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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.

Case No. S167531

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

REPLY BRIEF

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ARGUMENT

Our Opening Brief on the Merits demonstrates that consent is not a defense to a charge of lewd acts on a child in violation of Penal Code section 288, subdivision (b) (hereinafter "section 288(b)"). By eliminating the requirement that the crime must be committed "against the will of the victim" from an earlier version of section 288(b), the Legislature expressed its intent to eliminate consent by a child as a defense to aggravated lewd acts.

In his Answer Brief, appellant primarily urges arguments set out in *People v. Cicero* (1984) 157 Cal.App.3d 465, a decision which we thoroughly addressed in our opening brief. Similarly, appellant's prejudice analysis essentially tracks the approach taken by the Majority Opinion below, which we countered in our opening brief. Accordingly, this reply addresses only appellant's claims that merit additional response.

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

A. Legislative Intent

In the Opening Brief, we set out in detail the legislative history of the 1981 amendment to section 288(b) as demonstrating the Legislature's intent to eliminate any child-consent defense to aggravated lewd acts. Appellant asserts in his Answer Brief that the legislative history is "inconclusive." (AB at 30.) He does not dispute the content of the committee analyses relied upon by the People. Instead, he questions their significance, positing that they "express polemical contests between warring sides, and do not necessarily reflect the opinion of the majority of the legislators." (AB at 32.) Appellant's position is untenable. The

decision to eliminate any child-consent defense in section 288(b) cases. "'It is ordinarily to be presumed that the Legislature by deleting an express provision of a statute intended a substantial change in the law.'" (*People v. Barnes* (1986) 42 Cal.3d 284, 295, quoting *People v. Valentine* (1946) 28 Cal.2d 121, 142.) The choice of retaining or eliminating the "against the will of the victim" language permitting a consent defense was squarely presented and hotly contested, with the reasons for eliminating that language clearly spelled out in the committee analyses circulated before the final vote.

More importantly, these committee analyses demonstrate that the Legislature viewed the "against the will of the victim" language as the only source of a child-consent defense in section 288. The Legislature did not conceive that a child-consent defense remained an unstated, yet implicit, component of the definition of the terms "force," "duress," or "menace." Nor would the Legislature have expected courts to insert such a defense into the aggravating elements of the crime of lewd act after it deliberately had eliminated the "against the will of the victim" language in the original statute.

Appellant suggests that the committee analyses we rely on refer to early proposals in SB 586 that were never adopted, and thus are not persuasive. (AB at 32, 41.) To the contrary, the discussions regarding elimination of the "against the will" language did not refer to *creating new* provisions, but rather to *removing* that term from the then-existing version of section 288(b), irrespective of the other provisions proposed in the original draft of SB 586. (See Respondent's Request for Judicial Notice, Exhibits A-H.) Even as SB 586's proposals to restructure section 288(b) evolved in the legislative process, the legislative committee analyses recommending removal of the phrase "against the will of the victim" from the 1979 version of section 288(b) were consistent, clear, and specifically

B. The Rejection of *Cicero*'s Reincorporation of a Child-Consent Defense Applies Equally to Force and Duress

Notwithstanding the Legislature's intent to eliminate any child-consent defense by deleting the "against the will of the victim" language from section 288(b), appellant contends that the defense is still inherent in the plain meaning of the term "duress." Appellant points to *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50-51, which referred to several dictionary definitions of duress as part of its effort to identify the proper meaning of the term for purposes of instructing the jury. (AB at 24-25.) As appellant acknowledges, *Pitmon* found duress is properly defined by an *objective* standard, namely, "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.*, italics added; see also *People v. Leal* (2004) 33 Cal.4th 999, 1004-1005, 1009-1010 [endorsing *Pitmon*'s reasonable child definition of duress for section 288(b)]; see also

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certain class of forcible sex crimes against children. (AB at 56.) The enactment of section 269 in 1994 does not advance appellant's claim regarding the amendment to section 288(b) in 1981. Section 269 is notable for utilizing an entirely different legislative approach from section 288(b), namely incorporating by statutory enumeration the adult sex crimes of rape, sodomy, oral copulation, and sexual penetration, each of which contains an express statutory requirement that the crime be against the will of the victim. Section 269's enumeration of qualifying offenses does not include section 288, lewd acts on a child. Contrary to appellant's claim, section 269 demonstrates that the Legislature knows how to incorporate an "against the will" requirement as a statutory component when it so chooses, yet did not do so for section 288(b). (Cf. *In re Asencio* (2008) 166 Cal.App.4th 1195, 1200 [recognizing difference between force definitions for § 269 and § 288(b) that arise from different legislative approaches to the crimes defined by § 269 and § 288(b)].)

"against the will of the victim" requirement for all of section 288(b), notwithstanding the Legislature's elimination of that requirement. Thus, the case law criticizing *Cicero*'s decision to resurrect the against-the-will requirement necessarily encompasses criticism of its application to duress and menace, as well as to force and violence.

Appellant also points to cases which cite to the victim's actual compulsion and fear in finding sufficient evidence to support a conviction for violating section 288(b) by use of duress. (AB at 28; see, e.g., *People v. Veale* (2008) 160 Cal.App.4th 40, 70.) Appellant contends that substantial evidence analysis looking to actual compulsion demonstrates that duress requires overcoming the will and thus includes a consent defense. Appellant's argument conflates the defendant's conduct in accomplishing the act with the effect of that conduct on the victim.

In evaluating the sufficiency of the evidence under section 288(b), a child's testimony that she felt compelled against her will by duress to participate is strong evidence that the defendant *used* objectively sufficient duress. Yet, that is no different than looking to evidence that a victim suffered great bodily injury as showing the defendant committed an aggravated assault "*by . . . means of* force likely to produce great bodily injury," within the meaning of Penal Code section 245. The actual effect on the victim is helpful but not necessary as proof of the *aggravated means used to accomplish the act.* (See, e.g., *People v. Richardson* (1972) 23 Cal.App.3d 403, 410-411 ["'Actual bodily injury is not a necessary element of [section 245], but if such injury is inflicted its nature and extent are to be considered in connection with all the evidence in determining whether the means used and the manner in which it was used were such that they were likely to produce great bodily injury.'"]; *People v. Armstrong* (1992) 8 Cal.App.4th 1060, 1065 [same].) Similarly, in section 288(b) cases, courts are entitled to consider that, in a particular case, the victim's will was

Drawing an inference of legislative ratification from the failure to enact a statute abrogating *Cicero* is inappropriate in this case. First, the Legislature has not been silent on this question. It spoke clearly in the original 1981 amendment by deleting the very language *Cicero* subsequently read back into the statute in 1984.

Second, *Cicero* itself was a split decision, with a dissent on this very point. (See *People v. Cicero*, *supra*, 157 Cal.App.3d pp. 487-488 (dis. opn. of Regan, J.).) Consequently, at the time of the first amendment to section 288(b) in 1986, the two-year-old split decision in *Cicero* could hardly qualify as "a *consistent and long-standing* judicial interpretation of its operative language." (*People v. Escobar*, *supra*, 3 Cal.4th at pp. 750-751, italics added.) Two years later—several months before the 1988 amendment to section 288, and well before the 1994 amendment to subdivision (b) of section 288—the Court of Appeal in *People v. Quinones* (1988) 202 Cal.App.3d 1154, 1158, disagreed with the *Cicero* majority and embraced the dissenting view. (See Stats. 1988, ch. 1398, § 1 [enrolled September 27, 1988]; Stats. 1993-94, 1st Ex. Sess., ch. 60, § 1 [enrolled September 27, 1994.].) Likewise, several months before the 1994 amendment to section 288(b), the Court of Appeal in *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937, footnote 7, reiterated that consent is not a defense to section 288(b).

This judicial history admits of only one conclusion. There is no "consistent and long-standing judicial interpretation of [section 288(b)'s] operative language" in which to acquiesce. (See *People v. Escobar*, *supra*, 3 Cal.4th at p. 751 [rejecting inference of implied ratification despite legislative silence during subsequent amendments]; accord *People v. Morante* (1999) 20 Cal.4th 403, 430; *People v. King* (1993) 5 Cal.4th 59, 76-77.)

(*People v. Sandoval* (2007) 41 Cal.4th 825, 855 ["[J]udicial decisions are reviewed under 'core due process concepts of notice, foreseeability, and, in particular, the right to fair warning.'"].) "Thus, holding a defendant criminally responsible for conduct that he could not reasonably anticipate would be proscribed violates due process because the law must give sufficient warning so that individuals 'may conduct themselves so as to avoid that which is forbidden.'" (*People v. Davis*, *supra*, 7 Cal.4th at p. 811, quoting *Rose v. Locke* (1975) 423 U.S. 48, 50.)

Rejection of a child-consent defense in section 288(b) cases would not constitute an unforeseeable change in the criminal law of this state. As detailed in our Opening Brief, prior to *Cicero*, both case law and state policy rejected any child-consent defense to lewd acts. Indeed, the principle was long-standing and uniform. (See *People v. Olsen* (1984) 36 Cal.3d 638, 645 ["'[A] violation of section 288 does not involve consent of any sort.'"]; *People v. Toliver* (1969) 270 Cal.App.2d 492, 469; *People v. Simcich* (1949) 91 Cal.App.2d 524, 525; *People v. Parker* (1925) 74 Cal.App. 540, 545-546; *People v. Totman* (1901) 135 Cal. 133, 135; *People v. Roach* (1900) 129 Cal. 33, 34-35; *People v. Griffin* (1897) 117 Cal. 583, 586-587; *People v. Ratz* (1896) 115 Cal. 132, 134-135; *People v. Verdegreen* (1895) 106 Cal. 211, 214-215.)[2]

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[2] Appellant's reliance on *People v. Tobias* (2001) 25 Cal.4th 327, 333, for an argument that these earlier cases are not good law, is misplaced. (AB at 53, fn. 2.) Appellant's contention overlooks the distinction this Court has drawn between crimes encompassing older children up to the age of 18, such as statutory rape—or incest in the case of *Tobias*—and section 288, which is limited to preadolescent children, i.e., under the age of 14. In the latter group of crimes, the Legislature consistently has declined to recognize a consent defense as a matter of law irrespective of the child's emotional capacity to consent. (Compare *Olsen*, *supra*, 36 Cal.3d at p. 648 and *People v. Toliver*, *supra*, 270 Cal.App.2d at pp. 494-469, with *People v. Hernandez* (1964) 61 Cal.2d 529, 533-536 and *People v. Tobias*, *supra*,

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prosecuted, the Courts of Appeal had required a showing of fetal viability before allowing a conviction under section 187, subdivision (a), to stand."].) Given that uniformity of authority, *Blakeley* and *Davis* were unforeseeable shifts for which the defendants lacked fair notice.

However, these due process concerns do not arise in the absence of uniformity of existing authority.

> As we pointed out [in *Davis*], previous appellate decisions had uniformly held that a conviction for fetal homicide required proof of fetal viability. (*Id.* at p. 811.) Therefore, in *Davis,* ex post facto principles precluded the imposition of criminal liability for conduct that at the time was not considered criminal, namely, causing the pregnant victim to miscarry. No similar ex post facto problem exists with respect to the "pattern of criminal gang activity" requirement of the STEP Act that defendant challenges here. Unlike the situation in *Davis*, there was no uniform appellate rule interpreting the pertinent statutory language contrary to our holding here when defendant committed the assault with a deadly weapon on Ivan Corral.

(*People v. Loeun* (1997) 17 Cal.4th 1, 11-12; see also *People v. Taylor* (2004) 32 Cal.4th 863, 871 ["Nor is our conclusion today 'an overruling of controlling authority or a sudden, unforeseeable enlargement of a statute' in violation of ex post facto or due process principles. [Citation.] Rather, unlike the situation in *Davis*, on which defendant relies, 'there was no uniform appellate rule interpreting the pertinent statutory language contrary to our holding here when defendant' killed Fansler and her fetus."]; see generally *Rogers v. Tennessee* (2001) 532 U.S. 451, 466 [rejecting due process challenge to state court's abolition of common law rule in Tennessee, noting that the abolition was not "'unexpected and indefensible' such that it offended the due process principle of fair warning"]; *People v. Sandoval, supra*, 41 Cal.4th at p. 857 [quoting *United States v. Lata* (1st Cir. 2005) 415 F.3d 107, 110-111, for the principle that "'[a]n after-the-offense enlargement of the contours of the crime or maximum sentence *by*

CONCLUSION

Accordingly, respondent respectfully requests that the judgment of the Court of Appeal as to the aggravated lewd act counts be reversed.

Dated: July 2, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF uses a 13 point Times New Roman font and contains 4,293 words.

Dated: July 2, 2009

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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.

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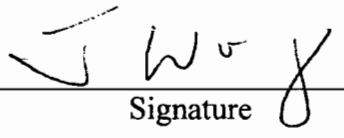
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