IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27374

STATE OF SOUTH DAKOTA,

Plaintiff and Appellant,

v.

ALVIN PLASTOW,

Defendant and Appellee.

APPEAL FROM THE CIRCUIT COURT
2nd JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE ROBIN HOUWMAN
Circuit Court Judge

APPELLANT'S BRIEF

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Order Allowing Intermediate Appeal Entered March 13, 2015

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JURISDICTIONAL STATEMENT

This court has jurisdiction pursuant to SDCL 15-26A-13.

STATEMENT OF LEGAL ISSUES

DID THE TRIAL COURT, THROUGH AN OVERLY STRICT APPLICATION OF THE *CORPUS DELICTI* RULE, IMPROPERLY SUPPRESS PLASTOW'S CONFESSION TO RAPING A THREE-YEAR-OLD CHILD?

State v. Thompson, 1997 SD 15, 560 N.W.2d 535

People v. Lara, 983 N.E.2d 959 (Ill. 2013)

People v. Bounds, 662 N.E.2d 1168 (Ill. 1996)

People v. Robbins, 755 P.2d 355 (Cal. 1989)

The trial court suppressed Plastow's confession because it believed the element of penetration required explicit, extrinsic corroboration to meet the *corpus delicti* rule.

IF THE TRIAL COURT'S SUPPRESSION ORDER IS CORRECT UNDER SOUTH DAKOTA'S CURRENT *CORPUS DELICTI* JURISPRUDENCE, SHOULD THIS COURT REFORM OR ABANDON THE *CORPUS DELICTI* RULE IN THE INTERESTS OF JUSTICE?

Opper v. United States, 75 S.Ct. 158 (1954)

State v. Bishop, 431 S.W.3d 22 (Tenn. 2014)

State v. McGill, 328 P.3d 554 (Ct.App.Kan. 2014)

State v. Suriner, 294 P.3d 1093 (Idaho 2013)

The trial court's suppression of Plastow's confession obstructs prosecuting Plastow for raping a child.

PRELIMINARY STATEMENT

The trial court's findings of fact and conclusions of law are referenced as FOF or COL followed by citation to the pertinent paragraph. Plastow's confession will be referenced herein as CONFESSION followed by citation to the appropriate page/line of the

transcript. The February 3, 2015, motions hearing will be referenced as MOTIONS HEARING followed by citation to the appropriate page/line of the transcript. Other select facts are gleaned from the police reports and evidentiary photos, which are filed under seal as Exhibits B, C, and D in the record of the proceedings below.

STATEMENT OF THE CASE AND FACTS

Before his release in July 2013, Alvin Plastow (DOB 1975) had been in prison for 15 years for raping a five-year old African-American girl, N.H. (DOB 1992), in 1998. FOF ¶ 3, 25; MOTIONS HEARING at 26/6, Appendix 40. Plastow had entered into a relationship with the girl's mother, Elizabeth Paige (DOB 1968), because he was sexually attracted to young, black girls like N.H. FOF ¶¶ 24, 25; CONFESSION at 10/23, 27/6, 35/17, Appendix 10, 12, 16.

Soon after Plastow's release, Paige divorced her husband to resume her relationship with Plastow. FOF ¶ 28; EXHIBIT B at 011; CONFESSION at 46/1, Appendix 18. Plastow moved into a rental house on Walts Avenue with Paige and four other people. N.H., by then 20 years of age, lived in her own apartment on Conklin Avenue but was nonetheless pressed into having sex with Plastow. CONFESSION at 31/45-32/28, 57/43, Appendix 13-14, 27. N.H. told police that she felt re-victimized by having her childhood abuser back in her life and having sex with her. EXHIBIT B at 011; CONFESSION at 32/41, 33/32, Appendix 14, 15.

Two of the four other people living in the Walts Avenue house with Plastow and Paige were Teerra Ragland (DOB 1989) and her young, black daughter, S.G. (DOB 2010). Ragland was engaged to S.G.'s father, Michael Grace (DOB 1970), who divided his time between living with Ragland at the Walts Avenue house and living with and dating N.H. EXHIBIT B at 003.

N.H. had told Grace that Plastow was a child molester so Grace became concerned when he saw Plastow stroking S.G.'s face and thigh while she sat on his lap. FOF ¶ 8; EXHIBIT B at 003. Grace questioned S.G. about whether Plastow had ever touched her and she told him that Plastow had touched her genitals, her butt, and her face. EXHIBIT B at 003, 004. When Grace confronted Plastow, Plastow admitted that he had touched S.G. inappropriately and apologized. FOF ¶ 10; EXHIBIT B at 003. Plastow said he had put his hand down S.G.'s pants, but he said he did not penetrate her. FOF ¶¶ 10, 11; EXHIBIT B at 003, 004.

Grace called the police to the Conklin Avenue apartment. Grace asked S.G. to show the officer where Plastow had touched her and both times SG touched her genitals. FOF ¶ 14; EXHIBIT B at 003. While officers were speaking to Grace, N.H. had been on the phone to her mother telling her that the police were at her apartment investigating Plastow's molestation of S.G. EXHIBIT B at 007. Plastow and Paige immediately fled to the bus station.

Another officer at the scene asked N.H. to hang up the phone so he could speak with her. While this officer interviewed N.H., S.G. came over

and spontaneously said "He touched me down here" and grabbed her "front genitalia." EXHIBIT B at 004.

Law enforcement intercepted Plastow at the bus station as he and Paige were waiting to board a bus out of town and brought him to the station for questioning. EXHIBIT B at 004, 008. Plastow admitted to two incidents where he had touched S.G.'s vagina, once when he was ostensibly helping her use the bathroom and once in a bedroom. CONFESSION at 58/34, Appendix 28.

During the bathroom incident, Plastow admitted that he had run his "pointy" finger "between [S.G.'s] vaginal lips." FOF ¶ 29; CONFESSION at 48/37, 49/19, 59/25-38, Appendix 19, 20, 29. Plastow said touching S.G. gave him an erection. FOF ¶ 30; CONFESSION at 50/7, Appendix 21.

During the bedroom incident, Plastow described how he initiated the encounter by photographing her standing in a bathroom doorway wearing purple "Dora the Explorer" pajamas with pink polka dots. CONFESSION at 51/5, 51/30, 53/47-54/4, Appendix 22, 24-25; EXHIBIT D. Afterward, Plastow laid S.G on the bed, ran his "finger in between her [vaginal] lips," and photographed her again. FOF ¶¶ 31, 33; CONFESSION at 52/46, 56/38, 58/32, Appendix 23, 26, 28. Plastow admitted he put his finger inside S.G., though "not very far." CONFESSION at 51/26, 67/14, Appendix 22, 30. According to Plastow, he was far enough inside S.G. to "feel the edge of her hole" but not far

enough to enter it. FOF ¶ 34; CONFESSION at 68/17, 69/26, Appendix 31, 32.

S.G. described her encounters with Plastow differently. She told a Child's Voice counselor that Plastow "touched her down there, pointing to her vaginal area." EXHIBIT B at 030. S.G. said Plastow did this "lots of times." EXHIBIT B at 031. S.G. said it "felt like a knife" when Plastow touched her "gina." EXHIBIT B at 031. S.G. also said Plastow would touch her "butthole" in a way that "cuts her." EXHIBIT B at 031. S.G. said Plastow told her he was "sorry." EXHIBIT B at 031. S.G. told the Child's Voice counselor that "she does not like" Alvin Plastow. EXHIBIT B at 031.

A search of Plastow's cell phone revealed nude photographs of N.H. in the bathtub and the photograph of S.G. in the bathroom doorway in her pajamas that Plastow admitted taking. FOF ¶ 16; EXHIBIT B at 004, 018; EXHIBIT C; CONFESSION at 51/5, Appendix 22. Three other photos on Plastow's phone were close-ups of a pre-pubescent, black girl's vagina. FOF ¶ 17; EXHIBIT B at 004, 018; EXHIBIT C; EXHIBIT D. The date/time signatures in the metadata on Plastow's phone show that these photos were taken seven minutes after the photograph of S.G. standing in the bathroom doorway. EXHIBIT C. In one of the nude photos the girl is wearing the "exact same" purple "Dora the Explorer" pajamas with pink polka dots as S.G.'s. FOF ¶ 18; MOTIONS HEARING at 21/12-16, 24/20, Appendix 38, 39. Plastow admitted taking another

photograph of S.G. while she was lying on the bed, but he did not explicitly admit that it was one of the nude photos on his phone. CONFESSION at 56/35, 59/35, 67/14, Appendix 26, 29, 30. According to Plastow, he downloaded the pre-pubescent vagina photos from an internet site that posts "grownup photos" of women shaved to "look like younger children." CONFESSION at 57/1, Appendix 27.

The state charged Plastow with two counts of first degree rape of a victim less than 13 years of age and two counts of possession, manufacture, or distribution of child pornography. FOF ¶ 1. Neither S.G. nor her father are available to testify. MOTIONS HEARING at 3/24, 11/6, Appendix 36, 37.

Though he raises no challenge to the voluntariness or accuracy of his recorded confession, Plastow filed a pre-trial motion to suppress his confession as respects the rape charges. FOF ¶ 22; MOTIONS HEARING at 31/5-20, Appendix 42. Believing that *State v. Thompson,* 1997 SD 15, 560 N.W.2d 535, requires strict application of the *corpus delicti* rule, *i.e.* full corroboration of each element of the charged offenses, and believing the corroborating evidence of rape to be insufficient without the testimony of S.G., her father, or a "photo of penetration," the trial court granted the motion to suppress Plastow's confession. FOF ¶ 43; COL ¶¶ 6, 13; MOTIONS HEARING at 30/8-31/20, Appendix 41-42. The state now appeals.

ARGUMENT

Thompson does not require strict corroboration of each element of an offense as the trial court believed. FOF ¶ 43; COL ¶ 7. The *corpus delicti* rule, as described by this court in *Thompson,* is the same rule applied in states like Illinois, California and Ohio. Those states look for circumstantial, rather than strict, corroboration of the crime charged. Illinois, California and Ohio likely would not have suppressed Plastow's confession. Comparing the Illinois, California and Ohio articulations of the rule to *Thompson's* suggests that the trial court should not have either.

If *Thompson* is as strict as the trial court believed, South Dakota should reform its *corpus delicti* rule so that the rule can serve, rather than confound, justice in cases such as this one. The trustworthiness test adopted by numerous states offers an appropriate template for this needed reform. Alternatively, this court could consider abandoning the *corpus delicti* rule entirely as the federal courts and Idaho have done.

A. *CORPUS DELICTI* GENERALLY AND HISTORICALLY

A creature of the common law, the *corpus delicti* rule has its origins in cases where defendants had confessed to murders that had not actually occurred. *State v. Bishop,* 431 S.W.3d 22, 46 (Tenn. 2014). Some unfortunate defendants had even been executed, or convicted and sentenced to death, only for the "victim" to reappear later having been kidnapped by someone else or wandered off in a deranged state of mind.

Bishop, 431 S.W.3d at 46. From circumstances such as these, courts developed the rule that a conviction could not be obtained on a confession alone absent corroborating evidence of "(1) the fact of an injury or loss, and (2) the fact of someone's criminal responsibility for the injury or loss." *Thompson,* 1997 SD 15 at ¶ 36, 560 N.W.2d at 543.

Beyond this basic principle, the *corpus delicti* rule has not proven uniform in its contours or application over time. Though strict applications of the rule are found, more often the rule is applied flexibly to effectuate its purpose of "ensur[ing] that a person is not convicted based solely on his own false confession to a crime that never occurred." *State v. McLelland,* 2015 WL 423679, *5 (Kan.App. 2015). The *corpus delicti* inquiry looks simply for confirmation of the occurrence of a crime, not independent evidence that the defendant perpetrated it. *McLelland,* 2015 WL 423679 at *5; *State v. C.M.V.,* 2001 WL 767853, *4 (Wash.App.)(child hearsay evidence admissible under Washington's version of SDCL 19-16-38 for establishing "corroborative evidence of the 'act,' not the perpetrator's identity").

With "the revolution in criminal procedure that occurred in the 1960s," legal scholars started to view the *corpus delicti* rule as "outdated and a potential obstacle to achieving justice." *Bishop,* 431 S.W.3d at 50. This emerging disfavor coincided, probably not coincidentally, with growing societal awareness of the pervasive and pernicious problems of child abuse, and the development of child protections unthinkable to the

medieval progenitors of the *corpus delicti* rule.[1] As long ago as 1985, North Carolina noted the "judicial trend toward abandoning a strict application of the corroboration requirement." *State v. Parker,* 337 S.E.2d 487, 491, 493 (N.C. 1985), citing MCCORMICK ON EVIDENCE, § 145 at 370 (observing that *corpus delicti* rule may have "outlived its usefulness"). The United States Supreme Court was ahead of the curve when, in 1954, it abandoned the traditional *corpus delicti* rule in federal courts in favor of a more lenient "trustworthiness" test. *Opper v. United States,* 75 S.Ct. 158 (1954); *Smith v. United States,* 75 S.Ct. 194, 197 (1954)(discussing the *corpus delicti* rule's origins in a time when legal standards to test the voluntariness and reliability of confessions did not exist). The court below even questioned the relevance of a rule that dates "from a time where confessions were beaten out of people where there was no record of the confession, there was certainly no video recording, no audio recording, which is not the case that we have here today." MOTIONS HEARING at 30/25-31/4, Appendix 41-42.

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[1] *History of the Reporting Law,* http://sogpubs.unc.edu//electronicversions/pdfs/rca/ch2.pdf?

Understanding of Child Sex Abuse Has Evolved In Last 50 Years, http://www.catholicnews.com/data/abuse/abuse15.htm

Historical Review of Sexual Offence and Child Sexual Abuse Legislation In Australia: 1788-2013, *http://www.aic.gov.au/media_library/publications/special/007/Historical-review-sexual-offence-child-sexual-abuse.pdf*

The Maltreatment of Children from a Historical Perspective, http://www.pearsonhighered.com/assets/hip/us/hip_us_pearsonhighered/samplechapter/0205961134.pdf

Some state courts, however, continued to adhere to the traditional *corpus delicti* rule since *Opper* and *Smith* despite growing criticism that the rule (1) "does not guard against innocent persons confessing to actual crimes that were committed by someone else," and (2) "has the potential to obstruct justice because it could prevent the prosecution of crimes that result in no tangible injury [*i.e.* child sexual abuse] or which appear to be just as likely the result of accident as of criminal malfeasance [*i.e.* infant homicide by suffocation]." *Bishop,* 431 S.W.3d 50; *United States v. Hotrum,* 2009 WL 6843589 (Army Ct.Crim.App)(citing testimony that "90-95% of child victims of sexual abuse show no physical signs of abuse").

Over time, criticisms of the traditional *corpus delicti* rule such as these have prompted at least 18 states and the District of Columbia to adopt some variation of *Opper's* trustworthiness test in lieu of traditional *corpus delicti,*[2] apply the rule less rigidly,[3] or, like Idaho, to abandon the

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[2] At least 19 jurisdictions use the trustworthiness test: *Jacinth v. State,* 593 P.2d 263 (Alaska 1979); *People v. LaRosa,* 293 P.3d 567 (Colo. 2013); *State v. Hafford,* 746 A.2d 150 (Conn. 2000); *Harrison v. United States,* 281 A.2d 222 (D.C.1971); *State v. Yoshida,* 354 P.2d 986 (Haw. 1960); *State v. Suriner,* 294 P.3d 1093 (Idaho 2013) (abandoning *corpus delicti* in favor of general standard allowing any extrajudicial confession to be submitted to the jury for a credibility determination); *State v. McGill,* 328 P.3d 554 (Ct.App.Kan. 2014); *State v. Heiges,* 806 N.W.2d 1 (Minn. 2011); *State v. True,* 316 N.W.2d 623 (Neb. 1982); *State v. Zysk,* 465 A.2d 480 (N.H. 1983); *State v. Reddish,* 859 A.2d 1173 (N.J. 2004); *State v. Weisser,* 150 P.3d 1043 (Ct.App.N.M. 2006)(adopting a modified trustworthiness standard that requires corroboration demonstrating trustworthiness plus evidence of the harm; if there is no tangible injury, then the corroboration must link the defendant to the crime); *State v. Parker,* 337 S.E.2d 487 (N.C. 1985) (adopting a modified version of the

rule entirely. One federal circuit court has gone so far as to express doubt that today's United States Supreme Court would impose even a trustworthiness test given that "the development of 5th Amendment protections has diminished concerns regarding interrogation practices as well as support for the corroboration requirement." *United States v. Brown,* 617 F.3d 857, 861 (6th Cir. 2010), citing 1 MCCORMICK ON EVIDENCE, § 145 (6th Ed.) and 7 WIGMORE, EVIDENCE, § 2070 p. 510 (1978)(the corroboration rule is often an "obstruction to the course of justice").

In its strict form, the *corpus delicti* rule has become an obstruction to justice in South Dakota, where it regularly thwarts the prosecution of child sexual abuse cases:

- In a 2012 Minnehaha County case, a middle-aged babysitter, H.S., confessed to masturbating two infant boys in her care on three occasions so she could play with their erections. H.S. was not

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trustworthiness standard requiring strong corroboration of essential facts in the defendant's confession when there is no independent evidence of injury); *Stout v. State,* 693 P.2d 617 (Okla.Crim.App.1984); *State v. Bishop,* 431 S.W.3d 22 (Tenn. 2014) (adopting a modified trustworthiness standard that requires corroboration demonstrating trustworthiness plus evidence of the harm; if there is no tangible injury, then the corroboration must link the defendant to the crime); *State v. Mauchley,* 67 P.3d 477 (Utah 2003); *State v. Osborne,* 516 S.E.2d 201 (S.C. 1999); *Holt v. State,* 117 N.W.2d 626 (Wis. 1962); *Simmers v. State,* 943 P.2d 1189 (Wyo. 1997).

[3] Illinois, California and Ohio are three examples of states that do not take a restrictive approach to the *corpus delicti* rule: *People v. Lara,* 983 N.E.2d 959 (Ill. 2013); *People v. Bounds,* 662 N.E.2d 1168 (Ill. 1996); *People v. Robbins,* 755 P.2d 355 (Cal. 1989); *People v. Jones,* 949 P.2d 890 (Cal. 1998); *In re W.B.,* 2009 WL 961500, *9 (Ohio App.4); *State v. Shannon,* 2004 WL 637848, *6 (Ohio App.11).

prosecuted because of a lack of available victim testimony from the infant boys and lack of corroborating physical evidence.

- In a 2014 Minnehaha County case, M.D. confessed to digitally penetrating his 8-year-old stepdaughter while he bathed her, and surreptitiously watching her shower after she became a teenager. M.D. cannot be prosecuted for the rapes because his stepdaughter does not remember the incidents.
- In a 2014 Pennington County case, C.I. confessed to vaginally, orally, digitally, and anally raping his 2- and 4-year old daughters between 2010 and 2014. C.I.'s confession was partially corroborated by evidence of searches for child pornography on his computer. Prosecution of this case was delayed for a year because the victims were afraid to testify.
- In a pending Minnehaha County case, T.B. confessed to digitally penetrating a 3-year-old girl after she told her mother that T.B. had touched her "lady parts" and "pee pee with his pee pee." Seminal stains were found in the girl's underwear. Prosecution of this case for rape may be thwarted if the girl is determined incompetent to testify.

As discussed herein, cases such as these could (and should) be prosecuted under other effective, but less inhibiting, approaches to the *corpus delicti* rule than the strict, traditional rule employed by the court below.

B. *THOMPSON'S* VERSION OF THE *CORPUS DELICTI* RULE IS NOT SO STRICT AS TO PRECLUDE ADMISSION OF PLASTOW'S CONFESSION AT TRIAL, OR PROOF OF THE *CORPUS DELICTI* FROM HIS CONFESSION AND THE AVAILABLE COMPETENT EVIDENCE OF RAPE

Among the states that have not expressly abandoned the *corpus delicti* rule, or outwardly adopted the trustworthiness test, some, such as Illinois, California and Ohio, have found that criminal charges can be corroborated in satisfaction of traditional *corpus delicti* requirements if the surrounding circumstances generally corroborate the confession. *Thompson's* articulation of the *corpus delicti* rule in South Dakota is the same as the Illinois, California and Ohio rules. All say that:

1. Corroborating evidence need only show the fact of an injury committed by criminal means;[4]
2. The *corpus delicti* must be proved independent of the defendant's confession, but that this independent evidence need not be conclusive or sufficient alone to prove the crime;[5]
3. The *corpus delicti* may be established by circumstantial evidence and reasonable inferences drawn from it;[6]

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[4] *Thompson,* 1997 SD 15 at ¶ 36, 560 N.W.2d at 543; *People v. Lara,* 983 N.E.2d 959, 964 (Ill. 2013); *People v. Jones,* 949 P.2d 890, 902 (Cal. 1998); *People v. Robbins,* 755 P.2d 355, 366 (Cal. 1989); *In re W.B.,* 2009 WL 961500, *9 (Ohio App.4); *State v. Shannon,* 2004 WL 637848, *6 (Ohio App.11).

[5] *Thompson,* 1997 SD 15 at ¶ 37, 560 N.W.2d at 543; *Lara,* 983 N.E.2d at 964, 967 (evidence need only tend to show the commission of a crime); *Jones,* 949 P.2d at 902; *Robbins,* 755 P.2d at 366; *W.B.,* 2009 WL 961500 at *9-*10.

[6] *Thompson,* 1997 SD 15 at ¶ 37, 560 N.W.2d at 543; *Lara,* 983 N.E.2d at 968; *Jones,* 949 P.2d at 902; *Robbins,* 755 P.2d at 366; *W.B.,* 2009 WL 961500 at *10.

4. Only slight evidence is needed to establish the *corpus delicti*;[7] and,

5. That the *corpus delicti* rule is satisfied if the corroborating evidence, taken in connection with the confession, establishes the elements of the crime charged.[8]

Since, as discussed below, Illinois, California and Ohio do not apply their *corpus delicti* rules so strictly as to require explicit corroboration of penetration in sexual assault cases, and since no South Dakota authority indicates that this state's rule should be interpreted more strictly than the Illinois, California or Ohio rules, the trial court erred in requiring strict corroboration of the penetration element in this case.

1. Illinois

In *People v. Stevens,* 544 N.E.2d 1208 (4th App.Ill. 1989), the Illinois appellate court examined a case where an elderly woman had told her daughter she had been raped while unconscious. Except for a torn nightgown and underclothes, there was no evidence of sexual trauma to the victim's genitalia, DNA from the defendant on her person, or other indicia of rape. The victim had no memory of the rape, or even of afterward telling her daughter that she had been raped. The *Stevens*

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[7] *Thompson,* 1997 SD 15 at ¶ 37, 560 N.W.2d at 543; *Lara,* 983 N.E.2d at 964, 967 (evidence need only *tend* to show the commission of a crime); *Jones,* 949 P.2d at 903; *Robbins,* 755 P.2d at 366; *W.B.,* 2009 WL 961500 at *10 ("minimal" evidence satisfactory); *Shannon,* 2004 WL 637848 at *7 (only "minimal corroborative evidence" needed).

[8] *Thompson,* 1997 SD 15 at ¶ 37, 560 N.W.2d at 543; *Lara,* 983 N.E.2d at 964; *Jones,* 949 P.2d at 902; *Robbins,* 755 P.2d at 366; *Shannon,* 2004 WL 637848 at *7 (victim statement in combination with confession).

court, nonetheless, admitted the defendant's confession under traditional *corpus delicti* principles. *Stevens,* 544 N.E.2d at 1220.

Stevens found that the victim's memory of waking to find someone grabbing her by the chest (before she again lost consciousness) and torn clothing, together with her traumatized appearance and excited hearsay utterance that she had been raped when found by her daughter, was sufficient proof that a rape had been committed. *Stevens,* 544 N.E.2d at 1220. These facts tended to corroborate defendant's confession that he had broken into a home that he thought to be his own, had had sex with a woman whom he thought was his wife, and had left the home when the woman yelled "rape." *Stevens,* 544 N.E.2d at 1220; *Perfecto,* 186 N.E.2d 258 (*corpus delicti* for rape inferred from circumstances).

Next, in *People v. Bounds,* 662 N.E.2d 1168 (Ill. 1996), the Illinois Supreme Court was faced with a defendant who had confessed to abducting a woman victim, taking her to a vacant building where he lived, forcing her into sexual intercourse, and strangling her with an electrical cord. *Bounds,* 662 N.E.2d at 1185. As here, Bounds argued that there was no semen or trauma to the victim's vaginal area to show that forcible penetration had occurred. *Bounds,* 662 N.E.2d at 1185.

The *Bounds* court nonetheless admitted Bounds' confession. According to *Bounds,* "[w]hile not conclusive proof that an act of penetration occurred, the undressed condition of the body tended to show that the victim was sexually assaulted and corroborated the

defendant's description of the attack." *Bounds,* 662 N.E.2d at 1186. These facts allowed the "*corpus delicti* of . . . sexual assault [to] be established in the absence of physical evidence of the type suggested by the defendant." *Bounds,* 662 N.E.2d at 1186.

Later, in *People v. Lara,* 983 N.E.2d 959 (Ill. 2013), the defendant confessed to touching and penetrating an 8-year-old girl's vagina "as far as his fingernail up to his cuticle." *Lara,* 983 N.E.2d at 962. At trial, the victim's hearsay report to a sexual abuse investigator was introduced to show that the child had reported that she had felt Lara "touch her on the outside." *Lara,* 983 N.E.2d at 962. The victim, who by then was age 12, testified at trial but "was not asked whether she was touched outside or inside." *Lara,* 983 N.E.2d at 962. As here, Lara argued that the state had not met the *corpus delicti* of sexual assault because it had no evidence of penetration except his confession.

The *Lara* court disagreed. It ruled that the *corpus delicti* rule is not so strict as to require independent proof of every element of an offense for a confession to be admitted or the evidence to be sufficient to sustain a conviction. It said that:

> To avoid running afoul of the *corpus delicti* rule, the independent evidence need only *tend to show* the commission of a crime. It need not be so strong that it alone proved the commission of the charged offense beyond a reasonable doubt. If the corroborating evidence is sufficient, 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.

Lara, 983 N.E.2d at 964 (emphasis in original). "Corroboration of only some of the circumstances related in a defendant's confession is sufficient." *Lara,* 983 N.E.2d at 971.

"Even if a defendant's confession involves an element of the charged offense, the independent evidence need not affirmatively verify those circumstances; rather the evidence must simply 'correspond' with the confession." *Lara,* 983 N.E.2d at 971. "The independent evidence need not precisely align with the details of the confession on each element of the charged offense, or indeed to any particular element of the charged offense." *Lara,* 983 N.E.2d at 972.

"[I]n some instances one type of criminal activity could be 'so closely related' to another type that 'corroboration of one may suffice to corroborate the other.'" *Lara,* 983 N.E.2d at 965. "Due to the fact-intensive nature of the inquiry, however, the question of whether certain independent evidence is sufficient to establish specific charged offenses must be decided on a case-by-case basis." *Lara,* 983 N.E.2d at 965; *People v. Cloutier,* 622 N.E.2d 774 (Ill. 1993)("[t]he particular circumstance must be considered and every detail need not correspond").

In summary, the *Lara* court stated that Illinois' version of *corpus delicti* had "consistently required far less independent evidence to corroborate a defendant's confession . . . than to show guilt beyond a

reasonable doubt." *Lara,* 983 N.E.2d at 970. So long as "independent evidence tends to prove the *corpus delicti* and 'correspond with the circumstances related to the confession,'" both may be used in Illinois to sustain a conviction. *Lara,* 983 N.E.2d at 970. The "corroboration is sufficient to satisfy the *corpus delicti* rule if the evidence, or reasonable inferences based on it, tends to support the commission of a crime that is *at least closely related to the charged offense." Lara,* 983 N.E.2d at 970.

2. California

In *People v. Robbins,* 755 P.2d 355 (Cal. 1989), a 6-year-old boy was last seen riding on a motorcycle with a known pedophile. The boy's skeletal remains were found three months later. His neck had been broken and the clothes removed from his body. Robbins confessed to abducting, sexually assaulting, and killing the boy, but later challenged the use of his admitted sexual assault to underpin his felony murder charge because no independent evidence corroborated his confession. *Robbins,* 755 P.2d at 366.

Although the boy's decomposed remains could not yield evidence of sexual penetration, the fact that his body was unclothed in an isolated location supplied the "slight" corroboration of Robbins' confession required by California's *corpus delicti* rule. *Corpus delicti, Robbins* said, "does not require impossible showings." *Robbins,* 755 P.2d at 366.

In *People v. Jones,* 949 P.2d 890 (Cal. 1998), the court examined a rapist's challenge to his conviction for orally raping his victim. No semen was found in her mouth. She could not testify to the oral rape because Jones' accomplice had killed her. The *Jones* court sustained the oral rape conviction nevertheless on the grounds that DNA linking Jones to vaginal and anal, but not oral, rape of the victim was sufficient to corroborate his confession to oral rape. *Jones,* 949 P.2d at 903-04; *People v. Jennings,* 807 P.2d 1009 (Cal. 1991)(conviction for murdering and raping prostitute sustained despite absence of corroborating evidence of penetration where victim was found in isolated location, undressed and with a broken jaw).

3. Ohio

In *In re W.B.,* 2009 WL 961500 (Ohio App.4), a juvenile defendant challenged his adjudication of delinquency on the grounds that independent evidence did not corroborate his confession to raping his 6-year-old sister by digital penetration. *W.B.,* 2009 WL 961500 at *8. W.B.'s sister testified that he had touched her on the "outside." *W.B.,* 2009 WL 961500 at *8. Despite this discrepancy, the *W.B.* court sustained the adjudication.

According to *W.B.,* Ohio requires only "some evidence outside of the confession tending to establish the *corpus delicti* before such confession is admissible." *W.B.,* 2009 WL 961500 at *9. The evidence may be circumstantial and need not "equal proof beyond a reasonable

doubt." *W.B.,* 2009 WL 961500 at *10. "[I]n light of the vast number of procedural safeguards protecting the due process rights of criminal defendants," *W.B.* observed that "the *corpus delicti* rule is supported by few practical or social-policy considerations." *W.B.,* 2009 WL 961500 at *10. Accordingly, *W.B.* found "little reason to apply the rule with a dogmatic vengeance." Thus, in light of the victim's testimony that it "hurt" when W.B. touched her "down there," the court found that W.B.'s confessed penetration was adequately corroborated, even though the victim never explicitly testified that he touched her on the "inside." *W.B.,* 2009 WL 961500 at *11.

In *State v. Shannon,* 2004 WL 637848 (Ohio App.11), the victim testified that Shannon had "rubbed her vagina," but said she did not know if he had digitally penetrated her. *Shannon,* 2004 WL 637848 at *6. The *Shannon* court acknowledged that, "the victim's testimony, standing alone, was insufficient to prove that [Shannon] engaged in sexual conduct" with her via "insertion of his finger into her vagina." *Shannon,* 2004 WL 637848 at *7. Nevertheless, the court sustained Shannon's conviction, finding that "evidence that [Shannon's] hand was on the victim's vagina" satisfied the standard of "very minimal" evidence required by Ohio law to corroborate the confessed digital penetration. *Shannon,* 2004 WL 637848 at *7.

And, in *State v. Clark,* 666 N.E.2d 308 (Ohio App.3 1995), the court examined whether the charge that Clark had forced a 4-month-old

infant to perform fellatio on him was adequately corroborated by independent evidence. The child's mother walked in to find the victim "face down on [Clark's] lap" with his "erect penis" exposed, though she could not testify to seeing any act of penetration. *Clark,* 666 N.E.2d at 309. Clark admitted that he had allowed his penis to "brush up against the outside" of the victim's mouth, and that his penis may have entered the victim's mouth "a little, but mostly on the outside." *Clark,* 666 N.E.2d at 310. Despite the lack of extrinsic corroboration, the court affirmed the admission of Clark's confession to prove the element of penetration. *Clark,* 666 N.E.2d at 311.

4. *Thompson* Is Consistent With Illinois, California And Ohio

Though Illinois, California and Ohio adhere to the same *corpus delicti* formula articulated in *Thompson,* their case authorities do not require strict corroboration of penetration in sexual assault cases. These populous, higher-crime states apparently learned from experience that rigid implementation of ancient *corpus delicti* dogma inhibits the prosecution of cases whose victims are too young or too dead for their voices to be heard. Had the trial court taken the less restrictive approach to *corpus delicti* exemplified by the Illinois, California and Ohio cases, it would have readily found Plastow's confession adequately corroborated by the pornographic photographs of S.G. on his phone and other telling circumstances of this case. See *Lara,* 983 N.E.2d at 973; *Shannon,* 2004 WL 637848 at *7.

As in *Robbins*, the fact that Plastow has an admitted fetish for raping young black girls[9] demonstrates a sexual (as opposed to any pseudo-parental)[10] purpose behind his encounters with S.G. *Robbins,* 755 P.2d at 366. As in *Bounds*, *Stevens* and *Robbins,* the fact that Plastow removed S.G.'s clothes tends to show that S.G. was sexually assaulted during these encounters. *Bounds,* 662 N.E.2d at 1186; *Stevens,* 544 N.E.2d at 1220; *Robbins,* 755 P.2d at 366.

As in *Stevens* and *Bounds,* the date/time signatures of the nude photos of S.G. on Plastow's phone corroborate Plastow's description of the rape having occurred after photographing S.G. clothed in her pajamas and as he photographed her on the bed. *Stevens,* 544 N.E.2d at 1220; *Bounds,* 662 N.E.2d at 1186. As in *Robbins,* the photographs establish that Plastow had the opportunity to isolate S.G. so that he could sexually assault her undetected. *Robbins,* 755 P.2d at 366; *C.M.V.,* 2001 WL 767853 at *4-*5 (evidence that defendant had the opportunity to molest child corroborative of confession). As in *Bounds,* the fact that

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[9] *People v. Cloutier,* 622 N.E.2d 774 (Ill. 1993)(defendant's attempted sexual assaults on other victims, and admitted intercourse with one deceased victim, corroborated *corpus delicti* of forced sexual penetration of another deceased victim); *State v. Stocker,* 2002 WL 34423560, *1 (Vt.)(father's admission to sexual attraction to his daughter corroborative of penetration during incident where he only admitted touching).

[10] *Stocker,* 2002 WL 34423560 at *2 (fact that innocent inferences could be drawn from blood in daughter's underwear did not preclude guilty inference of sexual penetration having occurred during incident where father admitted sexual attraction to daughter and touching her genitals while she slept).

Plastow later masturbated to the photos, again, shows a sexual purpose to his encounters with S.G. FOF ¶ 37; *Bounds,* 662 N.E.2d at 1186.

As in *Lara, Jones* and *Shannon,* the criminal act of photographing the genitalia of a nude 3-year-old child is so closely related to the contemporaneous rape that one crime tends to corroborate the other. *Lara,* 983 N.E.2d at 965, 970; *Jones,* 949 P.2d 903-04; *Shannon,* 2004 WL 637848 at *7. As in *W.B.,* S.G.'s statement to the Child's Voice counselor that Plastow's fondling of her felt like being "cut" corroborates Plastow's admission that he penetrated S.G. *W.B.,* 2009 WL 961500 at *11 (touching "hurt"). As in *W.B.,* SDCL 19-9-7 would allow S.G.'s statements to be considered in pretrial proceedings to determine if Plastow's confession is sufficiently corroborated to be admitted at trial.[11] *W.B.,* 2009 WL 961500 at *9; *Stevens,* 544 N.E.2d at 1220. And Plastow's apology and attempt to flee the area by bus also tend to corroborate his confession by demonstrating consciousness of his guilt of a serious offense. *Clark,* 666 N.E.2d at 310; *United States v. Baldwin,* 54

[11] See also *Leggett v. State of Alaska,* 320 P.3d 311, 314 (Ct.App. Alaska 2014); *State v. Sweat,* 727 S.E.2d 691, 697 (N.C. 2012)(admissibility of confession is preliminary question for trial court which, consistent with Rule 104(a), can consider victim's hearsay statement in determining if the confession satisfies the *corpus delicti* rule); *State v. Gerlaugh,* 654 P.2d 800, 806 (Ariz. 1982)(though co-defendant's statement could not be considered by jury to determine defendant's guilt, it could be used to establish that crimes were committed without regard to who committed them); *People v. Victor L.,* 2002 WL 205524 (Cal.App. 2nd Dist.)(though inadmissible at trial, victim hearsay could be used pretrial per statute to corroborate and admit confession for trial); see also *State v. C.M.V.,* 2001 WL 767853 (Wash.App.Div. 2)(child victim's inadmissible hearsay statements used to corroborate and admit confession).

M.J. 551 (Air Force Ct.Crim.App. 2000)(non-testimonial conduct of accused's startled flight from child victim's bedroom corroborative of confession).

These independent facts are sufficient to meet "the low threshold of proof required to satisfy the *corpus delicti* rule." *Jones,* 949 P.2d 903-04; *Shannon,* 2004 WL 637848 at *6. The nude photographs of S.G. sufficiently "correspond" with Plastow's confessed means of molesting her that a reasonable jury could easily infer the truth of Plastow's confessed penetration from them, and other pertinent circumstances. *Lara,* 983 N.E.2d at 971; *Shannon,* 2004 WL 637848 at *7. Thus, the trial court erred in applying such a high threshold of corroboration in this case. *Jones,* 949 P.2d 903-04.

Given the absence of any South Dakota case law setting a *corpus delicti* threshold for the element of sexual penetration in a rape case, it is understandable that the trial court mistook *Thompson* for a stricter application of the *corpus delicti* rule than it actually is. After all, *Thompson* overturned a conviction of a defendant who was obviously guilty of sexually molesting a child. It would not be hard to mistake this result as the product of a "dogmatic" approach to *corpus delicti* in South Dakota. In reality, *Thompson's* outcome was driven by its peculiar facts. *W.B.,* 2009 WL 961500 at *10.

Unlike the typical molestation scenario, the *Thompson* victim "steadfastly denied" that the particular act of sexual contact for which

Thompson was convicted had ever occurred. *Thompson,* 1997 SD 15 at ¶ 38, 560 N.W.2d at 543. The victim's testimony, thus, not only failed to corroborate Thompson's confession, it was diametrically contradictory. When confronted with the same scenario, even a trustworthiness jurisdiction like Alaska came to the same decision.[12] In this case, however, S.G.'s statements do not contradict Plastow's confession or cast doubt on the occurrence of a crime, they just happen to be inadmissible because she is unavailable. FOF ¶¶ 44-45; COL ¶ 1. *Corpus delicti* concerns are, thus, not implicated here in the same way they were in *Thompson.*

There is nothing in *Thompson* to suggest that the inadmissibility of S.G.'s statements necessitates suppression when Plastow's confession – like those of defendants in Illinois, California and Ohio – is thoroughly, circumstantially corroborated by other competent and convincing evidence. *Bounds,* 662 N.E.2d at 1186; *Robbins,* 755 P.2d at 366; *Clark,* 666 N.E.2d at 310. If anything, the perfect commonality between the Illinois, California and Ohio formulations of the *corpus delicti* rule and *Thompson's* indicate that the trial court erred in applying *corpus delicti* stringently in this case.

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[12] *Dushkin v. Alaska,* 2015 WL 996189 (Alaska App.)(confession that defendant had performed cunnilingus and analingus on victim, corroborated by victim, did not additionally corroborate defendant's confession that the victim had also performed fellatio on him when 3-year-old victim testified that she had not licked defendant's penis).

C. IF SOUTH DAKOTA'S CURRENT *CORPUS DELICTI* JURISPRUDENCE PRECLUDES ADMITTING AND OBTAINING A CONVICTION ON PLASTOW'S CONFESSION, THEN THE RULE SHOULD BE RELAXED OR ABANDONED IN THE INTERESTS OF JUSTICE

As in many other states, the *corpus delicti* rule in South Dakota (except in homicides) is a creature of state common law. SDCL 22-16-2 (sole statutory *corpus delicti* requirement pertains only to homicide cases). *Corpus delicti* is not constitutionally grounded or mandated. *State v. Dow,* 227 P.3d 1278, 1280 (Wash. 2010), citing *Opper,* 75 S.Ct. at 163. Thus, it is within the power of this court to modify or abandon the rule in non-homicide cases as needed to serve the interests of contemporary justice. *Lara,* 983 N.E.2d at 984 (since *corpus delicti* rule is "court made, not statutory," it was "up to [the] court to fix this problem"). If the trial court's application of *Thompson* was correct, this case illustrates the urgent need to reform the *corpus delicti* rule in South Dakota. Other states have done so by adopting *Opper's* trustworthiness test.

1. Trustworthiness Option

As its name implies, *Opper's* trustworthiness test is less concerned with fully corroborating the elements of a crime than it is with evidence that "tend[s] to establish the trustworthiness of the statement." *Opper,* 75 S.Ct. at 164. Before a confession is admitted at trial under the test, the prosecution must produce "substantial independent evidence" to "strengthen and add weight or credibility to the confession, so as to

produce a confidence in the truth of the confession." *Bishop,* 431 S.W.3d at 53, 55.

This evidence, however, "need not be as convincing as the evidence necessary to establish a *corpus delicti* in the absence of a confession." *Bishop,* 431 S.W.3d at 53, 55. Stated another way, the independent corroboration is sufficient if it "merely fortifies the truth of the confession, without independently establishing the crime charged." *Smith,* 75 S.Ct. at 199; *Opper,* 75 S.Ct. at 158. "[T]he adequacy of corroborating proof is measured not by its tendency to establish the *corpus delicti* but by the extent to which it supports the trustworthiness of the [defendant's] admissions." *United States v. Johnson,* 589 F.2d 716, 718-19 (D.C.Cir. 1978).

Once a confession is found corroborated and admitted at trial, the prosecution "must still establish all elements of the offense," to secure a conviction. "However, the elements may be established by independent evidence, a corroborated confession, or a combination of both." *Bishop,* 431 S.W.3d at 53; *Smith,* 75 S.Ct. at 199 ("one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense 'through' the statements of the accused"). When the crime is of a type that does not produce a tangible injury, however, "the corroborative evidence must implicate the accused in order to show that a crime has been committed." *Smith,* 75 S.Ct. at 198.

Because the trustworthiness test does not require stringent corroboration of each element of a crime, it is better suited to cases for which physical proof of a vital element is lacking, such as penetration in a child rape case. For example, in *State v. Dozier,* 2010 WL 4296666, *4 (Tenn.Crim.App.), defendant admitted to sexual intercourse with his sister on three occasions after administering an intravenous drug to render her unconscious. The victim had no recollection of the first two rapes, but woke up during the third rape to find her brother removing her clothing and woke up later to find her brother putting his pants on and a semen-like substance on her inner upper thigh. *Dozier,* 2010 WL 4296666 at *4.

Like Plastow, Dozier argued that his sister's testimony only corroborated sexual battery, but not incest, which required proof of penetration. *Dozier,* 2010 WL 4296666 at *4. The *Dozier* court disagreed that such explicit corroboration was required. Under Tennessee's trustworthiness test, only "slight evidence" of the *corpus delicti* is necessary "if the corroboration supports the essential facts admitted [by the defendant] sufficiently to justify a jury inference of their truth." *Dozier,* 2010 WL 4296666 at *23. Thus, the sister's hazy recollections of the circumstances of the third rape sufficiently "connect[ed] the defendant . . . to the time and place of the first two rapes" to corroborate his admissions to incestuous intercourse with his sister, even though no

evidence of penetration apart from Dozier's admissions was offered. *Dozier,* 2010 WL 4296666 at *24.

In *State v. McGill,* 328 P.3d 554 (Ct.App.Kan. 2014), the defendant admitted sexually abusing his infant daughters on a questionnaire prepping him to take a polygraph examination for court-ordered sex offender treatment in an unrelated case. *McGill,* 328 P.3d at 556. McGill stated on the questionnaire that he had inserted his penis into his 1-year-old and 3-month-old daughters' mouths, and rubbed his penis on the 1-year-old's vagina. *McGill,* 328 P.3d at 556-57. He later made the same admissions to his wife and a private investigator. But, other than McGill's wife's testimony that he had the opportunity to abuse the girls during times that he watched them while she was at work, there was no physical evidence corroborating McGill's confessions.

The *McGill* court nonetheless affirmed McGill's convictions based on the totality of the corroborating circumstances: (1) the consistency of all three confessions in describing the sexual acts that McGill perpetrated on his daughters; (2) the temporal match in the relative ages of the daughters and McGill at the time he described the sexual acts occurring in his confessions; (3) McGill's opportunities to commit the sexual acts as described; (4) the fact that none of McGill's confessions were given "under the pressure of police investigation;" (5) the fact that McGill's demeanor and behavior during his confessions was consistent with that of a person who knew he was "in trouble;" and (6) the fact that

McGill had no history of mental disorder, low IQ, cognitive deficit, or of making false confessions. *McGill,* 328 P.3d at 563, 564. Though these corroborating facts were "not . . . sufficient, independent of [McGill's] statements, to establish the *corpus delicti,*" they "corroborat[ed] . . . the essential facts admitted sufficiently to justify a jury inference of their truth." *McGill,* 328 P.3d at 569.

Again in *State v. McLelland,* 342 P.3d 2 (Kan.App. 2015), Kansas described the operation of its trustworthiness rule in the context of a case in which the defendant was charged with lewd contact with a child. The child reported that McLelland had stroked her leg and put his hand up her shorts, but did not report that he touched her vagina. When interviewed by police, McLelland admitted stroking the victim's leg and that he had "probably" touched the child's vagina.

At trial, McLelland claimed that the state could not establish the *corpus delicti* of lewd contact because, outside of the statement in his confession that he touched the child to get "frisky," there was no evidence that he touched her with the intent to sexually gratify himself. *McLelland,* 342 P.3d at *7. In response to defendant's claim, *McLelland* explained that *corpus delicti* corroboration under Kansas' trustworthiness rule "does not require the state to provide independent evidence to support each element of the charged offense beyond a reasonable doubt; again, the purpose of the *corpus delicti* rule is to provide independent evidence to corroborate the reliability of a defendant's incriminating

statement that a crime was actually committed." *McLelland,* 342 P.3d at *5.

The court found that the *corpus delicti* of sexual contact had been sufficiently established by the child's statements to allow the court to admit McLelland's confession. *McLelland,* 342 P.3d at *6. Once admitted, McLelland's confession that he had "probably" touched the child's vagina to get "frisky" could be used to determine if the evidence at trial as a whole had been sufficient to convict him of lewd contact. *McLelland,* 342 P.3d at *6-*7.

In *Simmers v. State,* 943 P.2d 1189 (Wyo. 1997), the defendant was convicted of sexually assaulting three children, A.B., A.J., and S.S. All three children testified to sexual contact but only two, A.J. and S.S., testified to sexual penetration by fellatio. *Simmers,* 943 P.2d at 1199. A.B. did not, like the victim in *Thompson,* deny that the fellatio occurred, but nor did she affirmatively testify to it at trial. *Simmers,* 943 P.2d at 1199. Simmers appealed his conviction for sexually penetrating S.S. *Simmers,* 943 P.2d at 1199.

The *Simmers* court affirmed. It found that Simmers' confession to forcing A.B. into performing fellatio on him was sufficiently corroborated by (1) A.B.'s testimony describing Simmers' other sexual contacts with her, and (2) testimony from A.J. and S.S. that Simmers had forced them to "suck his penis," to sustain Simmers' conviction for sexual penetration of A.B. *Simmers,* 943 P.2d at 1199.

While this court has not been asked outright, before now, to reform or depart from traditional *corpus delicti* strictures, the leap from *Thompson's* articulation of the rule to the trustworthiness approach is short. Indeed, the differences between traditional *corpus delicti* as articulated in *Thompson* (and as applied in Illinois and California) and *Opper's* trustworthiness test are more of expression than principle.

Both *Opper* and *Thompson* provide that "corroborative evidence need not be sufficient, independent of the [confession], to establish the *corpus delicti*" of the offense charged. *Opper,* 75 S.Ct. at 165; *Thompson,* 1997 SD 15 at ¶ 36, 560 N.W.2d at 543. And both provide that the corroborative evidence need not be conclusive. *Opper,* 75 S.Ct. at 165 (evidence need only "tend" to prove trustworthiness); *Thompson,* 1997 SD 15 at ¶ 36, 560 N.W.2d at 543 (evidence of the *corpus delicti* may be "slight"). In view of these common concessions to less-than-full corroboration, one could easily read *Thompson's* holding that the *corpus delicti* can be met by "such extrinsic corroborating or supplemental circumstances as will, when taken *in connection with* the admissions, establish beyond a reasonable doubt that the crime was in fact committed" as *Opper's* trustworthiness test in all but name. *Thompson,* 1997 SD 15 at ¶ 37, 560 N.W.2d at 543; *Opper,* 75 S.Ct. at 165 (jury could "consider the [defendant's confession] *in connection with* all the other evidence in the case . . . to decide whether the guilt . . . had been established beyond a reasonable doubt").

These facts corroborate and "fortify the truth of [Plastow's] confession" sufficiently to make it admissible under the trustworthiness test. *Opper,* 75 S.Ct. at 164. Plastow does not allege that his recorded confession is the product of coercion or involuntary action. FOF ¶ 22; *Opper,* 75 S.Ct. at 162; *McGill,* 328 P.3d at 563-64. MOTIONS HEARING at 31/5-20, Appendix 42. The fact that Plastow is a convicted pedophile indicates that he "helped" S.G. use the restroom and removed her pajamas to sexually gratify himself. *McLelland,* 342 P.3d at *7. Plastow's victim does not deny any sexual act to which Plastow confessed. *Simmers,* 943 P.2d at 1199. S.G.'s statement that she felt "cut" by Plastow's touch corroborates penetration.[13] *Simmers,* 943 P.2d at 1199. S.G.'s unavailability does not preclude admitting Plastow's confession or convicting him thereon. *McGill,* 328 P.3d at 556-67; *Dozier,* 2010 WL 4296666 at *4.

The nude photographs of S.G. on Plastow's phone are a "temporal match" to the "time and place" of the bedroom rape he described in his confession. CONFESSION at 56/35, 59/35, 67/14, Appendix 26, 29, 30; *McGill,* 328 P.3d at 563-64; *Dozier,* 2010 WL 4296666 at *23. The photographs also confirm that Plastow had the opportunity to commit the bedroom rape exactly as he described it. *McGill,* 328 P.3d at 563-64;

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[13] *State v. Biles,* 871 P.2d 159, 162 (Wash.Ct.App.3 1994)(penetration corroborated by victim's report that it "hurt" when her "daddy . . . touched her pee pee with his pee pee," even though victim's report did not explicitly described penetration).

Dozier, 2010 WL 4296666 at *23. The bedroom rape corroborated the bathroom rape. The crime of photographing S.G. is sufficiently connected to both rapes that the one crime tends to corroborate the others. *Dozier,* 2010 WL 4296666 at *23; *Simmers,* 943 P.2d at 1199; *Smith,* 75 S.Ct. at 199.

And Plastow's "apology," evasions during his confession – admitting penetration but not as far as into S.G.'s "hole," admitting to taking the photo of S.G. clothed in her pajamas but not the nudes seven minutes later – and his attempt to flee by bus are indicative of actual guilt. *McGill,* 328 P.3d at 563-64.

Because trustworthiness is a proven, effective test for corroborating and admitting confessions, it is a better instrument of justice in this case than the traditional *corpus delicti* rule. *Opper,* 75 S.Ct. at 164. Since *Thompson* is not overtly incompatible with *Opper,* the trial court could have found Plastow's confession trustworthy under the totality of the circumstances. Should this court find that *Thompson* required suppression of Plastow's confession, this case demonstrates the need to formally adopt the trustworthiness test in the interests of justice.

2. Abrogation Option

Recently, Idaho's Supreme Court abandoned the *corpus delicti* rule in *State v. Suriner,* 294 P.3d 1093, 1098 (Idaho 2013). In *Suriner,* the defendant admitted to sexually abusing his 3½-year-old twin daughters while their mother was at work on Sundays. *Suriner,* 294 P.3d at 1098.

The state's medical examination did not reveal any sexual trauma or injury, however the examining physician testified that between 66% and 95% of children examined for sexual abuse show no physical evidence of penetration. *Suriner,* 294 P.3d at 1094. The only evidence at trial corroborating the defendant's confession was his wife's testimony that he had, indeed, been alone with the girls on Sundays while she was at work. *Suriner,* 294 P.3d at 1094.

In its analysis of reasons to abandon the *corpus delicti* rule, *Suriner* observed (1) that there is no rule requiring corroboration of *accuser* testimony in sexual crimes, though it is often the only evidence, (2) that the *corpus delicti* rule "as applied does not protect against false confessions," and (3) the reality that the "harm caused by the rule" in terms of being "an impediment to convicting the guilty" exceeded the rule's ostensible benefit. *Suriner,* 294 P.3d at 1100.

Suriner's rejection of the *corpus delicti* rule was so complete that it saw "no reason to attempt to fashion another rule to take its place," such as Opper's trustworthiness test. *Suriner*, 294 P.3d at 1100. Instead, *Suriner* decided that the jury could "give a defendant's extrajudicial confession or statement whatever weight it deems appropriate along with all the other evidence when deciding whether the state has proved guilt beyond a reasonable doubt." *Suriner,* 294 P.3d at 1100.

Abandonment of the *corpus delicti* rule in full may strike this court as a reform too far for its liking. However, *Suriner* and *Brown* suggest

that, given the development of sound procedural protections against coerced and involuntary confessions, the need for half measures such as the trustworthiness test has passed. *W.B.,* 2009 WL 961500 at *10; *Suriner,* 294 P.3d at 1100; *Brown,* 617 F.3d at 861. If, as many learned academics insist, the *corpus delicti* rule has indeed "outlived its usefulness," then abrogation (except in murder cases) is the reform most consistent with the contemporary legal landscape. MCCORMICK ON EVIDENCE, § 145 at 370.

CONCLUSION

The *corpus delicti* rule "was intended to preclude the use of unreliable confessions derived from coercion or certain individuals' tendency to confess to offenses they did not actually commit" or which did not actually occur. *Lara,* 983 N.E.2d 974. Applying the *corpus delicti* rule to this case serves none of these stated purposes. Plastow does not claim that his confession resulted from coercion, or a pathological tendency to confess to sex crimes he did not commit. There is no evidence to suggest that the rapes did not occur exactly as Plastow described. Here, enforcing the *corpus delicti* rule only serves to allow an admitted child molester to skate on charges of raping a 3-year-old girl.

S.G.'s statements to her father, police, and Child's Voice, together with the nude photos, Plastow's admitted fetish for little black girls, attempted evasions during his confession, and attempted flight from the state, are sufficient corroboration of the confessed rapes to admit

Plastow's confession. The trial court erred in finding nude photographs of S.G. on Plastow's phone insufficiently corroborative of rape simply because there was "no photo of penetration." FOF ¶ 43. The nature of the photographs, and the circumstances behind them, raise a sufficient inference of sexual assault to corroborate Plastow's confessed rape.

As in the cases from Illinois, California and Ohio, the articulation of the *corpus delicti* rule in *Thompson* is not so rigid as to require strict corroboration of penetration before Plastow's confession could be used to convict him of rape. With the 5th Amendment protections against coerced confessions now in place, the question of Plastow's guilt should rest with a jury. And if the trial court's ruling suppressing Plastow's confession is correct under *Thompson,* it is time to reform *corpus delicti* in South Dakota so that the rule properly protects the innocent without shielding the guilty.

Dated this 21st day of May 2015.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

1. I certify that appellee's brief is within the typeface and volume limitations provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in proportional 12 point type. Appellee's brief contains 8,992 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Paul S. Swedlund
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 21st day of May 2015 a true and correct copy of the foregoing brief was served on Lyndsay DeMatteo via e-mail to ldematteo@minnehahacounty.org.

Paul S. Swedlund
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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27374

STATE OF SOUTH DAKOTA,
Plaintiff and Appellant,

v.

ALVIN PLASTOW,
Defendant and Appellee.

APPEAL FROM THE CIRCUIT COURT
2ND JUDICIAL CIRCUIT
MINNEHAHA COUNTY

THE HONORABLE ROBIN J. HOUWMAN
Circuit Court Judge

RESPONSE BRIEF OF APPELLEE

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Order Allowing Intermediate Appeal Entered March 13, 2015

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to SDCL 15-26A-13.

STATEMENT OF THE LEGAL ISSUES

DID THE TRIAL COURT CORRECTLY SUPPRESS PLASTOW'S CONFESSION FROM THE TRIAL FOR RAPE OF A CHILD UNDER THE CORPUS DELICTI RULE DESCRIBED IN STATE V. THOMPSON?

State v. Thompson, 1997 S.D. 15, 560 N.W.2d 535

State v. Best, 89 S.D. 227, 232 N.W.2d 447 (S.D. 1975)

People v. Lambert, 472 N.E.2d 427 (Ill. 1984)

Betzle v. State, 847 P.2d 1010 (Wyo. 1993)

The independent corroborating evidence in this case tends to show that Alvin Plastow potentially took a picture of S.G. when she was partially unclothed - it does not establish the corpus delicti of rape; therefore, his confession was properly excluded by the trial court.

ARE THERE COMPELLING REASONS TO REFORM OR ABANDON THE CORPUS DELICTI RULE?

Steiner v. Weber, 2011 S.D. 40, 815 N.W.2d 549 (S.D. 2012)

David A. Moran, *In Defense of the Corpus Delicti Rule*, 64 Ohio St. L.J. 817 (2003)

Our current corpus delicti rule provides protections to accused persons while also providing enough room for prosecutors to make their case. Lack of evidence in this case is not a compelling reason to change the law in South Dakota.

PRELIMINARY STATEMENT

The trial court's findings of facts and conclusions of law are referenced as FOF or COL followed by citation to the pertinent paragraph. Plastow's confession will be referenced herein as CONFESSION followed by citation to the appropriate page/line of the transcript. The January 29, 2015 and February 3, 2015 motions hearings will be referenced as JAN. MOTIONS HEARING and FEB. MOTIONS HEARING following by citation

to the appropriate page/line of the transcript. The December 19, 2014 order to disclose prior acts evidence will be referenced simply as ORDER. Other select facts are gleaned from the police reports and evidentiary photos, which are filed under seal as Exhibits B, C, and D in the record of the proceedings below.

STATEMENT OF THE CASE AND FACTS

In the summer of 2013, Plastow and his girlfriend, Elizabeth, met S.G. and her mother, Teerra, at the Union Gospel Mission in Sioux Falls. Plastow and Elizabeth knew S.G. and Teerra were essentially homeless and offered them a room in their home. All parties, aside from S.G., were aware Plastow was a registered sex offender for the rape of a N.H., a young black girl, in 1998. EXHIBIT B at 003-004.

S.G. and her mother lived with Plastow and his girlfriend for several months. S.G.'s father, Michael Grace, was a frequent visitor to the residence because he was still romantically involved with S.G.'s mother. In addition to dating S.G.'s mother, Grace was also romantically involved with N.H. N.H. was Plastow's victim from his 1998 conviction. Grace was aware of Plastow's prior conviction for raping N.H. FOF ¶ 8; EXHIBIT B AT 003.

At some point, Grace became suspicious of Plastow's behavior. S.G. was allowed to sit on Plastow's lap; however, Grace did not like how Plastow touched and stroked S.G.'s face while she sat on his lap. FOF ¶ 8; EXHIBIT B at 003. On January 19, 2015, Grace confronted Plastow over the telephone and demanded to know if Plastow had touched S.G. in 2014. Grace told police Plastow confessed over the phone that he touched S.G. inappropriately and had put his hand down S.G.'s pants. FOF ¶ 10; EXHIBIT B at 003. Plastow told Grace he did not penetrate S.G. FOF ¶¶ 10, 11; EXHIBIT B at 003,

004. After the conversation with Plastow, he asked S.G. where Plastow had touched her and she touched her genitals, butt, and face. EXHIBIT B at 003. S.G.'s first indication that Plastow touched her was January 19, 2015, after prompting by her father; the State alleges the actual rape occurred December 27, 2014. *Id*.

On January 20, 2014, Grace contacted law enforcement and Officer Billups responded to Grace's home for a possible sexual offense. FOF ¶ 14; EXHIBIT B at 003. Grace relayed his suspicions and Plastow's confession. *Id*. Grace told the officer that he asked S.G. three separate times where Plastow touched her, and each time S.G. pointed to her vagina, her butt, and her face. *Id*. In front of the officer, Grace asked S.G. again where Plastow touched her and she pointed to her genitals. *Id*. At one point, S.G. came over to the officer, grabbed her "front genitalia" and said, "He touched me down here." EXHIBIT B at 005. Grace also advised the officer that Plastow had inappropriate pictures on his phone. *Id*.

Plastow first spoke to law enforcement about the allegations on January 20, 2014. EXHIBIT B, 8-10. Officers tracked Plastow down to a local city bus station at 10th and Lowell. Plastow volunteered to speak with officers and left contact information if they needed to speak with him further. EXHIBIT B, 8-10; BUS ROUTES, APPENDIX 055. The bus route ran only locally in Sioux Falls and there is no indication Plastow was fleeing the jurisdiction. BUS ROUTES, APPENDIX 055. On January 20, 2015, Officer Walton noted "it was obvious during the . . . contact I had briefly with Alvin that [he] seemed to be of limited mental capacity." EXHIBIT B, 5.

Plastow was interviewed by Detective Bakke at the Law Enforcement Center on January 30, 2014. The majority of that interview discussed Plastow's own victimization

from his earliest memories up to and including his eventual perpetration on N.H. in 1996. EXHIBIT B, 12-15. During the interview, Plastow said he was attracted to children, specifically black females who were children. FOF ¶ 24, APPENDIX 003. Plastow's first victim, N.H., was a black female who was five-years-old at the time of the rape. FOF ¶ 25, APPENDIX 003. S.G. is a black female who was three-years-old at the time of the alleged rape. FOF ¶ 26, APPENDIX 003. Plastow admitted he continued to struggle with thoughts of children after getting out of prison. FOF, ¶ 27, APPENDIX 003. Plastow admitted that three weeks after S.G. began living with him he began to have sexual thoughts about her. FOF, ¶ 28, APPENDIX 003. On one occasion, while helping S.G. go to the bathroom and subsequently wiping S.G., Plastow's toilet paper-covered finger went between S.G.'s vaginal lips. FOF, ¶ 29, APPENDIX 003; CONFESSION at 48/19-50/16, APPENDIX 020-021. Plastow acknowledged that at some point, while wiping S.G., he started to get sexually aroused. *Id.*

Plastow admitted to touching S.G. one other time approximately one week or so after he helped S.G. in the bathroom. FOF ¶ 31, APPENDIX 004. He admitted to using his index finger to wipe S.G.'s vaginal lips while S.G. was laying on a bed in the residence. At first Plastow said he never "split the lips," then he later said the vaginal lips barely opened, and finally stated that all he did was go around the lip. CONFESSION, at 51/48-52/48; APPENDIX 022-023. Plastow denied ever reaching S.G.'s "hole." CONFESSION, at 68/21-37; at 69/10-26; APPENDIX 068, 069. Plastow also admitted he took a picture of S.G.'s vagina; when he took the picture, Plastow was fully clothed and did not touch himself or S.G. FOF ¶ 32, APPENDIX 32; CONFESSION at 53/27-54/4. At a later date, Plastow masturbated once to the picture. *Id.*

The State charged Plastow with two counts of first degree rape of a victim less than 13 years of age and two counts of possession, manufacture, or distribution of child pornography. FOF ¶ 1, APPENDIX 001. A Part II Information was also filed alleging Plastow is a habitual offender for previously having been convicted of First Degree Rape of a five-year-old African-American female. FOF ¶ 2-4; APPENDIX 001.

Neither S.G. nor her father are available to testify. FEB. MOTIONS HEARING at 3/24, 11/6, APPENDIX 045. S.G.'s father had active warrants out for his arrest and had left the state. FOF ¶ 44; APPENDIX 004. The State did not intend to offer S.G.'s statements into evidence and therefore a competency hearing was unnecessary. FOF ¶ 45, APPENDIX 004; Jan. Motions Hearing at 2/20-3/3, APPENDIX 036-037. The medical examination done on S.G. at Child's Voice was normal and could not prove or refute the allegations. FOF ¶ 42, APPENDIX 004; EXHIBIT B, 28.

The State was specifically ordered to file its notice of intent to use prior acts evidence by December 29, 2014. ORDER, APPENDIX 056. The State did not comply with that order, nor have they filed a notice of intent to admit prior acts evidence. FOF ¶ 5; APPENDIX 002; JAN. MOTIONS HEARING at 12/8-17, APPENDIX 042.

Plastow filed a pre-trial motion to sever the rape counts from the pornography counts because the State could not establish the corpus delicti of rape. Included in that request was for the confession to be suppressed from any trial for rape. Plastow did not request suppression of the confession as to the pornography counts. JAN. MOTION HEARING; FEB. MOTIONS HEARING, APPENDIX 035, 043. The trial court granted the request to sever the pornography counts from the rape counts because it believed the State could not first establish corpus delicti of rape, thereby rendering Plastow's

confession inadmissible at a trial on those counts. COL ¶ 6, 7; APPENDIX 006. The trial court erroneously stated in its Findings that the State was required to prove each element of rape to establish the corpus delicti. *Id*. Because the trial court correctly cites to *Thompson*, which requires no such burden, it is possible ¶ 7 of the COL includes a typographical error when it references "each element." *Id*.

ARGUMENT

The corpus delicti rule has been retained by most states, modified by others, and thrown away by a small minority; it has also been the substantive principal of South Dakota law for more than 100 years and there is no compelling reason to dispose of the rule and adopt a trustworthiness standard. *State v. Thompson*, 1997 S.D. 15, 560 N.W.2d 535; *State v. Goulding*, 2001 S.D. 25, ¶ 13, 799 N.W.2d 412, 417 (citing to David A. Moran, *In Defense of the Corpus Delicti Rule*, 64 Ohio St. L.J. 817 (2003)).

The trial court granted Plastow's request to sever the pornography counts from the rape counts, and additionally to suppress Plastow's confession in the trial for rape. Unfortunately and inexplicably, in its findings the trial court wrote that *Thompson* required the State to provide independent proof of each element of the crime of rape and, since the State could not do so, Plastow's admissions as to the rape counts must be suppressed. Plastow does not, nor did he ever, argue that *Thompson* makes such a requirement of the State; instead, *Thompson* requires the State to present sufficient independent corroborating evidence that (1) an injury or loss occurred; and, (2) that such injury or loss was caused by someone's criminal responsibility. *Thompson*, 1997 S.D. 15, ¶ 36, 560 N.W.2d at 543; *see also State v. Beard*, 34 S.D. 76, ¶ 3, 147 N.W.2d 69, 70 (S.D. 1914). Slight evidence is sufficient to establish the corpus delicti; however, such

evidence must be proved entirely independent of and without considering the defendant's extrajudicial statements. *Thompson*, 1997 S.D. 15, ¶ 37, 560 N.W.2d at 543.

Although the trial court misstated the corpus delicti rule in South Dakota, the trial court came to the correct result because the State is unable to present sufficient independent corroborating evidence of the corpus delicti of rape.

STATE V. THOMPSON:

At trial there was no physical evidence which would suggest Thompson forced the victim, C.B., to touch his penis (the sexual contact alleged). *Thompson*, 1997 S.D. 15, ¶ 38-39, 560 N.W.2d at 540, 544. More importantly, C.B. denied she ever touched his penis. *Id*. at 543. Despite a complete lack of corroborating evidence, Officer Ensley was allowed to testify regarding Thompson's admissions of sexual contact. *Id*.

In *State v. Best*, this Court stated, "The almost universal rule is that the admissibility of an extrajudicial confession is conditioned upon its corroboration by other evidence… The same principal has been applied to incriminating admissions." *Best*, 89 S.D. 227, 232 N.W.2d 447, 452 (S.D. 1975) (citing *Tabor v. United States*, 152 F.2d 254 (4th Cir. 1945); Annot., 127 A.L.R. 1130; and *Opper v. United States*, 348 U.S. 84 (1954)). The corroborating evidence must establish the corpus delicti of the crime by independent proof. *Thompson*, 1997 S.D. 15, ¶ 36, 560 N.W.2d at 543; *State v. Garza*, 337 N.W.2d 823, 824 (S.D. 1983); *State v. Bates*, 71 N.W.2d 641, 644 (S.D. 1955); *State v. Lowther*, 434 N.W.2d 747, 754 (S.D. 1989).

The "corpus delicti" of a crime means "the body or substance of the crime and may be defined in its primary sense as the fact that the crime charged has actually been committed by someone." *Bates*, 71 N.W.2d at 644. Thus, to establish the *corpus delicti* of

a crime, the State had to prove by corroborating evidence independent of the admission that: (1) an injury or loss did in fact occur, and (2) the fact of someone's criminal responsibility for the injury or loss. *Lowther*, 434 N.W.2d at 747 (citing *Bates*, *supra*).

Bates, and its progeny, precluded Thompson's conviction of sexual contact because no evidence of any kind, except the alleged admission, suggested C.B. touched anyone's penis, or that such a touch resulted from criminal conduct. Granted, evidence of the corpus delicti need not be conclusive, nor sufficient to prove the defendant's guilt beyond a reasonable doubt. *Lowther*, 434 N.W.2d at 747. To be sufficient, however, the evidence of the corpus delicti must be real and not imaginary or presumed. *Thompson*, 1997 S.D. 15, ¶ 39, 560 N.W.2d at 544; *Bates*, 71 N.W.2d at 644. At a minimum, the independent proof must establish the corpus delicti "to a probability." *Id*.

In *Thompson*, independent proof of the corpus delicti of sexual contact could only be presumed because it was wholly absent from the record. *Thompson*, 1997 S.D. 15, ¶ 39, 560 N.W.2d at 543. Evidence was presented that C.B. was exposed to a pornographic movie and Thompson was responsible for that exposure. *Thompson*, 1997 S.D. 15, ¶ 6, 560 N.W.2d at 537. As such, evidence established the corpus delicti of disseminating harmful materials to minors. Independent evidence was presented that Thompson exposed his genitals to C.B., and may have masturbated in front of her. *Id*. Such evidence established the corpus delicti of indecent exposure. Independent evidence was presented that Thompson penetrated C.B.'s vagina. *Id*. at ¶ 38, 543. As such, the corpus delicti for rape was established. This Court essentially determined that Thompson may have done all those terrible things, but the sum total of such acts did not establish the corpus delicti of sexual contact, or that Thompson was criminally liable for an imaginary touching. *Id*.

at ¶ 38-39, 543; *Cf*., *People v. Gould*, 402 N.W.2d 27 (Mich. Ct. App. 1986) (reversing conviction because corpus delicti could not have been established from mere inferences drawn from the evidence).

The *Thompson* court held that Thompson was entitled to a directed acquittal on the charge of sexual contact since all of the evidence independent of his alleged admissions established only a single criminal act of physical contact which was used as the basis for the rape conviction. *Thompson*, 1997 S.D. 15, ¶ 38, 560 N.W.2d at 543. In South Dakota, the offense of rape and sexual contact are mutually exclusive. *Id*. *See also*, *State v. Brammer*, 304 N.W.2d 111, 114 (S.D. 1981); *State v. Bachman*, 446 N.W.2d 271 (S.D. 1989). As such, this Court reversed Thompson's conviction for sexual contact with a child under age sixteen, and remanded to the trial court with instructions to strike the judgment of conviction and enter a judgment of acquittal. *Thompson*, 1997 S.D. 15, ¶ 40, 560 N.W.2d at 544.

In this case, there is no physical evidence which suggests Plastow raped S.G. Neither S.G., nor anyone else, will provide testimony at trial suggestive that Plastow raped her. Again, evidence of the corpus delicti need not be conclusive, nor sufficient to prove the defendant's guilt beyond a reasonable doubt. *Lowther*, 434 N.W.2d at 747. But, the evidence must be real and not imaginary. *Bates*, 71 N.W.2d at 644. At a minimum, the independent proof must establish the corpus delicti "to a probability." *Id*. In this case, even more so than in *Thompson*, independent proof of the corpus delicti of rape can only be imaginary because it is wholly absent from the record.

I. THE TRIAL COURT CORRECTLY SUPPRESSED PLASTOW'S CONFESSION FROM THE TRIAL FOR RAPE OF A CHILD UNDER THE CORPUS DELICTI RULE DESCRIBED IN *STATE V. THOMPSON*

The independent corroborative evidence in this case tends to show that Alvin Plastow possibly took a picture of S.G. when she was partially clothed – it does not establish the corpus delicti of rape.

The State's argument speaks to the issue of what evidence should be considered relevant to corroborate, and then enter into evidence, Plastow's confession. The State cites to several jurisdictions with a similar interpretation of the classic corpus delicti rule as South Dakota, then claims those states "would have readily found Plastow's confession adequately corroborated by the pornographic photographs of S.G. on his phone and other telling circumstances of this case." BRIEF, 21. First, as detailed below, the photograph of S.G. may not be pornographic under South Dakota law. Second, and more importantly, the State's argument ignores the first step of our corpus delicti doctrine which is that the corpus delicti must be established *before* the admissibility of Plastow's confession is determined.

The State spends the first half of its brief explaining why Plastow's confession should be entered into evidence against him, but fails to first show that it can present sufficient independent, *admissible*, corroborating evidence that (1) an injury or loss occurred; and, (2) that such injury or loss was caused by someone's criminal responsibility. The corpus delicti rule may be seen as a rule of evidence in that it bars the admission of an extrajudicial confession until a predicate showing is made that the crime charged was committed by someone. *State v. Best*, 89 S.D. 227, 235-37, 232 N.W.2d 447, 452-53 (1975).

The State conceded at the trial court level that the only *admissible*, independent, corroborating evidence in this case is a picture of a prepubescent vagina, that may or may not belong to S.G., found on Plastow's phone. JAN. MOTIONS HEARING at 11/14-17.

The State attempts to puff up its position by discussing facts that will not be, nor ever have been, admitted as evidence. Per the State's admissions:

1. S.G. will not testify;
2. Hearsay statements of S.G. will not be admitted, either from her Child's Voice interview, or any statements made to police or her father;
3. S.G.'s father will not testify;
4. No evidence of any alleged apology Plastow made to S.G.'s father will be admitted; and,
5. Plastow's prior conviction will not be admitted.

The following will be presented by the State to establish the corpus delicti: (1) the picture on Plastow's phone; (2) opportunity evidence, via the picture on the phone and that Plastow and S.G. potentially lived together for a period of time; and, (3) a nullifying Child's Voice physical exam which is just as consistent with a rape not occurring as it is with a rape having occurred.

A. THE PHOTOGRAPH IS NOT CORROBORATIVE OF THE CORPUS DELICTI OF RAPE.

Nudity in a photograph, standing alone, no longer constitutes a "prohibited sexual act" under South Dakota Codified Law. SDCL 22-24A-2. "Prohibited sexual act" *used to* include "nudity if such sexual act is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction." SDCL 22-22-22 (repealed by S.D. S.L. 2002, Ch. 109, §1); discussed in *State v. Blair*, 2006 S.D. 75, ¶ 13, 721

N.W.2d 55, 59 (defendant was convicted of possession of child porn based on the now-repealed statute because it was the law at the time of his alleged offenses).

To establish the corpus delicti of rape, the State will present a photograph of a passive prepubescent vagina, which may belong to S.G., found on Plastow's phone. The individual in the photo is passive and not posed in any way; further, the clothing only partially reveals the individual. Even if we assume the photo on Plastow's phone is of S.G., the photo itself is not provocative. The individual's vagina is visible, but there is no posing, no indication in the picture whether the person removed their own clothing, or any indication that the photo was taken for a lascivious purpose.

Possession of the photograph of partial nudity may not constitute possession of pornography in South Dakota; therefore, it cannot provide evidence that the corpus delicti of rape exists.

B. OPPORTUNITY IS NOT EVIDENCE THAT CORROBORATES THE CORPUS DELICTI OF RAPE.

In *Allen v. Commonwealth*, the Virginia Supreme Court examined a case where the defendant confessed to his daughter to having engaged in inappropriate sexual behavior with his four-year-old grandson. *Allen*, 752 S.E.2d 856 (Va. 2014). Other than the defendant's confession, the only other substantive evidence entered into the record was the testimony of the defendant's daughter who stated the following: (1) she and her son lived in a basement apartment and the defendant lived upstairs; (2) the defendant had various opportunities to be alone with his grandson; (3) the grandson would sometimes sleep in the same bed as his grandmother and the defendant, and sometimes alone with defendant; and, (4) she confirmed the defendant and grandson would rough house, watch movies, and spend a lot of time together. *Id*. at 860.

The Virginia Supreme Court disagreed with the trial court and appellate court's determination that the totality of the evidence provided the requisite slight corroboration of the corpus delicti and, ultimately, the admission of the confession. *Allen* found that for actions to provide slight corroboration of the corpus delicti, those actions cannot be "just as consistent with non-commission of [aggravated sexual battery] as [they are] with its commission." *Allen*, 752 S.E.2d at 861 (*citing to Phillips v. Commonwealth*, 202 Va. 207, 211-212 (1960)). When there is no evidence establishing the corpus delicti, evidence merely placing the defendant within the geographic proximity of an alleged crime is insufficient corroboration of the defendant's confession to having committed crimes within the area. *Id.* (*citing to Caminade v. Commonwealth*, 230 Va. 505, 507-08, 510-511 (1986)). *Allen* warned that courts must tread carefully when evaluating the probative weight of evidence that might provide slight corroboration because "the coincidence of circumstances tending to indicate guilt, however strong and numerous they may be, avails nothing unless the corpus delicti . . . be first established." *Allen*, 752 S.E.2d at 860 (*citing to Phillips*, 202 Va, 207, 211-212 (1960)).

In *People v. T.A.O.*, the Colorado Court of Appeals reversed a juvenile's conviction for sexual assault on a child. *T.A.O.*, 36 P.3d 180 (Colo. App. 2001). The prosecution's evidence consisted of: (1) the juvenile's confessions to a therapist and a detective that he touched his sister's vagina through her clothing on New Year's Eve; (2) evidence that the juvenile was with the victim on that occasion; and, (3) the prosecution was permitted to establish the juvenile was in therapy at the time because he previously committed a sexual assault. For purposes of its opinion, the court assumed the juvenile's confessions were properly admitted. *Id.* at 181. The *T.A.O.* court held that opportunity to

commit an offense does not establish the corpus delicti; and, further, that the prior acts evidence was improperly admitted because the prosecutor did not first present independent evidence that the corpus delicti of sexual assault existed. *Id*. at 181-182.

In this case, the location of the partially nude photograph on Plastow's phone shows Plastow potentially had the opportunity to take the photo. Opportunity to commit a crime does not establish the corpus delicti. Further, because the location of the photo on Plastow's phone is just as consistent with non-commission of rape as it is with its commission that evidence fails to corroborate that the crime of rape was actually committed.

The State also argues that because Plastow temporarily lived with S.G. and her parents, this also afforded him opportunity. No evidence has been entered – outside of Plastow's confession – that S.G. lived with Plastow for any period of time. However, even if the State provides such evidence, the fact that Plastow might have lived with S.G. for a time is mere opportunity evidence and is just as consistent with non-commission of rape as it is with its commission; as such, that evidence fails to establish the corpus delicti.

The State cites to *State v. CMV*, an unpublished opinion,[1] to stand for a determination by the Washington Appellate court that evidence of opportunity to molest a child alone was the corroboration necessary to enter CMV's confession into evidence.

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[1] Unpublished opinions are opinions that a particular court has designated as having non-binding precedential effect. They are written resolutions to specific cases, prepared exclusively for the involved parties, and they are intended to have no binding precedential effect – or even persuasive effect, for some jurisdictions – on future cases. Unpublished Opinions: A Convenient Means to an Unconstitutional End, Erica S. Weisberger (Georgetown Law Journal, vol. 97:621) p. 621; the State of Washington's Code also states that a party may not cite as an authority an unpublished opinion of the Court of Appeals. GR 14.1, WA R GEN GR 14.1.

State v. C.M.V., No. 25314-3-II, 2001 WL 767853 (Wash. Ct. App. July 10, 2001). The State ignores that the corpus delicti in *C.M.V.* was first clearly established by independent corroborative evidence. *C.M.V.*, 2001 WL 767853 at 5. The child's statements, which were admitted into evidence, clearly establish sexual contact occurred between her and the defendant. *Id*. Opportunity was one element of corroborating the confession for purposes of admission but it did not establish the corpus delicti alone. *Id*. The State in *C.M.V.* also provided statements and highly sexualized behaviors of the victim. *Id*. at 4.

This case is even more similar to *People v. Lambert*. In that case, the only independent evidence that was entered by the State to establish the corpus delicti of deviant sexual contact was that the defendant and the boy slept in the same room one night two to three weeks before the mother noted the boy's rectum appeared to be pink and swollen. *People v. Lambert*, 472 N.E.2d 427 (Ill. 1984). The *Lambert* court determined that opportunity and evidence that the child's rectum was pink and swollen three weeks later[2] did not establish corpus delicti of deviant sexual conduct; further, the court rejected the State's request to do away with the independent-corroboration rule in its quest to enter Lambert's confession into evidence. *Id*. at 429. The *Lambert* court noted:

> "Experience has shown that untrue confessions may be given to gain publicity, to shield another, to avoid apparent peril, or for other reasons, and because of this, the law demands corroborating proof that a crime did in fact occur before the individual is punished therefor."

Lambert, 472 N.E.2d at 429 (*citing to People v. O'Neil*, 165 N.E.2d 319, 321 (Ill. 1960)).

C. A NORMAL CHILD'S VOICE EXAMINATION IS NOT EVIDENCE THAT CORROBORATES THE CORPUS DELICTI OF RAPE.

[2] No evidence was offered to show that the pink rectum was anything other than a natural occurrence; especially in light of its remoteness in time to the alleged act.

In this case, the State advised the trial court it intends to introduce the results of S.G.'s physical examination by Child's Voice as corroborative evidence of rape. JAN. MOTION HEARING at 8/12. The physical exam was determined by the physician as being a "normal exam which neither supports nor refutes the history given." EXHIBIT B, 28. Again, the Child's Voice exam is essentially non-evidence; the result fails to rule out innocence or criminality and therefore does not reasonably or logically support an inference of either. The fact that a Child's Voice examination simply occurred cannot be evidence that establishes the existence of the corpus delicti of rape.

In *State v. Aten*, the Supreme Court of Washington was faced with the death of a four-month-old who was in the care of the defendant babysitter. *State v. Aten*, 927 P.2d 210 (Wash. 1996). The babysitter made statements weeks afterward that she suffocated the baby because the child would not stop crying. Independent corroborative evidence showed: (1) the baby had a simple viral upper respiratory infection on January 28, 1991, her lungs were clear and she primarily had nasal congestion; (2) on the night of January 30, 1991, the defendant took care of the four-month old child; (3) the next morning, defendant found the baby dead; (4) the baby's mother testified that the child was fine the night before; (5) after the baby died, the defendant began storing or giving away some of her possessions; (6) the defendant was voluntarily admitted to a hospital for grief and depression; (7) the doctor who performed the autopsy testified that the child died of SIDS, which is acute respiratory failure; and, (8) the doctor acknowledged suffocation could cause acute respiratory failure, but he also testified he could not determine via autopsy whether the respiratory failure was caused by SIDS or suffocation. *Id*. at 214. Based upon the autopsy findings alone, the doctor could not reasonably or logically infer

the child died as a result of a criminal act; he could only draw that inference haltingly after considering the medical history of the child. *Id*. at 220.

In *Aten*, the Washington Supreme Court affirmed the Court of Appeals decision to reverse the defendant's conviction. The Court reasoned: "Evidence may lead to a reasonable inference of criminality or it may lead to a reasonable inference of innocence. But evidence that simply fails to rule out criminality or innocence does not reasonably or logically support an inference of either." *Aten*, 927 P.2d at 221.

D. SOUTH DAKOTA IS NOT TOO STRICT IN ITS APPLICATION OF THE CORPUS DELICTI RULE.

a. THOMPSON IS CONSISTENT WITH ILLINOIS, CALIFORNIA, AND OHIO

This Court, using the *Thompson* analysis, would also have found the corpus delicti of the underlying crimes existed in each of the cases cited by the State for that premise. The flip side of that argument is also true: none of the courts in Illinois, California, and Ohio cited by the State would find that the photograph of S.G. establishes the corpus delicti of rape in this case. Further, if those courts decided to address the second step of determining whether Plastow's confession is sufficiently corroborated by independent, admissible evidence, none of those courts would have so ruled.

The State minimizes the independent evidence establishing the corpus delicti that was present in its cited line of cases. A reading of the cases below, and others cited,[3]

[3] *People v. Lara*, 983 N.E.2d 959 (Ill. 2013); *People v. Jones*, 949 P.2d 890 (Cal. 1998); *In re W.B. II*, Not Reported in N.E.2d (2009), 2009 WL 961500 (Ohio App. 4) (Notably the State's brief reads as if the victim only testified that her brother touched her on the outside and the court said, "Well, that's good enough for us!" On the contrary, the victim testified that it hurt when her brother touched her); *State v. Shannon*, 2004 WL 637848 (Ohio. App. 11); *State v. Clark*, 666 N.E.2d 308 (Ohio App. 3 1995).

reveals there were far more independent corroborating facts that established the corpus delicti than is listed by the State:

PEOPLE V. STEVENS, 544 N.W.2d 1208 (Ill. App. Ct. 1989).

Independent evidence found to establish corpus delicti of rape included the following: (1) daughter of victim testified that when she left the house at 8PM the house was clean and orderly, but when she returned at 2AM, the house was ransacked and one of the front door window panes was broken; (2) daughter testified she found her mother huddled on the floor in the bedroom – she appeared to be in shock and had scratches on her face; (3) daughter testified her mother immediately stated that she had been raped; (4) the victim testified she woke up screaming when she felt someone grab her in the chest area; and, (5) the victim testified when she went to bed her nightgown and panties were intact, but when she woke up her nightgown and panties were torn. *Id*. at 1219.

In *Stevens*, the defendant's confession was also admitted into evidence because not only did it match the independent evidence proffered to establish the corpus delicti, but additional admissions such as where he went that night, that he broke into another nearby house the same night, and details on where he was found was also corroborated by independent evidence.

PEOPLE V. BOUNDS,[4] 662 N.E.2d 1168 (Ill. 1996).

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[4] Bounds belonged to the infamous group the Death Row 10 - a group of ten men on Illinois's Death Row that were later found to have been tortured for their confessions by a ring of Chicago Police officers. Governor Ryan, on his way out of office in 2003 pardoned 4 of the Death Row 10 as being completely innocent and the remaining 6 had their sentences converted to life while investigations into the tactics used by former Chicago Police Commander Jon Burge and his detectives continued. Unfortunately, Frank Bounds died in prison from untreated lung cancer before his sentence was addressed. Burge was forced to take early retirement; however, he and his detectives were never charged.

Independent evidence found to establish corpus delicti of rape (victim deceased) included: (1) Neighbor testified she heard a woman scream at the time the crime was thought to have occurred; (2) the family of the victim testified as to specific times/locations the victim would travel on her way to work in the morning and that the victim was habitual in these patterns; (3) the victim was found wearing only a t-shirt, which did not belong to her, and was naked from the waist down despite the crime occurring in the middle of a Chicago winter; (4) the victim's possession were found near her body which tended to show the victim was undressed where her body was found; (5) the victim's body was found in an abandoned apartment building near her regular bus stop; (6) evidence was admitted of contusions and abrasions on the victim's body; and, (7) there was a broom handle smeared with what appeared to be feces and the victim's anus was dilated. *Id*. at 1186.

PEOPLE V. ROBBINS, 755 P.2d 355 (Cal. 1989).

Independent evidence found to establish corpus delicti of rape (victim deceased): (1) witness testified to seeing defendant riding a motorcycle on same date and in vicinity of victim's disappearance; (2) victim see riding on the back of a motorcycle with a man that fit defendant's description; (3) victim's nude body was found in a field; (4) other acts evidence was allowed into evidence of other sexual assaults and murders committed by defendant; and (5) defendant's expert testified that defendant was a diagnosed pedophile. *Robbins*, 755 P.2d at 366. In *Robbins*, the defendant's own expert testified that defendant was a pedophile and the evidence was allowed in of defendant's confession to several unsolved sexual assault-murders that occurred in other jurisdictions. *Id*.

The State uses colorful language to state that Plastow has a "fetish for raping young black girls." BRIEF at 17. However, there is no evidence the Defendant has such a proclivity outside statements made in his confession. The State is barred from presenting prior acts evidence stemming from Plastow's 1998 conviction for a number of reasons. In November, defense counsel filed a demand requiring the State to provide notice of any intent to present prior acts evidence at trial – at that point Plastow had been incarcerated for approximately 11 months and the defense did not want a late disclosure to delay the trial date. At the December 19, 2014 hearing, Judge Salter ordered the State to file its notice of intent to use prior acts evidence, if they wanted such evidence admitted, by December 29, 2014. APPENDIX 056. The deadline came and went. At the January 29, 2015 hearing, the State confirmed it never intended to file prior acts evidence - until it appeared Plastow might be successful in his motion to sever the pornography counts from the rape counts. JAN. MOTION HEARING at 12/8-17. At that point in time, Plastow had been in custody for 363 days.

Further, in the South Dakota sexual assault cases where prior bad acts were allowed into evidence at trial, there exist two very important elements that are absent in Plastow's case: (1) the corpus delicti was established; and, (2) there was timely notice of the State's intent to use such evidence. In Plastow's case, the State reference the use of prior acts evidence in its brief – for the first time – for the proposition it would help establish the corpus delicti of rape that the state cannot otherwise show. BRIEF, 22. This is an impermissible use of prior bad act evidence. *See State v. Champagne*, 422 N.W.2d 840 (S.D. 1988); *State v. Christopherson*, 482 N.W.2d 298 (S.D. 1992); *State v. Ondricek*,

535 N.W.2d 872 (S.D. 1995); *State v. Means*, 363 N.W.2d 565 (S.D. 1985); *State v. Klein*, 444 N.W.2d 16 (S.D. 1989); *State v. Basker*, 468 N.W.2d 413 (S.D. 1991). ***PEOPLE V. JENNINGS***, 807 P.2d 1009 (Cal. 1991).

Independent evidence to establish corpus delicti of rape (victim deceased) included: (1) victim was a known sex worker; (2) victim's body was found naked in an irrigation canal; and, (3) the victim was found dead, with a broken jaw. *Jennings*, 807 P.2d at 1029.

The *Jennings* court held that although evidence for rape was slight, it was present and sufficient to establish the corpus delicti. *Jennings*, 807 P.2d at 1029. For the loss portion of the corpus delicti rule, the court determined that any time you find the unclothed body of a young woman in a remote area, reasonable inference arises that some sexual activity occurred. *Jennings*, 807 P.2d at 1029. For the criminal agency prong, the fact that the victim was found dead in a canal with a broken jaw led to a further reasonable inference that whatever sexual activity occurred, it occurred against the victim's will. *Id.*

In *Bounds*, *Stevens*, and *Robbins*, the state of undress was deemed a significant factor toward establishing corpus delicti. The State tries to equate the state of undress in those cases with S.G.'s state of partial undress in the photo found on Plastow's phone. BRIEF at 22. However, a living individual being partially clothed in a photograph is vastly different from the significance of the partially dressed victims in *Bounds*, *Stevens*, and *Robbins*.

There is no independent evidence that Plastow removed AV's clothes. There is a photo of a young person partially clothed, but no witnesses to testify whether she

removed her own clothing, as many children that age do. *Bounds* and *Robbins* dealt with dead victims who were found unclothed in locations where that would not make any sense except as it related to sexual assault (Robbins' victim was naked in a field with a broken neck; and, Bounds' victim was a business woman whose partially unclothed and battered body was found in an abandoned apartment building in the middle of a Chicago winter). Contrary to the State's assertion, in *Stevens* the victim was not unclothed - her clothes had been ripped and torn, indicative of a possible sexual assault. A toddler being partially unclothed in her own apartment is not unusual nor indicative of sexual assault – instead it is presumably a daily/nightly occurrence.

b. THOMPSON IS ALSO CONSISTENT WITH MISSOURI, WYOMING, AND ARKANSAS, *INTER ALIA*

In *State v. Crenshaw*, the Missouri Court of Appeals reversed the trial court's denial of defendant's motion of acquittal of forcible rape and forcible sodomy. *Crenshaw*, 59 S.W.3d 45 (Mo. 2001). The defendant's conviction for murder of his step-daughter was upheld. The court determined there was no evidence that the victim had been raped or forcibly sodomized outside of the defendant's confession statements to two of his friends. As such, the corpus delict of rape and sodomy were not first established, so the defendant's confession statements were improperly admitted.

In *Barnes v. State*, evidence was sufficient to support the corpus delicti of murder because the coroner testified the victims had clearly died as a result of homicide. *Barnes*, 346 Ark. 91 (2001). Once the corpus delicti was established independent of inculpatory statements of the defendant and his accomplice, the court determined those same inculpatory statements were admissible because they were sufficiently corroborated by the independent evidence (i.e.: the confessions divulged location of the homicide,

description of the victims, descriptions of how the victims were killed, the placement of the bodies, and what was taken from the victims' home). *Id*. at 276.

Betzle v. State, the Wyoming Supreme Court upheld a babysitter's conviction for raping a mentally impaired 9 year-old girl. *Betzle*, 847 P.2d 1010 (WY. 1993). The court was asked by the prosecutor to adopt a rule that would permit a conviction to be sustained upon the uncorroborated statement of the accused. The court refused and held that it is necessary under Wyoming law to require the introduction of evidence that is independent of the confession in order to prove a criminal offense. *Id*. at 1021-22. The *Betzle* Court determined the following independent evidence existed to corroborate rape of the child victim: (1) she would come home from defendant's house wearing different clothing; (2) both victim's mother and defendant testified the victim stayed at his house all night on certain occasions; (3) the father testified the victim complained to him of soreness in her crotch area; (4) the victim's mother testified about a decrease in the victim's appetite, she began to wet the bed, and to complain of vaginal pain; (5) pediatrician testified as to irritation and redness in the genital area; and, (6) the child's counselor of two-plus years testified as to changes in the child's behavior. *Id*.

II. THERE ARE NO COMPELLING REASONS TO REFORM OR ABANDON THE CORPUS DELICTI RULE

A. ABROGATION IS AN UNTENABLE EROSION OF THE RIGHTS OF ACCUSED

The cases cited in Section I of this brief clearly establish that our current corpus delicti rule provides protections to accused persons while also providing enough room for prosecutors to make their case. There is no compelling reason to modify or dispose of the corpus delicti rule in South Dakota.

The corpus delicti rule in South Dakota has been well-articulated for more than a century. Only three years ago, this Court revisited the corpus delicti rule with its decision in *Steiner v. Weber*, 2011 S.D. 40, 815 N.W.2d 549 (S.D. 2012). *Steiner* dealt with a habeas petition where the defendant claimed ineffective assistance of counsel for failing to inform him of the corpus delicti rule prior to his plea of guilty. In confirming *Thompson* was the law of the land and remanding the defendant's petition back down for consideration, this Court recognized that application of the independent corroboration rule in South Dakota could at times require a judgment of acquittal. *Steiner*, 815 N.W.2d at 552-553.

The State bemoans that our corpus delicti rule has the potential to thwart the conviction of criminals;[5] however, the greater threat is the risk of false convictions in the absence of the rule. Society has made the fundamental value determination that it is far worse to convict an innocent man than to let a guilty man go free. *See* David A. Moran, *In Defense of the Corpus Delicti Rule*, 64 Ohio St. L.J. 817 (2003), quoting *In re Winship*, 397 U.S. 358, 372, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring). *See also* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L.Rev. 891 (2004) (analyzing "125 recent cases…in which indisputably innocent individuals confessed to crimes they did not commit"); Richard A. Leo & Richard J. Ofshe, *Missing the Forest for the Trees: A*

[5] The State cites to four cases in Minnehaha County and Pennington County, the information of which Plastow is not privy, as evidence that the corpus delicti rule thwarts the prosecution of sexual abuse cases. It appears only two of the four cited cases could not be prosecuted – the other two were fully prosecuted under our corpus delict rule. No doubt the seminal stains mentioned in the fourth case, if shown to belong to that defendant, may be enough to establish the corpus delicti of rape if there is some other evidence regarding any changed behavior in the victim, etc.

Response to Paul Cassell's "Balanced Approach" to the False Confession Problem, 74 Denv. U.L.Rev. 1135, 1137 n. 12, 1139 (1997); Moran, 64 Ohio St. L.J. at 839 ("What cannot be denied…is that false confessions are regularly admitted into evidence and regularly lead to wrongful convictions.").

Another argument that supports retaining the corpus delicti rule is that it promotes better law enforcement practices by encouraging police to conduct an independent investigation rather than rely solely on defendants' confessions. *Escobedo v. Illinois*, 378 U.S. 478, 488-89, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964) (A system of criminal law enforcement which comes to depend on the "confession" will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation); *see also* Mullen, 27 U.S.F. L.Rev., at 405-06.

The State makes much out of the fact that Plastow does not argue his admissions were coerced or "beaten out of him;" and, that because there are certain safeguards in the law to protect individuals under the 5th Amendment, any concerns for the truthfulness of confessions has simply gone the way of the Dodo. This is simply not true. Individuals confess for all sorts of reasons outside of actual guilt. A person might actually believe they committed a crime. However adamantly a person believes they committed a crime, that belief and its articulation in a confession does not establish the corpus delicti rule. Furthermore, such safeguards as relied upon by the State (i.e.: Due Process voluntariness and the Miranda rules), provide very little protection to the class of mentally ill persons the corpus delicti rule was originally designed to protect – mentally ill persons who confess to fictitious crimes. Moran, 64 Ohio St. L.J. at 842-51.

The State implies that many jurisdictions have adopted "trustworthiness" as the test for the legal sufficiency of a confession to sustain a conviction. The argument, however, is misleading because it lumps together jurisdictions requiring some extrinsic proof of criminal conduct to corroborate a confession – a modified form of corpus delicti – with those jurisdictions that have done away with the rule entirely and adopted a general test of trustworthiness. The latter does not require any connection to an actual crime and the State's burden may be met by a showing that the confession – even to an imagined crime – was given under "trustworthy" circumstances.

The State cites to two Kansas Appellate Court decisions, *State v. McGill* and *State v. McClelland* as authority this Court should look to as support for changing the law in South Dakota to that of a trustworthiness rule. *McGill*, 328 P.3d 554 (Kan. Ct. App. 2014); *McClelland*, 342 P.3d 2 (Kan. Ct. App. 2015). However, Plastow urges this Court to recognize the majority decision in *McGill* is not legally clear or well-articulated.

McGill misread *Opper* to support the application of a general trustworthiness test which required the state to present no evidence that a crime actually occurred and allowed the confession to entirely establish the corpus delicti because information, immaterial to the charged offense, was verified. A clear reading of *McGill* reveals the court was, at the very least, confused in its explanation of the rule:

> "The corpus delicti in a rape case may be proved by extrajudicial admission and circumstantial evidence. Our Supreme Court has recognized that as a basis for introduction of the defendant's confession or admission the prosecution is not required to establish the corpus delicti by proof as clear and convincing as is necessary to establish guilt; a slight or prima facie showing is sufficient."

McGill, 328 P.3d at 559 (*citing to State v. Pyle*, 216 Kan. 423, Syl. ¶ 2, 532 P.2d 1309 (1975)).

The first sentence of that paragraph suggests Kansas follows a trustworthiness standard; i.e.: the corpus delicti may be proved by an extrajudicial admission with circumstantial evidence. However, the second sentence states that before a confession or admission may be entered, the corpus delicti must be established at least slightly. One cannot fail to notice that second sentence appears to state that to be found guilty of a crime in Kansas, the state is only required to prove guilt by clear and convincing evidence. The latter would clearly violate the Constitution of the United States and is arguably (hopefully) not what the appellate court meant. The confusing and inconsistent nature of the majority decision in *McGill* is further illuminated when one reads that same court's 2015 decision in *State v. McClelland*.

McClelland dealt with a case of aggravated indecent liberties with a child. The State cites to *McClelland* as having further described the operation of Kansas' trustworthiness rule as outlined in *McGill*. BRIEF at 30. In the beginning of the court's discussion of the corpus delicti rule, the court states "the purpose of the corpus delicti rule is to provide independent evidence to corroborate the reliability of a defendant's incriminating statement that a crime was actually committed." *McClelland*, 342 P.3d at 5. This appears to be a recitation of the trustworthiness test as described in *McGill* and further gives the Kansas test the wordy title of "corpus delicti corroboration prerequisite." *Id*. However, in the following two pages the court states the following:

> "In sum, when the State wants to present evidence of a defendant's confession at trial to prove the defendant committed the crime charged, the corpus delicti corroboration prerequisite requires the government present evidence – independent from that of the defendant's confession – to show that a crime was committed and injury or harm was sustained as a result of that criminal act."

Id.

The Kansas "corpus delicti corroboration prerequisite," at least as described in *McClelland*, appears to be similar to South Dakota's current corpus delicti rule. The court determined McClelland's out-of-court statements to police were properly admitted because the prosecutor first provided independent evidence that the crime of aggravated indecent liberties with a child was committed and injury or harm was sustained by the victim as a result of that criminal act. *McClelland*, 342 P.3d at 6. That independent corroborating evidence included: (1) the victim testified McClelland rubbed her leg and try to reach up her shorts with his hand; (2) the victim also said that when defendant touched her she felt scared; (3) the children's investigative interviewer testified that the child knew she was there because she had "been touched inappropriately;" (4) the victim told the interviewer the same version of events and that the defendant's touch so scared her that she immediately left the residence; (5) the victim demonstrated the touching on an anatomical doll and her own body; (6) two of the victim's friends testified as to what the victim said happened; and, (7) McClelland's own girlfriend confirmed that the victim was over at the house on the specific day in question, that the victim was alone with the defendant in the den, and that the victim left the house abruptly. *Id*.

McGill was found guilty under a trustworthiness standard; McClelland was found guilty by a "corpus delicti corroboration prerequisite." The *McClelland* Court would not find the corpus delicti in Plastow's case established by the evidence proffered by the State, and it is anyone's guess what the *McGill* Court would do. At best, *McGill* should be ignored as confusing and inconsistent; or, at the very least, Kansas should be taken out of the persuasive category when considering whether to overturn more than 100 years of settled law in South Dakota.

Next, the State cites *Simmers v. State* as a case that supports a trustworthiness standard. However, a clear reading of *Simmers* reveals that Wyoming follows a modified corpus delicti rule which still requires "independent proof of the corpus delicti must exist apart from a defendant's confession in order to prove commission of a crime." *Simmers*, 943 P.2d at 1199. In *Simmers*, the alleged crime was twelve counts of second degree sexual assault against three separate children. S.S.'s hearsay statements, that defendant forced her to put her mouth on his penis, were entered into evidence. *Id*. at 1200. A.B. testified in court as to sexual contact with the defendant, but did not acknowledge she was forced to put her mouth on defendant's penis. *Id*. The third victim, A.J., testified that defendant forced her, S.S., *and a third child* to put their mouths on his penis. *Id*. The court determined the evidence taken together established the offense of second degree sexual assault as to all three, and, thereafter, determined the evidence sufficiently corroborated the defendant's confession that he forced S.S., A.B., and A.J. to put their mouths on his penis several times while the children were in his daycare. *Simmers*, 943 P.2d at 1199. A fair reading of *Simmers* does not establish that Wyoming follows a trustworthiness standard.[6]

B. DUE PROCESS REQUIRES THAT ANY CHANGE MADE TO THE CORPUS DELICTI RULE IN SOUTH DAKOTA MUST NOT APPLY TO PLASTOW.

[6] The State also cites to *State v. Dozier*, 2010 WL 4296666 (Tenn. 2010), an unpublished Tennessee opinion as support for why South Dakota should consider a trustworthiness rule. This is also a modified corpus delicti test in that it doesn't embrace a general trustworthiness rule. In Tennessee, there still must be independent corroborative evidence that at least tends to connect the defendant to the corpus delicti. In this case, the evidence clearly met the corpus delicti for sexual battery, but did not go all the way under the old rule to establish the corpus delicti for rape: (1) semen on victim's things; (2) partial memory of the beginning and end of the rape incident; (3) gut feeling that she had been raped, etc.

Ultimately, if this Court modifies or does away with the corpus delicti rule in South Dakota in order to adopt a trustworthiness standard, due process requires that such new rule not be applied to the instant case because defendant did not have fair warning that the Supreme Court would abandon corpus delicti rule and determine that a trustworthiness standard applies; therefore, any application of the new law would violate Plastow's due process. *People v. LaRosa*, 293 P.3d 567 (Colo. 2013).

Judicial ex post facto claims must be analyzed under the Due Process Clause and "in accordance with the more basic and general principal of fair warning." *People v. LaRosa*, 293 P.3d 567, 578, 579 (Colo. 2013) (*citing to*, *Rogers v. Tennessee*, 532 U.S. 451 (2001)). The corpus delicti rule, although criticized by some states, is still followed in the majority of state jurisdictions and has been the substantive principal of South Dakota law for more than 100 years. As discussed above, several states, including South Dakota have reaffirmed the rule on multiple occasions, and it has been regularly invoked to bar convictions in cases similar to this one. *See Thompson*, 560 N.W.2d 535 (S.D. 1997); *see also*, *State v. Bult*, 351 N.W.2d 731 (S.D. 1984) (Corpus delicti of sexual contact established by statements of the child that the defendant put his "wiener" in her, and physical evidence that the vulva-labia area was irritated, red, and swollen immediately after and two days post-incident).

If this Court determines that the corpus delicti rule should be discarded for a trustworthiness doctrine, modified-trustworthiness doctrine, or sufficiency of the evidence test, Plastow did not have "fair warning" of such a change in the law at the time of the conduct at issue; and, therefore, applying any new test to Plastow's case would

violate his due process rights. As such, this Court is constitutionally prohibited from applying a new rule here. *LaRosa*, 293 P.3d at 579.

CONCLUSION

The State asks to be relieved of its burden to prove that a crime was committed before prosecuting someone for a crime. To adopt a trustworthiness standard as championed by the State, an uncorroborated confession could corroborate itself as long as the circumstances of how the confession was given and received are deemed reliable. A man could confess to an imaginary crime, but as long as he appears calm in his confession and the authorities do not appear to badger the individual, the State could charge, convict, and punish that man - all without ever showing the crime even happened.

"This is a country of laws. The law requires that before an individual is punished for a crime, he must be proved guilty beyond a reasonable doubt. When an individual has been charged with a crime and confesses to that crime, the law of this State requires that the prosecution introduce evidence outside of the confession that tends to prove the offense actually occurred." *Lambert*, 427 N.E.2d at 429-430. In the case at bar, the State is unable to provide such evidence. We should not abandon a long-standing rule of law because the State has or will fail in its burden.

Dated this 17th day of July, 2015.

Respectfully submitted,
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Appendix

PAGE

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27374

STATE OF SOUTH DAKOTA,

Plaintiff and Appellant,

v.

ALVIN PLASTOW,

Defendant and Appellee.

APPEAL FROM THE CIRCUIT COURT
2nd JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE ROBIN HOUWMAN
Circuit Court Judge

APPELLANT'S REPLY BRIEF

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Order Allowing Intermediate Appeal Entered March 13, 2015

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Plastow's response brief argues simply that the trial court's suppression of Plastow's confession was proper under the *existing* rules and practices of *corpus delcti*. By limiting his argument to *corpus delicti's* existing rules and practices, Plastow's response fails to address the state's position that those rules and practices are in need of reform or reinterpretation, either in terms of the level of corroborative proof required at the guilt phase and/or the stage at which the court performs its corroboration investigation. The state's proposed reforms and interpretations are addressed to closing loopholes in existing *corpus delicti* practice that confessed offenders like Plastow are exploiting to escape prosecution.

1. Admissibility Of Corroborating Evidence At Guilt Phase Is An Outmoded Touchstone Of *Corpus Delicti*

Under one of the reforms proposed in its brief, the state envisions a procedure wherein a trial court will satisfy itself of the *corpus delicti* in a pretrial proceeding akin to a hearing on the voluntariness of a confession. At this hearing, the trial court would hear, consistent with SDCL 19-9-7, any and all corroborating evidence, whether admissible in a later guilt-phase proceeding or not. If the confession is found to be sufficiently corroborated in this pretrial hearing, it may be used to convict the defendant at trial with or without additional corroborating evidence. APPELLANT'S BRIEF at 23. Logically, a defendant's chances

for acquittal at trial improve appreciably if corroborating victim testimony is unavailable or inadmissible, but shifting the corroboration requirement from the trial to the pre-trial phase stops confessed offenders from avoiding trial altogether simply because victim testimony is unavailable or inadmissible.

Under this process, law enforcement will have the same incentives to investigate a case beyond a suspect's confession as under existing *corpus delicti* rules and practices because some level of corroboration will still be necessary to assure the admission of the confession, although not strict corroboration of every element. Under this process, defendants would have the same protections against false convictions for actual crimes, or false confessions to fictitious crimes, currently afforded by the *corpus delicti* rule, but without the gaping loophole of excluding a full confession that is fully corroborated by inadmissible evidence. Plastow's response brief completely fails to explain why this procedure, which is used in Alaska and other states, would not work in South Dakota. APPELLANT'S BRIEF at 23, n. 11.

2. Plastow's Confession Is Fully Corroborated By The Evidence As A Whole

Contrary to Plastow's argument that corroboration of his confession is weak, the evidence at the pre-trial *corpus delicti* hearing envisioned by the state would show that Plastow's confession to rape is fully corroborated, even as to the element of penetration. S.G. said Plastow's finger "felt like a knife" when he touched her "gina," and that it

felt like Plastow "cut" her when he touched her "butthole." EXHIBIT B at 031.[1] S.G.'s descriptions of Plastow's physical contacts corroborate his admissions to splitting S.G.'s vaginal lips and penetrating her to the rim of her "hole." Thus, far from being weak, the state's proof of the *corpus delicti* of the crime of rape is, in fact, conclusive. It is just that the proof is not all admissible at the guilt phase. Nor is there any need for all corroborating evidence to be admissible so long as sufficient corroboration is found from the evidence as a whole. Under the state's proposed reform, the admissibility of Plastow's confession would no longer depend on the *admissibility* of S.G.'s or her father's statements.

The inadmissibility of S.G.'s statement will certainly compromise the state's case at trial. Without it, Plastow can more convincingly argue that splitting S.G.'s vaginal lips to the point of reaching the rim of her vaginal "hole" is not penetration, and that he touched her "butthole" without penetrating it. The jury would have to assess Plastow's credibility and decide the question of penetration for or against Plastow unaided by S.G.'s statement, although the jury's determination would be aided by the corroborating circumstantial evidence of the pornographic photographs of S.G.'s vagina on Plastow's phone and a criminal record

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[1] *In re W.B.,* 2009 WL 961500, *11 (Ohio App.4)(victim's testimony that it "hurt" when defendant touched her "down there" corroborated penetration); *State v. Biles,* 871 P.2d 159, 162 (Wash.Ct.App.3 1994) (victim's report that it "hurt" when her "daddy . . . touched her pee pee with his pee pee" corroborated penetration).

that corroborates his admitted sexual attraction to young, black girls.[2] Whether the jury convicts or acquits, at least Plastow will have stood trial for his confessed crimes.

3. "Innocent Explanation" Does Not Prevent Inferring The Occurrence Of A Crime From Plastow's Admitted Conduct

Plastow argues that evidence that is capable of innocent explanation – he was "helping" S.G. use the bathroom, his photographing S.G.'s vagina was for some unexplained, pseudo-parental purpose – may not be considered corroborating. This court expressly rejected this notion in *State v. Riley,* 2013 SD 95, ¶20, 841 N.W.2d 431, 437 (state is not required to refute every hypothesis of innocence in order to support a conviction). Just as the cumulative effect of inferentially-incriminating circumstantial evidence can support a conviction or reasonable suspicion, it can corroborate a confession. *State v. Mohr,* 2013 SD 94, ¶ 16, 841 N.W.2d 440, 445 (reasonable suspicion may be inferred from cumulative evidence even if some evidence explained by innocent

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[2] Plastow would have this court assume that evidence of his prior rape conviction will not be admitted at the guilt phase of his trial. Though the state did not originally intend to enter his criminal record into evidence its position has changed in light of Plastow's late *corpus delicti* challenge, his attempt to sever the rape and child pornography charges into two trials, and his claims that "helping" S.G. urinate and the nude photos of her on his phone are nothing unusual. APPELLEE'S APPENDIX at 041-042; APPELLEE'S BRIEF at 21. Plastow's prior rape convictions are admissible to rebut his defense of innocent purpose to the nude photos he took of S.G. or "helping" her use the bathroom. On remand, the state will move to admit Plastow's criminal record before or at trial. The state's motion may or may not be granted, but it is not appropriate at this stage to simply assume that Plastow's prior criminal record will not be admitted during the trial.

purpose). Plastow can try to sell his innocent explanations to the jury at trial. In reality, the notion of a convicted pedophile, with no relation by blood or marriage to the victim, undressing and touching and photographing the vagina of a child for whom he has an admitted sexual attraction defies innocent explanation.

4. This Case Is Itself A Compelling Reason To Refine Or Reform *Corpus Delicti* Rules And Practices In South Dakota

Not that this court necessarily needs a "*compelling* reason to modify or dispose of the *corpus delicti* rule in South Dakota," but if it did, this case fits the bill. APPELLEE'S BRIEF at 23. Immediately upon his release from a 15-year sentence for raping one little black girl, Plastow trolled a homeless shelter for a single black mother with a young black daughter, offered her shelter from the streets, and then raped her child. APPELLEE'S BRIEF at 2. If the thought of a predator like Plastow skating on a rape charge under existing *corpus delicti* rules and practices is not a compelling reason to reform or reinterpret those rules and practices, it is hard to conceive of what is.

5. *Ex Post Facto* Concerns Not Implicated In This Case

Citing *People v. LaRosa,* 293 P.3d 567 (Colo. 2013), Plastow's response brief argues that any "retrospective" constriction or abolition of South Dakota's *corpus delicti* rule in his case would violate prohibitions on *ex post facto* laws. Plastow and *LaRosa* are incorrect because both fail to recognize that constitutional *ex post facto* proscriptions do not

apply to simple changes in evidentiary rules which occur between the commission of a criminal act and trial.

In *Collins v. Youngblood,* 110 S.Ct. 2715 (1990), the court stated that "the application of new evidentiary rules in trials for crimes committed before the changes" does not implicate *ex post facto* concerns because evidentiary rules "do[] not alter the definition of the crime of aggravated sexual abuse, of which [defendant] was convicted, nor does it increase the punishment for which he is eligible as a result of that conviction." *Collins,* 110 S.Ct. at 2720.

Thus, for example, in *State v. Rhines,* 1996 SD 55, ¶129, 548 N.W.2d 415, 445, this court found that victim impact testimony could be admitted at the sentencing phase in a capital case pursuant to a statute enacted after the murder. Here, as in Rhines, existing United States Supreme Court authority in *Opper v. United States,* 75 S.Ct. 158 (1954), stands as precedent for changes to the *corpus delicti* rule up to and including abolition and replacement with the trustworthiness standard.

Collins further rejected the entire line of "substantial protections" jurisprudence that had, over time, expanded the *ex post facto* proscription beyond its intended scope. *Collins,* 110 S.Ct. at 2721. This shows that the United States Supreme Court was looking to stop *ex post facto* jurisprudence from snowballing beyond "laws, 'whatever their form,' which make innocent acts criminal, alter the nature of the offense, or increase the punishment." *Collins,* 110 S.Ct. at 2722.

Thus, "retroactive" constriction, or even abolition, of South Dakota's current *corpus delicti* rule would not violate *ex post facto* proscriptions if applied to this case because, though nominally a "defense," the *corpus delicti* rule is not an *affirmative* defense. *LaRosa* fails to cite or analyze *Collins* and, consequently, fails to appreciate that *ex post facto* proscriptions apply to the constriction or abolition only of *affirmative* defenses of "justification or excuse." *Collins,* 110 S.Ct. 2723. This is "because [abolishing an affirmative defense] expands the scope of a criminal prohibition after the act is done." *Collins,* 110 S.Ct. 2723.

By contrast, not even full abolition of the *corpus delicti* rule would implicate *ex post facto* in this case because doing so does not expand the scope of the laws prohibiting rape of a child or increase the punishment for the offense. Abolition of *corpus delicti* would merely provide for proof of the offense as defined at the time of commission by different evidentiary means. *Collins,* 110 S.Ct. 2721. In other words, Plastow's rape of S.G. is not rendered criminal, or more severely criminal, by abolition of *corpus delicti,* just more provable.

Collins illustrated the point further by reference to an older case, *Thompson v. Utah,* 18 S.Ct. 620 (1898), which ruled that Utah's switch from 12- to 8-person juries during the pendency of the criminal proceedings against the defendant violated prohibitions on *ex post facto* laws. *Collins* observed that the right to trial by a jury of 12 "is obviously 'substantial,'" and makes the government's case harder to prove. Still,

Collins overruled *Thompson* saying that Utah's switch from 12- to 8-person juries did not implicate *ex post facto* concerns because the erstwhile right to a 12-person jury was "not a right that has anything to do with the definition of crimes, defenses, or punishments." *Collins,* 110 S.Ct. at 2724. *LaRosa* fails to appreciate this distinction between evidentiary changes facilitating proof of a crime whose elements are unchanged and actual changes to the elements or punishment of a crime itself.

LaRosa glossed over this distinction by misreading *Rogers v. Tennessee,* 121 S.Ct. 1693 (2001), to generally proscribe *any* "judicial alteration of a common law doctrine of criminal law" after the fact of the underlying crime. *LaRosa,* 293 P.3d 567. *LaRosa* was wrong, however, because a closer reading of *Rogers* reveals that the "common law doctine[s]" it had in mind were only those that implicated *ex post facto* concerns as opposed to just any ol' common law doctrine. Though *Rogers* admits that judicial *ex post facto* jurisprudence does not "incorporate jot-for-jot the specific [*ex post facto*] categories of" *Collins, Rogers* also clarifies that the "common law doctrine[s]" contemplated by it are limited to changes to "judicial constructions of criminal statutes" which, like legislative *ex post facto,* "bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct." *Rogers,* 121 S.Ct. at 1698-99.

For example, where the common law had required notice prior to entry in order to prosecute for trespass, a court could not retrospectively criminalize the conduct of civil rights protestors who entered a protest site without notice and whose only "crime" was to remain after being asked to leave. *Bouie v. City of Columbia,* 84 S.Ct. 1697 (1964). Or, where the common law had required that death occur within a year and a day of the infliction of an injury before a defendant could be convicted of murder, a criminal court could dispense with the rule only if the defendant had "fair warning" at the time of inflicting the mortal injury that the year-and-a-day rule could change. *Rogers,* 121 S.Ct. at 1698. In both *Bouie* and *Rogers*, the courts were eliminating common law constructions of criminal statutes in a way that expanded the basis for criminal liability after the fact, criminalizing behavior that was innocent or less culpable at the time of its commission.

No such injustice would occur here if this court were to constrict or abolish the *corpus delicti* rule's application to Plastow's confession. Here, *corpus delicti* is a common law construct[3] that is unrelated to the statutory elements of rape of a child under the age of 13. Whereas eliminating the "notice-prior-to-entry" and "year-and-a-day" rules in *Bouie* and *Rogers* had the effect of penalizing conduct that was innocent or less seriously criminal when it was committed, constricting or abolishing *corpus delicti* here would not change Plastow's contacts with

[3] Except as to homicides per SDCL 22-16-2.

S.G. from innocent to criminal, or moderately criminal to seriously criminal. The existence or non-existence of the *corpus delicti* rule in South Dakota's common law has no effect on the elements of the crime that Plastow is charged with, or his criminal *liability* for the acts he has confessed to. Stated another way, *ex post facto* exists to prevent innocent acts from being made criminal after-the-fact, not to prevent criminal acts from becoming prosecutable.

Consequently, the application of the "fair warning" doctrine here, and even in *LaRosa,* is a distortion of *ex post facto* principles. Fair warning exists to protect innocent people from incurring criminal *liability* for acts that were not criminal when committed, not to keep guilty people from *incriminating* themselves for acts that were criminal when committed. Certainly, nothing in *Collins* or *Rogers* suggests that *ex post facto* "fair warning" is a safe harbor from voluntary self-incrimination as respects acts that are criminal at the time the confession was made. Offenders in America certainly have ample and fair warning that our system vigorously pursues and depends on confessions to convict them of crimes, so no offender should confess expecting to later exploit some exception to admissibility.

Finally, as noted in the state's initial brief, states that continue to adhere to the *corpus delicti* rule allow for the use of a closely-related crimes exception in child sexual assault cases where corroborating proof of a confession is unavailable due to infancy, infirmity, or unavailability.

People v. Lara, 983 N.E.2d 959, 965 (Ill. 2013). In *Miller v. Texas,* 457 S.W.3d 919 (Ct.Crim.App. 2015), the defendant confessed to molesting his three-month-old daughter on four occasions. On one occasion, he described placing his penis on his daughter's vagina and ejaculating. There was no corroborating evidence of any of the molestations except for a seminal stain on the nursery room carpet beneath the infant's changing table. The *Miller* court found that this seminal stain sufficiently corroborated one of the admitted molestations that Miller's confession to all of the molestations could be admitted in evidence against him. *Miller,* 457 S.W.3d at 917 n. 11, 928-29. *Miller* also ruled that Texas could adopt the closely-related crimes exception without running afoul of *ex post facto* proscriptions. *Miller,* 457 S.W.3d at 928.

According to *Miller,* Plastow's nude photographs of S.G. are sufficient to corroborate the contemporaneous bedroom rape, as well as the bathroom rape, per an established exception to *corpus deliciti* that does not implicate *ex post facto* concerns, assuming (contrary to *Collins* and *Rogers*) that any such concerns attend constriction or abolition of the *corpus delicti* rule after the commission of a crime.

CONCLUSION

This case illustrates the price of a strict interpretation and application of the *corpus delicti* rule. The state's briefing proffers several alternatives – short of abandoning the rule entirely – that provide basic

corpus delicti protections without shielding criminals from justice. For purposes of this case, *Miller* shows that a simple reform like adopting the closely-related crimes exception would allow Plastow's crime of photographing of S.G.'s vagina to corroborate the related bedroom rape and, incidentally, the bathroom rape.

For purposes of future cases, more fundamental reform of *corpus delicti,* or guidance respecting its contours in South Dakota, is now due so that prosecutors know when to not dismiss cases for lack of full or requisite corroboration. South Dakota could, like Alaska, North Carolina and Arizona, corroborate confessions at a pretrial hearing using all available evidence, whether admissible at trial or not. If sufficiently corroborated, a defendant could be convicted on his or her confession alone. This practice would encourage law enforcement to investigate a case beyond a confession, particularly if the confession is less than full. South Dakota could, like many other states, adopt the trustworthiness or modified-trustworthiness standard.

There is no doubt of the occurrence of a crime here. S.G. described Plastow touching her genitals and rectum and the physical pain she felt as a result. Though he tried to minimize how far he physically penetrated S.G.'s vagina, Plastow admitted penetration as defined by law. Plastow has proven he will re-offend at the first opportunity and that society is safe from his depredations only when he

is behind bars. Plastow needs to remain behind bars long enough that he is no longer attractive to single black mothers with young daughters, which is the type of sentence that only rape charges can assure.

Dated this 28th day of July 2015.

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CERTIFICATE OF COMPLIANCE

1. I certify that appellee's brief is within the typeface and volume limitations provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in proportional 12 point type. Appellee's brief contains 3,015 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

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The undersigned hereby certifies that on this 28th day of July 2015 a true and correct copy of the foregoing brief was served on Lyndsay DeMatteo via e-mail to ldematteo@minnehahacounty.org.

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