COMMONWEALTH OF MASSACHUSETTS

BRISTOL

SUPREME JUDICIAL COURT
NO.

APPEALS COURT
17-P-1299

COMMONWEALTH

v.

CIRILO GARCIA

APPLICATION FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

REQUEST FOR FURTHER APPELLATE REVIEW

The defendant, Cirilo Garcia, in the above-entitled case, hereby requests, pursuant to M.R.A.P. 27.1 (effective March 1, 2019), leave to obtain further appellate review of the Appeals Court's decision in Commonwealth v. Cirilo Garcia, 95 Mass. App. Ct. 1 **(**decided March 1, 2019) (published opinion). (A. 23-37).

STATEMENT OF PRIOR PROCEEDINGS

The defendant, was arraigned in Fall River Superior Court on September 7, 2012 on six indictments. Three indictments alleged that he committed rape: two indictments alleged that he committed rape of a child aggravated by age

difference - (indictment nos. 1 & 2), G. L. c. 265, § 23A(a); one indictment alleged that he committed forcible rape of a child - (indictment no. 3), G. L c. 265, 22A. The defendant's other three indictments respectively alleged that he committed incest (indictment no. 4), G. L. c. 272, § 17; dissemination of matter harmful to a minor (indictment no. 5), G. L. c. 272, § 28; and intimidation of a witness, (indictment no. 5), G. L. c. 268, § 13B,

The jury found the defendant guilty on all charges. The defendant was sentenced to serve concurrent sentences of not more than 30 years and not less than 20 years on his convictions for forcible rape of a child and for rape of a child aggravated by age difference; a consecutive sentence of not more than 9 years and not less than 6 years for incest; and to concurrent 10 year terms of probation for dissemination of matter harmful to a minor and intimidation of a witness to be served after his release from prison. (pp. 35-36).

The Appeals Court, in a published opinion, reversed the defendant's conviction for dissemination of matter harmful to a minor and one of his convictions for rape of child aggravated by age difference (indictment no. 1). The Court ordered that judgments were to enter for the defendant on both charges. (p. 35). The Appeals Court affirmed the defendant's convictions for incest and intimidation of a witness. (pp. 33, 35). The Court further ordered that resentencing was not necessary because the sentences imposed on the convictions

that were reversed were concurrent with the sentences imposed on his convictions that were affirmed. (p. 35).

The defendant has filed a motion for reconsideration pursuant to M.R.A.P. 27.1 (effective March 1, 2019), which was accepted for filing by the Appeals Court on March 11, 2019.

STATEMENT OF FACTS RELEVANT TO APPEAL

The defendant's indictments for rape of child aggravated by age difference, rape of child by force, and incest - indictments 1 thru 4 - respectively alleged:

Indictment no. 1

"Cirilo Garcia . . . did have sexual intercourse with [the victim], a child under sixteen years of age, when there existed more than a five-year difference between him and said [ ].

Indictment no. 2

"Cirilo Garcia . . . did have sexual intercourse with [the victim], a child under sixteen years of age, when there existed more than a five-year difference between him and said [ ].

Indictment no. 3

"Cirilo Garcia . . . did have sexual intercourse or unnatural sexual intercourse with one with one [ ] child under sixteen years of age, and did compel said child to submit by force and against her will, or did

compel said child to submit by threat of bodily injury.

Indictment no. 4

"Cirilo Garcia . . . being [sic] father of [ ] . . .
did have carnal knowledge of the body of the said [ ]."

The trial judge's jury instructions on indictment no. 2 was limited to acts of "sexual intercourse."

The trial judge's jury instructions on indictment no. 3 included acts of "sexual intercourse" and " and "unnatural sexual intercourse."

STATEMENT OF POINTS WITH RESPECT TO WHICH FURTHER APPELLATE REVIEW OF THE APPEALS COURT'S DECISION IS SOUGHT

1. The Appeals Court's Decision is Erroneous Because It Ignores the Language of the Defendant's Indictment and Misconstrues the Commonwealth's Incest Statute

The Appeals Court erred by affirming the defendant's conviction for incest on the grounds that the defendant's indictment, which only alleged the defendant committed an act of "sexual intercourse," also included acts of "unnatural sexual intercourse" and since the incest statute included acts of both "natural" and "unnatural" sexual intercourse the trial judge properly instructed the jury that the defendant could be found guilty if his acts with his daughter included "unnatural

sexual intercourse." (pp. 29-31 & nn. 11 & 12).

The Appeals Court initially erred by disregarding the importance of the language of the defendant's indictment. (pp. 29-30). The Commonwealth solely and specifically alleged that the defendant committed incest because he engaged in an act of "carnal knowledge." (p. 31). It simply cannot be maintained, that the term "carnal knowledge," meant anything other than "sexual intercourse" as that term had been used and construed in the Commonwealth's rape and incest statutes. See Commonwealth v. Smith, 431 Mass. 417, 423-24 (2000) (incestuous acts are limited to sexual intercourse); Commonwealth v. Gallant, 373 Mass. 577, 584 (1977) (term "carnal knowledge" replaced in Commonwealth's statutes by term "sexual intercourse"). (common law defines "sexual intercourse" as the penetration of the female sex organ by the male sex organ."). Under the common law of the Commonwealth, "sexual intercourse" is the insertion of the male penis into the female vagina. Id. The common law meaning of "sexual intercourse" has been fully incorporated into the Commonwealth's criminal law without any change in its meaning by the legislature or by the Supreme Judicial Court. See Commonwealth v. Mullane, 445 Mass. 702, 717-18 (2006) ("sexual intercourse" as used in G. L. c. 272, §6 is penile-vaginal intercourse citing Commonwealth v. Smith, 431 Mass. 417, 422-23 (2000)).

The Appeals Court further erred by misreading and misapplying the

Commonwealth's incest statute. The Commonwealth's incest statute, before its amendment in 2002, provided:

> Persons within degrees of consanguinity within which marriages are prohibited . . who . . . have sexual intercourse with each other, shall be punished. G. L. c. 272, § 17 (2000) (in pertinent part) (emphasis added).

The Commonwealth's current incest statute, which the defendant was convicted for violating, provides:

> Persons within degrees of consanguinity within which marriages are prohibited . . . , who . . . have sexual intercourse with each other, or who engage in sexual activities with each other, including but not limited to, oral or anal intercourse, fellatio, cunnilingus, or other penetration of a part of a person's body, or insertion of an object into the genital or anal opening of another person's body, shall be punished. G. L. c. 272, § 17 (2002) (in pertinent part) (emphasis added).

Comparison of the prior incest statute (2000) with the current incest statute (2002) shows that the General Court retained the term "sexual intercourse" as it appeared in the 2000 statute but amended the statute by merely adding other forms of sexual conduct to the statute's proscriptions without purporting to change the meaning of "sexual intercourse."

The General Court and the Supreme Judicial Court has drawn a clear distinction between acts of "sexual intercourse" and "unnatural sexual

intercourse." "Sexual intercourse" and "unnatural sexual intercourse" are mutually exclusive. See Commonwealth v. Smith, 431 Mass. 417, 424 (2000) ("[T]the term "sexual intercourse" in the incest statute excludes such forms of sexual conduct as are encompassed by the term "unnatural sexual intercourse"). The Appeals Court's holding that the current incest statute prohibits a single act, which is "sexual intercourse and unnatural sexual intercourse," is belied both by the statute's text and principles of statutory construction. (p. 32-33). See Commonwealth v. Olivo, 369 Mass. 62, 67n.4 (1975) ("The word 'or' is given a disjunctive meaning unless the context and the main purpose of all the words demand otherwise.").

2. The Appeals Court's Interpretation of the Incest Statute is an Ex Post Facto Law by Judicial Decision.

The synonymity of "carnal knowledge" and "sexual intercourse" and the distinction between "sexual intercourse" and "unnatural sexual intercourse" was so well-established in the Commonwealth's law at the time of the defendant's prosecution that the application of the Appeals Court's novel construction of the term "sexual intercourse" to include "unnatural intercourse" constitutes an ex post facto law by judicial decision. Art. I, § 10 of the United States Constitution ("No State shall . . . pass any . . . ex post facto Law."); art. 24 of the Declaration of Rights **("**Laws made to punish for actions done before the existence of such

laws, and which have not been declared crimes by preceding laws, are unjust, oppressive, and inconsistent with the fundamental principles of a free government."**).** See Bouie v. Columbia, 378 U.S. 347, 353-54 (1964) ("[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids."); Commonwealth v. Wilkinson, 415 Mass. 402, 407 (1993) ("If a judicial construction of a criminal statute is `unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect" quoting Bouie v. Columbia, 378 U.S. 347, 354 (1964); Commonwealth v. Maloney, 447 Mass. 557, 586 (state and federal ex post facto clauses are interpreted identically)

When the defendant was arraigned on September 12, 2012, for acts allegedly committed between January 1, 2017 and July 8, 2012, it was well-settled law that "carnal knowledge" meant "sexual intercourse" and that "sexual intercourse" exclusively meant "the penetration of the female sex organ by the male sex organ." Commonwealth v. Gallant, 373 Mass. 577, 584 (1977); see Commonwealth v. Mullane, 445 Mass. 702, 717 (2006) (The term "sexual intercourse," as used in G. L. c. 272, § 6, encompasses only penile-vaginal penetration," citing Commonwealth v. Smith, 431 Mass. 417, 422-423 (2000) as authority); Commonwealth v. Smith, 431 Mass. 417, 424 (2000) ("[T]he term "sexual intercourse" in the incest statute excludes such forms of sexual conduct as are encompassed by the term "unnatural sexual intercourse.").

The defendant was solely and exclusively accused of committing an act of "carnal knowledge," which could only have been understood as alleging that the defendant committed an act of "sexual intercourse." The trial judge, however, instructed the jury that the defendant could also be convicted of incest if he committed acts of "unnatural sexual intercourse." (pp. 32-33). The Appeals Court affirmed the defendant's conviction on the grounds that under the incest statute, the term "sexual intercourse" included "unnatural sexual intercourse" and therefore the trial judge's instructions were proper. (pp. 32-33).

The Appeals Court's construction of the incest statute was so far contrary to existing judicial precedent that the application of the Court's decision to the defendant constitutes an unconstitutional ex post facto law.

3. The Appeals Court's Decision Denies the Defendant Due Process of Law

The Appeals Court's interpretation of the incest statute also denied the defendant to his right to due process of law under the Fourteenth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights. The specific language of the defendant's indictment - "carnal knowledge" - provided the defendant with notice that he was accused of committing incest by engaging in "sexual intercourse" with his daughter.

The very specificity of the indictment's language, however, when viewed in

light of the Supreme Judicial Court's opinions construing the term "carnal knowledge" and "sexual intercourse," also effectively provided him with notice that he was not being prosecuted for committing incest by committing any of the other acts appearing in § 17 (sexual activities with each other, including but not limited to, oral or anal intercourse, fellatio, cunnilingus, or other penetration of a part of a person's body, or insertion of an object into the genital or anal opening of another person's body).).

An indictment drafted by the Commonwealth, which intentionally omitted allegations of criminal acts for which the defendant may have been convicted, failed to provide the defendant with constitutionally sufficient notice violated his rights to due process of law provided by the state and federal constitutions. See Commonwealth v. Mayotte, 475 Mass. 254, 265 (2016) ("Due process requires that defendants be given sufficient notice of the charges against them."); Id. at 264 ("[A]n indictment that entirely omits a charge or does not conform to the substance of the statutory language defining the elements of the crime does not offer a defendant adequate notice of the nature of the charges against him.").

4. The Commonwealth's Constitution Requires that the Commonwealth Be Bound by the Language of Its Indictment.

The Commonwealth had the constitutional authority to choose to charge the defendant with committing incest by "carnal knowledge." art. 30 of the

Declaration of Rights. See Commonwealth v. Gordon, 410 Mass. 498, 502-03 (1991) (district attorney has right to prosecute lawful indictment in manner district attorney believes is appropriate). The Commonwealth could have charged the defendant with committing incest in several different ways and by more than one count or indictment if it so chose. See Commonwealth v. Murphy, 415 Mass. 161, 164 (1993) ("Where a crime can be committed in any one of several ways, an indictment properly charges its commission in all those ways, using the conjunction 'and' in joining them."); Commonwealth v. Nylander, 26 Mass. App. Ct. 784, 785 (1989) (Commonwealth obtained two indictments against defendant for rape with one indictment alleging rape by natural intercourse and the other indictment alleging rape by unnatural intercourse). The Commonwealth, pursuant to its essentially unreviewable powers under the state constitution to exercise prosecutorial discretion, chose to indict the defendant for incest using the language found in G. L. c. 277, § 79. (p. 31 & n.11).

The defendant has the right to due process of law under the state constitution which necessarily includes notice to the defendant of the crime which he is accused of committing. art. 12 of the Declaration of Rights. The defendant's indictment solely and exclusively accused him of committing an act "sexual intercourse." The trial judge's jury instructions, however, permitted the defendant to be convicted of incest if he engaged in an act of "unnatural sexual

intercourse." (p. 31 & n.11). From his arraignment until the close of all evidence at his trial, the defendant had neither actual nor constructive notice that he could be convicted of incest if he committed an act of "unnatural sexual intercourse."

The Commonwealth's constitutional authority to obtain and prosecute a lawful indictment in the form it chose and the defendant's right to be informed of the criminal acts he allegedly committed, requires that the Commonwealth be bound by the language it chose to use in its indictment. See Commonwealth v. Garrett, 473 Mass. 257, 267-68 (2015) (Gants, C.J. concurring) (where defendant's indictment erroneously alleged armed robbery by firearm but defendant used BB gun which was not a firearm defendant could only be convicted of robbery).

5. The Defendant's Conviction Must Be Reversed.

The trial judge's instructions impermissibly enlarged the defendant's indictment by adding grounds of criminal liability not stated in his indictment and therefore not made by the grand jury. See Commonwealth v. Ruidiaz, 65 Mass. App. Ct. 462, 464 (2006) (judge erred by inserting additional ground of criminal liability into defendant's indictment).

The defendant's conviction for incest must be reversed. In view of the evidence that the defendant committed acts of oral and anal intercourse with his daughter, there is a substantial possibility that the jury convicted the defendant on the basis of allegations not made in his indictment.

Where there is a substantial possibility that the jury convicted a defendant of a crime not alleged in his indictment, the conviction must be reversed. See Commonwealth v. Mayotte, 475 Mass. 254, 264-65 (2016) (where trial judge instructed jury on ground of criminal liability not alleged in defendant's indictment defendant's conviction must reversed notwithstanding evidence defendant committed criminal acts described in jury instructions and statute); Commonwealth v. Barbosa, 421 Mass. 547, 554 (1995) ("Where there is a substantial risk that the defendant was convicted of a crime for which he was not indicted by a grand jury, we cannot apply a harmless error standard."); Stirone v. United States, 361 U.S. 212, 217-18 (1960) ("Deprivation of [the defendant's substantial right to be tried only on charges presented in an indictment] is far too serious to be treated as nothing more than a variance and then dismissed as harmless error.").

STATEMENT OF REASONS WHY FURTHER APPELLATE REVIEW IS APPROPRIATE

I. THE DEFENDANT'S APPLICATION FOR FURTHER APPELLATE REVIEW SHOULD BE GRANTED FOR SUBSTANTIAL REASONS AFFECTING THE PUBLIC INTEREST

The Appeals Court's decision is the first published decision by a Massachusetts appellate court that construes and applies the sexual conduct

element of the Commonwealth's incest statute after the statute's amendment in 2002. G. L. c. 265, §17 (2002) .

The defendant's application should be granted because the Appeals Court's anomalous decision affirming the defendant's conviction is not only wrong, it is wrong in ways that will adversely affect incest prosecutions and, quite possibly other crimes with a sexual component, until the Appeals Court's decision is corrected.

The Appeals Court held that the incest statute prohibited "'sexual intercourse" . . . 'natural or unnatural.'" (pp. 31-32). The Appeals Court rendering of the statue is not only incorrect, it is misleading because it seemingly holds that the current incest statute provides for a single prohibited act of "sexual intercourse" that includes both "natural" and "unnatural intercourse." (pp. 31-32).

The incest statute does not provide a single definition of "sexual intercourse." An example of an incest statute that does provide for a single, unitary definition of "sexual intercourse" is the incest statute of Hawaii. See Hawaii v. Torres, 660 P.2d 522, 526-27 (1983) (Supreme court of Hawaii). The Hawaiian incest statute provides:

HRS § 707-741 . . .

> Incest. (1) A person commits the offense of incest if he commits an act of sexual intercourse with another who is within the degrees of consanguinity or affinity within which marriage is prohibited.
>
> . . .
>
> (7) "Sexual intercourse" means sexual intercourse in its ordinary meaning or any intrusion or penetration, however slight, of any part of a person's body, or of any object, into the genital opening of another person.

The Appeals Court panel that decided the defendant's case, believes that an incest statute like Hawaii's is superior to the Commonwealth's incest statute. In the portion of its decision considering whether one of the defendant's rape of child aggravated by age, G. L. c. 265, § 22A, should be reversed, the Court observed in a footnote:

> [8] We recognize that the language appearing in the statute dates to an earlier time. We do not intend by our reference to the term, consistent with the statutory language, to adopt or endorse any pejorative connotation that may flow from the designation of such conduct as "unnatural" (even when engaged in by consenting adults), and we invite the Legislature to update the statutory language.

The panel's opinion in footnote 8 equally applies to other statutes that use the term "unnatural sexual intercourse." Precedent to the contrary prevented the Court from construing § 22A as providing for a single, unified element of "sexual

intercourse." Apparently, the panel believed that no such precedent existed for the Commonwealth's incest statute after its amendment in 2002. The Appeals Court's conclusion was wrong. The Supreme Judicial Court's precedents as well as the plain language of §17 show that §17 is disjunctive in form and content and should be so interpreted and applied until the statute is changed by the legislature. See Commonwealth v. Smith, 431 Mass. 417, 425 (2000) (Supreme Judicial Court declined to change incest statute because responsible was the legislature's).

The panel's decision is self-contradictory. The precedents the Court cites, and the analysis it employs in reversing the defendant's conviction for rape of child aggravated by age difference, was fully applicable to the defendant's conviction for incest - perhaps even more so because of the historical fixity of the term "carnal knowledge." (pp. 27-31).

There is no doubt that defendant's case was wrongly decided. The Court initially erred by effectively holding that the accusatory language in an incest indictment, such as the defendant's, is irrelevant by holding that if a defendant's indictment alleges one of the acts specified in the statute, the defendant can be convicted of incest if he or she committed any of the acts specified in the incest statute. (pp 31-33).

The defendant's indictment alleged that he committed only one of the acts specified in the statute, "sexual intercourse." The Court held, however, that due to

the amendments to the incest statute in 2002, the language of the defendant's indictment permitted the trial judge to instruct on, and the jury to convict him for committing, any of the sexual acts listed in G. L. c. 272, § 17 (2002) ("sexual activities . . . including but not limited to, oral or anal intercourse, fellatio, cunnilingus, or other penetration of a part of a person's body, or insertion of an object into the genital or anal opening of another person's body, or the manual manipulation of the genitalia of another person's body"). (p. 33). In the Commonwealth of Massachusetts, the specific language of indictments cannot be so lightly disregarded. art. 12 of the Declaration of Rights. ("No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him.").

The Appeals Court's decision was also erroneous because it fundamentally misinterpreted the incest statute's text. Relying on the 2002 amendments, the Court effectively held that § 17 contains a single, unitary definition of the sexual conduct that may be punished by the incest statute. (pp. 32-33 & 32n.11). The amendments, contrary to the Appeals Court's interpretation, merely added acts other than "sexual intercourse" to the statute the commission of which would also constitute incest. The Court's decision also ignored the Supreme Judicial Court's decisions distinguishing between acts of "sexual intercourse" and "unnatural sexual intercourse" as well as the statute's conspicuously disjunctive language. See

Commonwealth v. Smith, 431 Mass. 424 (2000) ("[T]he term "sexual intercourse" in the incest statute excludes such forms of sexual conduct as are encompassed by the term "unnatural sexual intercourse."); Commonwealth v. Davie, 46 Mass. App. Ct. 25, 27 (1998) (use of word "or" in drug statute containing phrase "park or playground" distinguishes between parks and playgrounds and permits prosecution for act committed in park but not in playground).

The defendant's application should be granted so the Supreme Judicial Court can correctly construe the incest statute in the first instance and prevent the future errors that will inevitably occur because of the Appeals Court's decision.

II. THE DEFENDANT'S APPLICATION FOR FURTHER APPELLATE REVIEW SHOULD BE GRANTED IN THE INTERESTS OF JUSTICE

There is substantial reason to believe that the defendant was convicted of the crime of incest on the basis of allegations that were not made by the grand jury and not contained in his indictment contrary to the state and federal constitutions and the laws of the Commonwealth and therefore his conviction for incest must be reversed. U.S. Const. Amend. XIV; art. 12 of the Massachusetts Declaration of Rights. See Commonwealth v. Mayotte, 475 Mass. 254, 264-65 (2016); Stirone v. United States, 361 U.S. 212, 217-18 (1960).

CONCLUSION

For the above-stated reasons, the defendant's Application for Leave to Obtain Further Appellate Review should be allowed.

RESPECTFULLY SUBMITTED,

CIRILO GARCIA

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By his attorney,

/s/ Michael J. Hickson, Esq.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Application for Leave to Obtain Further Appellate Review pursuant to M.R.A.P. 27.1 (effective March 1, 2019) complies with M.RA.P. 16K, 20(a), 24(a)(4)(B) and that its "Statement of Reasons Why Further Appellate Review Is Appropriate" does not exceed 10 pages of text in the proportionally spaced font of Times New Roman of 14 point size or larger.

/s/_Michael J. Hickson, Esq.
Michael J. Hickson, Esq.

CERTIFICATE OF SERVICE

I hereby certify, under pains and penalties of perjury, that I have served a copy of the defendant's Application for Leave to Obtain Further Appellate Review by e-mailing the same to the Bristol District District Attorney's Office, 888 Purchase Street, Bristol, MA 02740 on March 22, 2019.

/s/ Michael J. Hickson, Esq.
Michael J. Hickson, Esq.

17-P-1299 Appeals Court

COMMONWEALTH vs. CIRILO GARCIA.

No. 17-P-1299.

Bristol. December 10, 2018. - March 1, 2019.

Present: Green, C.J., Wolohojian, & Wendlandt, JJ.

Rape. Incest. Unnatural Sexual Intercourse. Obscenity, Dissemination of matter harmful to minor. Witness, Intimidation. Practice, Criminal, Indictment, Instructions to jury. Constitutional Law, Indictment.

Indictments found and returned in the Superior Court Department on August 16, 2012.

The case was tried before Frances A. McIntyre, J.

Michael J. Hickson for the defendant.
Mary E. Lee, Assistant District Attorney, for the Commonwealth.

GREEN, C.J. After a jury trial, the defendant, Cirilo Garcia, was convicted of dissemination of matter harmful to a minor, G. L. c. 272, § 28; rape of a child aggravated by age

difference, G. L. c. 265, § 23A (a);[1] incest, G. L. c. 272, § 17; and witness intimidation, G. L. c. 268, § 13B, all arising from a series of assaults against his biological daughter when she was between the ages of seven and eleven.[2] On appeal he contends that (1) the conviction of dissemination of matter harmful to a minor must be vacated, because of a statutory exception applicable to parents and legal guardians, (2) his conviction on one indictment for rape must be vacated, because the indictment was improperly amended at trial, (3) the conviction of incest must be vacated because the jury instructions prejudicially enlarged the indictment for that charge, and (4) the evidence of witness intimidation was insufficient to support his conviction, because the threats supporting the conviction occurred before any criminal investigation began. We discern no merit in the defendant's challenges to his convictions of incest and witness intimidation, but we conclude that we are constrained to reverse the challenged counts of rape and dissemination of matter harmful to a minor.

Background. The defendant is the victim's father. The defendant moved to the United States from Guatemala around the

[1] The defendant was convicted on two indictments charging this offense. He challenges only the first on appeal.

[2] The defendant was also convicted of rape of a child using force, G. L. c. 265, § 22A, but he does not challenge this conviction on appeal.

time of the victim's birth in 2000. His wife, the victim's mother, followed him to the United States in 2003, leaving their two children with their maternal grandmother in Guatemala. In 2006, when the victim was five or six years old, she moved to New Bedford to live with her parents and siblings[3] and met the defendant for the first time. The defendant and his wife worked different shifts, such that the defendant was home alone with the children in the morning and sent them off to school. However, the victim missed "a lot" of school because her father kept her home. When the victim was seven years old, the defendant began raping her.

In all, from the time the victim was seven until she was eleven, the defendant raped her forty or more times. As the defendant raped the victim, he would talk about the victim's aunt's recent marriage and sex life despite the victim's protests that she was "too little to hear about it." The defendant also showed the victim naked men "putting their private stuff on each other" on the Playboy television channel as he raped her. The defendant threatened to kill the victim, her mother, and her family if she ever told anyone about the abuse. He told the victim that even if he went to jail and got deported he would pay someone to kill her and her family.

[3] Two more children had been born in the United States.

On July 8, 2012, the defendant raped the victim vaginally, orally, and anally. This was the last time the defendant raped her; she disclosed the abuse to her mother on that date. She disclosed the abuse because her parents were fighting, the children had to intervene, and the victim thought her "dad was actually going to kill" her mother. The victim went into her mother's bedroom, locked the door, and hid in the closet with her mother as she described the abuse. After the disclosure, the victim spoke to the police and went to the hospital. A nurse there took vaginal and anal-rectal swabs. The defendant's deoxyribonucleic acid (DNA) matched the major profile of the sperm found on both swabs. A supervisor in the State police forensics laboratory testified that the defendant's DNA profile is "very rare."[4]

Discussion. 1. Dissemination of matter harmful to a minor. The defendant contends, and the Commonwealth concedes, that his conviction of dissemination of matter harmful to a minor cannot stand because the statute provides a defense where "the defendant was in a parental or guardianship relationship

[4] The witness explained, "[T]he probability of a randomly selected, unrelated individual having this DNA profile matching that major male profile in both items is approximately 1 in 26.59 quintillion of the Caucasian population, 1 in 1.036 sextillion of the African-American population, 1 in 1.981 quintillion of the Hispanic population, and 1 in 6.341 quintillion of the Asian population."

with the minor." G. L. c. 272, § 28. See Commonwealth v. Poitras, 55 Mass. App. Ct. 691, 692 n.1 (2002). Our independent review of the record, see Commonwealth v. McClary, 33 Mass. App. Ct. 678, 686 n.6 (1992), cert. denied, 510 U.S. 975 (1993), demonstrates that the defendant was in a parental relationship with the victim,[5] and he is entitled to the parental defense provided by the statute. Accordingly, his conviction of dissemination of matter harmful to a minor under G. L. c. 272, § 28, must be reversed.

2. Rape of a child aggravated by age difference. The defendant contends that his conviction of rape of a child aggravated by age difference on indictment no. 2012-742-1 (indictment no. 1) must be reversed because the Commonwealth's proof, the judge's instructions, and the verdict slip constructively amended the indictment. The defendant argues that the judge's instructions "enlarge[d]" the indictment, "replaced" its allegation, and "impermissibly permit[ted] a material change" in the grand jury's work, thereby violating his due process rights by "adding an additional ground of criminal liability for which the defendant could be found guilty."

[5] The victim's original birth certificate was admitted into evidence; it identified the defendant as her father. Moreover, the victim and the defendant lived together, and the defendant was home in the mornings with the victim and her siblings as the children prepared for school.

Crimes must be "proved as charged," so as to "protect[] the grand jury's role in the criminal process and ensure[] that the defendant has proper notice of the charges against him." Commonwealth v. Hobbs, 385 Mass. 863, 869 (1982). See art. 12 of the Massachusetts Declaration of Rights. "A constructive amendment to an indictment occurs when either the government (usually during its presentation of evidence and/or its argument), the court (usually through its instructions to the jury), or both, broadens the possible bases for conviction beyond those presented by the grand jury" (citation omitted). Commonwealth v. Bynoe, 49 Mass. App. Ct. 687, 691-692 (2000). "[A]n amendment may not broaden the charges against a defendant." Commonwealth v. Ruidiaz, 65 Mass. App. Ct. 462, 464 (2006). Indictments may be amended as to form but not as to substance. See Mass. R. Crim. P. 4 (d), 378 Mass. 849 (1979). An amendment is substantive where "an acquittal on the original charge would not bar prosecution on the amended charge." Bynoe, 49 Mass. App. Ct. at 691.

Here, indictment no. 1 charged the defendant with rape of a child aggravated by age difference under G. L. c. 265, § 23A (a).[6] The text of the indictment alleged that the defendant "did

[6] General Laws c. 265, § 23A, provides for punishment for "[w]hoever unlawfully has sexual intercourse or unnatural sexual intercourse, and abuses a child under 16 years of age and: (a) there exists more than a 5 year age difference between the

have sexual intercourse" with the victim, a "child under sixteen years of age when there existed more than a five-year age difference" between them. At the commencement of trial, the Commonwealth made clear that it intended to rely at trial on the oral or anal rape of the victim, and the Commonwealth consistently did so during the course of the trial. Consistent with that approach, the judge's instructions and the verdict slip for that indictment referenced "unnatural" or "oral" sexual intercourse.

"Sexual intercourse," as used in the statute, means "the traditional common law notion of rape, the penetration of the female sex organ by the male sex organ, with or without emission." Commonwealth v. Gallant, 373 Mass. 577, 584 (1977). "Similarly, the definition of 'unnatural sexual intercourse' must be taken to include oral and anal intercourse, including fellatio, cunnilingus, and other intrusions of a part of a person's body or other object into the genital or anal opening of another person's body." Id.[7] General Laws c. 265, § 23A (a),

defendant and the victim and the victim is under 12 years of age" (emphasis added).

[7] The Commonwealth's argument on this point, relying on Commonwealth v. Smith, 431 Mass. 417 (2000), is misplaced. Although the Supreme Judicial Court in that case noted that rape as defined in G. L. c. 265, §§ 22-23, included both natural and unnatural sexual intercourse after legislative amendments sought to redefine and modernize the statutes, the court was silent as to whether an indictment in which the Commonwealth elected to

clearly prohibits both sexual intercourse (natural) and unnatural sexual intercourse with children.[8] However, the Commonwealth chose to charge the defendant, in indictment no. 1, with the former, and the indictment made no mention of the latter.[9] At trial, the evidence, the jury instructions, and the verdict slip on that indictment all concerned the alleged oral rape of the victim, an act of unnatural sexual intercourse.

"Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same." Stirone v. United States, 361 U.S. 212, 217 (1960). This

charge solely "sexual intercourse" would encompass the statute's disjunctively described category of unnatural sexual intercourse. Because we interpret statutes by giving independent meaning to each phrase, the Commonwealth's argument is incorrect. See Gallant, 373 Mass. at 585, quoting Commonwealth v. Brooks, 366 Mass. 423, 428 (1974) ("Every phrase of a statute should be given some effect").

[8] We recognize that the language appearing in the statute dates to an earlier time. We do not intend by our reference to the term, consistent with the statutory language, to adopt or endorse any pejorative connotation that may flow from the designation of such conduct as "unnatural" (even when engaged in by consenting adults), and we invite the Legislature to update the statutory language.

[9] We note that had the Commonwealth charged the defendant with "sexual intercourse and unnatural sexual intercourse" in the indictment, it could have proceeded under either theory at trial. See Commonwealth v. Murphy, 415 Mass. 161, 164 (1993) ("Where a crime can be committed in any one of several ways, an indictment properly charges its commission in all those ways, using the conjunction 'and' in joining them" [citation omitted]).

constructive amendment was one of substance.[10] Accordingly, the defendant's conviction of rape of a child aggravated by age difference on indictment no. 1 must be reversed. See Commonwealth v. Mayotte, 475 Mass. 254, 265-266 (2016) (vacating conviction where indictment charged one statutory theory of crime while testimony and jury instructions expanded indictment by introducing different theory); Commonwealth v. Barbosa, 421 Mass. 547, 554 (1995) ("Where there is a substantial risk that the defendant was convicted of a crime for which he was not indicted by a grand jury, we cannot apply a harmless error standard. . . . Instead, we must reverse the convictions").

3. Incest. The defendant similarly contends that his conviction of incest must be reversed based on the trial judge's instructions allegedly enlarging the indictment. The indictment charged the defendant with "[i]ncest" and alleged that the defendant, "being father of" the victim, had "carnal knowledge of the body" of the victim. The "carnal knowledge" language from the indictment directly tracks the statutory form language set out in G. L. c. 277, § 79.[11] See Commonwealth v. Canty, 466

[10] The defendant acknowledged at oral argument that double jeopardy would not bar new charges based specifically on the oral rape. See Bynoe, 49 Mass. App. Ct. at 691.

[11] "Incest. (Under Chap. 272, Sec. 17.) -- That A.B., being the father of C.D. . . ., did have carnal knowledge of the body of said C.D." G. L. c. 277, § 79.

Mass. 535, 547-548 (2013) ("Indeed, the various statutory forms of indictment in G. L. c. 277, § 79, do not set forth all of the required elements for many crimes, such as larceny, but these forms contain sufficient descriptions of the crimes listed therein" [quotation omitted]); Commonwealth v. Lopes, 455 Mass. 147, 168-169 (2009) (finding "no merit" to defendant's claim that trial judge erred by permitting Commonwealth to seek conviction on joint venture theory that did not appear on face of indictment and was not presented to grand jury, where indictment for murder tracked statutory form and, further, defense counsel was aware of testimony before grand jury that provided evidence supporting joint venture theory).

General Laws c. 272, § 17, punishes "[p]ersons within degrees of consanguinity within which marriages are prohibited or declared by law to be incestuous and void, who . . . have sexual intercourse with each other, or who engage in sexual activities with each other, including but not limited to, oral or anal intercourse, [or] fellatio . . . ."[12] The trial judge's

[12] The defendant erroneously contends that "carnal knowledge" "for purposes of the Commonwealth's incest statute exclusively means 'sexual intercourse' which is the insertion of the male penis into a female's vagina." The cases the defendant cites for this argument either predate the 2002 amendment to the incest statute, which broadened the sexual conduct prohibited to include unnatural sexual intercourse, G. L. c. 272, § 17, as amended through St. 2002, c. 13, or do not support the defendant's desired understanding of carnal knowledge and sexual intercourse.

instructions regarding this indictment quoted the statute and defined "sexual intercourse" for purposes of the incest statute as "natural or unnatural." The indictment sufficiently alleged incest by following the statutory form; the incest statute prohibits natural and unnatural sexual intercourse between people within specified degrees of consanguinity, and the trial judge's instructions therefore did not vary from, constructively amend, or enlarge the indictment. See Canty, 466 Mass. at 547-548; Lopes, 455 Mass. at 168-169.[13] Accordingly, we discern no error in the defendant's conviction of incest.

4. Witness intimidation. The defendant contends that the trial judge should have allowed his motion for a required finding of not guilty on the indictment for witness intimidation, because the intimidation occurred before "any stage of a criminal investigation." G. L. c. 268, § 13B (1) (c) (i), as appearing in St. 2006, c. 48, § 3.[14] However, the evidence was sufficient to support the defendant's conviction on this charge. We consider "the evidence in the light most favorable" to the Commonwealth and determine whether "any rational trier of fact could have found the essential elements

[13] Moreover, the defendant cannot show the prejudice required by G. L. c. 277, § 35. The defendant clearly had notice of the crime with which he was being charged.

[14] The defendant does not challenge the sufficiency of the evidence for any of the other elements of witness intimidation.

of the crime beyond a reasonable doubt." Commonwealth v. Bin, 480 Mass. 665, 674 (2018), quoting Commonwealth v. Latimore, 378 Mass. 671, 677-678 (1979).

Under this familiar standard, there was sufficient evidence that the defendant's witness intimidation occurred during a stage of a criminal investigation. "[T]o convict a defendant of witness intimidation . . . the Commonwealth must prove that . . . a possible criminal violation occurred that would trigger a criminal investigation or proceeding . . . ." Commonwealth v. Fragata, 480 Mass. 121, 122 (2018). "[T]he statute's reference to a 'potential witness at any stage of a criminal investigation' indicates that the investigation need not have already begun when the intimidation occurred." Id. at 125. Therefore, a "potential witness at any stage of a criminal investigation" encompasses those "who are likely to participate in a future investigation that has not yet begun." Id. at 126.

The evidence introduced at trial demonstrated that the defendant had raped the victim, his minor daughter, forty or more times over a period of four years. Even from the first time the defendant raped the victim, when she was seven years old, he told her that if she disclosed the abuse, he would "kill me or mom and everyone, my family." The last time the defendant raped the victim -- vaginally, orally, and anally -- he said he would kill her if she told anyone; if he went to jail, he would

get deported and "send people to kill [the victim and her family]. He's going to pay someone." When the victim disclosed the abuse to her mother, the victim went into her mother's bedroom, locked the door, and insisted on hiding in the closet. A rational jury could have found that the defendant's conduct of raping his daughter was more than the "possible criminal violation" Fragata requires the Commonwealth to demonstrate, and that the victim was clearly a "potential witness" who was "likely to participate in a future investigation."Fragata, 480 Mass. at 122, 125-126. Accordingly, there was sufficient evidence to convict the defendant of witness intimidation under G. L. c. 268, § 13B.

Conclusion.

On the indictment charging dissemination of matter harmful to a minor, and indictment no. 2012-742-1, charging rape of a child aggravated by age difference, the judgments are reversed, the verdicts are set aside, and judgments shall enter for the defendant. The remaining judgments are affirmed.[15]

[15] There is no need for resentencing, because the defendant's sentences on both convictions reversed by this opinion were concurrent with his sentences on the surviving convictions. The defendant was sentenced to

twenty to thirty years for each of the two aggravated rape convictions and the conviction of rape of a child using force, to be served concurrently. On the incest conviction, the defendant was sentenced to six to nine years from and after the concurrent rape sentences. Lastly, on the convictions of dissemination of

So ordered.

matter harmful to a minor and witness intimidation, the defendant was placed on ten years' concurrent probation.