In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ROMAN FLUGENCIO GONZALEZ,

Defendant and Appellant.

Case No. S207830

Fourth Appellate District, Division One,
Case No. D059713
San Diego County Superior Court,
Case No. SCD228173
The Honorable Roger W. Krauel, Judge

OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

Issue Presented 1

Introduction 1

Statement of the Case and Facts 2

Argument 3

I. In light of this court's more modern application of sections 954 and 654, *People v. Craig* is no longer good law, and should be overturned 3

A. Section 954 explicitly allows prosecutors to charge and convict defendants of different offenses or different statements of the same offense for the same act 4

B. *Craig* created an exception to section 954 that conflicts with its express language and this court's more modern decisions 7

C. The reasoning relied on by the court in *Craig* and the court of appeal here is faulty and outdated 12

D. The continued application of *Craig* creates an inconsistency in sentencing certain defendants and will continue to cause confusion for lower courts 22

E. This is an appropriate case in which to depart from the doctrine of stare decisis 27

Conclusion 29

TABLE OF CONTENTS
(continued)

Page

Appendix A
California Penal Codes and Statues in Force .....

Appendix B
Statutes of California and Amendments to the Codes 1915.
Statutes of California 1927 .....

Appendix C
Statutes of California 1927 .....

Appendix C
Respondent's Petition for Review filed in Case No. D059713 .....

TABLE OF AUTHORITIES

Page

CASES

Blockburger v. United States
(1932) 284 U.S. 299 [52 S.Ct. 180, 76 L.Ed. 306] 11, 15

Bourhis v. Lord
(2013) 56 Cal.4th 320 28

Cianci v. Superior Court
(1985) 40 Cal.3d 903 28

In re Hess
(1955) 45 Cal.2d 171 14

In re Lane
(1962) 58 Cal.2d 99 9

In re Pope
(2010) 50 Cal.4th 777 ..... 9, 27

In re Reeves
(2005) 35 Cal.4th 765 27

In re Wright
(1967) 65 Cal.2d 650 ..... 14, 26

Kellett v. Superior Court of Sacramento County
(1966) 63 Cal.2d 822 11

Moradi–Shalal v. Fireman's Fund Ins. Companies
(1988) 46 Cal.3d 287 28

People v. Beamon
(1973) 8 Cal.3d 625 6

People v. Benson
(1998) 18 Cal.4th 24 ..... 14, 23, 24

People v. Britt
(2004) 32 Cal.4th 944 ..... 9, 18

People v. Collins
(1960) 54 Cal.2d 57 19

People v. Craig
(1941) 17 Cal.2d 453 ..... passim

People v. Duff
(2010) 50 Cal.4th 787 6

People v. Gonzalez
(2008) 43 Cal.4th 1118 26

People v. Jailles
(1905) 146 Cal. 301 ..... 20, 21, 22

People v. Jones
(1988) 46 Cal.3d 585 15

People v. Karsai
(1982) 131 Cal.App.3d 224 15

People v. Kehoe
(1949) 33 Cal.2d 711 16

People v. Kramer
(2002) 29 Cal.4th 720 6

People v. Linwood
(2003) 105 Cal.App.4th 59 7

People v. Lofink
(1988) 206 Cal.App.3d 161 10

People v. Majors
(1884) 65 Cal. 138 11

People v. Martinez
(2007) 56 Cal.App.4th 851 17

People v. McFarland
(1962) 58 Cal.2d 748 9

People v. McNeal
(2009) 46 Cal.4th 1183 17

People v. Montoya
(2004) 33 Cal.4th 1031 ..... 6, 16

People v. Morante
(1999) 20 Cal.4th 403 28

People v. Niles
(1964) 227 Cal.App.2d 749 26

People v. Ortega
(1998) 19 Cal.4th 686 ..... 6, 7

People v. Pearson
(1986) 42 Cal.3d 354 ..... passim

People v. Reed
(2006) 38 Cal.4th 1224 ..... 6, 7, 16

People v. Ryan
(2006) 138 Cal.App.4th 360 5

People v. Sanchez
(2001) 24 Cal.4th 983 ..... 6, 24

People v. Scott
(2009) 179 Cal.App.4th 920 23

People v. Sloan
(2007) 42 Cal.4th 110 ..... 6, 10

People v. Smith
(2010) 191 Cal.App.4th 199 ..... 25, 26

People v. Tideman
(1962) 57 Cal.2d. 586 ..... 9, 13

People v. Vann
(1900) 129 Cal. 118 ..... 19, 20

People v. Wyatt
(2012) 55 Cal.4th 694 6

STATUTES

California Penal Code
- § 220, subd. (a) 2
- § 243.4, subd. (e)(1) 2
- § 261 ..... 8, 14
- § 261, subd. (1) 8
- § 261, subd. (3) 8
- § 261, subds. (a)(2) 23
- § 261.5 17
- § 263 ..... 15, 16
- § 264 17
- § 286 18
- § 286, subd. (c) 9
- § 288 ..... 18, 23
- § 288, subd. (a) ..... passim
- § 288a, subds. (a)(6) 23
- § 288a, subds. (c)(1) 23, 27
- § 288a, subds. (c)(2)(B) 12
- § 288a, subds. (c)(3) 12
- § 288a, subds. (c)(4). 23
- § 288a, subds. (d)(3) 23
- § 288a, subd. (e) 12
- § 288a, subd. (f) 1, 2
- § 288a, subd. (i) 1, 2, 27
- § 290 ..... 9, 18
- § 654 ..... passim
- § 667.5, subds. (c)(3) 23
- § 667.5, subds. (c)(5) 23, 27
- § 954 ..... passim

Statutes of California 1905
- Ch. 452, § 1 21
- Ch. 611, § 1 22
- Ch. 1024, § 1 21

Vehicle Code
- § 23152 18
- § 23152, subd. (a) 17
- § 23152, subd. (b) 17

COURT RULES

California Rules of Court
rule 4.424 26
rule 4.447 26
rule 8.520 subd. (h) 20

ISSUE PRESENTED

In light of this court's more recent application of sections 954 and 654, is *People v. Craig* (1941) 17 Cal.2d 453, still good law?

INTRODUCTION

Appellant Gonzalez forced an intoxicated and unconscious victim to orally copulate him. For this act, he was convicted of two crimes: oral copulation of an unconscious person (Pen. Code[1] § 288a, subd. (f); count 1), and oral copulation of an intoxicated person (§ 288a, subd. (i); count 2.) Under the authority and reasoning of *People v. Craig* (1941) 17 Cal.2d 453, 110 P.2d 403 (*Craig*), the Court of Appeal vacated Gonzalez's conviction for oral copulation of an intoxicated person, concluding the two convictions were actually one offense. *Craig* holds that such multiple convictions are improper where the convictions are based on the same act, and the violations are of different subdivisions of one statutory provision. (*Id.*, at p. 459.) Instead, *Craig* holds such convictions should be "consolidated."

The *Craig* opinion was born in an age of confusion regarding how to implement sections 954 and 654. In the 70 years since *Craig*, the courts have resolved the confusion and now consistently permit multiple convictions in similar situations, but require that the punishment be stayed under section 654. In light of this more modern understanding of the interplay between multiple convictions and multiple punishment, the *Craig* holding is an anomaly which creates an inherent conflict in an area of law that is otherwise well-settled.

In addition, *Craig* is inconsistently and arbitrarily applied. In other contexts, multiple convictions arising from a single act are routinely upheld. The remaining logic which purportedly supported the *Craig*

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[1] Future unlabeled statutory references are to the Penal Code.

decision also erodes under careful scrutiny. Finally, the continued application of *Craig* has potentially far-reaching consequences, and implementation of its proposed "consolidation" procedure is confusing and has proved burdensome for lower courts.

This court should overrule *Craig's* unworkable "exception" to section 954, apply the unambiguous language of section 954, and hold that a defendant can be convicted of multiple counts based on a single act. This court should reverse the Court of Appeal's decision in this case and reinstate appellant's conviction for unlawful oral copulation of an intoxicated person.

STATEMENT OF THE CASE AND FACTS

On June 25, 2010, Gonzalez was sitting on the sidewalk next to the victim, Carolyn H., on a street in downtown San Diego. (2 RT 77, 79.) Carolyn had been drinking, and eventually passed out. (2 RT 79, 80, 105-106, 133, 148.) Belligerently ignoring the protests of others around them, appellant forced Carolyn to perform oral sex on him while she was unconscious. (2 RT 83, 132, 147, 170, 172.) The police were summoned, caught appellant in the act and arrested him. (2 RT 170-171.)

On January 6, 2011, a San Diego County jury convicted appellant of one count of oral copulation of an unconscious person (§ 288a, subd. (f); count 1), and one count of oral copulation of an intoxicated person (§ 288a, subd. (i); count 2). Both counts 1 and 2 were based on the single act of oral copulation. For other separate acts, appellant was also convicted of one count of assault with intent to commit sexual penetration (§ 220, subd. (a); count 3), and two counts of sexual battery (§ 243.4, subd. (e)(1); counts 4 and 5)). (3 RT 367-368.) Counts 3, 4, and 5 are not relevant to the issue currently before this Court.

On April 21, 2011, appellant was sentenced to the low term of three years on count 1. The court also imposed the low term of three years on

count 2, but stayed the sentence pursuant to section 654. On count 3, the court imposed the low term of two years, and ran it concurrently to the term on count 1. (4 RT 402-403.) On counts 4 and 5, appellant was sentenced to 180 days with credit for time served. (4 RT 403.) Accordingly, appellant was sentenced to a total term of three years in prison.

On appeal, appellant argued his convictions in counts 1 and 2 could not both stand. He relied on *Craig, supra*, 17 Cal.2d 453, and argued that the two convictions were duplicative because he only committed a single act of unlawful oral copulation. A majority of the Fourth District Court of Appeal, Division One, agreed. According to the majority the two convictions could not both stand because appellant was convicted twice for the same offense based on two "*circumstances*" that existed at the time of the single act of intercourse. (Slip Op. at p. 13-14, emphasis added.) Because the two "circumstances" are delineated as subdivisions of the same statutory provision, and not as separate statutes, the subdivisions constitute separate "circumstances" for committing the same offense, but do not qualify as separate and distinct offenses of which appellant (or any other defendant) can be convicted. (Slip Op. at p. 13.) Accordingly, the court ordered count 2 to be vacated. Justice Benke authored a dissent in which she argued *Craig* was distinguishable, and she would have affirmed both convictions.

On January 8, 2013, respondent petitioned this court for review. On February 27, 2013, this court granted the petition for review.

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ARGUMENT

I. IN LIGHT OF THIS COURT'S MORE MODERN APPLICATION OF SECTIONS 954 AND 654, *PEOPLE V. CRAIG* IS NO LONGER GOOD LAW, AND SHOULD BE OVERTURNED

The Court of Appeal vacated appellant's conviction in reliance on *Craig*. But, against the backdrop of the more modern understanding and application of sections 954 and 654, the flaws in the *Craig* opinion and the need for its reversal become evident. At the outset, the *Craig* opinion ignored the express language of section 954, rendering it an anomaly in an otherwise well-settled area of law. Second, under modern scrutiny, the logic and reasoning that purportedly supported the conclusion in *Craig* prove faulty and unstable. Finally, implementation of the holding has either been ignored or proved cumbersome for lower courts. The procedure created in *Craig* is wholly unnecessary— a traditional application of sections 954 and 654 accomplishes the same goals and is a procedure with which trial courts are intimately familiar, one which is applied equitably on a consistent basis. The policy favoring adherence to precedent is outweighed by the fact that Craig is in direct conflict with the express language of 954, its conclusions are illogical, and the procedure it established has proved difficult to implement. Accordingly, the *Craig* opinion should be overturned, and the Court of Appeal's holding in this case should be reversed.

A. Section 954 explicitly allows prosecutors to charge and convict defendants of different offenses or different statements of the same offense for the same act

Section 954 sets forth the general rule that defendants may be charged with and convicted of multiple offenses based on a single act or an indivisible course of conduct. It states:

> An accusatory pleading may charge two or more *different offenses* connected together in their commission, *or different*

> *statements of the same offense* or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but *the defendant may be convicted of any number of the offenses charged*, and each offense of which the defendant is convicted must be stated in the verdict or the finding of the court; provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately. An acquittal of one or more counts shall not be deemed an acquittal of any other count.

(Emphasis added.) The plain language permits multiple charges and convictions in three different situations. First, an accusatory pleading may charge different offenses in separate counts, as long as the different offenses are connected together in their commission. Second, the pleading may charge different statements of the *same* offense in separate counts. Third, the pleading may charge different offenses (not connected in their commission) if the offenses are of the same class of crimes. In any of these situations, the defendant "may be convicted of any number of the offenses charged." (§ 954.) The statute "permits the charging of the same offense on alternative legal theories, so that a prosecutor in doubt need not decide at the outset what particular crime can be proved by evidence not yet presented." (*People v. Ryan* (2006) 138 Cal.App.4th 360, 368.)

In accordance with the provision's express language, this court has consistently interpreted section 954 as permitting multiple convictions for an act that violates multiple statutory provisions. In contrast, on the separate issue of punishment, section 654 prohibits multiple *punishments* where a defendant has violated multiple statutory provisions by the commission of one single act.

> In general, a person may be convicted of, although not punished for, more than one crime arising out of the same act or course of conduct. 'In California, *a single act* or course of conduct by a defendant can lead to convictions "of any number of the offenses charged." (§ 954[...]; *People v. Ortega* (1998) 19 Cal.4th 686, 692 ....)' (*People v. Montoya* (2004) 33 Cal.4th 1031, 1034.) Section 954 generally permits multiple convictions. Section 654 is its counterpart concerning punishment. It prohibits multiple punishment for the same 'act or omission.'

(*People v. Sloan* (2007) 42 Cal.4th 110, 116, citing *People v. Reed* (2006) 38 Cal.4th 1224 (*Reed*); emphasis added.) When multiple convictions are permissible, but multiple punishment is not, the trial court must impose and stay the execution of sentence on the convictions for which multiple punishment is prohibited. (*People v. Sloan* (2007) 42 Cal.4th 110, 116.) The trial court in this case did precisely as it was supposed to and stayed punishment on count 2 under section 654.

This court has often affirmed multiple convictions for a single act or indivisible course of conduct. (See e.g. *People v. Wyatt* (2012) 55 Cal.4th 694, 704 [involuntary manslaughter and assault on a child resulting in death for the same act of killing a child]; *People v. Duff* (2010) 50 Cal.4th 787, 792-793 [second degree murder and assault on a child resulting in death for single act of suffocating child]; *People v. Sanchez* (2001) 24 Cal.4th 983, 989-991 [murder and gross vehicular manslaughter]; *Ortega, supra*, 19 Cal.4th at p. 693 [grand theft and carjacking for the single act of taking a car]; *Pearson, supra*, 42 Cal.3d at p. 354 [sodomy and lewd conduct for the same act of sodomy]; *People v. Beamon* (1973) 8 Cal.3d 625, 639-640 [kidnapping for the purpose of robbery and robbery]; *People v. Montoya* (2004) 33 Cal.4th 1031, 1034 [carjacking and unlawful taking of a vehicle].) In *People v. Kramer* (2002) 29 Cal.4th 720, 722, the court stated explicitly, "Sometimes a single act constitutes more than one crime. When that happens, the person committing the act can be convicted of each of

those crimes, but Penal Code section 654 prohibits punishing the person for more than one of them."

An exception to section 954's rule that a single act may give rise to multiple convictions applies when a defendant is convicted of necessarily or lesser included offenses. (*People v. Reed* (2006) 38 Cal.4th 1224, 1227; *People v. Ortega* (1998) 19 Cal.4th 686, 692, overruled on another point in *People v. Reed, supra*, 38 Cal.4th at p. 1228; *People v. Pearson, supra*, 42 Cal.3d at pp. 354–355.) However, as the two crimes at issue here contain distinct elements, neither oral copulation of an unconscious person or an intoxicated person is a lesser included offense of the other. (See, e.g., *People v. Linwood* (2003) 105 Cal.App.4th 59, 63-65, & fn. 3 [jury found that the defendant was guilty of raping and attempting to rape an intoxicated woman, but not guilty of attempting to rape an unconscious woman who was still semi-conscious although intoxicated].) Thus, the lesser included offense exception would not prohibit the multiple convictions in this case.

Accordingly, by the plain language of section 954, appellant's two convictions in counts 1 and 2 are permissible. Indeed, this case highlights precisely why the Legislature has permitted multiple convictions in such situations. Assume for a moment that the evidence of unconsciousness or of intoxication was uncertain prior to trial. The prosecutor should be permitted to charge both crimes, and to secure convictions on both crimes, if after evidence has been presented, the jury determines appellant in fact violated both provisions. Otherwise, prosecutors would be forced to choose a crime based on factors not yet known, i.e. how the proof will come out at trial. The express language of section 954 together with the more modern interpretation and application of it and section 654 provide a solid and predictable foundation, which guides trial courts' imposition of sentence in a consistent manner.

B. *Craig* created an exception to section 954 that conflicts with its express language and this Court's more modern decisions

In 1941, the *Craig* court created an exception to section 954 for multiple violations of a rape statute based on a single act of intercourse. The defendant in *Craig* forcibly raped a 16-year old girl and was found guilty of both forcible rape in violation of former section 261, subdivision (3), and statutory rape in violation of former section 261, subdivision (1). (*Craig, supra,* 17 Cal.2d at p. 454.) The trial court imposed sentence on each of the two counts and ran the two sentences concurrently. (*Id.* at p. 455.) The *Craig* court found the defendant could be charged with both crimes, (*Id.* at p. 458.), but held both convictions could not stand because they were separate subdivisions of the same rape statute. According to the court, the defendant had committed, "but one punishable offense of rape result[ing] from a single act of intercourse, although that act may be accomplished under more than one of the conditions or circumstances specified in the foregoing subdivisions." (*Ibid.*) The *Craig* court pointed out that there had been a violation of only one statute (§ 261) and only one victim had been involved. (*Craig, supra,* 17 Cal.2d at p. 458.) It concluded:

> And, while the proof necessarily varies with respect to the several subdivisions of that section under which the charge may be brought, the sole punishable offense under any and all of them is the unlawful intercourse with the victim. We conclude that only one punishable offense of rape results from a single act of intercourse, though it may be chargeable in separate counts when accomplished under the varying circumstances specified in the subdivisions of section 261 of the Penal Code.

(*Craig, supra,* 17 Cal.2d at p. 458.) Nothing about the holding in *Craig* explains why rape convictions are somehow different than other situations. Section 954 expressly permitted then, as it does now, multiple charges *and*

convictions for a single act where the single act violates more than one criminal provision — either as different offenses, or as different statements of the same offense.

In that regard, the validity of *Craig* has been undermined by this court's more recent case law giving full effect to sections 954 and 654. (See *In re Lane* (1962) 58 Cal.2d 99, 105 ["a later decision overrules prior decisions which conflict with it, whether such prior decisions are mentioned and commented upon or not"].) For example, in *People v. Pearson* (1986) 42 Cal.3d 351, this court upheld a conviction for sodomy (§286, subd. (c)) and lewd conduct (§ 288, subd. (a)) for the same act of sodomy. The court stressed that "section 654 bars multiple punishment, not multiple conviction." (*Pearson, supra,* 42 Cal.3d at p. 359, citing *People v. Tideman, supra,* 57 Cal.2d at pp. 586-587; *People v. McFarland* (1962) 58 Cal.2d 748, 762-763; see *In re Pope* (2010) 50 Cal.4th 777, 784 ["Section 654 prohibits multiple punishment, but it does not operate to bar multiple conviction[s]"], citing *People v. Pearson, supra,* 42 Cal.3d at p. 359.) *Pearson* explained:

> [C]onduct giving rise to more than one offense within the meaning of the statute may result in initial conviction of both crimes, only one of which, the more serious offense, may be punished. [Citation.] The appropriate procedure, therefore, is to eliminate the effect of the judgment as to the lesser offense *insofar as the penalty alone is concerned.* [Citation.]

(*People v. Pearson, supra*, 42 Cal.3d at pp. 359-360, emphasis added, internal quotation marks omitted.) In *People v. Britt* (2004) 32 Cal.4th 944, 951-954, this court reiterated the same principles and held multiple convictions arising from violations of subdivisions of the same statute were also permissible. (*Id.*, at p. 951 [A defendant may be convicted of violating both parts of section 290."].) *Pearson* and *Britt* confirm that when a single act violates two provisions (either distinct provisions, or subdivisions of a

single statute), a defendant may be *convicted* of both offenses, although not punished for both. Contrarily, *Craig* held that multiple convictions under such circumstances were impermissible. *Pearson* and *Britt's* holdings have been echoed in hundreds of other cases, all of which say the same thing: multiple convictions for a single act are permitted under section 954, but multiple punishment is barred under section 654. (See e.g. *Sloan, supra*, 42 Cal.4th at p. 116, and cases cited therein.)

Despite the clarity of this court's more modern interpretation and application of sections 954 and 654, the Court of Appeal here applied the *Craig* exception to multiple convictions under different subdivisions of section 288a, prohibiting oral copulation under various circumstances, for the sole reason the single act of oral copulation violated subdivisions of a single statute as opposed to separately enumerated statutes. (Slip Op. at pp. 13-14.)

As explained in the preceding section, section 954 expressly permits multiple charges and convictions under three different scenarios. Here, the crimes at issue are either different offenses connected in their commission (since they occurred at the same time), or different statements of the same offense (since there was only one act). (See *People v. Lofink* (1988) 206 Cal.App.3d 161, 166 [holding section 954 expressly allows prosecutors to charge and convict of multiple counts where the counts are different statements of the same offense].) This court need not decide whether the crimes are different offenses or are simply different statements of the same offense because under either scenario, section 954 permits the prosecution to charge and convict appellant of both crimes in separate counts. Thus, the holding in *Craig*, and now the holding in the instant case stand in stark contrast to the express language of section 954, and both holdings run afoul of nearly the entire body of modern law on section 954.

Finally, even assuming this court agrees with *Craig* that defendants can be charged with multiple counts for the same act, but not convicted of multiple counts where only one offense was committed, the offenses at issue here are different offenses, and thus, *Craig* is distinguishable.

At the outset, oral copulation of an intoxicated person and oral copulation of an unconscious person are different offenses because they contain distinct elements. "Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not." (*Blockburger v. United States* (1932) 284 U.S. 299, 304 [52 S.Ct. 180, 182, 76 L.Ed. 306] (*Blockburger*); see also *People v. Majors* (1884) 65 Cal. 138, 146, [holding two offenses existed for purposes of double jeopardy where, "[t]he two crimes, although committed at one time and by the same act, are entirely different in their elements, and the evidence required to convict in the one case very different from that essential to a conviction in the other."], superseded by statute on other grounds as stated in *Kellett v. Superior Court of Sacramento County* (1966) 63 Cal.2d 822, 826, fn.4.) Here, the two crimes meet this definition. Oral copulation of an unconscious person requires proof that the victim was unconscious at the time of the crime, and oral copulation of an intoxicated person requires proof that the victim was intoxicated at the time of the crime. Thus, the two crimes require proof of a fact which the other does not, making them distinct offenses.

Further, the two crimes are delineated in separate subdivisions of section 288a. Section 288a contains a total of 10 subdivisions. Each subdivision delineates a separate offense. The fact that these are separate offenses and not simply different means of committing the same offense is made clear by the assignment of different punishments for some of these crimes. For example, forcible oral copulation of a child under age 14 is

punishable by eight, ten or twelve years in prison. (§ 288a, subd. (c)(2)(B).) But, unlawful oral copulation by threat of retaliation is punishable by three, six or eight years. (§ 288a, subd. (c)(3).) And, oral copulation while in prison is punishable by no more than a year. (§ 288a, subd. (e).) In addition, the punishment for each of the offenses included in section 288a is contained in each of the individual subdivisions, not in a universal punishment provision which applies to all of the subdivisions, as was the case in *Craig*. (*Craig, supra*, 17 Cal.2d at p. 458.) At a minimum, if two crimes carry different punishments, they must be considered separate offenses and not simply different means of committing the same offense. The fact that the two crimes at issue in this case carry the same punishment is more coincidental than it is an indication that they are the same offense. As noted, the punishment for each offense is included in the text of each individual subdivision. Because the subdivisions in 288a include different punishments in the text of each provision, the Legislature intended that they operate as separate offenses. Under this construction, *Craig* is distinguishable because there, the court held the two convictions could not stand because they were the same offense.

Craig's holding creates an inherent conflict in the manner in which section 954 is applied to different criminal acts. More modern decisions of this court highlight the conflict and demonstrate that since *Craig*, courts have developed a better and more consistent approach to apply sections 954 and 654. *Craig's* continued validity only serves to muddy the otherwise clear waters.

C. The reasoning relied on by the Court in *Craig* and the Court of Appeal here is faulty and outdated

Not only does the *Craig* court's "subdivision of the same statute" exception to section 954 conflict with the express language of section 954 (which allows for multiple convictions based on different statements of the

same offense) and current decisions of this court, but also much of the reasoning of the *Craig* opinion upon which the Court of Appeal relies in this case is faulty and outdated. Upon careful review, the integrity of the opinion disintegrates and reveals that the opinion in *Craig* amounts to nothing more than a house built on sand.

First, at various points throughout the opinion, *Craig* conflated the question of whether the defendant had committed multiple offenses with whether they would be separately "punishable." (*Craig, supra*, 17 Cal.2d at p. 457, 458.) In identifying the issue raised, the *Craig* court explained, "The only question meriting serious consideration is as to the propriety of entering *separate judgments and sentences* for both forcible and statutory rape, charged under separate counts, when but a single act of sexual intercourse has been committed." (*Id.* at p. 455, emphasis added.) It went on to explain that, "Under this section [the rape statute], but one *punishable* offense of rape results from a single act of intercourse." (*Ibid.*, emphasis added) And it later declared, "the charge and proof disclose a single act of intercourse resulting from force employed upon a minor, but one *punishable* rape is consummated." (*Id.*, at p. 457, emphasis added.) Finally, the court held,

> And, while the proof necessarily varies with respect to the several subdivisions of that section under which the charge may be brought, the sole *punishable* offense under any and all of them is the unlawful intercourse with the victim. We conclude that only one *punishable* offense of rape results from a single act of intercourse, ...

(*Id.*, at p. 458, emphasis added.)

This emphasis by the *Craig* court suggests that its true concern was with whether the defendant could be *punished* for both crimes, not whether he could be *convicted* of both crimes. (See *People v. Tideman* (1962) 57 Cal.2d 574, 586 [citing *Craig* for the proposition that "[s]ection 654

prohibits double punishment for the commission of a single act [citations], but it does not prohibit convictions for different offenses arising out of a single act"].) Section 654 makes clear that such a defendant cannot be punished for both crimes. The defendant in *Craig* was improperly punished for both crimes because his sentence on count 2 ran concurrently with his sentence on count 1, instead of being stayed pursuant to section 654.

As noted by Justice Benke in her dissent in this case, early cases had difficulty consistently implementing section 654 because the "modern procedure of staying the impermissible punishment had not yet developed." (Slip. Op., dissent of Benke, J., at p. 9, citing *People v. Benson* (1998) 18 Cal.4th 24, 38-40 (*Benson*), dissent of Chin, J.) Some courts set aside or reversed the judgment, as opposed to the modern use of the stay. (*Ibid.*) So, it is reasonable to conclude the court in *Craig* was trying to prohibit multiple *punishment* as opposed to multiple *convictions*. Notably, this court has previously indicated that *Craig's* holding—that the six subdivisions of section 261 were merely circumstances under which a defendant could commit but one offense — "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, emphasis added.) Through the modern development of section 654 jurisprudence, the concern over imposing multiple punishment was put to rest when courts concluded staying an imposed sentence preserved the conviction in case it was needed at a later date and prevented the defendant from suffering any additional punishment for the stayed conviction. (See *In re Wright* (1967) 65 Cal.2d 650, 656, fn.4 [noting that the stay procedure, "reasonably reconciles the policies involved in applying section 654 to protect the rights of both the state and the defendant."].) Here, in accordance with the resolution of the confusion over section 654, Gonzalez's sentence on count 2 was properly stayed—alleviating any

concern that he might suffer multiple punishments. But, *Craig* was decided before courts had resolved this issue and thus, was understandably concerned with avoiding double punishment for the defendant's single act of unlawful intercourse. Given the amount of emphasis the court placed on punishment, it is reasonable to conclude that this concern dictated the result.

Second, in support of its "one conviction" conclusion, *Craig* cited Penal Code section 263, which states, "The essential guilt of rape consists in the outrage to the person and the feelings of the female." According to *Craig*, "[t]he victim was not doubly outraged, once because she was forcibly attacked and once because she was under 18 years of age. There was but a single outrage and offense." (*Craig, supra*, 17 Cal.2d at p. 455.) This reasoning reflects an antiquated view of the crime of rape. The emotional trauma to the victim is undoubtedly more severe where the rape is both forcible and the victim is more vulnerable by virtue of her young age. Moreover, the reasoning is unsound and unsupported. The level of emotional trauma to the victim should not be the basis on which a court determines how many criminal offenses have been committed. Instead, criminal offenses are delineated and defined by their elements. (*Blockburger, supra,* 284 U.S. at p. 304.)

Indeed, the next sentence of section 263 -- "Any sexual penetration, however slight, is sufficient to complete the crime" – gives context to the provision and undermines *Craig's* reasoning. When read in its entirety, section 263 makes it clear that the "outrage" comprising the crime of rape lies in the forceful sexual penetration of the victim. The statute's purpose is to clarify that that outrage occurs no matter how "slight" the penetration. (See e.g. *People v. Karsai* (1982) 131 Cal.App.3d 224, 232-233, overruled on other grounds in *People v. Jones* (1988) 46 Cal.3d 585, 600, fn. 8.)

Craig's use of section 263 as if it required a separate "outrage" for each conviction was misplaced.

Third, *Craig* mistakenly viewed the two crimes as "identical" or "included in one another." It asserted,

> A defendant may be convicted of two separate offenses arising out of the same transaction when each offense is stated in a separate count and when the two offenses differ in their necessary elements and one is not included within the other." (*People v. Venable*, 25 Cal. App. (2d) 73, 74 [76 Pac. (2d) 523].) Where, as here, the charge and proof disclose a single act of intercourse resulting from force employed upon a minor, but one punishable rape is consummated, for the proof, though dual in character, *necessarily crystallizes into one "included" or identical offense.*

(*Id.*, at p. 457, emphasis added.) This reasoning seems to suggest that the two crimes fall within the long recognized exception to section 954 where one crime is the lesser or necessarily included offense of the other. (See, e.g., *People v. Kehoe* (1949) 33 Cal.2d 711, 715–716 [citing *Craig* for the proposition that a defendant cannot suffer convictions for both a greater and a lesser crime].) However, under the modern test for lesser included offenses, which looks to the crime's elements and not the proof of each offense, *Craig's* characterization of the offenses this way does not hold up, for it is certainly possible to commit rape of a minor without also committing forcible rape, and visa versa. (*People v. Reed, supra,* 38 Cal.4th at p. 1227 ["[I]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former."]; *People v. Montoya* (2004) 33 Cal.4th 1031, 1034 [same].) Further, as explained above, the necessarily included offense exception does not apply to the crimes at issue in this case.

Fourth, *Craig* relied on the fact that each subdivision of the rape statute at the time provided for the same punishment as a basis for concluding there was but one offense. (*Craig, supra*, 17 Cal.2d at 458.)

This is no longer the case with either the rape statute or the oral copulation statute at issue here. Forcible rape is now punishable by three, six, or eight years. (§ 264.) And, rape of a minor carries various punishments depending on the age of the victim and the age of the defendant. (§ 261.5.) In enacting section 288a, the Legislature also provided for separate punishments depending on which subdivision was violated. (§ 288a.) As noted above, this indicates that the Legislature intended the subdivisions of section 288a to operate as separate offenses, not a single offense which can be committed under various "circumstances."

Fifth, the *Craig* court relied on the manner in which the statutes were organized as a basis for determining that the defendant could only be convicted of one offense. The reliance on the organization of the statute—whether offenses are described under subdivisions of a singly enumerated statute or are stated under separately enumerated statutes—as a basis for determining whether one or more convictions for multiple offenses should stand is arbitrary and leads to anomalous results because this logic does not apply uniformly to other criminal convictions. For instance, driving under the influence is defined as driving while under the influence of alcohol or drugs in Vehicle Code section 23152, subdivision (a), and also as driving with a blood alcohol content of .08 or greater in Vehicle Code section 23152, subdivision (b). Theoretically, under *Craig*, these are merely two "circumstances" by which a defendant can commit the same offense, and he cannot be convicted of both crimes. But defendants are routinely (and properly) convicted of both subdivision (a), and subdivision (b) for the same act of driving, and the court simply stays the punishment on one of the convictions under section 654. (See *People v. McNeal* (2009) 46 Cal.4th 1183, 1189, 1193 [noting that it is permissible to convict a defendant under both of the subdivisions because the Legislature had created a new crime]; and see e.g. *People v. Martinez* (2007) 56

Cal.App.4th 851, 857 [applying section 654 to convictions under both subdivisions of Vehicle Code section 23152].) And, as noted above, this court has also upheld multiple convictions of subdivisions of the same statute under the sex offender registration law, section 290. In *People v. Britt* (2004) 32 Cal.4th 944, this court held the defendant "may clearly be *convicted* of violating" two subdivisions of section 290, although he could not be punished for both. (*Id.* at pp. 951, 954, emphasis in original.)

This adherence to whether multiple offenses are subdivisions of the same statute led the majority in this case to reject application of this court's more modern decision in *Pearson, supra*, 42 Cal.3d 351-- which upheld separate convictions for sodomy and lewd conduct based on the same act of sodomy – because they were based on separately enumerated statutory violations (§§ 286 and 288) and not subdivisions of the same statute. (Slip Op. at pp. 12-14.) The majority's reliance on the organization of the statutory provisions as a means of determining how many convictions a defendant can incur runs afoul of section 954. As noted above, the majority here distinguished *Pearson* because the defendant was convicted of two "different offenses based on a single act," and the defendant in this case "was convicted of the same offense twice based on a single act." (Slip Op. at pp. 13-14.) It is true that the defendant in *Pearson* was convicted of two "different offenses" in the sense that the two charges were pursuant to distinct Penal Code provisions (§§ 286 and 288). And that here, as in *Craig*, the defendant was arguably convicted of the "same offense" twice, in that he was convicted of unlawful oral copulation under two subdivisions of the same Penal Code provision. But organizational ease in collecting multiple related offenses under a single penal provision is no basis for determining whether multiple offenses have occurred or whether they may result in separate convictions. Further, even assuming the organizational structure of the Penal Code dictates what constitutes "an offense," the

distinction noted by the majority amounts to one without a difference. As explained in the preceding section, section 954 expressly permits the charging and conviction of multiple counts under both situations. Again, it states, "[a]n accusatory pleading may charge *two or more different offenses* connected together in their commission, *or different statements of the same offense*... under separate counts," and a defendant, "may be convicted of *any number* of the offenses charged." Thus, whether oral copulation of an intoxicated person and oral copulation of an unconscious person are considered two different offenses or two different statements of the same offense does not matter. Under either scenario, section 954 entitles the prosecution to charge multiple counts for the violations of multiple provisions, and appellant was subject to multiple convictions based on those counts.

Finally, the cases upon which *Craig* relies also provide no support for its holding. First, *Craig* cites to *People v. Vann* (1900) 129 Cal. 118, 120-121. There, the court held that evidence that the defendant committed a rape by means other than that alleged in the charging document was admissible at trial, because the six subdivisions of the rape statute were merely six types of the same offense, and not separate offenses.[2] *Craig* relied on *Vann's* conclusion that the different subdivisions represented different means of committing one offense (i.e. rape), and not separate offenses, as support for its conclusion that the defendant in *Craig* could only be convicted of one offense. Nothing about the holding in *Vann* supports the *Craig* court's interpretation. As noted above, the two charges

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[2] This decision was later overruled by *People v. Collins* (1960) 54 Cal.2d 57, 59-60, which held that such a variance between the information and the proof at trial violated due process unless the defendant had notice of the alternative means by which he was accused of having committed the offense.

at issue in *Craig* can be considered different statements of the *same offense*. Similarly, the two counts at issue in this case are either different offenses or different statements of the same offense. Section 954 permits the charging of two different statements of the same offense in separate counts, and explicitly allows a defendant to incur multiple convictions for crimes so charged. The holding in *Vann* regarding the subdivisions being different means of committing one offense says nothing about whether a defendant can be charged and/or convicted of separate counts which are actually "different statements of the same offense."

At the time *Vann* was decided in 1900, a defendant could be charged with multiple counts based on the same offense, but the statute did not yet indicate whether a defendant could be convicted of multiple counts. At the time, section 954 read:

> The indictment or information must charge but one offense, but the same offense may be set forth in different forms under different counts, and when the offense may be committed by the use of different means, the means may be alleged in the alternative in the same count.

(§ 954, eff. 1880-1905[3].) Thus, even if *Vann* stood for the proposition that a defendant could not be convicted of multiple counts based on one act, such a holding would have been based on statutory language which did not explicitly permit multiple convictions.

The *Craig* court's reliance on *People v. Jailles* (1905) 146 Cal. 301, is also precarious. In *Jailles*, the defendant was charged in separate counts with forcible and statutory rape based on the same act of intercourse. (*Jailles, supra*, 146 Cal. at p. 303.) Rejecting the defendant's argument that he could not be charged with both crimes for the same act, the *Jailles* court

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[3] For the Court's convenience, pursuant to California Rule of Court, rule 8.520, subd. (h), respondent has attached a copy of this version of section 954 as appendix A, as it may be difficult to locate.

concluded that the two counts were permissible because they were simply different statements of the same offense, which was permissible under section 954. (*Jailles, supra*, 146 Cal. at p. 303.) However, section 954 still did not permit multiple *convictions*. Even though a prosecutor could charge multiple counts for a single act, the statute prohibited the *conviction* of a defendant for more than one of the multiple counts. Instead, a defendant could only be "convicted of but *one of the offenses charged.*" (Stats.1905, ch. 1024, § 1[4], emphasis added)

Based on *Jailles*, the *Craig* court again concluded that the two convictions constituted "but one offense." And thus concluded that because the two convictions constituted "one offense," the defendant could only be *convicted* of one offense. (*Craig, supra*, 17 Cal.2d at p. 457.) This conclusion does not follow and it ignores the explicit language of section 954 which had changed since *Jailles*. *Jailles* confirmed that the same act could be charged in multiple counts as "different statements of the same offense." Section 954 still contains this language and thus, still permits multiple charges for the same offense. The distinction is in when it was amended to permit multiple *convictions* for those multiple charges. This happened with the 1915 amendment to section 954, between the decision in *Jailles* and the decision in *Craig*. The 1915 amendment changed the language so that it states, as it does now, that a defendant "may be convicted of *any number* of the offenses charged." (Stats.1915, ch. 452, § 1[5], emphasis added.) Accordingly, even if *Jailles* stood for the proposition that a defendant could only be convicted of a single offense (the holding *Craig* seems to attribute to *Jailles*), such a holding would be consistent with

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[4] The proposed amendment as well as a copy of the 1905 version of section 954 is attached as Appendix B. (See fn. 3.)

[5] The proposed amendment as well as a copy of the 1915 version of section 954 is attached as Appendix C. (See fn. 3.)

the language of section 954 at the time *Jailles* was decided. But, by the time *Craig* was decided, the statute had been amended to expressly permit multiple convictions based on multiple counts, even where the multiple counts were simply "different statements of the same offense." The opinion in *Craig* never mentions this change to section 954, and seemingly ignores the fact that in 1941 section 954 expressly permitted multiple convictions.[6]

Thus, the major tenets underpinning *Craig*'s holding that there can only be one conviction for rape despite multiple charges under different subsections, are no longer valid or are incongruous. Under modern review, the logic and reasoning of the *Craig* opinion disintegrates, leaving a holding that amounts to a house built on sand. The opinion needs to be overturned.

D. The continued application of *Craig* creates an inconsistency in sentencing certain defendants and will continue to cause confusion for lower courts

Finally, the application of *Craig* creates an inconsistency in the implementation of the Three Strikes Law, and it crafted a procedure for addressing multiple convictions in this context which is confusing and wholly unnecessary.

Application of the "subdivisions of the same statute" exception results in an inequity for certain defendants with two strike offenses arising out of the same act. Unlike all other defendants subject to multiple convictions for a single act, whose punishment is limited by section 654, defendants receiving the benefit of the *Craig* exception only possess a single

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[6] Section 954 was amended again in 1927. The statute was changed to include the following language, "A verdict of acquittal on one or more of the counts shall not be deemed or held to be an acquittal of any other count." (See Stats.1927, c. 611, §1.)

conviction. This affords certain defendants an advantage with respect to the Three Strikes law. Consider the following example: a 27-year-old defendant acting in concert with another commits oral copulation on a developmentally disabled 13-year-old victim, violating section 288a, subdivisions (c)(1) and (d)(3). Both subdivisions are considered violent felonies and thus, are strike offenses. (§ 667.5, subd. (c)(5)). But, under *Craig*, the defendant's convictions would have to be consolidated. Instead of two strike offenses for the two counts, the defendant would only stand convicted of one strike. This differs from other situations where a defendant who suffers two convictions for the same act stands convicted of two strike offenses. (See e.g. *People v. Scott* (2009) 179 Cal.App.4th 920, 923 (*Scott*) [defendant convicted of robbery and car jacking based on the same act, and had two strikes].) The same would be true for defendants who violate the multiple subdivisions of the rape statute which constitute violent offenses (§ 261, subds. (a)(2) and (a)(6)), and defendants who violate subdivisions (c) and (d) of the sodomy statute (§ 286). (See § 667.5, subds. (c)(3) and (c)(4).) Thus, the sex offenders who violate two subdivisions of a statute giving rise to two strike offenses, but who then secure the nullification of one of the convictions under *Craig* stand in a different position than all other criminals who committed one act which violated two statutes, and thus received two strike offenses.

Respondent is not arguing the merits of a court imposing punishment on both strike offenses where the offenses arise out of a single act. One lower court has held that the "same act" circumstance is only a factor for a court to consider when imposing sentence on a later crime and the single act circumstance does not mandate striking one of the strike offenses. (*Scott, supra*, 179 Cal.App.4th at p. 931.) This court has expressly declined to weigh in on the issue. In *People v. Benson* (1998) 18 Cal.4th 24 (*Benson*), this court held that a strike is a strike even if the sentence therefor

was stayed under section 654. But, *Benson* involved two strike offenses for an indivisible course of conduct, not a single act. In a footnote the court noted the distinction and observed,

> Because the proper exercise of a trial court's discretion under section 1385 necessarily relates to the circumstances of a particular defendant's current and past criminal conduct, we need not and do not determine whether there are some circumstances in which two prior felony convictions are so closely connected—for example, when multiple convictions arise out of a single act by the defendant as distinguished from multiple acts committed in an indivisible course of conduct—that a trial court would abuse its discretion under section 1385 if it failed to strike one of the priors.

(*Id*, 18 Cal.4th at p. 36, fn. 8; see also *People v. Sanchez* (2001) 24 Cal.4th 983, 993.) How this court ultimately decides this issue is beside the point. The problem with implementing the *Craig* holding is that it necessarily treats some offenders differently than others depending on how the statutes under which they were convicted are organized in the Penal Code. If a single act violates two statutes, both of which are considered strike offenses, defendants should stand convicted of two strike offenses no matter the act he committed. But, under *Craig*, certain sex offenders would stand convicted of only one strike offense.

In addition, implementation of the *Craig* exception garners confusion and unnecessarily burdens lower courts. The majority's order in this case is emblematic of the problem. It ordered the convictions "consolidated," in an effort to preserve the fact that appellant violated both subdivisions. This is also the procedure used in *Craig*. (*Craig, supra*, 17 Cal.2d at p. 459.) Specifically, the court's order was to modify the judgment of conviction so it reflects, "(1) that Gonzalez was convicted of a single violation of unlawful oral copulation, as defined and proscribed in subdivisions (f) and (i) of section 288a, as charged in counts 1 and 2, and that his sentence is three years in state prison for that conviction; [and] (2) Gonzalez's

conviction for unlawful copulation in count 2, together with the sentence imposed but stayed on that count, is vacated." (Slip. Op., at pp. 17-18.) This order is confusing at best. Consolidating the counts in this manner also applies a procedure for addressing this issue that is wholly unnecessary. A traditional application of a section 654 stay accomplishes the same thing (in that Gonzalez will only be punished for one offense), but it also preserves the conviction in the event of a future attack on count 1, and clarifies the criminal provisions which the jury found appellant violated. The "consolidation" procedure has the potential to create new procedural issues, and serves no helpful purpose. It should be disapproved and abandoned.

The difficulty in implementing the "consolidation" procedure is also evident in another recent decision. In *People v. Smith* (2010) 191 Cal.App.4th 199 (*Smith*), another appellate district recently published a decision vacating a conviction in reliance on *Craig*. The court stated, in relevant part:

> As detailed above, the evidence in this case indicated only one act of sexual intercourse with the victim, but defendant was charged with, and the jury found him guilty of, two counts of rape—rape of an intoxicated woman and rape of an unconscious woman. Both convictions cannot stand because "only one punishable offense of rape results from a single act of intercourse, though it may be chargeable in separate counts when accomplished under the varying circumstances specified in the subdivisions of section 261 of the Penal Code." (*People v. Craig* (1941) 17 Cal.2d 453, 458, 110 P.2d 403.) Accordingly, we will modify the judgment to *strike the second rape count.*

(*Smith, supra,* 191 Cal.App.4th at p. 205, emphasis added.) Applying *Craig*, the court "struck" the second count, instead of "consolidating" it as *Craig* had done. But, *Smith* cannot be discounted as simply implementing consolidation incorrectly. The *Smith* court's difficulty in implementing consolidation is not surprising. In the 70 years since *Craig*, there has been

virtually no guidance provided to trial courts on how to implement "consolidation." While the Rules of Court instruct trial courts on how to apply section 654 (see e.g., Cal. Rules of Court, rules 4. 447 & 4.424), "consolidation" is unknown in the rules, and they provide no guidance on how to sentence defendants subject to consolidated convictions. Similarly, there are no court decisions demonstrating how to implement *Craig's* "consolidation" procedure—instead, the decision has been largely ignored. When courts implement *Craig* as the *Smith* court did—by striking one of the counts—there are potentially far reaching consequences.

As noted above, the advantage of section 654's stay procedure is that it preserves the conviction in case it is needed at a later date. But, in *Smith*, the court struck count 2, which left the defendant convicted of only count 1. Such an approach demonstrates the very concern which gave rise to the modern stay procedure for section 654—it leaves open the possibility that the defendant will receive a windfall if the remaining conviction is overturned on appeal because the defendant would then stand convicted of nothing, as count 2 would no longer be available to take the place of count 1. (See *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1128-1129 [The stay procedure "preserv[es] the possibility of imposition of the stayed portion should a reversal on appeal reduce the unstayed portion of the sentence."]; see also *People v. Niles* (1964) 227 Cal.App.2d 749, 756 ["[I]f [the trial court] dismisses the count carrying the lesser penalty, and the conviction on the remaining count should be reversed on appeal, the defendant would stand with no conviction at all.... [which would] risk [] letting a defendant escape altogether,..."]; and see *In re Wright, supra*, 65 Cal.2d at p. 656, fn. 4.)

The extent of other potential issues which will arise is unknown. For instance, convictions for offenses where the punishment has been stayed under 654 are still "convictions" which often have collateral consequences,

like custody credit limitations. (See e.g. *In re Pope* (2010) 50 Cal.4th 777, 784 [conviction whose punishment was stayed under 654 is still a "conviction" which can limit a defendant's custody credits]; see also *In re Reeves* (2005) 35 Cal.4th 765, 777 [same].) If a defendant has a consolidated count which includes one conviction subject to a credit limitation and one which is not, which conviction governs his credit accrual rate? Or, where a 30-year old defendant commits oral copulation on an intoxicated 13-year old, he has violated section 288a subdivisions (c)(1) and (i). Subdivision (c)(1) is considered a violent felony, and subdivision (i) is not. (§ 667.5, subd. (c)(5).) In such a situation, is the consolidated count considered a violent felony, or a non-violent felony?

The issues discussed above have been litigated in the 654 context. The same issues would need to be re-litigated in the "consolidation" context. And while the answers to some of these questions may seem obvious, that will not save the courts from having to decide them. Sifting through the confusion and creating a uniform procedure known as "consolidation" is unnecessary. Applying a traditional 654 stay in these cases accomplishes the very same thing.

As discussed above, perpetuating *Craig's* misapplication of the law has potentially far-reaching consequences. The time has come to revisit the *Craig* opinion and overrule it. Such a decision will bring uniformity to the application of sections 954 and 654, and it will ensure that all defendants are treated equally, despite the organization of the statutes under which they are convicted.

E. This is an appropriate case in which to depart from the doctrine of stare decisis

Respondent recognizes that the doctrine of stare decisis dictates that, "prior applicable precedent usually must be followed even though the case, if considered anew, might be decided differently by the current justices."

(*Moradi–Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 296 (*Moradi-Shalal*).) But, this doctrine is not absolute. (*Bourhis v. Lord* (2013) 56 Cal.4th 320, 327) And, the policy favoring adherence to precedent, "is a flexible one which permits this court to reconsider, and ultimately to depart from, our own prior precedent in an appropriate case." (*Moradi–Shalal, supra*, 46 Cal.3d at p. 296.) "Although the doctrine [of stare decisis] does indeed serve important values, it nevertheless should not shield court-created error from correction." (*Cianci v. Superior Court* (1985) 40 Cal.3d 903, 924.)

In *People v. Morante* (1999) 20 Cal.4th 403, this court faced a similar question regarding overruling a prior decision that had been in existence for nearly 50 years. Ultimately, the court rejected the rule from the prior case because it was, "inconsistent with the express language of the several applicable statutes, ... the rule r[an] counter to practical considerations and public policy... and...retention of the rule ha[d] resulted in its inconsistent application." (*Id.*, at p. 430.) The same is true here. As explained in the preceding sections, the rule announced in *Craig* is inconsistent with the express language in section 954, it runs counter to the practical considerations concerning trial courts imposing sentences in a consistent manner, and the rule has been inconsistently applied. Accordingly, *Craig*, like *Morante*, is an appropriate case in which the court should depart from the doctrine of stare decisis, and correct court-created error.

CONCLUSION

The opinion in *Craig* is outdated and illogical. It creates an unnecessary conflict with the existed law in section 954 governing when defendants can be charged and convicted of multiple offenses for a single act. And, the continued application of the *Craig* opinion will only cause confusion and disparate treatment of defendants. For all of these reasons,

the *Craig* opinion should be overruled. Because it relied exclusively on *Craig*, the opinion from the Court of Appeal in this case should likewise be reversed and appellant's conviction in count 2 should be reinstated.

Dated: May 29, 2013

Respectfully submitted,

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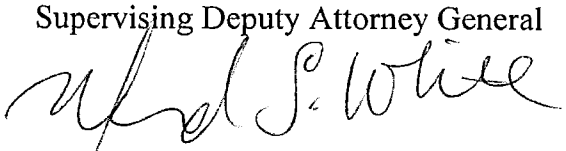

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CERTIFICATE OF COMPLIANCE

I certify that the attached **OPENING BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains **8, 895** words.

Dated: May 29, 2013

KAMALA D. HARRIS
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APPENDIX A

THE

CODES AND STATUTES

OF

CALIFORNIA,

AS AMENDED AND IN FORCE

AT THE CLOSE OF THE TWENTY-SIXTH SESSION OF THE LEGISLATURE, 1885,

WITH NOTES CONTAINING REFERENCES TO ALL THE DECISIONS OF THE SUPREME COURT CONSTRUING OR ILLUSTRATING THE SECTIONS OF THE CODES, AND TO ADJUDICATIONS OF THE COURTS OF OTHER STATES HAVING LIKE CODE PROVISIONS,

IN

FOUR VOLUMES,

BY

F. P. DEERING,
Of the San Francisco Bar.

PENAL CODE AND STATUTES IN FORCE.

SAN FRANCISCO:
BANCROFT-WHITNEY CO.
LAW PUBLISHERS & LAW BOOKSELLERS.
1886.

3. The particular circumstances of the offense charged, when they are necessary to constitute a complete offense.

Indictment when sufficient: See sec. 959, note. If the indictment be direct and certain as to the party charged, the offense charged, and states the particular circumstances which constitute the offense in ordinary and concise language, and in such a way that a person of ordinary understanding can know what was intended, it is sufficient: *People* v. *Saviers*, 14 Cal. 29. If the indictment does not state the particular circumstances, when they are necessary to constitute a complete offense, the defendant may demur on that ground; but if he fails to demur, a motion in arrest of judgment will be denied: *People* v. *Swenson*, 49 Id. 388. But see *People* v. *Martin*, 52 Id. 201. Where the offense charged admits of degrees, the indictment should charge the offense generally, and leave the degree to be determined by the verdict: *People* v. *Jefferson*, Id. 452; see also sec. 921, note.

Names of parties: See note to sec. 950.

953. *When defendant is indicted by fictitious name, etc.*

SEC. 953. When a defendant is charged by a fictitious or erroneous name, and in any stage of the proceedings his true name is discovered, it must be inserted in the subsequent proceedings, referring to the fact of his being charged by the name mentioned in the indictment or information. [*Amendment, approved April* 9, 1880; *Amendments* 1880, 13 (*Ban. ed.* 158); *took effect immediately.*]

Indictment by wrong name.—In *People* v. *Kelly*, 6 Cal. 210, it was urged in argument that the above section was in violation of the constitution; that in ordering the true name to be inserted upon the minutes the court altered the indictment in a material part, so that it was no longer an indictment found and presented by a grand jury. The court, however, held the section to be constitutional, the particular name by which defendant is designated being immaterial. See also *People* v. *Jim Ti*, 32 Id. 60; *People* v. *Ah Kim*, 34 Id. 189; and see in note to sec. 951.

Inserting true name, illustration of this practice: See *People* v. *Le Roy*, 3 West Coast Rep. 765.

954. *What indictment or information must charge.*

SEC. 954. The indictment or information must charge but one offense, but the same offense may be set forth in different forms under different counts, and when the offense may be committed by the use of different means, the means may be alleged in the alternative in the same count. [*Amendment, approved April* 9, 1880; *Amendments* 1880, 13 (*Ban. ed.* 158); *took effect immediately.*]

Objection, how taken: See sec. 1004, note. The objection to the indictment or information that two offenses are charged therein, or that the offense is charged in more than one form, must be taken by demurrer, otherwise it is waived: *People* v. *Weaver*, 47 Cal. 106; *People* v. *Burgess*, 35 Id. 115; *People* v. *Garnett*, 29 Id. 622; *People* v. *Connor*, 17 Id. 354. For an instance where the demurrer ought to have been sustained, see *People* v. *Quvise*, 56 Id. 396. The objection should be raised by special demurrer, where the pleading does not comply with sections 950, 951, and 952; general demurrer or motion in arrest will not reach the defect: *People* v. *Feilen*, 58 Id. 218.

Indictments charging more than one offense: See a valuable note to *Ben* v. *State*, 58 Am. Dec. 238–240. An indictment which charges the defendant with the murder of three persons charges three offenses: *People* v. *Alibez*, 49 Cal. 452. Where an indictment charged an officer of a corporation with concurring in the making of a statement of its condition which was false, and also with concurring in the publication of such false statement, a demurrer that the indictment charged more than one offense was sustained: *People* v. *Cooper*, 53 Id. 647. So also an indictment which charges burglary mixed with larceny was held to charge two offenses: *People* v. *Garnett*, 29 Id. 622. And where it is charged that one person stole the goods and another feloniously received them, knowing them to be stolen, two offenses are charged, and against different persons: *People* v. *Hawkins*, 34 Id. 181. If an indictment for forgery contains two counts, each containing a copy of the instrument alleged to have been forged, it will not be presumed, in the absence of an averment, that both are copies of one and the same instrument: *People* v. *Shotwell*, 27 Id. 394. If the indictment contains more than one count, it must plainly appear on its face that the matters set forth in the different counts are but different descriptions of one and the same transaction: *People* v. *Thompson*, 28 Id. 214. An indictment which charged both burglary and house-breaking was held to charge two offenses: *People* v. *Taggart*, 43 Id. 81. Larceny and embezzlement cannot be united in one information: *People* v. *De Coursey*, 61 Cal. 135; and see *People* v. *Quvise*, 56 Id. 396.

Indictments charging one offense only. The name given in the indictment to the offense charged is not of itself a charge of the offense, and a mistake in regard to it is not fatal. Where the indictment recited that defendant was accused therein of the crime of "assault with intent to commit murder," and then proceeded to state facts which showed that defendant had administered poison with intent to kill,

APPENDIX B

THE

STATUTES OF CALIFORNIA

AND

AMENDMENTS TO THE CODES

PASSED AT THE

FORTY-FIRST SESSION OF THE LEGISLATURE

1915

BEGAN ON MONDAY, JANUARY FOURTH, AND ADJOURNED ON SUNDAY, MAY NINTH, NINETEEN HUNDRED AND FIFTEEN

CALIFORNIA
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A—16281

dollars per annum and expenses, as supervisor and road commissioner not to exceed twenty cents per mile each way for traveling to and from his residence while engaged in the performance of the duties of supervision of public road as road commissioner, or other business of the county, said expenses not to exceed fifty dollars in any one month.

CHAPTER 451.

An act to repeal an act entitled "An act to regulate the erection of public buildings and structures," approved April 1, 1872.

[Approved May 22, 1915. In effect August 8, 1915.]

The people of the State of California do enact as follows:

Repealed.

SECTION 1. An act entitled "An act to regulate the erection of public buildings and structures," approved April 1, 1872, is hereby repealed.

CHAPTER 452.

An act to amend section nine hundred fifty-four of the Penal Code of the State of California, relating to charging two or more different offenses in indictments and informations.

[Approved May 22, 1915. In effect August 8, 1915.]

The people of the State of California do enact as follows:

SECTION 1. Section nine hundred fifty-four of the Penal Code is hereby amended to read as follows:

Two or more offenses in one indictment.

954. The indictment or information may charge two or more different offenses connected together in their commission, or different statements of the same offense, or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more indictments or informations are filed in such cases the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the indictment or information, but the defendant may be convicted of any number of the offenses charged, and each offense upon which the defendant is convicted must be stated in the verdict; *provided*, that the court, in the interest of justice and for good cause shown, may, in its discretion, order that the different offenses or counts set forth in the indictment or information be tried separately, or divided into two or more groups and each of said groups tried separately.

FORTY

CH.

...t to amend section on ...he Political Code, rel ...school districts.

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SECTION 1. Section on... ...e Political Code is her... ...30. In every union ... ...high school board shal... ...be elected from the l... ...of three years, exce... ...union or joint union ...intendent of schools ..., within fifteen days ...on or joint union high ...ting a high school boa... ...schoolhouse of each ...rict, and such superin... ...me number of officers ... ...give the same notices ...ion of school trustees ...same manner as are ... ...the returns shall be ...chools, and he shall ce... ...election to the perso... ...ted to hold office from ...election until the firs... ...mbers shall be elected ... ...their certificates of ...nd succeeding May; ...hold office from the ... ...tion until the first ...reafter their successo... ...ection one thousand s... ...thin twenty days afte... ...ools shall call a meeti... ...least ten days' notice ...rcof, for the purpose ... ...such meeting the hig... ...a president from th... ...y transact any other ...ool district.

THE

PENAL CODE

OF THE

STATE OF CALIFORNIA.

ADOPTED FEBRUARY 14, 1872.

WITH AMENDMENTS UP TO AND INCLUDING THOSE OF THE FORTY-FIRST SESSION OF THE LEGISLATURE, 1915.

EDITED BY

JAMES H. DEERING,

Of the San Francisco Bar.

LEGISLATIVE HISTORY BY

CHARLES H. FAIRALL,

AUTHOR OF FAIRALL'S CRIMINAL LAW AND PROCEDURE.

SAN FRANCISCO:

BANCROFT-WHITNEY COMPANY,

1915.

1. The party charged;
2. The offense charged;
3. The particular circumstances of the offense charged, when they are necessary to constitute a complete offense.

Sufficiency of allegation of offense: See ante, §§ 950, 951; post, § 959.

Certainty: See post, § 959.

Legislation § 952. Enacted February 14, 1872; based on Crim. Prac. Act, Stats. 1851, p. 238, § 239, the introductory paragraph of which read, "The indictment must be direct and contain as it regards," the subdivisions reading same as the code section.

§ 953. When defendant is indicted by fictitious name, etc. When a defendant is charged by a fictitious or erroneous name, and in any stage of the proceedings his true name is discovered, it must be inserted in the subsequent proceedings, referring to the fact of his being charged by the name mentioned in the indictment or information. [Amendment approved 1880; Code Amdts. 1880, p. 13.]

Charging defendant by fictitious or erroneous name, proceedings at arraignment: See post, § 989.

Legislation § 953. 1. Enacted February 14, 1872 (N. Y. Code Crim. Proc., § 277); in substance the same as Crim. Prac. Act, Stats. 1851, p. 238, § 240.

2. Amended by Code Amdts. 1880, p. 13, (1) changing "indictment" to "charged" in both instances, and (2) adding "or information" at end of section.

§ 954. Two or more offenses in one indictment. The indictment or information may charge two or more different offenses connected together in their commission, or different statements of the same offense, or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more indictments or informations are filed in such cases the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the indictment or information, but the defendant may be convicted of any number of the offenses charged, and each offense upon which the defendant is convicted must be stated in the verdict; provided, that the court, in the interest of justice and for good cause shown, may, in its discretion, order that the different offenses or counts set forth in the indictment or information be tried separately, or divided into two or more groups and each of said groups tried separately. [Amendment approved 1915; Stats. 1915, p. 744.]

Legislation § 954. 1. Enacted February 14, 1872 (N. Y. Code Crim. Proc., §§ 278, 279); based on Crim. Prac. Act, Stats. 1851, p. 238, § 241, which read: "§ 241. The indictment shall charge but one offense, but it may set forth that offense in different forms un-

der different counts." When enacted in 1872, § 954 read: "954. The indictment must charge but one offense, and in one form only, except that when the offense may be committed by the use of different means, the indictment may allege the means in the alternative."

2. Amended by Code Amdts. 1873-74, p. 437, to read: "954. The indictment must charge but one offense, but the same offense may set forth in different forms under different counts, and, when the offense may be committed by the use of different means, the means may be alleged in the alternative in the same count."

3. Amended by Code Amdts. 1880, p. 13, adding "or information" after "indictment."

4. Amendment by Stats. 1901, p. 485; unconstitutional. See note, § 5, ante.

5. Amended by Stats. 1905, p. 772; the code commissioner saying, "The amendment is designed to authorize an offense to be set forth under different counts, and to excuse the prosecution from electing between them." The section then read: "The indictment or information may charge different offenses, or different statements of the same offense, under separate counts, but they must all relate to the same act, transaction, or event, and charges of offenses occurring at different and distinct times and places must not be joined. The prosecution is not required to elect between the different offenses or counts set forth in the indictment or information, but the defendant can be convicted of but one of the offenses charged, and the same must be stated in the verdict."

6. Amended by Stats. 1915, p. 744.

§ 955. Statement as to time when offense was committed. The precise time at which the offense was committed need not be stated in the indictment or information, but it may be alleged to have been committed at any time before the finding or filing thereof, except where the time is a material ingredient in the offense. [Amendment approved 1880; Code Amdts. 1880, p. 13.]

Sufficiency of indictment or information: See post, § 959.

Legislation § 955. 1. Enacted February 14, 1872 (N. Y. Code Crim. Proc., § 280); in substance the same as Crim. Prac. Act, Stats. 1851, p. 238, § 242.

2. Amended by Code Amdts. 1880, p. 13, (1) inserting "or information" after "indictment," and (2) "or filing" after "finding."

§ 956. Statement as to person injured or intended to be. When an offense involves the commission of, or an attempt to commit, a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, is not material.

Legislation § 956. Enacted February 14, 1872 (N. Y. Code Crim. Proc., § 281); based on Crim. Prac. Act, Stats. 1851, p. 238, § 243, which read: § 243. When an offense involves the commission, or an attempt to commit private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, shall not be deemed material."

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APPENDIX C

STATUTES OF CALIFORNIA
1927

CONSTITUTION OF 1879
AS AMENDED

RESOLUTIONS
ADOPTED AT
EXTRA SESSION OF FORTY-SIXTH LEGISLATURE
1926

MEASURES SUBMITTED TO VOTE OF ELECTORS
1926

GENERAL LAWS, AMENDMENTS TO CODES
RESOLUTIONS
CONSTITUTIONAL AMENDMENTS
PASSED AT THE
REGULAR SESSION OF FORTY-SEVENTH LEGISLATURE
1927

CALIFORNIA STATE PRINTING OFFICE
SACRAMENTO, 1927

§ 954. **[Charging two or more offenses or same offense in different counts: Order to consolidate: Election by prosecution not necessary: Conviction on more than one count: Statement in verdict: Separate trials: Effect of acquittal on part of counts.]** An indictment, information, or complaint may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more indictments or informations are filed in such cases the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the indictment or information, but the defendant may be convicted of any number of the offenses charged, and each offense upon which the defendant is convicted must be stated in the verdict; provided, that the court in the interest of justice and for good cause shown, may, in its discretion, order that the different offenses or counts set forth in the indictment or information be tried separately, or divided into two or more groups and each of said groups tried separately. A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count. [Enacted 1872; Am. Code Amdts. 1873–74, p. 437; Code Amdts. 1880, p. 13; Stats. 1901, p. 485 (unconstitutional); Stats. 1905, p. 772; Stats. 1915, p. 744; Stats. 1927, p. 1042.]

Annotation: See 6 McK. Dig. Criminal Law, § 275; 10 Embezzlement, § 47; 11 Forgery, § 23; 12 Indictment and Information, §§ 70–79; 14 Larceny, § 31; 10 Cal. Jur. 261 (embezzlement); 12 Cal. Jur. 386 (extortion); 14 Cal. Jur. 64 (joinder and counts); 15 Cal. Jur. 916 (larceny); 16 Cal. Jur. 7 (lewdness, indecency and obscenity); 22 Cal. Jur. 846 (robbery); 23 Cal. Jur. 403 (sodomy); 24 Cal. Jur. 507 (offenses relating to telegraphs and telephones); 4 Cal. Jur. Ten-Year Supp. (1943 Rev.) 716, 719, 720; 27 Am. Jur. 687; 10 So. Cal. Law Rev. 209 (inconsistent verdict); notes; 18 A.L.R. 1077 (joinder of counts for theft of property, or receiving stolen property, belonging to different persons), 82 A.L.R. 484 (joinder in same indictment of defendant charged singly with one offense and codefendant charged jointly with him with another offense).

This section is constitutional. People v. Kelly, 203 C. 128; 263 P. 226; Ex parte Culver, 84 C.A. 295, 257 P. 876.

Under this section, as amended in 1915, one may be charged under two counts with having committed the crime of rape, and with having committed lewd and lascivious acts, where both crimes were alleged to have been committed on the same day and with the same child. People v. Warriner, 37 C.A. 107, 173 P. 489; 16 Cal. Jur. 7.

AMENDED § 955. **[Statement as to time of commission of offense: Where time a material ingredient.]** The precise time at which the offense was committed need not be stated in the indictment or information, but it may be alleged to have been committed at any time before the finding or filing thereof, except where the time is a material ingredient in the offense. [Enacted 1872; Am. Code Amdts. 1880, p. 13.]

Sufficiency of indictment or information: § 959.

APPENDIX D

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **ROMAN FLUGENCIO GONZALEZ,** **Defendant and Appellant.**	Case No. D059713

Fourth Appellate District, Division One, Case No. SCD228173
San Diego County Superior Court, Case No.
The Honorable Roger W. Krauel, Judge

PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

Petition for Review 1

Issue Presented 1

Reasons for Granting Review 1

Statement of the Case 2

Argument 4

I. This court should grant review to settle an important question of law and to secure uniformity of decision 4

A. Section 954 explicitly allows prosecutors to charge and convict defendants of multiple crimes for the same act 4

B. *Craig* created an exception to setion 954 that conflicts with its express language and this court's more modern decisions 6

C. The reasoning relied on by the Court in *Craig* and now the Court of Appeal here is faulty and outdated 9

D. The continued application of *Craig* grants certain offenders an undeserved windfall and will cause confusion for lower courts 13

Conclusion 19

TABLE OF AUTHORITIES

Page

CASES

In re Lane
(1962) 58 Cal.2d 99 7

In re Pope
(2010) 50 Cal.4th 777 7

People v. Craig
(1941) 17 Cal.2d 453 ..... passim

People v. Jones
(1988) 46 Cal.3d 585 9

People v. Karsai
(1982) 131 Cal.App.3d 224 9

People v. Linwood
(2003) 105 Cal.App.4th 59 8

People v. Martinez
(2007) 56 Cal.App.4th 851 ..... 12, 14

People v. McFarland
(1962) 58 Cal.2d 748 7

People v. McNeal
(2009) 46 Cal.4th 1183 14

People v. Montoya
(2004) 33 Cal.4th 1031 11

People v. Ortega
(1998) 19 Cal.4th 686 8

People v. Pearson
(1986) 42 Cal.3d 351 ..... 7, 8, 13, 14

People v. Reed
(2006) 38 Cal.4th 1224 ..... 6, 8, 11

People v. Ryan
(2006) 138 Cal.App.4th 360 5

People v. Scott
(2009) 179 Cal.App.4th 920 17

People v. Sloan
(2007) 42 Cal.4th 110 6

People v. Smith
(2010) 191 Cal.App.4th 199 ..... 12, 16

People v. Tideman,
57 Cal.2d 586 ..... 7, 10, 17

STATUTES

Penal Code
§ 220 subd. (a) 2
§ 261 6

Pen. Code
§ 243.4, subd. (e)(1 2
§ 261, subd. (1) 6
§ 261, subd. (3) 6
§ 263 9
§ 286, subd. (c) 13
§ 288a ..... passim
§ 288a, subd. (f) 2
§ 288a, subd.(i) 1, 2, 4, 15
§ 654 ..... passim
§ 654, subd. (a) 15
§ 954 ..... passim

Vehicle Code
§ 23152 14
§ 23152, subd. (a) 14
§ 23152, subd. (b) 14

COURT RULES

California Rules of Court, rule
8.115, subd. (a) 12
8.500 1
8.500, subd. (b)(1) 1

PETITION FOR REVIEW

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

Petitioner, the People of California, respectfully petitions this Court to grant review, pursuant to rule 8.500 of the California Rules of Court, of the above-entitled matter, following the issuance of a published opinion on November 27, 2012, by the Court of Appeal, Fourth Appellate District, Division One, vacating defendant Roman Gonzalez's conviction for oral copulation of an intoxicated person under Penal Code[1] section 288a, subdivision (i), because he was also convicted of oral copulation of an unconscious person under section 288a, subdivision (f), under the authority and reasoning of *People v. Craig* (1941) 17 Cal.2d 453, 110 P.2d 403 (*Craig*). A copy of the Court of Appeal's opinion is attached.

ISSUE PRESENTED

In light of section 954 and more recent case law, is *People v. Craig* (1941) 17 Cal.2d 453, still good law?

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).) *People v. Craig, supra,* 17 Cal.2d 453, holds that multiple convictions are improper where the convictions are based on the same act, and the violations are of different subdivisions of one statutory provision. (*Id.*, at p. 459.) This holding stands in stark contrast to nearly the entire body of law concerning Penal Code section 954, which expressly permits multiple convictions in such situations. It is also inconsistently and

[1] Future unlabeled statutory references are to the Penal Code.

arbitrarily applied—principally to sex offenses and not to other offenses where multiple convictions under separate subdivisions of the same statute, arising from a single act, are routinely upheld and the issue of punishment is determined by section 654. As explained below, the reasoning in *Craig* is unsound and needs to be revisited.

Accordingly, respondent respectfully requests that this Court grant review to settle an important question of law and to secure uniformity of decision. Granting review will provide needed guidance to lower courts determining the applicability of *Craig, supra,* 17 Cal.2d 453, as well as needed guidance to District Attorney's offices across the state making charging decisions in these cases.

STATEMENT OF THE CASE

On June 25, 2010, Gonzalez was sitting next to the victim, Carolyn H., on the street in downtown San Diego. (2 RT 77, 79.) Carolyn had been drinking, and eventually passed out. (2 RT 79, 80, 105-106, 133, 148.) Belligerently ignoring the protests of others around them, appellant forced Carolyn to perform oral sex on him while she was unconscious. (2 RT 83, 132, 147, 170, 172.) The police were summoned, caught appellant in the act and arrested him. (2 RT 170-171.)

On January 6, 2011, a San Diego County jury convicted appellant of one count of oral copulation of an unconscious person (Pen. Code, § 288a, subd. (f); count 1), one count of oral copulation of an intoxicated person (§ 288a, subd. (i); count 2), one count of assault with intent to commit sexual penetration (§ 220, subd. (a); count 3), and two counts of sexual battery (§ 243.4, subd. (e)(1); counts 4 and 5)). (3 RT 367-368.)

On April 21, 2011, appellant was sentenced to the low term of three years on count 1. The court also imposed the low term of three years on count 2, but stayed the sentence pursuant to section 654. On count 3, the court imposed the low term of two years, and ran it concurrently to the term

on count 1. (4 RT 402-402.) On counts 4 and 5, appellant was sentenced to 180 days with credit for time served. (4 RT 403.) Accordingly, appellant was sentenced to a total term of three years in prison.

On appeal, appellant argued his convictions in counts 1 and 2 could not both stand. Largely, he relied on *Craig, supra*, 17 Cal.2d 453, and argued that the two convictions were duplicative and he only committed a single act of unlawful oral copulation. On November 27, 2012, the Fourth District Court of Appeal, Division One, issued its published opinion. The majority agreed with appellant that his conviction in count 2 must be vacated pursuant to *Craig, supra*, 17 Cal.2d 453. According to the majority the two convictions could not stand because appellant was convicted twice for the same offense based on two "*circumstances*" that existed at the time of the single act of intercourse. (Slip Op. at p. 13-14, emphasis added.) Because the two "circumstances" are delineated as subdivisions of the same statutory provision, and not as separate statutes, the subdivisions constitute separate "circumstances" for committing the same offense, but do not qualify as separate and distinct offenses of which appellant (or any other defendant) can be convicted. (Slip Op. at p. 13.)

Justice Benke dissented. Trying to harmonize *Craig's* exception to section 954 for multiple convictions based on subdivisions of a singly enumerated statute with this Court's current interpretation of sections 954 and 654, Justice Benke endeavored to limit and distinguish *Craig* by pointing out its emphasis on preventing punishment, its now erroneous view (based on prevailing authority at the time) that the crime of rape, regardless of the circumstances under which it occurs, addressed but one "outrage" for the victim, and how modern iterations of sex offense statutes such as section 288a provide different punishment for different "circumstances" of the offense and therefore reflect the Legislature's determination that the different "circumstances" are separate offenses

regardless of whether they are listed as a subdivision of a singly enumerated statute or under an entirely separate statutory provision. (Slip Op., dissent by Benke, J. at pp. 1-8.) Justice Benke also detailed the potential far-reaching negative consequences of the majority's opinion such as disparate treatment of various criminal offenders solely by virtue of how their offenses are organized in the Penal Code. Thus, Justice Benke would have affirmed both convictions.

ARGUMENT

I. THIS COURT SHOULD GRANT REVIEW TO SETTLE AN IMPORTANT QUESTION OF LAW AND TO SECURE UNIFORMITY OF DECISION

Relying on *People v. Craig, supra*, 17 Cal.2d 453, the Court of Appeal struck appellant's conviction on count 2, oral copulation of an intoxicated person, on the ground that this conviction and the conviction in count 1, for the oral copulation of an unconscious person, which were based upon a single act of oral copulation, constituted but one offense for oral copulation under section 288a because those offenses are subdivisions of section 288a, even though neither offense is a lesser included offense of the other. (Slip Op. at p. 17-18.)

The Court of Appeal's holding and the reasoning in *Craig* turn on its head decades of section 954 case law expressly permitting multiple convictions for a single act, regardless of whether the offenses are set forth as subdivisions of the same statute or a separately enumerated statute when those crimes are not lesser included offenses of each other. *Craig* is a poorly reasoned and outdated decision which needs to be overturned.

A. Section 954 explicitly allows prosecutors to charge and convict defendants of multiple crimes for the same act

Section 954 sets forth the general rule that defendants may be charged with and convicted of multiple offenses based on a single act or an indivisible course of conduct. It states:

> An accusatory pleading may charge two or more different offenses connected together in their commission, *or different statements of the same offense* or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. *The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged*, and each offense of which the defendant is convicted must be stated in the verdict or the finding of the court; provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately. An acquittal of one or more counts shall not be deemed an acquittal of any other count.

(Emphasis added.) The statute "permits the charging of the same offense on alternative legal theories, so that a prosecutor in doubt need not decide at the outset what particular crime can be proved by evidence not yet presented." (*People v. Ryan* (2006) 138 Cal.App.4th 360, 368.)

In accordance with the provision's express language, this Court has consistently interpreted section 954 as permitting multiple convictions for an act that violates multiple statutory provisions. In contrast, on the separate issue of punishment, section 654 prohibits multiple punishment where a defendant has violated multiple statutory provisions by the commission of one single act.

> In general, a person may be convicted of, although not punished for, more than one crime arising out of the same act or course of conduct. 'In California, *a single act* or course of conduct by a defendant can lead to convictions "of any number of the offenses charged." (§ 954[...]; *People v. Ortega* (1998) 19 Cal.4th 686, 692 ....)' (*People v. Montoya* (2004) 33 Cal.4th

> 1031, 1034.) Section 954 generally permits multiple convictions. Section 654 is its counterpart concerning punishment. It prohibits multiple punishment for the same 'act or omission.'

(*People v. Sloan* (2007) 42 Cal.4th 110, 116, citing *People v. Reed* (2006) 38 Cal.4th 1224 (*Reed*); emphasis added.)

B. Craig created an exception to setion 954 that conflicts with its express language and this Court's more modern decisions

In 1941, the *Craig* court created an exception to section 954 for multiple violations of a rape statute based on a single act of intercourse. The defendant in Craig forcibly raped a 16-year old girl and was found guilty of both forcible rape in violation of former section 261, subdivision (3), and statutory rape in violation of former section 261, subdivision (1). (*Craig, supra,* 17 Cal.2d at p. 454.) The trial court imposed sentence on each of the two counts and ran the two sentences concurrently. (*Id.* at p. 455.) The *Craig* court found section 954 did not apply to permit both convictions under separate subdivisions of the same rape statute because, according to the Court, the defendant had committed, "but one punishable offense of rape result[ing] from a single act of intercourse, although that act may be accomplished under more than one of the conditions or circumstances specified in the foregoing subdivisions." (*Ibid.*) The *Craig* court pointed out that there had been a violation of only one statute (§ 261) and only one victim had been involved. (*Craig, supra,* 17 Cal.2d at p. 458.) It concluded:

> And, while the proof necessarily varies with respect to the several subdivisions of that section under which the charge may be brought, the sole punishable offense under any and all of them is the unlawful intercourse with the victim. We conclude that only one punishable offense of rape results from a single act of intercourse, though it may be chargeable in separate counts

> when accomplished under the varying circumstances specified in the subdivisions of section 261 of the Penal Code.

(*Craig, supra,* 17 Cal.2d at p. 458.) Nothing about the holding in *Craig* explains why the situation is different in the context of rape convictions, than in other situations. Section 954 expressly permitted then, as it does now, multiple convictions for a single act where the single act violated more than one criminal provision.

In that regard, the validity of *Craig* has been undermined by this Court's more recent case law giving full effect to section 954. (See *In re Lane* (1962) 58 Cal.2d 99, 105 ["a later decision overrules prior decisions which conflict with it, whether such prior decisions are mentioned and commented upon or not"].) For example, in *People v. Pearson* (1986) 42 Cal.3d 351, this Court upheld a conviction for sodomy (§286, subd. (c)) and lewd conduct (§ 288, subd. (a)) for the same act of sodomy. The Court stressed that "section 654 bars multiple punishment, not multiple conviction." (*Pearson, supra,* 42 Cal.3d at p. 359, citing *People v. Tideman, supra,* 57 Cal.2d at pp. 586-587; *People v. McFarland* (1962) 58 Cal.2d 748, 762-763; see *In re Pope* (2010) 50 Cal.4th 777, 784 ["Section 654 prohibits multiple punishment, but it does not operate to bar multiple conviction[s]"], citing *People v. Pearson, supra,* 42 Cal.3d at p. 359.) *Pearson* explained:

> conduct giving rise to more than one offense within the meaning of the statute may result in initial conviction of both crimes, only one of which, the more serious offense, may be punished. [Citation.] The appropriate procedure, therefore, is to eliminate the effect of the judgment as to the lesser offense *insofar as the penalty alone is concerned.* [Citation.]

(*People v. Pearson, supra*, 42 Cal.3d at pp. 359-360, emphasis added, internal quotation marks omitted.)

Further undermining the validity of *Craig*, this court has repeatedly observed that the only exception to section 954's rule that a single act may give rise to multiple convictions occurs when, as the result of a single act, a defendant is convicted of multiple crimes and some crimes are necessarily lesser included offenses of the other crimes. (*People v. Reed* (2006) 38 Cal.4th 1224, 1227; *People v. Ortega* (1998) 19 Cal.4th 686, 692, overruled on another point in *People v. Reed, supra*, 38 Cal.4th at p. 1228; *People v. Pearson, supra*, 42 Cal.3d at pp. 354–355.) As the two crimes contain distinct elements, neither oral copulation of an unconscious person or an intoxicated person are lesser included offenses of the other. (See, e.g., *People v. Linwood* (2003) 105 Cal.App.4th 59, 63-65, & fn. 3 [jury found that the defendant was guilty of raping and attempting to rape an intoxicated woman, but not guilty of attempting to rape an unconscious woman who was still semi-conscious although intoxicated].) Thus, the lesser included offense exception would not prohibit the multiple convictions in this case.

Despite the clarity of this Court's more modern interpretation and application of sections 954 and 654, the Court of Appeal here applied the *Craig* exception to multiple convictions under subdivisions of section 288a, prohibiting oral copulation under various circumstances, for the sole reason the single act of oral copulation violated subdivisions of a single statute as opposed to separately enumerated statutes. (Slip Op. at pp. 13-14.) In this case, as in *Craig*, the accusatory pleading charged "different statements of the same offense." Such charging is expressly permitted by section 954, and "the prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading." Finally, under section 954, "the defendant *may be convicted* of any number of the offenses charged..." Thus, the holding in *Craig*, and now the holding in the instant case stand in

stark contrast to the express language of section 954 and both holdings run afoul of nearly the entire body of modern law on section 954.

Such an interpretation of statutory provisions creates an inherent conflict in the manner in which section 954 is applied to different criminal acts. As explained below, this second exception to section 954 rests on faulty and outdated logic. In addition, it has the potential to create more confusion and to give certain sex offenders an unearned sentencing windfall. For all of these reasons, review is necessary so this Court can settle an important question of law and secure uniformity of decision with respect to section 954 and its application to different types of criminal offenses.

C. The reasoning relied on by the Court in *Craig* and now the Court of Appeal here is faulty and outdated

Not only does the *Craig* court's "subdivision of the same statute" exception to section 954 conflict with the express language of the statute and current decisions of this Court, but also much of the reasoning of the *Craig* opinion upon which the Court of Appeal relies in this case, is faulty and outdated.

First, in support of its "one conviction" conclusion, *Craig* cited Penal Code section 263, which states, "The essential guilt of rape consists in the outrage to the person and the feelings of the female." According to *Craig*, "[t]he victim was not doubly outraged, once because she was forcibly attacked and once because she was under 18 years of age. There was but a single outrage and offense." (*Craig, supra*, 17 Cal.2d at p. 455.) But, this reasoning is outdated and unsupported. The level of emotional trauma to the victim should not be the basis on which a court determines how many criminal offenses have been committed.

Indeed, the next sentence of section 263 -- "Any sexual penetration, however slight, is sufficient to complete the crime" – gives context to the

provision and undermines *Craig's* reasoning. When read in its entirety, section 263 makes it clear that the "outrage" comprising the crime of rape lies in the forceful sexual penetration of the victim. The statute's purpose is to clarify that that outrage occurs no matter how "slight" the penetration. (See e.g. *People v. Karsai* (1982) 131 Cal.App.3d 224, 232-233, overruled on other grounds in *People v. Jones* (1988) 46 Cal.3d 585, 600, fn. 8,.) *Craig's* use of section 263 as if it required a separate "outrage" for each conviction was misplaced.

Second, at various points throughout the opinion, *Craig* conflated the question of whether the defendant had committed multiple offenses with whether they would be separately "punishable." (*Craig, supra*, 17 Cal.2d at p. 457, 458.) Thus, in identifying the issue raised, the *Craig* court explained, "The only question meriting serious consideration is as to the propriety of entering *separate judgments and sentences* for both forcible and statutory rape, charged under separate counts, when but a single act of sexual intercourse has been committed." (*Id.* at p. 455, emphasis added.) It went on to explain that, "Under this section [the rape statute], but one *punishable* offense of rape results from a single act of intercourse." (*Ibid.*, emphasis added) And it later declared, "the charge and proof disclose a single act of intercourse resulting from force employed upon a minor, but one *punishable* rape is consummated." (*Id.*, at p. 457, emphasis added.) Finally, the Court held,

> And, while the proof necessarily varies with respect to the several subdivisions of that section under which the charge may be brought, the sole *punishable* offense under any and all of them is the unlawful intercourse with the victim. We conclude that only one *punishable* offense of rape results from a single act of intercourse, ...

(*Id.*, at p. 458, emphasis added.)

This emphasis by the *Craig* court suggests that its true concern was with whether the defendant could be *punished* for both crimes, not whether he could be *convicted* of both crimes. (See *People v. Tideman* (1962) 57 Cal.2d 574, 586 [citing *Craig* for the proposition that "[s]ection 654 prohibits double punishment for the commission of a single act [citations], but it does not prohibit convictions for different offenses arising out of a single act"].) Section 654 makes clear that such a defendant cannot be punished for both crimes. The defendant in *Craig* was improperly punished for both crimes because his sentence on count 2 ran concurrently with his sentence on count 1, instead of being stayed pursuant to section 654. As noted by Justice Benke in her dissent, early cases had difficulty consistently implementing section 654 because the "modern procedure of staying the impermissible punishment had not yet developed." (Slip. Op., dissent of Benke, J., at p. 9, citing *People v. Benson* (1998) 18 Cal.4th 24, 38-40, dissent of Chin, J.) Some courts set aside or reversed the judgment, as opposed to the modern use of the stay. (*Ibid.*) So, it is reasonable to conclude the Court in *Craig* was endeavoring to prohibit *punishment* as opposed to *convictions*. Here, however, Gonzalez's sentence on count 2 was properly stayed under section 654.

Third, *Craig* mistakenly viewed the two crimes as "identical" or "included in one another." It asserted,

> A defendant may be convicted of two separate offenses arising out of the same transaction when each offense is stated in a separate count and when the two offenses differ in their necessary elements and one is not included within the other." (*People v. Venable*, 25 Cal. App. (2d) 73, 74 [76 Pac. (2d) 523].) Where, as here, the charge and proof disclose a single act of intercourse resulting from force employed upon a minor, but one punishable rape is consummated, for the proof, though dual in character, *necessarily crystallizes into one "included" or identical offense.*

(*Id.*, at p. 457, emphasis added.) This reasoning seems to suggest that the two crimes fall within the long recognized exception to section 954 where one crime is the lesser or necessarily included offense of the other. However, under the modern test for lesser included offenses, which looks to the crime's elements and not the proof of each offense, *Craig's* characterization of the offenses this way does not hold up, for it is certainly possible to commit rape of a minor without also committing forcible rape, and visa versa. (*People v. Reed, supra,* 38 Cal.4th at p. 1227; *People v. Montoya* (2004) 33 Cal.4th 1031, 1034.)

Fourth, *Craig* relied on the fact that each subdivision of the rape statute at the time provided for the same punishment as a basis for concluding there was but one offense. This is no longer the case with either the rape statute or the oral copulation statute at issue here. As noted by Justice Benke in her dissent, in addition to separate subdivisions, the Legislature in enacting section 288a also provided for separate punishments depending on which subdivisions was violated. (Slip Op., dissent of Benke, J., at p. 15; and see § 288a.)

Last, but not least, the reliance on the organization of the statute—whether offenses are described under a subdivision of a singly enumerated statute or are stated under separately enumerated statutes—as a basis for determining whether one or more convictions for multiple offenses should stand is arbitrary and leads to anomalous results. This is vividly illustrated by the fact that if the defendant in *Craig* were currently charged and convicted of statutory rape and forcible rape, both of his convictions would stand. As noted by both the majority and Justice Benke in her dissent, the crimes at issue in *Craig* have since been reorganized. (Slip Op. at p. 10, fn. 4 & dissent of Benke, J., at p. 2, fn. 5.) Rape by force is now defined by section 261, subdivision (a)(2) and punished under section 264 with a term of imprisonment of three, six, or eight years. Unlawful intercourse with a

minor is now defined in section 261.5, and depending on the age of the offender and the age of the victim, may be punished either as a misdemeanor or as a felony. Since these two forms of rape are now enumerated in separate statutory provisions (and carry separate punishments), the reasoning in *Craig* presumably would not apply, and a defendant could stand convicted of both offenses. Indeed, this adherence to whether multiple offense are subdivisions of the same statute led the majority in this case to reject application of this Court's more modern decision in *People v. Pearson, supra*, 42 Cal.3d 351-- which upheld separate convictions for sodomy and lewd conduct based on the same act of sodomy – because they were based on separately enumerated statutory violations (§§ 286 and 288) and not subdivisions of the same statute. (Slip Op. at pp. 12-14.) This is simply an irrational and arbitrary basis for determining whether a defendant is properly subject to multiple convictions.

Thus, the major tenets underpinning *Craig*'s holding that there can only be one conviction for rape despite multiple convictions under different subsections, are no longer valid and were improperly relied upon by the Court of Appeal to vacate appellant's conviction for oral copulation of an intoxicated person because Gonzalez was also convicted of oral copulation of an unconscious person.

D. The continued application of *Craig* grants certain offenders an undeserved windfall and will cause confusion for lower courts

Finally, as noted by Justice Benke in dissent, the application of *Craig* not only provides certain offenders, particularly sex offenders, "with an undeserved windfall, it will unnecessarily confuse and burden trial courts, including in the application of the state's determinate sentencing law." (Slip Op., dissent of Benke, J., at p. 14.)

As a threshold matter, in addition to the Court of Appeal's opinion in this case, one other court has recently published a decision vacating a conviction in reliance on *Craig*. In *People v. Smith* (2010) 191 Cal.App.4th 199 (*Smith*), the court stated ion relevant part:

> As detailed above, the evidence in this case indicated only one act of sexual intercourse with the victim, but defendant was charged with, and the jury found him guilty of, two counts of rape—rape of an intoxicated woman and rape of an unconscious woman. Both convictions cannot stand because "only one punishable offense of rape results from a single act of intercourse, though it may be chargeable in separate counts when accomplished under the varying circumstances specified in the subdivisions of section 261 of the Penal Code." (*People v. Craig* (1941) 17 Cal.2d 453, 458, 110 P.2d 403.) Accordingly, we will modify the judgment to strike the second rape count.

(*Smith, supra,* 191 Cal.App.4th at p. 205.) As is evident from the citation in the quote, the *Smith* court's holding rested entirely on *Craig*. Thus, *Craig's* faulty reasoning has been recently revived in at least two published opinions.[2]

This application of the "subdivisions of the same statute" exception results in an undeserved windfall for certain defendants, particularly sex offenders, charged and convicted of multiple offenses falling within a single statute. Unlike all other defendants subject to multiple convictions

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[2] Although unpublished cases are not generally citeable (Cal. Rules of Court, rule 8.115, subd. (a)), these cases are not being relied upon to support a legal proposition, but to demonstrate that *Craig* is actively being relied upon in a number of cases. In all of the following cases, courts have struck various sexual offense convictions in reliance on *Craig*: *People v. Torres* (2012, Case No. A130609) 2012 WL 169995; *People v. Ochoa* (2012, Case No. A129751) 2012 WL 3765914; *People v. Woods* (2012, Case No. C069762) 2012 WL 4355542; *People v. Archie* (2011, Case No. C062881) 2011 WL 10636; *People v. Martinez* (2011, Case No. C064802) 2011 WL 2892002; *People v. Nunley* (2010, Case No. C061874) 2010 WL 4409254; *People v. Sherman* (2003, Case No. D037969) 2003 WL 463549; *In re Michael T.* (2002, Case No. H021512) 2002 WL 508357.

for a single act, who are then subject to Penal Code section 654, defendants getting the benefit of the *Craig* exception only possess a single conviction.

As Justice Benke pointed out, this affords defendants – like Gonzalez – an advantage with respect to the three strikes law. Instead of two strike offenses for counts 1 and 2, Gonzalez now stands convicted of only one strike. (See Slip Op., dissent of Benke, J. at p. 13.) This differs from other situations where a defendant who suffers two convictions for the same act stands convicted of two strike offenses. (See e.g. *People v. Scott* (2009) 179 Cal.App.4th 920, 923 [defendant convicted of robbery and car jacking based on the same act].) Further, the "same act" circumstance is only a factor for the court to consider when imposing sentence on a later crime. It does not mandate striking one of the strike offenses. (*Id.*, at p. 931.) Thus, defendants such as Gonzalez, who violate two statutes giving rise to two strike offenses, but who then secure the nullification of one of the convictions under *Craig* would receive an unearned windfall by limiting their future exposure to an enhanced sentence on a new crime. This effectively shields certain sex offenders from the full extent of their criminal culpability, where defendants who commit other single acts which violate multiple provisions are not so shielded.

Further, the *Craig* exception is not consistently applied in all areas of criminal law. For instance, driving under the influence is defined as driving while under the influence of alcohol or drugs in Vehicle Code section 23152, subdivision (a), and also as driving with a blood alcohol content of .08 or greater in Vehicle Code section 23152, subdivision (b). Theoretically, under *Craig*, these are merely two "circumstances" by which a defendant can commit the same offense, and he cannot be convicted of both crimes. But defendants are routinely convicted of both subdivision (a) and subdivision (b) for the same act of driving, and the court simply stays the punishment on one of the convictions under section 654. (See *People v.*

McNeal (2009) 46 Cal.4th 1183, 1189, 1193 [noting that it is permissible to convict a defendant under both of the subdivisions because the Legislature had created a new crime]; and see e.g. *People v. Martinez* (2007) 56 Cal.App.4th 851, 857 [applying section 654 to convictions under both subdivisions of Vehicle Code section 23152].) In that regard, review is also necessary to bring uniformity of decision, in order to ensure consistent treatment of defendants.

Finally, implementing the *Craig* exception will unnecessarily burden and confuse the lower courts as they struggle to give effect to the full nature of a defendant's offenses but avoid improper dual punishment.

For instance, had the victim in this case been intoxicated and 15 years old – and assuming the crime was committed by force—Gonzalez would have been guilty of violating section 288a, subdivision (i), and section 288a, subdivision (c)(2)(C). The punishment for a violation of subdivision (i) is three, six, or eight years in prison, while the punishment for violating subdivision (c)(2)(C), is six, eight or ten years in prison. *Craig* calls for the convictions in these cases to be "consolidated" into a single count. (*Craig, supra*, 17 Cal.2d at p. 458 ["The 'judgments' entered by the trial court should be modified to the extent of consolidating them into a single judgment."].) In *Craig*, as in the instant case, the two crimes resulted in the same punishment, so consolidation was theoretically possible. But in the hypothetical situation explained above, *Craig's* holding requiring only one conviction to stand because one offense was committed would still apply, but it is not clear how the courts would go about "consolidating" two counts which carry different punishments and the effect of "consolidation" on incarceration and future prosecutions. While courts typically impose the greater punishment, they do so in accordance with section 654 which expressly instructs courts to impose the greater punishment where the defendant has committed multiple offenses through a single act. (§ 654,

subd. (a).) Under "consolidation," it is not entirely clear how the differing punishments would be reconciled, and there is no statutory guidance on the issue.

Even where, as here, the same punishments are indicated for the applicable subdivisions, implementation of the *Craig* exception will garner confusion and unnecessarily burden trial courts. The majority's order in this case is emblematic of the problem. It ordered the convictions "consolidated," in an effort to preserve the fact that appellant violated both subdivisions. And, in fact the abstract of judgment will still list both subdivisions. Specifically, the Court's order was to modify the judgment of conviction so it reflects, "(1) that Gonzalez was convicted of a single violation of unlawful oral copulation, as defined and proscribed in subdivisions (f) and (i) of section 288a, as charged in counts 1 and 2, and that his sentence is three years in state prison for that conviction; [and] (2) Gonzalez's conviction for unlawful copulation in count 2, together with the sentence imposed but stayed on that count, is vacated." (Slip. Op., at pp. 17-18.) This order is confusing at best. It also applies a procedure for addressing this issue (i.e. "consolidation") that is wholly unnecessary. A traditional application of a section 654 stay accomplishes the same thing (in that Gonzalez will only be punished for one offense), but it also preserves the conviction in the event of a future attack on count 1, and clarifies the criminal provisions which the jury found appellant violated. The "consolidation" procedure has the potential to create new procedural issues, and serves no helpful purpose. This serves as yet another basis for review, to provide necessary guidance on how to implement the *Craig* exception if it is not abandoned by this Court.

Justice Benke's dissent also highlighted other problematic effects of the majority's holding. As noted above, the advantage of section 654's stay procedure is that it preserves the conviction in case it is needed at a later

date. (Slip Op. at p. 9-10.) But that could be lost under the majority's view. Take *People v. Smith, supra*, 191 Cal.App.4th 199, as an example. The defendant in *Smith* was convicted of rape of an intoxicated woman (count 1) and rape of an unconscious woman (count 2). (*Id.*, at p. 201.) Relying on *Craig*, the court struck the defendant's conviction for rape of an unconscious person. (*Id.* at pp. 205, 209.) But, if count 1 later were reversed because of insufficient evidence that the victim was intoxicated – count 2 no longer would be available to take its place – even though the insufficiency of the evidence of intoxication would not necessarily have any bearing on the sufficiency the evidence of unconsciousness.

As discussed above, the reasoning of the opinion in *Craig* is misguided and unsupportable. Yet, as an opinion of this Court, lower courts are bound to follow it. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Indeed, the Court of Appeal here and in one other case have recently published opinions adopting the reasoning in *Craig*, despite its many flaws. Perpetuating *Craig's* misapplication of the law has potentially far-reaching consequences. This case presents an opportunity for this Court to correct the *Craig* court's missteps, and to settle this important question and to secure uniform application of the law.

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CONCLUSION

The petition for review should be granted.

Dated: January 7, 2013

Respectfully submitted,

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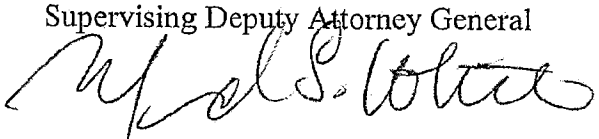

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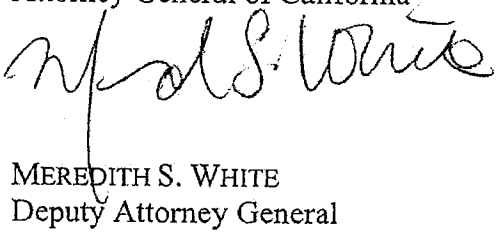
CERTIFICATE OF COMPLIANCE

I certify that the attached **PETITION FOR REVIEW** uses a 13 point Times New Roman font and contains 5, 599 words.

Dated: January 7, 2013

KAMALA D. HARRIS
Attorney General of California



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COURT OF APPEAL-OPINION
CASE NO. D059713
THE PEOPLE v. ROMAN FLUGENCIO GONZALEZ

AS

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. RAMON FLUGENCIO GONZALEZ, Defendant and Appellant.	D059713 (Super. Ct. No. SCD228173)

APPEAL from a judgment of the Superior Court of San Diego County, Roger W. Krauel, Judge. Affirmed in part, reversed in part; judgment modified.

Raymond M. DiGuiseppe, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie Garland, Assistant Attorney General, Scott C. Taylor and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

Defendant Ramon Flugencio Gonzalez appeals from a judgment of conviction after a jury convicted him of multiple sexual offenses against a single victim. On appeal, Gonzalez argues (1) that the trial court abused its discretion in allowing Juror No. 6 to remain on the jury after the juror indicated that, based on a photograph contained in one of the prosecution's exhibits, he believed that the victim was the grandmother of a friend of his, and that he would not be able to remain impartial; (2) that his convictions on counts 1 and 2 for unlawful oral copulation cannot both stand, because he committed only one act of unlawful copulation that constituted a single violation of Penal Code[1] section 288a; and (3) that his sentences for two counts of sexual battery must be stayed pursuant to section 654 because they were part of the same course of conduct for which Gonzalez was already punished as a result of his conviction for assault with the intent to penetrate.

With respect to Gonzalez's first contention, based on information provided by the prosecutor, the trial court informed the juror that the juror was likely mistaken about knowing the victim's granddaughter and told the juror that the court would revisit the issue if it turned out that the court and the prosecutor were wrong about that. The issue was never raised again. Under these circumstances, we conclude that there was no

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1 Further statutory references are to the Penal Code unless otherwise indicated.

demonstrable reality that the juror was unable to perform his proper function, and that the court therefore did not abuse its discretion in allowing the juror to remain on the jury.

We agree with Gonzalez's contention that he may be convicted of only one violation of section 288a (unlawful oral copulation) based on the single instance of oral copulation in which he engaged. We therefore consolidate his convictions on counts 1 and 2 into a single conviction, and vacate the conviction and sentence on count 2.

Finally, we conclude that Gonzalez's sentence on count 5 must be stayed because it is based on the same conduct for which he was convicted and sentenced on count 3, the assault count.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

On June 25, 2010, Gonzalez was sitting next to Carolyn H. on a street in downtown San Diego near the intersection of 16th Street and Island Avenue. A friend of Carolyn's, Keith Jennings, was nearby and saw Gonzalez and Carolyn sitting together. Jennings and Carolyn were both homeless and congregated in the same areas. Jennings initially saw Gonzalez and Carolyn talking and laughing. He also saw Carolyn give Gonzalez a peck on the cheek. Jennings's impression was that this was done in a joking manner. When Jennings next looked over, Carolyn was lying down, and her face was in Gonzalez's lap. Carolyn's body appeared limp and she was not responsive.

Carolyn's pants were unzipped and pulled down such that Jennings could see half of her buttocks. Gonzalez's left hand was down Carolyn's pants, and he was

"manipulating her genitalia." Jennings left for a few minutes to use the bathroom. When he returned, he saw Gonzalez moving Carolyn's head up and down on his lap. It appeared to Jennings that Gonzalez was attempting to make Carolyn perform oral sex on Gonzalez.

Two other men, Donald Goddard and Axcanyata "West" Laskey, who were friends of Carolyn, were also observing what was happening. They saw Gonzalez holding Carolyn's head and "bobbing it up and down" on his penis. Carolyn appeared to be passed out while this was happening. When Goddard and Laskey attempted to intervene and told Gonzalez to stop what he was doing, Gonzalez swung his cane at them and told them that it was "none of [their] fucking business."

Before the two men could stop what was going on, the police arrived. Two women had flagged down San Diego Police Officer Victor Calderson to report what was happening to Carolyn. Officer Calderson arrived at the scene and walked up behind Gonzalez. As Calderson looked over Gonzalez's shoulder, Calderson could see that Gonzalez's penis was in Carolyn's mouth. Calderson could also see that Gonzalez had his left hand inside of Carolyn's pants and that he was fondling her genitalia. When Calderson asked Gonzalez what he was doing, Gonzalez jumped and tried to put his penis back in his pants. When Gonzalez jumped up, Carolyn, who was unconscious, fell over and hit the concrete. Carolyn's eyes were rolled back in her head and she appeared pale. Officer Calderson handcuffed Gonzalez and placed him in the back of a police car.

Laskey shook Carolyn, but she did not respond. She appeared to be "totally passed out."

When Calderson returned to check on Carolyn, he noticed that she did not appear to be breathing. Calderson and some others who were nearby rolled Carolyn over, and she took a breath. Paramedics then arrived and took Carolyn to the hospital.

Carolyn testified that on the day of the incident, she was homeless. She had gotten into an argument with her boyfriend earlier that day and drank a pint of vodka. According to Carolyn, she lay down on Island Avenue to try to sleep. The next thing she remembered was being put in an ambulance. Carolyn testified that she had never seen Gonzalez before, and that she had not consented to any sexual activity with him.[2]

DNA tests confirmed that Gonzalez's semen was in Carolyn's mouth.

B. *Procedural background*

On January 6, 2011, a jury convicted Gonzalez of one count of oral copulation of an unconscious person (§ 288a, subd. (f); count 1); one count of oral copulation of an intoxicated person (§ 288a, subd. (i); count 2); one count of assault with intent to commit sexual penetration (§ 220, subd. (a); count 3), and two counts of sexual battery (§ 243.4, subd. (e)(1); counts 4 and 5).

The trial court sentenced Gonzalez to the low term of three years on count 1, and imposed but stayed the low term sentence of three years on count 2, pursuant to section 654. On count 3, the court imposed the low term of two years, to run concurrently with

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2 Although Carolyn denied knowing Gonzalez, three individuals, including Gonzalez's landlord and two neighbors, testified that they had seen Carolyn around Gonzalez's house on a few occasions, drunk and looking for Gonzalez.

the sentence on count 1. The court sentenced Gonzalez to 180 days, with credit for time served, on counts 4 and 5.

Gonzalez filed a timely notice of appeal on May 9, 2011.

III.

DISCUSSION

A. *The trial court did not abuse its discretion in allowing Juror No. 6 to remain on the jury*

Gonzalez contends that the trial court erred in failing to excuse Juror No. 6 on the ground that the juror was biased. According to Gonzalez, Juror No. 6 developed a bias against the defense based on one of the photographs of the victim, and the trial court's limited inquiry into the matter did not dispel the likelihood that the juror carried this bias into the jury's deliberations. Our review of the record discloses that Gonzalez's contention is without merit.

1. *Additional background*

At the close of the People's case, but before the defense called a witness, Juror No. 6 informed the court, "I don't think I can stay fair and unbiased. I recently came to the realization that People's exhibit B seemed vaguely familiar to me, and during the recess, I just placed where I had seen it." The court asked the juror to remain where he was and listen to the testimony of the defense's first witness. The court indicated that it would discuss the matter with the juror later.

After excusing the other jurors for the day, the court asked Juror No. 6 to stay behind to discuss the matter that the juror had raised earlier in the day. Juror No. 6

explained that he believed that he had recognized one of People's exhibits, which was a photograph of the victim. He thought that he had seen the photograph posted by a good friend on a Facebook page with a caption that read in part, "Nana." He assumed that the woman in the photograph was his friend's grandmother. The court asked Juror No. 6, "Is that an image and an association and information that you cannot set aside and rely just on the evidence that's presented here?" Juror No. 6 responded, "I was thinking about it all during the recess, even though I probably shouldn't have been, I don't think I could." The court conferred with the attorneys off the record at this point. After this discussion, the prosecutor asked to speak with the court outside the presence of the juror. Juror No. 6 left the courtroom and the attorneys and the court spoke about the matter. The prosecutor told the court that the victim had a son who lived in San Diego, but the son was in prison, and, more importantly, the photographs in question had never been released to the public.

The court called Juror No. 6 back into the courtroom and asked whether the juror recognized the actual photograph, or, rather, whether he believed he recognized the person in the photograph. The juror indicated that he believed he had seen one of the actual photographs that the prosecutor had used as an exhibit. When the trial court indicated to the juror that none of the photographs had been released, the juror said that the photograph he had seen seemed to show the same person in the same position, but with her granddaughter and grandson "like around her and on the bed." The court explained that the grandchildren of the person in the photograph "would not [have] be[en] able to do that," and said that it was unlikely that the person shown in the photograph in

the prosecution's exhibit was the same person as the person in the photograph that the juror had seen. The juror responded, "Okay. That makes everything different."

Defense counsel asked Juror No. 6 for the name of his friend, which Juror No. 6 provided. The court then said, "We'll make a check over this evening; and if we've miscalled this one, we'll recall it tomorrow and we'll address it again. But, right now, you can go home thinking that it's a different person." Juror No. 6 responded, "Okay." There was no further discussion of the matter.

2. *Analysis*

The constitutional right to a fair trial requires that the jury decide the case solely on the basis of evidence from witnesses. (*People v. Nesler* (1997) 16 Cal.4th 561, 578.)

" 'Before an appellate court will find error in failing to excuse a seated juror, the juror's inability to perform a juror's functions must be shown by the record to be a "demonstrable reality." The court will not presume bias, and will uphold the trial court's exercise of discretion on whether a seated juror should be discharged for good cause under section 1089 if supported by substantial evidence.' " (*People v. Jablonski* (2006) 37 Cal.4th 774, 807, quoting *People v. Holt* (1997) 15 Cal.4th 619, 659.) The decision whether to investigate the possibility of juror bias and the extent of any investigation rests within the sound discretion of the trial court. (*People v. Cleveland* (2001) 25 Cal.4th 466, 478.)

Contrary to Gonzalez's contention, the trial court's inquiry was sufficient. The trial court dispelled any potential bias that Juror No. 6 may have harbored based on his assumption that he recognized the victim. The trial court inquired as to Juror No. 6's

concern, and obtained sufficient information from that juror to be able to inform the juror that he was mistaken in his belief that the victim was the grandmother of one of his friends. Gonzalez makes much of the fact that Juror No. 6's friend could have been Carolyn's granddaughter after all, since there was nothing further on the record about this issue. However, as the matter was left, the court indicated that the court and the prosecutor would pursue the matter further and that if there had been some mistake about whether Juror No. 6's friend was related to the victim in this case, the court would revisit the issue. Given that this issue was not discussed again, we may reasonably infer both that Juror No. 6 was mistaken in his belief that he knew a relative of the victim, and also that Juror No. 6 understood that he had been mistaken in his belief that he knew a relative of the victim. We may further infer that any potential bias that Juror No. 6 may have harbored was dispelled once Juror No. 6 was disabused of the notion that his friend was related to the victim. Under these circumstances, the trial court did not abuse its discretion in the manner in which it handled the investigation into Juror No. 6's potential bias, or in allowing Juror No. 6 to remain on the panel.

B. *Appellant's two separate convictions under section 288a must be consolidated into a single conviction*

Gonzalez was convicted of both oral copulation of an unconscious person under section 288a, subdivision (f), and oral copulation of an intoxicated person under section 288a, subdivision (i). There is no dispute that both convictions under section 288a are

based on a single act of oral copulation.[3] Gonzalez contends that this court should strike one of his two convictions under section 288a, or merge the two convictions into a single conviction under section 288a, under the authority and reasoning of *People v. Craig* (1941) 17 Cal.2d 453 (*Craig*). We agree.

In *Craig, supra*, 17 Cal.2d at page 455, the defendant was convicted of both rape by force and violence, and statutory rape, and the trial court sentenced the defendant to concurrent terms on the two convictions. The issue before the Supreme Court was "the propriety of entering separate judgments and sentences for both forcible and statutory rape, charged under separate counts, when but a single act of sexual intercourse has been committed." (*Ibid.*) The *Craig* court observed: "There has been a violation of but one statute— section 261 of the Penal Code. And, while the proof necessarily varies with respect to the several subdivisions of that section under which the charge may be brought, the sole punishable offense under any and all of them is the unlawful intercourse with the victim." (*Id.* at p. 458.) On this basis, the *Craig* court concluded, "[O]nly one punishable offense of rape results from a single act of intercourse, though it may be chargeable in separate counts when accomplished under the varying circumstances specified in the subdivisions of section 261 of the Penal Code." (*Craig, supra,* at p. 458.)[4] The court

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3 Pursuant to section 654, the trial court stayed imposition of Gonzalez's sentence on the conviction for oral copulation of an intoxicated person since it was based on the same conduct for which Gonzalez was convicted of oral copulation of an unconscious person.

4 Since the time *Craig* was decided, the subdivisions of section 261 have been reorganized, such that forcible rape is now set forth under subdivision (a)(2) of section 261, and statutory rape is now defined under section 261.5.

modified the judgment to state that the defendant had been "found guilty of the crime of Rape, a felony, as defined and proscribed in subdivisions 1 and 3 of section 261 of the Penal Code, and as charged in counts 1 and 2 of the amended information, being separate statements of the same offense . . . ." (*Craig, supra,* at p. 459, italics omitted.)[5]

Section 288a provides that "oral copulation is the act of copulating the mouth of one person with the sexual organ or anus of another person." Like the rape statute at issue in *Craig*, section 288a goes on to specify various circumstances under which an act of oral copulation is unlawful, and delineates those circumstances under multiple subdivisions. This case is precisely analogous to *Craig* in that the defendant was convicted of oral copulation of an intoxicated person and oral copulation of an unconscious person *based on a single act of oral copulation.*

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5 The dissent attempts to avoid the holding in *Craig* by suggesting that the *Craig* court was somehow applying the "long-prevailing rule that dismissal of multiple convictions is required *only* where one crime is included within another crime." (Conc. & dis. opn. at p. 6.) The basis for this assertion is unclear. Not only does the *Craig* court not rely on the lesser-included offense rule in its decision, but it could not have done so, since each subdivision of the rape statute under which the defendant in *Craig* was convicted contains an element that the other does not. The rape statute at the time defined rape "as 'an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances,' viz: (1) where she is under 18 years of age; (2) where she does not possess the mental capacity legally to consent thereto; (3) where her resistance is overcome by force; (4) where resistance is precluded by certain designated means; (5) where she is unconscious of the nature of the act and this is known to the accused; and (6) where she submits under artifice, fraud, etc." (*Craig, supra,* 17 Cal.2d at p. 455.) The defendant in *Craig* was convicted of sexual intercourse *with someone under 18 years of age* (i.e., subdivision (1) of the statute) and sexual intercourse *by force* (i.e., subdivision (3) of the statute) based on a single act of intercourse.

The People argue that "[a]lthough the *Craig* court ultimately modified the trial court's ruling so that only one judgment was entered convicting the defendant [citation], it appears, from the court's language (i.e., 'We conclude that only one *punishable* offense of rape results from a single act of intercourse') that the *Craig* court was predominantly focused on avoiding double punishment in that case where the trial court had imposed concurrent terms. [Citations.]" However, as the People acknowledge, the *Craig* court did not simply reject the idea that the defendant in that case could be *punished* twice for a single act of intercourse that was unlawful for two reasons, but instead, concluded that the defendant could be *convicted* of only one offense of rape for his single act of intercourse under the two sets of circumstances set forth in the rape statute.

The People suggest that *People v. Pearson* (1986) 42 Cal.3d 351, 359, undermines the continuing validity of *Craig*. In *Pearson*, the Supreme Court determined that a defendant could be convicted of two separate offenses—statutory sodomy (§ 286, subd. (c)) and lewd conduct (§ 288, subd. (a))—based on the same act of sodomy. Relying on section 954, which sets forth the general rule that defendants may be charged with and convicted of multiple offenses based on a single act or an indivisible course of conduct,[6] the *Pearson* court concluded that the trial court was "authorized to convict defendant of both offenses for each act" because "the statute clearly provides that the defendant may

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6 Section 954 provides in relevant part: "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense . . . . The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged . . . ."

be convicted of 'any number of the offenses charged.' " (*Pearson*, *supra*, at p. 354, italics omitted.) However, " 'conduct giving rise to more than one offense within the meaning of the statute may result in initial conviction of both crimes, only one of which, the more serious offense, may be punished. [Citation.] The appropriate procedure, therefore, is to eliminate the effect of the judgment as to the lesser offense insofar as the penalty alone is concerned.' " (*Id.* at pp. 359-360, citation omitted.)

Pearson does not address the issue that was decided in *Craig*, nor does it implicitly undermine *Craig*'s reasoning. Unlike *Pearson*, which involved the defendant's convictions for *two separate offenses* based on the same conduct, *Craig* involved a defendant's two convictions for the same offense based on *two circumstances* that existed at the time of the single act of intercourse. The *Craig* court concluded that the defendant could stand convicted of only a single conviction of rape based on the two circumstances alleged in that case, stating:

> "Under this section [(section 261)], but one punishable offense of rape results from a single act of intercourse, although that act may be accomplished under more than one of the conditions or circumstances specified in the foregoing subdivisions. These subdivisions merely define the circumstances under which an act of intercourse may be deemed an act of rape; *they are not to be construed as creating several offenses of rape based upon that single act.*" (*Craig*, *supra*, 17 Cal.2d at p. 455, italics added.)

The two convictions for unlawful oral copulation that Gonzalez suffered in this case are akin to the two convictions for rape suffered by the defendant in *Craig*, and are entirely distinguishable from the convictions for sodomy and lewd conduct suffered by the defendant in *Pearson*. As in *Craig*, Gonzalez was convicted of two counts of the

same offense based on a single act. Specifically, Gonzalez was convicted of two counts of unlawful oral copulation on the basis of one act of oral copulation committed under the circumstances that the victim was both intoxicated and unconscious. The fact that the victim in this case was unconscious *as a result of* her intoxication supports the conclusion that she was subjected to but a single crime of unlawful oral copulation under circumstances in which she was unable to give consent. Unlike the situation addressed in *Pearson*, which involved multiple convictions for *different offenses* based on a single act, in this case, Gonzalez was convicted of the *same offense* twice based on a single act. This is precisely what the Supreme Court determined to be improper in *Craig*.

Further, with respect to the People's suggestion that the holding in *Pearson* undermines the continuing validity of *Craig*, an appellate court very recently applied *Craig* in a situation quite similar to the one presented here. In *People v. Smith* (2010) 191 Cal.App.4th 199 (*Smith*), the defendant was convicted at trial of two counts of rape— rape of an intoxicated woman, and rape of an unconscious woman. The evidence demonstrated only one act of sexual intercourse. (*Id.* at p. 205.) Following *Craig*, the *Smith* court concluded that the defendant could stand convicted of only a single count of rape based on the single act of intercourse. (*Smith, supra*, at p. 205.)

We further conclude that, as in *Craig* and *Smith*, Gonzalez may be convicted of only a single count of unlawful oral copulation based on a single act of oral copulation.

We conclude that as in *Craig*, the appropriate remedy in this case is to consolidate Gonzalez's convictions on counts 1 and 2 into a single conviction for unlawful oral copulation.

C. *Imposition of punishment on count 5 must be stayed pursuant to section 654*

Gonzalez contends that his sentences on counts 4 and 5 should have been stayed pursuant to section 654 because his commission of both of these sexual batteries was incidental to his commission of the assault with intent to commit penetration alleged in count 3.

Section 654 provides in relevant part: "(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other." Section 654 prohibits multiple punishments where a single criminal act or omission violates more than one penal statute. This statutory prohibition has been extended to cases in which the defendant engages in an indivisible course of conduct with a single objective, but violates several different penal statutes in the process. (See *Neal v. State of California* (1960) 55 Cal.2d 11, 19.) "If all of the crimes were merely incidental to, or were the means of accomplishing or facilitating one objective, a defendant may be punished only once. [Citation.] If, however, a defendant had several independent criminal objectives, he may be punished for each crime committed in pursuit of each objective, even though the crimes shared common acts or were parts of an otherwise indivisible course of conduct. [Citation.]" (*People v. Perry* (2007) 154 Cal.App.4th 1521, 1525.)

In reviewing a defendant's claim that the court erred in failing to stay a sentence pursuant to section 654, the "defendant's intent and objective present factual questions for the trial court, and its findings will be upheld if supported by substantial evidence." (*People v. Andra* (2007) 156 Cal.App.4th 638, 640.)

The People assert that the evidence presented at trial indicated that "at certain points, appellant had his hand down Carolyn's pants 'manipulating' her genitalia, and, at other points, his hand was on her buttocks, which w[ere] exposed as a result of appellant pulling down her pants." According to the People, based on the testimony, "the trial court could reasonabl[y] conclude that appellant had his hand on her buttocks at certain points, and inside her pants at other points" and that the "sexual battery counts (counts 4 and 5) were based on appellant's conduct of touching Carolyn's exposed buttocks." The People assert that "this is precisely what the prosecutor argued in her closing statements" and contend that the "sexual battery was not necessary to accomplish the assault, and the assault was not necessary to accomplish the sexual battery."

It is clear from both the closing statements and the instructions to the jury that the conduct underlying the charge in count 5 is in fact the same conduct that forms the basis for the charge in count 3. Count 3 charges an assault with the intent to commit penetration, and the People do not dispute that this charge was based on Gonzalez's fondling of Carolyn's genitalia. Contrary to the People's contention that both of the sexual battery counts could have been based on Gonzalez's conduct in touching Carolyn's buttocks (and apart from the issue whether the evidence would support two separate charges based on the touching of her buttocks), the jury was clearly informed that the two

sexual battery counts were based on two different acts, specifically, that one was based on Gonzalez's fondling of Carolyn's genitalia, and other was based on Gonzalez's touching Carolyn's buttocks. The information alleged as to count 4 that Gonzalez committed the crime of sexual battery when he "touched Victim's buttocks," and alleged as to count 5 that he "touched Victim's genital area." In addition, the jury was instructed with respect to the specific intent element of count 4 that it must find that Gonzalez "touched Caroline [*sic*] H.'s *buttocks* area: [¶] For the specific purpose of sexual arousal, sexual gratification, or sexual abuse." (Italics added.) With respect to the specific intent element of count 5, the jury was instructed that it must find that Gonzalez "touched Caroline [*sic*] H.'s *genital* area: [¶] For the specific purpose of sexual arousal, sexual gratification, or sexual abuse." (Italics added.) It is thus clear that the sexual battery alleged in count 5 and the offense alleged in count 3, assault with intent to commit penetration, were based on the same act—Gonzalez's fondling of Carolyn's genitalia.

Because the offenses in counts 3 and 5 are based on the same act, Gonzalez may not be punished twice for that act. The trial court should have stayed imposition of the sentence on count 5 pursuant to section 654.

IV.

DISPOSITION

The judgment of conviction is modified to reflect (1) that Gonzalez was convicted of a single violation of unlawful oral copulation, as defined and proscribed in subdivisions (f) and (i) of section 288a, as charged in counts 1 and 2, and that his sentence is three years in state prison for that conviction; (2) Gonzalez's conviction for

unlawful copulation in count 2, together with the sentence imposed but stayed on that count, is vacated; and (3) the sentence on count 5 is stayed pursuant to section 654. In all other respects, the judgment is affirmed.

The trial court is directed to prepare an amended abstract of judgment and minute order to reflect these modifications, and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

AARON, J.

I CONCUR:

McINTYRE, J.

BENKE, J., concurring and dissenting.

I dissent to part III, section B of the majority opinion which holds that one of Ramon Flugencio Gonzalez's two convictions under Penal Code[1] section 288a must be stricken.[2] I conclude the majority's reliance on *People v. Craig* (1941) 17 Cal.2d 453 (*Craig*)[3] is misplaced. *Craig* does not apply in a situation where, as here, a defendant is charged and convicted under two provisions of section 288a which require proof of different elements and set forth separate punishments.

The only exception to the rule that a single act may give rise to multiple convictions occurs when, as the result of a single act, a defendant is convicted of multiple crimes and some crimes are necessarily lesser included offenses of the other crimes. (3 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Punishment, § 252, pp. 402-403; see also *People v. Reed* (2006) 38 Cal.4th 1224, 1227; *People v. Ortega* (1998) 19 Cal.4th 686, 692, overruled on another point in *People v. Reed, supra,* 38 Cal.4th at p. 1228; *People v. Pearson* (1986) 42 Cal.3d 351, 354-355.) Here, Gonzalez engaged in oral

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1 All further statutory references are to the Penal Code.

2 I note the majority in its opinion uses the terms "strike" and "merge and consolidate" in concluding that Gonzalez can only be guilty of a single conviction in counts 1 and 2 for oral copulation in violation of section 288a. For ease of reference, I will use the term "strike" when discussing this issue.

3 The majority also relies on *People v. Smith* (2010) 191 Cal.App.4th 199, which is factually similar to *Craig* (e.g., evidence indicated only one act of sexual intercourse with the victim in violation of section 261, although defendant was charged and convicted of rape of an intoxicated person and rape of an unconscious person). My discussion and analysis of *Craig* applies with equal force to the Court of Appeal's decision of *People v. Smith.*

copulation with an unconscious person and oral copulation with an intoxicated person in violation of both section 288a, subdivision (f) and section 288a, subdivision (i). Because section 288a, subdivision (f) and section 288a, subdivision (i) are discrete substantive offenses with distinct elements and separate punishments, neither is the lesser included offense of the other and Gonzalez's conviction for each crime is therefore expressly authorized by section 954.[4]

The holding in *Craig* is entirely consistent with the well-established rule permitting multiple convictions for a single act except when one crime is the lesser included offense of the another. In *Craig*, the court treated the defendant's statutory rape conviction as an included offense of the defendant's conviction for forcible rape of a minor and properly dismissed the statutory rape conviction.[5]

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4 Subdivision (f) of section 288a provides that an act of oral copulation on an unconscious victim, as therein defined, is punishable by imprisonment for a period of three, six or eight years. Subdivision (i) of section 288a provides that an act of oral copulation on a victim who is prevented from resisting as a result of any intoxicating, anesthetic or controlled substance is punishable by imprisonment for a period of three, six or eight years. Although appearing in a single statute, these provisions define separate substantive offenses, as each contains elements the other does not, neither references nor depends on the other and perhaps most importantly, each provides its own period of punishment. (See *e.g., People v. Muhammad* (2007) 157 Cal.App.4th 484, 490-492 [discussing the definitions of and the differences between the terms "offense," "enhancement" and "penalty provision," and noting under section 15 that a "crime or public offense" is an " 'act committed or omitted in violation of law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments: . . . [¶] 2. [i]mprisonment' "].)

5 As the majority recognizes (maj. opn., p. 10, fn. 4) since *Craig* was decided the Legislature has amended our rape statutes. Rape by force is now defined by section 261, subdivision (a)(2) and punished under section 264 with a term of imprisonment of three, six, or eight years. Section 261.5 defines the distinct crime of Unlawful Sexual

The majority's use of *Craig* outside the particular circumstances the court confronted in that case has doctrinal and practical ramifications well beyond Gonzalez's conviction. By applying *Craig* outside the context of the crimes at issue in that case,[6] the majority has rendered section 654 largely obsolete in sex offense cases and provided sex offenders with unwarranted protection from the state's "Three Strikes" law. The damage however does not end there. The majority has created a new sentencing rule and given the trial courts no guidance with respect to how they should unravel the inevitable conflicts they will face in applying it.

I would affirm Gonzalez's conviction on count 2 for violation of section 288a, subdivision (i) and, like the trial court below, would apply section 654 to stay that conviction. I would not take the drastic, unwarranted, and unlawful step of striking Gonzalez's conviction.

Intercourse which, depending on the age of the offender and the age of the victim, may be punished either as a misdemeanor or as a felony.

6 See footnote 5, ante.

I

Gonzalez's Conviction in Count 2 Should Be Stayed under Section 654

A. *Multiple Convictions*

As set forth in 3 Witkin, Cal. Criminal Law, *supra*, § 252, p. 402: "The rule is that multiple convictions are permitted when the evidence establishes that more than one penal law has been violated, even though the violations occur during a single course of conduct. *The single exception* is for offenses that are lesser included offenses of another offense of which the defendant is convicted; in that instance, multiple convictions are not permitted. [Citation.]" (Italics added.)

The rule permitting multiple convictions for a single act is based on section 954 which states that "[a]n accusatory pleading may charge . . . different statements of the same offense" and "the defendant may be convicted of any number of the offenses charged." (See *People v. Ortega, supra,* 19 Cal.4th at p. 692.) The rule has been applied repeatedly by our Supreme Court in a variety of contexts in which defendants have asserted that their convictions fall within the exception for lesser included offenses. (See e.g. *People v. Reed, supra,* 38 Cal.4th at p. 1227 [single act of possessing firearm supports multiple firearm convictions]; *People v. Sanchez* (2001) 24 Cal.4th 983, 989-991, overruled on another point in *People v. Reed, supra,* 38 Cal.4th at p. 1228; *People v. Ortega, supra,* 19 Cal.4th at p. 692 [single act supports grand theft and carjacking convictions]; *People v. Pearson, supra,* 42 Cal.3d at pp. 354-355 [single act supports rape and lewd conduct convictions]. In those cases the court upheld multiple convictions

because, as is the case here, each crime had a distinct element not required of the other and thus neither crime was the lesser included offense of the other.

The holding and reasoning of the court in *People v. Sanchez* is the most instructive here. There the defendant was convicted of both murder (§ 187) and gross vehicular manslaughter while intoxicated (§ 191.5) arising out of a single collision in which one person was killed. Although the trial court stayed the manslaughter sentence under section 654, on appeal the defendant argued the manslaughter conviction was a lesser included offense of the murder conviction and should have been dismissed. The Supreme Court disagreed. (*People v. Sanchez, supra*, 24 Cal.4th at p. 988.) Because murder may be committed without the intoxication required under section 191.5, the court held multiple convictions were permissible: "Although as a factual matter, a murder may be carried out by means of a vehicle and by an intoxicated driver, in the abstract it obviously is possible to commit a murder without committing gross vehicular manslaughter while intoxicated. Accordingly, dual conviction in the present case was appropriate—although the trial court properly avoided dual punishment pursuant to section 654 by staying execution of sentence for the vehicular manslaughter offense." (*Ibid.*)

Here, although oral copulation may be committed with a person who is both unconscious and intoxicated, in the abstract it obviously is possible to commit an act of oral copulation with an unconscious person who is *not* intoxicated; similarly it is possible to commit an act of oral copulation with an intoxicated person who is *not* unconscious. Given these possibilities, section 288a, subdivision (f) and section 288a, subdivision (i) are not lesser included offenses of each other and a single act of oral copulation can give

rise to convictions under both provisions. As in *People v. Sanchez*, while dual conviction is appropriate, the trial court here properly avoided dual punishment pursuant to section 654 by staying the sentence on Gonzalez's section 288a, subdivision (i) conviction.

B. *Craig*

Rather than following the rule which permits multiple convictions except where one offense is a lesser included offense of the other, relying on *Craig* the majority creates a new exception to section 954: under this exception, multiple convictions are not possible where the Legislature has set forth multiple distinct crimes in one statute instead of in separately enumerated statutes. (Maj. opn., p. 13.) *Craig* does not support creation of such a new exception to section 954, untethered, as is the majority's exception, to any analysis of the elements of the crimes which give rise to a defendant's multiple convictions.

The court in *Craig* took no step outside the long-prevailing rule that dismissal of multiple convictions is required *only* where one crime is included within another crime. It bears emphasis that in explaining its holding, the court in *Craig* restated and applied the general rule with respect to included offenses: "The authorities have set down certain rules or tests whereby it may generally be determined whether one or more offenses result from a single act or transaction. Frequently, the test is stated to be 'the *identity of the offenses* as distinguished from the identity of the transactions from which they arise. A defendant may be convicted of two separate offenses arising out of the same transaction when each offense is stated in a separate count and when the two offenses differ in their necessary elements and one is not included *within the other*.' [Citation.]

Where, as here, the charge and proof disclose a *single* act of intercourse resulting from *force* employed upon a *minor*, but one punishable rape is consummated, for the proof, though dual in character, *necessarily crystallizes into one 'included' or identical offense* [italics added]." (*Craig, supra*, 17 Cal.2d at p. 457.)

In finding that each means of committing rape was *included* within the other means set forth under former section 261, the court in *Craig* was bound by the then-prevailing view of rape as a single form of "outrage" to the person and feelings of the victim and that a victim would not be "doubly outraged, once by force and once because of her tender years, but suffered on a single offense." (*People v. Mummert* (1943) 57 Cal.App.2d 849, 856-857, overruled in *People v. Collins* (1960) 54 Cal.2d 57, 60.) Later enactment of section 261.5 as a separate crime demonstrates that we have now abandoned the notion that consensual sex with a minor is indistinguishable from forcible rape. (See *People v. Chapman* (1975) 47 Cal.App.3d 597, 604, fn. 3.) Our evolving view of rape should teach us that in enacting section 288a and providing separate punishments for each subdivision, the Legislature has recognized each subdivision as a distinct crime.[7]

Because of the differences between oral copulation with an unconscious person and oral copulation with an intoxicated person, unlike the statutory rape and forcible rape of a minor considered in *Craig*, here it cannot be said Gonzalez's conviction for oral copulation with an intoxicated person was included or identical with his conviction for oral copulation with an unconscious person. Thus, even under *Craig*, the majority errs in

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7 See footnote 4, ante.

directing that Gonzalez's conviction for violation of section 288a, subdivision (i) be vacated.

II

The Ramifications of the Majority Opinion

A. *Section 654*

Justice Chin in his dissent in *People v. Benson* (1998) 18 Cal.4th 24, 38-40 (*Benson*) (cited with approval in *People v. Correa* (2012) 54 Cal.4th 331, 338, fn. 9) fully sets forth the development of our state's section 654 jurisprudence: "Section 654 was enacted in 1872. Although amended as recently as 1997, it has remained unchanged in relevant respects. It currently provides, as relevant: 'An act or omission that is punishable in different ways by different provisions of law shall be punished . . . , but in no case shall the act or omission be punished under more than one provision.' The statute is silent on the procedure to follow when there are multiple convictions that may be punished but once. The courts developed that procedure.

"The question the courts faced was how to guarantee a defendant would not receive multiple punishment in violation of section 654 without giving that defendant an *undeserved windfall.* [Italics added.] Generally, the Legislature has permitted multiple *conviction* even when multiple punishment is prohibited. 'An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense . . . . The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged . . . .' (§ 954.) As we

explained in *People v. Pearson* (1986) 42 Cal.3d 351, 354 (*Pearson*), 'Section 954 sets forth the general rule that defendants may be charged with and convicted of multiple offenses based on a single act or an indivisible course of conduct.' The courts had to decide how to treat multiple convictions that could be punished but once. Setting aside all but one of the convictions would be unwise because, if that conviction were ever vacated for any reason, the others would not be available to replace it. The courts struggled with this question in the decade of the 1960's.

"Early cases were inconsistent in their treatment of cases covered by section 654. Some simply set aside the excess conviction. (See *People* v. *McFarland* (1962) 58 Cal.2d 748, 763 [(*McFarland*)].) However, as we noted in *McFarland*, 'section 654 proscribes double punishment, not double conviction . . . .' [Citation.] In *McFarland*, because '[t]he appropriate procedure . . . is to eliminate the effect of the judgment as to the lesser offense insofar as the penalty alone is concerned,' we 'reversed [the judgment] insofar as it imposes a sentence for grand theft, and in all other respects' affirmed. [Citation.] The modern procedure of staying the impermissible punishment had not yet developed.

"That procedure was first used in *People v. Niles* (1964) 227 Cal.App.2d 749 (*Niles*). In *Niles*, the trial court did what has become the standard; it 'stay[ed]' sentence on the lesser offense. The appellate court considered whether that procedure satisfied section 654's prohibition against multiple punishment. In a thoughtful discussion that established the legal foundation for future section 654 jurisprudence, the court found the 'stay' did satisfy section 654. Citing *McFarland*, the court first noted that section 654

only proscribes multiple punishment, not multiple conviction. (*Niles, supra,* 227 Cal.App.2d at p. 756.) 'It is obvious,' the court stated, 'that this rule poses real problems for a trial court at the time of sentence. . . . [I]f it dismisses the count carrying the lesser penalty, and the conviction on the remaining count should be reversed on appeal, the defendant would stand with no conviction at all. . . . It follows that the procedure adopted by the trial court in this case was a reasonable—and so far as we can see the only possible—reconciliation of the various policies involved. Any other method either incurs the risk of letting a defendant escape altogether, or else imposes an unnecessary burden on an appellate court and on the trial court on the inevitable remand for correction of sentence. The procedure here affords appellant the maximum protection to which section 654 entitles him and, *under no condition*, can operate to his prejudice.' (*Ibid.*, italics added.) [¶] . . . [¶])

"More recently, in *Pearson*, we considered whether we should 'prohibit the use of more than one conviction based on each of [defendant's] criminal acts for the purpose of enhancing any subsequent sentences he may receive.' (*Pearson, supra,* 42 Cal.3d at p. 358.) We noted that in *In re Wright* we 'balanced the potential windfall to the defendant of reversing multiple convictions against the prejudice to him of allowing sentencing for such convictions. We then determined that the procedure of staying execution of sentence for multiple convictions instead of reversing such convictions "reasonably reconciles the policies involved in applying section 654 to protect the rights of both the state and the defendant," and follows logically from the section 654 prohibition against

punishing the defendant under more than one provision based on a single criminal act. [Citation.]' [Citation.]" (*Benson, supra*, 18 Cal.4th at pp. 38-40, dis. opn. of Chin, J.)

In *Benson*, the defendant sought to strike one of his prior convictions under the three strikes law (§§ 667, subds. (b)-(i), 1170.12) on the ground the sentence on that prior had been stayed pursuant to section 654. In affirming the trial court's refusal to strike the qualifying strike prior, the majority in *Benson* found the statutory definition of a prior felony conviction in section 1170.12, subdivision (b) and the Legislature's purpose and objectives underlying the three strikes law established that each prior conviction of defendant involving a serious or violent felony qualified as a separate strike notwithstanding the fact the sentence for that conviction was stayed under section 654. (*Benson, supra*, 18 Cal.4th at p. 31.) "[T]he language of section 1170.12, subdivision (b)(1), unequivocally establishes that the electorate intended to qualify as separate strikes *each* prior conviction that a defendant incurred relating to the commission of a serious or violent felony, notwithstanding the circumstances that the trial court, in the earlier proceeding, may have stayed sentence on one or more of the serious or violent felonies under compulsion of the provisions of section 654." (*Ibid.*)

Prior to the majority's decision, section 654 had obvious application to a number of the multiple distinct crimes set forth in section 288a.[8] Admittedly, some of the crimes

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8 Section 288a sets forth 17 crimes which share the common element of oral copulation: oral copulation of a person under the age of 18 (§ 288a (b)(1)); oral copulation of someone under the age of 16 by someone over the age of 21 (*id.* (b)(2)); oral copulation of someone under the age of 14 by someone more than 10 years older than the victim (*id.* (c)(1)); oral copulation by use of force or fear (*id.* (c)(2)(A)); oral

set forth in section 288a will not give rise to multiple convictions or application of section 654 because they are plainly lesser included offenses of other crimes defined and punished under the statute—e.g. section 288a, subdivision (c)(2)(A) forcible oral copulation, punishable with a term of three, six or eight years, is plainly a lesser included offense of forcible oral copulation of a person under the age of 14, punishable with a term of 8, 10 or 12 years. However, section 288a also sets forth other crimes which are not included in each other—e.g. oral copulation with a person under 14 when the perpetrator is 10 years older, proscribed by section 288a, subdivision (c)(1) is not included in oral copulation of an intoxicated person, proscribed by section 288a, subdivision (i). Plainly, it is possible to have oral copulation with an intoxicated person who is not under 14 and it is also possible to have oral copulation with person under 14 who is not intoxicated.

It is just as plain that with respect to this latter class of crimes set forth under section 288a—those not included within each other—a single act may give rise to multiple crimes and application of section 654. Clearly, a single act of oral copulation with an

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copulation of someone under the age of 14 by use of force or fear (*id.* (c)(2)(B)); oral copulation of someone over the age of 14 by use of force or fear (*id.* (c)(2)(C)); oral copulation by use of threat of future retaliation (*id.* (c)(3)); oral copulation of someone acting concert with another and the act is committed against the person's will (*id.* (d)(1)); oral copulation of someone acting concert with another and the act is committed against the person's will and the person is under the age of 14 (*id.* (d)(2)); oral copulation of someone acting concert with another and the act is committed against the person's will and the person is over the age of 14 (*id.* (d)(3)); oral copulation while confined while in prison or jail (*id.* (e)); oral copulation of an unconscious person (*id.* (f)); oral copulation of a person incapable of consenting by virtue of disability (*id.* (g)); oral copulation of person incapable of consenting by virtue of disability when both the perpetrator and victim are confined in a mental institution (*id.* (h)); oral copulation with an intoxicated person (*id.* (i)); oral copulation with someone who has been tricked to believe he or she is married to the perpetrator (*id.* (j)); oral copulation by someone threatening arrest or deportation (*id.* (k).

intoxicated person under 14 would give rise to culpability under both section 288a, subdivision (c)(1) and section 288a, subdivision (i). In such a case, section 654 requires that a trial court limit the perpetrator's punishment by staying the sentence on one or more of the crimes without providing the perpetrator with the windfall of escaping all potential culpability for a second or third offense if the first offense is vacated or overturned. In contrast, the majority opinion provides a sex offender the precise windfall our section 654 jurisprudence has, over the last 50 years, carefully avoided.

Unfortunately however, under the holding in *Benson*, the windfall the majority provides sex offenders convicted under multiple provisions of section 288a is not limited to the circumstance which arises when a conviction on one of multiple charges is later vacated. The majority, by requiring dismissal instead of a stay of a second or third conviction under section 288a, provides Gonzalez and other sex offenders with the additional and perhaps more significant benefit of avoiding application of the three strikes law to a second or third offense. I see no reason why sex offenders under section 288a should receive such deferential treatment for no other reason than that their crimes are set forth in subdivisions of a singly enumerated statute.

In considering the impact of the majority's decision on enforcement of the state's sex crimes statutes, it is also important to recognize that other sex offense statutes are written in the same manner as section 288a: like section 288a, those statutes define multiple crimes as subdivisions of a single statute. (See e.g., §§ 286 [sodomy] and 289 [sexual penetration by a foreign or unknown object].) Thus, the windfall the majority has created goes well beyond section 288a.

B. *Confusion*

The majority's application of *Craig* not only provides sex offenders with undeserved windfalls, it will unnecessarily confuse and burden trial courts, including in application of the state's determinate sentencing law.

Initially, I note the confusion in the majority's handling of counts 1 and 2. On the one hand, the majority states in the body of its opinion that Gonzalez's convictions on counts 1 and 2 must be *consolidated* into a single conviction for unlawful oral copulation. (Maj. opn., p. 14.) On the other hand, the majority states in the disposition of the case that Gonzalez's conviction on count 2 and his stayed sentence on that count are *vacated.* (Maj. opn., p. 17.) As I noted in footnote 2 of my dissent, the majority also confusingly refers to "striking" count 2. I do not believe that a conviction which has been consolidated with another conviction can at the same time be vacated, inasmuch as the consolidated conviction no longer independently exists.[9]

In any event, my colleagues conclude *Craig* requires that only one offense is possible for any enumerated statute. Here, the single statutory offense is "oral copulation." Sentencing here is not unduly problematic for the majority because the

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9 I note that in *Craig* the court did not direct that the statutory rape conviction be vacated. Instead, in its disposition the court in *Craig* modified the two judgments entered in the trial court so that only one judgment convicting the defendant of one count of rape was entered. (*Craig, supra*, 17 Cal.2d at p. 458.) "Such modification will serve to preclude the dual judgments of the trial court from hereafter working any possible disadvantage or detriment to the defendant in the later fixing of his definite term by the State Board of Prison Terms and Paroles." (*Id.* at pp. 458-459.) Here, under the governing determinate sentencing scheme, where sentences are set by the trial court, there was no risk of such confusion.

sentence ranges applicable are coincidentally identical under subdivisions (f) and (i) of section 288a. However, under the logic of the majority, even when subdivisions of 288a prescribe different sentences, there is still only one crime.

Where sentences are different within the subdivisions of 288a, I assume the majority would require the "lesser" of the offenses be stricken. (See § 1170.1, subd. (a).) However, the majority opinion does little to guide trial courts in determining what is in fact a lesser sentence for purposes of applying the rule it has adopted. Take for example, a defendant to be sentenced for a conviction of subdivision (k) of section 288a (e.g., force accomplished by threatening deportation of the victim), which carries a prison sentence of three, six or eight years, and of subdivision (d)(2) of that same statute (force accomplished by threat of retaliation), which carries a prison sentence of five, seven or nine years. Which sentence is stricken in order to satisfy the majority's implicit requirement that the sentencing court strike the less serious offense?

Under section 288a, the threat of retaliation conviction carries a more serious sentence *range*. However, current sentencing law allows the sentencing court to select the upper sentence of eight years on the threat of deportation and the middle term of seven years on the retaliation offense. Thus, should the trial court select the sentence on each count and then strike the less serious of its selections? Or should the trial court select the defendant's sentence only from the most serious range of sentences? In determining what conviction is greater, should the court consider the application of any enhancements? If there is a choice with respect to how a trial court proceeds, what due process and equal protection questions arise in making such a choice? The answers to

these questions will have profound effects not only on the way sentencing courts calculate sentences, but on the benefits currently permitted by way of a discretion-based sentence.

The chaos created by the majority opinion's incorrect application of *Craig* is unwarranted and unnecessary.

I would affirm Gonzalez's conviction on count 2 for violation of subdivision (i) of section 288a because I conclude counts 1 and 2 are separate substantive offenses, despite the fact both provisions derive from the same statute and despite the fact the violation of each arises from a single act or an indivisible course of conduct. I would also affirm the stay of Gonzalez's conviction in count 2 because, as directed by section 654, subdivision (a), it was the lower sentence term in contrast to count 1. In all other respects, I agree with the majority decision.

BENKE, Acting P. J.

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Gonzalez** Case No.: **D059713**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On **January 7, 2013**, I served the attached **PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Raymond M. DiGuiseppe
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The Honorable Roger W. Krauel - Judge
San Diego County Superior Court
P.O. Box 122724
San Diego, CA 92112-2724

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **January 7, 2013**, at San Diego, California.

and I furthermore declare, I electronically served a copy of the above document from the Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on **January 7, 2013**, to Raymond M. DiGuiseppe's electronic notification address diguiseppe228457@gmail.com and to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com.

Claudia Chavez-Estrada
Declarant

Signature

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DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **People v. Gonzalez** Case No.: **S207830**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **May 29, 2013**, I served the attached **OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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Court of Appeal of the State of California
Fourth Appellate District
750 B Street, Suite 300
San Diego, CA 92101

and I furthermore declare, I electronically served a copy of the above document from the Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on **May 29, 2013,** to Raymond M. DiGuiseppe's electronic notification address diguiseppe228457@gmail.com, and to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **May 29, 2013**, at San Diego, California.

Claudia Chavez-Estrada
Declarant

Signature

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