferber* (458 U.S. at 760), for the same proposition. (St Br 23) The United States Supreme Court has firmly and explicitly rejected the State's interpretation of *Ferber* (*id*.). "In contrast to the speech in *Ferber*, speech that is itself the record

of sexual abuse, the [State's argument] prohibits speech that records no crime and creates no victims by its production." *Ashcroft*, 535 U.S. at 236. The State's argument must fail, as it relies on nothing more than speculation as to the potential for future harm to unnamed children based on the risk of unlawful acts by intervening parties. (St Br 26-27) *Cf*. *id*. at 236-37. Such speculative risk of harm, predicated on the acts of someone other than the defendant, cannot justify a broad content-based restriction on speech. "The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." *Id*. at 237.

The State notes that the *Ashcroft* (*id*.) Court commented on the slightly elevated government interest in protecting real children whose images are superimposed via computer imaging to make a convincing facsimile of actual child pornography. (St Br 23-24) The State argues, therefore, that any image which could colorably be deemed "morphed" is "different from, and more insidious than virtual child pornography." (St Br 24) This argument suffers from two significant flaws: first, the *Ashcroft* (*id*.) Court was referring specifically to "computer morphing" (*id*. at 242) and not to handmade collages; second, the Court held that computer-morphed images are virtual pornography (rather than actual pornography) but that the balance of interests may be different where the creator alters real pictures so that "the children appear to be engaged in sexual activity." *Id*. Though the State argues that "the harm to actual children from morphed child pornography is direct and inherent in the creation," the State offers no explanation as to how such rationale could apply to an image which was not created by computer and does not appear to show real children engaged in sexual activity. (St Br 24) While the State argues that anything resembling child pornography will contribute to the market for actual child pornography, this argument too was refuted by *Ashcroft*. "Few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice." *Ashcroft*, 535 U.S. at 254.

The State next cites to federal cases from the first, second, fifth, and sixth circuits, interpreting a federal statute which addressed the concept of computer morphing. (St Br 23-24) *United States v. Hoey*, 508 F.3d 687, 690 (1st Cir. 2007) (defendant pleaded guilty to possessing 131 images and 2 videos of child pornography on his computer, but objected to a sentencing enhancement for portraying sadistic or masochistic conduct); *United States v. Hotaling*, 634 F.3d 725, 730 (2d Cir. 2011) (names and faces of six identifiable minors were digitally superimposed on pornographic images); *United States v. Mecham*, 950 F.3d 257, 260 (5th Cir. 2020) (defendant digitally superimposed his granddaughter's face on pornographic videos); *Doe v. Boland*, 698 F.3d 877, 881 (6th Cir. 2012) (children's images were digitally altered in an attempt to prove that virtual pornography can be indistinguishable from actual pornography).

Each of the cases cited by the State involved images altered by computer to appear as if they depicted a minor engaged in sexual activity. (St Br 23-24) In some instances, those cases also discussed digital morphing of lawful images with unlawful images, so that the smiling face of one child might be imposed on the body of a separate child engaged in sexual activity. See, *e.g.*, *Hoey*, 508 F.3d at 693; *Mecham*, 950 F.3d at 268. Most significantly, however, those cases dealt with a federal statute explicitly designed to target the alteration of an identifiable minor's image to present a record of sexually explicit conduct. See 18 U.S.C.A. § 2252A *et seq*. (2022); 18 U.S.C.A. § 2256(8)(C) (2022). In the context of the federal statute, "'[s]exually explicit conduct' connotes actual depiction of the sex act rather than merely the suggestion that it is occurring." *Williams*, 553 U.S. at 297. "If anything, the fact that the defined term here is 'sexually *explicit* conduct,' rather than (as in *Ferber*) merely 'sexual conduct,' renders the definition more immune from facial constitutional attack." *Id*. at 296 (emphasis in original). Illinois's child pornography statute refers instead to a "child" engaged in "sexual conduct." 720 ILCS 5/11-20.1 *et seq*. In order for the statute to be constitutionally applied, "child" is limited to "'an individual human being' or 'a human being as distinguished from an animal or thing.'"*Alexander*, 204 Ill. 2d at 486.

The State cites as well to inapposite cases from Texas, Ohio, and Alabama. (St Br 24-25) Once again, these cases involve computer imaging software used to make convincing facsimiles of actual child pornography. See *State v. Bolles*, 541 S.W.3d 128, 137 (Tex. Crim. App. 2017) (Tex. Penal Code Ann. § 43.26 (West 2016) prohibited "material that visually depicts a child younger than 18 years of age at the time the image of the child was made who *is engaging* in sexual conduct" (emphasis added); "Computer access and cell phone photography and editing add a different perspective to this issue"); *McFadden v. State*, 67 So. 3d 169, 178 (Ala. Crim. App. 2010) (defendant convicted of possession of obscene materials pursuant to Ala. Code § 13A-12-192 (West 2010); "Some of the photographs superimposed what appeared to be *children's unclothed bodies* with naked adult body parts.") (emphasis in original); *State v. Tooley*, 114 Ohio St. 3d 366, 379 (Ohio 2007) (defendant convicted for possessing "any material or performance that shows a minor who is not the person's child or ward in a state of nudity" Ohio Rev. Code Ann. § 2907.323 (West 2006); "Nothing in the record suggested that either digital image or the video clip did not depict actual minors."). Each of the cases cited by the State demonstrates that the State does not have to present affirmative evidence that *facially genuine* pornographic materials which were modified on a computer had been produced using real children. (St Br 24-25) None of these cases contradicts the holding in *Williams* that the only proscribable material is that which would convince a reasonable viewer that the depicted acts actually took place. *Williams*, 553 U.S. at 297.

As John argued in his opening brief, any construction of 720 ILCS 5/11-20.1(a) *et seq*. which would criminalize his collages would be unconstitutionally overbroad almost by definition. (Deft Br 30-33) No reasonable viewer could believe that the actors actually engaged in the depicted conduct on camera. (E7, 9, 12) The premise that a child who once posed for a parenting magazine will suffer some vague and speculative harm if someone later uses that magazine

image in a sexually-themed collage cannot withstand strict scrutiny: it would require the Court to rely on multiple unfounded assumptions to impose a broad restriction on private speech. (Deft Br 30-33) To hold that the image of a child is legally indistinguishable from a real child would lead to countless absurd results and would be directly contrary to the Court's interpretation of the plain meaning of "child" in *Alexander*, 204 Ill. 2d at 486. To hold that a collage "appears to be" that which it unequivocally is not (a record of a live act) would defy reason. *Cf. Williams*, 553 U.S. at 297. This Court should reverse John's conviction for possession of child pornography. (Deft Br 19-33)

II.

The *corpus delicti* rule bars conviction for predatory criminal sexual assault and aggravated criminal sexual abuse as alleged in Counts I and V, respectively, where J.M.'s testimony did not relate to the specific events described in John McKown's inculpatory statement to police.

In his opening brief, John McKown argued that the State had failed to present any evidence on which John's incriminating statements to police could arguably have been corroborated. (Deft Br 35-44) Courts in Illinois do not analyze the circumstances under which a confession was made or the tendency of standard interrogation methods to produce false confessions. *Cf. Corley v. United States*, 556 U.S. 303, 320–21 (2009) ("custodial police interrogation, by its very nature, isolates and pressures the individual,* * * and there is mounting empirical evidence that these pressures can induce a frighteningly high percentage of people to confess to crimes they never committed") (internal citations omitted). In Illinois, all extrajudicial confessions are inherently unreliable. See, *e.g.*, *People v. Furby*, 138 Ill. 2d 434, 447 (1990). Before a defendant's confession may be considered as evidence of guilt, Illinois courts require some independent evidence to show that the events described in the confession actually took place. *People v. Lueder*, 3 Ill. 2d 487, 489 (1954). The allegedly corroborating evidence need not correspond to the confession in every detail, and the elements of the charged offense need not themselves be corroborated. *People v. Lara*, 2012 IL 112370, ¶ 42. Rather, the State must present "evidence, independent of the confession, and consistent therewith, tending to confirm and strengthen the confession." *Lueder*, 3 Ill. 2d at 489.

Here, John was convicted of placing his penis in contact with J.M.'s anus and transferring semen to J.M.'s buttocks. (C18, 22; Sup C4) The trial court found J.M.'s various recorded statements and his trial testimony to be seriously inconsistent, leaving substantial doubt as to almost every detail of the case. (R281) "And if the State's case was solely based on [J.M.'s] testimony, I think we would be in a much different position today than where Mr. McKown

finds himself." (R281) The court stated that "[D]efendant's admissions were obviously very important, if not critical to the State's case." (R283) The trial court did not determine whether the events described in John's statement were corroborated; instead, it ruled that the statements were not obviously coerced or involuntary. (R283) Because John had confessed to conduct similar to that which J.M. alleged, the court found John guilty. (R293-294) In doing so, the trial court relied on the fact of John's uncorroborated confession in violation of the *corpus delicti* rule's "specific corroboration" requirement. (Deft Br 35-44)

The State falsely asserts that John seeks perfect corroboration of every detail described in a confession. (St Br 31-34) The State does not address the details of John's incriminating statement, nor does it attempt to argue that any details of his statement were corroborated. (St Br 31-35) Instead, the State argues that both John and J.M. described events involving John's penis and semen and J.M.'s buttocks. (St Br 30-31) This correspondence in the general elements of a chargeable offense, argues the State, is sufficient to corroborate John's statement. (St Br 31) The State argues that, while other cases have analyzed the content of the allegedly corroborating evidence against the content of the defendant's statement, such analysis is not necessary here. (St Br 32-33) *Cf.* , *e.g.*, *Lara*, 2012 IL 112370 at ¶ 48. As the State notes, the allegedly corroborating evidence is to be viewed in the light most favorable to the State. (St Br 29) See *People v. Pitts*, 2016 IL App (1st) 132205, ¶ 31. However, the determination of whether the defendant's confession has been sufficiently corroborated is a question of law reviewed *de novo*. *Lara*, 2012 IL 112370 at ¶ 16.

John acknowledges that the State need not corroborate every detail of a defendant's confession; he does not ask this Court to require perfect corroboration, as the State contends. (Deft Br 35-36; St Br 31-32) Rather, John asks this Court to enforce the *corpus delicti* rule's specific corroboration requirement: that the State present evidence "indicating that the offense

was committed in the manner stated by the defendant[]" before the confession may be considered as evidence of guilt. *Furby*, 138 Ill. 2d at 452. Because the State presented absolutely no evidence to suggest that the events described in John's statements actually took place, the trial court was not authorized to consider John's statements as evidence of his guilt. (Deft Br 35-44) The mere fact that detectives convinced John to fabricate a story involving "some sort of anal sex thing" ("People's Ex 2" 0:10:45-0:13:32) does not prove that such an act ever occurred. "[T]herefore, in the absence of any evidence independent of the confession clearly showing a crime to have been committed by some person and in the further absence of evidence of other facts or circumstances so fully corroborating the confession as to show the commission of the offense beyond a reasonable doubt, the rule that the *corpus delicti* cannot be proved by the confession of a defendant alone must be applied." *Lueder*, 3 Ill. 2d at 489–90.

In this case, J.M. gave two recorded statements and testified at trial. ("People's Ex 9;" "Defendant's Ex 1;" R98-140) In his recorded statements, J.M.'s demeanor was at odds with the purported events: when J.M. described repeated instances of sexual abuse over a span of five years, he showed no emotional distress but instead seemed to relish the attention he received. ("People's Ex 9," 0:03:45-0:13:40) J. M. was inconsistent about whether violence or the threat of violence were used in this case, and laughed as he claimed that John had swung a "cheap" belt at J.M. "like a whip or something. Like have you ever seen a Catwoman movie?" ("Defendant's Ex 1" 032:05-0:32:50) He was able to provide intimate details of the abuse his sister K.M. had suffered at the hands of their mother's boyfriend. ("People's Ex 9" 0:19:45-0:22:20) However, when asked for further information about the abuse he claimed to have suffered firsthand, J.M. was unable to provide additional detail and had no apparent frame of reference for the questions. ("People's Ex 9" 0:04:03-0:10:00)

Though his story changed substantially with every retelling, J.M. generally alleged that John had routinely forced him into anal sex in the first-floor bathroom of the McKown home(s) when J.M. was between six and eleven years old. (R98-140) J.M. claimed that every time happened in the same place and the same way, beginning when John would enter the bathroom while J.M. was bathing or after he relieved himself. ("People's Ex 9" 0:07:35-0:07:51) J.M. claimed that John wore a "penis extender," placed his penis in J.M.'s butt, and would "like take it in and out." (R106, 124-125; "Defendant's Ex 1" 0:04:15-0:04:35) He claimed that, when John was done, J.M. would have to wipe "sticky stuff" which he knew as "semen" off with toilet paper. ("People's Ex 9" 0:04:30-0:04:47) J.M. also claimed that John had a tablet computer filled with child pornography ("People's Ex 9" 0:16:15-0:16:45), and that Sheryl McKown had "butt-fucked [J.M.] with a dildo" on a regular basis. ("Defendant's Ex 1" 0:02:45-0:03:06) In his first recorded interview, J.M. stated that "everybody" would be in the house when the abuse took place, and that the abuse took place in "a blue house, a white house, and an alabaster house." ("People's Ex 9" 0:10:55-0:11:28, 0:12:30-0:13:40) At trial, J.M. testified that all misconduct happened in the first-floor bathroom of the "greenish tan" McKown home and nowhere else. (R123-124)

When detectives confronted John with J.M.'s allegations, John denied any misconduct. (R170) Detectives took John to the police station and told him that he was not under arrest, that they were performing a "voice stress test" on him, and subsequently that he had failed the test. ("People's Ex 1" 0:22:30-1:18:14) Detectives questioned John off-and-on for over three hours before taking him home. ("People's Ex 1" 1:18:14-1:56:00, 1:58:30-2:06:15, 2:15:30-2:47:05, 2:56:30-3:18:40) During the course of his first interview, and at detectives' repeated insistence that he tell them a story closer to what J.M. alleged, John fabricated multiple stories in which J.M. entered the basement after John had finished masturbating. ("People's Ex 1" 1:33:10-1:35:30, 2:57:00-3:09:00) Detectives were not satisfied with John's first few stories,

insisting after his arrest that he relate a story involving "some sort of an anal sex thing." ("People's Ex 2" 0:11:35-0:17:25) Eventually, John told a story in which an eleven-year-old J.M. entered the basement after John finished masturbating, asked about anal sex, pulled down his shorts and underwear, and bent over in front of John. ("People's Ex 2" 0:17:40-0:18:19) John stated that he touched his penis to J.M.'s anus for a few seconds, and that it was possible either Vaseline or semen could have gotten on J.M.'s buttocks because he had just finished masturbating. ("People's Ex 2" 0:18:15-0:20:30) John denied ever being in the first-floor bathroom at the same time as J.M., and denied any other sort of contact between John's penis or semen and J.M.'s buttocks. ("People's Ex 2" 0:19:00-0:19:30)

No penis extender or tablet was ever located, and at trial J.M. denied that his grandmother had ever used a dildo on him or that he had ever claimed she did. (R134, 281) J.M. further denied knowing the word for "semen," though he had volunteered the word in his first recorded interview. (R121; "People's Ex 9" 0:04:30-0:04:47) J.M. now testified that the abuse only took place when no one else was home. (R129-130) The trial court, though it believed that "something bad happened to" J.M., could not say what happened, when it happened, where it happened, how many times it happened, whether other people were present in the home, or who had participated. (R281) Based upon the totality of the evidence (not counting John's incriminating statement), the court could not enter a conviction on any count. (R281, 294) However, after considering John's statements, the court found that John had placed his penis in contact with J.M.'s anus and that John had transferred semen to J.M.'s buttocks. (R283, 293-294)

The trial court was not presented with any evidence to corroborate the events described in John's statements. (Deft Br 35-44) There is no indication that J.M. ever went into the basement when John was masturbating; to the contrary, J.M. explicitly testified that he was never in the basement at the same time as John. (R114-115) He also testified that nothing ever happened anywhere other than the first-floor bathroom of the "greenish-tan" house. (R123-124)

There was absolutely no evidence presented to suggest that the events described in John's statements ever took place. (Deft Br 35-44) Because John's incriminating statements were entirely uncorroborated, he argued, the trial court had erred in considering those statements as evidence of his guilt. (Deft Br 40-44) See, *e.g.*, *People v. Sargent*, 239 Ill. 2d 166, 187 (2010); *Lara*, 2012 IL 112370 at ¶ 47.

The State argues that both J.M.'s testimony and John's statement described some sort of contact between John's penis and J.M.'s buttocks and that, therefore, John's statements were corroborated. (St Br 30-32) The State implicitly concedes that J.M. and John described different settings and circumstances in their statements, arguing that the differences should not matter. (St Br 31-32) Because the *corpus delicti* rule does not require perfect corroboration, the State argues, any similarity between the testimony and the confession will provide sufficient corroboration. (St Br 32) "Because defendant's admissions that he anally penetrated J.M. and transferred his semen onto J.M. were sufficiently and independently corroborated by J.M.'s testimony that defendant had done so" at a different time and location, and in a different manner, the State argues, the trial court was allowed to consider John's statement as evidence of guilt. (St Br 35)

The State argues that this Court's decision in *People v. Sargent* favors its interpretation of the *corpus delicti* rule. (St Br 32-33) In *Sargent*, this Court reversed two of a defendant's three convictions for aggravated criminal assault for placing his finger in a child's anus. *Sargent*, 239 Ill. 2d at 184. In that case, the defendant admitted to dozens of incidents of misconduct but the child did not indicate that the penetration had occurred more than once. *Id*. at 185-187. The State argued in *Sargent*, much as it does here, that evidence of defendant's other acts could corroborate the unsupported portions of his confession. *Id*. at 184. "We note, however, that these were separate acts which gave rise to separate charges. Our precedent demonstrates that

under the corroboration rule, the independent corroborating evidence must relate to the specific events on which the prosecution is predicated." *Id.* at 184-85. Here, J.M. alleged repeated instances of identical conduct; detectives eventually convinced John to fabricate a story about a single, entirely different incident involving the same body parts. (Deft Br 41-44) If John's story could have been corroborated, it would in fact have led to separate charges because it did not describe the same events as J.M.'s allegations. (Deft Br 45)

Contrary to the State's assertion, the *corpus delicti* rule does not involve a bare elements-based comparison. *Cf. Lara*, 2012 IL 112370 at ¶ 26. "The true rule is that is there is evidence of corroborating circumstances which tend to prove the *corpus delicti* and correspond with the circumstances related in the confession, both the circumstances and the confession may be considered in determining whether the *corpus delicti* is sufficiently proved in a given case." *People v. Perfecto*, 26 Ill. 2d 228, 229 (1962). Similarly, the reasoning of the appellate court's published decision suffers from an unavoidable infirmity: if a confession is not corroborated, the fact of that confession may not be used to bolster otherwise incredible testimony. *Id.*; *cf. People v. McKown*, 2021 IL App (4th) 190660, ¶ 53 ("Ultimately, the court's comments reflect that it found J.M.'s testimony credible, particularly where corroborated by defendant's admissions to the police.") Importantly, a reviewing court is not entitled to substitute its findings of credibility for those of the trial court. See, *e.g.*, *People v. Brooks*, 187 Ill. 2d 91, 132 (1999).

The trial court found J.M.'s testimony too inconsistent to support a conviction alone, such that "the defendant's admissions were obviously very important, if not critical, to the State's case." (R280, 282) As John acknowledged in his opening brief, the fact that the trial court found J.M.'s testimony insufficient to support a conviction beyond a reasonable doubt was not dispositive. (Deft Br 39) "[I]f the independent evidence tends to prove that an offense occurred, then such evidence, if corroborative of the facts contained in the confession, may

be considered along with the confession in establishing the *corpus delicti*. In such event, the independent evidence need not establish beyond a reasonable doubt that an offense did occur." *People v. Willingham*, 89 Ill. 2d 352, 361 (1982). The focus of this Court's inquiry, then, must be whether the allegedly corroborating evidence in fact relates to the specific circumstances described in the confession. "[T]he evidence corroborating the confession 'must consist of facts or circumstances, appearing in evidence, independent of the confession, and consistent therewith, tending to confirm and strengthen the confession.'" *Lueder*, 3 Ill. 2d at 489 (citing *Bergen v. People*, 17 Ill. 426, 429 (1856))

The State's argument, if accepted, would render the specific corroboration requirement meaningless. (St Br 36-37) Rather than requiring *specific* corroboration of the facts or circumstances related in the confession, the State argues, courts should only require some amount of *general* corroboration about the body parts allegedly involved. (St Br 31) This case is not one in which the allegedly corroborating evidence coincides with the confession but for a few insignificant exceptions. *Cf.*, *e.g.*, *Furby*, 138 Ill. 2d at 450-51. In this case, John's incriminating statement was inconsistent in every detail with J.M.'s allegations. (Deft Br 40-44) The State does not argue otherwise; instead, it argues that John admitted to something with the same elements as the charged offense and this must suffice. (St Br 31, 36-37) Under the State's suggested approach, a suspect who confesses to a crime when accused by police – whose confession gets *every* detail wrong – may still be convicted based on the simple fact of the confession. (St Br 36-37)

The *corpus delicti* rule's specific corroboration requirement exists to ensure not only that a crime has in fact been committed, but that the accused is responsible for that crime. *Lueder*, 3 Ill. 2d at 489. The State must present evidence to show that the events *described in the confession* took place. *Id.* Here, the State presented no evidence whatsoever to indicate

that the events described in John's confession actually took place. (Deft Br 40-44) In fact, J.M. explicitly testified that the events described in John's statement did not happen. (R106-109, 116) John's incriminating statement was clearly "fabricated from whole cloth," as there is absolutely no evidence indicating that the described events ever took place. (Deft Br 44-45) *Cf. Lara*, 2012 IL 112370 at ¶ 63.

Because the State presented no evidence to corroborate the circumstances related in John's incriminating statement, the trial court was not authorized to consider John's statement as evidence of his guilt. (Deft Br 40-46) The State's evidence, taken as a whole, was insufficient to dispel the court's wholly reasonable doubts about (among other things) what happened, when it happened, where it happened, and who participated. (R281) Because the trial court improperly considered John's uncorroborated statement as evidence of guilt, and because the admissible evidence was insufficient to prove John's guilt beyond a reasonable doubt, this Court should reverse John's convictions for predatory criminal sexual assault and aggravated criminal sexual abuse under Counts I and V, respectively. (Deft Br 35-46)

CONCLUSION

For the foregoing reasons, John T. McKown, Petitioner-Appellant, respectfully requests that this Court reverse his convictions on all counts.

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 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 twenty pages.

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IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- JOHN T. McKOWN, Petitioner-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 4-19-0660. There on appeal from the Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois, No. 18-CF-136. Honorable Thomas E. Griffith, 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 July 1, 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 respondent-appellee 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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