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

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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

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[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

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[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,

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[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

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[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

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[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.)

beyond a reasonable doubt and the jury is required to reach a unanimous verdict. (See CALCRIM No. 3515 and 3550.) Generally, where there is but one offense that may be committed by alternate means or theories the jury need not specifically agree upon which theory it found beyond a reasonable doubt. (*People v. Davis* (1992) 8 Cal.App.4th 28, 32-45; *see also Schad v. Arizona* (1991) 501 U.S. 624, 643-645 (plur. opn.) [upholding as constitutional Arizona's characterization of first-degree murder as a single crime as to which a jury need not agree on one of the alternative statutory theories of premeditated or felony murder].) For instance, in a murder prosecution, six jurors could find premeditation and six jurors could find felony murder. (*People v. Davis, supra,* 8 Cal.App.4th at pp. 32-45; *In re Walker* (1974) 10 Cal.3d 764, 781.) The same may be said of alternative theories within a particular element such as force or fear in rape or other violent crimes. These are typically denoted by the presence of the disjunctive and the jury is not required to be unanimous as to which "alternative element" or "theory of force," only that it occurred in one of the several distinctly listed ways. (See *People v. Knox* (1988) 204 Cal.App.3d 197, 202, 251; *People v. Hallock* (1989) 208 Cal.App.3d 595, 608; *People v. Bergschneider* (1989) 211 Cal.App.3d 144, 155, disapproved of on other grounds by *People v. Griffin* (2004) 33 Cal.4th 1015. Therefore, because subdivisions (a)(3) and (a)(4) each set forth different elements, neither is a lesser included offense of the other and the jury is required to unanimously agree on the existence of each, the two rape offenses are different offenses and subject to multiple convictions consistent with section 954.

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

Although different punishments are not required, the existence of different punishments for some rape offenses defined under subdivision (a) of section 261 further supports the conclusion that the Legislature intended them to be different offenses. Post-*Craig*, the punishment provision for section 261, section 264, was significantly amended from an indeterminate term of up to 50 years to determinate term sentencing.[7] The versions of section 264 in existence at the time of White's conviction and presently are the same. (§ 264 (West 2011); see also App. A at p. 3.) Just as in the oral copulation statute examined in *Gonzalez*, section 264 provides a sentencing range of 3, 6 and 8 years for rapes of an intoxicated or unconscious person, among other provisions, but provides for a different, higher sentencing range for forcible rape of minors. (Compare § 288a, subd. (c)(2) with § 264.) For minors under 14 years old the sentencing range for forcible rape is 9, 11 and 13 years and for minors older than 14 years old the sentencing range is 7, 9 and 11 years. (§ 264.)

Importantly, with respect to the differences in punishment, it does not matter that none of those specific differences are applicable to this case. The same was true in *Gonzalez,* where the punishments for the two subdivisions at issue were equivalent. (See *Gonzalez, supra,* 60 Cal.4th at p. 535.) This court still found it relevant that the punishments for the various offenses were "not *all* . . . the same" because it showed that the

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[7] At the time of *Craig* and until 1979, section 264 provided for indeterminate terms of not more than 50 years for each violation of the rape statute. As to statutory rape, the court had the option to treat it as a misdemeanor if the defendant pled guilty or a jury recommended it. (Stats. 1923, ch. 130, § 1, pp. 271-272; see also, App. A at p. 3.)

Legislature could not have intended *any* of the various offenses to be the same crime. (See *id.* at p. 539, italics added.) Applying the same reasoning here, rape of an intoxicated person and rape of an unconscious person are not the same offense.

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

Notwithstanding the identical nature of White's two rape convictions and the oral copulation convictions in *Gonzalez*—both in terms of the elements and punishment—the Court of Appeal majority determined that the rape convictions were not different offenses. The decision rested largely on the majority's assumption that this court in *Gonzalez* made self-containment a requirement, that is each paragraph under subdivision (a) is required to have all of the elements of the offense and the punishment in order to be different. (*White II,* at pp. 16-17 ["Unlike the subdivisions of section 288a, these subdivisions under section 261, subdivision (a) do not contain all of the elements of a crime," "They are not self-contained," and "In contrast, section 288a sets out a specific punishment under each subdivision that describes a certain type of oral copulation"].) But this court did not make self-containment a requirement. In fact it did not consider this aspect of the structure of section 288a until after it found the offenses different because of they had different elements and were not lesser included offenses of the other. (*Gonzalez,* 60 Cal.4th at p. 539.)[8] The fact that

[8] To be sure, if it were a requirement section 288a would not fully comply. Subdivision (b)(2) of section 288a, stating that oral copulation by a defendant over 21 with a victim under 16, indicates only that the crime is a felony and does not provide any sentencing range. Just as in the rape

(continued...)

each subdivision was self-contained was only a consideration *supporting* "the view that each [subdivision of section 288a] describes an independent offense." (*Ibid.*)

Additionally, while the majority correctly observed that the punishment for rape is not included within each of the particular paragraphs of subdivision (a), it incorrectly determined that each paragraph does not contain the requisite elements because it is not organized in a fashion identical to section 288a. According to the majority, section 261 is more naturally read as providing for one rape offense with alternative means of negating consent as opposed to elements of different offenses. (*White II,* at p. 17.) There is no meaningful difference between how section 288a sets forth the elements of the offenses and subdivision (a) of section 261. Just as this court interpreted the subdivisions of section 288a to identify different elements so should it interpret the separately numbered paragraphs of subdivision (a) of section 261.

Sections 288a and 261 both start by defining the sexual act covered by their respective statutes. (Compare § 288a, subd. (a) defining oral copulation as "the act of copulating the mouth of one person with the sexual organ or anus of another person" and section 261, subdivision (a), defining rape as "the act of sexual intercourse accomplished with a person not the spouse of the perpetrator".) The subdivisions or paragraphs then define various ways the act, whether it be sexual intercourse or oral copulation, may be criminal. (See *Gonzalez,* 60 Cal.4th at p. 539 ["Subdivision (a) of section 288a defines

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(...continued)
statute, the sentencing range for this offense is provided in a different statute, § 18, and must be read in light of that provision.

what conduct constitutes oral copulation. Thereafter, subdivisions (b) through (k) define various ways the act may be criminal."].) Both require the definition and particular subdivision to be read together to completely define the elements of the offense. (Compare § 288a, subds. (b)-(k) and § 261 subds. (a)(1)-(7).) Hence, there is no substantive difference between the two provisions. Given the identical nature of the offenses, the mere fact that the different ways intercourse may be criminal are set forth in paragraphs under subdivision (a) as opposed to separate subdivisions should not be enough to reach a different conclusion. This court in *Gonzalez* acknowledged as much when it pointed out that *Craig* did not hold a single Penal Code provision could never compromise different offenses and found the subdivisions of section 288a did, in fact, compromise of different offenses. (*Gonzalez,* 60 Cal.4th at p. 529.) In other words, while structure is a relevant consideration, it is not necessarily determinative. More important is the substance of the provisions. The substance of the statutory provision is more relevant. As in *Gonzalez,* therefore, each rape defined in subdivision (a) of section 261 sets forth all the elements of the crime and supports the conclusion that the Legislature intended the offenses to be different.[9]

The different structures of the rape and oral copulation statutes are also readily explained by the history of the two statutes. The crime of rape was set forth in the first Penal Code enacted in 1872 (indeed predated it) and, as society's understanding of the crime has evolved, it has been expanded by amendments to existing rape provisions and by the

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[9] As set forth in Argument II, at minimum the subdivisions are different statements of the same offense if not different offenses altogether and different statements of the same offense are also subject to multiple convictions under section 954.

addition of new penal code sections. In 1872 rape was addressed in four provisions (§§ 261, 262, 263 and 264) whereas presently it is covered by nine different provisions. In contrast, the oral copulation statute is a construct solely of the twentieth century, having first been enacted in 1921. (Added by Stats. 1921, c. 848, p. 1633, § 2.) It is unremarkable that the Legislature, in creating an entirely new crime a half-century later, drafted a more comprehensive singular penal code provision.[10] Consequently, the different form for defining rape offenses in section 261 does not support treating rape differently than oral copulation.

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

Looking more broadly to the statutory scheme buttresses the conclusion that the Legislature intended subdivision (a) of the modern section 261 to define separate rape offenses. The statutory scheme does this in several ways. First, as with the punishments for rape, the Legislature proscribed additional penal consequences for some of the listed rape offenses and not others, which shows it considered them distinct. Second, the Legislature evidenced an intention to treat rapists like other sex offenders by enacting similar provisions—elements and punishments—not only with respect to oral copulation but also sodomy and sexual penetration. As with these other sex offenses, the rapes defined in subdivision (a) of section 261 should be understood to

[10] As demonstrated below in the discussion of the legislative history (§ I.C.3), the common nature of the various means of committing rape and oral copulation is by design, to ensure conformity among rape and the other major sex crime statutes, oral copulation, sodomy (§ 286), and sexual penetration (§ 289).

represent different offenses. Third, the Legislature has not enacted any statutory authority for striking or consolidating multiple rape convictions based on the same act. There is absolutely no guidance concerning how to dispose of the additional conviction (e.g., strike or consolidate), what considerations apply if striking a conviction or what happens if the remaining conviction is later reversed. There is no guidance because the Legislature intended the offenses to be different and therefore subject to sections 954 and 654.

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

Variation in penal consequences for rapes defined in subdivision (a) of section 261 evidence a legislative intent to treat them as substantively distinct and therefore as different offenses. For example, section 667.6, which mandates full consecutive terms for multiple sex offenses, applies to "Rape in violation of paragraph (2), (3), (6) or (7) of subdivision (a) of section 261." (§ 667.6, subd. (e).) Section 667.61 provides for a life term for anyone who, under the additional circumstances specified, commits rape "in violation of paragraph (2) or (6) of subdivision (a) of Section 261." (§ 667.61, subd. (c).)[11] In addition, section 290.008 requires mandatory registration for a defendant who commits "Any offense defined in paragraph (1), (2), (3), (4), or (6) of subdivision (a) of Section 261." (§ 290.008, subd. (c)(2).) Also, the information about a registered sex offender that may be published on the Internet may vary based on which paragraph of

[11] It also provides for full consecutive sentences for convictions under section 262 (spousal rape) and section 264.1 (rapes in concert). (Pen. Code, § 667.6, subds. (e)(2)-(3).)

subdivision (a) the offender violated. (See e.g., § 290.46, subds. (b) & (c).) And the availability of probation also turns on which paragraph is violated. (See § 1203.065, subds. (a) & (b).) Finally, violations of the different paragraphs could have different implications for future licensing. (See, e.g., Veh. Code, § 13377, subd. (a)(2).) For the same reasons this court found variation in punishment evidenced different offenses in *Gonzalez*, the variation in both punishment and other penal consequences evidences different offenses here.

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

Looking at the statutory scheme of sex offenses generally, it is apparent the Legislature intended to treat sex offenses similarly and not to carve out an exception where a rapist is treated differently than other sex offenders.

Just as with the oral copulation statute, the circumstances of the various rape offenses and their attendant punishments are repeated in virtually identical fashion in the statutes governing sodomy (§ 286) and sexual penetration (§ 289). (Compare rape by intoxication, unconsciousness, force, threat of retaliation and artifice with § 289(d) [sexual penetration by unconsciousness], § 289(e) [sexual penetration by intoxication], § 289(a)(1)(A) [sexual penetration by force], § 289(a)(1)(D) [sexual penetration by threat of retaliation] and § 289(f) [sexual penetration by artifice] and § 286(f) [sodomy by unconsciousness], § 286(i) [sodomy by intoxication], § 286(c)(2) [sodomy by force], § 286(f) [sodomy by threat of retaliation], § 286(j) [sodomy by artifice].)[12] The common provisions

[12] Section 286, like rape, provides a sentencing range of 7, 9 and 11 years for forcible rape of a child over 14 years of age while section 289 tracks section 288a and provides for 6, 8 and 10 years.

and punishment reflect a legislative intent to treat all sex offenders alike. (*People v. Lopez* (2003) 31 Cal.4th 1051, 1060 [holding consistent provisions call for consistent treatment by the courts] .) Finding someone who commits oral copulation subject to multiple convictions but not a rapist violates this principle. Indeed, other than invoking *Craig*, the Court of Appeal majority provides no rational basis for treating rapists differently than similarly situated sex offenders. And, there is none.

The logic behind conformity in treatment among the major sex crimes statutes is both inherent and, as discussed more thoroughly below, express, as time and time again, the Legislature has expressly stated its intention to conform the circumstances defining rape with its analogue provisions under the oral copulation, sodomy and sexual penetration.

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

As previously noted, this court has repeatedly recognized the application of sections 954 and 654 to multiple convictions based on the same act in a variety of contexts and, in particular concerning sex offenses. (§ I.A.) Further serving to show that the Legislature intended the same for rape offenses, and that they are different offenses, is the complete absence of any counter statutory framework addressing multiple rape convictions. And, without those provisions a jury verdict is judicially nullified and a rapist is spared the full measure of his culpability, up to and including the possibility of no conviction if his remaining conviction is reversed.

Some procedural history of the case is significant for this point. White was separately charged for each rape. (CT 173-176 .) His jury was instructed on the elements for each rape and the requirement of a unanimous verdict. (CT 63-65.) The jury was expressly instructed that

each count was a separate crime and to return separate verdicts for each one. (CT 66.) The trial court imposed a sentence on one and stayed a sentence on the other. (CT 184.) The Court of Appeal majority then struck White's conviction for rape of unconscious person without any explanation as to why it selected the one it did.

There is no statutory authority for vacating a rape conviction in this manner. Such judicial intervention should not be built into the proceedings as necessary as a matter of law. First, multiple convictions allow the jury to reach a verdict commensurate with the defendant's culpability, and the danger posed by his behavior. (See e.g. *People v. Eid* (2014) 59 Cal.4th 650, 657 [permitting two convictions that were lesser included offenses of the charged single crime but not of each other because multiple convictions allow a jury "to tailor its verdict to reflect its determination of the full extent of defendants' criminal acts"].) Vacating the conviction has the effect of masking the full measure of the defendant's guilt and shielding the defendant from any of the collateral consequences attendant to the vacated conviction.

Second, and related, vacating an otherwise proper verdict impermissibly intrudes upon the sanctity of the jury verdict. "With few exceptions, once the jury has heard the evidence and the case has been submitted, the litigants must accept the jury's collective judgment out of deference to collective judgment of the community and need for finality." (*People v. Palmer* (2001) 24 Cal.4th 856, 863, citing *United States v. Powell* (1984) 469 U.S. 57, 66-67.) Courts are, in general, cautious about interfering with the jury verdict, and do so only under particular circumstances. All of the standards of review on appeal demonstrate this. (See e.g. *People v. Watson* (1956) 46 Cal.2d 818 [requiring a showing of a miscarriage of justice before a court will overturn a verdict on state law grounds]; and see *People v. Johnson*

(1980) 26 Cal.3d 557, 578 [all inferences are drawn in favor of the jury's verdict].) Similarly, before a court can strike a prior conviction used to enhance a sentence under the Three Strikes Law in "furtherance of justice" under section 1385 the court must examine a defendant's entire background to determine whether he or she falls outside of the law. (*People v. Williams* (1998) 17 Cal.4th 148, 161.) The public's confidence in the jury system depends, in large part, on the sanctity of the verdict and its staying power. Reading section 261 to require vacating an otherwise valid verdict will therefore undermine the reliability of the entire jury trial process.

The Legislature is also completely silent about which rape conviction should be stricken or what to do if the remaining conviction is reversed on appeal or habeas. (Compare, *Sloan, supra*, 42 Cal.4th at p. 122 ["Where one of two multiple convictions valid under section 954 is overturned on appeal or habeas corpus, the remaining and intact conviction, even though it arose from the same facts or indivisible course of conduct as the conviction that is being reversed, may be substituted in its stead, with the stay of execution of sentence lifted at resentencing, so that punishment on the valid conviction can be imposed in the interests of justice."].)

There are also practical problems involved with implementing a vacating procedure. Consider the case where the sentencing ranges are different: a defendant is convicted of both use of force upon a minor over 14 years old (§ 261, subd. (a)(2) & § 264) and rape of a developmentally disabled person (§ 261, subd. (a)(1)) based on the same act. The facts supporting force fall within the low term of the 7, 9 and 11 sentencing triad for that offense but the facts supporting the rape of a developmentally disabled person fall within the aggravated term of the 3, 6 and 8 year sentencing triad for that offense. (§ 264.) How does

the court choose the correct sentence, let alone determine which conviction should be stricken?

In *Craig*, the court "consolidated" the convictions (*Craig,* 17 Cal.2d at p. 459), and presumably this would mean that at least the subdivisions serving the bases of the two convictions would be reflected in the defendant's abstract of judgment. But the Legislature did not enact any provisions concerning consolidation either.

In stark contrast, under an application of sections 954 and 654, the sanctity of the jury verdicts is preserved as well as the ability to use the stayed conviction at a future date if necessary in the interests of justice. There is no guidance concerning striking or consolidating an otherwise valid rape conviction because the Legislature intended the offenses to be different (or as set forth below, different statements of the same offense), and therefore subject to sections 954 and 654 and their related provisions.

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

The legislative history and other extrinsic aids support the conclusion that the Legislature intended the subdivisions (a)(1)-(7) of the modern section 261 to constitute different offenses. (See *People v. Zambia* (2011) 51 Cal.4th 965, 977 ["Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent."].) As demonstrated below, rape laws are rooted in a very complex history, culturally and legally. In the past, including the time of *Craig*, rape claims in particular were viewed with distrust because of society's long held misconceptions about the nature of

the crime and a woman's response to unwanted sexual conduct. That distrust was reflected in both statutory and decisional law. However, post-*Craig,* there was a profound cultural shift in society's understanding of rape—a refocusing on the conduct of the rapist and not the victim. The Legislature consequently amended the rape statutes to eliminate the historical bias, expand liability under the rape statutes commensurate with society's more enlightened view of rape, and to bring the rape statutes into conformity with other major sex crimes statutes. Each of these ostensible objectives would include permitting dual rape convictions based on the same act, just as this court found in the context of oral copulation.

This court in *People v. Barnes* (1986) 42 Cal.3d 284 (*Barnes*) thoroughly examined the historical bias against rape victims reflected in the early codification of rape and carried over from common law. (*Id.,* at pp. 297-302.) For example, to prove rape there were requirements of "utmost" resistance to show genuine lack of consent and of corroboration of the victim's testimony. The victim was subjected to a psychiatric evaluation and her prior sexual conduct was admissible as evidence of consent. The jury was also instructed to view the victim's testimony with caution, particularly of a victim of unchaste character.[13] (*Ibid.*)

Beginning in the 1970s, however, the Legislature and then the courts made significant in-roads into correcting for this bias in the law by amending and reinterpreting the rape statutes to facilitate rape prosecutions. (*Barnes,* 42 Cal.3d at p. 301-302.) Among other changes, the Legislature

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[13] One version of an instruction, known as the "Hale instruction" and given until 1975 read: "'A charge such as that made against the defendant in this case is one which is easily made and, once made, difficult to defend against, even if the person accused is innocent. [¶] Therefore, the law requires that you examine the testimony of the female person named in the information with caution.'" (*Barnes*, 42 Cal.2d at p. 295 [internal citations omitted].)

eventually prohibited psychiatric evaluations, first lessened and then eliminated the resistance requirement, made victims' prior sexual conduct generally inadmissible (Evid. Code, § 1103) and prohibited the mandatory instruction to view a victim's testimony with caution. (*Barnes,* 42 Cal.2d at pp. 301-302, citing §§ 1127d and 1127e; Evid. Code, § 1103 and *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 871, 873-877 [after an "examination of the evolution of the cautionary instruction, and with the benefit of contemporary empirical and theoretical analyses of the prosecution of sex offenses in general and rape in particular," this court determined that the "Hale instruction" "has outworn its usefulness and in modern circumstances is no longer to be given mandatory application.")

At the same time the Legislature repeatedly expanded the rape statute to criminalize more circumstances constituting rape in keeping with society's evolving understanding of the nature of rape and the different ways of committing it. By the late 1970s, in recognition that males and spouses can also be victims of rape the Legislature made rape gender neutral and enacted section 262 prohibiting spousal rape under certain conditions.[14] (Stats. 1979, ch. 994.) In the 1980s, the Legislature removed the resistance requirement altogether after coming to the realization that a failure to resist was not evidence of consent. (*Barnes,* at p. 301 ["For the first time, the Legislature has assigned the decision as to whether a sexual assault should be resisted to the realm of personal choice."].) It also redefined "rape under threats" to remove the requirements of fear of great

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[14] As one commentator noted, California, along with several other States, deleted spousal immunity from their rape statutes and "have made clear their intent not to follow the common law rape exemption that was established, ostensibly without legal precedent, by Lord Matthew Hale in the 17th century." (*Review of Selected 1979 California Legislation* (1979) Pacific L.J. 409-410.)

bodily injury and present ability in favor of fear of unlawful injury. (Stats. 1980, ch. 587; Leg. Counsel's Dig. of Assem. Bill No. 2899, 4 Stats. 1980 (Reg. Sess.) Summary Dig., p. 158; see also Review of Selected 1980 California Legislation, Crimes (1980) 12 Pacific L.J. 321-322.)

And over the course of the last 40 years the Legislature continued to expand the circumstances constituting rape and to facilitate prosecution of these offenses . (See e.g. Stats. 1981, ch. 849 [expanding rape to include rape by threat of retaliation]; Stats. 1984, chs. 1634 & 1635 [expanding rape to include rape by abuse of authority]; Stats. 2002, ch. 302 [adding fraudulent representation the sexual act is for a professional purpose to the conditions of unconsciousness].)

Importantly, most of the amendments were also designed to bring the four major sex crimes statutes into conformity with each other. The various amendments expanding the circumstances under which the particular sex offense may be committed were made either expressly applicable to each of the major sex offense statutes or rape statutes were expressly brought in line with the other statutes. (See e.g. Leg. Counsel's Dig. of Assem. Bill No. 2899, 4 Stats. 1980 (Reg. Sess.) Summary Dig., p. 158 ["This bill would delete the provisions relative to force, violence or threats and the element of resistance in connection therewith and provide for rape accomplished against the will by force or fear of immediate and unlawful bodily injury."] Ass. Comm. on Public Safety Report on Assem. Bill No. 485 (1986 Reg. Sess.), at p. 4 [noting 1986 bill recasts various aspects of major sex offense statutes to ensure conformity with each other]; Leg. Counsel's Dig., Assem. Bill No. 85, Ch. 40 (1993-1994 Ex. Sess.) [amending rape, sodomy and oral copulation to expand delete that element and add language that would require only that the defendant knew or reasonably should have known of the victim's condition]; Leg. Counsel's Dig., Assem. Bill No. 1844, Ch. 219 (2009-2010 Reg. Sess.) [Legislature

applied Chelsea's law across the board to offenses for rape, sodomy, oral copulation, among others].) The legislative history reveals the Legislature's clear intent to 1) broaden a rapist's criminal liability to conform to contemporary standards, and 2) make the rape statutes consistent with other sex crimes. This history, along with the text and statutory framework, supports the conclusion that the modern section 261 provides for different offenses subject to multiple convictions.

Despite the profound shift in the legal landscape of section 261, the majority resurrected the former provision and *Craig's* archaic interpretation to preclude White's dual convictions for rape of an unconscious person and intoxicated person.[15] As noted by Justice Benke, the majority's analysis missed the mark because it chose to be guided by a reason supporting the court's decision in *Gonzalez* not to overrule *Craig*—a comparison of the text and structure of former section 261 and section 288a—instead of the actual holding and analytical framework relied upon to reach it. (*White II,* at p. 14 ["Because we read *Gonzalez* as reaffirming *Craig*, *supra,* 17 Cal.2d 453, at least in the context of the interpretation of the former section 261, we must determine if the version of section 261 under which White was charged is more similar to the former section 261 interpreted by the court in *Craig* or the version of section 288a[] that the court interpreted in *Gonzalez, supra,* 60 Cal.4th 533."].) The majority therefore applied the

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[15] It appears that *Craig* lay essentially dormant for decades—no doubt because courts and parties reasonably understood it to be obsolete—until resurrected in 2010 in *People v. Smith* (2010) 191 Cal.App.4th 199, 205 (*Smith*). The court in *Smith* conducted no analysis of legislative intent and simply cited to *Craig.* (*Smith,* 191 Cal.App.4th at p. 205.) *Smith's* automatic application of *Craig* has now been followed by the lower courts in *Gonzalez, White* and more recently in *People v. Mesinas,* S227887, *People v. Soria,* S228653 and *People v. Brown,* S230134. The latter three cases are also before this court on a grant and hold basis along with this case.

wrong test to determine whether the Legislature intended one offense or two and disregarded basic principles of statutory construction such as giving words their plain meaning and harmonizing them with the various parts of the statute and its framework. As a result, the majority examined the text of section 261 in isolation, without regard to the other rape provisions and the statutory framework for sex offenses generally, and concluded that section 261 had not sufficiently changed since 1941 so as to take it outside of *Craig's* holding.[16]

Had the majority applied the correct test, as this court did in *Gonzalez*, it would have reached the same conclusion, that the Legislature intended White's two rape convictions to be different offenses subject to multiple convictions under section 954. As in *Gonzalez,* it is a result that simultaneously respects legislative intent and the principles of stare decisis because it recognizes the many legislative changes to the rape statutes that have rendered *Craig's* holding obsolete.

D. *Craig* Is Distinguishable and Therefore No Bar to Finding Separate Convictions

Craig does not foreclose finding White's two rape convictions constitute different offenses subject to multiple convictions. For the most part, *Craig* rests on a legal landscape that no longer exists due to statutory amendments and subsequent decisions by this court. To the extent it remains relevant, *Craig* supports the conclusion that the two rape offenses

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[16] The absurdity of the majority's "comparison test" is further illustrated by applying it to section 289 regarding sexual penetration. This court has not specifically examined this statute. Under the majority's comparison test sexual penetration, which is rape, identifies separate offenses because cosmetically it mirrors the oral copulation statute. Yet, sexual penetration is the functional equivalent of the rape statute except that the offending penetration is by an object other than a sexual organ. That is an absurd result and statutes are to read to avoid such construction. (*Lopez v. Superior Court*, 50 Cal.4th at p. 1063.)

are different and subject to multiple convictions because it reaffirmed the elements test and, under that test, the two offenses are different.

As demonstrated above, the rape statutes have been materially amended since *Craig*. Not only do the modern rape statutes substantively mirror section 288a, which this court held provided for different offenses, but also the force of *Craig*'s specific holding, that a defendant could not be convicted of both forcible and statutory rape, has been abrogated by the Legislature's repeal of statutory rape (formerly § 261(1)) and the enactment of section 261.5, prohibiting sexual intercourse with a female under age 18. (See *People v. Lohbauer* (1981) 29 Cal.3d 364, 372 [noting the court's conclusion in *People v. Collins* (1960) 54 Cal.2d 57, that a defendant was properly convicted of statutory rape although only charged with forcible rape was abrogated by the legislative recasting of statutory rape].) Statutorily speaking then, *Craig's* conclusion about former section 261 is no longer germane. This alone provides a sufficient basis upon which to distinguish *Craig*.

Nevertheless, there are several other bases upon which to distinguish and limit *Craig*. First, this court refined its application of section 654 to address the problem of multiple punishments for a single act or indivisible course of conduct, which was the principal concern in *Craig* because the defendant had received concurrent indeterminate terms under former section 264 for a single act of intercourse. The refinement, the now commonly used stay procedure, resolved *Craig's* concern with double punishment.

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 points to the fact 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,* 57 Cal.2d at p. 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"]; *In re Hayes* (1969) 70 Cal.2d 604, 606, 612.) At the time of *Craig*, the courts had difficulty consistently implementing section 654 because the "modern procedure of staying the impermissible punishment had not yet developed." (*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.*; see also *Pearson, supra,* 42 Cal.3d at pp. 359-360 [same].) 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; see also, *People v. Whitmer* (2014) 59 Cal.4th 733 [similarly limiting an interpretation of an older case in lights of its facts.) Through the modern development of section 654 jurisprudence, the concern over imposing multiple punishment was put to rest when courts concluded that 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."].) Thus, finding the modern version of section 261 provides for different offenses does not conflict with the goal of the court in *Craig* and it does not require a rejection of *Craig*.

Second, given the timing of the decision in *Craig*—it was very early in the process of society's evolving understanding of rape—it also rests an archaic view of rape and interpretation of section 263. 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 abandoned 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. This is true for each paragraph of subdivision (a), which carves out an individual outrage or illegality in addition to the physical act. For example, in subdivision (a)(1) the additional outrage is the advantage taken of a developmentally disabled

person. In subdivision (a)(2) it is the use of force and, when pled and proven in conjunction with section 264, it is force used upon a minor under 14 years of age.[17] The additional outrage described in each subdivision is also qualitatively different from each other. Put another way, a person who is disabled and is legally incapable of consenting to sex under the circumstances may nevertheless engage in the sex act voluntarily. However, that same disabled person could also be raped against her will. Surely it is more of an outrage against both the victim and society for such a disabled person to be forced to engage in sex against her will. (*See Dissent,* at p. 6 [noting the conclusion that "only one outrage has occurred regardless of the circumstances described in subdivisions 1-7 of subdivision (a) ignores the clear legislative intent that each distinct circumstance enumerated in the statute is an outrage, not just against the victim, but as expressed by individual law enforcement goals and public policy considerations, society in general."].) *Craig's* use of section 263 to limit the scope of what constitutes rape is no longer tenable.

Third, *Craig* relied on cases applying the former, more limiting language of section 954 that did not allow for multiple convictions for different offenses. (*Craig,* 17 Cal.2d at pp. 455-456, citing *People v. Snyder* (1888) 75 Cal. 323, *People v. Vann* (1900) 129 Cal. 118, 121 and

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[17] This is precisely the factual scenario in *People v. Mesinas,* S227887, review granted and held pending the disposition in this case. In *Mesinas,* Carlos Mesinas forcibly raped L.M., the 14–year–old, severely disabled daughter of his longtime live-in girlfriend and was convicted of both forcible rape of a 14 year old and rape of a developmentally disabled person but the court of appeal consolidated the convictions into only "one offense" of rape under the holding in *Craig.*

People v. Jailles (1905) 146 Cal. 301, 304; § 954, eff. 1880-1905.)[18] Interestingly, in each of these cases the court relied on an umbrella rape label for the various types of rape to *authorize* either a rape conviction (or, in the case of *Vann,* an assault with the intent to commit rape) based on an unpled subdivision of section 261 (*Snyder* and *Vann*), or to permit charging multiple counts of rape based on the different subdivisions (*Jailles*) despite section 954's limitation to charging only "one offense." Hence, in *Vann,* similar to *Snyder,* the court rejected the defendant's argument that he could not be convicted of assault with the intent to commit rape based on providing intoxicating substances when he was charged with rape by force. In *Jailles,* the court held that the defendant could be charged in separate counts with forcible and statutory rape based on the same act because they were simply different statements of the same offense. (*Jailles, supra,* 146 Cal. at p. 303.) But section 954's limiting framework no longer exists. Quite the opposite, as it now expressly authorizes multiple charges and multiple convictions as long as they are connected in their commission. (§ 954.) It would be ironic to use cases expanding the reach of the rape statute to now limit it, particularly in light of the clear legislative intent behind section 954 and the rape statutes to capture the full range of culpable conduct.

Craig is not without relevance. It endorsed the same test upon which this court principally relied in finding the oral copulation offenses different in *Gonzalez,* that is the elements test. Although *Craig* did not apply it to the former rape statute, as demonstrated herein, it is clear that applying it to

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[18] 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."

modern rape statutes would yield the same results as in *Gonzalez*. *Craig*, therefore, is no bar to finding different offenses.

In the event this court were to find *Craig*'s holding controlling, however, then for the same reasons that each subdivision of the rape statute constitutes a different offense and *Craig's* outdated premises are no longer valid set forth above, it is time for this court to depart from stare decisis and overrule *Craig* once and for all. (See *People v. Morante* (1999) 20 Cal.4th 403, 429-430 [rejecting the rule from a 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.") Rapists should be treated like other sex offenders and subject to multiple convictions consistent with section 954.

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

Even if this court were to determine that rape of an intoxicated person and rape of an unconscious person are not different offenses, section 954 still permits the dual convictions in this case because the offenses are—at the very least—"different statements of the same offense." (See § 954.)

Section 950 requires that an accusatory pleading contain "[a] statement of the public offense or offenses charged therein." A "statement of offense" is "a statement that the accused has committed some public offense therein specified." (§ 952.) As explained in section I.A/// above, section 954 provides that a defendant may be charged "under separate counts" with, and convicted of, not only "two or more different offenses connected together in their commission" or "two or more different offenses of the same class of crimes or offenses," but also "different statements of

the same offense." Accordingly, where a defendant's single act or course of conduct can be averred as "different statements of the same offense," the prosecution may plead them as separate counts and seek conviction for each one. (§ 954; see also *Ortega*, *supra*, 19 Cal.4th at p. 692 [section 954 permits that a defendant be charged and convicted of "different statements of the same offense"], *Pearson*, *supra*, 42 Cal.3d at p. 354 [same]; cf. *Gonzalez*, *supra*, 60 Cal.4th at p. 537 ["Because we conclude that the subdivisions of section 288a describe different offenses, we need not determine whether section 954 allows conviction of different statements of the same offense"].)

Here, even if the various rape subdivisions constitute a single offense, the undisputed substantive distinctions among each subdivision make them—at the very least—different *statements* of that single offense. (See § 954.) As explained in Argument I, *ante*, each of the rapes is distinct in nature. For all those same reasons, if this court were to determine that there is only one offense of "rape," then rape of an intoxicated person and rape of an unconscious person are "different statements of th[at] same offense." (See § 954.)

Craig did not directly address whether multiple convictions based on different statements of the same offense were permissible under section 954, although its analysis suggests not. The court relied on the prosecution's pleading of the two rape offenses as different statements of the same offense as further evidence rape was only "one offense." (*Craig, supra,* 17 Cal.2d at pp. 456-57.) While it recognized section 954 had been amended so as to authorize *charging* different statements of the same offense in separate counts, the court in *Craig* did not address whether multiple *convictions* were proper. As noted in the preceding section, this was in part due to *Craig's* treatment of statutory rape as a lesser included offense of forcible rape. (*Id.* at p. 457.) Regardless, this court has

definitively held that multiple convictions based on different statements of the same offense are permissible as long as they are based on different elements and neither is a lesser included offense of the other. (*Ortega*, *supra*, 19 Cal.4th at p. 692; *Pearson*, *supra*, 42 Cal.3d at p. 354.) Accordingly, for this alternative reason, section 954 permits White's dual convictions here.

This court should therefore should find White's dual rape convictions permissible under section 954 and reverse the decision of the court of appeal.[19]

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[19] The same disposition is appropriate for the cases on grant and hold, *People v. Mesinas,* S227887, *People v. Soria,* S228653 and *People v. Brown,* S230134.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this court reinstate White's conviction for rape of an unconscious person and affirm the remainder of the judgment.

Dated: January 28, 2016

Respectfully submitted,

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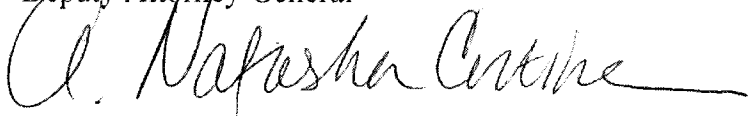

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CERTIFICATE OF COMPLIANCE

I certify that the attached Opening Brief on the Merits uses a 13 point Times New Roman font and contains 12,124 words.

Dated: January 28, 2016

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APPENDIX A

APPENDIX A-RELEVANT STATUTES

SECTION 261

Former section 261

§ 261. Rape defined.

Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances:

1. Where the female is under the age of eighteen years;
2. Where she is incapable, through lunacy or other unsoundness of mind, whether temporary or permanent, of giving legal consent;
3. Where she resists, but her resistance is overcome by force or violence;
4. Where she is prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution, or by any intoxicating narcotic, or anesthetic substance, administered by or with the privity of the accused;
5. Where she is at the time unconscious of the nature of the act, and this is known to the accused;
6. Where she submits under the belief that the person committing the act is her husband, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce such belief.

(Deerings 1913.)

Applicable Section 261

§ 261. Rape defined.

(a) Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances:

(1) Where a person is incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act. Notwithstanding the existence of a conservatorship pursuant to the provisions of the Lanterman-Petris-Short Act ..., the prosecuting attorney shall prove, as an element of the crime, that a mental disorder or developmental or physical disability rendered the alleged victim incapable of giving consent.

(2) Where it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.

(3) Where a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused.

(4) Where a person is at the time unconscious of the nature of the act, and this is known to the accused. As used in this paragraph, "unconscious of the nature of the act" means incapable of resisting because the victim meets any one of the following conditions:(A) Was unconscious or asleep.(B) Was not aware, knowing, perceiving, or cognizant that the act occurred.(C) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact.(D) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraudulent representation that the sexual penetration served a professional purpose when it served no professional purpose.

(5) Where a person submits under the belief that the person committing the act is the victim's spouse, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce the belief.

(6) Where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat. As used in this paragraph, "threatening to retaliate" means a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death.
(7) Where the act is accomplished against the victim's will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim has a reasonable belief that the perpetrator is a public official. As used in this paragraph, "public official" means a person employed by a governmental agency who has the authority, as part of that position, to incarcerate, arrest, or deport another. The perpetrator does not actually have to be a public official.(b) As used in this section, "duress" means a direct or implied threat of force, violence, danger, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed, or acquiesce in an act to which one otherwise would not have submitted. The total circumstances, including the age of the victim, and his or her relationship to the defendant, are factors to consider in appraising the existence of duress.(c) As used in this section, "menace" means any threat, declaration, or act which shows an intention to inflict an injury upon another.
(West 2011.)

SECTION 262

Applicable Section 262

§ 262. Rape of a spouse; elements; conditions of probation; fines, payments or restitution
(a) Rape of a person who is the spouse of the perpetrator is an act of sexual intercourse accomplished under any of the following circumstances:
(1) Where it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.
(2) Where a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known, by the accused.
(3) Where a person is at the time unconscious of the nature of the act, and this is known to the accused. As used in this paragraph, "unconscious of the nature of the act" means incapable of resisting because the victim meets one of the following conditions:(A) Was unconscious or asleep.(B) Was not aware, knowing, perceiving, or cognizant that the act occurred.(C) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact.
(4) Where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat. As used in this paragraph, "threatening to retaliate" means a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death.
(5) Where the act is accomplished against the victim's will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim has a reasonable belief that the perpetrator is a public official. As used in this paragraph, "public official" means a person employed by a governmental agency who has the authority, as part of that position, to incarcerate, arrest, or deport another. The perpetrator does not actually have to be a public official. (b) As used in this section, "duress" means a direct or implied threat of force, violence, danger, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed, or acquiesce

in an act to which one otherwise would not have submitted. The total circumstances, including the age of the victim, and his or her relationship to the defendant, are factors to consider in apprising the existence of duress. (c) As used in this section, "menace" means any threat, declaration, or act that shows an intention to inflict an injury upon another. (d) If probation is granted upon conviction of a violation of this section, the conditions of probation may include, in lieu of a fine, one or both of the following requirements: (1) That the defendant make payments to a battered women's shelter, up to a maximum of one thousand dollars ($1,000). (2) That the defendant reimburse the victim for reasonable costs of counseling and other reasonable expenses that the court finds are the direct result of the defendant's offense.
(West 2015.)

SECTION 264

Former section 264

§ 264. Punishment for rape: Recommendation by jury: Discretion of court]
Rape is punishable by imprisonment in the state prison for not more than fifty years, except where the offense is under subdivision one of section two hundred six-one of the Penal Code [unlawful sexual intercourse with minor], in which case the punishment shall be either by imprisonment in the county jail for not more than one year or in the state prison for not more than fifty years, and in such case the jury shall recommend by their verdict whether the punishment shall be by imprisonment in the county jail or in the state prison; provided, that when the defendant pleads guilty of an offense under subdivision one of section 261 of the Penal Code the punishment shall be in the discretion of the trial court, either by imprisonment in the county jail for not more than one year or in the state prison for not more than fifty years."
(Deering 1931).

Applicable section 264

§ 264. Rape; punishment
(a) Except as provided in subdivision (c), rape, as defined in Section 261 or 262, is punishable by imprisonment in the state prison for three, six, or eight years.
(b) In addition to any punishment imposed under this section the judge may assess a fine not to exceed seventy dollars ($70) against any person who violates Section 261 or 262 with the proceeds of this fine to be used in accordance with Section 1463.23. ....
(c)(1) Any person who commits rape in violation of paragraph (2) of subdivision (a) of Section 261 upon a child who is under 14 years of age shall be punished by imprisonment in the state prison for 9, 11, or 13 years. (2) Any person who commits rape in violation of paragraph (2) of subdivision (a) of Section 261 upon a minor who is 14 years of age or older shall be punished by imprisonment in the state prison for 7, 9, or 11 years. (3) This subdivision does not preclude prosecution under Section 269, Section 288.7, or any other provision of law."
(West 2010).)

SECTION 264.1

Applicable section 264.1

§ 264.1 Rape or penetration of genital or anal openings by foreign object, etc.; acting in concert by force or violence; punishment
(a) The provisions of Section 264 notwithstanding, in any case in which the defendant, voluntarily acting in concert with another person, by force or violence and against the will of the

victim, committed an act described in Section 261, 262, or 289, either personally or by aiding and abetting the other person, that fact shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or if admitted by the defendant, the defendant shall suffer confinement in the state prison for five, seven, or nine years. (b)(1) If the victim of an offense described in subdivision (a) is a child who is under 14 years of age, the defendant shall be punished by imprisonment in the state prison for 10, 12, or 14 years. (2) If the victim of an offense described in subdivision (a) is a minor who is 14 years of age or older, the defendant shall be punished by imprisonment in the state prison for 7, 9, or 11 years. (3) This subdivision does not preclude prosecution under Section 269, Section 288.7, or any other provision of law. (West 2010).)

SECTION 286

Applicable section 286

§ 286. Sodomy; punishment

(a) Sodomy is sexual conduct consisting of contact between the penis of one person and the anus of another person. Any sexual penetration, however slight, is sufficient to complete the crime of sodomy.

(b)(1) Except as provided in Section 288, any person who participates in an act of sodomy with another person who is under 18 years of age shall be punished by imprisonment in the state prison, or in a county jail for not more than one year. (2) Except as provided in Section 288, any person over 21 years of age who participates in an act of sodomy with another person who is under 16 years of age shall be guilty of a felony.

(c)(1) Any person who participates in an act of sodomy with another person who is under 14 years of age and more than 10 years younger than he or she shall be punished by imprisonment in the state prison for three, six, or eight years.

(2)(A) Any person who commits an act of sodomy when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state prison for three, six, or eight years. (B) Any person who commits an act of sodomy with another person who is under 14 years of age when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state prison for 9, 11, or 13 years. (C) Any person who commits an act of sodomy with another person who is a minor 14 years of age or older when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state prison for 7, 9, or 11 years. (D) This paragraph does not preclude prosecution under Section 269, Section 288.7, or any other provision of law.

(3) Any person who commits an act of sodomy where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat, shall be punished by imprisonment in the state prison for three, six, or eight years.

(d)(1) Any person who, while voluntarily acting in concert with another person, either personally or aiding and abetting that other person, commits an act of sodomy when the act is accomplished against the victim's will by means of force or fear of immediate and unlawful bodily injury on the victim or another person or where the act is accomplished against the victim's will by

threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat, shall be punished by imprisonment in the state prison for five, seven, or nine years.
(2) Any person who, while voluntarily acting in concert with another person, either personally or aiding and abetting that other person, commits an act of sodomy upon a victim who is under 14 years of age, when the act is accomplished against the victim's will by means of force or fear of immediate and unlawful bodily injury on the victim or another person, shall be punished by imprisonment in the state prison for 10, 12, or 14 years.
(3) Any person who, while voluntarily acting in concert with another person, either personally or aiding and abetting that other person, commits an act of sodomy upon a victim who is a minor 14 years of age or older, when the act is accomplished against the victim's will by means of force or fear of immediate and unlawful bodily injury on the victim or another person, shall be punished by imprisonment in the state prison for 7, 9, or 11 years.
(4) This subdivision does not preclude prosecution under Section 269, Section 288.7, or any other provision of law.
(e) Any person who participates in an act of sodomy with any person of any age while confined in any state prison, as defined in Section 4504, or in any local detention facility, as defined in Section 6031.4, shall be punished by imprisonment in the state prison, or in a county jail for not more than one year.
(f) Any person who commits an act of sodomy, and the victim is at the time unconscious of the nature of the act and this is known to the person committing the act, shall be punished by imprisonment in the state prison for three, six, or eight years. As used in this subdivision, "unconscious of the nature of the act" means incapable of resisting because the victim meets one of the following conditions: (1) Was unconscious or asleep. (2) Was not aware, knowing, perceiving, or cognizant that the act occurred. (3) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact. (4) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraudulent representation that the sexual penetration served a professional purpose when it served no professional purpose.
(g) Except as provided in subdivision (h), a person who commits an act of sodomy, and the victim is at the time incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act, shall be punished by imprisonment in the state prison for three, six, or eight years. Notwithstanding the existence of a conservatorship pursuant to the Lanterman-Petris-Short Act ..., the prosecuting attorney shall prove, as an element of the crime, that a mental disorder or developmental or physical disability rendered the alleged victim incapable of giving consent.
(h) Any person who commits an act of sodomy, and the victim is at the time incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act, and both the defendant and the victim are at the time confined in a state hospital for the care and treatment of the mentally disordered or in any other public or private facility for the care and treatment of the mentally disordered approved by a county mental health director, shall be punished by imprisonment in the state prison, or in a county jail for not more than one year. Notwithstanding the existence of a conservatorship pursuant to the Lanterman-Petris-Short Act ..., the prosecuting attorney shall prove, as an element of the crime, that a mental disorder or

developmental or physical disability rendered the alleged victim incapable of giving legal consent.
(i) Any person who commits an act of sodomy, where the victim is prevented from resisting by an intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused, shall be punished by imprisonment in the state prison for three, six, or eight years.
(j) Any person who commits an act of sodomy, where the victim submits under the belief that the person committing the act is the victim's spouse, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce the belief, shall be punished by imprisonment in the state prison for three, six, or eight years.
(k) Any person who commits an act of sodomy, where the act is accomplished against the victim's will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim has a reasonable belief that the perpetrator is a public official, shall be punished by imprisonment in the state prison for three, six, or eight years. As used in this subdivision, "public official" means a person employed by a governmental agency who has the authority, as part of that position, to incarcerate, arrest, or deport another. The perpetrator does not actually have to be a public official.
(*l*) As used in subdivisions (c) and (d), "threatening to retaliate" means a threat to kidnap or falsely imprison, or inflict extreme pain, serious bodily injury, or death.
(m) In addition to any punishment imposed under this section, the judge may assess a fine not to exceed seventy dollars ($70) ....
(West 2010)

SECTION 288a

Applicable section 288a

§ 288a. Oral copulation; punishment
(a) Oral copulation is the act of copulating the mouth of one person with the sexual organ or anus of another person.
(b)(1) Except as provided in Section 288, any person who participates in an act of oral copulation with another person who is under 18 years of age shall be punished by imprisonment in the state prison, or in a county jail for a period of not more than one year.
(2) Except as provided in Section 288, any person over 21 years of age who participates in an act of oral copulation with another person who is under 16 years of age is guilty of a felony.
(c)(1) Any person who participates in an act of oral copulation with another person who is under 14 years of age and more than 10 years younger than he or she shall be punished by imprisonment in the state prison for three, six, or eight years.
(2)(A) Any person who commits an act of oral copulation when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state prison for three, six, or eight years.
(B) Any person who commits an act of oral copulation upon a person who is under 14 years of age, when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, shall be punished by imprisonment in the state prison for 8, 10, or 12 years.
(C) Any person who commits an act of oral copulation upon a minor who is 14 years of age or older, when the act is accomplished against the victim's will by means of force, violence, duress,

menace, or fear of immediate and unlawful bodily injury on the victim or another person, shall be punished by imprisonment in the state prison for 6, 8, or 10 years.
(D) This paragraph does not preclude prosecution under Section 269, Section 288.7, or any other provision of law.
(3) Any person who commits an act of oral copulation where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat, shall be punished by imprisonment in the state prison for three, six, or eight years.
(d)(1) Any person who, while voluntarily acting in concert with another person, either personally or by aiding and abetting that other person, commits an act of oral copulation (A) when the act is accomplished against the victim's will by means of force or fear of immediate and unlawful bodily injury on the victim or another person, or (B) where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat, or (C) where the victim is at the time incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act, shall be punished by imprisonment in the state prison for five, seven, or nine years. Notwithstanding the appointment of a conservator with respect to the victim pursuant to the provisions of the Lanterman-Petris-Short Act ..., the prosecuting attorney shall prove, as an element of the crime described under paragraph (3), that a mental disorder or developmental or physical disability rendered the alleged victim incapable of giving legal consent.
(2) Any person who, while voluntarily acting in concert with another person, either personally or aiding and abetting that other person, commits an act of oral copulation upon a victim who is under 14 years of age, when the act is accomplished against the victim's will by means of force or fear of immediate and unlawful bodily injury on the victim or another person, shall be punished by imprisonment in the state prison for 10, 12, or 14 years.
(3) Any person who, while voluntarily acting in concert with another person, either personally or aiding and abetting that other person, commits an act of oral copulation upon a victim who is a minor 14 years of age or older, when the act is accomplished against the victim's will by means of force or fear of immediate and unlawful bodily injury on the victim or another person, shall be punished by imprisonment in the state prison for 8, 10, or 12 years.
(4) This paragraph does not preclude prosecution under Section 269, Section 288.7, or any other provision of law.
(e) Any person who participates in an act of oral copulation while confined in any state prison, as defined in Section 4504 or in any local detention facility as defined in Section 6031.4, shall be punished by imprisonment in the state prison, or in a county jail for a period of not more than one year.
(f) Any person who commits an act of oral copulation, and the victim is at the time unconscious of the nature of the act and this is known to the person committing the act, shall be punished by imprisonment in the state prison for a period of three, six, or eight years. As used in this subdivision, "unconscious of the nature of the act" means incapable of resisting because the victim meets one of the following conditions: (1) Was unconscious or asleep. (2) Was not aware, knowing, perceiving, or cognizant that the act occurred. (3) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact. (4) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the

act due to the perpetrator's fraudulent representation that the oral copulation served a professional purpose when it served no professional purpose.
(g) Except as provided in subdivision (h), any person who commits an act of oral copulation, and the victim is at the time incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act, shall be punished by imprisonment in the state prison, for three, six, or eight years. Notwithstanding the existence of a conservatorship pursuant to the provisions of the Lanterman-Petris-Short Act ..., the prosecuting attorney shall prove, as an element of the crime, that a mental disorder or developmental or physical disability rendered the alleged victim incapable of giving consent.
(h) Any person who commits an act of oral copulation, and the victim is at the time incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act, and both the defendant and the victim are at the time confined in a state hospital for the care and treatment of the mentally disordered or in any other public or private facility for the care and treatment of the mentally disordered approved by a county mental health director, shall be punished by imprisonment in the state prison, or in a county jail for a period of not more than one year. Notwithstanding the existence of a conservatorship pursuant to the provisions of the Lanterman-Petris-Short Act ..., the prosecuting attorney shall prove, as an element of the crime, that a mental disorder or developmental or physical disability rendered the alleged victim incapable of giving legal consent.
(i) Any person who commits an act of oral copulation, where the victim is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused, shall be punished by imprisonment in the state prison for a period of three, six, or eight years.
(j) Any person who commits an act of oral copulation, where the victim submits under the belief that the person committing the act is , and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce the belief, shall be punished by imprisonment in the state prison for a period of three, six, or eight years.
(k) Any person who commits an act of oral copulation, where the act is accomplished against the victim's will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim has a reasonable belief that the perpetrator is a public official, shall be punished by imprisonment in the state prison for a period of three, six, or eight years. As used in this subdivision, "public official" means a person employed by a governmental agency who has the authority, as part of that position, to incarcerate, arrest, or deport another. The perpetrator does not actually have to be a public official.
(*l*) As used in subdivisions (c) and (d), "threatening to retaliate" means a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death.
(m) In addition to any punishment imposed under this section, the judge may assess a fine not to exceed seventy dollars ($70) against any person who violates this section ....
(West 2010)

SECTION 289

Applicable section 289

§ 289. Forcible acts of sexual penetration; punishment

(a)(1)(A) Any person who commits an act of sexual penetration when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state prison for three, six, or eight years.

(B) Any person who commits an act of sexual penetration upon a child who is under 14 years of age, when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, shall be punished by imprisonment in the state prison for 8, 10, or 12 years.

(C) Any person who commits an act of sexual penetration upon a minor who is 14 years of age or older, when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, shall be punished by imprisonment in the state prison for 6, 8, or 10 years.

(D) This paragraph does not preclude prosecution under Section 269, Section 288.7, or any other provision of law.

(2) Any person who commits an act of sexual penetration when the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat, shall be punished by imprisonment in the state prison for three, six, or eight years.

(b) Except as provided in subdivision (c), any person who commits an act of sexual penetration, and the victim is at the time incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act or causing the act to be committed, shall be punished by imprisonment in the state prison for three, six, or eight years. Notwithstanding the appointment of a conservator with respect to the victim pursuant to the provisions of the Lanterman-Petris-Short Act ..., the prosecuting attorney shall prove, as an element of the crime, that a mental disorder or developmental or physical disability rendered the alleged victim incapable of giving legal consent.

(c) Any person who commits an act of sexual penetration, and the victim is at the time incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act or causing the act to be committed and both the defendant and the victim are at the time confined in a state hospital for the care and treatment of the mentally disordered or in any other public or private facility for the care and treatment of the mentally disordered approved by a county mental health director, shall be punished by imprisonment in the state prison, or in a county jail for a period of not more than one year. Notwithstanding the existence of a conservatorship pursuant to the provisions of the Lanterman-Petris-Short Act ..., the prosecuting attorney shall prove, as an element of the crime, that a mental disorder or developmental or physical disability rendered the alleged victim incapable of giving legal consent.

(d) Any person who commits an act of sexual penetration, and the victim is at the time unconscious of the nature of the act and this is known to the person committing the act or causing the act to be committed, shall be punished by imprisonment in the state prison for three, six, or eight years. As used in this subdivision, "unconscious of the nature of the act" means incapable of resisting because the victim meets one of the following conditions: (1) Was

unconscious or asleep. (2) Was not aware, knowing, perceiving, or cognizant that the act occurred. (3) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact. (4) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraudulent representation that the sexual penetration served a professional purpose when it served no professional purpose.

(e) Any person who commits an act of sexual penetration when the victim is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused, shall be punished by imprisonment in the state prison for a period of three, six, or eight years.

(f) Any person who commits an act of sexual penetration when the victim submits under the belief that the person committing the act or causing the act to be committed is the victim's spouse, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce the belief, shall be punished by imprisonment in the state prison for a period of three, six, or eight years.

(g) Any person who commits an act of sexual penetration when the act is accomplished against the victim's will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim has a reasonable belief that the perpetrator is a public official, shall be punished by imprisonment in the state prison for a period of three, six, or eight years. As used in this subdivision, "public official" means a person employed by a governmental agency who has the authority, as part of that position, to incarcerate, arrest, or deport another. The perpetrator does not actually have to be a public official.

(h) Except as provided in Section 288, any person who participates in an act of sexual penetration with another person who is under 18 years of age shall be punished by imprisonment in the state prison or in a county jail for a period of not more than one year.

(i) Except as provided in Section 288, any person over 21 years of age who participates in an act of sexual penetration with another person who is under 16 years of age shall be guilty of a felony.

(j) Any person who participates in an act of sexual penetration with another person who is under 14 years of age and who is more than 10 years younger than he or she shall be punished by imprisonment in the state prison for three, six, or eight years.

(k) As used in this section: (1) "Sexual penetration" is the act of causing the penetration, however slight, of the genital or anal opening of any person or causing another person to so penetrate the defendant's or another person's genital or anal opening for the purpose of sexual arousal, gratification, or abuse by any foreign object, substance, instrument, or device, or by any unknown object. (2) "Foreign object, substance, instrument, or device" shall include any part of the body, except a sexual organ. (3) "Unknown object" shall include any foreign object, substance, instrument, or device, or any part of the body, including a penis, when it is not known whether penetration was by a penis or by a foreign object, substance, instrument, or device, or by any other part of the body. (*l*) As used in subdivision (a), "threatening to retaliate" means a threat to kidnap or falsely imprison, or inflict extreme pain, serious bodily injury or death.

(m) As used in this section, "victim" includes any person who the defendant causes to penetrate the genital or anal opening of the defendant or another person or whose genital or anal opening is caused to be penetrated by the defendant or another person and who otherwise qualifies as a victim under the requirements of this section.

(West 2010)

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

Case Name: **People v. Billy Charles White** Case No.: **S228049**

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. The Office of the Attorney General's eService address is AGSD.DAService@doj.ca.gov.

On January 28, 2016, 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 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Raymond M. DiGuiseppe
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P.O. Box 10790
Southport, NC 28461

Honorable Frank A. Brown, Judge
c/o Michael M. Roddy
Court Executive Officer
San Diego County Superior Court
220 West Broadway
San Diego, CA 92101-3409

Kevin J. Lane/Court Administrator
Fourth Appellate District, Division One
750 B Street, Suite 300
San Diego, CA 92101

and, furthermore I declare, in compliance with California Rules of Court, rules 2.251(i)(1)(A)-(D) and 8.71(f)(1)(A)-(D), I electronically served a copy of the above document on **January 28, 2016**, by 5:00 p.m., on the close of business day to the following.

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Raymond M. DiGuiseppe
Attorney for Appellant Billy Charles White

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 28, 2016, at San Diego, California.

L. Hernández
Declarant

L. Hernández
Signature