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SUPREME COURT Copy

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **BILLY CHARLES WHITE,** **Defendant and Appellant.**	Case No.

SUPREME COURT
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Fourth Appellate District, Division One, Case No D060969
San Diego County Superior Court, Case No. SCD228290
The Honorable Frank A. Brown, Judge

PETITION FOR REVIEW

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TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Pursuant to rule 8.500 of the California Rules of Court, petitioner, the People of California, respectfully requests this court to grant review of the above-entitled matter following the issuance of a published opinion on June 18, 2015, by the Fourth District Court of Appeal, Division One. In its opinion, a two-justice majority held that a defendant, who was properly charged and found guilty by a jury of both rape of an intoxicated person and rape of an unconscious person based on the same act, could only stand convicted of one count of rape and vacated one of the convictions. Justice Benke dissented. A copy of the Court of Appeal's opinion is attached. No petition for rehearing was filed.

ISSUE PRESENTED

Whether a defendant may be convicted of both rape of an intoxicated person (Pen. Code, § 261, subd. (a)(3))[1] and rape of an unconscious person (§ 261, subd. (a)(4)) based on the same act.

REASONS FOR GRANTING REVIEW

Review of this case is necessary to settle an important question of law and to secure uniformity of decision. (Cal. Rules of Court, rule 8.500, subd. (b)(1).) Notwithstanding this court's decision in *People v. Gonzalez* (2014) 60 Cal.4th 533 (*Gonzalez*), the Court of Appeal here, as well as other courts throughout the state, continue to struggle with application of section 954, authorizing multiple convictions arising out of the same act. Although this court concluded in *Gonzalez* that section 954 authorizes

[1] All further statutory references are to the Penal Code.

multiple convictions for oral copulation of an intoxicated person and oral copulation of an unconscious person based on the same act, the Court of Appeal here reached the anomalous conclusion that it does not allow multiple convictions when the defendant uses identical means to commit rape. Surely the Legislature did not intend such an absurd result. The uncertainty surrounding whether multiple convictions can stand under section 954 will continue to sow confusion and mischief in charging, instruction and sentencing not only in rape cases but also for other crimes as well.

Accordingly, granting review will provide needed guidance to lower courts, as well as to prosecutors across the state making charging decisions.

STATEMENT OF THE CASE AND FACTS

Appellant Billy White climbed into the bed of an unsuspecting friend who was in and out of consciousness due to intoxication and, over the course of several hours, engaged in sexual conduct, including intercourse, until his victim realized what was happening and protested. At that point, White rolled off of his victim and pretended to be asleep, as if nothing had happened, although he later claimed that his victim was begging him for it. A San Diego County jury convicted White of both rape of an intoxicated person (count 1-Pen. Code, § 261, subd. (3))[2] and rape of an unconscious person (count 2-§ 261, subd. (4)), and the trial court sentenced White to three years in state prison on count 1 and stayed his punishment on count 2 pursuant to section 654.

Appellant appealed on various grounds, but not on the ground that he could only stand convicted of one rape offense. That issue was raised sua sponte by the Court of Appeal. The court requested briefing on the applicability, if any, of *People v. Gonzalez* (2012) 211 Cal.App.4th 405

[2] All future undesignated code references are to the Penal Code.

(opinion superseded by *People v. Gonzalez* (2014) 60 Cal.4th 533), in which a different two-justice majority in the same Division held that the defendant's convictions for oral copulation of an unconscious person (§ 288a, subd. (f)) and oral copulation of an intoxicated person (§ 288a, subd. (i)) based on the same act had to be consolidated into one conviction under the holding and reasoning of *People v. Craig* (1941) 17 Cal.2d 453 (*Craig*).

Following briefing, the Court of Appeal rejected each of appellant's claimed errors, including sufficiency of the evidence for both rape convictions. (*People v. White* (2013) 2013 WL 1444254 (*White I*).) The Court of Appeal divided, however, on the issue whether the two convictions could stand. Justice Huffman, joined by Justice McDonald, held that, under *Craig,* White could only stand convicted of one rape and chose, without explanation, count 2 as the conviction to be vacated. (*Id.* at pp. *7, 12.) Justice Benke dissented on the ground that sections 954 and 654, as well as subsequent decisions by this court concerning those provisions, limited *Craig* to its facts and permit multiple convictions, such as occurred in this case. Justice Benke would have affirmed both convictions and the trial court's stay of punishment on count 2 pursuant to section 654. (*White I,* at pp. 1-14.)

White I came on the heels of this court's grant of review in *People v. Gonzalez,* and the People successfully petitioned for review on a grant-and-hold basis. After this court reversed the Court of Appeal in *Gonzalez*– finding dual convictions for oral copulation of an unconscious and intoxicated person based on the same act authorized under section 954– it transferred the instant matter back to the Court of Appeal "for reconsideration in light of *Gonzalez*..."

On remand, the same two-justice majority again struck one of White's rape convictions. (Slip Op. at pp. 3, 25 (*White II*).) Relying on the fact that this court declined the People's request to overrule *Craig* and structural and

textual differences between the oral copulation and rape statutes, the majority found that this case was governed by *Craig* and not *Gonzalez* or section 954. (*White II*, at pp. 6-7.) The majority reasoned, "The People's reliance on case law that allows convictions of multiple offenses from a single act, subject to section 654 limitations is misplaced. Those cases address different offenses, with different elements." (*Id.* at p. 24.) Accordingly, the majority concluded: "[T]he prosecution properly pled two counts of rape as separate statements of the same offense, but because the counts are in fact separate statements of only one offense, *Craig, supra*, 17 Cal.2d 453 holds there may be only one conviction for the single act." (*Ibid.*)

Justice Benke again dissented, noting "the court in *Gonzalez* did not disapprove *Craig*, but neither did it approve of *Craig* in the manner suggested by the majority." (*Dissent,* at p. 3.) Rather, *Gonzalez* reiterated the primacy of the elements test for determining whether offenses were different and therefore subject to multiple convictions under section 954 and found that *Craig* likewise acknowledged the same test. (*Ibid.*) Justice Benke explained that the majority's analysis abandoned the elements test, which would yield the same result as in *Gonzalez,* in favor of a "structure test" that compares the structure of the rape and oral copulation statutes. She found the majority's comparison also does not withstand scrutiny. Alternatively, Justice Benke would have found dual convictions authorized under section 954 as different statements of the same offense, an issue that this court declined to reach in *Gonzalez* because it found the two oral copulations offenses were different offenses. (*Id.* at p. 17.)

ARGUMENT

This court remanded this case to the Court of Appeal to reconsider its decision vacating one of White's two rape convictions based on the same act in light of its decision in *Gonzalez*, where this court found dual oral

copulation convictions based on the same act authorized under section 954. A divided court again vacated one of White's rape convictions. The majority found that *Craig*'s holding, not *Gonzalez*'s, controlled on the ground that the version of the rape statute applicable to White more closely resembled former section 261 examined in *Craig* than it did the oral copulation statute (§ 288a) examined in *Gonzalez*. The majority's holding conflicts with this court's decision in *Gonzalez* and a plain application of section 954. And, as in *Gonzalez*, *Craig's* interpretation of *former* section 261 does not compel a different result in any case.

As observed by Justice Benke in dissent, the majority's analysis missed the mark because it chose to be guided by a reason supporting the court's decision in *Gonzalez* not to overrule *Craig*–a comparison of the text and structure of former section 261 and section 288a–instead of the actual holding and analytical framework relied upon to reach it. And, even relying on such a comparison, subsequent amendments to section 261 and related penal provisions provide ample reasons to distinguish it from the former section 261 examined in *Craig* and therefore to similarly distinguish that aspect of *Craig*. Had the majority properly followed *Gonzalez* it, too, could have and should have reached the same conclusion that dual rape convictions based on the same act are authorized under section 954 where the convictions are based on different elements and neither is a lesser included offense of the other. As in *Gonzalez*, it is a conclusion that simultaneously respects legislative intent (there is no basis for concluding the Legislature intended to treat rapists more leniently than someone who commits oral copulation) and the principles of stare decisis.

In *Gonzalez,* this court held that oral copulation of an unconscious person (§ 288a, subd. (f)) and oral copulation of an intoxicated person (§ 288a, subd. (i)) were different offenses subject to multiple convictions under section 954 even where based on the same act. (*Gonzalez, supra,* 60

Cal.4th at p. 535.) It reached this conclusion by looking at whether each offense had different elements and were lesser included offenses of the other. (*Id.* at p. 539.) This court observed: "We have repeatedly held that the same act can support multiple charges and multiple convictions. 'Unless one offense is necessarily included in the other [citation], multiple convictions can be based upon a single criminal act or an indivisible course of criminal conduct (§ 954).'" (*Id.* at p. 537.)

As noted by Justice Benke, *Craig* is no bar to multiple convictions under section 954. Subsequent amendments to section 261 and related penal provisions provide ample reasons to distinguish the modern version of section 261 from the former section 261 examined in *Craig* and therefore to similarly distinguish that aspect of *Craig,* which concluded the rape statute formerly stated only one offense instead of different offenses. For example, in finding that former section 261 defined but one crime, *Craig* relied on the express language of former section 261, which stated that rape occurred "under *either* of the following circumstances." (*Craig, supra,* 17 Cal.2d at p. 455, italics added.) The term "either" connotes "one or the other." That term was subsequently replaced by "any," which connotes "one or more" and therefore is reasonably understood to mean a rape may now be accomplished by more than just one of the enumerated acts. (*Dissent*, at p. 10.)

Since *Craig,* the punishment provision for rape was also amended and in fact provides for a sentencing range for rape of an unconscious and intoxicated person identical to the sentencing range for the same offenses under the oral copulation statute evaluated in *Gonzalez.* (Compare § 264 & § 288a, subds. (f) & (i).) The identical elements and punishment for these two types of offenses supports the conclusion that the Legislature also intended identical treatment. The majority entirely disregarded the significance of these legislative changes solely because under the oral

copulation statute all of the elements and particular punishment are self-contained within each subdivision whereas they are not in the rape statutes. As pointed out by Justice Benke, the majority's analysis exalts form over substance, and substantively the statutes call for identical treatment under section 954. (*Dissent,* at pp. 5-6.) Notably, the Legislature has demonstrated its intent to treat the different types of rape separately by providing different punishments. (See § 264, subd. (c) [providing punishment ranges for rape under § 261, subd. (a)(2), when committed against a minor].)

The different structures of the rape and oral copulation statutes are also readily explained by the history of the two statutes. The crime of rape was set forth in the first Penal Code enacted in 1872 (indeed predated it) and, as society's understanding of the crime has evolved, it has been expanded by amendments to existing rape provisions and by the addition of new Penal Code sections. (Compare rape statutes in 1872 (§§ 261, 262, 263 and 264) with the present version §§ 261, 261.5, 262, 263, 264 and 264.1.) In contrast, the oral copulation statute is a construct solely of the twentieth century, having first been enacted in 1921. (Added by Stats. 1921, ch. 848, p. 1633, § 2.) It is unremarkable that the Legislature, in creating an entirely new crime, drafted a more comprehensive singular Penal Code provision.

Other post-*Craig* amendments, such as providing different penal consequences for violations of the different subsections of 261, further support the conclusion that the Legislature intended each subdivision to be treated as a different offense. For example, only convictions under certain

subdivisions of the rape statute render a defendant eligible for additional punishment in future criminal prosecutions.[3]

Additionally, as noted by Justice Benke, *Craig* also based its decision on a discredited view of rape as a single outrage to the victim and "as such a victim could not be 'doubly outraged, once by force and once because of her tender years, but suffered only a single offense. []" (*Dissent*, at p. 11.) The majority revives this abandoned view by ignoring the legislative expansion of liability under the rape statute commensurate with a more evolved and enlightened understanding of rape. (*Id.* at pp. 5-7.)

And, as its holding indicates, *Craig* was also principally concerned with avoiding double punishment because in the 1940s the courts had yet to develop the stay procedure under section 654 and, under the then-existing indeterminate sentencing law, a defendant faced two judgments for the same offense with exposure of 50 years each. Around the time of *Craig*, this court inconsistently authorized concurrent sentences, consolidation or vacating convictions in an attempt to comply with section 654's prohibition against double punishment. (*Dissent*, at pp. 12-17 and cases cited therein.) In that regard, as this court previously noted, *Craig* "must be read in light of the problem then before the court, that is, whether the defendant could be doubly punished for a single act." (*In re Hess* (1955) 45 Cal.2d 171, 174.) Thus, as recognized by Justice Benke, the court's decision in *Craig* does not foreclose finding rape of an intoxicated and unconscious person

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[3]For example, section 667.6, which mandates full consecutive terms for multiple sex offenses, applies to "Rape in violation of paragraph (2), (3), (6) or (7) of subdivision (a) of section 261." (§ 667.6, subd. (e).) Penal Code section 667.61 provides for a life term for anyone who, under the additional circumstances specified, commits rape "in violation of paragraph (2) or (6) of subdivision (a) of Section 261." (§ 667.61, subd. (c).)

constitutes different offenses subject to multiple convictions under section 954.

Even if rape of an intoxicated and unconscious person are not different offenses, this case would present the opportunity to decide whether section 954 would authorize a conviction on both as different statements of the same offense. The majority declined to address this issue but Justice Benke agreed with the People that, alternatively, multiple convictions would be authorized under section 954 as different statements of the same offense. In that regard, providing even further support for like treatment under section 954 is the fact that Legislature codified an exception to section 954 in section 496 because it shows that when the Legislature intends an exception to dual convictions to apply it does it expressly and not by implication. In section 496, concerning receiving stolen property, the Legislature expressly prohibits dual convictions for theft and receiving stolen property. Consistently, juries in theft and receiving cases are instructed that they can only return a verdict for one or the other crime (CALCRIM No. 3516); no such instruction exists in cases of rape. Rather, juries are directed to consider each and every charge separately, by proof beyond a reasonable doubt, and return verdicts accordingly.

Finally, the majority's remedy, to vacate one of the rape convictions, as opposed to stay it under section 654, is devoid of any statutory authority, and even *Craig* did not call for vacating an otherwise valid conviction. Jury verdicts, in general, should not be lightly disregarded. (See *People v. Palmer* (2001) 24 Cal.4th 856, 863; *People v. Eid* (2014) 59 Cal.4th 650, 657 [multiple convictions allow a jury "to tailor its verdict to reflect its determination of the full extent of defendants' criminal acts"].) The public's confidence in the jury system depends, in part, on the sanctity of the verdict and its staying power. Further, there is no statutory mechanism

or court rule guiding the court's discretion over which rape conviction should be vacated or what to do if the remaining conviction is reversed on appeal or habeas. There does not appear to be any authority for reinstatement of the conviction and such a remedy raises concerns of double jeopardy. Vacating also jeopardizes application of future penalty provisions that may be enacted by the Legislature.

As pointed out by Justice Benke, the majority opinion will lead to confusion and mischief as appellate courts vacate or, as is being done in other cases, consolidate, convictions based on the same act by comparing whether the Penal Code provision under which they have been prosecuted more closely resemble the form of the oral copulation statute or the rape statutes. (*Dissent* at p. 9 & fn. 4.)[4]

This court has already granted review in *People v. Vidana* (rev. granted April 1, 2015; case no. S224546), which raises the related question whether larceny and embezzlement are separate and distinct offenses under *Gonzalez.* Although these cases involve different statutes, this court's analysis of section 954 in *Vidana* may well impact the outcome of the present case. Accordingly, in the event this court declines to grant plenary

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[4] In *People v. Soria,* C070238, the Court of Appeal in the Third Appellate District recently granted rehearing to reconsider its initial decision, pursuant to *Craig,* to consolidate the defendant's convictions for rape of an intoxicated and unconscious person based on the same act and ordered oral argument to discuss the significance of the decision in this case. The day before *White* was decided the Third Appellate District issued an unpublished decision in *People v. Mesinas*, C074781, likewise disregarding the elements test and finding a defendant who forcibly raped a 14 year-old developmentally disable girl and was properly charged and found guilty of rape of a developmentally disabled person (§ 261(a)(1)) and forcible rape (§ 261(a)(2)) could only stand convicted of one rape offense. Two of the justices in the unanimous *Mesinas* decision are also on the panel in *Soria.* Respondent with also file a petition for review in *Mesinas.*

review, respondent respectfully requests this court grant and hold the present case for *Vidana*.

CONCLUSION

The petition for review should be granted.

Dated: July 23, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Petition for Review uses a 13 point Times New Roman font and contains 2,906 words.

Dated: July 23, 2015

KAMALA D. HARRIS
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ATTACHMENT

Filed 6/18/15

CERTIFIED FOR PUBLICATION

OPINION ON REMAND

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. BILLY CHARLES WHITE, Defendant and Appellant.	D060969 (Super. Ct. No. SCD228290)

APPEAL from a judgment of the Superior Court of San Diego County, Frank A. Brown, Judge. Affirmed as modified.

Theresa Osterman Stevenson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, and A. Natasha Cortina, Deputy Attorney General, for Plaintiff and Respondent.

A jury found Billy Charles White guilty of rape of an intoxicated person (Pen. Code,[1] § 261, subd. (a)(3); count 1) and of rape of an unconscious person (§ 261, subd. (a)(4)(A); count 2). The trial court sentenced White to three years in state prison and ordered him to register as a sex offender.

White contends the evidence is insufficient to prove under section 261 that when he engaged in sexual intercourse with the victim, he knew the victim was unable to resist because of intoxication (count 1) or because the victim was unconscious of the nature of the act of intercourse (count 2). White also contends the trial court prejudicially erred by refusing both to instruct the jury on mistake of fact and to grant his new trial motion based on juror misconduct. Finally, White contends the trial court abused its discretion when it denied him probation.

In addition to these contentions, on our own motion we requested supplemental briefing from the parties whether White's convictions on counts 1 and 2 should be consolidated under *People v. Craig* (1941) 17 Cal.2d 453 (*Craig*) and its progeny into a single conviction given there was a single act of sexual intercourse.

In an unpublished opinion filed April 10, 2013, we rejected White's contentions on appeal. After considering the supplemental briefing of the parties, we concluded that White was not properly convicted both on counts 1 and 2 and further, that the judgment must be modified to reflect only one conviction for violation of section 261.

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1 All statutory references are to the Penal Code.

Our high court granted the People's petition for review, but deferred further action on the matter pending consideration and disposition of a related issue in *People v. Gonzalez* (2014) 60 Cal.4th 533 (*Gonzalez*). After the court issued its opinion in that matter, it transferred the matter to this court with directions to reconsider the case in light of *Gonzalez*. We have complied with the Supreme Court's direction and affirm the judgment as modified. Specifically, we conclude that *Gonzalez* does not hold that White can be convicted of both rape of an intoxicated person and rape of an unconscious person based on a single act of intercourse under section 261. As such, we strike the second count for rape. We otherwise affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

On February 14, 2010, White asked the victim to go out for Valentine's Day. White knew the victim from a local bar White frequented, where the victim worked as a bartender. White and the victim in the past had participated in some group activities, including taking a trip to Las Vegas with other employees and patrons of the bar. Although the victim refused to go out alone with White on Valentine's Day, she agreed to go out in a group that included White.

That night, the victim met White at the local bar where the victim worked. Before she met up with White, the victim had dinner with a friend. During dinner the victim consumed one beer.

At about 9:00 p.m., the victim drove to downtown San Diego with White and John Jacoby (John), another regular from the bar where the victim worked. The victim dropped off White at a hotel where White planned to stay. However, the victim had not

intended to stay the night at the hotel. After the victim parked her car in the hotel parking lot, they headed downtown to some clubs but found the lines to enter too long and the cover charge for admission too expensive. The victim next contacted a friend who worked at a "gentlemen's club" (club).

The three of them went to the club at about 10:30 p.m., sat in the "V.I.P." section and purchased a bottle of vodka to share. While at the club, the group was joined by John's brother, Joey Jacoby (Joey), Joey's girlfriend, Jamey Booth (Jamey), and the victim's former boyfriend. White and John each received a private or "lap" dance at the club.

With the exception of the victim's former boyfriend, the group stayed at the club until it closed at about 2:00 a.m. The victim testified she consumed at least four vodka drinks while at the club. The victim also testified she did not remember leaving the club; instead, her last memory that night was being told by club employees that the club was closing. Her next memory was waking up at 5:30 a.m. in the hotel room after "somebody roll[ed] off of [her]."

The victim testified that on the night of the attack, she dreamt she was being touched and kissed. The victim also testified that when she awakened she looked at the clock and realized then she was in a hotel room and that somebody actually had been touching her, including her vagina and breasts. At that moment, the victim knew somebody had intercourse with her while she had been in a "dream state." The victim testified she remember saying "no" to intercourse, but could not remember whether she was actually saying "no" out loud to her attacker or was saying it "inside [her] head."

The victim testified she saw John sleeping on a bed to her left. The victim still had on her dress and sweater but her dress was "scrunched up" like a shirt, her underwear was missing and her bottom half was exposed. The victim saw White in bed next to her, wearing an undershirt with his pants down. White appeared to be sleeping.

The victim got up from the bed, found her underwear and frantically went over to John. The victim shook John to wake him. The victim next grabbed a few of her belongings and ran out of the room into the hallway, where she sat crying.

John came to the victim's assistance. The victim told John she had been raped. Because of the noise, hotel security approached the victim and John in the hallway and told them either to leave the hotel or go back inside their room. The victim did not tell security she had been raped because she was embarrassed. John drove the victim home.

The victim testified that once home she felt "completely lost" emotionally. She could not remember going to the hotel the night before or how she ended up sleeping in the hotel room. The day after the attack, the victim told her roommate what had happened, who called police. The victim was taken to a clinic for an evidentiary examination.

The examination revealed abrasions on the peri-hymenal area of the victim, both left and right, and lacerations on the victim's posterior fourchette and the fossa navcularis. The findings were consistent with the victim being asleep or unconscious and not physically aroused at the time of sexual penetration.

The victim's roommate testified she could hear the victim crying inside her room most of the day following the attack, and the victim appeared scared and shaken up. The