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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **JAIME VARGAS SOTO,** Defendant and Appellant.

S167531

Sixth Appellate District, H030475
Santa Clara County Superior Court No. EE504317
The Honorable Aaron Persky, Judge

OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

Is the lack of the child's consent an element of Penal Code section 288, subdivision (b), requiring an instruction on actual consent as a defense to a charge of lewd act by use of force, violence, duress, menace or fear on a child under the age of 14 years?

INTRODUCTION

In this case, the Sixth District Court of Appeal held that consent is a valid defense to the crime of aggravated lewd acts on a child. Relying on *People v. Cicero* (1984) 157 Cal.App.3d 465, the Court of Appeal read Penal Code section 288, subdivision (b) (hereinafter "section 288(b)"), to mean that forcible lewd acts must be committed "against the will of the victim." That conclusion is mistaken. The Legislature deleted an "against the will of the victim" requirement from the statute over a quarter-century ago. Consequently, the law precludes consent as a defense to aggravated lewd acts on a child.

The Court of Appeal also erred in finding prejudice from an instruction that directed appellant's jury not to consider consent a defense. The record is devoid of evidence of consent to lewd acts. The court's erroneous interpretation of section 288 and its equally erroneous prejudice analysis require

the reinstatement of the section 288(b) convictions in this case.

STATEMENT OF THE CASE AND FACTS

Crystal Doe – Counts 1 and 2

Crystal, who was 12 years old at the time of the forcible lewd acts, is appellant's cousin. Appellant lived with Crystal and her mother in their apartment. (2RT 60.) In late 2004, appellant began focusing his attention on Crystal after he broke up with a girlfriend. (2RT 83.) He gave Crystal frequent hugs, kissed her on the cheek, and said she was pretty. (2RT 87, 112.) He gave Crystal a watch and a ring on her 12th birthday in November and a necklace at Christmas. (2RT 86-87.) Crystal was initially flattered by the attention, but then grew concerned when he forced himself on her shortly after the New Year. (2RT 82-83, 87-88, 4RT 341.) He forced kisses on her and talked dirty to her. (2RT 87-88; 4RT 341.) He would grab her, hold her tight, and force her to kiss him. When she tried to push away, he would pull her back and continue. (2RT 87-88; 3RT 199.) He forced her to French kiss and fondled her buttocks while hugging her. (2RT 88-89; 4RT 305-306.) When she refused to French kiss him and told him to stop, he threatened to lie to her mother that she had a boyfriend and that she was doing "stuff" with him. (2RT 88; 4RT 304.)

One time Crystal was in appellant's room watching him play a video game with her adult brother. (2RT 78-79.) After her brother left, appellant pushed Crystal down on the bed and climbed on top of her. He kissed and licked her, leaving saliva on her face, and he pressed his groin against her. (2RT 78-79; 3RT 173, 201.) Appellant had an erection and began "humping" Crystal with his clothing on, rubbing against her body. (2RT 78-79, 83; 3RT 173.) It felt "nasty" to Crystal, but she could not get away because appellant held her tightly. (2RT 78-79.)

After seeing appellant kissing Crystal, her mother told him to move out.

(3RT 171; 4RT 307.) Her mother blamed Crystal. Crystal had to seek a church teacher's assistance to convince her mother that she was not responsible for the incident. (3RT 171; 4RT 307.)

April Assault – Count 2.[1/]

One charged incident of forcible lewd conduct occurred in April, 2005 after Crystal's mother kicked him out of the home. Appellant had moderated his behavior until Crystal thought it safe to be with him again. (2RT 92.) Near the end of April, however, he assaulted her again. While giving her a ride to school, appellant suddenly reached over, reclined Crystal's seat, and climbed on top of her. He locked the car doors to prevent Crystal from leaving. (2RT 77, 80-83; 3RT 172; 4RT 309-310.) Appellant kissed her and fondled her buttocks. He tried to fondle her breasts, but she pushed his hand away. (2RT 77, 80-83; 3RT 172; 4RT 309-310.) Appellant began "humping" her, which involved appellant rubbing his penis against her crotch while clothed. (2RT 80-81, 83; 3RT 172.) Crystal kept her legs pressed together and tried to turn away from appellant to evade his assault. (4RT 306-307.)

May Assault – Count 1.

The other charged incident occurred on the morning of May 5th. Shortly after Crystal had been dropped off at school, appellant pulled up to the school, called Crystal over, and started talking to her. (2RT 64; 3RT 338; 4RT 324.) Noticing that a school secretary, Gloria Diaz, was watching, Crystal directed appellant to drive to the end of the parking lot and around the corner, away from Ms. Diaz's scrutiny. (2RT 64, 66; 4RT 326-328.) There, appellant got out of the car, grabbed Crystal, hugged her, French kissed her and fondled her buttocks and thighs. (2RT 71-72, 74-75, 83-84; 3RT 338-339.) He pressed his

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1. This incident was charged as count 2 in the second amended information, although it preceded the incident charged as count 1. (2CT 219-224.)

groin against her, and she could feel through his clothes that he had an erection. He began rubbing his erect penis against her body. (2RT 74-75, 83-84; 3RT 338-339.) Crystal tried to push him away, but appellant pulled her back against him, held her tight, and continued his assault. (2RT 71-72; 3RT 338-339.) Appellant finally released her when the school bell rang and she told him she had to get to class. (2RT 67-68.)

Uncomfortable about the way appellant and Crystal interacted, Ms. Diaz had kept watch over them for several minutes, until they moved further down the parking lot. (4RT 326-328.) Ms. Diaz then went into the school, found Principal Larry Curb, and reported her concerns about Crystal and the man. (4RT 283-284, 328.) Principal Curb retrieved a walkie talkie and went to the parking lot, but the man's car was gone and Crystal already was walking toward school. (4RT 283-285, 329.) Principal Curb brought Crystal to his office for questioning about her interaction with the man. She said the man was a friend who called her over and kissed her. She was unwilling to divulge his name. (3RT 193; 4RT 286-287, 291, 293.) Principal Curb told Crystal that he was going to call her mother and possibly authorities, and then sent her to class. (4RT 287-288, 291.) Crystal left the Principal's office, borrowed a cell phone, and called appellant, who told her not to reveal his name to anyone. (2RT 70, 121.)

A short time later, Police Officer Phebea Byron questioned Crystal in the Principal's office for about 30 minutes. (4RT 334-343.) Five days later, Detective Terry Schillinger recorded an interview with Crystal. (4RT 301-321.) Crystal identified appellant as the man in the car. She detailed the two acts by appellant that resulted in two forcible lewd act convictions.

Reyna Doe – Counts 3 and 4

Crystal's statements to the police led them to her friend Reyna, who was also a victim of appellant's forcible lewd conduct. In summer 2004, appellant

saw Reyna standing at the door of her family's apartment next door to Crystal's apartment. (3RT 212-213, 216, 222, 224, 250-251.) He asked her name and said she was pretty. (3RT 213.) Reyna told appellant that she was only 11 years old. (3RT 216, 225, 252.) Reyna thought that appellant was nice and good looking. She later asked Crystal to give appellant her cell phone number. (3RT 214, 223, 251.)

Laundry Room – Count 3.

A few days later, Reyna encountered appellant in a laundry room behind the apartment complex while washing clothes. (3RT 215, 252.) They talked for five minutes, then appellant suddenly grabbed Reyna and began hugging and kissing her. (3RT 215-216, 252.) Reyna said no and tried to push away, but appellant continued to hug her. (2RT 225.) He started to fondle Reyna's chest, but she pushed his hand away and told him not to touch her there. (3RT 217-218.) Appellant took her hand and placed it on his crotch, outside his pants, pressing her hand against his erect penis. (3RT 218-219.) He told her he wanted to have sex with her. (3RT 221.) She said she did not want to do this, but he replied, "It's all right," and moved her hand to rub his crotch for a few seconds before she was able to pull her hand away. (3RT 220.)

Bedroom – Count 4.

Several months later, appellant assaulted Reyna again after she turned 12 years old and started 6th grade. (3RT 227.) Appellant called Reyna and told her that Crystal was home and wanted to see her. (3RT 227-228.) Reyna went next door, but discovered only appellant was home. (3RT 228.) Appellant led Reyna to his bedroom where they talked. (3RT 229.) After a few minutes, appellant held Reyna by her cheeks and told her she was pretty. (3RT 230, 273.) He turned on the TV and started playing a pornographic movie for Reyna. (3RT 230.) Reyna felt embarrassed and uncomfortable, and she asked him to turn it off, which he did. (3RT 230-231.) Appellant took a condom out

of his pocket and said he wanted to have sex. (3RT 231.) Reyna was afraid and told him to throw the condom away, hoping that would dissuade him. (3RT 231.) Feeling scared, Reyna said she had to leave. (3RT 232, 242.) She started to go, but tripped over the television cable, stumbled, and fell on the bed where appellant was reclining, landing on top of him. (3RT 232, 261.) Appellant caught her and started hugging her. (3RT 232.) Reyna repeated that she had to leave and gave appellant a goodbye hug. (3RT 232-233, 262.) As she started to get up, appellant pulled her back onto the bed on top of him. (3RT 235-236, 261.) He resumed hugging her and then kissed her. (3RT 233.) As appellant hugged her, he reached down and fondled her buttocks and then fondled her between her legs. (3RT 236-237, 262.) Reyna pulled appellant's hand away, which upset him. (3RT 238.)

Appellant directed Reyna to pull down his pants, but she refused. (3RT 240-242.) He lowered his pants himself, leaving on his boxer shorts. (3RT 241.) Appellant tried to pull down Reyna's pants but she said no. (3RT 242, 262-263.) Appellant took hold of Reyna's hand with a painful, squeezing grip, and placed it over his boxers onto his erect penis. (3RT 240, 264-265, 269.) He held her hand there for a few seconds before she was able to pull it away. (3RT 240, 265.) Reyna was very scared and said again that she had to leave. Appellant asked why, and she replied that her mother was going to be home soon. (3RT 242-243.) Appellant stopped holding her, and Reyna got off the bed and fled the apartment. (3RT 240-269.)

Follow-up Investigation

Crystal's 26-year-old brother Israel reported that he had seen appellant with girls of Crystal's age over the past year and a half. (4RT 295-299, 311-312.) Israel had told appellant it was against the law to fool around with girls that young, warning him that appellant would get in a "whole bunch of trouble" and find himself in jail. (4RT 311-312.) Appellant had replied that he didn't

care because "the young girls were fun." (4RT 312.)

Police attempted to locate appellant, but his family proved uncooperative. (4RT 311.) The police eventually searched the apartment of one relative and found appellant crouched down in a closet with clothing draped over himself. (4RT 313.)

Criminal Proceedings

Appellant was charged with one count of lewd acts on Reyna, for the laundry room incident (Pen. Code, § 288, subd. (a); count 3), and three counts of lewd acts on a minor by use of force, violence, duress, menace or fear of immediate bodily injury, for the school and car assaults on Crystal, and for the bedroom assault on Reyna (Pen. Code, § 288, subd. (b)(1); counts 1, 2, & 4 respectively). (2CT 219-223.)[2/]

At trial, Crystal denied that appellant touched her sexually. (2RT 65-179.) She claimed that she lied to the police because she was mad appellant dated her best friend, 13-year-old Alma. (2RT 65.) Crystal claimed that appellant stopped talking to her after he began dating Alma, causing Crystal to confront appellant at school on May 5 about ignoring her. (2RT 65-66.) However, Crystal also said that appellant began dating Alma nine months earlier at the start of school. (3RT 185-186.) Crystal admitted she did not want appellant to get in trouble. (2RT 131, 138.) Crystal was impeached with her statements to the police. (4RT 302-310, 334-343.)

Reyna's trial testimony was an unwavering account of appellant's aggravated lewd conduct. (3RT 203-275.)

The prosecutor argued that the jury could find appellant guilty of aggravated lewd acts based on his use of force and/or duress. (4RT 376, 379,

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2. All subsequent statutory references are to the Penal Code unless otherwise noted.

380, 394.) The court instructed the jury, pursuant to CALCRIM No. 1111, that "[i]t is not a defense that the child may have consented to the act." (Aug RT-B 20; see also Aug RT-A 13.)[3/] The jury found appellant guilty on all counts. (2CT 250-259.) The court imposed full, consecutive three-year lower terms on each count, a sentence totaling 12 years. (6RT 435-436.)

A divided panel of the Sixth District Court of Appeal reversed the three aggravated lewd act convictions. It held the trial court erred in instructing the jury that consent is not a defense to aggravated lewd acts on a minor. (Maj. Opn. at p. 6.) The court also found that the erroneous instruction prejudiced appellant by foreclosing a consent defense. (Maj. Opn. at pp. 10-12.)

Justice Mihara disagreed that consent is a defense to aggravated lewd acts on a child. (Conc. & Dis. Opn. at pp. 9-10.) Justice Mihara also rejected the court's finding of prejudice from the instruction. The dissenting justice found no evidence of consent in the trial record, and consequently found the instruction that consent is not a defense was necessarily harmless. (Conc. & Dis. Opn. at pp. 9-10.)

SUMMARY OF THE ARGUMENT

California courts have long held that consent is not a defense to a charge of lewd acts on a child in violation of Penal Code section 288. *People v. Cicero* (1984) 157 Cal.App.3d 465, a decision by a divided panel of the Court of Appeal for the Third District, was the first decision suggesting that consent could be a defense to aggravated lewd acts on a child, at least where the child suffered no actual physical injuries. *Cicero* concluded that the Legislature intended to incorporate such a defense in section 288(b), because an element

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3. Citations to "Aug RT-A" and "Aug RT-B" refer to the two volumes of augmented reporter's transcript filed February 23, 2007, labeled "Addendum A" and "Addendum B" respectively.

of the crime is the defendant's use of "force, violence, duress, menace, or threat of great bodily harm." Extrapolating from that statutory language, *Cicero* found an implicit requirement that the crime be committed "against the will of the victim," notwithstanding the Legislature's decision in 1981 to remove an express "against the will of the victim" requirement from an earlier version of section 288(b). (*Id.* at pp. 475-483.)

The Court of Appeal below erred in adopting *Cicero*'s conclusion that section 288(b) contains an implied "against the victim's will" requirement. The statute does not authorize, expressly or impliedly, a defense of consent by the child to forcible lewd acts.

Cicero mistakenly departed from the statute's language and deemed inconclusive the legislative history underlying the 1981 amendment to section 288(b). That history, including bill analyses of a competing proposal then under consideration by the Legislature, reveals that the lawmakers removed the "against the will of the victim" provision from that statute to conform to the longstanding policy that a child under the age of 14 is presumed incapable of consenting to sex.

Cicero also erred by analogizing the forcible lewd acts statute to the forcible rape statute. *Cicero* noted that the gravamen of rape is a violation of the will of the victim—i.e., the victim's ability to make his or her own sexual choices—and concluded that aggravated lewd acts on a child similarly rests on the violation of the will of the child. That analogy is flawed. The forcible lewd acts statute is designed to protect the *innocence* of the child, irrespective of the child's will or sexual choices.

Similarly, *Cicero*'s analysis and conclusion is incorrect respecting the force, violence, duress, menace or threat element that defines the crime of aggravated lewd acts. The distinction between an aggravated lewd act (section 288(b)) and a non-aggravated lewd act (section 288, subdivision (a)) does not

turn on a child's failure to give consent to, or having his or her will overborne by, forcible or coercive acts of the defendant. The distinction turns on whether the defendant employed actual force, violence, duress, or threats in committing the lewd act. The existence of force, violence, duress, etc. is analyzed objectively, not subjectively, for its impact on the child's willingness to engage in the act. Thus, the focus of both subdivision (a) and (b) of section 288 is on the nature of the defendant's lewd act, not on the informed or the voluntary nature of the child's conduct or on the maturity or the cogency of the child's decision making.

The Court of Appeal also erred in finding that appellant was prejudiced by the trial court's instruction that consent was not a defense. Contrary to the appellate court's finding, there was an absence of evidence of consent to the charged lewd acts by either child in this case. Had the jury been instructed that a child's consent is a defense, there is no reasonable possibility the jury would have found appellant inflicted a lewd act on the victims in any of the three incidents that resulted in section 288(b) charges, but without the use either of force or duress. Accordingly, any assumed error was harmless.

ARGUMENT

I.

A CHILD'S CONSENT IS NOT A DEFENSE TO AGGRAVATED LEWD CONDUCT

Penal Code section 288(b), defines aggravated lewd acts on a child under the age of 14. It provides in relevant part:

> (1) Any person who commits an act described in subdivision (a) by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.

(*Ibid.*)[4/]

The statute nowhere mentions consent or the will of the victim. Nevertheless, the Court of Appeal held that a child's consent is a valid defense to the crime of lewd acts on a child committed by force, violence, duress, menace, or fear of great bodily injury. The majority further concluded that CALCRIM No. 1111, which states that a minor's consent to the act is not a defense to the crime, "deprived [appellant] of a valid defense." (Maj. Opn. at p. 6.)

The court so concluded based on *People v. Cicero*, *supra*, 157 Cal.App.3d 465, which held that, for aggravated lewd acts, the element of force,

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4. Penal Code section 288, subdivision (a) (hereinafter "section 288(a)") provides:

> Any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.

violence, duress, menace or fear implicitly requires that the lewd acts be committed "against the will" of the child. (Maj. Opn. at pp. 7-10.) Following *Cicero*'s view, it held that the "the will of the victim [must be] overcome." (Maj. Opn. at p. 10.) The Court of Appeal's analysis and reliance on *Cicero* is misplaced.

Under longstanding legal policy, California has refused to recognize a child's consent as a defense to committing lewd acts. *Cicero*'s conclusion that the Legislature here departed from that policy misconstrues the legislative history of section 288(b). To the contrary, the requirement that the aggravated lewd acts must be committed "against the will of the child" was specifically eliminated from that statute. *Cicero* also employs a flawed legal analysis by importing principles from rape that are inapplicable to lewd acts on a child.

This Court should disapprove *Cicero* and reaffirm that a child's consent is not a defense to aggravated lewd acts under section 288(b).

A. Consent Has Never Been a Defense to Lewd Acts on a Child in California

It has long been the law and policy of the State of California that the child's consent is no defense to a sexual offense perpetrated on a child. (*People v. Olsen* (1984) 36 Cal.3d 638 (*Olsen*); *People v. Toliver* (1969) 270 Cal.App.2d 492, 469.) Well over century ago, *People v. Verdegreen* (1895) 106 Cal. 211 explained the unavailability of a consent defense to sex offenses committed on a child. *Verdegreen* observed in the context of assault to commit rape:

> It is the declared policy of our law, as expressed in the statute, that any female under the age there fixed shall be incapable of consenting to the act of sexual intercourse; and that one committing the act with a girl within that age shall be guilty of rape, notwithstanding he obtain her actual consent. The obvious purpose of this is the protection of society by protecting from violation the virtue of young and unsophisticated girls. To

> hold that one of this class, although incapable of consenting to sexual commerce, could nevertheless give her assent to an assault upon her person, made for the express purpose of accomplishing the sexual act, would be to largely emasculate the statute, and defeat in great part its beneficent object. . . . It is true that an assault implies force and resistance by the one assaulted; and that one is not, in legal contemplation, injured by a consensual act. But these principles have no application to a case where, under the law, there can be no consent. Here the law implies incapacity to give consent, and this implication is conclusive. In such case the female is to be regarded as resisting, no matter what the actual state of her mind may be at the time. The law resists for her.

(*Id.* at pp. 214-215.) A long line of authority is to the same effect. (See, e.g., *People v. Ratz* (1896) 115 Cal. 132, 134-135; *People v. Griffin* (1897) 117 Cal. 583, 586-587; *People v. Roach* (1900) 129 Cal. 33, 34-35; *People v. Totman* (1901) 135 Cal. 133, 135; *People v. Parker* (1925) 74 Cal.App. 540, 545-546; *People v. Simcich* (1949) 91 Cal.App.2d 524, 525.)

Many early cases applying the principle, including *Verdegreen*, *Ratz*, and *Griffin*, addressed the crime of rape. Historically, rape was of two types, forcible rape, and sex with a minor girl under the age of 14, denominated statutory rape. (See generally *People v. Hernandez* (1964) 61 Cal.2d 529, 530, 533; *People v. Olsen*, *supra*, 36 Cal.3d at p. 648.) These early decisions discussing consent in the context of the then-applicable rape statute were directed at the legal irrelevance of consent by a child under the age of 14. (See *People v. Verdegreen*, *supra*, 106 Cal. at p. 213; *People v. Ratz*, *supra*, 115 Cal. at pp. 133-134; *People v. Griffin*, *supra*, 117 Cal. at p. 586; see also *People v. Roach*, *supra*, 129 Cal. at p. 34 [same].)

The Legislature later expanded statutory rape by raising the age of consent from 14 to 18, and the crime of statutory rape was moved out of the rape statute into a separate statute, Penal Code section 261.5. (*People v. Hernandez*, *supra*, 61 Cal.2d at pp. 530, 533; *People v. Olsen*, *supra*, 36 Cal.3d

at p. 643, fn.11.) The legislative increase in the age of consent to 18 ultimately caused this Court in *People v. Hernandez*, *supra*, 61 Cal.2d 529, to recognize a defense of good faith mistake in the victim's age in cases of statutory rape and to overrule earlier decisions to the extent they held such a defense unavailable. (*Id.* at pp. 535-536 [overruling *Ratz* and *Griffin* with respect to good faith mistake of age defense].) The legislative increase in the age of consent diminished the significance of the older decisions in cases charging sex offenses not restricted to children below the age of 14 such as statutory rape. (See *Ibid.*; cf. *People v. Tobias* (2001) 25 Cal.4th 327, 333-335.)

Nevertheless, the legal and policy implications articulated by the appellate courts in the earlier cases retained their vitality when the Legislature sought the protection from sexual exploitation of children under the age of 14, such as in section 288. This Court in *Olsen* limited the scope of *Hernandez* with respect to lewd acts on a child under the age of 14. *Olsen* held that the defense of good faith mistake of age was unavailable a defense to a section 288 charge. (*People v. Olsen*, *supra*, 36 Cal.3d at pp. 642-649.)

Olsen explained that the courts and the Legislature have consistently drawn a distinction between crimes directed at children under the age of 14 and those encompassing offenses against juveniles over the age of 14. Quoting approvingly from *People v. Toliver*, *supra*, 270 Cal.App.2d 492, *Olsen* observed that "'the philosophy applying to violations of [section 288] is entirely different from that applying to [unlawful sexual intercourse].'" (*People v. Olsen*, *supra*, 36 Cal.3d at p. 645, alterations in original.) "[S]ection 288 is for protection of infants or children as to whom persons commit lewd and lascivious acts at their peril." (*Ibid.*)

> Time and again, the Legislature has recognized that persons under 14 years of age are in need of special protection. This is particularly evident from the provisions of [Penal Code] section 26. That statute creates a rebuttable presumption that children under the age of 14 are incapable of knowing the wrongfulness

> of their actions and, therefore, are incapable of committing a crime. A fortiori, when the child is a victim, rather than an accused, similar "special protection," not given to older teenagers, should be afforded. By its very terms, section 288 furthers that goal.

(*Id.* at pp. 647-648, footnote omitted.)[5/]

In light of this policy, *Olsen* confirmed that the holdings of *Verdegreen*, *Ratz*, *Griffin*, and *Roach* apply fully to any lewd acts committed on a child. That is, "'[a] violation of section 288 does not involve consent of any sort, thereby placing the public policies underlying it and statutory rape on different footings.'" (*Olsen, supra,* 36 Cal.3d at p. 645, alteration in original, quoting *Toliver*; see also *People v. Hillhouse* (2003) 109 Cal.App.4th 1612, 1619-1620) *Olsen* noted young children receive special protection when accused of a crime by virtue of section 26's rebuttable presumption of their incapacity to commit a crime. (36 Cal.3d at p. 647.) "A fortiori, when the child is a victim, rather than an accused, similar 'special protection,' not given to older teenagers, should be afforded. By its very terms, section 288 furthers that goal." (*Id.* at pp. 647-648.) Thus, over the past century, California courts and the Legislature consistently maintained that a child's consent is no defense to the crime of committing a lewd act on a child under 14, as defined in section 288.

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5. *Toliver* explained the historical roots for the choice of 14 as the age of consent. "Under the Roman and common laws, childhood was considered to exist until puberty, which was determined to be at age 14. (1 Burdick, Law of Crime, §§ 155, 156, pp. 202, 204.) While today it is found that some females reach puberty below that age, there is no reason why the distinction between a child and a more mature person should not continue to be held at that age. Even 13 is below the age of sexual pursuit by normal males." (*People v. Toliver, supra*, 270 Cal.App.2d at p. 496; see also *People v. Olsen, supra*, 36 Cal.3d at pp. 645-646.)

B. The Legislature Did Not Incorporate an Implied Consent Defense into Section 288(b)

In 1984, the long-standing rule that section 288 does not involve consent of any sort, intersected with the opinion of a divided court in *People v. Cicero*, *supra*, 157 Cal.App.3d 465. *Cicero* was the first appellate decision to suggest that a child's consent was a defense to aggravated lewd conduct committed against that child.

Cicero's recognition of a consent defense to forcible lewd acts was based squarely on its interpretation of 1979 and 1981 amendments to Penal Code section 288. The 1979 amendment enacted a new crime in subdivision (b) for forcible lewd acts and included language that the new crime must be committed "against the will" of the child. The 1981 amendment deleted the "against the will" language from subdivision (b).

Cicero decided that the legislative history underlying the deletion of that statutory language was inconclusive. The court then reasoned that notwithstanding the deletion, the Legislature intended to retain an implied "against the will" requirement and thereby incorporated into forcible lewd acts a consent defense paralleling cases of forcible rape. *Cicero*'s interpretation of subdivision (b) is erroneous. The legislative history shows the very reason the Legislature deleted the "against the will" language was to eliminate any consent defense to section 288(b).

1. The 1979 Amendment to Section 288

Prior to 1979, section 288 did not distinguish forcible from non-forcible lewd acts. That year, the Legislature divided section 288 into two crimes. Subdivision (a) of section 288 covers the general offense of committing a lewd act on a child under 14. Subdivision (b) defines the crime of aggravated lewd acts on a child under 14.

As enacted in 1979, section 288(b) provided:

> (b) Any person who commits an act described in subdivision (a) by use of force, violence, duress, menace, or threat of great bodily harm, *and against the will of the victim* shall be guilty of a felony and shall be imprisoned in the state prison for a term of three, five or seven years.

(Stats. 1979, ch. 944, § 6.5, p. 3254, italics added.)

The creation of that crime was part of a broader legislative overhaul of punishment for forcible sex offenses. (See Stats. 1979, ch. 944, § 6.5; see generally *Review of Selected 1979 California Legislation* (1979) 11 Pacific L.J. 259, 429.) The overhaul included the enactment of an alternative sentencing scheme and of additional penalties and enhancements for forcible sex crimes. (Stats. 1979, ch. 944, § 10, p. 3258; see generally *Review of Selected 1979 California Legislation*, *supra*, 11 Pacific L.J. at pp. 431-433.)

The legislative division of section 288 into two parts assimilated the new crime of forcible lewd acts within those new schemes. As enacted, enhanced punishment applied to this crime like other forcible sex crimes. (See Stats. 1979, ch. 944, §§ 6.5 & 10, pp. 3253-3254, 3258; *Review of Selected 1979 California Legislation*, *supra*, 11 Pacific L.J. at pp. 429-431.) The same base punishment range applied to simple and aggravated lewd acts, namely, a term of three, five, or seven years. (Stats. 1979, ch. 944, § 6.5, p. 3254.) But aggravated lewd acts on a child under subdivision (b) of section 288 made the defendant eligible for the additional enhancements and alternative sentencing scheme set out in the newly created Penal Code section 667.6, and the probation restrictions in the newly created Penal Code section 1203.065. (Stats. 1979, ch. 944, §§ 10, 15, pp. 3258, 3262.)

2. The 1981 Amendment to Section 288

In 1981, the Legislature revisited the aggravated lewd acts statute, enacting Senate Bill Number 586 (SB 586), the "Roberti-Imbrecht-Rains-Goggin Child Sexual Abuse Prevention Act." (Stats. 1981, ch. 1064, § 5, p.

4096.) Among other things, the Act increased penalties for section 288, mandated life terms for recidivist offenders by adding Penal Code section 667.51, and further curtailed probation eligibility by amending section 1203.065 and adding section 1203.066. (Stats. 1981, ch. 1064, §§ 1-4, pp. 4093-4096; see also *Review of Selected 1981 California Legislation* (1981) 13 Pacific L.J. 513, 634-639.) With the increased penalties for forcible lewd acts, the Act also amended section 288(b), by deleting the reference to the act being "against the will of the victim." As a result of that amendment, subdivision (b) read:

> (b) Any person who commits an act described in subdivision (a) by use of force, violence, duress, menace, or threat of great bodily harm, shall be guilty of a felony and shall be imprisoned in the state prison for a term of three, six or eight years.

(Stats. 1981, ch. 1064, § 1, p. 4093.)

It was against this legislative backdrop that the *Cicero* court interpreted subdivision (b) and specifically the meaning of the term "force" therein. *Cicero* concluded that the Legislature's 1979 differentiation between the minimum proscribed conduct under subdivision (a) and the aggravated conduct under subdivision (b) meant force used in the latter crime must be "substantially different from or substantially greater than that necessary to accomplish the lewd act itself." (*Cicero*, *supra*, 157 Cal.App.3d at p. 474.)

That definition of force was correct and uncontroversial. It has been employed with little difficulty since its articulation in *Cicero*. (See CALJIC No. 10.42 [defining "force" for section 288(b) as "physical force that is substantially different from or substantially greater than that necessary to accomplish the lewd act itself"]; CALCRIM No. 1111 ["The force used must be substantially different from or substantially greater than the force needed to accomplish the act itself."]; see generally *People v. Griffin* (2004) 33 Cal.4th 1015, 1026-1028 [discussing various definitions of force].)

Having articulated the appropriate definition of "force" for the subdivision (b) crime, *Cicero* essentially had completed the necessary analysis of the issue before it. The court should have stopped there. However, the majority decided to conduct further "inquiry" into the nature and scope of subdivision (b). (*Id.* at p. 475.) The inquiry led the court to decide to "borrow the concept of 'force' from the law of rape so as to define the concept in terms of its effect on the will of the child." (*Id.* at p. 486.)

The court in *Cicero* recognized that any interpretation it adopted had to comport with the legislative intent in enacting section 288 and the changes made to the statute. As this Court has explained, "Our task in construing . . . any statute[] is to ascertain and effectuate legislative intent. [Citations.] We turn first to the words of the statute themselves, recognizing that 'they generally provide the most reliable indicator of legislative intent.'" (*People v. Gardeley* (1996) 14 Cal.4th 605, 621.) "To the extent that uncertainty remains in interpreting statutory language, 'consideration should be given to the consequences that will flow from a particular interpretation' [citation], and both legislative history and the 'wider historical circumstances' of the enactment may be considered." (*People v. Cruz* (1996) 13 Cal.4th 764, 782-783.)

The court in *Cicero* acknowledged that the Legislature originally incorporated the phrase "and against the will of the victim" in the 1979 version of subdivision (b), only to delete that language in the 1981 amendment. The court found the deletion "perplexing" and acknowledged that it could not simply be dismissed as accidental. (*Cicero*, *supra*, 157 Cal.App.3d at p. 476.) In fact, as was pointed out by the dissent in *Cicero* (*id.* at p. 476 (dis. opn. of Evans, J.)) and by Justice Mihara below (Conc. & Dis. Opn. at p. 9), the legislative deletion of the "against the will of the victim" requirement from subdivision (b) was directly contrary to a requirement that force had to be used not just to commit the lewd act, but to overcome a child's will that the act not

be committed.

Cicero then turned to the legislative history of the 1981 amendment to illuminate the Legislature's intent in striking the "against the will of the victim" language. The court concluded that the history "shed dim light" on the deletion. (*Ibid.*)

The court's legislative review, however, was incomplete.[6] *Cicero* provided a description of the *procedural* history of SB 586, but its description did not contain any legislative *analysis* of SB 586. A review of the committee analyses of SB 586, which were not addressed by the *Cicero* court, demonstrates that *Cicero*'s interpretation is contrary to the intent of the Legislature. (See *Calvillo-Silva v. Home Grocery* (1998) 19 Cal.4th 714, 722-723 [looking to committee reports in interpreting legislative intent]; *Hutnick v. U.S. Fidelity & Guaranty Co.* (1988) 47 Cal.3d 456, 465, fn.7 ["[I]t is well established that reports of legislative committees and commissions are part of a statute's legislative history and may be considered when the meaning of a statute is uncertain."].)

3. Legislative History of the 1981 Amendment

Cicero notes that, as originally introduced in March 1981, SB 586 proposed dramatic changes in the characterization of sexual offenses involving children. The proposal included the repeal of section 288 and replacing it with a series of offenses that differentiated lewd contact from lewd conduct. The bill also proposed punishment based on the relative ages of the offender and victim, as well as the relationship that existed between the offender and the child. (*Cicero, supra*, 157 Cal.App.3d at p. 476; SB 586 (1981-1982 Reg. Sess.); see

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6. In conjunction with filing this brief, Respondent has moved for judicial notice of additional legislative history material. (See Respondent's Request for Judicial Notice, Exhibits A-H.)

also Respondent's Request for Judicial Notice, Exhibit C.)[7/]

During this same period, Assembly Bill No. 457 (AB 457) was also pending in the Legislature. AB 457 was largely a sentencing bill. It proposed fewer changes to section 288 and retained the "against the will of the victim" language in that statute. (*Cicero*, *supra*, 157 Cal.App.3d at p. 476; see also Respondent's Request for Judicial Notice, Exhibit B.)

Cicero summarized the procedural history of SB 586 as follows:

> On August 25, 1981, SB 586 was drastically amended in the Assembly by deleting many of its existing provisions and substituting, as new SB 586, many of the provisions of then Assembly Bill No. 457 (hereafter AB 457). As last amended in the Assembly on September 8, 1981, SB 586 set forth subdivision (b) of section 288 with the language "and against the will of the victim" still in the statute. (Assem. amend. to SB 586, § 1.) On September 13, 1981, the Senate rejected the Assembly amendments by a vote of 24 to 0. (Sen. J. of Sept. 13, 1981, p. 6337.)
>
> Two days later, a conference committee reported the bill out with amendments, including the one at issue here, and recommended "That the Assembly amendments be concurred in, and that the bill be further amended." The conference committee report was adopted unanimously by both houses on that same day. The reason for the conference committee's amendment deleting "and against the will of the victim" is unknown. (Sen. J. of Sept. 15, 1981, p. 6613.) Similarly the reason for unanimous approval by both houses of the conference committee's report, on the same day it was reported out, is not apparent.

(*Cicero*, *supra*, 157 Cal.App.3d at pp. 476-477; see also *People v. Jeffers*,

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7. SB 586 was the centerpiece of a series of bills drafted by the Joint Committee for the Revision of the Penal Code addressing lewd acts on a child. (See Respondent's Request for Judicial Notice, Exhibit G; see also *People v. Jeffers* (1987) 43 Cal.3d 984, 993-997; *People v. Wutzke* (2002) 28 Cal.4th 923, 936-938; see generally *Baker v. Superior Court* (1984) 35 Cal.3d 663, 670, fn.7 [noting legislative overhaul of child sex offense statutes in 1981 including related legislation to eliminate MDSO classification].)

supra, 43 Cal.3d at pp. 993-997 [discussing procedural history of SB 586 with respect to enactment of Pen. Code § 1203.066]; *People v. Wutzke*, *supra*, 28 Cal.4th at pp. 936-938 [same].)

Cicero's recount of SB 586's procedural history was correct as far as it went. But it failed to recognize the underlying substantive policy disagreement represented by SB 586 and AB 476. The disagreement specifically pertained to the "against the will of the victim" requirement and was a primary reason for SB 586's convoluted procedural history.

On August 11, 1981, the Chair of the Assembly Committee on Criminal Justice wrote the lead Senate author of SB 586, stating that the bill, which was scheduled for a hearing before the committee the following week, conflicted with AB 457, which had already been passed out of that committee. The Chair urged the Senate author to work with AB 457's authors to resolve the conflicts. (Respondent's Request for Judicial Notice, Exhibit B.) The Chair's letter was consistent with the Assembly Committee on Criminal Justice's analysis of August 10, 1981, which highlighted conflicts between AB 457 and SB 586. That analysis emphasized a key difference between the two bills: SB 586 specifically deleted the "against the will" requirement, whereas AB 457 retained it. (Respondent's Request for Judicial Notice, Exhibit A at p. 1 [explaining SB 586 "[w]ould delete the current requirement that the act be against the will of the victim"]; p. 3 ["SB 586 . . . deletes the requirement that the act be committed against the will of the victim"]; p. 4 ["Under current law, there are many references for various purposes of the crime of forcible child molestation. For all of these references, SB 586 would delete the requirement that the act be committed against the will of the victim . . . ."]; p. 7 ["SB 586 would raise the term from 3, 5 or 7 years to 5, 7 or 9 years if there is involved force, violence, duress, menace or threat of bodily harm. There is no requirement that the act be against the will of the victim."].)

The Assembly Committee analysis made clear that the difference between the two bills on this point was substantive. AB 457 retained a consent defense through the "against the will" language and SB 586 eliminated any consent defense. The analysis noted in relevant part:

> c. SB 586 requires imprisonment if the defendant was a stranger to the victim or befriends the victim for the purpose of sex. AB457 has a similar circumstance, but deletes the situation where the victim neither solicits sexual contact nor shares in that purpose at the time of befriending. AB 457 is designed to exempt from this mandatory coverage the 13 year old prostitute and the Lolita situations. SB 586 would mandatorily send the persons engaging in sexual contact with these girls to prison. Should this be the case?
>
> d. SB 586 requires imprisonment if there is force or threats involved even if it is not against the victim's will. This is contrasted with AB 457 where probation is authorized only in the unusual in-family case for such offense and not at all if it is accomplished against the victim's will.

(Respondent's Request for Judicial Notice, Exhibit A at p. 7.)

The Assembly Committee on Criminal Justice sided with the approach taken in AB 457. As noted by *Cicero*, on August 25, 1981, the committee "drastically amended" SB 586 to delete many of its original provisions and to substitute in their place many of provisions of AB 457, including the retention of the "against the will of the victim" language. (*Cicero*, *supra*, 157 Cal.App.3d at p. 476.)

In response, the Joint Legislative Committee for the Revision of the Penal Code (Joint Committee), which had originally created SB 586, prepared a "Summary of Major Differences" between AB 457 and SB 586 before its revision by the Assembly Committee on Criminal Justice. (Respondent's Request for Judicial Notice, Exhibit D.) The Joint Committee analysis emphasized that the elimination of the "against the will of the victim"

requirement for forcible lewd acts was an important feature of SB 586 and central to SB 586's stricter approach to forcible lewd acts. Moreover, the Joint Committee analysis specifically explained that SB 586 was based on the principle that children are presumed incapable of consent to sexual acts:

> Various crimes are redefined in SB 586 to give maximum support and credence to the child victim. Children under age 14 are presumed to be incapable of consenting to sexual advances. The victim who is under age 14 need not prove that the sexual assault was accomplished against her will or that, in entering into a friendship with someone who later molests her, she did not solicit the act or share in that initial purpose at the time of befriending. AB 457 requires that a victim over the age of 10 establish that she did not consent to the act of sexual abuse. This is because proponents of AB 457 seemingly believe that most children want to be molested, that there exist 11 year old prostitutes who freely and willingly choose that profession, and that those who molest children should not be harshly treated by the courts.

(Respondent's Request for Judicial Notice, Exhibit D at p. 1.)[8/]

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8. The Senate Committee on the Judiciary analysis of AB 457 prepared on August 13, 1981 included "Background Information," which in a "Summary of the Major Differences Between AB 457 and SB 586" made the same point:

> The crimes [pertaining to lewd acts on a child] are redefined in SB 586 to give maximum support and credence to the child victim. Children under age 14 are assumed to be incapable of consenting to sexual advances in all instances. The victim who is under age 14 need not prove that the sexual assault was accomplished against her will or, that in entering into a friendship with someone who later molests her, that she did not solicit the act or share in the initial purpose at the time of befriending. AB 457 requires that a victim over the age of 10 establish that she did not consent to the act of sexual abuse. This is because some proponents believe that there do exist 11 year old prostitutes who freely and willingly choose that profession, and their clients shouldn't be imprisoned.

(Respondent's Request for Judicial Notice, Exhibit H at p. 3.)

The Joint Committee analysis specifically recognized that this difference in the bills was of elemental magnitude to the aggravated form of lewd acts: "AB 457 requires, where force or violence is an issue, that the prosecution prove that force or violence was against the child victim's will. SB 586 does not." (Respondent's Request for Judicial Notice, Exhibit D at p. 2.) The Joint Committee recommended to the Senate three possible courses of action in response to the Assembly amendments to SB 586: (1) "[R]estore [SB 586] to its former strength in Conference," and "[k]ill AB 457 in order to keep pressure on the Assembly to pass tough legislation in this area"; (2) "Hold AB 457 in Committee for use as a 'back-up' vehicle in the event the Assembly continues to play games with SB 586;" or (3) "Amend the contents of SB 586 into AB 457," provided that the author of AB 457 "makes a commitment that he will ask for concurrence in Senate amendments when the bill is returned to the Assembly and not allow the bill to be returned for emasculation to the Assembly Criminal Justice Committee." (Respondent's Request for Judicial Notice, Exhibit D at p. 3.) The Senate unanimously rejected the Assembly's amendments to SB 586. (*Cicero*, *supra*, 157 Cal.App.3d at p. 476; see also *People v. Jeffers*, *supra*, 43 Cal.3d at p. 996; *People v. Wutzke*, *supra*, 28 Cal.4th at p. 938.)

SB 586 proceeded to the Conference Committee, which also prepared an analysis of SB 586 and AB 457 on September 13, 1981. The Conference Committee observed: "The crimes in SB 586 are redefined to give maximum support and credence to the child victim. Children under age 14 are presumed incapable of consenting to sexual advances in all instances." (Respondent's Request for Judicial Notice, Exhibit E at p. 2.)

The Conference Committee analysis further noted that SB 586 rejected AB 457's proposed requirement that the prosecution show a lack of consent by the child victim when the defendant claims he was solicited by a willing child

prostitute. The Committee analysis noted that a consent defense of any kind "would not be consistent with the underlying philosophy of [SB 586] which is to protect the child victim from further psychological harm whenever at all possible." (*Id.* at p. 3.) Unlike AB 457, according to the Conference Committee analysis, "SB 586 requires mandatory state prison in all cases where force, violence, duress, menac[e] or threat of bodily harm are used." (*Id.* at p. 4.)

On September 14, 1981, the Conference Committee released a summary of "Major Issues" pertaining to SB 586. The second issue identified by the Conference Committee was: "2. Should children under age 14 be presumed incapable of consenting to sexual advances in all instances?" (See Respondent's Request for Judicial Notice, Exhibit F at p. 2.)

On September 15, 1981, the Conference Committee resolved the conflict between SB 586 and AB 457. It merged many of the compatible provisions in a final revised version of SB 586. In the final version of SB 586, the original structure of section 288 was retained. SB 586's mandatory prison terms for non-familial offenders and the new concept of "substantial sexual contact" were incorporated into Penal Code section 1203.066's probation ineligibility provisions, while the bill's recidivist offender provisions were placed into Penal Code section 667.51. (See *People v. Jeffers*, *supra*, 43 Cal.3d at pp. 996-997.) Most importantly, the Conference Committee removed the "against the will of the victim" language in conformity with the original version of SB 586. This final version was unanimously approved by both houses of the Legislature on the Conference Committee's report. (*Cicero*, *supra*, 157 Cal.App.3d at p. 476; see generally Stats. 1981, ch. 1064, §§ 1-4, pp. 4093-4096.)

Contrary to *Cicero*'s finding, the legislative history is conclusive. It makes clear the Legislature's specific purpose in deleting the "against the will of the victim" language from section 288(b). The Legislature, as part of an

increase in punishment for subdivision (b), removed that language to codify the principle that "[c]hildren under age 14 are presumed incapable of consenting to sexual advances in all instances." (Respondent's Request for Judicial Notice, Exhibit E p. 2.) As noted in the *Review of Selected 1981 California Legislation*, *supra*, 13 Pacific L.J. at page 636, "Chapter 1064 [SB 586] removes the requirement that the offense be committed against the will of the victim, as consent is not a defense . . . ." (Footnote omitted.)

The plain language of the statute and the legislative intent underlying the 1981 amendment to section 288(b) are each clear and consistent. That should have been determinative of the questions raised in *Cicero*. It should be determinative of the issue before this Court. The Legislature removed the "against the will of the victim" language to eliminate any consent defense to aggravated lewd conduct on a child. The majority in *Cicero* therefore erred in attempting to insert a consent defense into the definition of force and duress after the Legislature intentionally removed the "against the will" language to eliminate consent as a defense to that crime. (See generally *People v. Escobar* (1992) 3 Cal.4th 740, 748-749 [faulting court decision for failing to consider legislative history explaining amendments to bill prior to passage, "attribut[ing] no significance to the subsequent alteration in the definitional standards," and "proceed[ing] to borrow a number of themes from the legislatively *abandoned* criteria and incorporated them into a working translation or gloss on the statutory definition"].) As the dissent in *Cicero* observed:

> [The majority's] conclusion is misguided. It writes back into the subdivision precisely what the Legislature wrote out of the subdivision, so that the majority may in turn rest the conviction on the question of "knowing consent." I believe the Legislature simply recognized the lewd act in subdivision (a) need not be against the will, and thus, it need not be in the use of force under subdivision (b). In fact, under the plain language of the statute, the act in subdivision (b) can be committed *with* knowing consent and still be a violation of the subdivision, if

force is used.

(*Cicero*, *supra*, 157 Cal.App.3d at pp. 487-488 (dis. opn. of Regan, P.J.).)

The Court of Appeal in *Cicero* suggested a view of the reason for the legislative deletion of the "against the will of the victim" language. *Cicero* noted that in 1980, the Legislature had amended California's rape statute to delete the requirement of resistance as an element of rape. (*Cicero*, *supra*, 157 Cal.App.3d at p. 480.) *Cicero* posited that the Legislature later deleted the "against the will of the victim" language from section 288(b), to ensure that the People would not have to prove resistance by the child for aggravated lewd conduct. (*Id.* at p. 481.)[9]

The 1981 amendment cannot be explained on the basis that it was meant to preclude a resistance requirement. That requirement never appeared in section 288(b). By contrast, prior to 1980, the rape statute expressly required that the victim's "resistance is overcome." (See *People v. Salazar* (1983) 144 Cal.App.3d 799, 806, fn. 2.) That year, the Legislature replaced the resistance requirement with the requirement that the act be "accomplished against a person's will." (*Ibid.*) That is, resistance as an element of rape was removed by *adopting* and *incorporating* the "against the will" language into the rape statute. It is not reasonable to suggest that the following year the Legislature then *eliminated* the "against the will" language from the aggravated lewd act statute to forestall an interpretation of that language as requiring resistance by the victim.

"Whether enacted directly by the People or by the Legislature, a statute

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9. The court admitted it was unaware whether any prior witness testimony regarding the infeasibility of child resistance to forcible lewd conduct was even presented to or considered by the Legislature, when it amended SB 586. (See *Cicero*, *supra*, 157 Cal.App.3d at p. 481.) Not surprisingly, the legislative history provides no support that legislators acted on such a motivating impulse.

should not be construed so as to render its provisions ineffective or contrary to a stated legislative objective." (*People v. Pieters* (1991) 52 Cal.3d 894, 901.) Because its evaluation of the legislative history was incomplete, *Cicero* failed to identify the legislative objective in eliminating the "against the will" language from section 288(b).

C. *Cicero*'s Reliance on the Law of Rape for the Force Requirement Was Also Erroneous

Cicero's interpretation of the statute was error for a second reason. *Cicero* departs from the general rule recited in *Olsen* precluding a child's consent as a defense by relying on an inapt analogy to the forcible rape statute. *Cicero* observed:

> [T]he fundamental wrong at which the law of rape is aimed is not the application of physical force that causes physical harm. Rather, the law of rape primarily guards the integrity of a woman's will and the privacy of her sexuality from an act of intercourse undertaken without her consent. Because the fundamental wrong is the violation of a woman's will and sexuality, the law of rape does not require that "force" cause physical harm. Rather, in this scenario, "force" plays merely a supporting evidentiary role, as necessary only to insure an act of intercourse has been undertaken against a victim's will.
>
> It seems both logical and fair to us that if the will and sexuality of an adult woman are protected by the Penal Code, then the will and sexuality of children deserve no lesser protection. Accordingly, both logic and fairness compel the conclusion that "force" in subdivision (b) must reasonably be given the same established meaning it has achieved in the law of rape: "force" should be defined as a method of obtaining a child's participation in a lewd act in violation of a child's will and not exclusively as a means of causing physical harm to the child.

(*People v. Cicero*, *supra*, 157 Cal.App.3d at pp. 475-476.)

This reasoning contains a basic flaw. The gravamen of the crime of

lewd acts on a child is not the protection of the *will* of the child, i.e. the right of the child to have sex as he or she chooses and sees fit. Instead, the gravamen of the offense is the protection of the *innocence* of the child, irrespective of the child's will. The distinction is exemplified by the fact that consent is not a defense to Penal Code section 288(a), the crime of non-forcible lewd acts on a child. (See *People v. Olsen*, *supra*, 36 Cal.3d at pp. 645-646; *People v. Toliver*, *supra*, 270 Cal.App.2d at p. 469.)

This distinction is also demonstrated by the fact that section 288 encompasses acts that are not inherently sexual, but which are rendered lewd by the defendant's intent. This Court has explained that the scope of protection provided by section 288 derives from its core purpose of protecting children's innocence by shielding them from any sexualization.

> The Legislature's decision to cast a prohibited lewd act in such general terms is consistent with the basic purpose of the statute as long described by the courts. As we have explained, section 288 was enacted to provide children with "special protection" from sexual exploitation. [Citation.] The statute recognizes that children are "uniquely susceptible" to such abuse as a result of their dependence upon adults, smaller size, and relative naiveté. [Citation.] The statute also assumes that young victims suffer profound harm whenever they are perceived and used as objects of sexual desire. [Citation.] It seems clear that such concerns cannot be satisfied unless the kinds of sexual misconduct that result in criminal liability are greatly expanded where children are concerned.

(*People v. Martinez* (1995) 11 Cal.4th 434, 443-444.)

Cicero's recognition of a consent defense to aggravated lewd conduct runs counter to the fundamental policy underlying section 288. Making the degree of criminality of the defendant's conduct follow the degree to which a child "wants" or "invites" the defendant to commit lewd acts only exacerbates the "profound harm" the child suffers. Not only is the child then perceived by the defendant as an object of sexual desire, the child is considered by the law

a sexual entity.

Cicero's incorporation of a consent defense cannot be reconciled with the fact that, under section 288, it is the defendant's sexual intent, rather than the sexual nature of the touching itself, that renders the act lewd. As this Court observed in *Martinez*:

> [T]he courts have long indicated that section 288 prohibits *all* forms of sexually motivated contact with an underage child. Indeed, the "gist" of the offense has always been the defendant's intent to sexually exploit a child, not the nature of the offending act. [Citation.] "[T]he purpose of the perpetrator in touching the child is the controlling factor and each case is to be examined in the light of the intent with which the act was done. . . . If [the] intent of the act, *although it may have the outward appearance of innocence*, is to arouse . . . the lust, the passion or the sexual desire of the perpetrator [or the child,] it stands condemned by the statute . . . ."

(*People v. Martinez*, *supra*, 11 Cal.4th at p. 444.)

It makes no sense to apportion criminal liability according to a child's consent to an act which appears outwardly to be non-sexual, yet which is rendered lewd by the defendant's underlying sexual intent. The defendant's sexual purpose may become apparent only through evidence of events separate from the charged act, such as lewd behavior with other children on different occasions. (See Evid. Code, § 1108.) Basing a legal defense to lewd conduct on a child's consent to a forcible act that has "the outward appearance of innocence," yet is sexualized by the defendant's underlying lewd intent, places too great a responsibility on children to discern the sexual motivations of adults seeking to exploit them.

As *Martinez* recognized, "It is common knowledge that children are routinely cuddled, disrobed, stroked, examined, and groomed as part of a normal and healthy upbringing. On the other hand, any of these intimate acts may also be undertaken for the purpose of sexual arousal. Thus, depending upon the actor's motivation, innocent or sexual, such behavior may fall within

or without the protective purposes of section 288." (*Id.* at p. 450.) It is contrary to the essential purpose of section 288 to hinge the defendant's degree of culpability on a child's ability to recognize when such intimate acts are undertaken for the purpose of sexual arousal, and withhold consent.

Cicero's reliance on the rape requirement that force or duress must overcome the will of the victim is misplaced. Rape and other traditional adult sex offenses differ fundamentally from section 288. The former criminalize specific sex acts when forced upon victims against their will so as to deprive the victims of their right of control over their sexual choices. Section 288 criminalizes any touching done with the purpose of sexually exploiting a child, regardless of the sexual nature of the act itself, with the goal of protecting the innocence of the child from the damaging effects of premature sexualization. This distinction is why the rape statute expressly provides that the act must be "accomplished against a person's will" and section 288(b) does not. (Compare § 261, subd. (a)(2) with § 288(b).)

The fundamental error in importing the "against the will" requirement from the rape context into the definition of force for section 288(b) was laid bare in *People v. Griffin*, *supra*, 33 Cal.4th 1015. *Griffin* makes clear that the concept of force necessary for rape is different from, and ultimately incompatible with, the legal construct of force necessary for aggravated lewd acts on a child.

Griffin involved a challenge to the legal definition of the term "force" as used in the rape statute. Agreeing with the defendant that "force" has a technical meaning requiring a sua sponte instruction that defines the term, the Court of Appeal looked to the technical definition articulated in *Cicero* for section 288(b), that force means "physical force substantially different from or substantially greater than that necessary to accomplish the . . . act." (*Id.* at p. 1021.) The court held that definition also applied to rape.

This Court reversed, observing that the force requirement in the rape statute serves a very different function from that in section 288(b). (*People v. Griffin*, *supra*, 33 Cal.4th at p. 1027.) *Griffin* explained that the force requirement in section 288(b) differentiates aggravated criminal conduct from less culpable conduct that is nonetheless still criminal. Thus, a technical definition of force, i.e., physical force substantially different from or substantially greater than that necessary to accomplish the act, is needed to distinguish between the two forms of otherwise culpable conduct. (*Ibid.*)

> That same distinction does not arise in the context of the rape statute. The element of force in forcible rape does not serve to differentiate between two forms of unlawful sexual contact as it does under section 288. When two adults engage in *consensual* sexual intercourse, whether with or without physical force greater than that normally required to accomplish an act of sexual intercourse, the forcible rape statute is not implicated. The gravamen of the crime of forcible rape is a sexual penetration *accomplished against the victim's will* by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury. As reflected in the surveyed case law, in a forcible rape prosecution the jury determines whether the use of force served to overcome the will of the victim to thwart or resist the attack, *not* whether the use of such force physically facilitated sexual penetration or prevented the victim from physically resisting her attacker. The Legislature has never sought to circumscribe the nature or type of forcible conduct that will support a conviction of forcible rape, and indeed, the rape case law suggests that even conduct which might normally attend sexual intercourse, when engaged in with force sufficient to overcome the victim's will, can support a forcible rape conviction. [Citation.] Nor has the rape law ever sought to quantify the amount of force necessary to establish the crime of forcible rape, at least not until the courts in *People v. Mom* (2000) 80 Cal.App.4th 1217, 1224, *People v. Bergschneider* (1989) 211 Cal.App.3d 144, 153, and the instant case sought to apply *Cicero*'s special definition of "force" for forcible lewd act prosecutions to forcible rape cases.

(*People v. Griffin*, *supra*, 33 Cal.4th at pp. 1027-1028.)

This Court declined to equate force in the adult rape context with the lewd acts context. Instead, it concluded that "[t]he Court of Appeal's holding is contrary to the plain language of the forcible rape statute, and fails to recognize the significant differences the element of force plays in the crimes of forcible lewd acts on a minor and forcible rape." (*Id.* at p. 1019; see also *id.* at p. 1028 ["We therefore conclude that the Court of Appeal erred in applying *Cicero*'s 'substantially different from or substantially greater' definition of force, applicable in forcible lewd conduct prosecutions under section 288, subdivision (b)(1) (see CALJIC No. 10.42), to this forcible rape case."].)

For these same reasons, *Cicero* erred in applying the "against the will" standard of force applicable in the rape context, to cases of forcible lewd acts against children. As in *Griffin*, *Cicero*'s holding "fails to recognize the significant differences the element of force plays in the crimes of forcible lewd acts on a minor and forcible rape." (*Id.* at p. 1019.)

D. *Cicero*'s Assumption that Duress, Menace, and Threats Necessarily Involve Overcoming the Will of the Child Is Incorrect

Cicero extrapolated an "against the will" requirement from the statute's terms "duress," "menace," and "threat of great bodily harm." (*Cicero*, *supra*, 157 Cal.App.3d at p. 477.) *Cicero* posited that "[t]hese words are ordinarily used to demonstrate that someone has used some form of psychological coercion to get someone else to do something they don't want to do, i.e., something against their will. Consequently, if the concept of violation of will is removed from these words, they are left, like shells on a beach, without substance." (*Ibid.*) *Cicero*'s analysis confuses intent with effect and improperly shifts the focus from the aggravated nature of the perpetrator's conduct to the child's response.

Duress, menace, and threats are coercive tools the criminal uses to

achieve his sexually assaultive goal. Section 288(b) recognizes that the defendant's use of such heinous methods elevates the criminality of his conduct. These instrumentalities heighten the severity of the crime irrespective of the actual impact on the child's will. Thus, these coercive tools are properly viewed objectively, in terms of the sexual goals the defendant hopes to accomplish by using them on the child.

The use of instrumentalities of force and violence aggravate the perpetrator's conduct even if the child "consents." The means employed by the perpetrator render the lewd act more blameworthy, irrespective of whether those means were necessary to overcome the will of the child, or, instead, were gratuitously employed. As Justice Mihara's dissent below pointed out:

> While the fact that the victim actually consents to a lewd act might render the use of force unnecessary, the victim's actual consent does not eliminate the fact that the defendant actually uses violence, compulsion or constraint in the commission of the lewd act, nor does the victim's consent diminish the defendant's culpability or immunize the defendant from suffering the penal consequences that arise from a forcible lewd act. . . . The perpetrator may use force because he or she is not aware that the victim is willing, or may engage in gratuitous violence notwithstanding the victim's willing compliance.

(Conc. & Dis. Opn. at p. 9.)

The *Cicero* dissent made this same point. "[U]nder the plain language of the statute, the act in subdivision (b) can be committed *with* knowing consent and still be a violation of the subdivision, if force is used. Force is limited to something the *perpetrator* applies; it is independent of the actions or thoughts of the under-14 year old victim." (*Cicero*, *supra*, 157 Cal.App.3d at p. 488 (dis. opn. of Regan, P.J.); see also *People v. Quinones* (1988) 202 Cal.App.3d 1154, 1158 [endorsing the dissent's view].) Accordingly, force is properly viewed in relation to the severity of the perpetrator's conduct, not the response of the child.

The same holds true for the other instrumentalities in the statute cited by *Cicero*. Duress as used in section 288(b), is defined in terms of a *reasonable person* in the victim's position. The Court of Appeal in *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50, first identified the proper standard for duress:

> Taking in part from [the dictionary] definition, we find duress as used in the context of section 288 to mean a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted.

(*Ibid.*; see also *People v. Leal* (2004) 33 Cal.4th 999, 1004-1005, 1009-1010 [endorsing *Pitmon*'s definition of duress for section 288(b)].) The CALCRIM instruction on duress reflects this objective approach to duress, while directing the jury to view the reasonable person standard in relation to victim's age and circumstances. It provides:

> *Duress* means a direct or implied threat of force, violence, danger, hardship, or retribution that causes a reasonable person to do [or submit to] something that he or she would not otherwise do [or submit to]. When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the child and (his/her) relationship to the defendant.

(CALCRIM No. 1111.)

Thus, overcoming the child's will is unnecessary for a finding of duress. What is necessary is that the defendant make threats designed to cause a child to submit to the sexual assault. The focus properly remains on the defendant's conduct, not the child's response. As Justice Mihara observed below,

> While a perpetrator may not *need* to utilize actual or implied threats to coerce the participation of a willing victim in a lewd act, the perpetrator nevertheless may in fact utilize such threats either gratuitously or due to his or her unawareness of the child victim's actual consent. Notably, duress is defined in terms of the objective impact of the perpetrator's conduct on a "reasonable person," rather than in terms of the subjective impact

> on the actual victim. As is true with force, the child victim's actual consent does not eliminate the fact that the perpetrator utilizes duress in the commission of the lewd act, and does not reduce the perpetrator's culpability or eliminate the penal consequences that attach due to the perpetrator's conduct.

(Conc. & Dis. Opn. at p. 10; cf. *People v. Bergschneider* (1989) 211 Cal.App.3d 144, 154 ["It was for the jury to determine whether a reasonable adolescent in Tonia's position would have been coerced."], disapproved on other grounds by *People v. Griffin*, *supra*, 33 Cal.4th at p. 1028.)

The same holds for "menace," which is defined as "a threat, statement, or act showing an intent to injure someone." (CALCRIM No. 1111; see also CALJIC No. 10.42 ["'Menace' means a direct or implied threat, declaration, or act that shows an intention to inflict an injury upon another."].) The use of threats of great bodily harm or menace elevates the seriousness of the defendant's actions regardless of the impact of the threats on the child's will.

Cicero expressed concern that "it is semantically unreasonable to amputate from the concept of 'menace' the requirement that an act be undertaken 'against the will of the victim.' The latter concept is necessary to any coherent meaning of 'menace.'" (*Cicero*, *supra*, 157 Cal.App.3d at p. 478.) It suggested that "similar arguments could be constructed to demonstrate the terms 'duress' and 'threats' have no useful meaning absent a consideration of their effect on the will of a victim." (*Ibid.*)

These concerns conflate the intent of the defendant with the effect on the child. The "concepts" of menace, duress, and threat, even when directed at overcoming the will of the victim, are properly viewed as tools designed to accomplish the goal of coercion. The goal need not be achieved, nor must the child be unwilling, to censure the use of these instrumentalities of coercion. Nor does the absence of a consent defense "amputate" the legal concepts of duress or menace. Force, violence, duress, menace, etc. respecting a lewd act cannot in the legal sense be used "against" a child's will, because California law

recognizes no capacity of children under 14 years old to give assent to a touching of the child committed with sexual intent. Rather, the preclusion of a consent defense maintains the focus on the defendant's conduct and purpose, rather than the effect on the child.

The fact that force, duress, menace, or threats are viewed objectively does not mean that the child's responses are irrelevant. The child's responses may be informative as an evidentiary matter in evaluating the degree of force or the strength of the coercion. A child's *consent*, however, has no legal significance, because it does negate proof that the defendant, in committing the lewd conduct, employed one or more of the instrumentalities that aggravate culpability.

Appellant observes in his answer to the petition for review that the Legislature amended section 288(b), to replace "threat of great bodily harm" with "fear of immediate and unlawful bodily injury on the victim or another person." (See Stats. 1986, ch. 1299, § 4.) Appellant correctly observes that fear is subjective. He incorrectly asserts that the use of fear supports *Cicero*'s finding that the crime must be against the will of the child. The legislative substitution of fear for threats occurred in 1986. It does not alter the legislative history of the 1981 amendment, discussed *ante*, demonstrating the intent to eliminate any consent defense. Moreover, the Legislature's replacement of objective threats with subjective fear does not reflect an intent to implicitly incorporate a consent defense into section 288(b). The fear requirement is still tied to the actions of the defendant because it contains both subjective and objective components. As defined in CALCRIM No. 1111, "An act is accomplished by *fear* if the child is actually *and reasonably* afraid [or (he/she) is actually but unreasonably afraid and the defendant knows of (his/her) fear and takes advantage of it.]" Thus, not only must the child be subjectively afraid, the fear, whatever its source, must be objectively reasonable.

Alternatively, "[e]ven unreasonable fear of immediate bodily injury may suffice *if the accused knowingly takes advantage of that fear* in order to accomplish a sexual offense." (*People v. Cardenas* (1994) 21 Cal.App.4th 927, 940, italics added.)

The fear component is properly evaluated in relation to the severity of the perpetrator's actions, not the child's judgment. The inclusion of fear as an aggravator serves as an additional protection for child victims of sexual exploitation and signals no adoption of a consent defense. It is difficult to imagine how consent would function as a legal *defense* to fear. While testimony of a child's willingness to engage in lewd conduct with the defendant may serve as evidence to show, as a factual matter, that the child was not "actually afraid," it has no legal significance as a consent defense. Even when the prosecution alleges the defendant placed the victim in fear, CALCRIM No. 1111 correctly identifies the applicable law from *Olsen* that "[i]t is not a defense that the child may have consented to the act."

E. *Cicero* Erred by Focusing on Factual Consent Instead of Legal Consent

Cicero examined sociological studies to demonstrate that some children below the age of 14 have the mental capacity to "consent," and experience sexual encounters. (*Cicero*, *supra*, 157 Cal.App.3d at pp. 483-485.) This empirical observation misses the point. The question is not whether some children as a class may be sexual experienced or capable of understanding sexual behavior, but whether the law assigns to any particular child's behavior a significance that diminishes the perpetrator's culpability for committing the lewd acts on that child.

The Court of Appeal in *People v. Hillhouse* (2003) 109 Cal.App.4th 1612, 1619-1620, made this point in distinguishing oral copulation of a minor from oral copulation of a mentally disabled victim. *Hillhouse* observed:

> Contrary to defendant's contention, we would not assume—nor would we infer a legislative presumption—that the average 14 year old in our current society does not possess the intelligence capable of understanding the nature and consequences of a sexual act. It is teenagers' judgment and impulse control, not his or her knowledge or intelligence, which tend to be problematic. "'[M]inors are treated differently from adults in our laws, which reflects the simple truth derived from communal experience that juveniles as a class have not the level of maturation and responsibility that we presume in adults and consider desirable for full participation in the rights and duties of modern life. [¶] . . . Adolescents "are more vulnerable, more impulsive, and less self-disciplined than adults," and are without the same "capacity to control their conduct and to think in long-range terms."'" (*American Academy of Pediatrics v. Lungren* [(1997)] 16 Cal.4th [307,] 395-396 (dis. opn. of Mosk, J.), quoting *Stanford v. Kentucky* (1989) 492 U.S. 361, 395 (dis. opn. of Brennan, J.).) It is for those reasons that our laws governing sexual contact with minors make it irrelevant, as a general rule, whether the minor consented.

(*Ibid.*, alterations in original.)

Hillhouse's observation's are equally applicable here. The Legislature removed the "against the will of the victim" language from section 288(b), to eliminate any consent defense in recognition that children are more immature, vulnerable, and impulsive, and likely to make poor decisions without appreciating the consequences of such decisions. By creating a consent defense to forcible lewd acts on a child, *Cicero* wrongly shifted the focus from the perpetrator's actions to the decision-making skills of each individual child. Rewarding the perpetrator the benefit of poor choices by the child he assaults undermines the central protective purpose of the statute.

F. *Cicero*'s Force Standard Is Unsupported by the Language of Section 288 and Inconsistent with the Legal Principles It Purports to Apply

Cicero's incorporation of a consent defense for aggravated lewd acts produces an inconsistent standard for force without support in the statute.

Cicero states, "We presume all would agree that one who inflicts physical harm on a child in the commission of a lewd act is properly convicted of a violation of subdivision (b) 'by use of force.'" (*Cicero*, *supra*, 157 Cal.App.3d at p. 474.) *Cicero* then differentiated cases of physical harm from cases involving no physical injury. "[I]n cases where 'force' is charged under subdivision (b), and the People pursue a theory that physical force was used on a child, and the child is not physically harmed, it is incumbent upon the People to prove that the defendant used physical force substantially different from or substantially greater than that necessary to accomplish the lewd act itself." (*Ibid.*) *Cicero* summarized its two-level definition of force as follows:

> Where a defendant uses physical force to commit a lewd act upon a child under the age of 14, and the child suffers physical harm as a consequence, the defendant has committed a lewd act "by use of force" under subdivision (b). Consent is no defense. Where no physical harm to the child has occurred, the prosecution has the burden of proving (1) that the defendant used physical force substantially different from or substantially in excess of that required for the lewd act and (2) that the lewd act was accomplished against the will of the victim.

(*Id.* at p. 484.)

Although *Cicero* held that the Legislature intended to require force that overcomes the will of the child, it differentiated force causing injury from force not causing injury, with the child's consent applicable only in the latter case. *Cicero*'s furcation of the term "force" is without support in section 288(b). Nor did the Legislature need to split the meaning of the term "force" in any such manner. Any "physical force substantially different from or substantially greater than that necessary to accomplish the lewd act itself," encompasses force that results in physical injury and force that does not. And since a slight touching is sufficient to constitute a lewd act, the application of force that causes actual injury usually establishes the force was substantially different from or substantially greater than that necessary for the lewd act itself.

Notably, in rape cases, where sex acts are criminalized when forced upon victims against their will, the use of force resulting in physical injury or harm does not render a consent defense legally unavailable. (See, e.g., *People v. Perez* (1987) 194 Cal.App.3d 525, 528-529 [defendant's testimony that he administered consensual "monkey bites" resulting in bruising and injury to victim sufficient to warrant instruction on consent as a defense to rape notwithstanding injuries]; cf. *People v. Walker* (2006) 139 Cal.App.4th 782, 807 & fn. 20 [permitting prior sex offense evidence to rebut possible claim that sex was consensual and injuries resulted because victim liked rough sex]; see generally *People v. Griffin*, *supra*, 33 Cal.4th at p. 1027.) *Cicero* presumably justified its physical harm limitation on the child's consent to aggravated lewd acts because physical injury objectively evidences the application of force. Yet *Cicero* chose not to allow for a child consent defense even though a consent defense could be asserted in a comparable rape context.

The challenges inherent in *Cicero*'s dual definition of force are eliminated by rejecting an implied "against the will of the child" requirement and by embracing the singular definition of force required for section 288(b) as that "substantially different from or substantially greater than the force needed to accomplish the act itself." (CALCRIM No. 1111.)

G. *Cicero*'s Sentencing Concerns

Cicero's attempt to more clearly articulate a definition of "force" is understandable given the significant sentencing disparity that attaches to lewd acts committed by force and those that are not. (See *Cicero*, *supra*, 157 Cal.App.3d at p. 473.) As *Cicero* noted in describing that disparity, sentencing courts cannot grant probation to defendants convicted of violating section 288(b), and defendants convicted of two or more offenses under section 288(b) face mandatory state prison terms at least twice as long as defendants who commit multiple offenses under section 288(a). (*Id.* at pp. 473-474; see Pen.

Code § 667.6, subd. (d).) *Cicero* interpreted those distinctions as rendering section 288(b) "manifestly a more serious offense" than one under section 288(a). (*Id.* at p. 473.)

Cicero's search for a clearer definition of force that aligns with section 288(b) sentencing also was driven by the "broad spectrum of conduct, age groups and relationships" to which section 288 applies. (*Cicero*, *supra*, 157 Cal.App.3d at p. 479.) As *Cicero* observed, section 288's lewd acts range from a mere touching to oral copulation; the statute includes victims of all ages from infants to teenagers; and it exempts no class or category of relationship, including minors. (*Ibid.*) And so *Cicero* was concerned that, absent a consent defense, the "harsh contours" of section 288(b) would cover "the 16-year-old boy who gives his 13-year-old girl friend a piggy-back ride into her bedroom, there to fondle her with her consent." (*Id.* at p. 480.) Punishing that hypothetical 16-year-old in the same manner as those who commit lewd acts by violence or threats of great bodily injury struck *Cicero* as an unintended result. (*Ibid.*)

Cicero thus was concerned that defining force needed for section 288(b) merely as physical force "substantially different from or substantially greater than that necessary to commit the lewd act" would punish alike "the stranger who drags the teenage girl into the bushes" and those far less culpable with "the potential formidable penalties of subdivision (b)." (*Cicero*, *supra*, 157 Cal.App.3d at p. 479.) As a result, *Cicero* attempted to align the coercion associated with force with its view of the psychological coercion associated with the other section 288(b) conduct of "duress, menace or threat of great bodily harm" to distinguish the significantly different conduct covered by, and harsher sentencing associated with, section 288(b) from that covered by section 288(a). (*Id.* at pp. 477-479.)

Accordingly, *Cicero*'s motivation to ensure that 288(b) captures only

conduct proportional to its severe sentencing is not irrational. Its use of a consent defense to align the definition of section 288(b)'s forcible lewd acts with its severe sentencing consequences, however, is inconsistent with the Legislature's policy of protecting the innocence of children.

Ultimately, it is the traditional definition of "force," recognized by this Court in *Griffin* and by the standard CALCRIM instruction, that operates as the proper means of limiting the sweep of section 288(b). To make that limit effective, courts must continue to give substantive meaning to the well-established "force" standard. Trial judges and reviewing courts must remain vigilant in ensuring that the term "substantial" in the definition of force as being "substantially different from or substantially greater than the force needed to accomplish the act itself" is not diluted or weakened. Courts must maintain the focus on the *substantiality* of the amount of force or the *objective severity* of the duress to maintain a meaningful differentiation between less culpable and more culpable forms of lewd acts on a child and to ensure that the most severe punishments are reserved for the worst offenders.

There is a further reason why the Legislature's preclusion of any consent defense does not invite abuse in the application of subdivision (b). Not only must the force be substantially greater than or different from that needed to accomplish the act itself, the statute also requires that the act be accomplished "by use of" that force, i.e., the defendant must use the force as a tool to accomplish his lewd purpose. Force that is merely incidental or unconnected to the lewd conduct would not trigger the application of subdivision (b).[10/]

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10. Thus, a brawny hug used to show affection that is accompanied by a lewd touching as an afterthought would not constitute lewd conduct "by use of" force, whereas a strong hug used to forcibly restrain the child and prevent her from pulling away from the lewd touching would. Under the latter example, the defendant's exertion of control over the child demonstrates the defendant's "use" of force to commit the lewd act.

The concerns of overreaching raised by *Cicero* should be resolved by maintaining focus on the twin safeguards already inherent in the definitions of force and duress, namely the substantiality of the force or objective severity of the threat, coupled with the requirement that the defendant must, in fact, be using these tools to accomplish his lewd purpose. With this recognition, a consent defense is not only unsupported by law or statute, it is unnecessary to accomplish the protective goals motivating *Cicero*'s decision.

In this case, the trial court gave the correct definition of force and duress contained in CALCRIM No. 1111. The trial court also correctly instructed the jury with the bracketed portion of CALCRIM No. 1111 that "[i]t is not a defense that the child may have consented to the act." (Aug RT-B 20.) The CALCRIM instruction was correct.

II.

ANY ERROR IN INSTRUCTING THAT CONSENT IS NOT A DEFENSE TO AGGRAVATED LEWD ACTS ON A CHILD WAS HARMLESS

The Court of Appeal below concluded that the trial court's instruction that consent is not a defense was prejudicial to the defendant and required reversal. That finding is not supported by the record.

Assuming the trial court erroneously instructed that "[i]t is not a defense that the child may have consented to the act," the Court must determine the impact of that error on appellant's trial. *Cicero* held that consent "is an affirmative defense to a charged violation of [section 288,] subdivision (b)." (*Cicero*, *supra*, 157 Cal.App.3d at p. 482.) This Court has not articulated the standard for assessing prejudice when the trial court gives an instruction foreclosing an affirmative defense. (*People v. Salas* (2006) 37 Cal.4th 967,

983-984 & fn. 8.)[11/] Resolution of that question is not necessary in this case because the alleged error was harmless beyond a reasonable doubt. There was no evidence of consent that would give rise to a valid consent defense to the aggravated lewd acts committed on the children in this case.

Crystal informed the police that appellant committed the lewd acts by force and duress despite her resistance. She recounted that, while they lived in the same house, appellant demanded that she French kiss him. She refused. Appellant threatened he would tell her mother lies about her, including that she had a boyfriend and was doing inappropriate "stuff." (2RT 88; 4RT 304.)

Crystal described how appellant escalated his conduct when committing the two charged counts.

Count 2 involved the lewd acts by appellant at the end of April 2005, when he gave Crystal a ride to school. Crystal described to the police how appellant surprised her by reclining her car seat and climbing on top of her. (2RT 77-78, 80-83; 3RT 172; 4RT 309-310.) While she was pinned under appellant, he kissed her and fondled her buttocks. He began fondling her breasts, but she pushed his hand away. (2RT 77-78, 80-83; 4RT 309-310.) Appellant "humped" her, rubbing his penis against her crotch while still clothed. (2RT 80-81, 83; 3RT 172; 4RT 310.) She described appellant's actions as "disgusting." (2RT 80.) She explained to the police that she tried to

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11. The United States Supreme Court has indicated that the constitutional right to present a defense is limited to improper exclusion of defense evidence or defense witnesses and does not extend to instructional theories. (*Gilmore v. Taylor* (1993) 508 U.S. 333, 341-344.) Absent a constitutional violation, the appropriate standard for state law error is set out in *People v. Watson* (1956) 46 Cal.2d 818, 836. (Cf. *People v. Felix* (2001) 92 Cal.App.4th 905, 911 [applying *Watson* state harmless error standard for failure to instruct on good faith belief of consent for kidnapping]; but cf. *People v. Quach* (2004) 116 Cal.App.4th 294, 303 [applying federal standard articulated in *Chapman v. California* (1967) 386 U.S. 18, 24, for failing to instruct on affirmative defense].)

get out of the car during this attack but appellant locked the door to prevent her escape. (2RT 81; 4RT 309-310.) Crystal tried to protect herself from his assault by keeping her legs pressed together and turning her body away from him as he humped her. (4RT 306.)

In count 1, the school parking lot incident, Crystal told the police that after appellant called her over and the two went around the corner, appellant got out of the car and began hugging her. (1RT 70-71; 4RT 338.) Appellant grabbed her around the waist, pulled her toward him and started French kissing her. (1RT 70-72; 2RT 197; 4RT 338.) She did not want to kiss him and tried to push away from him, but he grabbed her and pulled her back and continued despite her resistance. (1RT 70-72; 2RT 197; 4RT 339.) Appellant pressed his groin against her thigh and rubbed his erect penis against her as he held her, even as she tried to push away. (1RT 74-75, 83-84; 2RT 197.) Crystal was only able to free herself from appellant's grasp when the school bell rang and she told him she had to get to class and pushed herself away from him. (2RT 67-68; 4RT 339.)

At trial, Crystal acknowledged these statements but claimed they were all lies, and that neither charged incident happened. She denied appellant ever French kissed, fondled, or "humped" her. She insisted she made up the entire story. (2RT 64-68, 72-73, 75, 77-78; 3RT 170, 172-173, 187-188.)

Crystal's testimony presented two stark choices for the jury. Either appellant forcibly assaulted her in the car against her will and without consent, by kissing, fondling, and rubbing his penis against her groin, thwarting her efforts to escape by locking the door and continuing the assault despite her efforts to fend him off by turning her body and pressing her legs together, or he never touched her. Either he overcame her will on the sidewalk outside the school by forcibly pulling her against his body and holding her tight as he kissed and fondled her and rubbed his erect penis against her, despite her efforts

to push away from him, or he committed no lewd act whatsoever. The evidence in this case presented no middle ground on which the jury could consider a consent defense.

The same holds true for Reyna, who presented a singular account of appellant's aggravated lewd conduct in his bedroom as charged in count 4. Reyna described how appellant used a ruse to lure her into his bedroom alone. (3RT 227-229.) There, he tried to show her a pornographic movie, which she refused to watch. (3RT 230-231.) Appellant took out a condom and said that he wanted to have sex with her. She got scared and made it clear she did not want to have sex. (3RT 231.) She said she had to leave, but tripped on a cord and fell on the bed as she did so. Appellant used the opportunity to begin hugging her. Reyna gave appellant a goodbye hug and tried to get off the bed, but appellant pulled her back down onto the bed and fondled and kissed her. (3RT 232-236, 261-262.) Appellant reached down and fondled Reyna her between her legs, but she pulled his hand away, which upset him. (3RT 236-238, 262.) She refused to pull down his pants, so he pulled them down himself. (3RT 240-242.) She resisted his efforts to remove her pants. (3RT 242, 262-263.) Appellant then forced Reyna to touch his erect penis through his boxer shorts by taking hold of Reyna's hand with in a tight, squeezing grip, and placing it onto his crotch. (3RT 240, 264-265, 269.) He held her hand on his penis for a few seconds before she was able to pull it away. (3RT 240, 264-265.)

Nothing in Reyna's account supports a consent defense. Reyna never suggested that she consented to any lewd acts in appellant's bedroom. To the contrary, her account detailed her repeated, albeit unsuccessful, efforts to thwart appellant's sexual assaults as he restrained her, fondled her, and forced her to touch his genitals.

The Court of Appeal found evidence of a potential consent defense. We

quote its complete analysis:

> Here, the People and the trial court implicitly recognized that evidence of consent existed by telling the jury that consent was not a defense. Indeed, evidence supports that [Crystal] had been annoyed by defendant's lack of attention toward her and jealous of his relationship with her friend but cared about him nevertheless; it supports that [Crystal] initiated the school-yard incident, was reluctant to identify defendant as the person with her in the school yard, and warned defendant that he was under scrutiny because of the school-yard incident; it supports that the car incident occurred when [Crystal] accepted a ride to school from defendant after he had moved from [Crystal]'s home because of his sexualized behavior toward [Crystal]; and it supports that [Reyna] was attracted to defendant and remained with him during the apartment incident for an hour and a half after discovering the ruse that brought her to the apartment.

(Maj. Opn. at p. 11.)

This analysis is flawed. First, neither the court's instruction nor the prosecution's argument were evidence. The instruction and argument no more reflect evidence of consent than an instruction and argument admonishing against discussions of the case before submission would reflect evidence of premature deliberations by the jury. Such bootstrapping would render instructional error such as this prejudicial in virtually all cases.

Second, the Court of Appeal ignored that the consent at issue is consent to the sexual *act* (*Cicero*, *supra*, 157 Cal.App.3d at p. 482), not to being in appellant's presence, or to fondness for him. The Court of Appeal pointed to evidence of the girls' friendship with appellant, their assent to be in his presence, and in Reyna's case attraction to him. But the record is devoid of evidence that Crystal consented to the French kissing, fondling, or rubbing of appellant's penis against her, or that Reyna consented to appellant's kissing, fondling, or forcing her to fondle his penis. As Justice Mihara observed below:

> Not the slightest evidence of consent was introduced at trial. Both [Crystal] and [Reyna] confirmed that they *did not consent* to the lewd acts. [Crystal] never asserted that she kissed

> defendant or allowed him intimate contact with her in the school parking lot or in his car due to his threats. She claimed that defendant's physical force overcame her resistance on both occasions. [Reyna] did not testify that she acquiesced to the lewd conduct in the apartment. Instead, she testified that her fear of defendant and his forceful conduct motivated her resistance and led her to leave the apartment soon after defendant commenced the lewd acts. Defendant did not testify at trial or introduce any evidence. His trial counsel never intimated or suggested that either girl consented to a lewd act or that defendant's defense was premised on consent. Under these circumstances, there is no reasonable possibility that the trial court's instruction that consent is not a defense in any way "contribute[d] to the jury's verdict." (*People v. Lamas* (2007) 42 Cal.4th 516, 526.)

(Conc. & Dis. Opn. at pp. 10-11.)

Given the absence of any evidence of consent, the trial court's instruction that consent is not a defense was necessarily harmless under any standard.

CONCLUSION

Accordingly, respondent respectfully requests that the Court of Appeal's decision be reversed and that the convictions for aggravated lewd acts on a child be reinstated.

Dated: March 11, 2009

Respectfully submitted,

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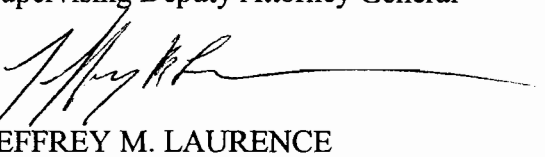

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CERTIFICATE OF COMPLIANCE

I certify that the attached OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 16,289 words.

Dated: March 11, 2009

Respectfully submitted,

EDMUND G. BROWN JR.
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Jaime Vargas Soto*** No.:**S167531**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On March 11, 2009, I served the attached **OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 11, 2009, at San Francisco, California.

S. Chiang
Declarant

Signature

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