

DEFENDANT/APPELLANT'S PETITION TO TRANSFER

BACKGROUND AND PRIOR TREATMENT OF THE ISSUE ON TRANSFER

1. The Issue presented on transfer.

The question is whether there was sufficient evidence to sustain Graham's conviction for forcibly resisting law enforcement. The precedent warranting transfer is in *Spangler v. State*, 607 N.E.2d 720, 723 (Ind. 1993): "We believe that one 'forcibly resists' law enforcement when strong, powerful, violent means are used to evade a law enforcement official's rightful exercise of his or her duties."

The Court of Appeals in its decision in Graham follows some other appellate panels that have considered Spangler but declines to follow others. Thus, the decision by the Court of Appeals conflicts with other decisions of the Court of Appeals on this important issue. Appellate Rule 57(H)(1).

More significantly, the Court of Appeals in our case declines to follow the "overly strict" definition of "forcibly resist" in *Spangler* "until instructed otherwise by our Supreme Court." Thus, the decision by the Court of Appeals also conflicts with *Spangler*, a decision of the Supreme Court, on this important issue. Appellate Rule 57(H)(2).

2. Summary of the case in the trial court.

On December 20, 2005, the Bartholomew County Prosecutor filed three counts against Graham under cause number 03D01-0512-FD-02059. Appellant's Appendix (App.) 1-6. All counts related to an incident that occurred on or about December 14, 2005. App. 2-6.

On September 27, 2007, a jury found Graham guilty of Count 1, Criminal Recklessness, a D felony; Count 2, Resisting Law Enforcement, an A misdemeanor; and Count 3, Criminal Mischief, an A misdemeanor. App. 112-114, 118.

At sentencing on October 24, 2007, the Court sentenced Defendant to Indiana Department of Correction (DOC) for thirty-two (32) months on Count 1; to Bartholomew County Jail for one (1) year on Count 2; and to Bartholomew County Jail for one year on Count 3, all counts to run consecutively. App. 124. No time was suspended on Count 1. *Id.* The balance of the time on Count 2 was suspended. *Id.* All of the time on Count 3 was suspended. *Id.* The defendant was to receive credit for 132 days spent in confinement (66 actual days) to be applied towards Count 2. App. 125.

3. The facts as they relate to the charge of forcibly resisting law enforcement.

Police responded to Graham's residence after Adam Sharp reported that Graham had fired a shotgun at him while Sharp was driving his 1989 GMC Jimmy past Graham's yard. Tr. pp. 136-149. Graham sat in the house with the lights out and did not answer their knock at the door. 197-198-301. When contacted by the SWAT team negotiator by telephone, Graham at first refused to come out of his house. Tr. pp. 274-277.

As noted in Graham's brief, when Graham finally came out onto his porch, he refused to come off of it. Tr. pp. 277-279, 425. The next two paragraphs are from Appellant's brief at pages 6-7.

Graham refused to put his hands up. Tr. pp. 319-321, 426. His response was, "Fuck you." Tr. p. 321. He said it not once but twice. Tr. pp. 321, 400. The SWAT team thought he was turning to go back into his house and one member on orders from her supervisor shot Graham

four times in his thighs with “less lethal” rounds (“bean bags” fired from a shotgun). Tr. pp. 321-322.

As Graham started to go down, several officers rushed him and pulled him down off the porch. Tr. pp. 322, 324. The SWAT team officer who had shot the bean bags thought Graham appeared to be cooperating with the officers who were trying to handcuff him. Tr. pp. 324-325. On her report she described Graham as offering “passive resistance.” This meant that he responded to their commands by doing nothing. Tr. pp. 327-328. He did not demonstrate “active aggression.” Tr. p. 328. Graham also showed “defensive aggression” – when he said “fuck you” he was saying he was not going to comply with their commands, not going to deal with them at that time. Tr. pp. 328-329.

4. Graham’s Summary of Argument in the Court of Appeals as to this issue.

There is insufficient evidence to prove that Graham *forcibly* resisted law enforcement officers. One officer shot him four times in his thighs with “less lethal” rounds. Other officers then dragged him off his porch as he started to go down. The statute defining Resisting Law Enforcement requires that a defendant knowingly *and forcibly* resist, obstruct or interfere with law enforcement officers.

The State did not produce evidence of forcible resistance by Graham. The State never argued to the jury that Graham had forcibly resisted. The State appeared to accept the notion that resistance in any form was enough.

Thus, the jury – although instructed that the State had to prove forcible resistance – never heard any evidence as to forcible resistance. It never heard any argument about forcible resistance. See Appellant’s Brief, p. 8. The question of forcible resistance having never been

presented to or argued to the jury, it is unlikely that the jury even considered the element of *forcible* resistance.

5. The Court of Appeals decided that the evidence was sufficient.

The Court of Appeals noted that the evidence is sufficient if an inference may *reasonably* be drawn from it to support the judgment. *Graham v. State*, 889 N.E.2d 1283 (Ind. Ct. App. 2008), [*6], emphasis added. The Court of Appeals noted that a person forcibly resists "when strong, powerful, violent means are used to evade a law enforcement official's rightful exercise of his or her duties." *Id.*, quoting *Guthrie v. State*, 720 N.E.2d 7, 9 (Ind. Ct. App. 1999) (quoting *Spangler v. State*, 607 N.E.2d 720, 723 (Ind. 1993)).

Citing *Guthrie*, the Court of Appeals added: "Mere passive resistance is not sufficient to sustain a conviction for resisting law enforcement." *Id.* The Court then quoted *Spangler* – the forcible element of the crime requires "some form of violent action toward another." *Id.*

The court in *Graham* then cited and quoted *Johnson v. State*, 833 N.E.2d 516, 519 (Ind. Ct. App. 2005), in turn quoting a footnote from *Price v. State*, 622 N.E.2d 954, 963 n.14 (Ind. 1993), a case in which "the sole issue . . . [was] the volume of defendant's expression." *Id.* The footnote stated: "an individual who directs strength, power *or* violence towards police officers or who makes a threatening gesture or movement in their direction, may properly be charged with [resisting law enforcement]."

The Court in *Graham* then observed: "[U]ntil we are instructed otherwise by our Supreme Court, we see no reason to apply what appears to be an overly strict definition of 'forcibly resist' when the facts in *Spangler* established that an individual did no more than

passively resist by walking away" Graham, 889 N.E.2d at 1283, [*7], quoting *Johnson v. State*, 833 N.E.2d 516, 519 (Ind. Ct. App. 2005).

ARGUMENT

Transfer should be granted because the decision by the Court of Appeals in our case is in conflict with the Supreme Court's decision in *Spangler* and with other decisions of the Court of Appeals as to the definition of "forcibly." Appellate Rule 57(H)(1), -(2).

1. The Standard of Review.

The Standard of Review for sufficiency of the evidence is well settled. The Court on Appeal will neither weigh the evidence nor resolve questions of credibility. It will look only to the evidence and the reasonable inferences therefrom which support the verdict. If from that viewpoint there was evidence of probative value from which a reasonable trier of fact could conclude that the defendant was guilty beyond a reasonable doubt, the court on appeal will affirm the conviction. *Spangler*, 607 N.E.2d at 724. Appellant's Brief, p. 9.

2. In *Spangler*, the Supreme Court considered the statute at length.

The statute under which Graham was charged in count 2 provides that a person "who knowingly or intentionally: (1) *forcibly* resists, obstructs, or interferes with a law enforcement officer or a person assisting the officer while the officer is lawfully engaged in the execution of the officer's duties. . . commits resisting law enforcement, a Class A misdemeanor. . ." I.C. 35-44-3-3(a)(1), emphasis supplied; App. 3.

Indiana's Supreme Court has considered this statute at length after transfer and found that the statute requires the State to prove forcible resistance:

When construing a statute, the Court must also examine the grammatical structure of the clause or sentence in issue. Here, the legislature

placed the modifier "forcibly" before the verb "resists," and "resists" was the first in a string of verbs. If the legislature had intended only to modify "resists," then "forcibly" would have appeared after the verb, and the statute would have instead read "resists forcibly, obstructs, or interferes." We agree with the Third District Court of Appeals that "forcibly" modifies the entire string of verbs in that particular section of the statute, due to the placement of the adverb before the string of verbs in that particular clause. *Spangler v. State*, 607 N.E.2d 720, 723 (Ind. 1993), internal citations omitted.

The court next considered the appropriate meaning of the term "forcibly" as it is used in this statute.

As this is a penal statute, it is to be strictly construed against the State. Our final objective is to determine and effect legislative intent. The word "forcibly" is an adverb that modifies the verbs which follow it. "Forcibly" is a word descriptive of the type of resistance, obstruction, or interference, proscribed by law. Resistance, obstruction, or interference, with force is the action the statute addresses. Here, the Court must consider exactly what constitutes force, as applied in the statute. *Spangler*, 607 N.E.2d at 723, internal citations omitted, emphasis added.

The Supreme Court consulted definitions in three dictionaries, including Black's Law Dictionary. *Id.* "The common denominators of these definitions are the use of strength, power, or violence, applied to one's actions, in order to accomplish one's ends. We believe that one 'forcibly resists' law enforcement when strong, powerful, violent means are used to evade a law enforcement official's rightful exercise of his or her duties." *Id.*

The court in *Spangler* added: "Another fact convinces us that the legislature intended the term 'forcible' to connote some form of violent action toward another." *Spangler*, 607 N.E.2d at 724. "The legislature has, by statute, defined a "forcible felony' as 'a felony that involves the use or threat of force against a human being, or

in which there is imminent danger of bodily injury to a human being.” Id., internal citations omitted, emphasis in original.

In *Spangler*, Indiana’s Supreme Court had observed:

In the case before us, both the trial court and the Court of Appeals characterize Spangler's resistance as active, not passive. We agree with this characterization. Next, both the trial court and the Court of Appeals distinguish the instant case from *White*. In that case, the defendant's actions were entirely passive, not active. From the holding in *White*, the trial court and the Fourth District Court of Appeals in the instant case inferred that any actions to resist would fall within the statute, unless the acts were entirely passive in nature. We do not agree with the lower courts' interpretation. As we have already stated, "forcibly" is an element of the crime. Therefore, *any action to resist must be done with force in order to violate this statute. It is error as a matter of law to conclude that "forcibly resists" includes all actions that are not passive. Id.*

As noted above, because it is a penal statute, the statute requiring the defendant to resist “forcibly” is to be strictly construed against the State, with the final objective of determining and effecting the legislative intent. *Id.* The word "forcibly" is an element of the crime. *Id.* “Therefore, any action to resist must be done with force in order to violate this statute. It is error as a matter of law to conclude that "forcibly resists" includes all actions that are not passive.” *Id.*

When considering the facts in Spangler’s case, the Supreme Court concluded: There was insufficient evidence from which “a reasonable trier of fact could conclude with the required level of certainty that Spangler acted forcibly, as forcibly is defined above. There was no strength, power, or violence directed towards the law enforcement official. There was no movement or threatening gesture made in the direction of the official.” *Id.*

Finally, the Supreme Court reversed the judgment of the trial court. “Retrial would violate the strictures of the Double Jeopardy Clause. This case is remanded to the trial court for entry of a judgment of acquittal.” *Spangler*, 607 N.E.2d at 725, internal citation omitted.

3. The statute's record – and *Spangler's* – in the Court of Appeals is mixed.

This issue has been discussed by the Court of Appeals several times. The Court of Appeals in the case at bar cited and quoted *Guthrie v. State*, 720 N.E.2d 7, 9 (Ind. Ct. App. 1999). *Graham v. State*, 889 N.E.2d 1283, (Ind. Ct. App. 2008). The court in *Guthrie* had noted the following:

[The defendant] also directs us to *White v. State*, 545 N.E.2d 1124 (Ind. Ct. App. 1989), *Braster v. State*, 596 N.E.2d 278 (Ind. Ct. App. 1992), and *Ajabu v. State*, 704 N.E.2d 494 (Ind. Ct. App. 1998), all of which support his assertion that *mere passive resistance is not sufficient to sustain a conviction of resisting law enforcement*. In *White*, the court reversed a conviction for resisting law enforcement where the defendant blocked his driveway and refused to allow a tow truck to enter a parking lot to retrieve a vehicle that contained stolen goods. *White*, 545 N.E.2d at 1125. Similarly, in *Braster*, this court reversed a conviction where the only evidence of resisting law enforcement was defendant's failure to obey the officer's demand to lie on the ground. "*While defendant's failure to obey [the officer's instructions] is a definite resistance, obstruction, and interference with law enforcement, there was no force involved on defendant's part.*" *Braster v. State*, 596 N.E.2d at 280. Finally, in *Ajabu*, this court overturned a conviction where the defendant resisted police efforts to remove a flag from his possession and the record revealed that he "twisted and turned a little as he held onto his flag." *Ajabu*, 704 N.E.2d at 495.

However, these cases are distinguishable from the case at bar because *Guthrie* did resist in some meaningful way that extended beyond mere passive resistance. These facts are similar to those in *Wellman v. State*, 703 N.E.2d 1061 (Ind. Ct. App. 1998), where the court found sufficient evidence that a defendant acted with the requisite force in resisting an officer, so as to sustain a conviction for resisting law enforcement, where defendant physically resisted leaving his house by placing his hands against the door frame. The officer was forced to shove defendant through the doorway in order to get him outside, and once outside, the defendant refused to get up and walk, forcing the officer to lift defendant onto his feet. *Id.* at 1064. *Guthrie*, 720 N.E.2d at 9, emphases added.

Thus, in *Braster* (decided before *Spangler*), where the defendant failed to obey an officer's demand that he lie on the floor, instead remaining standing and staring at the officer, the

evidence was insufficient to support a conviction because “there was no force involved on defendant’s part.” *Id.* Following *Spangler*, the Court of Appeals reversed a conviction in *Ajabu*:

Ajabu twisted and turned a little as he held onto his flag, even after being maced, and only let go after Officer Dubois dragged him approximately eight to ten feet.

While we agree that *this evidence establishes some resistance by Ajabu, the record fails to disclose any evidence from which a reasonable trier of fact could conclude beyond a reasonable doubt that Ajabu acted forcibly*, as defined by our supreme court in *Spangler. Ajabu*, 704 N.E.2 495-496. emphasis added.

4. There is no evidence that Graham “forcibly” resisted law enforcement officers.

Graham respectfully suggests that the Court of Appeals in the case at bar has accepted the barest hint of activity on the part of Graham as active resistance – and accepted that as enough to warrant the designation, “forcible.” Graham refused to put his hands up. *Graham*, 889 N.E.2d at 1283, [*7]. This “required” the officer to fire four “bean bag” rounds at this legs to get him to submit. *Id.* “After Graham fell to the porch, the officers grabbed him and carried him into the front yard.” *Graham*, 889 N.E.2d at 1283, [*7-8]. In this record, there is as yet no sign of “active” resistance, much less forcible resistance, by Graham.

The Court of Appeals continued: “However, despite the officers' commands to ‘give us your hands,’ Graham ‘was still not complying even after physically being taken into custody.’ *Graham*, 889 N.E.2d at 1283, [*8]. The Court of Appeals citation for this quote is to an officer who was observing the action from across the street and described what he saw as follows:

I, I could hear them yelling at him give us your hands, give us your hands. He still resisted to give, not to give the hands. The idea is to put the hands behind the back in handcuffs. And I could hear them yelling at him to give, to give us your hands, give us your hands. He was still not complying even after physically being taken into custody. He was handcuffed at that point. Tr. p. 281.

The most that we have here is that several officers are holding Graham and yelling “give us your hands.” There is no evidence that he did not do so. There is certainly no evidence that he did so with any kind of force. There is no evidence even that he had any idea what he was supposed to do. None of the officers involved in taking Graham down to the ground or putting on the handcuffs ever testified. The officer who fired the shots testified that she thought Graham was being cooperative, as noted by the Court of Appeals. Tr. pp. 324-325; *Graham*, 889 N.E.2d at 1283, [*8].

The Court of Appeals concluded from this that Graham “used more force than the defendant whose conviction we upheld in *Johnson*.” Id. Graham respectfully suggests that the Court of Appeals is mistaken in that assessment of Graham’s actions.

This was the evidence in *Johnson*: “When Officer Stockton attempted to search Johnson, he turned away and pushed away with his shoulders while cursing and yelling. After Johnson was searched, he refused to get into the transport vehicle. Officers Viewegh and Stockton then grabbed him to place him into the vehicle. At that time, he ‘stiffened up’ and the officers had to physically place him inside.” *Johnson*, 833 N.E.2d at 517.

There is no evidence at all that Graham so much as “pushed away with his shoulders” or “stiffened up” when the officers were yelling at him to “give us your hands.” The officer across the street said Graham was not complying. That is not the same thing as saying he was somehow “forcibly” not complying. Tr. p. 281.

5. In *Graham* and in *Johnson*, the Court of Appeals has declined to follow the statute or accept the Supreme Court’s definition of “forcibly.”

The Court of Appeals in *Graham* and *Johnson*, apparently based on the use of the word “or” in a footnote in *Price*, have redefined “forcible” – but they have not strictly construed the statute against the State. *Graham*, 889 N.E.2d 1283 [*7], quoting *Johnson*. Instead, both courts appear to be concerned that the statute could not be used against enough people as the Supreme Court interpreted it. “Were that definition [urged by the defendant] to be applied, only those individuals who commit acts such as striking, kicking, or biting police officers could be guilty of resisting law enforcement.” *Johnson*, 833 N.E.2d at 519. “[U]ntil we are instructed otherwise by our Supreme Court, we see no reason to apply what appears to be an overly strict definition of ‘forcibly resist’ . . . *Graham*, 889 N.E.2d 1283 [*7], quoting *Johnson*.

The *Graham* and *Johnson* courts have essentially taken the word “forcibly” out of the statute. The idea behind the statute as *Graham* and *Johnson* interpret it is to punish for “resisting law enforcement,” whether or not that resistance is “forcible” as defined in *Spangler*.

These courts – unlike the legislature – do not consider it necessary that the defendant “forcibly” resist law enforcement in any meaningful fashion. The inclusion of that word in the statute appears to be superfluous.

But see *Spangler*:

“While we agree that law enforcement officials deserve additional protections in fulfilling their duties, we cannot say that the purpose of the Resisting Law Enforcement statute expands an officer's authority to make an arrest. Our system of government charges law enforcement officials with upholding the laws as the laws are stated. This statute prohibits the knowing and forcible resistance, obstruction or interference with authorized service of civil process. It goes no further. *Spangler*, 607 N.E.2d 725.

The interpretation by the Court of Appeals in *Graham* ignores the lengthy explanation by the Supreme Court in *Spangler* (a case that was transferred specifically to consider the definition

of “forcibly” in this statute and in this context). Instead, the courts in *Graham* and *Johnson* appear to use their own definition rather than the “overly strict” one explained in *Spangler*.

The *Johnson* court recognized “that our decision, and even that in *Guthrie* upon which we have relied, may have moderated the definition of “forcibly resist” as it was written in *Spangler*.” *Johnson*, 833 N.E.2d at 519. The court in *Johnson* continued: “Were that definition to be applied, only those individuals who commit acts such as striking, kicking, or biting police officers could be guilty of resisting law enforcement. However, we have not found any case in which our Supreme Court has addressed with detail the definition it crafted in *Spangler*.” *Id.*

The *Johnson* court then reached out to the footnote in *Price*, noting that “our Supreme Court has made one statement which could be interpreted to alter the definition as it appeared to have been written in *Spangler*.” *Johnson*, 833 N.E.2d at 519.

We do not presume to know which definition the Supreme Court would prefer. We respectfully suggest only that the various panels of the Court of Appeals (including the panel in *Graham*) do not agree with each other. Nor do they all – including *Graham* – agree with our Supreme Court.

CONCLUSION

Graham respectfully asks the Supreme Court to grant transfer in this cause and reverse the decision of the Court of Appeals as to this issue; remand to the trial court with instructions to vacate the conviction for Count 2, Resisting law Enforcement; and for such other relief as the court may deem appropriate.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I verify that this Petition to Transfer from page 1 through and including the Conclusion, including all headings, footnotes, and quotations, but excluding the Table of Contents, signature block, Certificate of Word Count, and Certificate of Service, contains 3,789 words as determined by the word count of the word processing system used to prepare this brief, specifically Microsoft Word 2000, less than the 4,200 words permitted by Appellate Rule 44(E).

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Appellant's Reply Brief has been served upon the Attorney General of Indiana by delivering a copy of the same to his office at the Office of the Attorney General, Indiana Government Center South, Fifth Floor, 302 West Washington Street, Indianapolis, IN 46204-2770, this 19th day of August 2008.

I affirm under the penalties of perjury that the foregoing representations in the Certificate of Service are true.

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