In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

BILLY CHARLES WHITE,

Defendant and Appellant.

Case No. S228049

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

OPENING BRIEF ON THE MERITS

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
STEVE OETTING
Deputy Solicitor General
LISE JACOBSON
Deputy Attorney General
A. NATASHA CORTINA
Supervising Deputy Attorney General
State Bar No. 156368
600 West Broadway, Suite 1800
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2220
Fax: (619) 645-2191
Email: Natasha.Cortina@doj.ca.gov
Attorneys for Plaintiff and Respondent

TABLE OF CONTENTS

Page

Issue Presented 1

Introduction 1

Statement of the Case and Facts 3

Argument 6

I. White's separate convictions for rape of an intoxicated person and rape of an unconscious person based on the same act were proper because they are different offenses 6

A. Section 954 permits multiple convictions based on the same act or indivisible course of conduct where, among other things, the act or conduct constitutes more than one offense 7

B. Whether separate code provisions describe more than one offense turns on whether the Legislature intended them to be different offenses 8

C. The Legislature intended rape of an intoxicated person and rape of an unconscious person to be different offenses 11

1. Textual: A plain and commonsense reading of the rape statutes supports the conclusion that the Legislature intended subdivisions (a)(1)-(7) of section 261 to define separate rape offenses 11

a. Each rape defined in subdivision (a) of section 261 is a separate offense because each requires proof of different elements and none is a lesser included offense of the other 12

TABLE OF CONTENTS
(continued)

Page

b. Different punishment for some rape offenses defined under subdivision (a) of section 261 further indicates that each is a separate offense 16

c. Rape offenses are not contained in one statutory provision, nor is there a requirement that each offense be self-contained in order to be a separate offense..... 17

2. Statutory Framework: Considering section 261 in light of the statutory framework as a whole supports the conclusion that the Legislature intended each subdivision to be a different offense subject to section 954 20

a. Distinct penal consequences for different violations of subdivision (a) reflect a Legislative intent to treat each rape as a separate offense 21

b. The Legislature's similar treatment of rape and other sex offenses generally reflects an intent to treat them alike 22

c. The omission of any alternative or exception to sections 954 and 654 strongly points to the fact that none is intended and section 261 is subject to those provisions allowing for multiple convictions..... 23

TABLE OF CONTENTS
(continued)

Page

3. Legislative History and other extrinsic aids: Treating each paragraph under section 261, subdivision (a) as a separate rape offense is consistent with the Legislature's repeated expansion of liability under the rape statutes, and expressed intent to have the major sex offense statutes conform to each other 26

D. *Craig* is distinguishable and therefore no bar to finding separate convictions 31

II. Alternatively, White's separate convictions for rape of an intoxicated person and rape of an unconscious person based on the same act were proper because they are—at the very least—different statements of the same offense 37

Conclusion 40

TABLE OF AUTHORITIES

Page

CASES

Blockburger v. *United States*
(1932) 284 U.S. 299 9

In re Hayes
(1969) 70 Cal.2d 604 33

In re Hess
(1955) 45 Cal.2d 171 34

In re Walker
(1974) 10 Cal.3d 764 15

In re Wright
(1967) 65 Cal.2d 650 34

Johnson v. Dep't of Justice
(2015) 60 Cal.4th 871 14

Lopez v. Superior Court
50 Cal.4th at p. 1063 31

People v. Barnes
(1986) 42 Cal.3d 284 (*Barnes*) 27, 28

People v. Benson
(1998)18 Cal.4th 24 33

People v. Bergschneider
(1989) 211 Cal.App.3d 144 15

People v. Collins
(1960) 54 Cal.2d 57 32

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

People v. Davis
(1992) 8 Cal.App.4th 28 15

People v. Eid
(2014) 59 Cal.4th 650 24

People v. Gonzalez
(2012) 211 Cal.App.4th 405 3

People v. Gonzalez
(2014) 60 Cal.4th 533 (*Gonzalez*) ..... *passim*

People v. Griffin
(2004) 33 Cal.4th 1015 15

People v. Hallock
(1989) 208 Cal.App.3d 595 15

People v. Hoyt
(1942) 20 Cal.2d 306 14

People v. Jailles
(1905) 146 Cal. 301 36

People v. Johnson
(1980) 26 Cal.3d 557 24

People v. Kehoe
(1949) 33 Cal.2d 711 13

People v. Knox
(1988) 204 Cal.App.3d 197 15

People v. Kramer
(2002) 29 Cal.4th 720 8

People v. Lohbauer
(1981) 29 Cal.3d 364 32

People v. Lopez
(2003) 31 Cal.4th 1051 23

People v. Montoya
(2004) 33 Cal.4th 1031 7

People v. Morante
(1999) 20 Cal.4th 403 37

People v. Ortega
(1998) 19 Cal.4th 686 (*Ortega*) 7, 38, 39

People v. Palmer
(2001) 24 Cal.4th 856 24

People v. Pearson
(1986) 42 Cal.3d 351 (*Pearson*) 7, 33, 38, 39

People v. Reed
(2006) 38 Cal.4th 1224 (*Reed*) 7, 14

People v. Rincon-Pineda
(1975) 14 Cal.3d 864 28

People v. Sloan
(2007) 42 Cal.4th 110 ..... 14, 25

People v. Smith
(2010) 191 Cal.App.4th 199 (*Smith*) 30

People v. Snyder
(1888) 75 Cal. 323 ..... 35, 36

People v. Tideman
(1962) 57 Cal.2d 574 (*Tideman*) 8, 14, 33

People v. Vann
(1900) 129 Cal. 118 ..... 35, 36

People v. Watson
(1956) 46 Cal.2d 818 24

People v. White
(2013) 2013 WL 1444254 (*White I*) 3, 4, 30

White II, at pp. 6-7 ..... *passim*

People v. Whitmer
(2014) 59 Cal.4th 733 34

People v. Williams
(1998) 17 Cal.4th 148 25

People v. Zambia
(2011) 51 Cal.4th 965 26

Schad v. Arizona
(1991) 501 U.S. 624 15

United States v. Powell
(1984) 469 U.S. 57 24

STATUTES

Evidence Code
§ 1103 28

Penal Code
§ 18 18
§ 261 ..... *passim*
§ 261(1) 32
§ 261, subd. (a) 13, 17, 18, 26
§ 261, subd. (3) 3
§ 261, subd. (a)(1) 25
§ 261, subd. (a)(2) 25
§ 261, subd. (a)(3) 1, 12
§ 261, subd. (a)(4) 1, 12
§ 261 subds. (a)(1)-(7) 19
§ 261.5 ..... 14, 32
§ 262 ..... 20, 21, 28
§ 263 ..... 20, 34, 35
§ 264 ..... *passim*
§ 264.1 21
§ 286 ..... 20, 22
§ 286(f) 22
§ 286(i) 22
§ 286(c)(2) 22
§ 286(j) 22
§ 288a ..... *passim*
§ 288a, subd. (a) 18
§ 288a, subds. (b)-(k) 19
§ 288a, subd. (c)(2) 16
§ 288a, subd. (f) 3, 8, 12
§ 288a, subd. (i) 3, 12
§ 289 ..... 20, 22, 31
§ 289(d) 22
§ 289(e) 22

Penal Code
§ 289(a)(1)(A) 22
§ 289(a)(1)(D) 22
§ 289(f) 22
§ 290.008 21
§ 290.008, subd. (c)(2) 21
§ 290.46, subd. (b) 22
§ 290.46, subd. (c) 22
§ 496 7
§ 654 ..... *passim*
§ 667.6 21
§ 667.6, subd. (e) 21
§ 667.6, subds. (e)(2)-(3) 21
§ 667.61 21
§ 667.61, subd. (c) 21
§ 950 37
§ 952 37
§ 954 ..... *passim*
§ 1127d 28
§ 1127e 28
§ 1203.065, subd. (a) 22
§ 1203.065, subd. (b) 22
§ 1385 25

Stats. 1921, c. 848, p. 1633, § 2 20

Stats. 1923, ch. 130, § 1 16

Stats. 1979, ch. 994 28

Stats. 1980, ch. 587; Leg. Counsel's Dig. of Assem. Bill No. 2899, 4 Stats. 1980 (Reg. Sess.) Summary Dig., p. 158 29

Stats. 1981 ch. 849 29

Stats. 1984
ch. 1634 29
ch. 1635 29

Stats. 2002 ch. 302 29

Three Strikes Law 25

Vehicle Code
§ 13377, subd. (a)(2) 22

OTHER AUTHORITIES

CALCRIM
No. 1002 12
No. 1017 12
No. 3515 15
No. 3550 15

Ass. Comm. on Public Safety Report on Assem. Bill No. 485 (1986 Reg. Sess.), at p. 4 29

Leg. Counsel's Dig. of Assem. Bill No. 2899, 4 Stats. 1980 (Reg. Sess.) Summary Dig., p. 158 29

Leg. Counsel's Dig., Assem. Bill No. 1844, Ch. 219 (2009-2010 Reg. Sess.) 29

2013 Cal. Legis. Serv. Chapter 259 13

Sen. Bill No. 497 (1970 Reg. Sess.) chaptered as Stats. 1970, ch. 1301, §§ 1, 2 14

Review of Selected 1980 California Legislation, Crimes (1980) 12 Pacific L.J. 321-322 29

Review of Selected 1979 California Legislation (1979) Pacific L.J. 409-410 28

ISSUE PRESENTED

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

INTRODUCTION

In *People v. Gonzalez* (2014) 60 Cal.4th 533 (*Gonzalez*), this court recently held that a defendant may, consistent with section 954, be convicted of both oral copulation of an intoxicated person and oral copulation of an unconscious person based on the same act. (*Id.* at p. 535.) In reaching this conclusion, this court applied well-established rules of statutory construction—examining the text, statutory framework and legislative history—to determine the Legislature's intent to proscribe one offense or two. The court rejected the application of *People v. Craig* (1941) 17 Cal.2d 453 (*Craig*), which found that the rape statutes in 1941 did not describe different offenses subject to multiple convictions, on the grounds that those statutes were textually and structurally different from the modern oral copulation statute. The same conclusion applies equally to the modern rape statutes, which are vastly different and expanded from the ones interpreted in *Craig*. Just as this court held in the context of oral copulation (§ 288a), a defendant found guilty of rape of an intoxicated person and rape of an unconscious person based on the same act stands properly convicted of both under section 954, although only punished for one. Applying the same analytical framework as in *Gonzalez* to the modern rape statutes, and by parity of reasoning, it is apparent that the Legislature intended rape of an intoxicated person and rape of an unconscious person

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

based on the same act to be different offenses subject to multiple convictions, just as they are under the oral copulation statute.

As in the oral copulation statute, the elements for rape of an intoxicated person and rape of an unconscious person in subdivision (a) of section 261 are different and neither is a lesser included offense of the other. Indeed, with the exception of the particular sex act (intercourse versus oral copulation), the elements and punishments under both statutes are identical. Also as in the oral copulation statute, while the punishments are the same for both of these types of rape offenses, the Legislature has proscribed different punishments and other penal consequences for other rapes that are defined under subdivision (a). Statutes in pari materia, as here, should be interpreted consistently. Finally, the legislative history of the rape statutes, the repeated expansion of circumstances constituting rape commensurate with sex offenses generally and oral copulation specifically, confirm a legislative intent to have subdivision (a) of section 261 define different offenses subject to multiple convictions. It reflects society's evolving understanding of and intolerance for sexual offenses such as rape. The result of these legislative changes is to relegate *Craig's* seven decades old interpretation of the former rape statutes to the past, with no force in the modern era. This is bolstered by subsequent decisions of this court redressing the concerns underscoring the decision in *Craig.*

Even assuming this court were to find the different subdivisions of section 261 were not different offenses but different statements of the same offense, section 954 likewise allows for multiple convictions under this scenario as well. And because *Craig* did not address this issue directly, it does not foreclose its application. A contrary conclusion—that a defendant may not stand convicted of both rape of intoxicated person and rape of an unconscious person based on the same act— defeats a clear legislative intent to hold rapists fully accountable, and in the same manner as someone

who commits oral copulation using identical means. This court should reverse the Court of Appeal's decision in this case and reinstate White's conviction for rape of an unconscious person.

STATEMENT OF THE CASE AND FACTS

White climbed into the bed of an unsuspecting friend who was in and out of consciousness due to intoxication and, over the course of several hours, engaged in sexual conduct, including intercourse, until his victim realized what was happening and protested. At that point, White rolled off of his victim and pretended to be asleep, as if nothing had happened. White later claimed that his victim had begged him for sex. (RT 49-55, 79-80, 90, 130-135.) A San Diego County jury convicted White of both rape of an intoxicated person (count 1- § 261, subd. (3)) and rape of an unconscious person (count 2-§ 261, subd. (4)), and the trial court sentenced him to three years in state prison on count 1 and stayed his punishment on count 2 pursuant to section 654.

White appealed on various grounds, but not on the ground that he could stand convicted of only one rape offense. That issue was raised sua sponte by the Court of Appeal. The court requested briefing on the applicability, if any, of *People v. Gonzalez* (2012) 211 Cal.App.4th 405 (opinion superseded by *Gonzalez*, 60 Cal.4th 533), in which a different two-justice majority in the same Division held that the defendant's convictions for oral copulation of an unconscious person (§ 288a, subd. (f)) and oral copulation of an intoxicated person (§ 288a, subd. (i)) based on the same act had to be consolidated into one conviction under the holding and reasoning of *Craig*.

Following briefing, the Court of Appeal rejected each of White's claimed errors, including sufficiency of the evidence for both rape convictions. (*People v. White* (2013) 2013 WL 1444254 (*White I*).) The Court of Appeal divided, however, on the issue of whether the two

convictions could stand. Justice Huffman, joined by Justice McDonald, held that, under *Craig*, White could only stand convicted of one rape and chose, without explanation, to strike count 2. (*Id.* at pp. 7, 12.) Justice Benke dissented on the ground that subsequent amendments to the rape statutes and subsequent decisions by this court concerning sections 954 and 654 limited *Craig* to its facts and permitted multiple convictions, such as occurred in this case. She cautioned that *Craig* should be read in light of the problems before it—double punishment for two rape convictions based on the same act. Justice Benke would have affirmed both convictions and the trial court's stay of punishment on count 2 pursuant to section 654. (*White I*, at pp. 1-14.)

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

On remand, the same two-justice majority struck one of White's rape convictions, and again chose to strike Count 2 without any explanation for that selection. (Slip opn. at pp. 3, 25 (*White II*).) Relying on this court's decision in *Gonzalez* not to overrule *Craig* and structural and textual differences between the oral copulation and rape statutes the majority found that this case was governed by *Craig* and not *Gonzalez* or section 954. (*White II*, at pp. 6-7.) The majority reasoned, "The People's reliance on case law that allows convictions of multiple offenses from a single act, subject to section 654 limitations is misplaced. Those cases address different offenses, with different elements." (*Id.* at p. 24.) Accordingly, the majority concluded: "[T]he prosecution properly pled two counts of rape

as *separate statements of the same offense*, but because the counts are in fact separate statements of only one offense, *Craig, supra,* 17 Cal.2d 453 holds there may be only one conviction for the single act." (*Ibid.*)

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

This court granted the People's petition to review the question of whether a defendant may stand separately convicted of both rape of an intoxicated person and rape of an unconscious person based on the same act.

ARGUMENT

I. WHITE'S SEPARATE CONVICTIONS FOR RAPE OF AN INTOXICATED PERSON AND RAPE OF AN UNCONSCIOUS PERSON BASED ON THE SAME ACT WERE PROPER BECAUSE THEY ARE DIFFERENT OFFENSES

Section 954 permits multiple convictions based on the same act or indivisible course of conduct where that act or conduct constitutes more than one offense. Whether separate code provisions define more than one offense turns on whether the Legislature intended them to be different offenses. Here, the Legislature intended rape of an intoxicated person and rape of an unconscious person to be different offenses. First, examining the text of the rape statutes evidences an intention for the numbered paragraphs of subdivision (a) of section 261 to define different rape offenses—the offenses differ in their necessary elements, neither is a lesser included offense of the other, and the Legislature proscribed divergent punishments for some rape offenses. Second, the statutory framework addressing sex crimes supports the textual interpretation of different offenses, in particular the existence of virtually identical provisions—elements and punishment—under the oral copulation statute, which this court already found constituted different offenses. Third, the legislative history—the repeated expansion of liability under the rape statutes, and with the express intent to conform rape statutes to oral copulation, sodomy and sexual penetration statutes—evidences an intention on the part of the Legislature to fully capture a defendant's culpability in committing a particular rape. Vacating an otherwise valid conviction would be contrary to that purpose. Fourth, and finally, the court's decision in *Craig* characterizing the *former* rape statute as setting forth only one offense is, just as this court found in *Gonzalez*, distinguishable from our more modern statutes and therefore no bar to multiple convictions for rape based on the same act. Accordingly, because

rape of intoxicated person and rape of an unconscious person are different offenses, section 954 permits White's dual convictions based on the same act of intercourse.

A. Section 954 Permits Multiple Convictions Based on the Same Act or Indivisible Course of Conduct Where, Among Other Things, the Act or Conduct Constitutes More than One Offense

Section 954 provides that a defendant may be charged with and convicted of (1) "two or more different offenses connected together in their commission[]"; (2) "different statements of the same offense"; or (3) "two or more different offenses of the same class of crimes or offenses[.]"

Applying section 954, this court has repeatedly affirmed the rule "that the same act can support multiple charges and multiple convictions." (*Gonzalez*, *supra*, 60 Cal.4th at p. 537; see also, e.g., *People v. Reed* (2006) 38 Cal.4th 1224, 1226 (*Reed*) [felon-in-possession and carrying a concealed and loaded firearm in public]; *People v. Ortega* (1998) 19 Cal.4th 686, 693 (*Ortega*) [grand theft and carjacking for the single act of taking a car]; *People v. Pearson* (1986) 42 Cal.3d 351, 354 (*Pearson*) [sodomy and lewd conduct for the same act of sodomy]; *People v. Montoya* (2004) 33 Cal.4th 1031, 1034 [carjacking and unlawful taking of a vehicle].)

There are only two exceptions to the rule permitting multiple convictions based on the same act: One is the statutory exception set forth in section 496, expressly prohibiting separate convictions for stealing and receiving stolen property; and the other is a judicially created exception for lesser included offenses (*Reed*, 38 Cal.4th at p. 1227 ["[a] judicially created exception to the general rule permitting multiple conviction 'prohibits multiple convictions based on necessarily included offenses.' [Citation.]"]).

While a person may be convicted of more than one offense arising out of the same act or course of conduct, a person may be punished only once. (*Reed*, *supra*, 38 Cal.4th at p. 1226.) "Section 954," at issue in this case,

only "concerns the propriety of multiple convictions, not multiple punishments, which are governed by section 654." (*Gonzalez*, *supra*, 60 Cal.4th at p. 537.) Thus, when "a single act constitutes more than one crime . . . , the person committing the act can be convicted of each of those crimes [under section 954], but [section] 654 prohibits *punishing* the person for more than one of them." (*People v. Kramer* (2002) 29 Cal.4th 720, 722, italics original.) Notably, because a defendant is only punished once for a single act or course of conduct, he or she suffers no adverse effect from section 954's permitting multiple convictions. (*People v. Tideman* (1962) 57 Cal.2d 574, 586 (*Tideman*) ["[A]s both offenses were pleaded, and both statutes were violated by one act, defendant is guilty of both offenses and he is not prejudiced by being convicted of both. His statutory rights would be prejudiced by being sentenced *and punished* for both."].)[2]

B. Whether Separate Code Provisions Describe More than One Offense Turns on Whether the Legislature Intended Them to Be Different Offenses

Consistent with section 954, a defendant may sustain multiple convictions for a single act or course of conduct where that act or course of conduct constitutes the commission of different offenses. Last year, this court in *Gonzalez* considered the meaning of "different offenses" in addressing the question of whether section 954 permitted a defendant to be convicted of both oral copulation of an unconscious person (§ 288a, subd. (f)) and oral copulation of an intoxicated person (§ 288a, subd. (i)) based on the same act. (*Gonzalez*, *supra*, 60 Cal.4th at p. 535.) The court explained that whether two Penal Code provisions describe different offenses is a

---

[2] Consistently, the trial court here only sentenced White to prison on count 1 and stayed sentence on count 2 pursuant to section 654. White is therefore not doubly punished by two rape convictions based on the same act. (*Tideman,* 57 Cal.2d a p. 586.)

matter of legislative intent. (*Id.*, at p. 537.) In addressing the question, a court begins by examining the statute's words, giving them a plain and commonsense meaning, in context of the entire statute, and keeping in mind the nature and obvious purpose of the statute. (*Ibid.*) The court cautioned: "We must harmonize ' the various parts of a statutory enactment ... by considering the particular clause or section in the context of the statutory framework as a whole.'" (*Ibid.*, citation omitted.) And, where statutory language is susceptible to more than one reasonable construction, it is appropriate to look at the legislative history in aid of ascertaining legislative intent. (*Id.* at pp. 537-538.)

Applying these principles, the court in *Gonzalez* first looked at the text of subdivisions (f) and (i) of section 288a and found that the offenses were different because the "offenses differ in their necessary elements—an act of oral copulation may be committed with a person who is unconscious but not intoxicated, and also with a person who is intoxicated but not unconscious—and neither offense is included within the other. (*Id.* at p. 539, citing *Blockburger* v. *United States* (1932) 284 U.S. 299, 304 ["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."].)[3]

An examination of the entire oral copulation statute bolstered the court's conclusion that the offenses were different. The court observed that subdivision (a) defines what conduct constitutes an act of oral

---

[3] For the court's convenience, the text of section 288a is reproduced in Appendix A at pp. 6-8, along with rape and the two other major sex offense statutes (sodomy and sexual penetration) that are relevant to the analysis in this case. The modern version now lists the different forms of rape under subdivision (a), paragraphs (1)-(7).

copulation and thereafter each subdivision defines various ways that the act may be criminal, with each subdivision setting forth all of the elements of a crime and proscribing a specific punishment that was not all the same.

The court found the fact that each subdivision of section 288a was drafted to be self-contained also "supports the view that each describes an independent offense and therefore section 954 is no impediment to a defendant's conviction under more than one subdivision for a single act." (*Id.* at p. 539.) Thus, after examining the text of the statutory provisions at issue and the statute as a whole, the court concluded that a defendant may properly be convicted of violating more than one subdivision of section 288a under section 954. (*Ibid.*)

In reaching this conclusion, the court in *Gonzalez* rejected the Court of Appeal's application of its decision in *Craig, supra,* 17 Cal.2d 453 to preclude multiple section 288a convictions based on one act. (*Gonzalez, supra,* 60 Cal.4th at pp. 539-538.) In *Craig,* the court held that a defendant could not be convicted of multiple rapes based on one act of forcible sexual intercourse upon a 16 year old girl under former section 261.[4] (*Craig, supra,* 17 Cal.2d at p. 455.) The court in *Gonzalez* found *Craig* was distinguishable and indicated that its holding and reasoning were limited: "*Craig* did not hold that a single Penal Code section could never compromise multiple offenses; it simply concluded, based on the wording and structure of the statute, that *former* section 261 set forth only one offense that could be committed under several different circumstances, as described in its several subdivisions. This conclusion flowed naturally from the wording and structure of *former* 261. Indeed,

---

[4] When *Craig* was decided in 1941 section 261 listed six subdivisions. (App. A at p. 1.) Statutory rape was listed under subdivision (1) and forcible rape was listed under subdivision (3). (*Ibid.*).

Craig acknowledged that " '[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.*'" (*Craig, supra,* 17 Cal.2d at p. 457.)" (*Gonzalez, supra,* 60Cal.4th at p. 539, first italics added.) *Craig* therefore was no bar to multiple oral copulation convictions based on the same act.

Applying the same analytical framework, and harmonizing the modern oral copulation and rape statutes with each other and the statutory framework governing sex offenses generally, this court should reach the same conclusion in this case and uphold dual convictions for rape of an intoxicated person and rape of unconscious person based on the same act.

C. The Legislature Intended Rape of an Intoxicated Person and Rape of an Unconscious Person to Be Different Offenses

A plain reading of the text of the modern rape statutes, in context, and keeping in mind the nature and obvious purpose of the statute as well as consideration of the statutory framework as a whole, demonstrates that the Legislature intended rape of an intoxicated person and rape of an unconscious person to be different offenses subject to multiple convictions.

1. Textual: A plain and commonsense reading of the rape statutes supports the conclusion that the Legislature intended subdivisions (a)(1)-(7) of section 261 to define separate rape offenses

The text of the modern rape statutes, which have been substantially and materially amended since *Craig,* demonstrates a legislative intent for each rape defined in subdivision (a) of section 261 to be a different offense because, in a manner substantively mirroring the oral copulation statute, each rape consists of different elements, none is a lesser included offense of the other and different rapes give rise to different punishments.

a. Each rape defined in subdivision (a) of section 261 is a separate offense because each requires proof of different elements and none is a lesser included offense of the other

Rape of an intoxicated person and rape of an unconscious person are different offenses because, just like their counterpart offenses under the oral copulation statute examined in *Gonzalez,* they "differ in their necessary elements," and "neither offense is included within the other." (See *Gonzalez, supra,* 60 Cal.4th at p. 539.) In fact, the elements for each offense are identical under the rape and oral copulation statutes with the exception of the particular sex act (intercourse versus oral copulation). (Compare § 261, subds. (a)(3) & (4), App. A at p. 1, and § 288a, subds. (f) and (i) , App. A at pp. 5-6; compare also CALCRIM Nos. 1002 (rape of intoxicated victim) and 1003 (rape of an unconscious victim) with CALCRIM Nos. 1017 (oral copulation of an intoxicated person) and 1018 (oral copulation of an unconscious person).)

As for the crimes' respective elements, at the time of White's convictions in 2011 and presently, rape of an intoxicated person requires proof of intercourse with a person who was not a spouse and the person was incapable of resisting due to intoxication, whether by an intoxicating substance, anesthetic or controlled substance. (§ 261, subd. (a)(3) (2011) and § 261, subd. (a)(3) (2015).) Rape of an unconscious person is the same except that the victim must be incapable of resisting due to unconsciousness. (§ 261, subd. (a)(4) (2011) and § 261, subd. (a)(4) (2015).) Unconsciousness exists under four separate conditions ranging from being unconscious or asleep to being unaware due to fraud in fact. (*Ibid.*) Just as this court found when examining the same offenses under the oral copulation statute (*Gonzalez,* 60 Cal.4th at p. 539), the rape offenses differ in their necessary elements—an act of rape may be

committed with a person who is intoxicated but not unconscious, and also with a person who is unconscious and not intoxicated—and neither offense is included in the other.[5] Therefore, the two offense are in fact different.

Indeed, the same is true for each of the rapes defined in each of the paragraphs of section 261, subdivision (a) as well: each has different elements and none is a lesser included offense of the other. (App. A at pp. 1-2.) This consistency—that each offense is different—bolsters the conclusion that the Legislature intended all of them to be separate rape offenses.

Although the different subdivisions of section 261 also had different elements when *Craig* was decided in 1941 that does not negate the relevance of this factor here because *Craig* did not apply the elements test. The court, based on outdated historical considerations discussed *post*, treated the two rape offenses at issue, statutory rape and forcible rape, as lesser included offenses, one of the two exceptions to the multiple convictions. (*Craig,* 17 Cal.2d at p. 457 ["Where, as here, the charge and proof disclose a *single* act of intercourse resulting from *force* accomplished upon a *minor*, but one punishable rape is consummated, for the proof, though dual in character, necessarily crystallizes into one 'included' or identical offense."]; see also *White II,* at p. 20 [agreeing "the court in *Craig* treated the issue before it as one involving included offenses..."]; see also, *People v. Kehoe* (1949) 33 Cal.2d 711, 715–716 [citing *Craig* for the

---

[5] With the exception of subdivision (a)(5), concerning rape by artifice, there is no substantive difference between section 261 in 2011 and the current version. In 2013, the Legislature expanded the reach of rape through artifice to include rapes of persons who submit under the belief that the person committing the act was "someone known to the victim other than the accused" instead of just persons who submit under the belief that the person committing the act was the victim's spouse. (2013 Cal. Legis. Serv. Ch. 259 (A.B. 65) (WEST).)

proposition that a defendant cannot suffer convictions for both a greater and a lesser crime].)[6]

But, as this court has repeatedly recognized in a variety of contexts, the "elements test" is the primary means for determining whether offenses are different from one another and therefore subject to multiple convictions. (See, e.g., *Reed*, 38 Cal.4th at pp. 1227-1229 [holding the multiple conviction bar is governed solely by the elements test]; *People v. Sloan* (2007) 42 Cal.4th 110, 119 ["'[I]t makes no sense to look to the pleading, rather than just the legal elements, in deciding whether conviction of two charged offenses is proper.[]'[]."]; *Tideman*, *supra*, 57 Cal.2d at pp. 584-586 [recognizing the charges of abortion and murder, although based on the same act, are obviously different offenses because they have different elements]; *People v. Hoyt* (1942) 20 Cal.2d 306, 317 ["The test is 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 elements and one is not included in the other."].) Applying that test here, as this court did in *Gonzalez*, yields the same result. White's two rape convictions are different offenses.

Further, consistent with each being a different offense, as opposed to one offense of rape that may be committed by alternative theories or means, the prosecution is required to prove the elements for each type of rape

---

[6] Due to legislative recasting in 1970 to remove the stigma of a rape label in cases of statutory rape, statutory rape was removed from section 261, renumbered (§ 261.5) and relabeled "unlawful intercourse." (*Johnson v. Dep't of Justice* (2015) 60 Cal.4th 871, 885, citing Sen. Bill No. 497 (1970 Reg. Sess.) chaptered as Stats. 1970, ch. 1301, §§ 1, 2, pp. 2405–2406.)