No. 127683

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOHN McKOWN, Defendant-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, Fourth Judicial District, No. 4-19-0660. There on Appeal from the Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois, No. 18 CF 136 The Honorable Thomas E. Griffith, Judge Presiding.

BRIEF AND ARGUMENT FOR RESPONDENT-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

GARSON S. FISCHER
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(773) 590-6911
eserve.criminalappeals@ilag.gov

Counsel for Plaintiff-Appellee
People of the State of Illinois

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CYNTHIA A. GRANT
SUPREME COURT CLERK

TABLE OF CONTENTS

POINTS AND AUTHORITIES

NATURE OF THE CASE

Following a 2019 bench trial in the Macon County Circuit Court, defendant was convicted of one count of predatory criminal sexual assault of a child, two counts of aggravated criminal sexual abuse, and one count of possessing child pornography. Sup. C3.[1]

Defendant appeals from the appellate court's judgment to the extent that court affirmed all but one of his convictions. No issue is raised on the sufficiency of the pleadings.

ISSUES PRESENTED

Child pornography — images of real children engaged in sexually explicit conduct — is not protected by the First Amendment. *See Osborne v. Ohio*, 495 U.S. 103, 111 (1990); *New York v. Ferber*, 458 U.S. 747, 756-64 (1982). Virtual child pornography — images that appear to depict children engaged in sexually explicit conduct but do not depict real children — is protected by the First Amendment. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 239-40, 256 (2002). Morphed child pornography — images of real children that have been modified so that the children, who were not engaged

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[1] Citations to defendant's appendix, the common law record, the supplemental common law record, the report of proceedings, the exhibits, and defendant's opening brief appear as "A_," "C_," "Sup. C_," "R_," "E_," and "Def. Br. __," respectively

in sexually explicit conduct, appear to be so engaged — is "closer" to real child pornography, *see id.*, and neither this Court nor the Supreme Court has decided whether it is protected by the First Amendment.

The issues presented are:

(1) Whether Illinois's child pornography statute criminalizes possession of morphed child pornography;

(2) If Illinois's child pornography statute does criminalize possession of morphed child pornography, whether the statute comports with the First Amendment; and

(3) Whether the evidence was sufficient to prove the *corpus delicti* of the charges that defendant anally penetrated and ejaculated on the child victim where the victim's testimony corroborated defendant's statements that he had done so.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 301, 315, and 612. This Court allowed defendant's petition for leave to appeal on November 24, 2021. *People v. McKown*, 451 Ill. Dec. 427 (2021) (Table).

STATUTORY PROVISIONS INVOLVED

Section 11-20.1 of the Criminal Code of 2012 provides, in relevant part:

(a) A person commits child pornography who:

> (1) films, videotapes, photographs, or otherwise depicts or portrays by means of any similar visual medium or reproduction . . . any child whom he or she knows or reasonably should know to be under the age of 18 . . . where such child . . . is:
>
> * * *
>
> (ii) actually or by simulation engaged in any act of sexual penetration or sexual conduct involving . . . the mouth, anus or sex organs of the child . . . and the sex organs of another person or animal;
>
> * * *
>
> (6) with knowledge of the nature or content thereof, possesses any film, videotape, photograph or other similar visual reproduction . . . of any child . . . engaged in any activity described in subparagraphs (i) through (vii) of paragraph (1) of this subsection[.]

720 ILCS 5/11-20.1.

Section 11-20.1 further provides, in relevant part, that:

> For the purposes of this Section, "child pornography" includes a film, videotape, photograph, or other similar visual medium or reproduction. . . that is, or appears to be, that of a person, either in part, or in total, under the age of 18. . . , regardless of the method by which the film, videotape, photograph, or other similar visual medium or reproduction . . . is created, adopted, or modified to appear as such[.]

720 ILCS 5/11-20.1(f)(7).

STATEMENT OF FACTS

Defendant was charged with three counts of predatory criminal sexual assault of a child under 720 ILCS 5/11-1.40(a)(1) and three counts of

aggravated criminal sexual abuse under 720 ILCS 5/11-1.60(c)(1)(i) for sexual offenses against his grandson, J.M., that occurred between May 2012 and July 2017. C18-22, 45. Specifically, defendant was charged with predatory criminal sexual assault for placing his penis in J.M.'s anus (Count I), C18; placing his penis in J.M.'s mouth (Count II), C19; and placing an object in J.M.'s anus (Count III), C20. And defendant was charged with aggravated criminal sexual abuse for placing J.M.'s hand on defendant's penis (Count IV), C21; transferring his semen onto J.M.'s buttocks (Count V), C22; and placing his hand on J.M.'s penis (Count VI), C45. Defendant was also charged with one count of child pornography under 720 ILCS 5/11-20.1(a)(1)(ii) for knowingly depicting by visual medium a child whom he knew or reasonably should have known was under the age of 13 where such child was actually or by simulation engaged in sexual conduct involving the child's mouth and another person's sex organ (Count VII). C46.

The evidence at trial showed that defendant lived in Decatur, Illinois, with his wife, Cheryl, and adult son, Brian. R102-03, 144. Brian had separated from his wife, Jacqueline, and moved back home in 2011, leaving Jacqueline with their son, J.M., and daughter, K.M. R100-02, 142-43. The children visited Brian at defendant's house, but J.M. visited more frequently

than K.M., whose autism-related behavior issues Brian and his parents had difficulty handling. R143-44.

J.M. visited Brian at defendant's home every summer. R102. The last of these summer visits was from May to July 2017. R147. A few months after that visit, in October 2017, J.M. reported that defendant had sexually abused him. R148. J.M. was twice interviewed by a forensic investigator at the Child Advocacy Center (CAC), once in December 2017 and again in October 2018. R118-19, 153.

At trial in November 2018, then 12-year-old J.M. testified that defendant started sexually abusing him when J.M. was about six years old and continued until J.M. was 11 years old. R99, 103, 105. J.M. testified that defendant anally penetrated him every time J.M. visited defendant's house and defendant would hit J.M. if he did not do what defendant wanted. R106. Sometimes defendant touched J.M.'s penis with his hand while anally penetrating J.M. R109. J.M. described one instance of anal penetration in which defendant "put his penis in [J.M.'s] butt" in the bathroom at defendant's house, R103-04, 106, and J.M. then had to clean his buttocks to remove a "sticky" substance that defendant had left there, R107; J.M. testified that he did not know what the substance was, *id.* Sometimes defendant anally penetrated J.M. with "an extender," R112, which J.M.

described as "a little tube type thing" that defendant used to make his penis longer, R113. J.M. recalled learning the term "extender" from his mother, who "researched it" after he told her what defendant had done. R112-13. (Jacqueline testified that she looked up "extender" after J.M. told her what defendant had done to him, and she recalled that J.M. used the term before she looked it up. R149.) Defendant also sometimes forced his penis into J.M.'s mouth. R108. The last time defendant sexually abused J.M. was during the summer of 2017, which was the last time J.M. was at defendant's house. R105.

Defendant threatened to hurt J.M. or his family if J.M. told anyone about the abuse, and promised to take J.M. to Disneyland if J.M. cooperated. R113. J.M. testified that he first disclosed the abuse to his uncle, who then told J.M.'s mother. R138. J.M. initially reported the abuse a few days before his sister, K.M., disclosed that she had been abused by Jacqueline's ex-boyfriend. R148.

Recordings of J.M.'s December 2017 and October 2018 forensic interviews at the CAC were admitted into evidence, R157, and the interviewer, Denise Johnson, testified for the People. Johnson testified that, at the first interview, J.M. told her that defendant made him bend over and then placed his penis in J.M.'s "butt." Peo. Exh. 9. J.M. also told Johnson

about the "extender," and about using toilet paper to wipe away a sticky substance that defendant had left on his buttocks. *Id.*

Some of the details that J.M. reported in the CAC interviews were inconsistent with his testimony at trial. J.M. told Johnson that the first time defendant abused him, defendant told him "not to tell anyone" and to "stay still mother effer." R118-19. When cross-examined about whether defendant said anything before the first incident of abuse, J.M. initially testified that defendant "made really weird noises when he was doing it," but agreed with defense counsel that defendant did not say anything before the abuse. R118. When asked follow-up questions, however, J.M. testified that defendant told him to be quiet and stay still, as J.M. had reported during the CAC interview. R118-19. In addition, J.M.'s statements at the CAC interviews were inconsistent with his trial testimony with respect to whether defendant put his penis in J.M.'s mouth more than once. R121-22. Although J.M. told Johnson that the first time defendant put his penis in J.M.'s mouth, he bit defendant's penis, with the result that defendant did not put his penis in J.M.'s mouth again, R161, at trial J.M. did not explain whether he bit defendant's penis the first time defendant put it in his mouth or a subsequent time, R121.

At trial, J.M. denied describing the sticky substance that defendant left on his buttocks as "semen" during the forensic interview, R121, but Johnson testified that when she interviewed J.M. in December 2017, he knew that the sticky substance was semen, R159. J.M. and Johnson also offered conflicting testimony regarding whether J.M. told Johnson that defendant abused him while at three different houses, rather than at defendant's house. R124. And J.M. testified that nobody else was home when defendant abused him and denied telling the interviewer that others, including his father, grandmother, and cousin, were usually home when it happened. R130-31. But the interviewer testified that J.M. said that other family members were usually home and watching television when the abuse occurred. R160. J.M. confirmed that the abused ended in the summer of 2017, R128, and denied that he was abused on July 4, 2017, R129, but the interviewer testified that J.M. said that he remembered being abused on July 4, 2017, because of the fireworks, R160-61. Finally, J.M. testified that only defendant abused him, and he disputed interview notes indicating that he told the interviewer that his grandmother penetrated his anus "with a dildo while [defendant] held [him] down." R134.

Decatur Police Detective Eric Matthews investigated J.M.'s allegations. R168. On January 15, 2018, he went to defendant's home, where

defendant denied abusing J.M. and gave Matthews permission to search the house. R169-71. When asked where he watched pornography, defendant led Matthews to a corner of the basement that he called his "man cave." R173. There, Mathews found magazines, pornographic DVDs, a DVD player, several "masturbatory aids," and a desk, which contained "multiple cutout pictures of young female children's faces that had slits cut into the mouths and cutout images of male penises inserted into those slits." R174-77; *see* E7, 9, 12. (J.M. also testified to finding pictures of young girls with "cut[-]out penises in their mouths" on defendant's desk in the basement, R115, and he previously reported during the December 2017 CAC interview that he had seen such pictures in defendant's basement, Peo. Exh. 9.) Matthews did not find an "extender" in his search of defendant's basement. R209.

Defendant told Matthews that "he had been cutting out images of young girls' faces and inserting penises into their mouths for years and that it was a fantasy of his." R189. Defendant admitted that he had fantasized about young girls since he was a teenager because of their "youthfulness and innocence," which he "found attractive." *Id.* He told Matthews that he had "been trying to stop his fantasies for his whole life and ha[d]n't been able to." R192. Defendant reported that his uncle had sexually abused him as a child. R193. He denied being gay and claimed that the "homosexual pornography"

found in his basement belonged to Brian. R191. Defendant acknowledged that J.M. had walked in on him several times while defendant was watching pornography and masturbating in the basement. R192.

Later that day, Matthews interviewed defendant at the police station. R193-95. The recording of that interview was admitted into evidence. Defendant initially denied any sexual contact with J.M., then claimed that on one of the occasions when J.M. discovered defendant masturbating, J.M. had "grabbed" defendant's penis and may have gotten defendant's semen on his hand. Peo. Exh. 1. Defendant admitted that when J.M. discovered him masturbating on a second occasion, defendant did not stop J.M. from watching him masturbate, and on a third occasion, defendant showed J.M. how to masturbate while they watched pornography together. *Id.* During a fourth incident, J.M. asked defendant about the "white stuff." *Id.* Defendant denied engaging in anal sex with J.M., touching J.M.'s penis, or ejaculating on J.M.'s buttocks. *Id.*

After defendant was arrested later that month, Matthews interviewed him again, and a recording of that interview was also admitted into evidence. R204-06. Defendant again admitted that J.M. touched defendant's penis and admitted for the first time that he put his hand on J.M.'s penis to show J.M. how to masturbate. Peo. Exh. 2. Defendant told Matthews that J.M. had

asked him about anal sex, and in the course of defendant answering those questions, J.M. pulled down his pants down and bent over, and defendant rubbed his penis on the "crack" of J.M.'s buttocks. *Id.* Defendant admitted that his penis "probably" entered J.M.'s anus, but said that he put his penis on J.M.'s buttocks only once and he denied abusing J.M. in the bathroom. *Id.* Defendant suggested that the sticky substance that his penis deposited on J.M.'s buttocks could have been Vaseline, which defendant had been using to masturbate when J.M. visited him in the basement. *Id.* On cross-examination, Matthews agreed that defendant's statements changed significantly over the course of the two interviews. R213.

Cheryl and Brian testified for the defense. They denied seeing defendant and J.M. in the bathroom at the same time. R228, 240. Cheryl denied that she told Matthews that she knew about defendant's cutout pictures or his sexual fantasies about young girls, R233-34, but she was impeached by Matthews's testimony on rebuttal that she told him that she was aware of defendant's fantasies, but did not believe he would ever act on them, and that she knew about his collages. R249-50. Brian testified that he had been kidnapped and sexually abused in 1996 at the age of 15, and that he told J.M. about the kidnapping and abuse every day, beginning when J.M.

was about six years old, to make J.M. "aware of the dangers that were out there in the world." R242-44.

The trial court found defendant guilty of one count of predatory criminal sexual assault of a child for putting his penis in J.M.'s anus (Count I) and two counts of aggravated criminal sexual abuse for placing J.M.'s hand on defendant's penis (Count IV) and transferring his semen onto J.M.'s buttocks (Count V). R280. In denying defendant's motion to reconsider, the court explained that "the counts to which [defendant] was found guilty were all counts where the victim indicated something had occurred, and then by the defendant's own statement he confessed or corroborated the same behavior"; the court found reasonable doubt regarding the remaining counts because "there was just a lot of discrepancy regarding the testimony." R293-94. The trial court also found defendant guilty of possession of child pornography, 720 ILCS 5/11-20.1(a)(6), which is a lesser included offense of the charged child pornography offense. R280-81. The court sentenced defendant to a total of 20 years in prison: 15 years for predatory criminal sexual assault of a child, to be served consecutively to concurrent 5-year terms for each aggravated criminal sexual abuse conviction and 3 years for possessing child pornography. R303-04.

On appeal, defendant argued that the evidence was insufficient to prove the *corpus delicti* of the predatory criminal sexual assault of a child and aggravated criminal sexual abuse convictions and that his child pornography conviction was for possession of constitutionally protected material. A11. The appellate court agreed that the evidence was insufficient to prove the *corpus delicti* of Count IV, which alleged that defendant placed J.M.'s hand on defendant's penis, because the only evidence that J.M.'s hand ever touched defendant's penis was defendant's uncorroborated statement to police. A28.[2] Accordingly, the appellate court reversed defendant's conviction for Court IV. *Id.*

As to Count I, which alleged that defendant placed his penis in J.M.'s anus, and Count V, which alleged that defendant transferred semen onto J.M.'s buttocks, the appellate court held that J.M.'s testimony that defendant had anally penetrated him and ejaculated on his buttocks was sufficient to prove that these offenses occurred, A30, and that J.M.'s testimony in combination with defendant's statements to police were sufficient to prove

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[2] As the appellate court noted, the trial court apparently confused Count IV, which alleged that J.M.'s hand touched defendant's penis and was supported only by defendant's statements, with Count VI, which alleged that defendant's hand touched J.M.'s penis and was supported by J.M.'s testimony. A27.

beyond a reasonable doubt that it was defendant who committed the offenses. A31.

Finally, the appellate court held, defendant's collages, which he made by altering cut-out pictures of real children to make them appear to be engaged in oral sex, constituted child pornography under § 11-20.1, and, in addition, that such "morphed" child pornography may be prohibited under the First Amendment because it poses the same type of reputational or emotional harm as child pornography produced through the physical exploitation of children. A36-38.

ARGUMENT

The plain language of § 11-20.1 proscribes "morphed" child pornographic images such as those that defendant possessed. That proscription comports with the First Amendment because "morphed" child pornography — that is, images of real children that have been altered so that the children appear to be engaged in sexual conduct — poses virtually all of the same risks and inflicts virtually all of the same emotional and reputational harms on children that the Supreme Court identified when upholding criminal penalties for possession of child pornography that depicts real children who are actually engaged in sexual conduct.

Additionally, the evidence was sufficient to prove the *corpus delicti* of the two contact sex offenses for which the appellate court affirmed defendant's convictions. J.M.'s trial testimony and forensic interview statements that defendant anally penetrated him and transferred semen onto his body provided sufficient independent corroboration that the offenses occurred for the fact-finder to consider defendant's statements to police that he anally penetrated J.M. and transferred his semen onto J.M.'s body. And, the People's evidence, including J.M.'s testimony and defendant's statements to police, was sufficient to prove defendant guilty of those offenses beyond a reasonable doubt.

I. Standards of Review

Whether § 11-20.1 proscribes possession of morphed child pornographic images is a question of statutory interpretation, which this Court reviews *de novo*. *See People v. Grant*, 2022 IL 126824, ¶ 23. This Court also reviews *de novo* whether a proscription on the possession of such images violates the First Amendment. *See People v. Austin*, 2019 IL 123910, ¶ 14.

Insofar as this Court is asked to determine as a matter of law what degree of independent corroboration of defendant's inculpatory statements is required under the *corpus delicti* rule, that question is also reviewed de novo. *See People v. Lara*, 2012 IL 112370, ¶ 16. This Court's reviews the sufficiency

of the evidence of *corpus delicti*, as well as the sufficiency of the evidence of defendant's guilt, in the light most favorable to the People. *See People v. Cline*, 2022 IL 126383, ¶ 25; *People v. Pitts*, 2016 IL App (1st) 132205, ¶ 31.

II. Illinois's Child Pornography Statute Proscribes Possession of Morphed Child Pornographic Images, Including the Images Defendant Created.

The plain language of § 11-20.1 criminalizes possession of "morphed" child pornography, that is, images of real children that are altered so that the children appear to be engaged in sexual activity. And the images at issue here clearly fall within the scope of this prohibition.

Section 11-20.1 prohibits the possession of, *inter alia*, "photograph[s] or other similar visual reproduction[s] . . . of any child," 720 ILCS 5/11-20.1(a)(6), "actually or by simulation engaged in any act . . . which involves the mouth . . . of the child . . . and the sex organs of another person," 720 ILCS 5/11-20.1(a)(1)(ii). Furthermore, for purposes of § 11-20.1, "child pornography" is defined as including "a film, videotape, photograph, or other similar visual medium or reproduction . . . that is, or appears to be, that of a person, either in part, or in total, under the age of 18 . . ., regardless of the method by which the film, videotape, photograph, or other similar visual medium or reproduction . . . is created, adopted, or modified to appear as such." 720 ILCS 5/11-20.1(f)(7).

"'The fundamental rule of statutory construction is to ascertain and give effect to the legislature's intent.'" *People v. McChriston*, 2014 IL 115310, ¶ 15 (quoting *People v. Davison,* 233 Ill. 2d 30, 40 (2009)). "The best indication of legislative intent is the statutory language, given its plain and ordinary meaning." *Id.* "Where the language is clear and unambiguous, we will apply the statute without resort to further aids of statutory construction." *Id.*

Under these established principles of statutory interpretation, defendant's collages clearly fall within the scope of §§ 5/11-20.1(a)(1)(ii) & (a)(6). It is undisputed that the collages consist of photographs of real children that defendant altered so that the children are depicted as engaged in simulated sexual acts involving the children's mouths and adult sex organs. *See* E7, 9, 12. Accordingly, the collages are prohibited under the statute as photographs or other similar visual reproductions of children where the children by simulation are engaged in acts involving the children's mouths and the sex organs of another person. *See* 720 ILCS 5/11-20.1(a)(6) & (a)(1)(ii). Under 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 the children in the first instance or by altering existing photographs of children; in either circumstance, the resulting image depicts a

child who by simulation is engaged in a sexual act, and therefore is prohibited under § 11-20.1. *See* 720 ILCS 5/11-20.1(f)(7).

Defendant argues that his collages are not child pornography under § 11-20.1 because, although they use photographs of real children to create images that depict those children engaged in oral sex, the children were present only for the creation of the component photographs, and not the creation of defendant's collages. *See* Def. Br. 27. But defendant's argument asks this Court to read a limitation into § 11-20.1 that is not there. He would have the Court rewrite the statute to prohibit the possession of "photograph[s] or other similar visual reproduction[s] . . . of any child [*who was present for the creation of the image*]," 720 ILCS 5/11-20.1(a)(6) (substantively modified), "actually or by simulation engaged in any act . . . which involves the mouth . . . of the child . . . and the sex organs of another person," 720 ILCS 5/11-20.1(a)(1)(ii). But this Court will "not depart from the plain language of the statute by reading into it exceptions, limitations, or conditions that conflict with the expressed intent." *People v. Perry*, 224 Ill. 2d 312, 323-24 (2007). Here, defendant's proposed additional condition conflicts with the General Assembly's expressed intent, as communicated through the plain and unambiguous language of the statute, to prohibit images of real children depicted by simulation to be engaged in sexual activity, regardless of

whether the children were present when the image was created. 720 ILCS 5/11-20.1(f)(7).

Defendant also contends that the Court should depart from the plain and unambiguous language of the statute because the interpretation dictated by that language "is directly contrary to this Court's prior holding" in *People v. Alexander*, 204 Ill. 2d 472 (2003). Def. Br. 29. Defendant asserts that *Alexander* "held that the definition of 'child' in 720 ILCS 5/11-20.1(f)(7) (2006) refers to a human person, not to 'identifiable children, and, accordingly, does not proscribe computer morphing.'" Def. Br. 20 (quoting *Alexander*, 204 Ill. 2d at 483). Defendant is incorrect. By truncating his quotation from *Alexander*, defendant has impermissibly changed this Court's meaning. As the immediately following sentence makes clear, *Alexander* stated that § 11-20.1 "does not proscribe computer morphing," not because it does not proscribe morphed child pornography, but because "section 11-20.1(f)(7) goes beyond morphing to attack the same virtual and pandered child pornography" that the United States Supreme Court had found constitutionally protected in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). *Alexander*, 204 Ill. 2d at 482-83. Because the prior version of Illinois's child pornography statute proscribed not only morphed child pornography but also virtual child pornography, *Alexander* held that the

statute was unconstitutionally overbroad. 204 Ill. 2d at 483. Accordingly, this Court severed the unconstitutionally overbroad statutory definition of child — which the General Assembly subsequently replaced with the definition of "child pornography" at issue here — and relied on dictionary definitions to determine that § 11-20.1 applied only to images of actual human children, not virtual children. *Alexander*, 204 Ill. 2d at 485-86.

In sum, the plain language of § 5/11-20.1 unambiguously applies to images like defendant's collages that consist of photographs of actual human children modified to appear as if they are engaged in sexual acts.

III. Application of the Child Pornography Statute to Morphed Child Pornographic Images Does Not Violate the First Amendment.

Alternatively, defendant argues that § 5/11-20.1 cannot apply to morphed child pornographic images because if it does, then the statute would be unconstitutionally overbroad. Def. Br. 30-33. He is incorrect.

The First Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, provides that "Congress shall make no law. . . abridging the freedom of speech." U.S. Const. amend. I; *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940). Defendant's challenge implicates the overbreadth doctrine, which "permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible

applications of the law are substantial when judged in relation to the statute's plainly legitimate sweep." *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999).

But child pornography — images of real children engaged in sexual activity — is categorically unprotected speech under the First Amendment. *Osborne v. Ohio*, 495 U.S. 103, 111 (1990); *New York v. Ferber*, 458 U.S. 747, 764 (1982). In *Osborne*, the Court held that the First Amendment permits laws criminalizing the possession of child pornography, reasoning that such laws reduce demand for child pornography, limits the reputational and emotional damage to the depicted child by encouraging destruction of the pornographic images, and deprives pedophiles of a tool that "evidence suggests [they] use . . . to seduce other children into sexual activity." *Osborne*, 495 U.S. at 111.

Defendant's argument that the State cannot constitutionally criminalize images depicting real children where "no children engaged in sexually explicit conduct for the [images'] creation," *see, e.g.*, Def. Br. 33, flows from the faulty presumption that children who appear in pornographic images suffer harm only if they are forced to engage in sexual conduct to create the images. To be sure, morphed child pornography that simulates real children engaged in sexual activity is different from child pornography

that depicts real children engaged in sexual activity, inasmuch as the children depicted in the former may not have been sexually abused or physically harmed during the images' production. But morphed child pornography is still a record, albeit a false record, of the sexual exploitation of real children, and so still poses a substantial risk of emotional and reputational harm to the children depicted.

As both this Court and the United States Supreme Court have recognized, the State's interest in protecting children is not limited to protecting them from the physical and psychological harm of being sexually abused; the State also has an interest in more broadly safeguarding the psychological well-being of children. *See Alexander*, 204 Ill. 2d at 477 ("states have a compelling interest in safeguarding the physical and psychological health of children") (citing *Ferber*, 458 U.S. at 756-59 (1982)); *Ferber*, 458 U.S. at 756-57 ("It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is compelling.") (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)); *see also, e.g., Maryland v. Craig*, 497 U.S. 836, 855 (1990) (recognizing State's interest in protecting child witnesses from trauma associated with testifying in child abuse cases).

Both this Court and the United States Supreme Court have similarly recognized that the creation and possession of images depicting real children engaged in sex acts threatens the children's psychological well-being, even in circumstances where the images falsely show the children engaged in sexual conduct, because the psychological harm from being depicted in pornography is independent of the psychological trauma of engaging in the sex acts themselves. *See People v. Lamborn*, 185 Ill. 2d 585, 589 (1999) ("When a child is made the target of the pornographer-photographer, the statute will not suffer the insult to the human spirit, that the child should be treated as a thing." (cleaned up)); *Ferber*, 458 U.S. at 760 n.10 ("'[P]ornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place.'") (quoting DP Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 Wake Forest L. Rev. 535, 545 (1981)).

Indeed, in *Free Speech Coalition*, the United States Supreme Court stated that "morphed" images — "innocent pictures of real children [altered] so that the children appear to be engaged in sexual activity" — "implicate the interests of real children and are in that sense closer to the images in *Ferber*." *Free Speech Coalition*, 535 U.S. at 242; *see also United States v. Mecham*, 950

F.3d 257, 260, 265 (5th Cir. 2020) (children's well-being is threatened when their images are morphed to make it appear that they performed sexually explicit acts that they did not perform); *Doe v. Boland*, 698 F.3d 877, 883 (6th Cir. 2012) (same); *United States v. Hotaling*, 634 F.3d 725, 729-30 (2d Cir. 2011) (same); *cf. United States v. Hoey*, 508 F.3d 687, 693 (1st Cir. 2007) (acknowledging that morphed child pornography causes psychological harm without addressing question whether such pornography may be criminalized). Thus, morphed child pornography is different from, and more insidious than virtual child pornography, because although virtual child pornography may have effects on the market for child pornography and psychological effects on its consumers, the link to harm against actual children "does not necessarily flow from the speech," but is "contingent and indirect." *Id.* at 250. In contrast, the harm to actual children from morphed child pornography is direct and inherent in the creation and existence of the image.

Accordingly, courts throughout the country have nearly unanimously held that morphed child pornography does not enjoy First Amendment protection. *See Mecham*, 950 F.3d at 260; *Doe*, 698 F.3d at 883*; Hotaling*, 634 F.3d at 729-30; *McFadden v. State*, 67 So. 3d 169, 184 (Ala. Crim. App. 2010) (holding that it does not violate the First Amendment to criminalize

possession of "collage images of child pornography . . . created without filming or photographing actual sexual conduct on the part of an identifiable minor, but edited to appear as though the children are engaged in sexual conduct"); *State v. Tooley*, 114 Ohio St. 3d 366, 374 (Ohio 2007) ("We will not extend *Ashcroft* to cover morphed child pornography"); *see also State v. Bolles*, 541 S.W. 3d 128, 138 (Tex. Crim. App. 2017) ("a lascivious or lewd exhibition can be created by an individual who manipulates an existing photograph of a minor into a different image even when the original depiction is one of an innocent child acting innocently"); *Shoemaker v. Taylor*, 730 F.3d 778, 787 (9th Cir. 2013) (denying federal habeas relief on First Amendment challenge to conviction for morphed child pornography). *But see United States v. Anderson*, 759 F.3d 891, 894-95 (8th Cir. 2014) (holding morphed child pornography created without any child being abused is protected speech); *State v. Zidel*, 156 N.H. 684, 694 (N.H. 2008) (holding statute criminalizing possession of morphed child pornography unconstitutional).

In an attempt to show that his collages are protected by the First Amendment, defendant notes that "no children were present for the creation of [his] collages," and further suggests that the collages "did not use 'actual human models or actors.'" Def. Br. 27 (quoting *Alexander*, 204 Ill. 2d at 485-87). On the contrary, the collages *do* use actual human models or actors:

they consist of photographs of *actual* children that have been altered so that the children appear to be engaged in oral sex. *See* E7, 9, 12. The fact that the children were present for the creation of the component photographs and not for the later creation of the collages does not somehow render the children imaginary, such that the collages would constitute virtual child pornography.

Alexander's discussion of the scienter element of child pornography clarifies that the distinction between morphed and virtual child pornography does not turn on the physical presence of the child during the morphing process. The Court noted that "sections 11-20.1(a)(1) and 11-20.1(a)(6) both require that the defendant 'knows or reasonably should know' that the child depicted is under the age of 18. *See* 720 ILCS 5/11-20.1(a)(1), (a)(6) (2001)." *Alexander*, 204 Ill. 2d at 486. It followed, therefore, that "[i]n the context of virtual child pornography, the State could never satisfy this *scienter* requirement because a virtual child is ageless." *Id.* But the children whose photos are used in defendant's collages are not ageless imaginary figures; they are actual human children.

Defendant's collages threatened harm to real children by altering their photographs to falsely portray them as engaging in sexual activity.[3] The

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[3] Defendant claims that the United States Supreme Court has held that "to constitute child pornography, '[t]he portrayal must cause a reasonable viewer

children are sexually exploited and psychologically harmed by the very existence of the images, and subject to additional reputational harm if the images are circulated. It is irrelevant that defendant did not intend to circulate the images. It only requires one person discovering the images and capturing them via cell phone for them to become widely available. At the very least, J.M. and Cheryl discovered defendant's images, and it is impossible to know who else might have seen them. As this Court has noted, "despite the best intentions of the parties involved. . ., there is no guarantee private photographic images will always remain private. For a variety of reasons, once-private material can someday be made public, whether by accident [or] theft." *People v. Hollins*, 2012 IL 122754, ¶ 25. For these reasons, this Court should hold that morphed child pornography depicting real children is unprotected speech.

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to believe that the actors actually engaged in that conduct on camera.'" Def. Br. 28 (quoting *United States v. Williams*, 553 U.S. 285, 297 (2008). Not so. *Williams*, on which defendant relies, was construing the meaning of the word "simulated" in the federal pandering pornography statute. *Williams*, 553 U.S. at 297. In context, the quotation from *Williams* reads: "'[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." *Id.* The Court did not suggest that morphed child pornography must appear realistic to qualify as unprotected speech.

IV. The Evidence Was Sufficient to Prove the *Corpus Delicti* of the Predatory Criminal Sexual Assault and Aggravated Criminal Sexual Abuse Charges.

The appellate court affirmed defendant's convictions for predatory criminal sexual assault of a child for placing his penis in J.M.'s anus (Count I) and aggravated criminal sexual abuse for transferring semen onto J.M.'s buttocks (Count V). To prove defendant guilty of these offenses, the evidence at trial had to establish "two distinct propositions or facts beyond a reasonable doubt: (1) that a crime occurred, *i.e.*, the *corpus delicti*; and (2) that the crime was committed by [defendant]." *People v. Sargent*, 239 Ill. 2d 166, 183 (2010); *see Lara*, 2012 IL 112370, ¶ 17. Viewed in the light most favorable to the prosecution, J.M.'s testimony at trial and statements to the CAC interviewer that defendant penetrated J.M.'s anus with his penis and transferred semen onto J.M.'s buttocks, together with defendant's admission to police that he had penetrated J.M.'s anus with his penis and transferred semen onto J.M.'s body, was sufficient to prove beyond a reasonable doubt that the charged offenses occurred and that defendant committed them.

A. The Evidence Was Sufficient to Prove the *Corpus Delicti* of the Offenses.

"The *corpus delicti* of an offense is simply the commission of a crime." *Lara*, 2012 IL 112370, ¶ 17. Because "[t]he primary purpose of the *corpus delicti* rule is to ensure that [a defendant's] confession is not rendered

unreliable due to either improper coercion of the defendant or the presence of some psychological factor," *id.* ¶ 47, "[w]hen a defendant's confession is part of the *corpus delicti* proof, the State must also provide independent corroborating evidence," *id.*; *see also Sargent*, 239 Ill. 2d at 183. But the "independent corroborating evidence need only *tend to show* the commission of a crime," *Lara*, 2012 IL 112370, ¶ 18 (emphasis in original). That is, the State "need not present independent evidence corroborating every element of the charged offense," but only evidence "correspond[ing] with the circumstances recited in the confession and tend[ing] to connect the defendant with the crime." *Id.* ¶ 51. In addition, "[c]orroboration of only some of the circumstances related in a defendant's confession is sufficient," *id.* ¶ 44, and "[t]he independent evidence need not precisely align with the details of the confession," *id.* ¶ 51. If independent evidence corroborates some of the circumstances related in the defendant's confession, then "it may be considered, together with the defendant's confession, to determine if the State has sufficiently established the *corpus delicti* to support a conviction." *Id.* ¶ 18; *accord Sargent*, 239 Ill. 2d at 183; *People v. Willingham*, 89 Ill. 2d 352, 358-59 (1982). In determining the sufficiency of the corroborating evidence, the evidence is viewed in the light most favorable to the prosecution. *Pitts*, 2016 IL App (1st) 132205, ¶ 31.

Here, the evidence was sufficient to prove beyond a reasonable doubt that the charged predatory criminal sexual assault of a child and aggravated criminal sexual abuse occurred. Count I alleged that defendant committed predatory criminal sexual assault of a child by placing his penis in J.M.'s anus. C18; *see* 720 ILCS 5/11-1.40(a)(1) ("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 . . . the victim is under 13 years of age."). Count V alleged that defendant committed aggravated criminal sexual abuse by transferring his semen onto J.M.'s buttocks. C22; *see* 720 ILCS 5/11-1.60(c)(1)(i) ("A person commits aggravated criminal sexual abuse if . . . that person is 17 years of age or over and . . . commits an act of sexual conduct with a victim who is under 13 years of age."); *see also* 720 ILCS 5/11-0.1 ("'Sexual conduct' means . . . any transfer or transmission of semen by the accused upon any part of the clothed or unclothed body of the victim.").

J.M.'s testimony at trial and statements during the forensic interviews were sufficient, when viewed in the light most favorable to the prosecution, to establish the *corpus delicti* of the offenses charged in Counts I and V. *See*

Cline, 2022 IL 126383, ¶ 27 (victim's testimony that his home was burgled was sufficient to establish *corpus delicti* of residential burglary). J.M. testified that defendant committed the precise acts alleged in Counts I and V. He described instances when defendant's penis penetrated his anus, and he described having to wipe defendant's semen from his buttocks. R103-04, 106-07. His prior statements during the two forensic interviews further established that defendant anally penetrated him and transferred semen onto his body. Accordingly, because J.M.'s testimony and forensic interview statements tended to show that the offenses occurred, the trial court could consider defendant's confession, along with J.M.'s testimony and statements, to conclude that the People proved defendant's guilt beyond a reasonable doubt.

Defendant argues that J.M.'s testimony insufficiently corroborated defendant's confession because it was not on all fours with defendant's admissions to Detective Matthews. *See* Def. Br. 37-40. Defendant argues, for example, that J.M.'s testimony that defendant anally penetrated him does not corroborate defendant's admissions because J.M. maintained that defendant abused him in the bathroom rather than the basement, and J.M. did not describe having "asked [defendant] about anal sex," as defendant had claimed when explaining to Matthews why he anally penetrated J.M. *Id.* at

37. According to defendant, J.M. "described a completely different scenario than the one in [defendant's] incriminating statement" and therefore did not corroborate defendant's confession for *corpus delicti* purposes. *Id.* at 40.

But the *corpus delicti* rule does not require perfect corroboration of every detail of a confession; instead, the rule merely requires corroboration that tends to show that the offense occurred. J.M. described the exact same offenses to which defendant confessed: J.M. testified at trial and told the CAC interviewer that (1) defendant placed his penis in J.M.'s anus, and (2) defendant transmitted his semen onto J.M.'s buttocks. This is sufficient corroboration to permit consideration of defendant's confession. *See Lara*, 2012 IL 112370, ¶ 45 (independent evidence must simply "correspond" with the confession); *Willingham*, 89 Ill. 2d at 359 (evidence is sufficient if it "tends to connect the defendant with the crime"); *People v. Furby*, 138 Ill. 2d 434, 451-52 (1990) ("There is no requirement that the independent evidence and the details of the confession correspond in every particular."); *see also People v. Perfecto*, 26 Ill. 2d 228, 229 (1962). Defendant's insistence on perfect corroboration of every detail of his confession is simply inconsistent with the *corpus delicti* rule.

Although defendant relies on this Court's decision in *Sargent*, *see* Def. Br. 35-36, 41-42, 44-45, *Sargent* confirms his error. Indeed, *Sargent* makes

clear that the independent evidence of the *corpus delicti* need not corroborate every aspect (or even many aspects) of the defendant's confession. In *Sargent*, the defendant confessed "that he had placed his finger in M.G.'s anus 50 to 70 times within the past year or year and a half," and "that there might have been a few times when he touched M.G.'s penis." *Sargent*, 239 Ill. 2d at 176. And the victim, M.G., told an interviewer, Joseph Veronda, that defendant:

> put his finger in M.G.'s butt and that the incident occurred at their old house, which was brick. Veronda then asked him how many times that had happened, to which he responded verbally and in writing, "I don't know." Veronda asked M.G., "Did it happen one time or more than one time?" M.G. responded by writing the numeral one.

Id. at 172. The Court reversed Sargent's convictions that were based on allegations that he touched M.G.'s penis because "there was no evidence of any kind to corroborate that defendant had, in fact, ever touched M.G.'s penis for any purpose.". *Id.* at 184-85. The Court also vacated two of Sargent's three convictions for putting his finger in M.G.'s anus because "there was no actual corroboration for defendant's claim that he had used his finger to penetrate M.G.'s anus more than once." *Sargent*, 239 Ill. 2d at 187.[4]

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[4] Whereas Sargent confessed to multiple offenses, only one of which was corroborated, J.M. alleged more offenses than those to which defendant confessed.

But, despite the dramatic inconsistency between Sargent's confession to penetrating M.G.'s anus with his finger 50 to 70 times and M.G.'s statement that Sargent did so only once, as well as M.G.'s in court testimony that he could not remember whether Sargent "had done *anything* to him he did not like," *id.* at 185, and M.G. initially telling Veronda "that [Sargent] 'thought he put his finger in my butt,' but that [Sargent] 'did not stick his finger in my butt,' and that he had 'made sure that Bill did not touch my butt,'" *id.* at 172, this Court held that "there can be no doubt that the evidence clearly corroborated that defendant had used his finger to penetrate M.G.'s anus on one occasion," *id.* at 187. Similarly, here, J.M.'s interview statements and testimony that defendant penetrated J.M.'s anus with defendant's penis is sufficient to corroborate defendant's confession to the exact same contact between the same body parts, even though there were inconsistencies as to how often this happened. Defendant confessed to a single offense of this type, and J.M.'s testimony corroborated that single offense, even if he also alleged many more offenses.

Next, contrary to defendant's suggestion, *see* Def. Br. 39, it is irrelevant under the *corpus delicti* rule that the trial court found J.M.'s testimony insufficient to support a conviction on its own. This Court has consistently required far less evidence to corroborate a defendant's confession

under the *corpus delicti* rule than to prove guilt beyond a reasonable doubt. *Lara*, 2012 IL 112370, ¶ 45; *Sargent*, 239 Ill. 2d at 183; *People v. Bounds*, 171 Ill. 2d 1, 42-43 (1995); *People v. Cloutier*, 156 Ill. 2d 483, 503 (1993); *Furby*, 138 Ill. 2d at 446; *People v. Dalton*, 91 Ill. 2d 22, 28 (1982); *Willingham*, 89 Ill. 2d at 359; *Perfecto*, 26 Ill. 2d at 229.

Defendant's remaining arguments are dedicated to detailing the inconsistencies between J.M.'s trial testimony and his forensic interview statements. Def. Br. 37-39. But these arguments simply challenge the reliability of the independent evidence corroborating defendant's admissions, not the existence of that evidence, and thus do not call into question the independent evidence's sufficiency for purposes of satisfying the *corpus delicti* rule. *See Cline*, 2022 IL 126383, ¶ 39 (when determining whether *corpus delicti* rule was satisfied, courts may not substitute their judgment for that of the trier of fact with respect to inconsistencies in the evidence and witness credibility). 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, the *corpus delicti* rule did not bar consideration of defendant's admissions.

B. The Evidence Was Sufficient to Prove That Defendant Committed the Offenses.

In assessing the sufficiency of the evidence, this Court "must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *People v. Harris*, 2018 IL 121932, ¶ 26 (cleaned up). "A conviction will not be reversed on appeal for insufficient evidence unless the evidence is so improbable or unsatisfactory that a reasonable doubt remains as to the defendant's guilt." *Id.* And where, as here, the defendant's confession is sufficiently corroborated, it is "one stick in the evidentiary bundle the trier of fact may use in deciding whether the State has met its burden of proving beyond a reasonable doubt that the defendant committed the charged offenses." *Lara*, 2012 IL 112370, ¶¶ 46-47.

Viewing the evidence presented at trial in the light most favorable to the People, the evidence plainly was not so improbable or unsatisfactory as to render it constitutionally insufficient. The offenses charged in Counts I and V are the same offenses that J.M. described in his testimony and his CAC interviews and to which defendant confessed: that defendant anally penetrated J.M. with his penis and transferred his semen onto J.M.'s body. The trial court acknowledged the weaknesses in J.M.'s testimony and found defendant not guilty of the offenses to which defendant did not confess. But

the trial court credited J.M.'s testimony where it was corroborated by defendant's admissions.

In interviews with Detective Matthews, defendant admitted to having sexual fantasies about young children, R189-92, and to engaging in sexual acts with J.M. He described masturbating and ejaculating in J.M.'s presence and putting his penis in J.M.'s anus. The trial court found that defendant's statements to Matthews were reliable and not coerced. Indeed, Matthews testified that there were several instances when he attempted to leave the interview room but defendant called Matthews back in and kept talking. R216. Taken together, and viewed in the light most favorable to the prosecution, defendant's admissions and J.M.'s statements regarding the specific acts alleged in counts I and V were sufficient to establish defendant's guilt beyond a reasonable doubt.

CONCLUSION

This Court should affirm the appellate court's judgment.

June 22, 2022

Respectfully submitted,

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

KATHERINE M. DOERSCH
Criminal Appeals Division Chief

GARSON S. FISCHER
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(773) 590-6911
eserve.criminalappeals@ilag.gov

Attorneys 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, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 38 pages.

/s/ Garson S. Fischer
GARSON S. FISCHER
Assistant Attorney General

PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On June 22, 2022, the foregoing **Brief and Argument for Respondent-Appellee the People of the State of Illinois** was electronically filed with the Clerk, Illinois Supreme Court, using the Court's electronic filing system which served a copy upon the following:

Bryan JW McIntyre
Office of the State Appellate Defender
400 West Monroe Street, Suite 303
Springfield, IL 62704
(217) 782-3654
4thdistrict.eserve@osad.state.il.us

Counsel for Defendant-Appellant
John McKown

/s/ Garson S. Fischer
Counsel for Plaintiff-Appellee
People of the State of Illinois

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CYNTHIA A. GRANT
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