No. 129425

IN THE

SUPREME COURT OF ILLINOIS

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

REPLY BRIEF FOR DEFENDANT-APPELLANT

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ORAL ARGUMENT REQUESTED

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ARGUMENT

Section (a)(1) of the predatory criminal sexual assault statute and section (c)(1) of the aggravated criminal sexual abuse statute have identical elements but carry different penalties. This Court therefore should find the statutes to be unconstitutionally disproportionate, vacate Korem Johanson's conviction and sentence for predatory criminal sexual assault, enter a conviction for aggravated criminal sexual abuse, and remand for a new sentencing hearing.

Section (a)(1) of the predatory criminal sexual assault of a child statute and section (c)(1) of the aggravated criminal sexual abuse statute are unconstitutionally disproportionate. (*See* Def. Br. at 14–16). Under the objective test used to determine if offenses share identical elements but different penalties, (*see People v. Williams*, 2015 IL 117470, ¶ 19), both offenses contain the same elements: (1) the accused is over 17 and the victim is under 13; (2) contact between the sex organ or anus of one person with the body part of another; and (3) the contact is for the purpose of sexual gratification or arousal. (Def. Br. at 15); 720 ILCS 5/11-1.40(a)(1), 1.60(c)(1) (2019). While the appellate court said these offenses are not identical because "sexual conduct" as used in the aggravated criminal sexual abuse statute can occur in multiple ways whereas predatory criminal sexual assault of a child specifies one type of contact, Korem Johanson argued to this Court that the identical elements test does not require offenses to be equally specific for a violation to occur. *People v. Johanson*, 2023 IL App (2d) 210690, ¶ 19; (Def. Br. at 16). Johanson therefore asked this Court to reverse the decision of the appellate court and remand for a new sentencing hearing after entering a conviction for aggravated criminal sexual abuse. (Def. Br. at 17).

In response, the State essentially asks this Court to find for the first time

that two offenses *must* be equally specific in order for them to contain identical elements. (*See* St. Br. at 6–8). In other words, because it is possible for conduct to satisfy the more general offense of aggravated criminal sexual abuse but not the more specific offense of predatory criminal sexual assault of a child, the State contends these offenses contain different elements—an argument already rejected by this Court. (St. Br. at 7–8; CI. 45). The State also relies on several red herring arguments that should be rejected, such as that Johanson asked this Court to analyze these offenses using a "charging instrument approach" and that Johanson "concede[d] that the two crimes do not violate the identical elements test." (St. Br. at 12, 15). And, the State requests, should this Court agree that these offenses are unconstitutionally disproportionate, that the remedy for identical-element violations be modified by adopting a foreign test, which is again an argument already rejected by this Court. (St. Br. at, 20), *citing State v. Thompson*, 200 P.3d 22 (Kan. 2009). As noted, this Court has repeatedly rejected the arguments of the State before, and for the reasons that follow, should do so again in this case.

To start, the State's argument that these offenses do not share identical elements because the "sexual conduct" element of aggravated criminal sexual abuse can be satisfied in three ways already has been rejected by this Court. (St. Br. at 6–7). The State asserts that "many interactions between a defendant and a victim may satisfy the elements of aggravated criminal sexual abuse but not the elements of predatory criminal sexual assault of a child." (St. Br. at 7). The crux of the State's assertion is that a defendant could satisfy the element of sexual conduct in the aggravated criminal sexual abuse statute through a separate

aggravating factor found in the statutory definition of "sexual conduct," not just the aggravating factor of contact between the sex organ or anus of one person with the body of another. (St. Br. at 7).

But this Court has never required that two offenses be equally specific to satisfy the identical elements test. *People v. Clemons*, 2012 IL 107821, ¶ 23. For example, case law from this Court found identical elements to exist between disproportionate criminal offenses where one offense is based on an aggravating factor of possessing some categories of weapons defined by statute, but not others. (Def. Br. at 12–13), *citing People v. Hauschild*, 226 Ill.2d 63, 86 (2006), *and People v. Lewis*, 175 Ill.2d 412, 418 (1996). In other words, this Court already has rejected the argument that two offenses do not share identical arguments simply because it is possible for some conduct to satisfy a more general offense but not a more specific offense. The State does not acknowledge that this Court rejected requiring statutes to be equally specific in order for an identical-elements violation to occur in cases like *Hauschild* or *Lewis*. Nor does the State offer a reason as to why this Court should depart from its past precedent in those cases.

Moreover, the presence of possible aggravating factors in a statute should not preclude a determination that two offenses share identical elements because an uncharged aggravating factor is not an element of a criminal offense. *See People v. Koppa*, 184 Ill.2d 159, 169–70 (1998). In *Koppa*, the defendant raised a proportionality challenge between his conviction for armed violence based on aggravated criminal sexual abuse and aggravated criminal sexual abuse, and his conviction for armed violence based on aggravated kidnapping and aggravated

kidnapping. *Koppa*, 184 Ill.2d at 166–69. Both armed violence convictions contained an additional element not required to prove the other offenses—bodily harm for armed violence based on aggravated criminal sexual abuse and concealment of identity for armed violence based on aggravated kidnapping—but the defendant argued they shared identical elements because aggravated criminal sexual abuse and aggravated kidnapping had possible aggravating factors of bodily harm and concealment of identity, respectively. *Id.* This argument was flawed, however, because it combined the possible aggravating factors instead of viewing them as separate charges:

> Initially, we note that the language of a statute is the best means to determine legislative intent [citation], and the language of a statute should be given its plain and ordinary meaning [citation]. The statutory language for aggravated criminal sexual abuse and aggravated kidnapping indicates that the different aggravating factors listed therein are to be utilized to form the basis of separate offenses, based on different theories of guilt. *A particular aggravating factor becomes an element of the offense only once it is charged.* This intent by the legislature is evident in its use of the word "or" to separate the aggravating factors in both statutes.

Id. at 169–70 (emphasis added).

The State's argument in this case is analogous to the defendant's argument in *Koppa* and likewise should be rejected. The State asserts that a defendant could commit aggravated criminal sexual abuse through the sexual conduct of massaging the body of a child under the age of 13 or ejaculating onto the clothed body of another without committing predatory criminal sexual assault, meaning the two offenses do not contain identical elements. (St. Br. at 7–8). Like the defendant in *Koppa*, the State merely combines possible aggravating factors instead of treating them as separate charges. *Koppa*, 184 Ill.2d at 169–70. The use of the disjunctive "or"

in the statutory definition of "sexual conduct" to separate the aggravating factors mean these factors are to be used to form the basis of separate offenses based on different theories of guilt. *Id.* For the same reason, the appellate court in this case erred in concluding that "[t]he fact that 'sexual conduct' occurs in three distinct ways necessarily means that predatory criminal sexual assault of a child and aggravated criminal sexual abuse do not have identical elements." *Johanson*, 2023 IL App (2d) 210690, ¶ 19. Both the State and appellate court failed to view the possible aggravating factors of aggravated criminal sexual abuse as separate charges, based on separate theories of guilt.

Here, Johanson was charged with and convicted of predatory criminal sexual assault based on one theory of guilt—that he caused his penis to make contact with the hand of AJ for sexual gratification or arousal—and that offense shares identical elements with a separate charge found in section (c)(1) of the aggravated criminal sexual abuse statute. (CI. 45). While a criminal defendant can commit the more general offense of aggravated criminal sexual abuse without committing predatory criminal sexual assault of a child, the presence of possible aggravating factors in the aggravated criminal sexual abuse statute does not preclude a finding of identical elements. This Court has *never* required two offenses to be equally specific for the offenses to contain identical elements, and this Court should reaffirm that proposition of law in finding these two offenses are unconstitutionally disproportionate.

In addition, the State presents several irrelevant arguments, such as its assertion that Johanson "urges" this Court to use the charging instrument approach

and that he demonstrated "only that aggravated criminal sexual abuse is a lesser-included offense of predatory criminal sexual assault of a child." (St. Br. at 11, 15). Notably, the State never defines "charging instrument approach" in its brief, which allows an offense to be deemed lesser-included "even though every element of the lesser offense is not explicitly contained in the indictment, as long as the missing element can be reasonably inferred." *People v. Kennebrew*, 2013 IL 113998, ¶ 34. Or, in *Koppa*, discussed above, this Court explained that the other offenses were lesser-included to defendant's armed violence convictions because "they require[d] proof of some but not all of the statutory elements in the armed violence charges." *Koppa*, 184 Ill.2d at 168.

Neither situation is present here—Johanson's indictment did not contain an element missing from aggravated criminal sexual abuse that can be reasonably inferred nor does predatory criminal sexual assault require proof of an additional element. (CI. 45). Instead, as Johanson actually argued, using the objective test for an identical elements claim, section (a)(1) of predatory criminal sexual assault of a child and section (c)(1) of aggravated criminal sexual abuse share the same elements: (1) the accused is over 17 and the victim is under 13; (2) contact between the sex organ or anus of one person with the body part of another; and (3) the contact is for the purpose of sexual gratification or arousal. (*See* Def. Br. at 15); 720 ILCS 5/11-1.40(a)(1), 1.60(c)(1). This is not a case involving a lesser-included offense, and Johanson never asked this Court to make that determination.

Similarly, the State asserts that Johanson "conced[ed] that the sexual conduct element of aggravated criminal sexual abuse is not identical to the contact element

of predatory criminal sexual assault of a child" based on the State's mistaken belief that two offenses must be equally specific for an identical elements violation to occur. (St. Br. at 12). As argued in Johanson's opening brief and above, equally specific statutes are not required in order to prove a proportionate penalties violation. (*See* Def. Br. at 15–16; *see above* at 2–5). The State plainly misrepresents Johanson's argument by erroneously saying that he "conced[ed] that the two crimes do not violate the identical elements test," and this Court accordingly should reject the State's claim. (St. Br. at 12).

And, in several instances, the State's brief misconstrues case law interpreting the proportionate-penalties clause, as well as Johanson's arguments about that case law. For example, when discussing this Court's decision in *People v. Williams*, 2015 IL 117470, ¶ 21, the State relies on that case for language explaining that a person could violate the FOID Card Act but not the AUUW statute. (St. Br. at 14–15). Responding to Johanson's statement that his conduct "satisfied the elements of both offenses," (Def. Br. at 14), the State argues that, under *Williams*, it is irrelevant if a defendant could be charged with two offenses because the identical elements test looks to statutory language, not the facts alleged in a particular case. (St. Br. at 14–15). But the State omits mention of the fact that the two offenses in *Williams* were found not to share identical elements because AUUW contained an additional location element not found in the FOID Card Act. *Williams*, 2015 IL 117470, ¶ 14.

Likewise, the State asserts that Johanson relies on the unpublished order in *People v. Deckard*, 2020 IL App (4th) 170781-U, ¶ 75, which found that section

(a)(1) of the predatory criminal sexual assault statute and section (c)(1) of the aggravated criminal sexual abuse statute share identical elements "when applied to the facts alleged." (St. Br. at 13). It is true that Johanson noted that the appellate court distinguished his case from *Deckard* because *Deckard* appeared to rely on a subjective comparison of the facts. (Def. Br. at 14–16). But Johanson argued that, regardless of the finding of the *Deckard* Court, section (a)(1) of the predatory criminal sexual assault statute and section (c)(1) of the aggravated criminal sexual abuse statute still share identical elements when compared objectively. (Def. Br. at 15–16). The point is this—even if the two offenses in *Williams* were not identical because one offense carried an additional element and even if the *Deckard* Court mistakenly relied on a subjective comparison of facts, here, Johanson's conduct satisfied the elements of both offenses because their elements are identical.

Also, the State points to this Court's discussion in *Hauschild*, 226 Ill.2d at 87, on prosecutorial discretion and identical elements challenges. (St. Br. at 16–17). This Court previously rejected an argument brought by the State that penalties in violation of the proportionate-penalties clause could be upheld as a matter of prosecutorial discretion by explaining that prosecutorial discretion "will effectively nullify" the statute carrying the lesser penalty since a skilled prosecutor generally will charge a criminal defendant with the offense carrying the more severe penalty. *See Lewis*, 175 Ill.2d at 417; *People v. Christy*, 139 Ill.2d 172, 180 (1990). The State argues here that prosecutorial discretion cannot nullify aggravated criminal sexual abuse because not all conduct satisfying that offense can be charged as predatory criminal sexual assault of a child. (St. Br. at 17).

Once again, the State simply is combining possible aggravating factors instead of treating those factors as separate charges. *See Koppa*, 184 Ill.2d at 169–70. Not only that, but the State leaves out what this Court further said about prosecutorial discretion: "The defendant did not allege improper use of prosecutorial discretion; rather, he argued the State had no authority, discretionary or otherwise, to charge the offense because it violated the proportionate penalties clause." *Hauschild*, 226 Ill.2d at 87–88. The same is true here—where the elements of these two offenses are identical, the State had no authority to charge Johanson with predatory criminal sexual assault of a child on this count because it shares identical elements with aggravated criminal sexual abuse. And, aggravated criminal sexual abuse based on contact of the sex organ or anus of one person with the body part of another is effectively nullified because prosecutors will seek to charge a criminal defendant with the more severe charge.

Therefore, this Court should reject the State's arguments and find that a proportionate-penalties violation occurred here because section (a)(1) of the predatory criminal sexual assault statute and section (c)(1) of the aggravated criminal sexual abuse statute share identical elements. And, because predatory criminal sexual assault is punished more harshly than aggravated criminal sexual abuse, *Johanson*, 2023 IL App (2d) 210690, ¶ 12, the penalty for predatory criminal sexual assault of a child cannot stand. (Def. Br. at 16–17).

Finally, the State sets forth an alternate argument asking this Court to modify its remedy for identical-element violations should this Court agree with Johanson that such a violation occurred here. (St. Br. at 18). According to the

State, the "typical" remedy for an identical-elements violation is remand for sentencing "under the sentencing provision in effect prior to the adoption of the unconstitutionally disproportionate sentencing provision under which the defendant was sentenced." (St. Br. at 18), *citing Clemons*, 2012 IL 107821, ¶ 60. The State says that when predatory criminal sexual assault was amended to add the contact element, it still carried a Class X felony penalty, meaning the offense always carried a more severe penalty than a Class 2 felony offense of aggravated criminal sexual abuse. (St. Br. at 18).

The State accordingly believes the remedy from *Clemons* to be unworkable in this case and suggests adoption of the remedy from *State v. Thompson*, 287 Kan. 238 (2009). (St. Br. at 19–20). Under Kansas's "identical offense sentencing doctrine," the State explains that, where two crimes are identical but carry different statutory penalties, a defendant may be sentenced using only the lesser sentencing range. (St. Br. at 20). Should this Court adopt Kansas's approach, as the State asks here, it argues that, should this Court find an identical elements violation to exist where the higher of two penalties is unconstitutional, then "the Court should still give effect to the legislature's intent to the extent possible by imposing the alternative lesser penalty that the General Assembly found appropriate for the offense." (St. Br. at 20–21).

Like with its arguments, above, the State again omits mention that this Court already rejected its request to adopt Kansas's identical offense sentencing doctrine when it previously reaffirmed use of Illinois's identical elements test. *See Clemons*, 2012 IL 107821, ¶¶ 55–60. The State also omits note that Kansas's

rule in *Thompson* applies to "overlapping provisions," meaning that a defendant "can only be sentenced to the lesser of two sentences provided for in overlapping provisions with identical elements." *Thompson*, 287 Kan. at 256–57, 258. This Court explained in *Clemons* that the identical elements violation would reduce defendant's sentencing range from 21-to-45 years to 6-to-30 years, but adoption of *Thompson*'s overlapping provisions would subject defendant to a 15-to-30 year range. *Clemons*, 2012 IL 107821, ¶¶ 56–57. This Court also noted that adoption of *Thompson* and its overlapping provision would allow defendant to be sentenced under the armed violence statute with a more severe penalty, instead of the statute the State charged defendant under, thereby allowing the State to modify the charging instrument on appeal and seek a higher penalty. *Id.,* ¶¶ 57–58.

Like in *Clemons*, the State once again offers no authority for the proposition that the charging instrument may be modified on appeal so that the State may proceed under a different statute that imposes a more severe penalty. *Id.*, ¶ 58. As this Court noted in *Clemons*, the State's argument is better directed to the legislature, and the "solution to this perceived problem is for the legislature to engage in more careful drafting, both as an initial matter, and in response to [this Court's] opinions." *Id.*, ¶ 52. Therefore, this Court should reject the State's invitation to predicate Illinois constitutional law on foreign jurisprudence. *Id.*, ¶ 32 ("This Court's jurisprudence of Illinois constitutional law cannot be predicated on the actions of our sister states.").

However, to the extent that this Court agrees that the remedy from *Clemons* is "unworkable" for the violation that occurred in Johanson's case, this Court should

adopt the reasoning of the First District appellate court in *People v. Span*, 2011 IL App (1st) 083037, ¶¶ 109–10, *leave to appeal denied*, No. 112786 (Ill. Sup. Ct. May 30, 2012). Following this Court's holding in *Hauschild*, 226 Ill.2d at 88–89, the *Span* Court found that the proper remedy when an amended sentencing statute is found to violate the proportionate-penalties clause is remand for resentencing in accordance with the statute as it existed prior to the amendment. *Span*, 2011 IL App (1st) 083037, ¶¶ 109–10. *Hauschild* was an appeal by the State directly to this Court from a trial court order finding an enhanced penalty for armed robbery while armed with a firearm as unconstitutionally disproportionate and remedied the error with a term of imprisonment in accordance with the previous version of the statute. *Hauschild*, 226 Ill.2d at 88. Notably, the issue before this Court in the *Clemons* decision was expressly whether this Court should overrule *Hauschild*. *See Clemons*, 2012 IL 10782, ¶ 1.

The *Span* Court noted the discrepancy between the remedy from *Hauschild* coming from amendment to a sentencing statute versus the remedy from other precedent before this Court including in *Christy*, 139 Ill.2d at 174, 181. *Span*, 2011 IL App (1st) 083037, ¶ 109. The *Span* Court concluded as follows:

> Where a Class X felony and a Class 1 felony were found to have identical elements, the defendant's conviction and sentence for the Class X offense was vacated, and the case was remanded for sentencing on the Class 1 felony. [citing *Christy*]. Where an amended sentencing statute violates the proportionate penalties clause, the proper remedy is to remand for resentencing on the conviction in accordance with the statute as it existed prior to the amendment. [citing *Hauschild*].
>
> In this case, a violation of the proportionate penalties clause was not the result of an amendment to the statute. Therefore, we agree with the defendant that the remedy set forth in *Christy* applies.

Id., ¶¶ 109–10.

Here, the disproportionality between the predatory criminal sexual assault statute and the aggravated criminal sexual abuse statute did not result from amendment to the sentence of either statute. Instead, the offenses are unconstitutionally disproportionate because the Class X felony of predatory criminal sexual assault of a child shares the same elements with the Class 2 felony of aggravated criminal sexual abuse but carries a harsher penalty. Insofar that this Court agrees that its remedy from *Hauschild* and *Clemons* does not apply to Johanson's case, it should adopt the reasoning from the First District in *Span*.

Therefore, this Court should find that Johanson's conviction and sentence for predatory criminal sexual assault of a child shares identical elements but carries a higher penalty than the offense of aggravated criminal sexual abuse. Moreover, this Court should adopt the reasoning in *Span* and find that the error here justifies vacatur of Johanson's predatory criminal sexual assault conviction. Importantly, the State has asked this Court to reverse its decision in *Christy* multiple times and to abandon the identical elements test. *See, e.g., Clemons*, 2012 IL 107821, ¶ 8; *Lewis*, 175 Ill.2d at 419. By asking this Court to require offenses be equally specific in order for an identical elements violation to occur, the State now is attempting to undermine the identical elements test through a backdoor. As it has before, this Court should reject the State's arguments and find an identical elements violation occurred here. This Court then should vacate Johanson's conviction and sentence for predatory criminal sexual assault, enter a conviction for aggravated criminal sexual abuse, and remand for sentencing on that count.

CONCLUSION

For the foregoing reasons, Korem Johanson, defendant-appellant, respectfully requests that this Court vacate his conviction and sentence for the offense of predatory criminal sexual assault of a child, enter a conviction for aggravated criminal sexual abuse, and remand for a new sentencing hearing.

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(c) certificate of compliance, and the certificate of service, is 14 pages.

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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 November 27, 2023, 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 Elgin, 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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