IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JAIME VARGAS SOTO, Defendant and Appellant.	No. S167531 Court of Appeal No. H030475 Santa Clara County Superior Court No. EE504317

ANSWER BRIEF ON THE MERITS

On Appeal from the Judgment of the Superior Court
of the State of California
in and for the County of Santa Clara
HON. AARON PERSKY

Heather MacKay, SBN 161434
P.O. Box 3112
Oakland, CA 94609
Telephone (510) 653-7507

Attorney for Appellant
Jaime Vargas Soto
By Appointment of the Court

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ISSUE PRESENTED

Does an instruction stating that consent is not a defense to a Penal Code section 288, subdivision (b)(1) charge undermine the prosecution's burden of proving that a lewd act with a child was committed "by use of force, violence, duress, menace or fear" and deprive the accused of the right to defend himself on the ground that the lewd act was undertaken with the child's consent?

INTRODUCTION

The dispute in this case concerns whether a lewd or lascivious act with a child under age 14 can be "committed by use of force, violence, duress, menace or fear" if the child consented to the acts. In other words, is it enough that the defendant applied some degree of physical force or made direct or implied threats, or must the defendant's actions actually have some

effect in compelling the child to submit to the lewd acts?

A majority of the Court of Appeal held that the trial court erred in this case by instructing the jury that consent is not a defense to a charge under section 288, subdivision (b). That ruling rests on 25 years of consistently-applied case law holding that subdivision (b)'s "duress" requirement inherently implies that the will of the victim was overcome; thus, an instruction telling the jury to ignore the child's consent undermines the prosecution's burden of proof and deprives the accused of a valid defense. Over this 25-year period, courts have also held that subdivision (b) crimes committed by use of "force" must likewise be non-consensual, since that is the interpretation of the statute that is most logical, most consistent with other provisions of subdivision (b) and other sex offense laws, and best carries out the Legislature's intent in assessing much more severe punishment for subdivision (b) crimes.

There is no legislative history addressing the meaning of duress or the difference between subdivision (a) and (b) crimes, and general statements made by various parties during debates over competing amendment proposals in 1981 should not override the prevailing judicial interpretation of section 288, subdivision (b). Moreover, the prevailing judicial interpretation has been accepted by the Legislature. Although it has amended section 288, subdivision (b) repeatedly, the Legislature has not re-written that subdivision to encompass consensual acts. In addition, the Legislature has adopted new provisions focusing on the subjective will of the child rather than the objective acts of the defendant; these include both an amendment to section 288, subdivision (b) and a new statute defining aggravated sexual assault of a child.

The prevailing judicial interpretation of section 288, subdivision (b)

also is consistent with the general legal principles pertaining to sex offenses. Under those rules, all sexual acts with minors are criminal, regardless of consent. However, the law also recognizes that some children are capable of consenting to some lewd acts, and that the existence or non-existence of consent is a valid basis upon which to gauge a defendant's culpability. The prevailing judicial interpretation of section 288 furthers both of these goals by making all lewd acts with children criminal, regardless of consent, and increasing the punishment for such acts when they are accomplished against the child's will.

The Court of Appeal properly held that the erroneous "consent is not a defense" instruction was prejudicial to the appellant in this case. The prosecution relied heavily on the theory that the lewd acts were committed by use of "duress;" alternatively, the prosecution alleged that the lewd acts were committed by use of force. There was ample evidence from which a reasonable jury might have found that appellant committed the alleged lewd acts, but that those acts were consensual rather than accomplished by duress or force.

STATEMENT OF THE CASE AND FACTS

A. Charges Concerning Crystal Doe

Crystal Doe is appellant Jaime Soto's cousin. (2RT 60.) In the spring of 2005, Crystal was 12 years old and Jaime was 19 years old. (3RT 183; 2CT 290.) Jaime been living with Crystal's family, but then he went to live with other relatives, an aunt Griselda and cousin Sergio. (2RT 60-61, 116-117.) Even after Jaime moved out, Crystal saw him about three times a week when he was dropping Sergio off at the school that Sergio and Crystal both attended. (2RT 116-117.)

1. The Parking Lot Incident (Count One)

Crystal testified that she had been standing in front of her school on May 5, 2005 at about 7:30 a.m. when she saw Jaime driving by. (2RT 63, 115-116, 119-120; see also 4RT 284.) Crystal wanted to talk to Jaime because her 13-year-old friend Alma had said that she was going out with him; it was Crystal's impression that Alma and Jaime were more than just friends. Crystal was angry that they had been keeping secrets from her and because Jaime had stopped talking to her. (2RT 64-65, 123-124, 168; 3RT 185.)

Crystal called out to Jaime and motioned for him to drive around the corner and into the school parking lot. Jaime complied. (2RT 64, 120.) Jaime got out of the car and they talked for five minutes. (2RT 66-67.) Jaime said he was not going out with Alma. (2RT 68, 138.) Crystal thought he was lying, which made her even more angry, so she was going to leave. (2RT 68.) Jaime briefly held her arms to try to get her to stay. (2RT 66-68, 124-125.) The school bell rang, and Crystal did not want to be late for class, so she left and headed toward the school entrance. (2RT 67-68.) Crystal testified that Jaime did not kiss her, hug her, or rub any part of her body while they were in the parking lot. (2RT 67, 125.)

Meanwhile, Gloria Diaz, a school administrative employee, had arrived at about 7:30 a.m. (4RT 324.) Diaz saw Crystal in the staff parking lot and saw an older male in a red car who was waving at Crystal. (4RT 324-326.) Diaz watched them for two or three minutes, then got out of her car. (4RT 325-326.) Crystal noticed Diaz watching them. (4RT 326, 331-332.) Crystal then signaled for the man to drive away to the far end of the parking lot near the athletic field; Crystal walked alongside and talked with him as he drove. (4RT 326-328, 331-332.) Diaz went to the school office

and told Principal Larry Curb what she had seen. (4RT 284, 328.)

Principal Curb went outside between 7:40 a.m. and 8:00 a.m. (4RT 284, 329.) He saw Crystal walking toward the school, motioned to her, and asked her to come with him. (2RT 290.) Curb took Crystal to his office, and asked if she knew the man in the parking lot and if he was her boyfriend. (2RT 69.) Crystal said he was a friend, but not her boyfriend; she refused to give Jaime's name because she did not was to tell them who he was. (2RT 69, 127; 3RT 193; 4RT 286.) Crystal was afraid she was going to get in trouble with her mother for talking to Jaime when she was supposed to be in class. (2RT 127-128.) At some point, Crystal did tell Curb that her friend had kissed her either that morning or on a prior occasion. (4RT 286-287, 291.) Curb told Crystal he was going to call her mother and the police. (2RT 127; 4RT 287-288.) He then sent Crystal to class and had the school staff call her mother and the police. (2RT 69; 4RT 287-288.)

After she left the principal's office, Crystal used a friend's cell phone to call Jaime. She told him the principal had been asking about him. Jaime asked her to not tell anyone his name. (2RT 70, 121; 3RT 195-196.)

Crystal started crying in class. She was nervous because the principal thought Jaime was her boyfriend and too old for her and because she was going to have to talk to the police. She was also scared that her mother would be upset with her. (2RT 103-105; 3RT 178-179.) Crystal's teacher made her go back to the principal's office. (3RT 194-195; 4RT 291-292.)

Sunnyvale Police Officer Phebea Byrom then arrived at the school in response to Principal Curb's call. Officer Byrom interviewed Crystal. (4RT 335-336.) Crystal seemed embarrassed and afraid of being trouble.

(4RT 336.) Crystal was reluctant to give the name of the man she had met in the parking lot, but eventually she told Byrom Jaime's name, phone number and where he worked. (4RT 337.)

The story that Crystal told Officer Byrom about what had happened in the parking lot was very different than her trial testimony. Crystal said that she had been walking to school when Jaime pulled into the parking lot and flagged her down. Jaime got out of his car, grabbed her around the waist, hugged her and French-kissed her. (2RT 70-72; 4RT 338.) She tried to pull back and shove him away. (2RT 71-72; 4RT 339.) Jaime continued to hug her, but she broke away when she heard the principal call her name. (4RT 339.) Crystal also said that when she telephoned Jaime, he said he "would do something" to her if she told anyone what happened. (2RT 102.)

Detective Terry Schillinger interviewed Crystal a few days later. (2RT 73; 4RT 301-302.) Crystal's statement to Detective Schillinger was similar to what she said to Officer Byrom. Crystal told Detective Schillinger that Jaime had hugged and kissed her in the school parking lot. She also said Jaime had pressed himself against her so that she could feel his erect penis. (2RT 74-75.)

Crystal testified that she lied to Officer Byrom and Detective Schillinger and that Jaime did not kiss, hug or press against her when they were in the school parking lot. (2RT 67, 75; 3RT 170.) Also, Jaime never threatened her. (3RT 181, 195-196.) Crystal lied to the officers because she was mad at Jaime for ignoring her and not talking to her; she was also afraid of her mother. (2RT 72, 131.) Crystal had not thought that anything would happen to Jaime because of what she said. (2RT 72-73; 3RT 201.)

2. The Car Incident (Count Two)

When Detective Schillinger interviewed Crystal, she told him that Jaime had also touched her inappropriately a week or two before the parking lot incident. That time, Crystal had gotten a ride to school with Jaime in his red Honda. When the car was stopped, Jaime kissed Crystal, put the seat down, got on top of her, "humped" her, and touched her buttocks and stomach. (2RT 77, 80-82; 4RT 318.) Crystal didn't want to do this; she tried to turn away and keep her legs together. She also tried to open the car door to get out, but Jaime locked it. (2RT 77, 80-81; 4RT 306, 309-310.)

At trial, Crystal testified that this never happened and that she had lied to Detective Schillinger about it. (2RT 77-78; 3RT 172.) For that matter, Jaime's car was a two-seater and the seats did not even recline all the way back. (3RT 117-118, 204-205.) On the other hand, Schillinger testified that he had seen a red Honda CRX during his investigation that he thought was Jaime's car. He did not remember if it was a two- or four-seater, but it did appear to have reclining seats. (4RT 319.) Schillinger did not determine whether the car had automatic locks. (4RT 320.)

3. Preceding Events

Crystal testified that during the time Jaime lived with her family, he never touched her inappropriately. The most he did was give her friendly hugs, as he did with other family members, and kiss her on the cheek. (2RT 125-126; 3RT 187.) Jaime was Crystal's best friend, who listened to her when she talked about her problems and told her secrets. (2RT 111-112.) He told her she was pretty, which made her feel good. (2RT 112.) He gave her birthday and Christmas presents; one of the presents he gave her was a

ring that she wore when she testified at the trial. (2RT 110-112, 3 RT 175-176.) She would occasionally go places with him. (2RT 111-112; 3RT 174-175.)

Crystal's prior statements to Officer Byrom and Detective Schillinger were inconsistent with her testimony. When she talked to the officers, Crystal reported that when Jaime was living with her family, he had talked "dirty" to her and told her he wanted to hold her tight and be with her forever. Crystal was "grossed out" and told Jaime that she wasn't interested. (4RT 305, 342.) Jaime started giving her hugs and kissing her on the cheek, then began to go further, such as rubbing her back and butt. (2RT 87-89; 4RT 305-306, 342.) Crystal pushed Jaime away and ended the contact. (4RT 342.) Other times, he would pull her closer, kiss her and say he loved her. (2RT 88-89; 4RT 306.) At least once, Jaime pinched Crystal on the back and said he was going to tell her mother that she had a boyfriend if she didn't kiss him. (4RT 304.) Jaime also "humped" Crystal one time when he pushed her onto a bed, held her down and rubbed himself against her. (2RT 78-80, 83-84.) However, Jaime never touched her genitals or breasts and never put his hands down her pants. (2RT 89; 4RT 305, 308.)

Crystal also told the officers that her mother kicked Jaime out of the house after she saw him kissing her. (2RT 85; 4RT 307, 340-341.) Crystal's mother initially blamed Crystal for inviting Jaime's attentions. Crystal then talked to a friend at church who spoke to her mother. (2RT 75-76, 91; 4RT 307-308, 316.) Jaime told people that it was all her fault and that he didn't do anything wrong. (2RT 102.) After Crystal's mother kicked him out, Jaime came back one night, banged on Crystal's window with a rock and told her to open it; she was scared that he would break the

window. Jaime said thing like telling her he would never give her a last kiss. (2RT 85-86; 4RT 308-309.)

At trial, Crystal testified that she had lied to the police. Jaime never touched her inappropriately and never told her he loved her. Crystal did not know why Jaime moved out. (3RT 171, 174.) Crystal also had not talked to her church friend about Jaime until after she talked to the police. (2RT 135-136; 3RT 190-191.) Crystal testified that she had lied because she was mad at Jaime for paying more attention to Alma than to her and because she was scared her mother would be angry with her for getting in trouble at school. (2RT 131-133; 3RT 187, 191-192.) Crystal never thought that Jaime would be arrested because of what she said. (3RT 200-201.) She retracted her lies at trial because she felt guilty that her dishonesty had resulted in Jaime's arrest and she was worried about what would happen to him. (2RT 109-111; 3RT 187-188.)

B. Charges Concerning Reyna Doe

Reyna Doe, who was 13-years old at the time of the trial, had become friends with Crystal Doe when they were living in the same apartment complex in 2004. (3RT 208, 214, 250.) When Reyna was 11 years old, she met Jaime, who was living with Crystal's family. The first time they met was when they were each standing in the doorway of their own apartments. Jaime started talking to Reyna and told her she was pretty. (3RT 212-213, 222-223.) Reyna told Jaime that she was going to turn 12 soon. (3RT 225.) Reyna later asked Crystal to give her phone number to Jaime because she thought he was good-looking and nice. (3RT 223, 258.) She also talked to Jaime again. (3RT 222.)

1. The Laundry Room Incident (Count Three)

A few days after Reyna met Jaime, she went to the laundry room of the apartment complex. Jaime was there. (3RT 215, 252.) They talked about five minutes and then Jaime hugged Reyna and kissed her briefly with a closed mouth. (3RT 215-216, 252-253.) Reyna told Jaime she didn't want to do that and pushed him away. (3RT 225.) Jaime told Reyna he wanted to have sex with her. (3RT 220-221, 256.) He tried to touch Reyna on the chest, but she told him "don't grab me" and took his hand off her. (3RT 216-218.) Jaime also took Reyna's hand and put it on his body between his legs in the front; his body felt hard. (3RT 219-220.) Reyna pulled her hand away and again told Jaime that she didn't want to do this. Jaime said he was sorry and that he hadn't meant to grab her. (3RT 219-220, 254-255.) Reyna was not scared of Jaime, but she was afraid people would see them. (3RT 219, 243-244, 255-256.) Then they left. (3RT 221.) About two hours later, Jaime called Reyna and again told her he wanted to have sex with her. (3RT 221-222.)

2. The Bedroom Incident (Count Four)

Sometime after Reyna had turned 12 years old, Jaime called her and said Crystal wanted to talk to her. (3RT 227-228.) Reyna went over to the apartment where Crystal's family lived. Jaime was there, but Crystal wasn't. (3RT 228.)

Reyna ended up staying for an hour and a half. (3RT 264.) Reyna and Jaime talked for a while in a bedroom. (3RT 229.) Then Jaime played a movie that showed two fully-dressed women kissing each other. Reyna was embarrassed and told Jaime to turn the movie off. (3RT 230, 259-260.) Jaime did as she requested. (3RT 231.) Jaime told Reyna he wanted to

have sex with her. (3RT 231, 244-245.) He took a condom out of his pocket, but Reyna told Jaime she did not want to have sex with him and to throw the condom in the trash. Jaime threw away the condom. (3RT 231-232, 260.) Jaime grabbed her cheeks and told her she was pretty. (3RT 273.) Reyna said she had to leave. (3RT 232.)

As Reyna was leaving, she tripped on the TV cable; then she either fell on top of Jaime or he got on top of her after she fell on the bed. (3RT 232, 234, 260-261.) Jaime hugged Reyna and kissed her once. (3RT 232-233, 263-364.) Jaime wanted Reyna to pull his pants down. She refused, but Jaime took his pants off and was wearing just his boxers. (3RT 240-241, 265.) Jaime also tried to take Reyna's pants off, but she told him no. (3RT 241-242, 263.) At one point, Jaime grabbed her butt and told her she was pretty. (3RT 273.) Reyna told him she had to leave. (3RT 232.)

Reyna got up, but either she tripped again or Jaime pulled her back down when she went to give him another hug. (3RT 234-235, 261.) Jaime tried to touch her between her legs in the back. (3RT 236-237.) Reyna grabbed his hand and pulled it away. (2RT 237-239.) Jaime then took Reyna's hand and put it against his body between his legs on top of his boxers. Jaime's body was hard. Jaime squeezed Reyna's hand a little bit, but not enough to cause bruises. (3RT 239-240, 265, 269.) Reyna pulled her hand away. (3RT 240.)

Reyna was nervous and afraid Jaime would get upset because she refused to do what he wanted. She was also afraid he would rape her in the future. (3RT 238, 240, 243, 265.) Reyna told Jaime she had to leave because his aunt might come home and because her mother was expected home soon. (3RT 240, 242.) Then Reyna left. (3RT 244.) Jaime did not try to keep her from leaving. (3RT 242, 244.) He did not threaten her or

warn her not to tell anyone what had happened. (3RT 269, 274.)

Reyna did not see Jaime after that because she was afraid something would happen between them. (3RT 245.) However, she lied and told Crystal that she had had sex with Jaime. (4RT 271-272.)

After Crystal talked to the police in May 2005, Detective Schillinger interviewed Reyna several times. (4RT 310, 322.) Reyna was reluctant to talk and she cried during the second interview. (4RT 310-311, 322-323.) She told Schillinger that whenever Jaime saw her, he would ask her to call him. (3RT 248-249.) After Reyna talked to Detective Schillinger, her mother got upset and hit her. (3RT 246-247.) Reyna's mother said that what had happened was Reyna's fault and that she thought Reyna might be not be a virgin. (3RT 247.) Reyna's mother made a doctor's appointment to have Reyna get a pregnancy test. The night before the test, Reyna ran away with her friend Alma because she was afraid that her mother would hit her again and that she might get sent back to Mexico. (3RT 248, 268-269.) Reyna and Alma walked from Sunnyvale to Redwood City before they turned around to go home; the police picked them up at 5:00 a.m. (3RT 267-268.) Reyna's mom hit her because she ran away. (3RT 246.) Reyna's mother then had her take a pregnancy test. The test initially gave a false positive result, but Reyna was not actually pregnant. (3RT 247.)

C. Jaime Soto's Arrest

After he talked to Crystal and Reyna, Detective Schillinger tried to locate Jaime. Schillinger tried to get information from Jaime's family members, but didn't get any help. (4RT 311, 318.)

During Detective Schillinger's attempts to find Jaime, he talked to Israel Alcazar. (4RT 311.) Alcazar said he was Crystal's brother.

Schillinger told Alcazar why he was looking for Jaime, and Alcazar reported that he had seen Jaime with some girls Crystal's age or younger. Alcazar also said he had advised Jaime that he could go to jail if he had a romantic relationship with a girl that age. Jaime had replied that he didn't care and that young girls were fun. (4RT 311-312.)

Alcazar testified that he actually had never seen Jaime with girls of Crystal's age, although friends had told him that Jaime had young girlfriends. (4RT 296-297, 299.) Also, Alcazar had told Jaime that he could end up in jail if he had sex with young girls, but Jaime did not say anything in response. (4RT 297-298.)

Detective Schillinger eventually located Jaime in the bedroom of an apartment, crouched in a closet with clothes draped over him. (4RT 312-313.)

D. The Criminal Proceedings

For the laundry room incident involving Reyna, Jaime Soto was charged with committing a lewd and lascivious act with a child under age 14 (Count Three; § 288, subd.(a)).[1] For the two incidents involving Crystal (Counts One and Two) and the apartment incident involving Reyna (Count Four), Soto was charged with committing a lewd or lascivious act with a child under age 14 by use of force, violence, duress, menace or fear (§ 288, subd. (b)(1)). It was also alleged that Soto should be ineligible for probation because he had committed Counts One, Two and Four by the use of force, violence, duress, menace or fear (§ 1203.066, subd. (a)(1)) and

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[1] All subsequent statutory references are to the Penal Code except as otherwise noted.

committed offenses involving more than one child (§ 1203.066, subd. (a)(7)). (2CT 219-223.) Soto pled not guilty and denied all allegations. (5RT 301; 2CT 256.)

At the start and end of trial, the court instructed the jury that the three section 288, subdivision (b)(1) charges required proof of four elements:

> 1A. The defendant willfully touched any part of a child's body either on the bare skin or through the clothing;
>
> Or
>
> 1B. The defendant willfully caused a child to touch her own body, the defendant's body, or the body of someone else, either on the bare skin or through the clothing;
>
> 2. In committing the act, the defendant used force, violence, duress, menace or fear of immediate and unlawful bodily injury to the child or someone else;
>
> 3. The defendant committed the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child;
>
> AND
>
> 4. The child was under the age of 14 years at the time of the act.

(AugRTA 12-13; AugRTB 19; 2CT 238-239 [CALCRIM No. 1111].) The instruction further defined some of the terms:

> The *force* used must be substantially different from or substantially greater than the force needed to accomplish the act itself.
>
> *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 her relationship to the defendant.
>
> *Retribution* is a form of payback or revenge.

> An act is accomplished by *fear* if the child is actually and reasonably afraid.

(AugRTB 20; 2CT 239 [CALCRIM No. 1111], emphasis in original; see also AugRTA 13 [pretrial instructions with slightly different wording].) The instruction concluded with the statement that "*It is not a defense that the child may have consented to the act.*" (AugRTA 13; AugRTB 20; 2CT 239, emphasis added.) The trial court also instructed the jury that committing a lewd or lascivious act on a child under age 14 – without force, violence, duress menace or fear (§ 288, subd. (a)) – was lesser-included offense of the charges on Counts One, Two and Four. (AugRTB 24-25; 2CT 242.)

In closing argument, the prosecutor urged that the jury to find Soto guilty of Counts One, Two and Four based on the existence of either force or duress. (5RT 375-380.) The prosecutor reminded the jurors that, as they had been instructed, consent was not a defense to those charges. (5RT 368.) Although defense counsel was effectively prohibited from arguing that consent was a defense, he did contend that the prosecution had not proven the charges beyond a reasonable doubt, and that there were no threats or force. (5RT 403-404.) In doing so, he described evidence indicating that both Crystal and Reyna had on-going relationships with Soto and motivations for telling their parents and the police that any hugging, kissing and petting was non-consensual. (5RT 400-404.)

The jury found Soto guilty of all the charged counts and allegations. (5RT 420-422; 2CT 250-254.) Soto was sentenced to a prison term of 12 years. (6RT 435-436; 2CT 309.)

Two justices of the Sixth District Court of Appeal subsequently held that the trial court had erred by instructing the jury that consent was not a

defense to Counts One, Two, and Four. (Maj. Opn., p. 10 and fn 4.) This majority observed that there was disagreement as to whether a charge of committing a lewd act by use of force requires proof that the act was accomplished against the will of the victim, such that a defendant could assert a defense that the child consented to the act. (Maj. Opn., pp. 7-10; see also CALCRIM No. 1111 (Fall 2008 Ed.), Bench Notes [describing disagreement between *People v. Cicero* (1984) 157 Cal.App.3d 465, 484-485 and *People v. Quinones* (1988) 202 Cal.App.3d 1154, 1158 and leaving it to trial courts to decide whether to give the "consent is not a defense" portion of the instruction].) However, the majority did not need to "jump into this fray" because the prosecutor had also relied upon a claim that the lewd acts were committed by use of duress. Both *Cicero* and *Quinones* had agreed that "[A] conviction based on 'duress,' . . . necessarily implies that the 'will of the victim' has been overcome." (Maj. Opn., p. 10, quoting *Quinones, supra*, 202 Cal.App.3d at p. 1158; see also *Cicero, supra*, 157 Cal.App.3d at pp. 477-478.) "It follows that, whether characterized as a substantive element or affirmative defense, the concept of consent is a defense to a section 288, subdivision (b)(1), charge if the People rely upon duress." (Maj. Opn., p. 10.) The majority also found that the error in instructing the jury that consent was not a defense was prejudicial, given evidence that would have supported a claim the two girls had consensually engaged in the kissing, hugging and petting upon which Counts One, Two and Four were based. (Maj. Opn., pp. 4-5, 11-12.)

In a dissenting opinion, Justice Mihara asserted that any requirement that a lewd act by force or duress be against the will of the child was eliminated by the Legislature via a 1981 statutory amendment. (Conc. & Dis. Opn., pp. 8-9.) He further opined that neither force nor duress is

inherently inconsistent with the child's actual consent, and that force or threats are actions undertaken by the defendant that are entirely independent of the child's state of mind. (Conc. & Dis. Opn., pp. 9-10.) Justice Mihara also concluded that any instructional error was not prejudicial because Crystal and Reyna had stated that they did not consent to the lewd acts. (Conc. & Dis. Opn., pp. 10-11.)

ARGUMENT

I. A CHARGE THAT A LEWD ACT WAS COMMITTED BY USE OF FORCE, VIOLENCE, DURESS, MENACE OR FEAR REQUIRES THE PROSECUTION TO PROVE THAT THE LEWD ACT WAS AGAINST THE CHILD'S WILL, AND CONSENT IS A DEFENSE TO SUCH A CHARGE.

Respondent argues that the only concern in determining whether a defendant is guilty of violating section 288, subdivision (b) is whether, as an objective matter, the defendant used force or made direct or implied threats. Respondent characterizes appellant's claim that a section 288, subdivision (b) crime must be non-consensual as resting entirely on a 1984 Court of Appeal case, *People v. Cicero* (1984) 157 Cal.App.3d 465, which respondent argues was misguided. Respondent argues that the *Cicero* decision conflicts with the general principle that sexual acts with children are strictly illegal, regardless of whether or not a child actually consented to such acts. Respondent also argues that *Cicero* failed to heed the legislative history of section 288, pointing to the fact that, in 1981, the Legislature deleted from the statute the statement that the lewd act must be "against the will of the victim." This Court should reject respondent's position.

First, respondent ignores the principle that statutory interpretation begins with the plain language of the statute, and that the requirement that a

lewd act be committed by use of duress or menace inherently means that the lewd act was coerced. This is a not merely a definition of duress adopted by one lone court, but a definition that has been applied repeatedly in section 288, subdivision (b) cases for 25 years. During this lengthy time frame, not one court has ever adopted respondent's contrary position. Although the legislative history of the 1981 amendment to section 288, subdivision (b) contains general statements that consent is irrelevant to child sex offenses, it does not address the meaning of duress or menace or discuss how section 288, subdivision (a) crimes are to be distinguished from subdivision (b) crimes. This inconclusive legislative history cannot override the common-sense interpretation of the statute and the force of 25 years of judicial precedent.

Second, respondent ignores the majority of court decisions that have held that a section 288, subdivision (b) crime "committed by use of force" must also be accomplished against the will of the child. Again, this is a rule that has been applied repeatedly for 25 years; the only case in which the rule was not followed involved a different question (whether the jury instructions must specifically include "against the will" language) than that presented here. Requiring force sufficient to overcome the will of the victim is also the most logical and consistent interpretation of the statute. This requires that all forms of subdivision (b) crimes be against the will of the child, rather that setting different standards for crimes committed by duress, menace or fear and crimes committed by force. It also provides a meaningful guide for assessing the harm to the victim and the culpability of the defendant under a statute which covers a broad range of behavior.

Third, respondent ignores the fact that the Legislature has acceded to the prevailing judicial interpretation. Although the Legislature has amended

subdivision (b) several times in the past 25 years, it has not made any amendment indicating that the child's consent is irrelevant. Indeed, the only pertinent amendment during that time changed the word "threats" to "fear," indicating that it is proper to focus on the subjective feelings of the child. Even respondent is ultimately forced to acknowledge that evidence of consent undermines an allegation that a lewd act was coerced by fear.

Fourth, respondent stretches the principle that children cannot consent to sexual activities far beyond its boundaries. It is true that sexual acts with children are always criminal, and that consent is irrelevant to non-forcible sex offenses involving children. But this does not mean that a child's factual consent or lack thereof cannot and should not affect a defendant's level of culpability. Indeed, the legislature and courts have acknowledged that some children are capable of consenting to some sexual acts and may be held liable for their own sexual offenses. Moreover, a child's consent or non-consent determines a defendant's level of culpability in regards to other types of sex offenses. Since enacting the 1981 amendments to section 288, the Legislature has even adopted a new law (§ 269) that increases the punishment for various sex offenses with children under age 14, which applies only to cases in which the prosecution can prove that the sexual acts were non-consensual.

For these reasons, as discussed in detail in the following sections, this Court should conclude that an instruction that "consent is not a defense" contradicts section 288, subdivision (b)'s requirement that the lewd act be "committed by use of force, violence, duress, menace or fear of imminent and unlawful bodily injury."

A. The Statutory Provisions.

1. The 1979 Amendment.

Penal Code section 288, prohibiting lewd and lascivious acts with children under age 14, was enacted in 1901. (Stats.1901, ch. 204, § 1, p. 630.) In 1979, the Legislature amended the statute. Subdivision (a) continued to proscribe any lewd act with a child under the age of 14 years. New subdivision (b) stated "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.) Subdivision (b) crimes carried the same base range of punishment as subdivision (a) crimes, but were subject to additional enhancements, the alternative sentencing scheme in section 667.6, and more limits on probation. (Stats. 1979, ch. 944, §§ 6.5, 10, 12, 13, 15, 18, pp. 3245, 3254, 3258-3263.)

2. The 1981 Amendments.

In 1981, legislators introduced several bills proposing changes to the child sex offense laws. Senate Bill 586 proposed that section 288 be replaced with a new series of offenses that differentiated lewd contact from lewd conduct. The bill also proposed drawing distinctions in culpability based such matters as use of force or duress, infliction of bodily injury, and the relative ages of and relationship between the offender and the child; SB 586 did not state that any of the proscribed acts must be committed "against the will of the victim." (*Cicero, supra*,157 Cal.App.3d at p. 476; see also Respondent's Request for Judicial Notice, Exhibit C at pp. 2-3, and Exhibit G at pp. 3-4; Appellant's Request for Judicial Notice, Exhibit A [SB 586, as

amended Aug. 10, 1981].)

At the same time, Assembly Bill 457 was pending. That bill proposed retaining section 288, including its requirement that a subdivision (b) crime be "against the will of the victim." (*Cicero, supra*, 157 Cal.App.3d at p. 476.) AB 457 proposed adding "intimidation" and "coercion" to the means by which subdivision (b) could be violated and increasing the sentences and enhancements for section 288 crimes. (Appellant's Request for Judicial Notice, Exhibit B [AB 457, as amended July 6, 1981].)

The Assembly amended SB 586 on August 25 and September 8, 1981, deleting many of its existing provisions and incorporating many of the AB 457 provisions. The proposals for new provisions punishing lewd conduct and contact were abandoned. Section 288 was to be retained, complete with the phrase "and against the will of the victim." However, the Senate rejected the Assembly amendments. (See *Cicero, supra*, 157 Cal.App.3d at p. 476.)

SB 586 was sent to a joint house conference committee. On September 15, 1981, the committee recommended that the Assembly amendments be concurred in, and that the bill be further amended. Both houses unanimously adopted the committee's report. (See *Cicero, supra*, 157 Cal.App.3d at p. 477.) The bill was approved by the Governor on September 30, 1981. (Stats. 1981, ch. 1064, p. 4093.)

As enacted, SB 586 increased the base sentences for section 288 crimes, removed the words "and against the will of the victim" from subdivision (b), and added subdivision (c) directing law enforcement officers, prosecutors and courts to protect child victims from psychological harm. As amended, subdivision (b) then stated:

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; see also Cicero, supra, 157 Cal.App.3d at p. 472, fn. 5.) Other provisions added sentencing enhancements and restricted probation eligibility for section 288 offenses in various circumstances. (Stats. 1981, ch. 1064, §§ 2-4, pp. 4093-4096 [adding § 667.51 and § 1203.066 and amending § 1203.065].)

3. Subsequent Amendments

In 1986, the Legislature again amended section 288, subdivision (b). The phrase "threat of great bodily harm" was removed and replaced with "fear of immediate and unlawful bodily injury on the victim or another person." (Stats. 1986, ch. 1299, § 4.)

Later, subdivision (b) was amended twice. The amendments made minor language changes, renumbered subdivision (b) as subdivision (b)(1), and added subdivision (b)(2) to punish lewd acts committed by a caretaker upon a dependent person by use of force, violence, duress, menace or fear. (Stats. 1993-1994, 1st Ex.Sess., ch. 60, § 1; Stats. 1995, ch. 890, § 1.) In its current form, subdivision (b)(1) states:

> 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.

B. For 25 years, Courts Have Relied Upon Common-Sense Definitions of Duress and Menace and Have Held that Commission of Lewd Acts by Use of Duress or Menace Necessarily Means that the Will of the Child was Overcome.

As discussed above, the Legislature removed the phrase "and against the will of the victim" from section 288, subdivision (b) in 1981. However, the Legislature retained the requirement that the prosecution prove a lewd act was committed "by use of" one of the specified means. Among those means are menace and duress. Respondent and Justice Mihara, the dissenting justice in this case, assert that proof that a lewd act was committed by use of duress or menace does not necessarily mean that the will of the child was overcome, and that the 1981 amendment eliminated any consent defense. (Opening Brief, pp. 20-29, 34-38; Conc. and Dis. Opn., pp. 9-10.) However, not one court has ever adopted that position. Instead, for 25 years, courts have unanimously held that, according to the plain meaning of the words, an act is committed by use of duress or menace only if the victim's will was overcome. Nothing in the legislative history of the 1981 amendments overrides this well-established principle.

1. The Plain Meaning of Duress or Menace Means that the Will of the Victim Was Overcome.

Interpretation of a statute must "begin with the language of the statute itself. [Citation.] That is, we look first to the words the Legislature used, giving them their usual and ordinary meaning. [Citation.]" (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192; *People v. Leal* (2004) 33 Cal.4th 999, 1007.) Accordingly, "[courts] must follow the statute's plain meaning, if such appears, unless doing so would lead to absurd results the Legislature could not have intended." (*People v. Birkett* (1999) 21 Cal.4th

226, 231.)

After section 288 was amended in 1981, the Third District Court of Appeal considered what it means that a lewd act must be "committed by use" of menace, duress or threats. The court found that the ordinary meaning of these words was "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." (*Cicero, supra*, 157 Cal.App.3d at p. 477.) In other words, duress and menace "have no useful meaning absent a consideration of their effect on the will of a victim." (*Id.* at p. 478 .) This necessarily means that an accused may defend himself against a subdivision (b) charge based on duress or menace by arguing that the lewd act was not against the will of the victim but was undertaken with knowing consent. (*Id.* at p. 482; see also *People v. Carr* (2000) 81 Cal.App.4th 837, 842 [consent is a proper defense where it negates an element of the charged offense]; 1Witkin, Cal.Crim. Law 3d (2000 and 2008 supp) Chapter III, Defenses, § 87, p. 426 [consent of the victim ordinarily not a defense unless lack of consent is an element of the charge].)

The following year, the Third District further considered the definition of duress for a section 288, subdivision (b) offense. The court again "resort[ed] to one of the most fundamental canons of statutory construction: courts are bound to give effect to statutes according to the usual, ordinary import of the language used." (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 50.) After referring to Webster's Third New International Dictionary for guidance, the court came up with a definition for the duress sufficient to violate section 288, subdivision (b): "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." (*Id.* at pp. 50-51.) This definition of duress is a common-sense interpretation, rather than a "technical" definition peculiar to the law. (*Pitmon, supra*, 170 Cal.App.3d at p. 52; *Leal, supra*, 33 Cal.4th at pp. 1004-105, 1009 [implicitly approving *Pitmon*'s reliance on the dictionary and *Pitmon* definition of duress in section 288 cases].)

Respondent and Justice Mihara point out that *Pitmon* defines duress in terms of whether the perpetrator's conduct would coerce a "reasonable person." From this they conclude that duress can be present regardless of whether a defendant's direct or implied threat has any subjective impact on the victim or whether the child willingly consents the lewd act. (Opening Brief, pp. 36-37; Conc. & Dis. Opn., pp. 9-10.) But the *Pitmon* court clearly did not intend to dispense with *Cicero*'s rule that commission of a lewd act by use of duress inherently means that defendant's actions overcame the child's will. Indeed, *Pitmon* stated that a finder of fact must examine the actual circumstances in the case, including the age of the victim, and the victim's relationship to defendant. (*Pitmon, supra*, 170 Cal.App.3d at p. 51.) Furthermore, *Pitmon* described section 288, subdivision (b) as "a statute designed in part to punish the obtaining of a child's participation in a lewd act in violation of the child's will." (*Id.* at p. 49, citing *Cicero*, *supra*, 157 Cal.App.3d at pp. 475-476.) The court also noted that the instructions given in that case had informed the jury that the prosecutor had to prove the lewd act "was committed against the will of said child." (*Pitmon*, *supra*, 170 Cal.App.3d at p. 51, fn. 10.) In applying the law to the facts before it, the

court pointed to evidence that the defendant "made" the child engage in the acts, concluding that there was duress "which prompted [the child] against his will to participate in the sexual acts." (*Id.* at pp. 48, 51.)

Consistent with *Cicero* and *Pitmon*, "duress" continues to be equated with coercion.:

> A common dictionary meaning of "duress" is "stringent compulsion by threat of danger, hardship, or retribution ...: Coercion." (Webster's 3d New Internat. Dict. [1993] p. 703, col. 2.) Another common meaning is "compulsion or constraint by which a person is illegally forced to do or forbear some act by ... physical violence to the person or by threat of such violence, the violence or threat being such as to inspire a person of ordinary firmness with fear of serious injury to the person ... [or] reputation."

(*People v. Elam* (2001) 91 Cal.App.4th 298, 307.) As recently noted by this Court, Webster's Third New International Dictionary (2002) included the following definition of duress: "'restraint or check by force ... stringent compulsion by threat of danger, hardship, or retribution....'" (*Leal, supra*, 33 Cal.4th at p. 1009, emphasis omitted.) The *Merriam-Webster On-Line Dictionary* defines duress as "forcible restraint or restriction" or "compulsion by threat; specifically: unlawful constraint." (www.merriam-webster.com/dictionary/ duress, last checked June 4, 2009.) The first definition for duress listed at *Dictionary.com* is "compulsion by threat or force; coercion; constraint. (www.dictionary.reference.com/ browse/duress, last checked June 4, 2009.) Each of these definitions is consistent with that adopted in *Cicero*.

2. Courts have Consistently Relied Upon These Meanings of Duress and Menace in Section 288 Cases.

For the past 25 years, courts have consistently followed *Cicero* in holding that commission of a lewd act by use of duress or menace inherently means that the child was compelled to participate against his or her will. In 1988, the Sixth District stated, "we agree with the *Cicero* majority that a conviction [of section 288, subdivision (b)] based on 'duress,' 'menace,' or 'threat of great bodily harm' necessarily implies that the 'will of the victim' has been overcome." (*People v. Quinones* (1988) 202 Cal.App.3d 1154, 1158.) The Fifth District re-stated that rule by opining that there is duress where "the total circumstances support an inference that the victims' participation was impelled, at least partly, by an implied threat." (*People v. Wilkerson* (1992) 6 Cal.App.4th 1571, 1580.) Six years later, the Second District, Division 4, effectively followed *Cicero* by finding sufficient evidence of duress where the minor had been "reluctant" to allow defendant to perform the sexual acts and the defendant had "coerce[d] [her] to submit to specific treatments against [her] will" by imposing psychological and physical deprivations. (*People v. Cardenas* (1994) 21 Cal.App.4th 927, 938.) That same year, the Sixth District confirmed that section 288, subdivision (b) requires "that the lewd act be undertaken without the consent of the victim." (*People v. Bolander* (1994) 23 Cal.App.4th 155, 161.) Even Justice Mihara has recognized the rule is that "Duress cannot be established unless there is evidence that 'the victim['s] participation was impelled, at least partly, by an implied threat'." (*People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1321.) Likewise, the Fourth District has stated that, "[t]he very nature of duress is psychological coercion" and found duress

where the victim's "compliance was derived from intimidation and the psychological control [defendant] exercised over her and was not the result of freely given consent." (*People v. Cochran* (2002) 103 Cal.App.4th 8, 15-16.) Six years later, the same district again effectively followed *Cicero* by finding duress where the victim actually "feared defendant and was afraid that if she told anyone about the molestation, that defendant would harm or kill [her], her mother or someone else." (*People v. Veale* (2008) 160 Cal.App.4th 40, 47.) Finally, this Court has quoted without criticism *Cicero* and *Pitmon*'s description of section 288, subdivision (b) as "'a statute designed in part to punish the obtaining of a child's participation in a lewd act in violation of the child's will.'" (*Leal, supra,* 33 Cal.4th at p. 1009.)

Neither Justice Mihara nor respondent explain how the well-established requirement that the victim be coerced or compelled can be squared with their position that a child's actual consent is immaterial to the existence of duress. This Court should abide by the principle of stare decisis and uphold the definitions of duress and menace that have been consistently applied since 1984. Indeed, stare decisis has special importance in substantive criminal law, where changes in the law can raise ex post facto and due process concerns. "Adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts." (Cardozo, The Nature of the Judicial Process (1921), p. 34; see also *People v. Tobias* (2001) 25 Cal.4th 327, 344 Conc. Opn. of Werdeger, J.) In addition, there is also a principle that ambiguities in the law should be constructed in a defendant's favor. (See *In re Christian S.* (1994) 7 Cal.4th 768, 780 [because "definition of implied malice is, at the very least, reasonably susceptible to the construction asserted by defendant, we adopt that construction"]; *In re Zerbe* (1964) 60

Cal.2d 666, 668 [defendant must be given the benefit of every reasonable doubt as to whether the statute applied to him].)

Respondent's attempts to find support for some other meaning of duress are unpersuasive. Not one court has defined duress as proposed by respondent. Even the dissenting justice in *Cicero* did not dispute that duress and menace were terms describing coercion. Although the dissent asserted that a subdivision (b) can be committed with knowing consent, *if force is used*, and that consent is not a defense to a violation of subdivision (b) charge *by use of force*, it did not challenge the majority's finding that accomplishing a lewd act by use of duress, menace or threats *inherently* means that the will of the victim was overcome. (*Cicero*, 157 Cal.App.3d at pp. 487-488, Dis. Opn. of Evans, J.; *see also Bolander, supra,* 23 Cal.App.4th at pp. 161-164, Conc. Opn of Mihara, J. [suggesting court should follow *Cicero* dissent in where allegation was that lewd act was committed by use of force, but not mentioning the meaning of duress or menace].) Similarly, the CALCRIM Advisory Committee Bench Notes for CALCRIM No. 1111 authorize judges to give the optional consent is not a defense instruction, stating that there is disagreement as to whether consent by a minor is an affirmative defense to a lewd act accomplished by *force.* But the Notes do not indicate that the optional language would be appropriate in cases involving allegations of duress or menace. (CALCRIM No. 1111 (Fall 2008 Ed.), Bench Notes.) Moreover, the instruction defines duress as something that actually has a subjective coercive effect. (CALCRIM No. 1111 (Fall 2008 Ed.) [duress is a direct or implied threat "that causes" a reasonable person to do or submit to something that he or she would not otherwise do or submit to].)

3. The Legislative History of the Statute Does Not Directly Contradict the Plain Meaning of Duress and Menace.

Respondent also argues that this Court should overturn the prevailing definition of duress in reliance on the legislative history of SB 586, the bill which removed the phrase "and against the will of the child" from section 288, subdivision (b) in 1981. Respondent asserts that the language was removed to codify the principle that "children under age 14 are presumed incapable of consenting to sexual advances in all instances," and that this eliminated any consent defense to any form of aggravated lewd conduct. (Opening Brief, pp. 20-29.) This court should reject respondent's claims.

A statement of legislative intent can be relevant to determining the meaning of a statute. (See, e.g., *People v. Totari* (2002) 28 Cal.4th 876, 883 and fn. 3; *People v. Escobar* (1992) 3 Cal.4th 740, 746-750.) But a court need not refer to legislative history unless a statute's apparent meaning is ambiguous, obscure, or so improbable as to be fairly characterized as absurd. (See *Zamudio, supra*, 23 Cal.4th at pp. 192-193.) As discussed in the preceding sections, there has been no controversy about what section 288, subdivision (b) means when it proscribes commission of a lewd act by use of duress. This Court should not inject controversy where none exists .

Moreover, this Court should not override the prevailing judicial interpretations of duress and menace because the legislative history, which is at best inconclusive, does not support doing so. The Senate Judiciary Committee's analysis of SB 586, as amended April 20, 1981, did not indicate that there would be any change in the proof needed to show that the proposed crimes of lewd conduct or contact were committed by use of duress, force, etc. (Respondent's Request for Judicial Notice, Exhibit C.)

So this analysis provides no support for respondent's position.

The June 1981 Assembly Committee on Criminal Justice analysis did view SB 586 as deleting the requirement that the lewd act be "against the will of the victim." (Respondent's Request for Judicial Notice, Exhibit A at pp. 1, 3-4, 7.) But these comments were specifically directed to provisions restricting probation eligibility:

> SB 586 requires imprisonment if there is force or threat 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.) Moreover, that committee apparently disfavored many of SB 586's provisions, as demonstrated by the fact that a joint house committee complained about that committee's attempts to dilute the bill. (Respondent's Request for Judicial Notice, Exhibit D at p. 3.) Thus, that committee might have been prone to exaggerating the potential effect of SB 586's provisions.

Committee analyses prepared in mid-August 1981 made similar statements in summarizing the "Major Differences" between AB 457 and SB 586. These analyses described AB 457 as primarily a penalty bill that made no philosophical changes in the law, while describing SB 586 as making major changes based in part on the premise that children do not generally lie about sexual abuse. The analyses stated that "AB 457 requires, where force or violence is an issue, that the prosecution prove that force or violence was against the victim's will. SB 586 does not." (Respondent's Request for Judicial Notice at p. 2; see also *id.*, Exhibit H, p. 4.) But these statements refer to the *force or violence* being against the child's will, not the lewd act itself, and they do not address other allegations such as duress. The analyses

also stated that under Senate Bill 586 as then written:

> Children under age 14 are presumed incapable of consenting to sexual advances. A 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 the proponents seemingly believe that there exist 11 year old prostitutes who freely and willingly choose that profession.

(Respondent's Request for Judicial Notice, Exhibit D at p. 1 [emphasis in original]; see also *id.*, Exhibit H at p. 3.) These general statements described then-SB 586's proposals to do away with section 288 entirely and replace it with alternate offenses (See Appellant's Request for Judicial Notice, Exhibit A [SB 586, as amended Aug. 10, 1981); those, provisions ultimately were not adopted. The statements focused on controversy over AB 457's provisions for determining probation eligibility, and were not necessarily meant as a critique of the then-existing language of section 288. (Respondent's Request for Judicial Notice, Exhibit D at p. 2; *id.*, Exhibit H at p. 4; see also Appellant's Request for Judicial Notice, Exhibit B [AB 457 as amended July 6, 1981].) They express polemical contests between warring sides, and do not necessarily reflect the opinion of the majority of the legislators. Most importantly, nothing in these two analyses specifically addresses the meaning of a requirement at a crime be committed by use of "duress" or discusses how sexual abuse accomplished by use or force or duress is distinguished from other abuse.

The joint house conference committee analyses from September 1981 also do not discuss the meaning of the word duress; nor did they discuss force. The committee's specific statements on issues of consent concerned

whether the prosecution should have to show that the victim neither consented to nor solicited the sexual contact in order to obtain mandatory imprisonment. (Respondent's Request for Judicial Notice, Exhibit E at pp. 2-3; *id.*, Exhibit F at pp. 2-3.) The committee also more generally stated 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 at p. 2; see also *id.*, Exhibit F at p. 2 ["Should children under age 14 be presumed incapable of consenting to sexual advances in all instances?"].) Again, this does not speak to the differences between a criminal lewd act and criminal lewd acts committed by use of force or duress. The statements are not necessarily contrary to the current interpretation of section 288, subdivision (a) because a consensual lewd act is still a crime under section 288, subdivision (a).

Other conference committee statements undermine respondent's position that the only consideration if the defendant's actions, not the child's state of mind. The committee certainly acknowledged that not all molestation was committed against a child's will, stating that "[s]exually abused children are often willing victims." (Respondent's Request for Judicial Notice, Exhibit E at p. 1; see also *id.*, Exhibit F at p. 1 [citing testimony that "sexually abused children are often willing victims"].) The committed also acknowledged that the underlying philosophy of SB 586 "is to protect the child from further psychological harm whenever at all possible." (Respondent's Request for Judicial Notice, Exhibit E at p. 3.) A definition duress, force, etc. that focuses on the effect of the defendant's actions on the child's actual state of mind is consistent with that philosophy.

Ultimately, "[t]he reason for the conference committee's amendment deleting "and against the will of the victim" is unknown." (*Cicero*, *supra*,

157 Cal.App.3d at p. 477.) There is no definitive evidence as to why the two houses agreed on the language that was enacted. Some members of the Legislature could well have believed that the "against the will of the victim" language was redundant and agreed to removal of that language on the belief that the phrase "committed by use of . . .duress" or other means inherently ensures that the lewd act was coerced. Interestingly, the Legislative Counsel's Report to the Governor on SB 586 makes absolutely no mention of the bill changing the definition of aggravated lewd acts. (Appellant's Request for Judicial Notice, Exhibit C.)

Nor is there any guidance to be drawn from the fact that Section 288, subdivision (b) is the only sex crime statute that punishes acts committed by use of "force, violence, duress, menace or fear of immediate and unlawful bodily injury" without also including language stating that the act was "against the victim's will." The various sex offense provisions have been enacted and amended at different times without there necessarily being consistent or contemporaneous amendments to the other sex crime statutes. For example, the requirement that the victim be "compelled" by force, duress or other specified means was added to sections 286 (sodomy) and 288a (oral copulation) in 1975; prior to that time those sex acts were criminal even between consenting adults. (Stats. 1975, ch. 877, §§ 1-2, pp. 1957-1958.) A requirement that sexual penetration (§ 289) be by use of force, duress or other means and against the will of the victim was included when that statute was enacted in 1978. (Stats. 1978, ch. 1313, § 1, p. 4300.) Such language was then added to the lewd acts statute (§ 288) a year later. (Stats. 1979, ch. 944, § 6.5, p. 3254.) Prior to 1980, the forcible rape statute (§ 261) required that the victim's resistance be overcome by force or violence or that the victim be prevented from resisting by threats; in 1980,

this was changed to state that the intercourse must be accomplished against the victim's will by means of force, violence or threats. (Stats. 1980, ch. 587,§ 1, p. 1595.) And, although duress and menace had been included in all the other forcible sex crime statutes since the late 1970s, they were not added as means by which forcible rape could be accomplished until 1990. (Stats. 1990, ch. 630, § 1.) Moreover, section 288, subdivision (b) is unique in that it is the only one of these statutes that co-mingles a crime against a child with a forcible crime; the other statutes have subdivisions that separately proscribe forcible acts and acts involving minors. This piecemeal creation and amendment of statutes cannot support respondent's claim that section 288, subdivision (b) crimes can be consensual simply because, unlike other sex crime statutes, section 288 does not specifically state that the act must be against the victim's will.

In sum, statutory interpretation starts with the language of the statute. By its common-sense definition, "duress" inherently means that the victim was coerced. The courts have applied this definition for over 25 years. The inconclusive legislative history of SB 586 does not overcome this strong authority. This Court should affirm the long-standing definition of duress. Accordingly, this Court should also affirm the Court of Appeal's decision that an instruction telling the jury that consent is not a defense is erroneous in a section 288, subdivision (b) case in which duress is alleged.

C. Consistent and Fair Application of the Statute Requires that, Like Acts Committed By Use of Duress or Menace, Lewd Acts Committed By Use of Force Must Be Non-Consensual.

As discussed in Argument I-B, commission of a lewd act by use of duress or menace inherently means that the lewd act was coerced. A fair and

consistent interpretation of section 288, subdivision (b) is that commission of a lewd act by use of force also must mean that the act was non-consensual.

People v. Cicero, supra, 157 Cal.App.3d 465 addressed this matter 25 years ago when it set forth a two-part definition of the force requirement of section 288, subdivision (b). The *Cicero* court observed that subdivisions (b) and (a) of section 288 distinguish between lewd acts which are committed by force or other specified means and those which are not. The court held that if commission of a lewd act constituted the minimum prescribed conduct under subdivision (a), then subdivision (b) must require "physical force substantially different from or substantially greater than that necessary to accomplish the lewd act itself." (*Id.* at p. 474.) This definition of force continues to be used in section 288, subdivision (b) cases. (See *People v. Griffin* (2004) 33 Cal.4th 1015, 1018; CALCRIM No. 1111 (Fall 2008 Ed.).) Respondent does not quarrel with it. (Opening Brief, p. 18.)

The *Cicero* court further held that the Legislature intended to confine application of section 288, subdivision (b) to situations in which force compelled the child to submitted to the lewd acts against his or her will. (*Cicero, supra*, 157 Cal.App.3d at p. 484.) *Cicero* based this conclusion on several grounds.

The court started by rejecting any claim that physical injury was necessary to prove use of force. (*Cicero, supra*, 157 Cal.App.3d at p. 474.) At the suggestion of both the People and the defendant, the court turned to the law of rape for guidance, as the concept of force had been part of that statute since 1850. (*Id.* at p. 475.) The court concluded that the fundamental wrong at which the law of rape is aimed is not the application of physical force that causes bodily harm. Rather, the statute "guards the integrity of a

woman's will and the privacy of her sexuality from an act of intercourse undertaken without her consent." . . . [I]n 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." (*Id.* at p. 475.) The Court concluded that "the will and sexuality of children deserve no lesser protection" and that "'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." (*Id.* at pp. 475-476.) The court further found that infliction of actual physical injury would lead to a presumption that the lewd acts were forceful and non-consensual. (*Id.* at pp. 474, 484.)

The *Cicero* court also found that linking force to coercion was consistent with the other specified means by which section 288, subdivision (b) could be violated. As discussed in Argument I-B, above, *Cicero* held that the words "duress," "menace" and "threat of great bodily harm" indicate coercion or compulsion. (*Cicero, supra*, 157 Cal.App.3d at pp. 477-478.) The court properly opined that it would be illogical to interpret the statute so that a lewd act by duress would have to be non-consensual but a lewd act by force would not. Instead, the court interpreted the provisions of the statute in a consistent manner by holding that the prosecution must prove that a lewd act committed by use of force was accomplished against the will of the victim. (*Id.* at pp. 479-481.) Cicero's conclusion on this point is also consistent with the principle that courts should be reluctant to attribute to the Legislature an intent to create "an illogical or confusing scheme," and that legislative policy is best effectuated by avoiding constructions which lead to mischief or absurdity. (*People v. Jeffers* (1987) 43 Cal.3d 984, 998-999.)

The *Cicero* court also rested its interpretation on the Legislature's

intent (1) to punish a broad spectrum of acts under section 288 and (2) to impose much more serious punishment for acts committed by use of force or duress. Section 288 applies to a huge variety of conduct, age groups and relationships. (*Cicero, supra*, 157 Cal.App.3d at pp. 479-480.) It could be used to punish intercourse with a toddler two years old or patting the head of a 13-year-old adolescent. Subdivision (b) covers an equally broad scope of lewd acts, but a violation under that subdivision is subject to much more punitive measures – probation is forbidden and defendants who are convicted of two or more counts can face mandatory terms twice as long. (*Id.* at pp. 473-474; see also §§ 667.6, subd. (d) and 1203.066.) The *Cicero* court was concerned that if section 288, subdivision (b) applied to consensual acts, that provision would cover such situations as a 16-year-old boy who gives his 13-year-old girlfriend a piggy back ride to her bedroom and fondles her with her consent; the court reasonably believed that the Legislature could not have meant subdivision (b) to apply in such a case. (*Cicero, supra,* 157 Cal.App.3d at p. 480.) The court rejected a totally objective definition of force because, "[o]nce the concept of 'force' is cut loose from its ethical anchor (its effect on a victim's will)" it would cause unfairly lenient punishments to be levied on some and unfairly harsh punishments to be levied on others. (*Id.* at p. 479.)

Most courts have followed *Cicero*'s holding that section 288, subdivision (b) requires force sufficient to show that the lewd act was in violation of the child's will. As previously noted, *Pitmon* opined generally that section 288, subdivision (b) is "a statute designed in part to punish the obtaining of a child's participation in a lewd act in violation of the child's will." (*Pitmon, supra*, 170 Cal.App.3d at p. 49.) Several years later, the Fourth District followed *Cicero*'s holding that where force is alleged but

there is no physical harm to the victim, the prosecution must prove the lewd act was committed against will of victim. (*People v. Stark* (1989) 213 Cal.App.3d 107, 111-112.) Subsequently, the Third District reconfirmed that the element of force is intended as a requirement that the lewd act be undertaken without the victim's consent. (*People v. Neel* (1993) 19 Cal.App.4th 1784, 1787.) The following year, the Sixth District joined in this majority view in a case involving force allegations:

> We instead join those courts which have held that "[i]n subdivision (b), the element of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person is intended as a requirement that the lewd act be undertaken without the consent of the victim. [Citation.] As used in that subdivision, 'force' means 'physical force substantially different from or substantially greater than that necessary to accomplish the lewd act itself.'" [Citation].)

(*Bolander, supra*, 23 Cal.App.4th at pp. 160-161.)

Over the years, a few appellate justices have opined that section 288, subdivision (b) should be interpreted so that the force applied by the defendant need not necessarily overcome the victim's will. With such an interpretation, a subdivision (b) crime could be committed by the use of force even if the child consented to the lewd acts. (See CALCRIM No. 1111 (Fall 2008 Ed.), Bench Notes [noting disagreement on whether consent is a defense to a charge of committing a lewd act by use of force].) However, this Court should reject respondent's invitation to adopt this opposing view.

The position proffered by respondent rests on reasoning first set forth by Justice Regan in his dissent in *Cicero*. Justice Regan disagreed with the majority, which had found sufficient force based on evidence that the defendant had picked up and carried the two girl victims, ignored their

statements that they were scared, and refused to let them go until they broke free and ran away. (*Cicero, supra*, 157 Cal.App.3d at pp. 470, 486.) Regan found that this was not force substantially different from or greater than that required to commit the lewd acts of fondling the girls and making them kiss the defendant. (*Id.* at p. 487, Dis. Opn. of Regan, J.) However, Regan further opined that, in holding that the prosecutor must prove that a lewd act by force was undertaken against the will of the victim, the majority had written "back into the subdivision precisely what the Legislature wrote out."

> In fact, under the plan 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.
>
> . . . In my mind, the statute creates a protected class under the age of 14, and the act, if done with force, is a violation of subdivision (b) regardless of 'knowing consent,' 'against the will,' or whether the victim resisted.

(*Id.* at pp. 487-488, emphasis in original.)

Justice Regan's dissent has been followed only once. That was in *People v. Quinones*, which addressed an issue somewhat different from that presented in the current case. In *Quinones*, the Sixth District rejected a defendant's claim that, where force is alleged, a trial court must instruct the jury that the lewd acts were accomplished against the will of the victim; the court relied extensively on the *Cicero* dissent. (*Quinones, supra*, 202 Cal.App.3d at pp. 1157-1158.) However, the Sixth District later followed the *Cicero* majority in a case involving a question of whether the evidence of force was sufficient to support a section 288, subdivision (b) conviction. (*Bolander, supra,* 23 Cal.App.4th at p. 161.) In *Bolander*, Justice Mihara wrote a concurring opinion relying on the *Cicero* dissent; he agreed with the

majority that there was sufficient evidence of force to support the judgment, but suggested that it had been unnecessary for the majority to analyze whether the defendant had accomplished the lewd act without the victim's consent. (*Bolander, supra,* 23 Cal.App.4th at pp. 161-164, Conc. Opn. of Mihara, J.) In the current case, Justice Mihara again cites the *Cicero* dissent and opines that consent is not a defense to a charge of committing a lewd act by use of force. (Conc. & Dis. Opn., at p. 9.)

Respondent urges this Court to follow the *Cicero* dissent and find that the Legislature eliminated any requirement that the prosecution prove the lewd act was against the will of the victim in force cases, thereby eliminating any consent defense to such a charge. Respondent relies largely on the legislative history of the 1981 amendment. (Opening Brief, pp. 20-29, 40-41.) However, as discussed in Argument I-B-3, above, the legislative history is inconclusive. The committee statements that SB 586 would delete the requirement that a lewd act be "against the will of the victim" referred to a version of SB 586 that proposed scrapping section 288 entirely and replacing it with wholly new provisions. (See Respondent's Request for Judicial Notice, Exhibit A at p. 7; *id.*, Exhibit D at p. 1; *id.*, Exhibit H at p. 3; Appellant's Request for Judicial Notice, Exhibit A.) Moreover, two of these analyses somewhat cryptically described the difference between AB 457 and SB 586 as being whether or not the prosecution had to prove that the "force or violence was against the victim's will, " not whether the lewd act was against the victim's will. (Respondent's Request for Judicial Notice at p. 2; see also *id.*, Exhibit H, p. 4.) In the final weeks of back and forth comments, the analyses focused on disagreements between the two bills as to probation eligibility; not on the basic elements of section 288, subdivision (b) as it then existed. (Respondent's Request for Judicial Notice, Exhibit D at p. 1; *id.*,

Exhibit E at pp. 2-3; *id.*, Exhibit H at p. 3.) And although the conference committee reports stated that children were presumed incapable of consenting to sexual acts in all instances (Respondent's Request for Judicial Notice, Exhibit E at p. 2.), that does not necessarily mean that a defendant's level of culpability should not be increased for non-consensual acts.

Respondent also quarrels with *Cicero*'s findings that the purpose of the law of rape is to guard the integrity of a woman's will and privacy of her sexuality from intercourse without consent, that children should be entitled to the same protection, and that it therefore makes sense that as in rape cases, force in lewd act cases should be defined as a method of obtaining a child's participation in a lewd act in violation of a child's will. (Opening Brief, pp. 29-34.) Respondent seeks support in a recent opinion in which this Court stated that force serves a different purpose in a rape case than in a lewd act case. (Opening Brief, pp. 32-33, quoting *Griffin*, *supra*, 33 Cal.4th at pp. 1019, 1027-1028.) But *Griffin* does not undermine the Cicero definition of force in section 288 cases, and instead supports it. *Griffin* held that since forcible intercourse was only a crime when the intercourse was non-consensual, the force used by the defendant was sufficient to support a rape charge if it simply overcame the will of the victim. Thus, unlike section 288, subdivision (b) cases, there is no need to instruct a jury that the force has to be substantially different from or greater than that used to accomplish the intercourse itself. (*Griffin, supra*, 33 Cal.4th at pp. 1019, 1023-1024.) *Griffin* quoted extensively, and with apparent approval, the portions of *Cicero* noting that there must be a significant distinction between 288, subdivisions (a) and (b) in order to carry out the Legislature's apparent intent to differentiate aggravated criminal conduct from less culpable conduct that is still criminal. (*Griffin, supra*, 33 Cal.4th at pp. 1026-1027.) *Griffin*

provides no reason why section 288 should not be interpreted so as to protect both the innocence of children (through subdivision (a)) and the will of children (through subdivision (b)).

Furthermore, *Griffin* indicates that, like "duress" the idea of compulsion is inherent in a common-sense definition of force:

> There are several nonlegal definitions of "force" that have been cited in the cases construing penal provisions that incorporate the term. "One nonlegal meaning of force is 'to press, drive, attain to, or effect as indicated against resistance ... by some positive compelling force or action.' (Webster's 3d New Internat. Dict. (1993) p. 887, col. 2, italics omitted.) Another is 'to achieve or win by strength in struggle or violence.' (*Ibid.*)" (*People v. Elam* (2001) 91 Cal.App.4th 298, 306, 110 Cal.Rptr.2d 185 [ ].)

(*Griffin, supra*, 33 Cal.4th at p. 1023.) This indicates that an "against the will" component should inherently be understood when a jury is instructed that the prosecution must prove that the lewd act was committed by use of force.

Respondent criticizes *Cicero* for differentiating cases where force caused physical harm from those in which it did not by presuming that where there is physical harm, there was necessarily sufficient force. Respondent argues that there was no need to bifurcate the definition of force in this manner. Respondent also notes that in rape cases, force resulting in physical injury does not necessarily establish that an act was against the victim's will or render a consent defense legally unavailable. (Opening Brief, pp. 41-42, citing *People v. Perez* (1987) 194 Cal.App.3d 525, 528-529; *People v. Walker* (2006) 139 Cal.App.4th 782, 807 and fn 20; *Griffin, supra,* 33 Cal.4th at p. 1027.) But these criticisms do not affect the issues here. Maybe *Cicero* was wrong in presuming that injury equates to non-consent, but that does not affect whether section 288, subdivision (b) crimes must be

non-consensual.

Respondent also claims that preclusion of consent defense would not lead to an overly broad application of section 288, subdivision (b) because the statute requires that the lewd act be committed by use of force; thus, there must be nexus between force and the lewd act, not just force incidental or unconnected to the lewd conduct. (Opening Brief, pp. 44-45.) But respondent ignores the most logical and common sense interpretation of this language, which is that the force contributed to accomplishment of the lewd act by overcoming the child's will to avoid it. This Court has phrased the matter in a similar way, stating that subdivision (b) increases "the punishment for the same acts proscribed in subdivision (a) when they are accomplished by the use of force, violence, duress, menace, or threat of bodily harm." (*Griffin, supra*, 33 Cal.4th at p. 1026.) Even respondent's own example of the required nexus shows that an element of compulsion must be present. Respondent proposes that a hug used to keep a child from pulling away from lewd acts is sufficient but that there would not be a sufficient nexus where a hug was given and then lewd acts done. (Opening Brief, p. 44, fn. 10.) What respondent describes is a hug being used to overcome a child's will to avoid or flee from non-consensual lewd acts.

Finally, this Court need not fear that upholding the *Cicero* definition of force will result in undue leniency. Using this definition, courts have upheld convictions under section 288, subdivision (b) in situations involving relatively minor force. (*Pitmon, supra,* 170 Cal.App.3d at pp. 44-45, 48 [defendant grabbed the child's hand, placed it on his own genitals, and rubbed himself with it]; *People v. Mendibles* (188) 199 Cal.App.3d 1277, 1307 [force established where each victim tried to get away, but defendant pulled her back and pulled her head forward to perform oral copulation];

Bolander, supra, 23 Cal.App.4th at p. 159 [defendant stopped child from pulling shorts back up, bent child over and pulled child toward him]; *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1381 [defendant's placed forearm over child's mouth rendering her unable to cry out and pushed her back when she tried to move]; *People v. Babcock* (1993) 14 Cal.App.4th 383, 386-387 [defendant grabbed girls' hands, forced them to touch his genitals, and prevented one of them from pulling her hand away]; *Neel, supra*, 19 Cal.App.4th at p. 1790 [defendant pushed child's head down on his penis when she tried to pull away, grabbed her wrist, and placed her hand on his penis].)

In sum, requiring force sufficient to overcome the will of the victim is consistent with the other means of violating section 288, subdivision (b), which inherently imply that the will of the victim was overcome. It also is consistent with the Legislature's intent to distinguish subdivision (a) crimes from subdivision (b) crimes, and to punish subdivision (b) crimes much more severely. It is a logical interpretation of the statute that sets reasonable and appropriate guidelines for evaluating whether a lewd act was committed by use of force. Application of this prevailing judicial interpretation has not resulted in undue leniency.

D. The Legislature Has Accepted the Prevailing Interpretation of the Statute.

This Court should also uphold the Court of Appeal decision because subsequent events show that the Legislature has accepted the *Cicero* interpretation of the statute.

Since 1984, the courts have consistently and repeatedly stated that commission of a lewd act by use of duress inherently means that the victim's

participation in the act was coerced. (See Argument I-B.) These statements were not mere dicta, but were rules applied repeatedly in the resolution of individual cases. Over that same time period, the prevailing judicial view has been that "force" is also defined as a method of obtaining participation in a lewd act in violation of the child's will. (See Argument I-C.)

During the 25 years in which *Cicero* has been applied, the Legislature has taken no action to alter the statute by writing in a statement that the lewd acts need not be against the will of the child or a statement that consent is not a defense. This is true even though the Legislature has amended section 288 on eight occasions. (Stats. 1986, ch. 1299, § 4; Stats. 1987, ch. 1068, § 3; Stats. 1988, ch. 1398, § 1; Stats.1989, ch. 1402, § 3; Stats. 1993-1994, 1st Ex.Sess., ch. 60, § 1; Stats. 1995, ch. 890, § 1; Stats. 1998, ch. 925, § 2; Stats. 2004, ch. 823, § 7.) Several of these amendments even altered other language in subdivision (b). (Stats. 1986, ch. 1299, § 4; Stats. 1993-94, 1st Ex.Sess., ch. 60, § 1; Stats. 1995, ch. 890, § 1.)

"[W]here the Legislature amends a statute without altering a consistent and long-standing judicial interpretation of its operative language, courts generally indulge in a presumption that the Legislature has ratified that interpretation." (*Escobar, supra,* 3 Cal.4th at pp. 750-751; *People v. Superior Court (Lavi)* (1993) 4 Cal.4th 1164, 1178, fn. 9.) For example, in *People v. Bouzas* (1991) 53 Cal.3d 467, this Court examined whether the prior conviction aspect of petty theft with a prior (§ 666) is or is not an element of the offense, affecting whether a defendant is entitled to stipulate to the prior conviction. Courts had long held that, under prior versions of the statute, the existence of a prior conviction was not an element. This Court presumed that the Legislature was aware of this judicial construction, and accepted it, because the Legislature had taken no action to alter the relevant

terms even though it had subsequently reenacted the statute and made numerous other amendments. (*Id.* at pp. 474-475.) Likewise, when the Legislature enacted the subsequent amendments to section 288, subdivision (b), it could easily have corrected any judicial misunderstanding of the statute. The fact that the Legislature took no action indicates that it agrees with the prevailing judicial interpretation.

Furthermore, one of the amendments supports appellant's position that a subdivision (b) offense requires that the defendant coerce the child to do something against his or her will. In 1986, two years after *Cicero* was decided, the Legislature changed "threat of great bodily harm" to "fear of immediate and unlawful bodily injury on the victim or another person." (Stats. 1986, ch. 1299, § 4.) A "threat" might plausibly be seen as something a defendant makes, which might exist regardless of the effect of the threat on a victim. But "fear" is not something a defendant does; it is something a victim feels. "Fear" in the context of subdivision (b) has been defined as "'A feeling of alarm or disquiet caused by the expectation of danger, pain, disaster, or the like; terror; dread; apprehension'" or "'Extreme reverence or awe, as toward a supreme power.'" (*Cardenas, supra*, 21 Cal App.4th at pp. 939-940.) Accordingly, the standard jury instruction states: "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]." (CALCRIM No. 1111 (Fall 2008 Ed.); see similar language in CALJIC No. 10.42 (Spring 2009 Ed.).) This instruction is a correct definition of the law in that it states "that the jury must find that the defendant used the victim's fear of immediate harm as a means of molesting the victim." (*Veale, supra,* 160 Cal.App.4th at pp. 50-51.) The same element of fear in the rape statute has likewise been held to

have a subjective component; "[t]he subjective component asks whether a victim genuinely entertained a fear of immediate and unlawful bodily injury sufficient to induce her to submit to sexual intercourse against her will." (*People v. Iniguez* (1994) 7 Cal.4th 847, 856.) The Legislature's decision to insert "fear" into section 288, subdivision (b) thus seems to indicate that the Legislature is content with the courts' position that culpability under that statute rests in part on whether the defendant's actions actually had an effect on the mind of the child victim.

Respondent argues that even though fear is a subjective matter, its inclusion as a means by which the statute may be violated does not mean that consent is a defense. However, this Court should reject respondent's claim. As respondent admits, evidence of a child's willingness to engage in lewd acts may serve to negate a claim that the child was actually afraid. (Opening Brief, pp. 38-39.) In other words, a defendant should be able to argue that fear has not been not proven by asserting that the victim consented to the acts. Since it would be inconsistent to view a lewd act accomplished by fear as being inherently non-consensual without viewing duress, menace or force in the same way, consent should also be a defense to those allegations..

E. The Prevailing Interpretation of the Statute Is Consistent with the Principles that (1) Consent is Irrelevant to Non-forcible Child Sex Crimes and (2) Some Children Can Consent to Some Sexual Acts.

Respondent asserts that recognizing a child's consent as a defense to the crime of committing a lewd act with a child would be contrary to California's long-standing policy that children are immature, vulnerable, and impulsive and thus presumed incapable of consenting to sex. Respondent also argues that because section 288 has the goal of protecting the innocence

of the child, it is different from other forcible sex crime statutes that protect the will of the victim. (Opening Brief, p. 32.) Based on this, respondent argues that the focus of section 288, subdivision (b) should be on the nature of the perpetrator's actions, not the impact of those actions on the child. (Opening Brief, pp. 12-15, 29-34, 39-40.)

Respondent's position is unsound. Maintaining a consent defense to a charge that a lewd act was committed by use of force or duress does not undermine the intent of the law to protect the innocence of children, because consensual lewd acts are still criminal under subdivision (a). Although a lewd act with a child is always a crime, that does not necessarily mean consent or lack thereof has no role to play in distinguishing a section 288, subdivision (b) crime from a subdivision (b) crime. Furthermore, the sex offense laws generally recognize that children may willingly participate in sexual acts and gauge a defendant's culpability based on whether or not the acts were consensual.

Respondent primarily relies upon *People v. Toliver* (1969) 270 Cal.App.2d 492 and *People v. Olsen* (1984) 36 Cal.3d 638. (AOB 14-15.) *Toliver* did state that "the philosophy applying to violations of section 288 is entirely different from that applying to unlawful sexual intercourse" and "violation of section 288 does not involve consent of any sort." (*Olsen, supra,* 36 Cal.3d at p. 645, quoting *Toliver, supra,* 270 Cal.App.2d at p. 495-496.) But at the time *Toliver* was decided, section 288 described only the offenses now set forth in section 288, subdivision (a); the Legislature had not yet adopted subdivision (b) to impose more severe punishment on lewd acts accomplished by particular means. Likewise, *Olsen* involved only a subdivision (a) crime. (*Olsen, supra,* 36 Cal.3d at p. 640.)

Furthermore, neither *Toliver* nor *Olsen* speaks to the question of what

committed "by use of force, violence, duress, menace or fear of bodily injury" means in the context of a *subdivision (b)* charge. Rather those cases held that a mistake of age is not a defense to a charge of lewd conduct with a child under age 14 even though it is a defense to unlawful sexual intercourse. (*Olsen, supra,* 36 Cal.3d at p. 649, quoting *Toliver, supra,* 270 Cal.App.2d at p. 496.) In other words, the defense would have been not that the minor actually consented, but that the accused reasonably believed that the victim's consent was legally valid because she appeared to be an adult. Distinguishing section 288 from statutory rape in this manner is appropriate given that consensual sex with a person over age 18 is not a crime, but it is untenable that a defendant could reasonably believe that a child under age 14 was an adult with whom consensual sexual activities might be legal. (See *Toliver, supra*, 270 Cal.App.2d at pp. 495; *Olsen, supra*, 36 Cal.3d at pp. 644-645.)

Moreover, recognizing a consent defense to a subdivision (b) charge is not contrary to the statement that "section 288 is for protection of infants or children as to whom persons commit lewd and lascivious acts at their peril." (*Olsen, supra,* 36 Cal.3d at p. 645, quoting *Toliver, supra,* 270 Cal.App.2d at p. 496.) Regardless of how subdivision (b) is interpreted, a consensual lewd act with a child under age 14 is still a serious crime. And it is undisputed that the minor's consent is not a defense to a *section 288, subdivision (a)* charge; the *Cicero* court recognized that and made no change to that policy. (*Cicero, supra*, 157 Cal.App.3d at p. 482.) Indeed, consent is irrelevant to any of the statutory provisions that criminalize non-forcible sexual acts involving minors. (*People v. Hillhouse* (2003) 109 Cal.App.4th 1612, 1619-1620; § 261.5 [statutory rape]; § 286, subds. (b) and (c)(1) [sodomy with a minor]; 288a, subd. (b) and (c)(1) [oral copulation with a

minor]; § 289, subds. (h) through (j) [penetration with a minor].) This policy protects children by recognizing that even though some minors may understand the nature and consequences of a sexual act, they lack judgment and impulse control. (*Hillhouse*, *supra*, 109 Cal.App.4th at pp. 1619-1620.) But it is not necessary to adopt respondent's interpretation of subdivision (b) to further this policy, as it is already carried out under section 288, subdivision (a).

Respondent also argues that a consent defense cannot be reconciled with the fact that under section 288, it is the defendant's sexual intent, rather than objective nature of the touching, that renders an act lewd. Respondent cites *People v. Martinez* (1995) 11 Cal.4th 434, 443-444, 450, which says that although children are routinely cuddled, stroked, examined, groomed, and disrobed as part of a normal upbringing, any of those acts may also be undertaken for purpose of sexual arousal. Respondent argues it makes no sense to apportion criminal liability according to a child's consent to acts which appear outwardly non-sexual, but are rendered lewd by underlying intent. (Opening Brief, pp. 30-31.) But, again, this has no bearing on the distinction between a section 288, subdivision (a) crime and a subdivision (b) crime. The acts described in *Martinez* would be criminal under subdivision (a) if committed with the requisite intent, but could not be charged under subdivision (b) without something more. *Martinez* does not speak to what that something more should be.

Respondent further argues that since sexual acts with minors are criminal regardless of consent, the law should not assign to any particular child's behavior a significance that diminishes the perpetrator's culpability for lewd acts. First, respondent misstates the question, which really is whether the perpetrator's level of culpability should be *increased* even if the

child's freely decided to participate in the acts, unaffected by any attempts to exert physical or psychological pressure. Second, respondent fails to acknowledge that the law generally deems minors to be capable of voluntarily participating in lewd acts and increases the defendant's culpability when crimes are against a child's will.

Cicero addressed this issue thoroughly. The *Cicero* court ruled that there was no factual basis to deem all children under age 14 per se incapable of consenting to all of the possible forms of sexual conduct chargeable under section 288, subdivision (b). (*Cicero*, *supra*, 157 Cal.App.3d at p. 484.) The court concluded that *some* children under age 14 are capable of knowingly consenting to *some* forms of sexual conduct, citing a comprehensive government report showing that, as of 1973, 68 percent of girls age 13 and younger had engaged in kissing; 43 percent of those girls had engaged in "necking" (prolonged hugging and kissing), 31 percent in "petting" above the waist and 17 percent in "petting " below the waist. (*Id.* at p. 483.) The court also observed that the statute covered "a wide spectrum of ages, conduct and relationships." (*Ibid.*) Although the report upon which *Cicero* relied is now over35 years old, there is no reason to believe that the percentage of minors engaging in sexual activities of various sorts has gone down. If anything, there is evidence that the percentages have increased. See A. Jarrell, *The Face of Teenage Sex Grows Younger,* The New York Times on the Web (April 2, 2000), available at www.guttmacher.org/ media/pdf/0403_clip.pdf (last viewed May 25, 2009) [citing academic studies of teen sexual activities].)

Cicero's conclusion is also consistent with the positions taken by the Legislature and other courts. The major sex crime statutes – punishing rape, sodomy, oral copulation and forcible penetration – contain separate

provisions punishing crimes against children and crimes committed against the will of the victim by use of force, violence, duress, menace or fear or where the victim is unable to give valid consent due to a mental disorder or condition such as intoxication or unconsciousness. (§§ 261, 261.5, 286, 288a, 289.) Depending on the circumstances, a crime involving a minor victim could be charged under either provision. Accordingly, even if the victim is a minor, a forcible sex crime is committed under these statutes only if the prosecution can prove that child did not consent to it. (See *People v. Young* (1987) 190 Cal.App.3d 248, 25.)

In *People v. Tobias* (2001) 25 Cal.4th 327, this Court made statements rejecting the position taken by respondent in the current case. The Court observed that the Legislature had amended the rape statutes in 1970 to provide separate provisions for unlawful sexual intercourse with a minor (§ 261.5) and forcible rape (§ 261). "In making this change, the Legislature implicitly acknowledged that, in some cases at least, a minor may be capable of giving legal consent to sexual relations. If that were not so, then every violation of section 261.5 would also constitute rape under section 261, subdivision (a)(1)."[2] (*Tobias, supra,* 25 Cal.4th at p. 333; see also *Michael M. v. Superior Court* (1979) 25 Cal.3d 608, 614 [indicating that the Legislature, when it adopted section 261.5, "necessarily acknowledged

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[2] *Tobias, supra,* 25 Cal.4th at p. 333 explains that this change is why the old cases relied upon by respondent, dating from the time in which sexual intercourse with a minor was commingled in the forcible rape statute, are no longer good law. (See, e.g., cases cited at Opening Brief, pp. 12-13, including *People v. Verdegreen* (1895) 106 Cal. 211, 214-215; *People v. Ratz* (1896) 115 Cal. 132, 134-135; *People v. Griffin* (1887) 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.)

the obvious truism that minor females are fully capable of freely and voluntarily consenting to sexual relations."].) The Court further recognized that the same was true of the oral copulation and sodomy statutes, which were amended in 1975 to make those acts criminal if done with a minor or without knowing consent. (See *Tobias*, *supra*, 25 Cal.4th at p. 337.)

Following *Tobias*, *People v. Hillhouse*, *supra*, 109 Cal.App.4th 1612 further explained how consent factors into the assessment of culpability for sex crimes. In that case, the court held that oral copulations and sexual penetrations of a 14-year old who was also mentally impaired could be charged either as crimes against a child or crimes against a person who was incapable of giving legal consent due to a developmental disability.

> [A]lthough common parlance (even that indulged in by courts) tends to suggest that minors cannot consent to sexual contact, none of the statutory provisions which specifically govern that contact says any such thing. To the contrary, the concept of consent, whether legal or actual, is actually *irrelevant* to the determination of whether those statutes have been violated.

(*Hillhouse*, *supra*, 109 Cal.App.4th at p. 1619, emphasis in original.) "The existence of such consent, of course, is the distinction between the crimes. Nonconsensual sexual intercourse with a minor still constitutes rape, and carries a higher penalty." (*Id.* at p. 1620.)

The law also recognizes that minors may initiate or voluntarily participate in sexual acts by making them culpable for their actions. It is true that there is a presumption that children under the age of 14 are incapable of committing crimes, but that presumption is rebuttable by clear proof that at the time of committing the act charged against them, they knew its wrongfulness. (§ 26.) Thus, minors under the age of 14 can be held responsible for sex-related offenses, including section 288 crimes. (See, e.g., *Tobias, supra*, 25 Cal.4th at p. 334; *In re Tony* C. (1978) 21 Cal.3d 888

[13-year old committed rape]; *In re Jerry M.* (1997) 59 Cal.App.4th 289 [11-year old committed lewd or lascivious act on a child]; *In re Paul C.* (1990) 221 Cal.App.3d 43 [13-year old committed lewd or lascivious act on a child and oral copulation with a minor]; *In re Billie Y.* (1990) 220 Cal.App.3d 127 [13-year old committed lewd or lascivious act on a child]; *People v. Herman* (2002) 97 Cal.App.4th 1369, 1380, fn. 8 [minor can violate section 288].)

Finally, respondent argues, as a policy matter, that making the degree of criminality depend on whether a child consents or does not consent to the lewd acts only exacerbates the profound harm the child suffers. (Opening Brief, pp. 30-31.) On this basis, respondent claims that *Cicero* wrongly focused on the mental state of each individual child rather than solely on the perpetrator's actions. (Opening Brief, pp. 39-40.) Again, there is no basis for this position. A child who is impelled to do something against his or her will can reasonably be said to suffer more trauma than a child who willingly engages in acts. Indeed, inquiring into the state of the mind of the child seems a much more logical way to assess the damage to the child than merely inquiring into the objective acts of the defendant. And, as discussed above, that is the attitude reflected in the sex offense laws generally. Inquiring into the mind of the child seems especially appropriate in section 288 cases, where both the nature of the lewd acts and the nature of the force or duress – ranging from physical brutality to amorphous "implied" threats of "hardship" – can cover a huge range of behavior. As *Cicero* acknowledges, it makes sense in these circumstances to determine the level of punishment based on whether the acts had any effect in overcoming the will of the child. (*Cicero, supra*, 157 Cal.App.3d at pp. 482-484.)

In fact, after *Cicero* was decided, the Legislature explicitly recognized that consent or non-consent is an appropriate basis for deciding

whether sexual crimes with children under age 14 are aggravated offenses. In 1994, the Legislature created a whole new crime based on that view, Penal Code section 269. (Stats. 1993-1994, 1st Ex.Sess., ch. 48 and Stats. 1994, ch. 878.) Entitled "aggravated sexual assault of a child," section 269 applies only when the child is under age 14 and provides for life terms and fully consecutive sentences when sex crimes are committed by a defendant who is seven or more years older than the child. Section 269 applies only to sexual acts that are by definition non-consensual. (See § 261, subd (a)(2) or (6); § 264.1; § 286, subd. (c)(2) or (3) or subd. (d); § 288a, subd (c)(2) or (3) or subd. (d); § 289, subd.(a); see also CALCRIM No. 1123 (Fall 2008 Ed.) [requiring instruction on elements of the underlying offense].) Accordingly, in deciding what force is necessary to violate section 269, courts have adopted the definition applied in rape cases – there must be force sufficient to overcome the will of the victim. (*In re Asencio* (2008) 166 Cal.App.4th 1195; *People v. Guido* (2005) 125 Cal.App.4th 566, 575-576.) If the Legislature did not care about the will of the child victim, it could and would have written this law differently.

In sum, there is no support for respondent's claim that the law does not recognize the capability of children under age 14 to consent to lewd acts. In fact, our state has generally adopted a two-prong approach to sex offenses against children, making all sex acts with children criminal, and increasing the punishment for such crimes when they are committed against the child's will. The prevailing judicial interpretation of section 288 protects both of these interests by applying the increased penalties of subdivision (b) only when a lewd act is non-consensual.

II. ANY RETROACTIVE APPLICATION OF AN EXPANDED DEFINITION OF A LEWD ACT "COMMITTED BY USE OF FORCE, VIOLENCE, DURESS, MENACE OR FEAR" ENCOMPASSING CONSENSUAL ACTS WOULD VIOLATE THE RIGHT TO DUE PROCESS (U.S. CONST., AMEND. XIV).

As discussed in Argument I, this Court should conclude that section 288, subdivision (b)(1) encompasses only lewd acts that are non-consensual. However should this Court find that some or all subdivision (b)(1) crimes may be committed with the consent of the child, it should not apply that holding in the current case because expanding the scope of the statute in this fashion would violate Soto's right to due process.

"[T]he principle upon which the [ex post facto] clause is based – the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties – is fundamental to our concept of constitutional liberty. . . . As such that right is protected against judicial action by the Due Process Clause of the Fifth Amendment." (*Marks v. United States* (1977) 430 U.S. 188, 191-192.) "Courts violate constitutional due process guarantees (U.S. Const., 5th and 14th Amends.; Cal. Const., art. I, § 7) when they impose unexpected criminal penalties by construing existing laws in a manner that the accused could not have foreseen at the time of the alleged criminal conduct." (*People v. Blakeley* (2000) 23 Cal.4th 82, 91- 92; *Bouie v. City of Columbia* (1964) 378 U.S. 347.) Thus, "an unforeseeable judicial enlargement of a statute" that changes the elements of a crime to the detriment of a defendant may not be applied retroactively. (*Blakeley*, *supra*, 23 Cal.4th at p. 92; see, also *People v. Martinez* (1999) 20 Cal.4th 225, 238-239.)

This Court has applied this doctrine numerous times in situations similar to this one. For example, this Court held that its judicial redefinition

of fetal homicide, eliminating the requirement that the fetus be viable, was a major change in the law that could not be applied retroactively without violating due process. (*People v. Davis* (1981) 29 Cal.3d 814, 828.) This Court also refused to allow retroactive application of a decision overruling prior case law that interpreted the asportation element of kidnapping. (*Martinez, supra,* 20 Cal.4th at pp. 238-239.) In another case, this Court decreed that a new judicial rule it had proclaimed could not be applied retroactively where the overwhelming weight of previous authority was to the contrary. (*People v. Welch* (1993) 5 Cal.4th 228, 237.) Likewise, a Court of Appeal has held that a decision abrogating the former rule that a person must form intent before or during the crime in order to be liable as aider or abettor could apply only prospectively. (*People v. Farley* (1996) 45 Cal.App.4th 1697, 1704.)

Most recently, this Court applied these principles in *People v. Blakeley,* in which it rendered an unforeseeable judicial enlargement of the crime of voluntary manslaughter by holding that intent to kill is not an element of that crime and that one who kills unintentionally may be found guilty of it. (*Blakeley, supra,* 23 Cal.4th at p. 92.) Although the Court held that the courts' "assumption that intent to kill is a necessary element of voluntary manslaughter" was erroneous (*id.* at p. 89), it also decided that it would violate due process to apply that holding to the defendant. (*Id.* at pp. 91-92.) The Court observed that, at the time of the defendant's offense, it had not addressed whether an unintentional killing in unreasonable self defense could be voluntary manslaughter. However, several courts of appeal had held that voluntary manslaughter required an intent to kill and no Court of Appeal had issued a contrary decision. (*Id.* at p. 92.) Therefore, the Court applied the previous rule that voluntary manslaughter required an

intent to kill, and examined whether the defendant had suffered any prejudice as a result of the trial court's failure to instruct the jury in accord with that rule. (*Id.* at pp. 93-94.)

The current case presents the same situation as *Blakeley*, and it should be treated the same. This Court has not previously opined whether a lewd act committed by use of duress or force is necessarily non-consensual. But for 25 years, the courts of appeal have repeatedly and consistently held that commission of a lewd act by use of duress necessarily means that the will of the victim was overcome. Thus, Soto's offense was committed when the law clearly established that lewd acts committed by use of duress were non-consensual. If this Court now adopts an expanded definition of section 288, subdivision (b) that encompasses consensual crimes, it cannot apply that definition here without violating due process. Instead, it should proceed to considering whether Soto suffered prejudice as a result of the instruction that consent was not a defense as to Counts One, Two and Four.

III. APPELLANT WAS PREJUDICED BY THE ERRONEOUS INSTRUCTION THAT CONSENT IS NOT A DEFENSE TO A CHARGE OF COMMITTING A LEWD ACT BY FORCE OR DURESS.

The Court of Appeal did not determine whether the erroneous "consent is not a defense" instruction in this case should be reviewed under the standard applicable to federal constitutional error (*Chapman v. California* (1967) 386 U.S. 18, 24) or the standard applicable to state law error (*People v. Watson* (1956) 46 Cal.2d 818, 836-838). (Slip op., pp. 11-12.) However, the court concluded that the error was prejudicial and required reversal under either standard.

This Court should rule that the error is reversible per se or,

alternatively, that the *Chapman* standard applies. The erroneous instruction did not affect just an affirmative defense; it undermined the prosecution's burden of proving that the lewd acts were non-consensual. It thus violated appellant's federal constitutional rights to force the prosecution to prove all elements of the offense and to present a defense negating the prosecution's attempts to prove those elements.

This Court should also reject respondent's claim that this is an "all or nothing" case in which the jury necessarily would have found either that the lewd acts were forcible or that no lewd acts occurred at all. Respondent ignores the large body of evidence that strongly suggests that the lewd acts occurred, but were consensual. Based on this evidence, the Court of Appeal correctly found that the instructional error was prejudicial as to all three section 288, subdivision charges.

A. Because the Error Violated Federal Constitutional Rights, It Should Either Result in Per Se Reversal or Be Analyzed for Prejudice Under the *Chapman* Standard.

The instruction that "consent is not a defense" violated Soto's federal constitutional rights in two distinct ways. First, the Fifth Amendment right to due process and Sixth Amendment right to jury trial, made applicable to the states through the Fourteenth Amendment, require the prosecution to prove to a jury beyond a reasonable doubt every element of a crime. (*In re Winship* (1970) 397 U.S. 358, 364; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278.) An instruction that omits or distorts an element of the charged offense violates these principles. (*United States v. Gaudin* (1995) 515 U.S. 506, 509-511, 522-523; *Pope v. Illinois* (1987) 481 U.S. 497; *Bartlett v. Alameida* (9th Cir. 2004) 366 F.3d 1020, 1025; *People v. Harris* (1994) 9 Cal.4th 407, 428 [applying *Chapman* standard to misinstruction on

facts necessary to support taking element of robbery].) Here, the instruction that consent is not a defense constituted an omission or mis-instruction on the elements of the offense because it removed the prosecution's burden of proving beyond a reasonable doubt that Crystal and Reyna were coerced into submitting to lewd acts against their will.

Second, the same sections of the federal constitution guarantee a criminal defendant the right to present a defense. (*California v. Trombetta* (1984) 467 U.S. 479, 485; *Mathews v. United States* (1988) 485 U.S. 58, 63.) This includes the right to have the jury properly instructed on defenses that negate an element of the offense and the right to make arguments to the jury regarding such a defense, where such arguments are supported by the evidence. (See, e.g., *People v. Stewart* (1976) 16 Cal.3d 133, 140 [failure to instruct on defense that accused had a good faith belief he was acting in scope of authority, not fraudulently]; *United States v. Sayetsitty* (9th Cir. 1997) 107 F.3d 1405, 1414 [failure to instruct on voluntary intoxication defense]; *Conde v. Henry* (9th Cir.1999) 198 F.3d 734, 739 [refusal to give instructions or permit counsel to argue that state failed to prove intent to rob].) Here, the instructions deprived Soto of his right to have the jury consider a valid defense claim that any lewd acts were consensual, and thus not committed by use of force or duress.

There is good authority that the federal constitutional errors in this case require reversal per se. The right to have the jury instructed on the defense theory of the case is "so basic to a fair trial" that failure to instruct on a defense when there is law and evidence to support the instruction can never be considered harmless error. (*United States v. Escobar de Bright* (1984) 742 F.2d 1196,1201-1202; *Conde, supra,* 198 F.3d at p. 741; accord, *People v. Lee* (1987) 43 Cal.3d 666, 675, fn. 1; *United States v. Miguel* (9th

Cir. 2003) 338 F.3d 995, 1000-1002; *United States v. Zuniga* (9th Cir. 1993) 989 F.2d 1109, 1111.) This Court has also opined an error in failing to instruct on a defense negating an element of a crime is reversible per se, unless some other portion of the judgment shows the issue was necessarily resolved against the defendant. (*Stewart*, *supra*, 16 Cal.3d at p. 140.) Here, the instructional error both diluted the prosecution's burden to prove the acts were committed by force or duress and deprived Soto of his best defense; it should result in reversal per se.

Appellant acknowledges that instructions which violate federal constitutional rights by omitting or distorting elements of the offense, are generally scrutinized for harmless error. (*Neder v. United States* (1999) 527 U.S. 1, 9-10; *People v. Flood* (1998) 18 Cal.4th 470, 479-480; *People v. Hagen* (1999) 19 Cal.4th 652, 670-671.) Under the federal standard, a conviction must be reversed unless it appears beyond a reasonable doubt that the improper instruction did not contribute to the verdict. (*Chapman, supra,* 386 U.S. at p. 24; *Rose v. Clark* (1986) 478 U.S. 570, 580; *Hagen, supra,* 19 Cal.4th at pp. 670-671.) A reviewing Court must ask whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted or mis-described element. (*Neder*, *supra*, 527 U.S. at p. 19.)

> "If ... the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error–*for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding*–it should not find the error harmless."

(*Ibid*, emphasis added.)

This Court should reject respondent's claim that the state-law error standard set forth in *People v. Watson* (1956) 46 Cal.2d 818 applies in this case. Respondent asserts that the United State Supreme Court in *Gilmore v. Taylor* (1993) 508 U.S. 333, 343-344 has indicated that there is no

constitutional right to instructions on an affirmative defense, and that such an issue is purely a matter of state law. (Opening Brief, at p. 46, fn. 11.) In addition, the Court of Appeal indicated that this Court has not yet decided the test to be applied when an instruction erroneously states that a defense is not a defense. (*People v. Salas* (2006) 37 Cal.4th 967, 983, fn. 8, 984, fn. 9.) But both *Gilmore* and *Salas* are distinguishable from the current case because they involved affirmative defenses, meaning defenses that do not negate an element of the offense but instead present new matters to excuse or justify the defendant's conduct. (See *People v. Noble* (2002) 100 Cal.App.4th 184, 189.) In *Gilmore*, the instructions given by the trial court were misleading because it was possible for a jury to find a defendant guilty of the elements of murder without considering whether he was instead entitled to a conviction of the lesser offense of voluntary manslaughter. (*Gilmore, supra*, 508 U.S. at pp. 338-340.) The court held that the instructions did not lessen the state's burden of proof for murder or misstate the applicable state law; the most that could be said was that they created a risk that the jury would fail to consider evidence related to an affirmative defense. (*Id.* at p. 341.) Likewise, in *Salas*, the error consisted of, among other things, improperly instructing that a defendant's good faith belief that a security did not require registration was not a defense to a charge of selling unregistered securities; the court made clear that bad faith was not an element of the crime and that good faith was an affirmative defense rather than a defense that negated the prosecution's proof of an element of the offense. (*Salas*, *supra*, 37 Cal.4th at pp. 971-972, 982, 984.) In contrast, in the current case, consent is not an affirmative defense; rather proof that the crime was committed by force or duress requires that the lewd acts were non-consensual; a consent defense attacks the prosecution's proof of the

elements of the offense. (Maj. Opn., pp. 10, fn. 4.)

Accordingly, neither *Gilmore* nor *Salas* support respondent's claim that the error in this case should be scrutinized under the *Watson* standard. The error should require per se reversal. Alternatively, if the error here is analyzed for prejudice, the proper standard is that set forth in *Chapman*.

B. Under Any Standard, the Error Was Prejudicial.

This Court should reject respondent's claim that any error was harmless and that the record is devoid of evidence that the lewd acts were consensual. (Opening Brief, pp. 45-50.) The state cannot show that the error here was harmless beyond a reasonable doubt – or under any other standard – because, as the Court of Appeal found, the prosecutor relied heavily on a claim of duress and there was evidence from which a jury could conclude that the two girls consensually engaged in the kissing, hugging and petting charged in Counts One, Two and Four. (Maj. Opn., pp. 4-5, 11-12.)

The trial court apparently thought there was evidence upon which the jury might find consent, as otherwise it simply could have declined to include the controversial and optional "consent is not a defense" portion of CALCRIM 1111. The fact that the trial court instructed on several lesser included offenses – with no objection from the prosecution – also shows that this case was not an "all or nothing" matter in which the jury would necessarily either believe Crystal and Reyna's most damaging statements or would find that no lewd acts had occurred at all. (See 5RT 355-361 [discussion of jury instructions]; 5RT 2CT 241-244 [instructions on lessers].)

The prosecutor primarily argued that Soto had used duress in committing lewd acts on both girls. (5RT 376-380.) Alternatively, the

prosecutor argued that Soto had applied force.[3] (5RT 378-379, 412-413.) However, the prosecutor was obviously concerned that the jury would find that lewd acts had been committed, but that those acts were not accomplished by duress or force because Crystal and Reyna had consented to them. The prosecutor made a point of highlighting the erroneous instruction in her closing argument regarding the section 288, subdivision (b) charges:

> Consent is not a defense. It is not a defense that one or both of the girls wanted to do it or wanted to be with the defendant when this happened. Because he's the adult in the equation.(5RT 368.)

There is no reason for this Court to treat the issue of consent as any less important than the prosecutor and the trial court treated it. (*People v. Cruz* (1964) 61 Cal.2d 861, 868.)

The prosecutor and trial court were correct in thinking that the jury might find that Crystal and Reyna consented participating in the acts charged in Counts One, Two and Four. There was no physical evidence of force or duress. No third party witness testified seeing any of the alleged lewd acts or previous interactions between Soto and the two girls. The case thus hinged on statements made by Crystal and Reyna, each of whom had motives for denying that she was consensually involved in lewd acts and claiming that she was coerced into submitting to them against her will.

As for Counts One and Two, Crystal told the police that Soto had kissed her, rubbed against her, and hugged her against her will in his car and in the school parking lot. She told the police she had submitted to these acts because Jaime had wheedled her, pinched her, and threatened to tell her mother she had a boyfriend, and because he had locked the car door or held

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[3] A section 288, subdivision (b) offense can also be committed by violence, menace or fear of immediate bodily injury. The prosecutor did not argue that the lewd acts were committed by any of these other means.

her when she tried to get away. (2RT 70-72, 77, 80-84, 87-89; 4RT 304-306, 338-339, 342.) At trial, Crystal denied that Soto had ever touched her improperly at all. (2RT 67, 77-78, 125-126; 3RT 172, 187.)

But other evidence could have supported an inference that the lewd acts had occurred, but that Crystal had consented to them. Crystal reported that Jaime was her best friend, that she sometimes went places with him, and that he complimented her and gave her presents. (2RT 86-87, 111-112; 3RT 174-175.) She wore the ring he gave her when she testified at trial. (2RT 87.) Crystal's mother had seen Jaime kissing her and apparently thought that Crystal was inviting his attentions. (2RT 75-76, 91; 4RT 307-308.) Even after Jaime began making sexualized advances toward her, and even after her mother made Jaime move out of the house, Crystal rode to school with Soto. (2RT 80-81; see *People v. Westek* (1948) 31 Cal.2d 469, 474 [evidence that children accompanied defendant on successive trips and so gave him opportunity to repeat his alleged criminal acts was evidence the jury could consider in connection with other facts tending to solve the question whether they acted voluntarily].)

A week after the alleged incident in Jaime's car, Crystal still wanted to have private encounters with Jaime. Crystal herself admitted that she called out to Jaime when she saw him driving by, and then manipulated their meeting so that it would take place away from the main school entrance. (2RT 64, 120; 4RT 318.) Crystal said that she wanted to see Jaime because she was jealous that he was dating another girl and had stopped talking to her. (2RT 64-65, 72-73, 123-124, 168; 3RT 185.)

Gloria Diaz, the school secretary who saw Crystal and Jaime in the school parking lot testified in a manner inconsistent with Crystal's statements to the police, and consistent with an inference that Crystal was

not being subjected to force or duress. Diaz unequivocally stated that Crystal when Crystal saw her watching, it was Crystal who motioned for Jaime to drive to a more secluded area and who walked beside the car as Jaime drove. (4RT 326-328, 331-332.) Even though the parking lot was in a public place, Crystal never shouted for help, tried to make a commotion to attract attention, or used Diaz's presence as an excuse to get away. She seemingly had no trouble walking away from Jaime once she decided to do so. (2RT 67-68.) She was already heading toward the school entrance when the principal called her name. (2RT 290.)

Crystal did not spontaneously complain to anyone about Jaime touching her in his car or in the school parking lot. The incidents did not come to light until Crystal was interrogated by the principal and the police. Even then, she was reluctant to talk. When Crystal was called into the principal's office, she refused to say much. (2RT 69, 127; 3RT 193; 4RT 286.) After she was allowed to leave the principal's office, the first thing she did was call Jaime and tell him the principal had been asking about him. (2RT 70, 121; 3RT 195-196.) Crystal was so afraid that she was going to have to talk to the police and that she would be in trouble with her mother that she started crying in class. (2RT 103-105; 3RT 178-179.) She was also reticent when the police first interviewed her; even Officer Byrom thought Crystal seemed embarrassed and afraid of being in trouble. (4RT 335-337.) Only under these circumstances did Crystal then claim that Jaime had kissed, hugged and touched her against her will.

Under oath, Crystal retracted the stories she had told the police and claimed that no lewd acts had occurred at all. (2RT 67, 77-78, 125-126; 3RT 172, 187.) In doing so, Crystal offered plausible reasons for lying to the police, revealing that Crystal had motives for shifting blame for any sexual

encounters away from herself and onto Jaime. Crystal admitted that when she talked to the police, she was mad at Jaime for dating someone else and ignoring her. (2RT 72, 131, 133.) Crystal also testified that she was scared her mother would be angry with her for getting in trouble at school. (2RT 127-128, 131-132.) Crystal had not thought that anything bad would happen to Jaime because of what she said. (2RT 72-73; 3RT 200-201.) She felt guilty that her dishonesty had resulted in Jaime's arrest, and she was worried about what would happen to him. (2RT 109-111; 3RT 187-188.)

As for Count Four, Reyna told the police and testified that Jaime held her down with a hug when she tried to leave, touched her crotch area, and placed her hand on his penis outside his boxers. (3RT 234-237, 239-240.) ; Reyna was also afraid that Jaime would get upset because she did not do what he wanted or that he might force her to have sex in the future. (3RT 238, 240, 243, 265.)

But other portions of Reyna's testimony supported an inference that she engaged in their encounter voluntarily. Reyna admitted she was attracted to Jaime. When she met him, he had told her she was pretty. (3RT 213.) She asked Crystal to give him her phone number because she thought he was good-looking and nice. (3RT 223, 258.) When she met up with Jaime in the laundry room, Jaime kissed her, tried to touch her, and put her hand on his genital area. But he respected her wishes and desisted when she said she did not want to each of these things; she was not afraid of Jaime but she was afraid people would see them. (3RT 216-219, 225, 219-220, 243-244, 254-256.) In light of this testimony, the prosecutor dismissed the allegation that this incident was forcible, and reduced it to a section 288, subdivision (a) charge. (5RT 358-359.) As for the events in the apartment charged in Count Four, Reyna stayed in the apartment with Jaime for an hour

and a half even though no one else was there. (3RT 264.) She did not attempt to leave when appellant began suggesting sexual activity. (3RT 231, 244-245.) Jaime respected her wishes to throw away the condom he had presented to her and to turn off the movie that showed two clothed women kissing (not really a "pornographic" movie). (3RT 230-232, 259-260.) He complied when she told him she did not want to remove her pants. (3RT 240-241.) Reyna also had no difficulty in moving Jaime's or her own hand away when he tried to touch her between her legs or put her hand on his genital area. (2RT 236-240, 265, 269.) She was not certain whether she ended up on the bed with Jaime because he pulled her down or because she had tripped and fallen on him. (3RT 232, 243, 260-261.) Moreover, after she first got up from the bed, she went back to give Jaime a goodbye hug. (3RT 234-235, 261.) She admitted that Jaime did nothing to prevent her from leaving when she decided to do so. (3RT 242, 244.)

Like Crystal, Reyna did not complain about Soto's actions on her own initiative. Indeed, she bragged to Crystal, untruthfully, that she had had sex with Jaime. (4RT 271-272.) When the police interviewed her, she cried a lot and was reluctant to talk. (4RT 310-311, 322-323.) Reyna she was afraid her mother would physically abuse her for being involved in sexual activity. Indeed, after Reyna talked to Detective Schillinger, her mother hit her and told her she would have to take a pregnancy test. (3RT 246-248.) Reyna was so afraid of her mother that she ran away from home. (3RT 267-269.) Thus, Reyna, like Crystal, had a powerful a motive to downplay her role in the events and to exaggerate Soto's behavior;

Other facts indicated that a consent defense could have been accepted by the jury. The girls in the case were not very young children. Rather, they were pre-teens 11 or 12 years old (3RT 183; 225, 227-228), an age at which

children can be held responsible for their own participation in sexual acts. (See *Tobias, supra,* 25 Cal.4th at p. 333 and cases cited therein.) Soto himself was still a teenager 19 years old. (2CT 290.) The acts that the girls engaged in with Soto were not explicit acts involving nudity, penetration or direct contact with breasts or genitals; rather, they consisted of kissing, hugging, and rubbing or touching on top of clothes.

Nor is there any indication that the jury necessarily found, based on other instructions, that the acts were accomplished against Crystal's or Reyna's will. Although the jury found true separate force or fear allegations on Counts One, Two and Four, the instructions on those allegations echoed a portion of CALCRIM 1111: "To prove this allegation, the People must prove that: The defendant committed the offense by the use of force, violence, duress, menace or fear of immediate bodily injury on the child." (AugRTB 22; 2CT 241 [CALCRIM No. 3250].) This language did not necessarily convey to the jurors that they could find these allegations not true if Crystal or Reyna consented to the acts. Rather, given the "consent is not a defense" instruction they had already received, it would have been most reasonable for the jurors to infer that lack of consent was not a defense to the special allegations either. Indeed, the prosecutor asserted in closing that "the force and fear allegation is just a repetition of the same definitions that are in Counts One, Two and Four." (5RT 371.)

Considering all of the evidence, the state cannot demonstrate beyond a reasonable doubt that the improper instruction did not affect the verdicts. There is also reasonable probability that the jury would have reached a different outcome in the absence of the error. The issues of force and duress were in dispute and there was ample evidence from which a properly-instructed rational jury could have concluded that the alleged lewd acts had

happened, but were not accomplished by use of force or duress because they were consensual. The Court of Appeal therefore properly ordered that the judgment on Counts One, Two and Four be reversed, and this Court should affirm that decision.

CONCLUSION

For the foregoing reasons, the instruction that consent is not a defense to a charge of lewd conduct by force or duress was erroneous. The error lightened the prosecution's of burden of proof and deprived appellant of a defense to Counts One, Two and Four. The error was also prejudicial. Accordingly, this Court should affirm the Court of Appeal decision reversing the judgment on those counts.

DATE: June 16, 2009

Respectfully submitted,

Heather J. Mackay

HEATHER J. MACKAY
Attorney for Appellant
Jaime Vargas Soto

CERTIFICATION OF COMPLIANCE

I, Heather J. MacKay, certify pursuant to the California Rules of Court, that the word count for this document is 21,544 words, excluding the tables, this certificate, and any attachment permitted under rule 14(d). This document was prepared in Wordperfect X3, and this is the word count generated by the program for this document.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Oakland, CA on June 16, 2009.

HEATHER J. MACKAY
Attorney for Appellant
Jaime Vargas Soto

DECLARATION OF SERVICE BY MAIL

Case Name: *People v. Soto*, No. S167531
Court of Appeal No. H030475
Santa Clara County Superior Court No. EE504317

I am employed in the County of Alameda, California. I am over the age of 18 years and not a party to the within entitled cause: my business address is P.O. Box 3112, Oakland, CA 94609

On June 17, 2009, I served the attached

ANSWER BRIEF ON THE MERITS

in said cause, placing true copies thereof, enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail at Oakland, California, addressed as follows:

Office of Attorney General
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102

Sixth District Appellate Program
100 N. Winchester Blvd.,
Suite 310
Santa Clara, CA 95050

Mr. Jaime Soto, F-37241
Red Rock Correctional Facility
1750 East Arica Rd.
Eloy, AZ 85231

Santa Clara County Superior Court
191 N. First St
San Jose, CA 95113

Court of Appeal
Sixth Appellate District
333 W. Santa Clara St, Ste. 1060
San Jose, CA 95113

Santa Clara Public Defender
120 W. Mission St.
San Jose, CA 95510

Santa Clara County District Attorney
West Wing, 5th Fl.
70 W. Hedding St.
San Jose, CA 95110

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed at Oakland, California on June 17, 2009.

Heather J. MacKay