In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ROMAN FLUGENCIO GONZALEZ,

Defendant and Appellant.

Case No. S207830

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

RESPONDENT'S REPLY BRIEF

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
STEVEN T. OETTING
Supervising Deputy Attorney General
MEREDITH S. WHITE
Deputy Attorney General
State Bar No. 255840
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2297
Fax: (619) 645-2271
Email: Meredith.White@doj.ca.gov
Attorneys for Plaintiff and Respondent

TABLE OF CONTENTS

Page

Introduction 1

Argument 3

I. Section 954 permits multiple convictions for different offenses connected in their commission and different offenses of the same class of crimes regardless of the criminal intents of the crimes charged 3

II. Section 954 also permits multiple convictions for different statements of the same offense 8

III. The exceptions to section 954's general rule do not undermine the validity of the statute's express language permitting multiple convictions 14

IV. Oral copulation of an intoxicated person is not a lesser included offense of oral copulation of an unconscious person 27

Conclusion 30

TABLE OF AUTHORITIES

Page

CASES

In re C.H.
(2011) 53 Cal.4th 94 17

In re Peter F.
(2005) 132 Cal.App.4th 877 17

Marshall M. v. Superior Court
(1999) 75 Cal.App.4th 48 10

Neal v. State of California
(1960) 55 Cal.2d 11 ..... 25, 26

People v. Aguirre
(1970) 10 Cal.App.3d 884 22

People v. Alvarez
(2002) 27 Cal.4th 1161 18

People v. Bailey
(1961) 55 Cal.2d 514 ..... 14, 16, 22, 23

People v. Bailey
(1961) 55 Cal.2d 514 16

People v. Beamon
(1973) 8 Cal.3d 625 20

People v. Benavides
(2005) 35 Cal.4th 69 5

People v. Briones
(2008) Cal.App.4th 524 22

People v. Brooks
(1985) 166 Cal.App.3d 24 11

People v. Butte
(2004) 117 Cal.App.4th 956 11

People v. Ceja
(2010) 49 Cal.4th 1 16

People v. Correa
(2012) 54 Cal.4th 331 ..... 24, 25, 26

People v. Coyle
(2009) 178 Cal.App.4th 209 13

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

People v. Duff
(2010) 50 Cal.4th 787 20

People v. Frank
(1865) 28 Cal. 507 21

People v. Garcia
(2003) 107 Cal.App.4th 1159 ..... 17, 18

People v. Harris
(1977) 71 Cal.App.3d 963 22

People v. Harrison
(1989) 48 Cal.3d 321 6

People v. Harrold
(1890) 84 Cal.567 21

People v. Hertzig
(2007) 156 Cal.App.4th 398 22

People v. Johnson
(1980) 26 Cal.3d 557 10

People v. Kirk
(1989) 211 Cal.App.3d 58 25

People v. Kronemyer
(1987) 189 Cal.App.3d 314 23

People v. Kuhn
(1963) 216 Cal.App.2d 695 7

People v. Latimer
(1993) 5 Cal.4th 1203 26

People v. Leyshon
(1895) 108 Cal. 440 21

People v. Linwood
(2003) 105 Cal.App.4th 59 28

People v. Lohbauer
(1981) 29 Cal.3d 364 28

People v. Lopez
(1998) 19 Cal.4th 282 28

People v. McFarland
(1989) 47 Cal.3d 798 ..... 19, 20

People v. Montoya
(2004) 33 Cal.4th 1031 20

People v. Muhammad
(2007) 157 Cal.App.4th 484 14

People v. Newton
(2007) 155 Cal.App.4th 1000 ..... 17, 18

People v. Ortega
(1998) 19 Cal.4th 686 ..... 5, 12, 14, 20

People v. Packard
(1982) 131 Cal.App.3d 622 23

People v. Palmer
(2001) 24 Cal.4th 856 10

People v. Pearson
(1986) 42 Cal.3d 351 ..... passim

People v. Pearson
(1986) 42 Cal.4th 351 12

People v. Perez
(2010) 50 Cal.4th 222 21

People v. Rouser
(1997) 59 Cal.App.4th 1065 22

People v. Rowland
(1999) 75 Cal.App.4th 61 22

People v. Russell
(2010) 50 Cal.4th 1228 13

People v. Ryan
(2006) 138 Cal.App.4th 360 14

People v. Sanchez
(2001) 24 Cal.4th 983 20

People v. Scott
(1944) 24 Cal.2d 774 11

People v. Smith
(2012) 209 Cal.App.4th 910 17

People v. Stephens
(1889) 79 Cal.428 18

People v. Watson
(1956) 46 Cal.2d 818 10

People v. Whitmer
(2013) 213 Cal.App.4th 122 16

People v. Wyatt
(2012) 55 Cal.4th 694 20

Schad v. Arizona
(1991) 501 U.S. 624 6

United States v. Powell
(1984) 469 U.S. 57 10

Wilkoff v. Superior Court
(1985) 38 Cal.3d 345 ..... 18, 19, 20

STATUTES

Penal Code
§ 186.11, subd. (a)(1) 23
§ 192, subd. (c)(3) 19
§ 237 7
§ 286, subd. (c) 12
§ 288, subd. (a) 12, 28
§ 288a 7, 24
§ 288a, subds. (c)(2)(B) 7
§ 288a, subds. (c)(3) 7
§ 288a, subd. (i) 6. 20, 28
§ 288a, subd. (f) 6.20, 28
§ 487 23
§ 487, subd. (a) 23
§ 496, subd. (a) 16, 17
§ 654 ..... passim
§ 954 ..... passim
§ 1159 ..... 27, 28
§ 1192.7, subd. (c)(26) 23

Vehicle Code
§ 23153 ..... 18, 19
§ 23153, subd. (a) 19
§ 23182 20

INTRODUCTION

This court granted review in this case to decide if appellant was properly convicted of oral copulation of an intoxicated person and oral copulation of an unconscious person for the same act. Relying on *People v. Craig* (1941) 17 Cal.2d 453 (*Craig*), the lower court struck the conviction for oral copulation of an intoxicated person. In the opening brief, respondent argued the two convictions were permissible by the express terms of Penal Code[1] section 954, although appellant could not be punished for both convictions pursuant to section 654 (and appropriately, was not punished for both convictions). Further, respondent argued *Craig* was outdated, inconsistent with the terms of the statute, and contrary to the more modern understanding of sections 954 and 654.

In trying to justify the holding in *Craig* and here, appellant proposes an entirely new reading of section 954, and argues that the explicit language of section 954 is limited by a judicial "gloss" that appellant extracts from the holdings of cases that never considered or decided the pertinent issue. While he recognizes defendants may be convicted of distinct offenses for a single act, he claims they may only be so convicted if the two offenses require proof of different criminal intents. The explicit language of section 954 does not impose this requirement, and no court has ever held that multiple convictions under section 954 are only permissible where the convictions are for crimes with distinct criminal intents. Beyond the obvious lack of authority, adopting this rule would invite an unnecessary flood of litigation over the propriety of multiple convictions. This would defeat the purpose of section 954 and undermine the now well-settled approach to multiple convictions and multiple punishments. Notably, appellant has proposed this rule instead of adopting or defending the

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

reasoning of the Court of Appeal or the Court in *Craig*. Accordingly, he has abandoned those arguments.

Further, appellant proposes an interpretation of section 954 which would prohibit multiple convictions arising from different statements of the same offense, despite section 954's language permitting such convictions. Because the crimes at issue in this case are distinct offenses, this Court need not reach this second issue. Even so, appellant's proposed interpretation of the statute distorts the purpose and creates confusion. The more natural reading proposed by respondent is straight-forward, better effectuates the legislative intent, and has already been adopted by this Court.

Attempting to buttress his argument regarding the interpretation of section 954, appellant contends four judicially-created exceptions to section 954's allowance of multiple convictions confirm that the statute should be read to prohibit multiple convictions wherever they arise from charges of different statements of the same offense. But, the four judicially-created exceptions are offense-specific and viewing them collectively, as appellant urges, permits the exceptions to take over the general rule, and render it meaningless.

In a separate attempt to justify the lower court's decision in this case, appellant argues that his two convictions are not permissible because oral copulation of an intoxicated person is a lesser included offense of oral copulation of an unconscious person. A basic application of the elements test demonstrates that this argument is wholly without merit.

For the reasons explained in respondent's opening brief on the merits and herein, the two convictions at issue are permissible under section 954, and the reasoning in *Craig,* which was used to strike one of the counts, should be overturned.

ARGUMENT

I. SECTION 954 PERMITS MULTIPLE CONVICTIONS FOR DIFFERENT OFFENSES CONNECTED IN THEIR COMMISSION AND DIFFERENT OFFENSES OF THE SAME CLASS OF CRIMES REGARDLESS OF THE CRIMINAL INTENTS OF THE CRIMES CHARGED

Respondent and appellant appear to agree that the issue of multiple convictions is primarily governed by Penal Code section 954. And, we agree that the language of section 954 permits multiple convictions for a single criminal act where the convictions are for different offenses. But, appellant argues that the statute's explicit language has been restricted by this Court and such multiple convictions are only permissible where the two convictions are for crimes which require proof of different criminal intents.

This Court has never interpreted section 954 in such a manner, and no other court has either. There is no indication that the Legislature intended such a restriction on the permissibility of multiple convictions and accordingly, appellant's proposed rule should be rejected.

Section 954 reads:

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

and each of said groups tried separately. An acquittal of one or more counts shall not be deemed an acquittal of any other count.

As noted in respondent's opening brief, the statute authorizes multiple charges in three different situations: 1) where the prosecution charges different offenses connected together in their commission, 2) where the prosecution charges different statements of the same offense, and 3) where the prosecution charges different offenses of the same class of crimes. (ROBM2 5.) Appellant concedes this point (AABM3 6), and agrees that multiple convictions may result from the first and third situation, i.e. where the charges are for "different offenses." (AABM 6-7.)

Here, the Court of Appeal concluded the two crimes at issue in this case were not "different offenses" because they were subdivisions of a single statute instead of separately delineated Penal Code provisions. (Slip Op. 12-14.) Appellant does not make this argument, and abandons the reasoning, claiming, "this Court need not trouble itself with whether or the extent to which this point—that the two descriptions of the offense appear as subdivision of the same statute—bears upon the analysis in such cases." (AABM 32.) Respondent also argued in the opening brief that the remaining reasoning offered by *Craig* in support of its "one offense" conclusion, and relied upon by the Court of Appeal, was flawed and should not be adopted by this Court. (ROBM 12-22.) Appellant also does not attempt to save *Craig*– he never defends the reasoning of the opinion, nor does he rely on its reasoning when defending the decision of the Court of Appeal.

Instead of adopting the reasoning of the Court of Appeal or attempting to use *Craig*, appellant proposes a new rule which restricts the broad

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[2] "ROBM" refers to Respondent's Opening Brief on the Merits.
[3] "AABM" refers to Appellant's Answer Brief on the Merits.

language of section 954. While appellant acknowledges that a defendant can suffer multiple convictions for a single act, he posits that multiple convictions are not permissible unless the two charges require distinct criminal intents. (AABM at pp. 19-20.) But, there is no authority for this proposed limitation on section 954's clear language. In support of his proposed restriction on section 954, appellant cites *People v. Ortega* (1998) 19 Cal.4th 686, 693, *People v. Benavides* (2005) 35 Cal.4th 69, 98, and *People v. Pearson* (1986) 42 Cal.3d 351, 355-356. Appellant argues that these cases held multiple convictions were permissible even though based on a single criminal act, but only because the crimes at issue in each required distinct criminal intents. Even if true that the criminal intents for each crime committed in these cases were distinct, this Court did not base its holdings on the notion that distinct criminal intents were a *requirement* to permit multiple convictions. Instead, this Court held in all three cases that the multiple convictions were permissible under the explicit language of section 954. (*Ortega, supra*, 19 Cal.4th at p.692; *Benavides, supra*, 35 Cal.4th at p. 97; *Pearson, supra*, 42 Cal.3d at p. 354.) The mere coincidence that the crimes at issue in these cases had distinct criminal intents does not give rise to a universal rule limiting multiple convictions to such circumstances. Appellant offers no other authority in support of his proposed rule limiting multiple convictions for different offenses under section 954.

Adopting appellant's rule would also invite a flood of litigation over what constitutes "distinct criminal intents." The Court need only look to the mass of cases on section 654 to preview the litigation that would result if appellant's rule were adopted. Courts across this state are flooded with claims under section 654 regarding whether two convictions had "multiple simultaneous but distinct criminal objectives," or were part of one "indivisible transaction" based on a single intent and objective, such that

multiple punishments was either permissible or prohibited. (*People v. Harrison* (1989) 48 Cal.3d 321, 335 ["[I]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.] [¶] If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.'"].) If appellant's rule were adopted, courts would need to decide the issue of distinct criminal intents twice—once to determine if the multiple convictions are permissible, and again to determine if multiple punishments are permissible. The language of section 954 does not limit the types of offenses for which a defendant may be convicted, and appellant has not offered any legitimate reason or basis to impose a restriction on the statute's clear language.

As explained in respondent's opening brief, oral copulation of an intoxicated person (§ 288a, subd. (i)) and oral copulation of an unconscious person (§ 288a, subd. (f)) are different offenses because they are defined by distinct elements. (ROBM 11-12.) The Legislature knows how to define criminal offenses, and is, in general, constitutionally permitted to do so. (*Schad v. Arizona* (1991) 501 U.S. 624, 632.) In striking count 2, the Court of Appeal majority in this case concluded these were not different offenses, but simply different "circumstances" by which a defendant commits the same offense—unlawful oral copulation. (See Slip Op. 12-14.) This conclusion was, according to the majority, supported by the delineation of the crimes in subdivisions of the same statute, as opposed to under distinct Penal Code provisions. Appellant does not attempt to defend this conclusion. As explained in respondent's opening brief, the organizational

ease with which these crimes are identified in the Penal Code is not enough, by itself, to conclude the two crimes are in fact the same offense. (ROBM 17-18.) Most importantly, the two subdivisions of section 288a at issue in this case are two of a total of 10 subdivisions of section 288a. Some of the other subdivisions carry different punishments. (See §§ 288a, subds. (c)(2)(B) and (c) (3).) This is a strong indication that the Legislature intended the different subdivisions of 288a to operate as distinct offenses. Further, the two crimes have different elements, and require different proof. (See *People v. Kuhn* (1963) 216 Cal.App.2d 695, 700 [statutes do not define identical offenses if one offense requires proof of an element not required for the other offense].) They happen to carry the same punishment, but certainly that alone is not a sufficient basis to conclude two crimes are actually one crime – otherwise false imprisonment and grand theft, both of which are punished by not more than a year in county jail (§ 237 and § 489, subd. (a)), would be considered the same crime. For the reasons stated above, the mere fact that two crimes are delineated in subdivisions as opposed to separate Penal Code provisions is not a sufficient basis on which to conclude they are the same offense. If this were true, every time a defendant was charged with a violation of one subdivision of a statute, the jury would need to be instructed on all subdivisions as all would be a permissible basis by which to convict him of the singular offense. This has never been the law, nor should it be.

Appellant offers no other basis for finding these two crimes are not distinct criminal offenses. And, he acknowledges that if they are distinct criminal offenses, section 954 permits multiple convictions even where the offenses arise out of a single act. (AABM 8.) The only other barrier to allowing both convictions in this case to stand is *Craig*. But, appellant makes no attempt to justify the reasoning in *Craig* either. And rightfully so. Having already explained all of the many flaws in the *Craig* opinion,

(ROBM 12-22), respondent submits *Craig* is not an appropriate basis upon which to strike one of appellant's convictions. Accordingly, the two convictions in this case were permissible and should stand.

II. SECTION 954 ALSO PERMITS MULTIPLE CONVICTIONS FOR DIFFERENT STATEMENTS OF THE SAME OFFENSE

Alternatively, respondent argued in the opening brief that these two crimes are "different statements of the same offense" and that multiple convictions are permitted on this basis as well under section 954. (ROBM 10, 18-19.) Appellant argues section 954 permits *charges* based on "different statements of the same offense," but it does permit *convictions* on those charges. (AABM 6-8.)

Notably, if this Court agrees with respondent that the two crimes are distinct offenses, it need not reach this issue regarding whether different statements of the same offenses may result in multiple convictions under section 954. Should this Court agree with appellant that the two crimes were not distinct offenses, the multiple convictions are still proper under section 954 because the statute allows for multiple convictions based on different statements of the same offense.

As noted above, section 954 permits charges in three different situations: 1) where the prosecution charges different offenses connected together in their commission, 2) where the prosecution charges different statements of the same offense, and 3) where the prosecution charges different offenses of the same class of crimes.

Following the sentence which authorizes these charges, the statute reads, "The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged..." (§ 954.)

Appellant argues that the phrase, "the defendant may be convicted of any number of the offenses charged," only applies to situations where the

charges are comprised of distinct criminal *offenses*. Stated another way, appellant argues that convictions can only result for the different charges where the charges state different offenses connected in their commission or different offenses of the same class of crimes. But, where the charges are different statements of the same offense, multiple convictions would be prohibited because the statute allows convictions only for "offenses." (AABM 6.)

Reading the statute in this manner creates unnecessary confusion and necessitates judicial nullification of the jury verdict. After explaining the various charges which are permissible, section 954 expressly states, "the defendant may be convicted of any number of the offenses *charged*." (italics added.) Thus, the language of the statute unambiguously provides the defendant can be convicted of any of the charges previously identified as permissible. This includes different statements of the same offense laid out under different counts which the previous sentence explicitly authorized. Further, the statute clarifies that the prosecution need not elect from amongst the different counts or offenses. It also dictates that each offense of which the defendant is convicted must be stated in the verdict or finding of the court. Accordingly, it is not clear how, under appellant's reading, a court would preserve the prosecutor's right to proceed on all of the charges, but also ensure that the jury only return verdicts on the counts which constitute distinct "offenses." Read more naturally, it appears the Legislature used the term "offense" interchangeably with "offenses and counts." When read in this manner, the statute permits charges on the three bases previously mentioned and permits a jury to convict a defendant on any of the charges included in the pleading. When interpreting statutory text, courts strive to "give the provision a reasonable and commonsense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application

will result in wise policy rather than mischief or absurdity." (*Marshall M. v. Superior Court* (1999) 75 Cal.App.4th 48, 55)

Further, assuming appellant would argue that the court could strike unnecessary offenses after the jury returns its verdicts; this interpretation of section 954 necessitates judicial intervention and the nullification of a portion of the jury's verdict where the charges represent different statements of the same offense. Such intervention should not be built into the criminal proceedings as a necessary matter of law. Appellant argues that at that point, the prosecution could elect which counts it wished to keep. But, this too forces the prosecutor to elect to nullify a portion of the jury verdict. Jury verdicts, in general, should not be lightly disregarded: "[W]ith few exceptions, once the jury has heard the evidence and the case has been submitted, the litigants must accept the jury's collective judgment. Courts have always resisted inquiring into a jury's thought processes; through this deference the jury brings to the criminal process, in addition to the collective judgment of the community, an element of needed 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].) The public's confidence in the jury system depends, in part, on the sanctity of the verdict and its staying power. It seems counter-productive to read section 954 in a manner which would require interference with the jury verdict and thus undermine the reliability of the entire jury trial process.

Appellant's proposed interpretation of section 954 would also contradict the statute's express purpose and cause unnecessary confusion and litigation. The purpose of section 954 is to govern "the form of the information" (*People v. Brooks* (1985) 166 Cal.App.3d 24, 29) and to permit joinder of different offenses so as to prevent "repetition of evidence and save [ ] time and expense to the state as well as to the defendant" (*People v. Scott* (1944) 24 Cal.2d 774, 779). "[A]n information plays a limited but important role: It tells a defendant what kinds of offenses he is charged with (usually by reference to a statute violated), and it states the number of offenses (convictions) that can result from the prosecution." (*People v. Butte* (2004) 117 Cal.App.4th 956, 959, internal quotations omitted.) Section 954 is supposed to make the procedure behind charging a defendant more straight-forward. The broad permissibility in the charges and counts puts the defendant on notice of the crimes he faces. Reading the statute in the manner proposed by appellant would defeat this purpose and introduce into the pleading stages of criminal trials unnecessary confusion about which charges can result in convictions and which cannot. This could potentially raise a whole new subset of claims regarding whether a defendant was on notice that he faced *convictions* for all of the charges or convictions for only some of the charges. Appellant's proposed approach would also create a tangled mess of unnecessary litigation about what constitutes a "different offense," versus what is merely a "different statement of the same offense." This case is a good example of the arguments through which courts would have to sift to make such determinations.

The more natural reading of section 954 permits multiple convictions for any of the charges which are permitted. Put simply, if the prosecutor can charge the crime, the defendant can be convicted of it. To hold otherwise necessitates intervention by a court after everybody has done

everything correctly. A prosecutor appropriately charges different statements of the same offense, and appropriately presents evidence to support the differing charges, and the jury returns verdicts on all of the charges. No judicial intervention should be statutorily or legally required at this point.

Demonstrating that the more natural reading of the statute permits multiple convictions based on different statements of the same offense, this Court also read section 954 in this manner in *People v. Ortega* (1998) 19 Cal.4th 686 (*Ortega*). There, the Court summarized section 954 as follows: "Section 954 states that, '[a]n accusatory pleading may charge ... different statements of the same offense' and 'the defendant may be convicted of any number of the offenses charged.'" (*Id.*, at p. 692.) The obvious implication from the statement in *Ortega* is that multiple convictions are permissible where the multiple counts are based on different statements of the same offense.

Similarly, in *People v. Pearson* (1986) 42 Cal.4th 351 (*Pearson*), this Court considered whether a defendant could be convicted of lewd conduct on a child (§ 288, subd. (a)), and sodomy (§ 286, subd. (c)), for the same singular act of sodomy. (*Id.*, at p. 354-355.) The Court recited section 954 as follows:

> Section 954 sets forth the general rule that defendants may be charged with and convicted of multiple offenses based on a single act or an indivisible course of conduct. It provides in relevant part: "An accusatory pleading may charge two or more different offenses connected together in their commission or *different statements of the same offense* .... The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged ..."

(*Id.*, at p. 354, italics in original.) The Court went on to conclude that the defendant was properly charged with both crimes because, "such

charges clearly constitute 'different statements of the same offense' and thus are authorized under section 954." (*Ibid.*) And finally, the *Pearson* Court, reading section 954 in the manner proposed by respondent, stated, "It also appears the court was authorized to convict defendant of both offenses for each act; the statute clearly provides that the defendant may be convicted of 'any number of the offenses charged.'" (*Ibid.*)

A few lower courts have interpreted section 954 in the manner suggested by appellant. In *People v. Coyle* (2009) 178 Cal.App.4th 209, the defendant was charged with three counts of murder based on three alternative theories of first degree murder. Count 1 charged the defendant with murder during the commission of a burglary, count 2 charged the defendant with murder during the commission of a robbery, and count 3 charged the defendant with second degree murder. (*Id.*, at p. 211.) At the outset, the charging decision in *Coyle* is curious because it necessarily made the prosecutor's job more difficult. Where a charge of first degree murder is alleged, and alternate theories of committing the offense are presented, the jury need not unanimously agree on the theory of commission. (*People v. Russell* (2010) 50 Cal.4th 1228, 1257.) But, by charging the crime as three separate counts, the prosecutor required the jury to unanimously agree on all three theories. It seems unlikely this type of charging is commonplace. The court in *Coyle* held the three convictions could not stand because under section 954, the defendant's multiple convictions had to be based on separate "offenses" and the three counts in *Coyle* were simply different "theories" of committing the same offense.[4] (*Id.*, at p. 217.) The holding in *Coyle* may be correct in that a "theory" of an offense would not constitute a different "statement" of the offense for

[4] Notably, the court in *Coyle* did not have the benefit of adversarial view points as the Attorney General conceded the point.

purposes of section 954, but its conclusion that section 954 prohibits multiple convictions if the charges are different statements of the same offense is in conflict with the holdings in *Pearson* and *Ortega* which read section 954 to permit multiple convictions based on different statements of the same offense. *People v. Muhammad* (2007) 157 Cal.App.4th 484 and *People v. Ryan* (2006) 138 Cal.App.4th 360, read section 954 in the same manner, and thus are similarly at odds with this Court's authority on the issue.

Respondent's interpretation of section 954 follows the interpretation adopted by this Court in *Pearson* and *Ortega*, and reads the statute to permit convictions arising from charges based on different statements of the same offense. This is the more natural and straightforward reading of section 954 and it avoids unnecessary litigation and confusion. Accordingly, respondent's proposed interpretation best effectuates the legislative intent behind section 954.

III. THE EXCEPTIONS TO SECTION 954'S GENERAL RULE DO NOT UNDERMINE THE VALIDITY OF THE STATUTE'S EXPRESS LANGUAGE PERMITTING MULTIPLE CONVICTIONS

Next, appellant contends the case law "makes clear that multiple convictions are permissible only for multiple *distinct* offenses." (AABM 13, emphasis in original.) In support of this claim, he cites a number of cases where courts have found an exception to section 954's general rule permitting multiple convictions. These cases can be categorized into four main groups: 1) the multiple victims' cases, 2) the forgery cases, 3) the possession cases, and 4) the theft cases (based on the *Bailey*[5] doctrine). Appellant argues that these cases, taken together, confirm that courts have

[5] *People v. Bailey* (1961) 55 Cal.2d 514 (*Bailey*).

interpreted section 954 to prohibit multiple convictions based on different statements of the same offense. (AABM 13-20.)

This Court need not address the propriety of each of these lines of cases. Section 954 sets forth a general rule: a prosecutor can charge different statements of the same offense, and a defendant may be convicted of any of the charges. As explained in Section II, *ante*, this reading of section 954 is supported by principles of statutory construction and the opinions of this Court. The cases cited by appellant do not undo the general rule; they simply highlight that there are certain exceptions to the rule. The exceptions are offense specific, and cannot, as appellant suggests, be distilled into one cohesive rule which would directly contradict the language of section 954. The reasoning underlying each of the exceptions is different, and each may be of differing validity. Respondent does not concede the validity of any of these exceptions to section 954's general rule—it is simply unnecessary to address the propriety of each exception in order to resolve this case.

None of the exceptions cited by appellant applies to this case, as this case does not involve multiple victims, forgery, possession or theft. The only potential exception which would apply is the one created in *Craig*, which respondent has asked this Court to reconsider, and which, notably, appellant does not defend.

These exceptions to the general rule are hold-overs from the common law, based on statutory interpretation of the specific offense at issue (without any discussion of section 954), or derived from cases which predate changes to section 954. And some of them, like *Craig*, are products of a period of confusion over how to appropriately reconcile multiple convictions and multiple punishment. (See ROBM 14.) As a result of this confusion, many courts struck or reversed convictions in an effort to avoid multiple punishment. The confusion undoubtedly left in its wake, authority

and case law that is inconsistent with the plain language of section 954 and predates the now settled interpretation applied by this Court over the last several decades. The more modern understanding of the interplay between section 954 and section 654 sheds new light on the questionable soundness of these prior decisions. This Court may, in the years to come, need to address the propriety of these decisions, as it is being asked to address the propriety of *Craig*. Indeed, the *Bailey* doctrine is already pending review in *People v. Whitmer* (2013) 213 Cal.App.4th 122, review granted May 1, 2013, S208843[6]. But, importantly, resolution of this case does not require review of all of these exceptions to section 954's explicit language.

That section 954 sets forth a general rule regarding multiple convictions is confirmed by the Legislature's specific enactment of statutes disallowing multiple convictions in specific circumstances. In *People v. Ceja* (2010) 49 Cal.4th 1, this Court explained that section 496, subdivision (a), codified a rule of common law that a defendant could not be convicted of receiving stolen property and theft for the theft of the same property. Section 496, subdivision (a), explicitly states, "A principal in the actual theft of the property may be convicted pursuant to this section [for receiving stolen property]. However, no person may be convicted both pursuant to this section and of the theft of the same property." The very existence of section 496, subdivision (a), demonstrates that the general rule would permit multiple convictions in such circumstances. The Legislature enacted section 496, subdivision (a), because in the particular case of receiving stolen property and theft, it wished to recognize an exception to the general rule. If section 954 would not permit multiple convictions for

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[6] The issue before this Court in *Whitmer* is: "Was defendant properly sentenced on multiple counts of grand theft or did his multiple takings constitute a single offense under *People v. Bailey* (1961) 55 Cal.2d 514?"

receiving stolen property and theft of the same property, there would be no need to enact a statute duplicating that principle. Indeed, section 496, subdivision (a), would be rendered superfluous. "It is a settled principle of statutory construction [ ] that courts should 'strive to give meaning to every word in a statute and to avoid constructions that render words, phrases, or clauses superfluous.' [Citations.]" (*In re C.H.* (2011) 53 Cal.4th 94, 103.)

The multiple victims' cases hold a defendant can only be convicted of one offense where a single act has resulted in harm to more than one victim. (*People v. Garcia* (2003) 107 Cal.App.4th 1159, 1161-1162, 1166 (*Garcia*) [evading three police officers is not three counts of evading, but just one]; *People v. Newton* (2007) 155 Cal.App.4th 1000, 1002-1005 (*Newton*) [defendant could only be convicted of one count of felony hit and run despite injuring multiple people]; *In re Peter F.* (2005) 132 Cal.App.4th 877, 878-881 [defendant could only suffer one true finding for brandishing even though two people witnessed the brandishing]; *People v. Smith* (2012) 209 Cal.App.4th 910, 915-917 (*Smith*) [defendant could only be convicted of one count of indecent exposure despite multiple witnesses].)

Two of the cases held only one such conviction was allowed because the crime itself did not necessitate a victim (brandishing and indecent exposure). (*In re Peter F.*, *supra*, 132 Cal.App.4th at pp. 880-881, and *Smith, supra*, 209 Cal.App.4th at p. 915.) Arguably, in such circumstances, including different victims in the counts would not constitute a justifiably "different statement of the same offense" because the existence of a victim is not an element of the offense. Thus, the holdings in these cases may well be correct, but they do not undermine the validity of the two convictions in this case because the identity of the victim was not the distinction in the charges; instead the two counts charged crimes comprised of distinct elements.

Citing *Garcia*, appellant argues that courts have "long recognized that multiple convictions cannot be based on 'different statements of the same offense.'" (AABM 11.) The portion of *Garcia* on which appellant relies is a quotation from an opinion of this Court from 1889. The quote reads, "Although, when a man has done a criminal act, the prosecutor may carve as large an offense out of the transaction as he can, yet he is not at liberty to cut but once." (*People v. Stephens* (1889) 79 Cal.428, 432.) While the quote is indeed catchy, the case predates the change in section 954 which added the language that explicitly permits multiple convictions for different statements of the same offense, and for different offenses. (See ROBM at pp. 20-22.)

In addition, *Garcia* and *Newton* rely on *Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, 349 (*Wilkoff*). (*Garcia, supra*, 107 Cal.App.4th at pp. 1162-1163; *Newton, supra*, 155 Cal.App.4th 1000.) In *Wilkoff*, the defendant was charged with multiple counts of felony driving under the influence resulting in injury (§ 23153) arising out of a single incident in which six people were injured. (*Id.*, at p. 348.) *Wilkoff* and *Newton* base their holdings on statutory interpretation of the specific offense at hand. (*Wilkoff, supra*, 38 Cal.3d at p. 353 *Newton, supra*, 155 Cal.App.4th at pp. 1003-1004.) Further, the cases never discussed section 954, and never purported to interpret the language included in section 954. Accordingly, these cases are not authority for the issue now raised in this case which is whether section 954 permits multiple convictions for a single act where the pleading charges different statements of the same offense. Cases are not, of course, authority for propositions not considered. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176.)

In reaching its conclusion, *Wilkoff* did use broad language which appellant now cites as a general all-encompassing rule regarding the propriety of multiple convictions. Without any citation to authority, the

Court in *Wilkoff* stated, "a charge of multiple counts of violating a statute is appropriate only where the actus reus prohibited by the statute—the gravamen of the offense—has been committed more than once." (*Wilkoff, supra*, 38 Cal.3d at p. 349.) This Court has already addressed this broad language and concluded the holding of *Wilkoff* is limited to the facts of the particular case.

In *People v. McFarland* (1989) 47 Cal.3d 798, 803, the defendant, while intoxicated, collided with a car stopped at a stop light. One of the victims, the driver, was killed, but his wife and son (passengers in the vehicle) survived although both were severely injured. (*Id.*, at p. 800.) Distinguishing *Wilkoff*, the *McFarland* Court held the defendant could be properly convicted and punished for a violation of section 192, subdivision (c)(3) (vehicular manslaughter), and Vehicle Code section 23153, subdivision (a) (felony drunk driving causing injury). (*Id.*, at p. 803-804.) The Court was careful to emphasize that the holding in *Wilkoff* was offense-specific and a determination of legislative intent with respect to Vehicle Code section 23153:

> Our holding was based upon the express language of the statute, which defines the offense principally in terms of driving while intoxicated rather than the injuries which result therefrom, as well as evidence that the Legislature clearly intended only one violation of the statute regardless of the number of victims. (Citation.) The legislative intent, we concluded, indicated "that one instance of driving under the influence which causes injury to several persons is chargeable as only one count of driving under the influence." (Citation.)

(*McFarland, supra*, 47 Cal.3d at p. 802.) Accordingly, appellant's attempt to use the broad language in *Wilkoff* as a general rule restricting multiple convictions under section 954 is misguided. This Court has already determined that the language in *Wilkoff* did not give rise to a

universal rule restricting multiple convictions to situations where the actus reas has been committed twice.[7]

In addition, contrary to *Wilkoff's* broad language, this Court has repeatedly held, and appellant acknowledges, that a single act (i.e. only one commission of the actus reas) can result in multiple convictions. (See e.g. *People v. Wyatt* (2012) 55 Cal.4th 694, 704 [involuntary manslaughter and assault on a child resulting in death for the same act of killing a child]; *People v. Duff* (2010) 50 Cal.4th 787, 792-793 [second degree murder and assault on a child resulting in death for single act of suffocating child]; *People v. Sanchez* (2001) 24 Cal.4th 983, 989-991 [murder and gross vehicular manslaughter]; *Ortega, supra*, 19 Cal.4th at p. 693 [grand theft and carjacking for the single act of taking a car]; *Pearson, supra*, 42 Cal.3d at p. 354 [sodomy and lewd conduct for the same act of sodomy]; *People v. Beamon* (1973) 8 Cal.3d 625, 639-640 [kidnapping for the purpose of robbery and robbery]; *People v. Montoya* (2004) 33 Cal.4th 1031, 1034 [carjacking and unlawful taking of a vehicle].)

In *Wilkoff,* the defendant was charged with multiple violations of the *same* statute, and here, similar to the other cases cited immediately above, the defendant was charged with violations of *different* subdivisions. (§ 288a, subd. (f) and § 288a, subd. (i).) To the extent appellant is arguing *Wilkoff* should govern the resolution of this case, it is distinguishable on that basis as well. Accordingly, this case aligns more appropriately with the holdings in *Ortega*, *Pearson*, and the numerous other cases cited above, and is distinguishable from *Wilkoff.*

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[7] The Legislature responded to *Wilkoff* by enacting Vehicle Code section 23182, which provides enhancements for each additional injured victim. (*McFarland, supra*, 47 Cal.3d at p. 805.)

Appellant also claims *People v. Perez* (2010) 50 Cal.4th 222, is additional authority for his contention that courts have concluded a defendant may not suffer multiple convictions for different statements of the same offense—where the statements allege different victims. (ABOM 14.) But, *Perez* decided an entirely different issue and is inapposite to the instant case. In *Perez*, the defendant fired one shot into a group of people. He was convicted of multiple counts of attempted murder based on the number of people in the group. This Court held there was *insufficient evidence* to support multiple convictions because the defendant fired a solitary shot and there was no additional evidence to prove he had the intent to kill more than one person (a necessary showing for the attempted murder convictions). (*Id.*, at p. 234.) *Perez* did not address section 954 and whether or not it permits multiple convictions based on a single act—it was a sufficiency of the evidence claim. Thus, *Perez* is not helpful in resolving the issue before this Court in this case.

With forgery, a handful of cases from the 19th century held that a defendant could only be convicted of one count of forgery per forged document, despite multiple forged signatures on that document. (*People v. Frank* (1865) 28 Cal. 507, 513; *People v. Leyshon* (1895) 108 Cal. 440, 442-443; *People v. Harrold* (1890) 84 Cal.567, 568-569.) But, the cases which first enunciated the forgery rule predate the changes to section 954 which explicitly permit multiple convictions based on different statements of the same offense. (See ROBM 20-22.) There may well be independent considerations in the context of forgery convictions which lend the rule validity and warrant its continued application, despite the change in the statutory language of section 954. These considerations would best be vetted in a case which squarely presents the issue.

The possession cases present another exception to section 954's general rule permitting multiple convictions. Essentially, this line of cases

holds that a defendant can only be convicted of one count of a possession offense despite possessing multiple unlawful items. (*People v. Hertzig* (2007) 156 Cal.App.4th 398, 399-403 (*Hertzig*) [possession of multiple images of child pornography]; *People v. Harris* (1977) 71 Cal.App.3d 963, 971 [possession of various items with defaced serial numbers]; *People v. Rowland* (1999) 75 Cal.App.4th 61, 63-67 (*Rowland*) [possession of multiple weapons in prison]; *People v. Rouser* (1997) 59 Cal.App.4th 1065, 1071-1074 (*Rouser*) [possession of multiple controlled substances in prison].) First, the cases on this point seem somewhat inconsistent as defendants who are not in prison can suffer multiple convictions (and multiple punishment) for the simultaneous possession of different types of controlled substances. (See *People v. Briones* (2008) Cal.App.4th 524, 529-530; *People v. Aguirre* (1970) 10 Cal.App.3d 884, 893; contra *Rouser, supra*, 59 Cal.App.4th at pp. 1071-1074.) Closer examination of each of these cases demonstrates that this exception, like the others, is offense-specific. Courts often engage in an analysis of the specific statute at hand without any discussion of section 954. (*Hertzig, supra*, 156 Cal.App.4th at p. 301; *Rouser, supra*, 59 Cal.App.3d at pp. 1071-1072; *Rowland, supra*, 75 Cal.App.4th at p. 65.) For these reasons, the possession exception cannot be easily expanded to encompass the oral copulation crimes at issue in this case.

The theft cases hold that multiple theft convictions are not permissible where the defendant steals multiple items from the same victim as part of the same "plan or scheme." (See cases cited in AABM at pp. 15-16.) All of these cases trace back to *People v. Bailey* (1961) 55 Cal.2d 514 (*Bailey*), where the rule was first announced. In *Bailey*, the defendant committed a series of petty thefts which were aggregated into one count of grand theft because all of the individual petty thefts were part of the same plan or scheme. (*Id.*, at pp. 515, 518-520.) This rule makes sense, as the defendant

is employing the same scheme to steal an amount of money which, when aggregated, exceeds the threshold for grand theft. Thus, the conduct is more appropriately viewed as grand theft, and not petty theft. But, based on broad language in *Bailey* (*Id.*, at p. 519), the rule was extended to multiple counts of grand theft. (See e.g. *People v. Packard* (1982) 131 Cal.App.3d 622; and see *People v. Kronemyer* (1987) 189 Cal.App.3d 314.)

The extension of the *Bailey* rule is problematic for many of the same reasons the *Craig* rule is problematic. It runs counter to the explicit language of section 954, and it creates inherent problems for prosecutors charging cases. Consider the following hypothetical: a defendant breaks into a victim's house and steals a gun and $1 million in cash. The theft statute (§ 487), like the oral copulation statute, is divided into subdivisions. Subdivision (a) of section 487 sets out the crime of grand theft based on the value of the property taken. Any theft of property valued over $950 is grand theft. (§ 487, subd. (a).) Subdivision (d)(2) of section 487 makes it grand theft for a defendant who steals a firearm, no matter the value of the firearm (i.e., even if the firearm is valued under $950, theft of it is still grand theft). A conviction for theft of a firearm is a strike offense. (§ 1192.7, subd. (c)(26).) Accordingly, under the expanded *Bailey* doctrine, the defendant who steals a gun and $1 million can only be convicted of one theft offense—either grand theft under subdivision (a), for stealing property valued over $950, or grand theft under subdivision (d)(2), for stealing the firearm. The prosecutor then must choose between restitution for the victim of the $1 million (or potentially a sentence enhancement under section 186.11, subd. (a)(1)), or the strike offense. This makes no sense, and it runs contrary to nearly every basic notion of criminal law and liability. Thus, this Court's review of the *Bailey* doctrine is likely necessary, just as its review of *Craig* is necessary. But, the considerations for undoing the *Bailey* exception to the general rule will undoubtedly differ from the

considerations before this Court in determining whether or not to overturn *Craig*.

With each exception, the courts have looked to the legislative intent behind the particular statute. This analysis demonstrates the individualized consideration necessary for each offense, and the propriety of multiple convictions in each case. In each situation, something in the legislative intent regarding the particular offenses indicated the Legislature intended an exception to section 954's general rule. In the opening brief, respondent argued no such legislative intent is apparent with section 288a. (ROBM 11-12.) To the contrary, the use of differing punishments for crimes which contain differing elements indicates the Legislature intended the subdivisions of section 288a operate as distinct criminal offenses. Appellant has pointed to nothing about section 288a which hints at a contrary legislative intent. Accordingly, the exceptions laid out above are not applicable to this case and appellant has not attempted to demonstrate that the Legislature intended an exception apply here, as it has with these other types of offenses. The individualized nature of the analysis also cuts against appellant's argument that the exceptions should be taken together as an indication of a cohesive rule which would completely undermine section 954.

Finally, appellant contends this court's recent decision in *People v. Correa* (2012) 54 Cal.4th 331 (*Correa*), "recognized the continuing vitality" of the line of cases prohibiting multiple convictions for a single act. (ABOM 17.) Appellant goes on to explain that this court's discussion of several cases in *Correa* operates as an implicit approval of the holdings in those cases. (ABOM 17-19.) Appellant reads too much into the *Correa* opinion. The issue in *Correa* was whether a defendant could be *punished*

multiple times for multiple convictions of possessing a firearm[8]. (*Id.*, at p. 336.) The court stated explicitly, "[t]his case involves only the multiple punishment aspect of section 654." (*Ibid.*)

This Court in *Correa* reconsidered a footnote in *Neal v. State of California* (1960) 55 Cal.2d 11, 18, footnote 1 (*Neal*), which precluded "double punishment when an act gives rise to more than one violation of the same Penal Code section..." (*Ibid.*) In reconsidering the footnote, the court examined the cases on which *Neal* had relied. (*Correa, supra*, 54 Cal.4th at pp. 339-340.) The *Correa* court concluded that none of the cases cited in the *Neal* footnote supported the proposition espoused, which was that defendants could not be punished for multiple violations of the same provision. (*Correa, supra*, 54 Cal.4th at p. 340.) For the most part, the cases cited in the *Neal* footnote dealt with whether multiple convictions were proper. In discussing the cases and their holdings, the *Correa* court simply referenced the fact that the courts were concerned with multiple convictions as a means of distinguishing the cases from the proposition they purportedly supported which was whether multiple punishment was permissible for multiple violations of the same statute. Thus, the *Correa* court found the cases addressed a different issue, and were not support for the legal proposition announced in the *Neal* footnote. This analysis was part of the *Correa* court's overall discussion about the *Neal* footnote and whether it should be overruled. Ultimately, the *Correa* court concluded that

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[8] Multiple convictions for possessing multiple firearms are explicitly authorized under section 23510 (formerly section 12001, subdivision (k)). Similar to the cases cited by appellant, *People v. Kirk* (1989) 211 Cal.App.3d 58, held that such multiple convictions were not permissible. In a specific move to overrule *Kirk*, the Legislature enacted section 23510 to permit multiple convictions and punishment for possessing multiple firearms. (See *Correa, supra*, 54 Cal.4th at 345-346.)

the footnote should be overruled because it was a misstatement of law. (*Correa, supra*, 54 Cal.4th at p. 344.)

The discussion of the cases cited in the *Neal* footnote cannot fairly be characterized as a "recognition of their continued vitality." The *Correa* court never discussed or considered the propriety of the holdings in those cases; it simply discussed them to the extent necessary to show they were not authority for the legal principle announced in the *Neal* footnote. Accordingly, appellant's reliance on *Correa* is misplaced. What is more, *Correa* actually recites all of the pertinent legal principles which support respondent's position. The opinion explains, like many opinions before it, that section 954 permits multiple convictions based on a single act, but section 654 prohibits multiple punishment. (*Id.* at pp. 336-337.)

In addition, as respondent recognized in its opening brief, the doctrine of stare decisis is a consideration whenever this Court revisits or reconsiders older opinions. (ROBM 27-28.) To the extent any of the above exceptions are also inconsistent with section 954 and products of the confusion over application of sections 954 and 654, they too may need to be revisited. But, as this court explained in *Correa*, the policy considerations supporting the doctrine of stare decisis must be weighed against other factors including the legal support for the principle, later jurisprudence, and the extent to which the Legislature has relied on a particular judicial construction. (*Correa, supra*, 54 Cal.4th at pp. 343-344.) Such a balancing of factors can lead to different results in different cases. For example, the policies behind the doctrine and the extent of legislative reliance prevented this Court from overruling *Neal* in *People v. Latimer* (1993) 5 Cal.4th 1203, 1205-1206, despite agreeing with some of the Attorney General's criticisms of the *Neal* opinion. But, those same factors weighed differently in *Correa*, and permitted this Court to correct the legally unsupported principle announced in the *Neal* footnote. (*Correa,*

supra, 54 Cal.4th at p. 344.) Accordingly, reconsideration of any of the exceptions is likewise an individualized task.

Ultimately, appellant's citation to these four exceptions to the general rule serves only to confuse the issue and muddy the waters of what is otherwise a very clear application of section 954, but for the existence of *Craig*. Appellant has thrown before this Court a panoply of cases which are all distinguishable from the issue at hand. Consideration of each of these lines of cases would require a separate and distinct analysis before this Court could determine the propriety of each exception. Contrary to appellant's argument, these exceptions do not overrun the general rule—they are simply exceptions.

Despite appellant's attempt to craft from these lines of cases a consistent rule, these cases do the opposite and highlight that the general rule is exactly what this Court has held on numerous occasions: multiple convictions are permissible for different statements of the same offense, but multiple punishment is prohibited. The cases cited by appellant simply demonstrate that there are some judicially recognized exceptions to this rule. None of these exceptions is applicable to this case except *Craig*, and accordingly, *Craig* is the only exception this Court needs to review.

IV. ORAL COPULATION OF AN INTOXICATED PERSON IS NOT A LESSER INCLUDED OFFENSE OF ORAL COPULATION OF AN UNCONSCIOUS PERSON

Both parties recognize that courts have long held (and the Legislature has confirmed)that lesser included offenses are an exception to the ordinary rule permitting multiple convictions based on a single act. (ROBM 7; AABM 9; see also § 1159.) Because of this, appellant argues that oral copulation of an intoxicated person is a lesser included offense of oral copulation of an unconscious person. (AABM 33-37.) Appellant's tortured attempt to squeeze these two crimes into this exception is to no avail.

Put simply, as this Court has reiterated many times, the test for determining lesser included offenses is this: "[I]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former." (*People v. Lopez* (1998) 19 Cal.4th 282, 288; *People v. Pearson* (1986) 42 Cal.3d 351, 355.) A perpetrator can certainly violate section 288a, subdivision (i), without violating section 288a, subdivision (f). For instance, a perpetrator could hit a non-intoxicated victim over the head with a blunt force object rendering her unconscious, and then force her to engage in an act of oral copulation. In such a case, the perpetrator does not violate section 288a, subdivision (i), because there is no intoxicating substance in the victim's system that has prevented that victim from resisting the unlawful act of sexual penetration. A perpetrator can also violate section 288a, subdivision (f), without violating section 288a, subdivision (i). For example, a perpetrator can orally copulate a victim who is intoxicated, but who is still sufficiently conscious of the nature of the act. (See, e.g., *People v. Linwood* (2003) 105 Cal.App.4th 59, 63-65, & fn. 3 [the jury found the defendant guilty of raping and attempting to rape an intoxicated woman, but not guilty of attempting to rape an unconscious woman because the victim was still semi-conscious although intoxicated].) Thus, contrary to appellant's argument, oral copulation of an intoxicated person is not a lesser or necessarily included offense within oral copulation of an unconscious person.

Viewed in another context, the absurdity of appellant's argument that these two crimes are lesser included offenses is clear. A defendant may only be convicted of an uncharged crime where the uncharged crime is a lesser included offense of one of the charges. (§ 1159.) This protects the defendant's constitutional due process right to notice of the charges he faces. (*People v. Lohbauer* (1981) 29 Cal.3d 364, 368-369.) If appellant is

correct that oral copulation of an intoxicated person is a lesser included offense of oral copulation of an unconscious person, then a defendant is on notice when he is charged with the latter, that he is also facing a charge for the former. Undoubtedly, if a prosecutor charged a defendant with oral copulation of an unconscious person, but then after the evidence was presented, the prosecutor sought a conviction for oral copulation of an intoxicated person, the defendant would have a valid claim that he had not received adequate due process in that he did not have notice that he was facing a charge of oral copulation of an intoxicated person.

Neither of the crimes at issue is a lesser included offenses of the other.

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CONCLUSION

On the whole, appellant's entire answer brief is perhaps the best argument in favor of overturning *Craig* and applying the familiar and consistent application of sections 954 and 654. As appellant has demonstrated, the case law contains numerous exceptions and can be inconsistent and confusing. Even where the various exceptions that have been created work in a given context, they cannot be applied universally. But, sections 954 and 654, when applied correctly, are consistent, predictable, and fair. Respondent does not doubt that the work of cleaning up these anomalies in the case law is not over, this is simply one more step in that direction, and reviewing *Craig* is the only step this Court needs to take in this case.

Dated: November 15, 2013

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
STEVEN T. OETTING
Supervising Deputy Attorney General

MEREDITH S. WHITE
Deputy Attorney General
Attorneys for Plaintiff and Respondent

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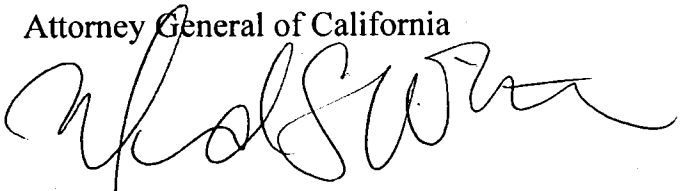
CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S REPLY BRIEF** uses a 13 point Times New Roman font and contains **8, 860** words.

Dated: November 15, 2013

KAMALA D. HARRIS
Attorney General of California



MEREDITH S. WHITE
Deputy Attorney General
Attorneys for Plaintiff and Respondent
General Fund - Legal/Case Work

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

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

I declare:

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

On **November 15, 2013**, I served the attached **RESPONDENT'S REPLY BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Raymond M. DiGuiseppe
Attorney at Law
P.O. Box 10790
Southport, NC 28461
****ADI Panel Attorney***
diguiseppe228457@gmail.com
Attorney for Appellant

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

Appellate Defenders, Inc.
555 West Beech Street, Suite 300
San Diego, CA 92101

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

Bonnie M. Dumains
San Diego District Attorney's Office
330 West Broadway, Suite 1300
San Diego, CA 92101-3826

and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on **November 15, 2013**, to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com. and to ADI Panel Attorney, Raymond M. DiGuiseppe, electronic notification address at diguiseppe228457@gmail.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **November 15, 2013**, at San Diego, California.

Claudia Chavez-Estrada
Declarant

Signature

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