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Court of Appeal No. B152731
Los Angeles County Superior Court No. GA043525

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

BRYANT D. GRIFFIN,

Defendant and Appellant.

On review from the decision of the Court of Appeal, Second Appellate District,
reversing the judgment of the Los Angeles County Superior Court,
The Honorable C. Edward Simpson, Judge

**BRIEF AMICUS CURIAE OF THE
CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF RESPONDENT**

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SUMMARY OF FACTS AND CASE

A jury convicted the defendant, Bryant Griffin, of five counts of child molestation and one count of forcible rape. (*People v. Griffin* (2002) 100 Cal.App.4th 917, 919¹.) Only the forcible rape conviction was at issue on appeal. (*Ibid.*) Griffin began molesting the victim, Latasha J., in 1994 when she was between 10 and 11 years old. (*Id.* at p. 920.) “According to Latasha, the pattern of molestation was always the same.” (*Ibid.*) Griffin would first have her touch his penis, then he “would put his hand, and then his mouth, on her vagina.” (*Ibid.*) Griffin told Latasha not to tell her mother because if she did, her mother would

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1. Review granted October 23, 2002, reprinted without change in the Review Granted Opinions Pamphlet to permit tracking.

not believe her and would stop loving her. (*Id.* at p. 921.) Latasha told no one of the abuse. (*Ibid.*)

The incident that was the subject of the prosecution and ensuing appeal took place one night in May 2000. (See *ibid.*) According to Latasha, the “ ‘same process’ ” “ ‘started again.’ ” (*Ibid.*) Griffin had Latasha “touch his penis until he got an erection,” then he “digitally penetrated her and told her to lie on the den floor.” (*Ibid.*) Griffin orally copulated Latasha and then got on top of her. (*Ibid.*) He began to penetrate her, and at that point, he pinned her wrists down at either side of her shoulders. (*Ibid.*) According to Latasha, this was the first time that Griffin ever attempted to have sexual intercourse with her. (*Ibid.*) Before Griffin achieved full penetration, Latasha said, “ ‘no, no. I don’t want to,’ ” got up, and went to her room. (*Ibid.*)

A jury convicted Griffin of all counts and sentenced him to a total term of six years. (*Id.* at p. 923.) Griffin appealed. (*Ibid.*) In a 2-1 decision, the Court of Appeal for the Second District reversed the forcible rape conviction. (See *id.* at p. 919.)

On October 23, 2002, this Court granted the People’s petition for review. The issue this case presents is whether the “force” element in a forcible rape prosecution has a specialized legal meaning not known to the average lay juror. The Respondent’s Opening Brief on the Merits thoroughly addresses the major arguments this issue presents. Therefore, amicus files this brief only to expand on the argument that the definition of “force,” as it is used under Penal Code section 288, subdivision (b),² does not cross over and apply to “force,” as that term is used in section 261, subdivision (a)(2).

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

SUMMARY OF ARGUMENT

A majority of the Court of Appeal panel held that the definition of force, as it is used in the rape statute under section 261, subdivision (a)(2), has a specialized legal meaning not known to the average lay juror. In reaching that conclusion, the majority borrowed and applied the definition of force from a lewd acts with a minor case under section 288, subdivision (b). Specifically, the Court of Appeal majority held that “force” as used in section 261, subdivision (a)(2), requires the prosecution to prove that physical force is substantially different from or greater than that necessary to commit the act of sexual intercourse itself.

That holding is contrary to the plain language of the rape statute and also to the significant differences between the rape statute and the lewd acts with a minor statute. The specialized legal definition given to force is limited to section 288, subdivision (b). Under section 261, subdivision (a)(2), however, a definition of force, requiring no specialized legal meaning and within the common understanding of jurors, is an act is forcible if physical power facilitated the act and was not merely incidental to it.

ARGUMENT

I. The specialized legal meaning given to “force” under Penal Code section 288, subdivision (b), is limited to that statute.

A majority of the Court of Appeal panel in the present case stated that, although “force” has not been defined by the Legislature, a specialized legal meaning of force has been developed by the case law. (*People v. Griffin* (2002) 100 Cal.App.4th 917, 924.) Specifically, the majority stated that the standard is that the defendant must use physical force “substantially greater than or different from that necessary to commit the act of sexual intercourse itself.” (*Id.* at p. 927.) The majority also stated that,

“[j]ust what actions or gestures will constitute the ‘force’ sufficient to demonstrate the sexual act was against the will of a victim varies with the circumstances and age of the victim. Nevertheless, in each case in which the court found the requisite force, the defendant had applied some sort of physical pressure to overcome the victim’s will in order to commit the act.” (*Id.* at p. 925.)

After canvassing the facts of several sex abuse cases, the majority concluded,

“the record evidence does not permit a finding appellant used ‘force’ to overcome Latasha’s will in order to commit the act of intercourse. That is to say, there was no evidence appellant applied any force substantially greater than or different from that necessary in order to commit the act of intercourse.” (*Id.* at p. 927.)

With respect to the evidence that Griffin held Latasha’s wrists as he penetrated her, the majority concluded that “[g]iven the absence of evidence of any type of physical gesture designed to overcome Latasha’s will, holding her wrists at this particular moment during the sex act is just as consistent with consensual relations.” (*Id.* at p. 928.) The majority also held that the trial court erroneously failed to sua sponte instruct the jury of the specialized legal meaning of “force.” (*Id.* at pp. 929-930.)

The *Griffin* majority borrowed and applied the definition of force from *People v. Cicero* (1984) 157 Cal.App.3d 465, 474. *Cicero*, however, was not a forcible rape case under section 261, subdivision (a)(2). Rather, it was a lewd acts with a minor case under section 288, subdivision (b).³ There is a considerable difference between the statute implicated in *Cicero* and the statute implicated in this case. Section 288, subdivision (b), prohibits lewd acts with a child under the age of 14 by means of force. Section 261, subdivision (a)(2), on the other hand,

3. Section 288, subdivision (b), as referenced in *Cicero*, is now section 288, subdivision (b)(1). The Legislature subsequently added subdivision (b)(2), which is not pertinent to this case.

prohibits having sexual intercourse with a person who is not the spouse of the perpetrator when it is accomplished “against a person’s will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury” The only commonality these two statutes share is the requirement of force.

The court in *Cicero* construed the term “force” as used in section 288, subdivision (b). In doing so, it held that to satisfy the force element, the People must prove that the application of physical force was “substantially different from or greater than that necessary to accomplish the lewd act itself.” (157 Cal.App.3d at p. 474.) The *Griffin* majority relied heavily on *Cicero* to conclude that the specialized legal meaning of “force” used in section 288, subdivision (b) prosecutions also applies to the meaning of force in section 261, subdivision (a)(2) prosecutions. Amicus submits that the specialized legal definition given to “force” by the *Cicero* majority is limited to section 288. (See *People v. Barnes* (1986) 42 Cal.3d 284, 304 [applying case law decided prior to the Legislature’s deletion of the resistance requirement to determine whether the force element was met in a section 261, subdivision (a)(2) case]; see also *People v. Young* (1987) 190 Cal.App.3d 248, 258, fn. 3 [refusing to apply the *Cicero* definition of force in a section 261, subdivision (a)(2) case].)

Section 288 is broken down into two subdivisions and proscribes very different conduct than section 261, subdivision (a)(2). Subdivision (a) of section 288 prohibits lewd acts with a child under the age of 14. Subdivision (b) makes criminal the same acts as described in subdivision (a) if accomplished by use of force, violence, duress, menace, or threat of great bodily harm.⁴ The *Cicero* court examined those two subdivi

4. The additional element of force to convict under subdivision (b) becomes important in sentencing. Under section 667.6, subdivision (a), if a person has previously been convicted of violating section 288, subdivision (b),

sions separately and then examined them in context. In doing so, the court stated,

“[s]ubdivisions (b) and (a) of section 288 on their face draw a distinction between those lewd acts that are committed by force and those that are not. . . . The consequential *statutory distinction between subdivisions (a) and (b) must be given significance*, because the Legislature is not presumed to use statutory language in a sense which would render nugatory or redundant important provisions of a statute. [Citations.] *Subdivision (b) must therefore proscribe conduct significantly different from that proscribed by subdivision (a).*” (*Cicero*, 157 Cal.App.3d at pp. 473-474, italics added.)

Cicero was concerned with the difference between nonforcible lewd conduct under subdivision (a) and forcible lewd conduct under subdivision (b). For that statute to make sense, the intent of the Legislature had to be that the force as used in subdivision (b) is substantially different from or greater than the force that is inherent in the lewd act itself. (See *People v. Mom* (2000) 80 Cal.App.4th 1217, 1222 [acknowledging a legislative distinction between the two subdivisions of section 288]; but see *People v. Bolander* (1994) 23 Cal.App.4th 155, 163-164 (conc. opn. of Mihara, J.) [arguing that the *Cicero* court misconstrued the Legislature’s intent and provides a misleading definition of force].) That same distinction is not necessary under the forcible rape statute. The key to the rape statute is that the act of intercourse has been taken against a victim’s will. To prove it was against the victim’s will, the statute gives the prosecution several choices to pick from—*i.e.*, force, violence, duress, menace, or fear of immediate and unlawful bodily injury. There is no similar distinction under section 261, subdivision (a)(2), between sexual intercourse and sexual intercourse taken against the victim’s will. The

that person “shall receive a five-year enhancement for each of those prior convictions” Further, under section 667.6, subdivision (d), the sentencing court must impose “a full, separate, and consecutive” prison term for each violation of section 288, subdivision (b).

crime is the latter, not the former. However, under section 288, both subdivisions (a) and (b) describe criminal acts—*i.e.*, lewd conduct and forcible lewd conduct. A person cannot go around touching children under the age of 14 with the intent of sexual gratification, regardless of whether force was present. Whereas, two consenting adults over the age of majority *can* engage in sexual intercourse, with or without force, without being charged with the crime of forcible rape. To fully appreciate the different contexts in which the term “force” is used in each statute, an examination of the relevant case law is necessary.

In *Cicero*, the defendant approached two young girls, ages 11 and 12, as they were throwing rocks into a waterway. (157 Cal.App.3d at p. 470.) The defendant engaged in a friendly conversation with the girls. (*Ibid.*) The girls then began pretending to throw each other into the water, and one of the girls asked the defendant if he would help her throw her friend into the water. (*Ibid.*) Responding with, “ ‘why don’t I throw you both in the water[,]’ ” the defendant picked the girls up by the waist, one under each arm, and then felt their crotches. (*Ibid.*) The court held that there was sufficient evidence of force to satisfy section 288, subdivision (b), because the act of picking up and carrying the girls was an application of “physical force substantially different from and substantially greater than that necessary to accomplish the lewd act of feeling their crotches.” (*Id.* at p. 474.) *Cicero* articulated a specialized legal meaning that is now applied to all prosecutions brought under section 288, subdivision (b). (See *People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [requiring courts to instruct the jury on the specialized meaning of force under section 288, subdivision (b), *sua sponte*].)

When looking for guidance in defining “force,” the *Cicero* court examined the law of rape. In doing so, the court stated,

“the fundamental wrong at which the law of rape is aimed is not the application of physical force that causes physical harm. Rather, the law of rape primarily guards the integrity of a woman’s will and the

privacy of her sexuality from an act of intercourse undertaken without her consent. Because the fundamental wrong is the violation of a woman's will and sexuality, the law of rape does not require that 'force' cause physical harm. *Rather, in this scenario, 'force' plays merely a supporting evidentiary role, as necessary only to insure an act of intercourse has been taken against a victim's will.*" (*Cicero*, 157 Cal.App.3d at p. 475, italics added.)

The *Cicero* court was concerned with defining "force" where no physical injury occurred to the victim. If physical injury occurs, force is presumed. (*Id.* at p. 474.) The same is true of the law of rape. (See *People v. Montero* (1986) 185 Cal.App.3d 415, 432.) However, in a case such as this where no physical injury occurred, *Cicero* makes clear that the focus is not on the application of physical force, but rather the key is whether the act was a violation of a person's will and sexuality. To hold as the *Griffin* majority did, and require the prosecution to introduce evidence that the physical force used against the victim is substantially different from or greater than that necessary to commit the act of intercourse, puts the focus where it should not be, *i.e.*, on the application of physical force itself. (See *People v. Young* (1987) 190 Cal.App.3d 248, 257-258 (1987) [physical force need only be of a "degree sufficient to support a finding that the act of sexual intercourse was against the will of the child"].)

In *People v. Tollack* (1951) 105 Cal.App.2d 169, disapproved on another ground in *People v. Collins* (1960) 54 Cal.2d 57, 60, a rape case decided at the time when resistance was still an element of the offense, the court addressed the issue of whether the victim's resistance was overcome by force or violence. In doing so, the court was required to address the level of force that would be sufficient to satisfy the requirements of the rape statute. The defendant in *Tollack* was convicted of forcible rape, and on appeal, he argued that there was a lack of evidence to support the jury's verdict. (*Tollack, supra*, at p. 170.) The court disagreed stating that "[t]he word 'force' implies physical power exerted

upon a person or thing.” (*Id.* at p. 171.) The court further stated that the kind of force applied is immaterial in that it could consist of as little as laying a hold of a woman and kissing her against her will. (*Ibid.*)

Tollack, a rape case, is certainly more on point and controlling on the present issue than *Cicero*, a lewd act with a minor case. As *Tollack* states, the *kind of force is immaterial*. Force, as used in the rape context, cannot be defined as that which is substantially different from or greater than the act of intercourse itself, when *Tollack*, a case more certainly analogous, dictates that the kind of physical force is immaterial. The general understanding of force, as stated in *Tollack*, is physical power exerted upon a person or thing. If physical power facilitated the act and was not merely incidental to the act, then the force element of section 261, subdivision (a)(2), is satisfied. (See *People v. Griffin* (2002) 100 Cal.App.4th 917, 934 (conc. and dis. opn. of Perluss, J.)) Here, not only did Griffin “lay a hold of” Latasha, but he compelled her to engage in the same sexual acts he had forced her to submit to for years, and he also held her wrists down while he penetrated her. That, in itself, is physical power exerted against Latasha.

Griffin contends that Latasha’s age and experience dictate against a finding that Griffin’s actions were against her will and thus “forcible.” (See Appellant’s Brief at p. 57.) In other words, simply because Latasha was almost the age of majority and because she herself had a child, Griffin presumes she is sexually experienced and thus voluntarily engaged in those sexual acts with him. Latasha’s age and prior sexual experience should have no bearing on whether the act was against her will. Latasha testified that the sexual acts were nonconsensual. Further, her “will” had been overcome by Griffin for many years, this time he just decided to take his molestation a step further by holding her wrists down and penetrating her with his penis. A robbery victim who leaves a large wad of cash sticking out of his pants back pocket is not presumed to consent to have it taken from him. Similarly, it should not be presumed

that every woman with an allegedly colorful sexual past is presumed to consent to every sexual act.

In *People v. Montero, supra*, the court had before it, for the first time since *Cicero* was decided, the issue of whether the specialized legal meaning given to force under section 288, subdivision (b), crossed over and also applied to the meaning of force in section 261, subdivision (a)(2). The court examined both *Cicero* and *People v. Kusumoto* (1985) 169 Cal.App.3d 487 in its analysis. *Kusumoto* construed the term force as used in section 289, subdivision (a), which punishes rape by foreign object. (*Montero*, 185 Cal.App.3d at p. 431.) The victim in *Kusumoto* was asleep and the issue was “whether the legislature intended the concept of ‘force’ to encompass those situations in which the defendant penetrates the victim while asleep.” (169 Cal.App.3d at p. 491.) The *Kusumoto* court answered that question in the negative because “the victim’s will was not overcome by any physical force substantially different from or greater than that necessary to accomplish the act itself.” (*Id.* at p. 494.)

The *Montero* court concluded that both *Cicero* and *Kusumoto* were distinguishable because in both of those cases, the victim suffered no physical injuries. If physical injury occurs, force is presumed and there is no need to define the term for the jury. (*Montero*, 185 Cal.App.3d at p. 432, citing *Cicero*, 157 Cal.App.3d at p. 484.) Because the victim in *Montero* suffered physical injury during the commission of the act, the court was able to avoid the issue of whether *Cicero*’s definition of force applied in the forcible rape context all together. (See *Montero*, 185 Cal.App.3d at p. 432.) However, in a footnote, the *Montero* court stated,

“[w]e do not reach the issue whether the *Cicero* definition of force is required in all forcible rape cases without some evidence of physical harm beyond the act itself. We merely note the recent California Supreme Court case *People v. Barnes, supra*, 42 Cal.3d 284 (which involves the rape of a woman without evidence of

physical harm other than the act itself, and clarifies the elimination of the resistance element from § 261, subd. (2)), relies on the common law and preamendment rape cases defining force to evaluate the sufficiency of the evidence. *From this, we can only assume no new technical definition of force has arisen from the amendment to the forcible rape statute.*” (*Id.* at p. 432, fn. 7, italics added.)

A few forcible rape cases after *Montero*, including the present case, merely assumed the *Cicero* definition of force applied to section 261, subdivision (a)(2) cases without further discussion. (See, e.g., *In re John Z.* (2003) 29 Cal.4th 756, 763 [sufficient evidence of force to satisfy section 261, subdivision (a)(2)]; *People v. Mom* (2000) 80 Cal.App.4th 1217, 1224 [applying *Cicero* definition]; *People v. Bergschneider* (1989) 211 Cal.App.3d 144, 153 [same].) The court in *People v. Young* (1987) 190 Cal.App.3d 248, however, refused to apply the *Cicero* standard and supports the argument that the *Cicero* definition of force should be limited to section 288, subdivision (b) cases.

In *Young*, a forcible rape case, the court acknowledged in a footnote that *Cicero* and *Pitmon* utilized a specialized legal definition of force for cases under section 288, subdivision (b). (*Young*, 190 Cal.App.3d at p. 258, fn. 3.) In refusing to apply that definition to a forcible rape case, the court noted that,

“[w]e are of the view, however, that those cases [*Cicero* and *Pitmon*] are distinguishable in that a mere touching with the requisite intent may constitute a lewd and lascivious act under section 288 [citation], while forcible rape under section 261, subdivision (2), requires penetration, however slight, of the female’s vagina by the penis of the male (§ 263.).” (*Ibid.*)

Basically, *Young* refused to apply the *Cicero* definition of force, finding the case distinguishable because of the differences between the two statutes involved. As explained earlier, although the *Griffin* majority found the *Cicero* definition applicable, it failed to examine that special-

ized legal meaning in the context of section 288 itself. If the court had done so, it too would have concluded that the *Cicero* definition was inapplicable to the definition of force under section 261, subdivision (a)(2).

In *Kusumoto, supra*, 169 Cal.App.3d at pp. 493-494, the court noted that by including the requirement of force, the Legislature's intent was to ensure that there be more to the crime of rape than merely showing that the victim did not consent to sexual intercourse. Specifically, to construe the rape statute to mean that the requirement of force is only to show an evidentiary lack of consent would render the use of the term "force" in the statute "superfluous." (*Id.* at p. 493.) That is true and the amicus argument is not that no force is required at all, but rather, amicus submits that there is no need for a specialized legal meaning of force, especially that given to it by the *Griffin* majority. A definition within the common understanding of jurors is that an act is forcible if physical power facilitated the act, and was not merely incidental to it. (See *Griffin, supra*, 100 Cal.App.4th at p. 934 (conc. and dis. opn. of Perluss, J.); see also *People v. Bolander* (1994) 23 Cal.App.4th 155, 163-164 (conc. opn. of Mihara, J.).)

In a rape prosecution, focusing on whether the use of force was substantially different from or greater than the act of intercourse itself will unnecessarily confuse jurors. The *Griffin* definition of force under the rape statute simply amounts to an evidentiary obstacle, which is something both the legislative and judicial branches have increasingly moved away from in sexual assault cases. (See *People v. Barnes* (1986) 42 Cal.3d 284, 301 ["the elimination of the resistance requirement is also consistent with the modern trend of removing evidentiary obstacles unique to the prosecution of sexual assault cases"].) No longer must a rape victim be examined by a psychiatrist. (*Ibid.*) Nor can the jury be instructed that an "unchaste woman" is more likely to consent. (*Ibid.*) Similarly, evidence of the victim's sexual conduct cannot be used to

prove consent. (*Ibid.*) The increased evidentiary burden the *Griffin* majority places on rape victims is inconsistent with this modern trend. *Griffin*'s definition is also inconsistent with the key inquiry into all rape cases, *i.e.*, was intercourse undertaken against the victim's will? Proof of force is simply to corroborate the victim's statement that it was against her will. Thus, all that need be shown is that some form of physical force facilitated the act. *Griffin*'s legal definition of force is hard to understand and requires rape victims to jump over an unnecessary evidentiary hurdle to prevail in their quest for justice.

Recently, this Court held in *In re John Z.*, *supra*, that under section 261, subdivision (a)(2), if during an act of initially consensual intercourse the victim withdraws consent, then the male is subject to forcible rape charges if he continues to engage in the act despite the withdrawn consent. (*Id.* at p. 760.) In *John Z.*, the victim, a 17-year-old girl, was initially engaged in sexual activity with two boys at the same time. (*Id.* at p. 759.) The defendant left the room before the other boy, Juan, engaged in sexual intercourse with her. (*Ibid.*) Juan penetrated the victim regardless of her telling him she did not want to have intercourse. (*Ibid.*) The victim continued to struggle and the rape eventually terminated. (*Ibid.*) Juan left the room, leaving the victim unclothed on the bed in the dark. (*Ibid.*) At that point, the defendant entered the room. (*Ibid.*) The defendant and the victim began kissing. (*Ibid.*) The defendant also penetrated her and then rolled her on top of him. (*Ibid.*) The victim testified that she wanted to stop and get off of the defendant, but he grabbed her waist and pulled her back down. (*Ibid.*) The victim repeatedly told the defendant that she had to go home. (*Id.* at p. 760.) The defendant finally stopped, helped the victim dress and find her keys, and she subsequently drove home. (*Id.* at p. 759.)

Although consent, not force, was at issue in *John Z.*, the majority of this court found those facts sufficient to satisfy the force element of section 261, subdivision (a)(2), without further discussion. The facts of

these two cases are similar in that neither victim overtly resisted the defendant,⁵ nor was either victim physically injured by their perpetrators. Rather, in *John Z.*, the defendant held on to the victim's waist during the act, which this court found sufficient evidence of force; and in this case, Griffin pinned Latasha's wrists down during the act, which the Court of Appeal found insufficient to satisfy the force element. The main differences between the two cases, beside the fact that Latasha had been repeatedly molested by Griffin for many years, is that in this case, when Latasha said, "no, no. I don't want to," the rape stopped, whereas in *John Z.*, the defendant continued to penetrate the victim.

This court, in summarily concluding that the force element was satisfied in *John Z.*, cited *People v. Mom* (2000) 80 Cal.App.4th 1217, and stated in a parenthetical the *Cicero* standard of force. There was no discussion about if, how, or why that standard was applicable. Justice Brown, in her dissent, felt that the force issue should have been addressed. (See 29 Cal.4th at pp. 767-768 (dis. opn. of Brown, J).) Because this court has never specifically addressed this issue and is now faced with that opportunity, this court should find that the plain language of section 261, subdivision (a)(2), does not support the use of the *Cicero* definition.

Therefore, to conclude as the Court of Appeal majority did, that "force" as used in section 261, subdivision (a)(2), requires the prosecution to prove that physical force is substantially different from or greater than that necessary to commit the act of sexual intercourse itself, is erroneous given the plain language of the statute.

5. Resistance, however, is no longer a required element to prove forcible rape. (See *Barnes, supra*, 42 Cal.3d at p. 302; see also Respondent's Opening Brief on the Merits at pp. 21-27.)

CONCLUSION

The judgment of the Court of Appeal for the Second District should be reversed.

June 20, 2003

Respectfully Submitted,

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