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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 29

LUIS GUAMAN,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
January 9, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 29, People v.  
2 Guaman.

3 MR. MCGUIRE: May it please the court.

4 CHIEF JUDGE LIPPMAN: Counsel, do you want  
5 any rebuttal time?

6 MR. MCGUIRE: Three minutes, if it pleases,  
7 Your Honor.

8 CHIEF JUDGE LIPPMAN: You've got it,  
9 proceed.

10 MR. MCGUIRE: Thank you. I'd like to begin  
11 with a confession. And that is that I grabbed my  
12 analysis and the brief from Judge Richard Weinberg's  
13 analysis in People v. Nuruzzaman, and I forcibly  
14 squeezed everything that I could from it, but I trust  
15 the court will agree that I didn't add even a pinch  
16 of levity to the analysis.

17 Now, the essential point that I want to  
18 make is that the People's position impermissibly does  
19 a couple of things. It reads the word "forcibly" out  
20 of the statute.

21 JUDGE SMITH: Well, why - - - why isn't  
22 rubbing forcible? I mean, do - - - doesn't the very  
23 word "rub" imply some - - - I mean, some degree of  
24 force? I mean, it's the counterpart - - - if you  
25 brush something, you - - - you touch it without

1 force, but if you rub it, you use a little force.

2 MR. MCGUIRE: Well, even brushing can  
3 entail manual pressure, as some of the cases seem to  
4 suggest, that manual pressure is a touch - - -

5 JUDGE SMITH: But - - - but isn't - - - but  
6 isn't the difference between rubbing and brushing is  
7 that some force is inherent in rubbing. You bear  
8 down when you rub.

9 MR. MCGUIRE: There's - - - there's  
10 certainly is. And I don't - - - and we don't dispute  
11 that this is some element of force in a rubbing. A  
12 rubbing can be gentle; a rubbing can be more forcible  
13 - - - forcible.

14 CHIEF JUDGE LIPPMAN: Counsel, what's the  
15 difference between rubbing and squeezing, grabbing  
16 and pinching?

17 MR. MCGUIRE: That's I think the most  
18 important point I want - - - I want to make, which is  
19 that - - - is that I - - - we do believe that the  
20 People's position reads the word "forcibly" out of  
21 the statute. But it does, unquestionably, fail to  
22 take into account the striking similarity between the  
23 three specific examples that the legislature gave of  
24 what a forcible touching is.

25 JUDGE READ: So they all - - -

1 MR. MCGUIRE: And they - - -

2 JUDGE READ: Because they all require a  
3 compression?

4 MR. MCGUIRE: Every one of them does in any  
5 common sense parlance - - -

6 JUDGE READ: And rubbing doesn't?

7 MR. MCGUIRE: Excuse me?

8 JUDGE READ: And rubbing doesn't?

9 MR. MCGUIRE: Not compression between two  
10 objects, as squeezing - - -

11 JUDGE READ: That's what it is - - - that's  
12 what - - - okay, that's - - -

13 MR. MCGUIRE: - - - as squeezing, pinching  
14 and grabbing do.

15 JUDGE GRAFFEO: Although some of the other  
16 provisions refer to forcible compulsion.

17 MR. MCGUIRE: But that - - - but that's  
18 addressed - - -

19 JUDGE GRAFFEO: So is that - - -

20 MR. MCGUIRE: Yes, Your - - -

21 JUDGE GRAFFEO: I mean, that seems to be  
22 somewhat a distinguishing characteristic between the  
23 statutes - - -

24 MR. MCGUIRE: But force - - -

25 JUDGE GRAFFEO: - - - for a legislative

1 determination, a difference in degree?

2 MR. MCGUIRE: Right. Well - - - well,  
3 forcible compulsion plays a completely different  
4 office in - - - in Article 130 in the sex offenses.  
5 That has to do with lack of consent and where there's  
6 lack of consent. That's not at issue here when we're  
7 trying to determine what the objective meaning of the  
8 - - -

9 JUDGE GRAFFEO: No, but it shows somewhat  
10 the legislature made - - - selected different  
11 language in different statutes, perhaps to - - -

12 MR. MCGUIRE: It's true. They said  
13 forcible - - -

14 JUDGE GRAFFEO: - - - indicate a difference  
15 of degree of contact.

16 MR. MCGUIRE: That - - - that - - - that -  
17 - - I would agree with that, although, again, the  
18 forcible compulsion is a completely different - - -  
19 it is a different concept. But the legislature did  
20 use the word forcible. It used these very similar  
21 terms, and the question is, what hay does this make -  
22 - - the court make of it?

23 The legislature did not provide an analytic  
24 definition. It defined the term only by example, and  
25 I think there's a couple of reasons why - - - why the

1 court must do what it necessarily does from time to  
2 time, which is act as the interstitial lawmaker.

3 CHIEF JUDGE LIPPMAN: Counsel, your view is  
4 Mack is not relevant to this?

5 MR. MCGUIRE: I'm sorry?

6 CHIEF JUDGE LIPPMAN: The Mack case is not  
7 relevant to this?

8 MR. MCGUIRE: I'm - - - I'm - - -

9 CHIEF JUDGE LIPPMAN: To this case?

10 MR. MCGUIRE: I'm afraid - - - perhaps a  
11 senior moment; I'm not remembering the Mack case.

12 CHIEF JUDGE LIPPMAN: Forcible compulsion.

13 JUDGE READ: In the subway - - -

14 JUDGE GRAFFEO: That's - - - that's a first  
15 - - -

16 CHIEF JUDGE LIPPMAN: The subway case.

17 JUDGE GRAFFEO: - - - that's first degree  
18 sexual abuse.

19 CHIEF JUDGE LIPPMAN: Yeah.

20 MR. MCGUIRE: Yeah, no.

21 CHIEF JUDGE LIPPMAN: That's - - - that's  
22 not relevant.

23 MR. MCGUIRE: That's not - - - that's not  
24 relevant here - - -

25 CHIEF JUDGE LIPPMAN: Right.

1                   MR. MCGUIRE: - - - when someone uses  
2 forcible compulsion, when they - - - when they  
3 threaten someone and - - - and put them in fear of  
4 immediate death or physical injury in order to compel  
5 them to do something.

6                   CHIEF JUDGE LIPPMAN: Right.

7                   MR. MCGUIRE: That's not what we're talking  
8 about here. We're talking about the meaning of the  
9 actus reus of this - - - of this offense. And that's  
10 a fact that - - - that squeezing, grabbing or  
11 pinching all entail compression between objects.

12                  JUDGE READ: Can you really make that fine  
13 a distinction, though? I mean, what - - - what if -  
14 - - what if - - - what if the - - - the cop, I guess,  
15 as it said, he squeezed up against him. I mean, can  
16 you really make that fine a distinction between  
17 squeezing, grabbing, and pinching on the one hand and  
18 rubbing on the other?

19                  MR. MCGUIRE: I don't know - - - I don't  
20 know how the court cannot, given - - - given the  
21 specificity of the three examples that the  
22 legislature gave.

23                  JUDGE READ: So it has to be one of those  
24 three. That is an exhaustive list - - -

25                  MR. MCGUIRE: No, no - - -

1 JUDGE READ: - - - not - - -

2 MR. MCGUIRE: No, it's not. It says,

3 "includes" - - -

4 JUDGE READ: Yeah.

5 MR. MCGUIRE: - - - grabbing, squeezing or  
6 pinching.

7 JUDGE GRAFFEO: Right, so it could be - - -

8 MR. MCGUIRE: And - - -

9 JUDGE GRAFFEO: It could be broader.

10 MR. MCGUIRE: It could be, and we gave it -

11 - -

12 JUDGE GRAFFEO: In order to rub - - -

13 MR. MCGUIRE: - - - and we gave it - - -

14 JUDGE GRAFFEO: - - - don't you have to  
15 kind of grab in order to rub?

16 MR. MCGUIRE: I'm sorry?

17 JUDGE GRAFFEO: Don't you have to grab, in  
18 order to rub?

19 MR. MCGUIRE: I don't think so.

20 JUDGE GRAFFEO: Typically, you have to kind  
21 of - - -

22 MR. MCGUIRE: If I'm - - - rub my hand - -

23 -

24 JUDGE GRAFFEO: - - - you got - - - you got  
25 to put your hand - - -

1                   MR. MCGUIRE: - - - as I said in our brief,  
2                   a - - - a mother who - - - who rubs a child's head,  
3                   certainly hasn't grabbed, pinched or squeezed - - -

4                   CHIEF JUDGE LIPPMAN: Counsel, your - - -

5                   MR. MCGUIRE: - - - the child's head.

6                   CHIEF JUDGE LIPPMAN: Your argument is that  
7                   we do have to make this kind of fine distinction,  
8                   even though we're all kind of grappling with what's  
9                   the difference between those examples - - - that's  
10                  the kind of things we have to do to get to the  
11                  different levels of offense.

12                  MR. MCGUIRE: Right. The legislature - - -

13                  CHIEF JUDGE LIPPMAN: Is that - - -

14                  MR. MCGUIRE: The legislature, of course,  
15                  punts these issues to the courts all the time.  
16                  That's why we have a difficult interpretive pro - - -  
17                  problem here perhaps in this case. I don't think  
18                  it's all that difficult, but there's a couple of  
19                  other things that need to be taken into account.

20                  The legislature clearly meant to make this  
21                  a more serious offense, to bump up the B misdemeanor  
22                  from an A misdemeanor. The People's position, just  
23                  any kind of rubbing, any kind of manual pressure, is  
24                  sufficient to establish a forcible touching, leaves  
25                  precious little room, if any, between baseline

1 offense and the more serious A misdemeanor. The  
2 legislature clearly wasn't intending to do that.

3 You know, last night I thought of another  
4 reason why I just - - - didn't occur to me, which is  
5 that the baseline offense has an affirmative defense  
6 in it. And the affirmative defense is, you're not  
7 guilty of this - - - of the - - - of the third degree  
8 sexual abuse if the victim is more than fourteen and  
9 the defendant is less than five years older. So if  
10 you have a fifteen-year-old and a fifteen-year-old or  
11 a fifteen-year-old and a sixteen- or a seventeen-  
12 year-old, they're not guilty of sexual abuse in the  
13 third degree for an - - - for any touching.

14 But if my adversary's position is right,  
15 that the - - - any kind of forcible touching, ignore  
16 the striking similarities, then you - - - you've  
17 effectively, implicitly repealed that affirmative  
18 defense, because it's not an affirmative defense with  
19 a forcible touching.

20 JUDGE SMITH: But is it really - - - is - -  
21 - is what happened here really less offensive than  
22 someone who - - - who pinches or grabs someone?

23 MR. MCGUIRE: Well, I - - - you know, that  
24 - - - that's a - - - that - - - Judge Smith, is - - -  
25 is really a moral question. And the People try to

1 make some hay out of that in their brief. But I  
2 don't see any role for the court in interpreting the  
3 language of the statute to try to interpret it in  
4 terms of how much moral indignation an act provokes.

5 JUDGE SMITH: Well, isn't - - - I mean,  
6 isn't that why we have A and B misdemeanors? The A  
7 ones are the ones we think are worse?

8 MR. MCGUIRE: Yes, but - - - but the  
9 question is what makes them worse?

10 CHIEF JUDGE LIPPMAN: More offensive or  
11 more disgusting doesn't make it worse in your - - -

12 MR. MCGUIRE: No - - -

13 CHIEF JUDGE LIPPMAN: - - - from your  
14 prospective.

15 MR. MCGUIRE: It's - - - it's a different  
16 evil that the legislature was trying to address,  
17 which is why they have words like "forcible touching"  
18 and they say, grabbing, squeezing or pinching. And  
19 to just get back to that point.

20 We have not said it's an exclusive set.  
21 The legislature said to "include". Includes. And we  
22 gave another example. A biting would also be an act.  
23 Maybe this statute is under-inclusive from some  
24 policy perspectives, but that is the job of the  
25 legislature to fix.

1 CHIEF JUDGE LIPPMAN: Okay, counsel.

2 You'll have your rebuttal.

3 MR. MCGUIRE: Thank you.

4 CHIEF JUDGE LIPPMAN: Let's hear from your  
5 adversary.

6 MR. SIMCHI-LEVI: Good morning, Your  
7 Honors. My name is Yuval - - -

8 CHIEF JUDGE LIPPMAN: Counsel, aside from  
9 the - - -

10 MR. SIMCHI-LEVI: - - - Simchi-Levi for the  
11 People.

12 CHIEF JUDGE LIPPMAN: Aside from the - - -  
13 what would be an offensive nature of what went on  
14 here, where does it fit in to the statute,  
15 particularly in view of what we talked about with  
16 your adversary, the three examples given in the  
17 statute, versus what ha - - - are - - - isn't there a  
18 difference between the - - - those descriptions and  
19 what happened here?

20 MR. SIMCHI-LEVI: No, Your Honor. In fact,  
21 if you look at - - -

22 CHIEF JUDGE LIPPMAN: Why not? Why is  
23 there no difference?

24 MR. SIMCHI-LEVI: If you look at the  
25 Nuruzzaman cage - - - case, which my adversary refers

1 to - - -

2 CHIEF JUDGE LIPPMAN: The focusing on  
3 forcible?

4 MR. SIMCHI-LEVI: Um-hum. That judge  
5 specifically said that if you look at squeezing,  
6 grabbing and pinching, the similarity that those  
7 terms have and the similarity - - - the similarity to  
8 the term rubbing is that they all are more than a  
9 mere touching. And all rubbing, squeezing, pinching,  
10 grabbing, also share the fact that they all deal with  
11 the application of pressure to a surface.

12 JUDGE PIGOTT: Well, there's a certain  
13 amount of intent in three of them. And in - - - you  
14 know, I mean, if I'm getting out a subway at 5  
15 o'clock or 5:15 or something, and - - - and I'm  
16 trying to get to a seat, and there's a bunch of  
17 people standing in my way, and I rub up against  
18 people, am I - - - am I committing a misdemeanor?

19 MR. SIMCHI-LEVI: You're not, Your Honor,  
20 because the forcible touching statute has a mens rea  
21 component. So in addition to a forceful touch, you  
22 have to so with intent - - - intent, and also for - -  
23 - to abuse the victim, to degrade the victim - - -

24 JUDGE PIGOTT: What happens if - - -

25 MR. SIMCHI-LEVI: - - - and for sexual

1 gratification.

2 JUDGE PIGOTT: Is that facially sufficient  
3 in your view the way this thing was charged?

4 MR. SIMCHI-LEVI: If the - - - can you - -  
5 - if the information simply said that the defendant  
6 rubbed?

7 JUDGE PIGOTT: Yeah.

8 MR. SIMCHI-LEVI: Without - - - and it  
9 doesn't said what he did? No, that would not be  
10 sufficient to show the other components of the  
11 forcible touching statute. The term "rubbed" would  
12 be sufficient to allege the forcible touching  
13 element, but in your hypothetical, Your Honor, the  
14 defendant - - - the information would not be  
15 sufficient, because that information did not allege  
16 that the defendant did so with the purpose of sexual  
17 gratification, with - - - to abuse the victim or to  
18 degrade the victim.

19 In this case, it's clear that the defendant  
20 forcibly touched the victim and that he did so with  
21 the purpose of sexual gratification.

22 CHIEF JUDGE LIPPMAN: But why - - - why - -  
23 - why wouldn't you argue that these are fine  
24 distinctions? We're looking at what the statute  
25 means, and again, as you go from one level of offense

1 to another, why wouldn't one be able to find the  
2 difference? I mean, I understand the statute is  
3 giving examples, but - - - but they are, kind of,  
4 visceral examples that you can relate to as opposed  
5 to this.

6 MR. SIMCHI-LEVI: Well, Your Honor, the  
7 legislature - - -

8 CHIEF JUDGE LIPPMAN: Again, not talking  
9 about if the - - - if the act itself is disgusting or  
10 whatever, but looking at - - - at what happened. Why  
11 isn't there a - - - a - - - a difference - - - a  
12 qualitative difference between?

13 MR. SIMCHI-LEVI: The legislature was - - -  
14 when it enacted the statute, was seeking to close the  
15 loophole and wanted to prohibit forcibly touching of  
16 a sexual nature. The reason why it provided those  
17 three examples of squeezing, pinching, grabbing, is  
18 because the legislature wanted the courts to know  
19 what the lowest threshold of force is.

20 That squeezing, pinching - - - even squeeze  
21 - - - squeezing, pinching, and grabbing constitutes  
22 forcible touching, and even slapping - - -

23 CHIEF JUDGE LIPPMAN: You consider rubbing  
24 to be a higher level than those three words, or  
25 lower? If that's the floor, and rubbing is lower,

1           then - - -

2                       MR. SIMCHI-LEVI:  No, I don't think rubbing  
3           is lower.  I think rubbing - - -

4                       CHIEF JUDGE LIPPMAN:  Where is rub - - -  
5           higher?

6                       MR. SIMCHI-LEVI:  Rubbing in this case is  
7           higher.

8                       CHIEF JUDGE LIPPMAN:  In terms of forcible?

9                       MR. SIMCHI-LEVI:  I think that rubbing, as  
10          I said earlier, Your Honor, is similar - - - is  
11          exactly the same as - - -

12                      CHIEF JUDGE LIPPMAN:  So they're all in the  
13          same level?

14                      MR. SIMCHI-LEVI:  They're all in the same  
15          level, and the statute also encompasses even greater  
16          conduct.  For instance, slapping constitutes forcible  
17          touching under the statute.  Kicking constitutes  
18          forcible touching.  Punching constitutes a forcible  
19          touch - - -

20                      CHIEF JUDGE LIPPMAN:  But all those things  
21          are different than rubbing; that you'd admit?

22                      MR. SIMCHI-LEVI:  They - - - they're all -  
23          - -

24                      CHIEF JUDGE LIPPMAN:  They're - - - they're  
25          - - - I'd say on the higher end of - - - beyond the

1 examples of the statute, and certainly beyond  
2 rubbing, right?

3 MR. SIMCHI-LEVI: Um-hum. And I think that  
4 the - - - the baseline was that the examples that the  
5 legislature provided of squeezing, pinching, and  
6 grabbing, and then - - - I actually do think that  
7 rubbing is a little bit more, because I do think  
8 rubbing intrinsically involves the def - - - friction  
9 with another surface.

10 JUDGE PIGOTT: Yeah, but why - - - why  
11 raise that issue about an affirmative defense with  
12 respect to sexual abuse in terms of age differential?  
13 Would that have been an affirmative defense here?

14 MR. SIMCHI-LEVI: I don't believe so, Your  
15 Honor, because unlike the third degree of sexual  
16 abuse, the defendant, when he commits this crime, has  
17 to do so with the - - - with intent and for no  
18 legitimate purpose, and in addition, he has to do so  
19 - - - he has to forcibly touch the victim in a way -  
20 - - in - - - for - - - to either to degrade the  
21 victim, to abuse the victim, or for the purpose of -  
22 - -

23 JUDGE PIGOTT: But if you say - - -

24 MR. SIMCHI-LEVI: - - - sexual  
25 gratification.

1                   JUDGE PIGOTT: But if - - - if - - - if he  
2                   - - - if what Mr. McGuire said is right, I mean,  
3                   would it be an affirmative defense for this defendant  
4                   to say I was nineteen, and the person I rubbed up  
5                   against was sixteen?

6                   MR. SIMCHI-LEVI: No, Your Honor, that  
7                   would not be an af - - - it would not be an  
8                   affirmative defense, because I believe that the  
9                   reason why that the third degree sexual abuse  
10                  contains that affirmative defense is because there  
11                  are issues regarding age of consent of the victim,  
12                  and that's to deal - - - that - - - that was - - -  
13                  that's to deal with that - - - that issue.

14                  But in - - - in this situation where we  
15                  have the forcible touching, is the People allege, for  
16                  pleading purposes, that the defendant acted with the  
17                  appropriate mens rea - - -

18                  JUDGE PIGOTT: But, wait - - - wait - - - I  
19                  guess I'm confused. Does - - - if there is an  
20                  affirmative defense within sexual abuse third, does  
21                  it apply to the entire sexual abuse third, or only to  
22                  a certain section or what?

23                  MR. SIMCHI-LEVI: I believe that the way  
24                  the - - - the Penal Law was written that it only  
25                  applies to the third degree sexual abuse. There

1           could be other affirmative defenses to forcible  
2           touching, but I believe that that specific age  
3           affirmative defense has to do with consent as to the  
4           third degree sexual abuse statute.

5                        CHIEF JUDGE LIPPMAN: Counsel, is patting -  
6           - - patting different than rubbing?

7                        MR. SIMCHI-LEVI: Patting is different than  
8           rubbing, Your Honor, in - - - in an abstract sense.

9                        CHIEF JUDGE LIPPMAN: I mean, you disagree  
10          with the Nuruzzaman case?

11                       MR. SIMCHI-LEVI: No, I think that  
12          Nuruzzaman was correct because - - -

13                       CHIEF JUDGE LIPPMAN: But you agree patting  
14          is different; in your view - - -

15                       MR. SIMCHI-LEVI: Um-hum.

16                       CHIEF JUDGE LIPPMAN: - - - patting is  
17          different than rubbing.

18                       MR. SIMCHI-LEVI: In the abstract sense - -  
19          -

20                       CHIEF JUDGE LIPPMAN: The logic is not the  
21          same in both cases?

22                       MR. SIMCHI-LEVI: In this - - -

23                       CHIEF JUDGE LIPPMAN: The logic of the  
24          court's decision, you don't think is persuasive in  
25          terms of a rubbing situation?



1 to affirm the defendant's conviction. Thank you,  
2 Your Honors.

3 CHIEF JUDGE LIPPMAN: Okay, counsel.

4 Counsel, rebuttal?

5 MR. MCGUIRE: Please, thank you, Your  
6 Honor.

7 Acts of squeezing, grabbing or pinching  
8 can, of course, be gentle. They don't have to be  
9 forcible. That's why the statute also provides for  
10 forcible. That's why be - - - we believe the court  
11 must read into the statute just as the court did in  
12 the New York Times case versus the Fire Department  
13 case, an element to make sense of the statute as a  
14 whole, the requirement that the forcible touching  
15 must be an act of compression, like the examples  
16 given, and like the - - - a biting example, which are  
17 likely to cause pain, or at least - - - or at least  
18 physical discomfort.

19 JUDGE SMITH: What about a slap - - - what  
20 about a slap?

21 MR. MCGUIRE: I'm glad Your Honor asked  
22 about a slap. I think a slap is a really powerful  
23 argument in support of our position. That is an act  
24 - - - an obvious act, that the legislature could have  
25 chosen. It did not choose it. Why didn't the

1 legislature - - -

2 JUDGE SMITH: Why - - - well, what he says

3 - - -

4 MR. MCGUIRE: - - - we don't - - -

5 JUDGE SMITH: - - - he says that the more  
6 forcible thing, slaps and punches, you don't need - -  
7 - you - - - you don't need to write them in, because  
8 everyone will recognize that as forcible touching,  
9 whereas squeezing, grabbing, or pinching might be  
10 more debatable.

11 MR. MCGUIRE: Well, but first of all, a  
12 couple of points. First of all, a slap is something  
13 that - - - it's hard to see how it couldn't have been  
14 in the legislature's mind. They didn't do it. It  
15 does not entail the kind of compression like that - -  
16 - the examples that they - - - that they did give.

17 JUDGE SMITH: You say that someone who  
18 slaps the - - - the sexual or intimate parts of  
19 another person without consent has not violated the  
20 statute?

21 MR. MCGUIRE: Well - - -

22 JUDGE SMITH: No matter how hard he slaps?

23 MR. MCGUIRE: That's our position, Your  
24 Honor, yes. And - - - and one reason why that could  
25 be so is because a slap could be misdirected in a way

1           that a squeeze, a bite - - - a bite or a pinch or - -  
2           - or an act of grabbing might not be. The point is,  
3           that the legislature did not use that term. And the  
4           terms that it did use have very different meanings.

5                       I - - - I just want to make a couple of  
6           points about the affirmative defense. It is gone, if  
7           you're - - - if you accept my adversary's position.  
8           The affirmative defense has nothing to do with  
9           consent. The affirmative defense has solely to do  
10          with the fact that when you have youth with very  
11          small age groups in between, fourteen-year-olds and  
12          seventeen-year-olds, or sixteen-years-olds versus  
13          sixteen-years-old, they cannot be convicted of sexual  
14          abuse in the third degree.

15                       JUDGE SMITH: Well, is that - - - is that -  
16          - -

17                       MR. MCGUIRE: As an affirmative defense,  
18          but now you - - - now they can just charge them with  
19          forcible touching.

20                       CHIEF JUDGE LIPPMAN: But what - - -

21                       JUDGE SMITH: You say it has nothing to do  
22          with consent? Is it - - - isn't reason that they  
23          can't be charged that the - - - you - - - you - - -  
24          you get into problems because the kids might be  
25          incapable of consent and what they're doing might be

1           totally voluntarily.

2                   MR. MCGUIRE: Under - - - under - - - under  
3 age seventeen, you can't consent at all, but - - -  
4 but - - - but when you - - - but - - -

5                   JUDGE SMITH: So when a - - - when a - - -  
6 when a - - - so when a - - - an eighteen-year-old  
7 gropes a sixteen-year-old, and the sixteen-year-old  
8 does not object, then in theory that would be - - -  
9 that would - - - that would be criminal, and to  
10 decriminalize it, they took them out. Isn't that  
11 what's going on?

12                   MR. MCGUIRE: Yes, yes. It - - - it  
13 doesn't change the fact - - -

14                   JUDGE SMITH: But when it's forcible - - -

15                   MR. MCGUIRE: It doesn't change the fact -  
16 - - it doesn't change the fact - - -

17                   JUDGE SMITH: But when it's forcible, you  
18 don't have that problem.

19                   MR. MCGUIRE: It doesn't change the fact  
20 that there's no consent in that situation. It simply  
21 says it's not going to be criminal. And all I'm  
22 saying is, is that if you accept my adversary's  
23 position, then any kind of touching, a patting, a  
24 rubbing, that means that that sixteen-year-old and  
25 sixteen-year-old - - - sixteen-year-old victim and

1 sixteen-year-old defendant, just charge them with  
2 forcible touching. Now they're guilty of an A  
3 misdemeanor; there goes your affirmative defense.  
4 Thank you, Your Honors.

5 CHIEF JUDGE LIPPMAN: Thank you both.  
6 Appreciate it.

7 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Luis Guaman, No. 29 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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