IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent **v.** **BILLY CHARLES WHITE,** Defendant and Appellant.	**Case No. S228049** Court of Appeal Case No. D060969 San Diego County Superior Court Case No. SCD228290

ON REVIEW FROM
THE FOURTH APPELLATE DISTRICT, DIVISION ONE
AND THE SAN DIEGO COUNTY SUPERIOR COURT
THE HONORABLE FRANK A. BROWN, JUDGE

APPELLANT'S ANSWER BRIEF ON THE MERITS

Raymond Mark DiGuiseppe
State Bar Number 228457
Post Office Box 10790
Southport, North Carolina 28461
Phone: 910-713-8804
Email: diguiseppe228457@gmail.com

Attorney for Defendant and Appellant,
Billy Charles White

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

ISSUE PRESENTED

Was White properly convicted of both rape of an intoxicated person and rape of an unconscious person for a single act of sexual intercourse?[1]

INTRODUCTION

Billy White's two rape convictions under section 261 based upon a single act of sexual intercourse have been under appellate review since November 2011. In that time, a Court of Appeal majority has twice ruled in his favor that both convictions cannot stand – in its initial opinion and in its subsequent opinion after reconsideration of the matter in light of *People v. Gonzalez* (2014) 60 Cal.4th 533, concerning dual convictions of unlawful oral copulation under section 288a based on similar circumstances. Both times, the majority followed the long settled case authority holding that section 261 is intended to create a unitary offense permitting a single conviction of rape for a single act of nonconsensual intercourse. Both times, the majority was correct. This consistent line of case authority traces back over a century now and has yet to be at all disturbed or even called into doubt, by *Gonzalez* or any other discernible published authority – much less the Legislature. In fact, this unbroken line of authority, the canons of statutory construction, and the legislative history of section 261 all compel the conclusion that the Legislature has adopted this interpretation of section 261.

Being a matter reserved to the exclusive province of the Legislature, unless and until it determines otherwise, this is the law that must be enforced. And the courts are fully equipped to properly enforce it so long as they interpret and apply section 261 as the unitary offense it is intended to be. The disposition the Court of Appeal crafted to remedy the situation on appeal (reversal of the rape conviction on Count 2) is consistent with the disposition

---

[1] Statutory citations are to the Penal Code unless otherwise indicated.

that could and should have been reached in the first instance had the charged offenses been treated as what they are – alternate charges permitting a single conviction of rape for the single act of nonconsensual intercourse. Moreover, the interpretation of section 261 as creating a unitary offense is now so firmly established that even if the Court determines it can and should reverse that law by judicial declaration, such a marked reversal could only be applied prospectively. Thus, the judgment in this case must be affirmed either way.

STATEMENT OF THE CASE AND FACTS

On the night of 14, 2010, Valentine's Day, Stephanie W., White, Johnny Jacoby, and other mutual friends socialized and drank alcohol together at a strip club in downtown San Diego until the early morning hours of the next day. (RT 43-44, 47-48, 77, 79, 94.) Stephanie, White, and Jacoby then went to a hotel. (RT 87, 99-100, 124, 162-163.) Stephanie had consumed several alcoholic drinks and was apparently intoxicated – "stumbling" around the hotel lobby as if "totally wasted" and throwing up inside the hotel room. (RT 47, 68-69, 100-103, 111-114, 123-129, 163-165, 194, 267.) She was "kind of in and out" of it, until she fell asleep on one of the beds. (RT 103, 128-130, 168, 185.) White got on the bed next to her, on top of the covers, and Jacoby went to sleep in the other bed. (RT 129-130, 186.)

At some point during the early morning hours, White and Stephanie had sexual intercourse. All Stephanie recalled of this was the sensation of having intercourse with someone on top of her, while being in a "dreamlike" state in which she was "having a dream of sex" involving her ex-boyfriend; mumbling "no" or thinking "no;" feeling the person roll off her; and then waking up to see White lying next to her wearing only an undershirt. (RT 48-49, 59, 74-75, 78-80, 83, 89, 93.) Stephanie woke up Jacoby and told him White had assaulted her. (RT 75, 130-131.) When Jacoby confronted him, White denied that, saying Stephanie was "begging him for it." (RT 131, 191.)

White was charged, and convicted, of both rape of an intoxicated person (§261, subd. (a)(3); Count 1) and rape of unconscious person (§261, subd. (a)(4); Count 2.) (CT 87-88, 173-176.) On appeal, the Court of Appeal majority reversed the conviction on Count 2, holding that section 261 permits only a single conviction for a single act of nonconsensual sexual intercourse. This Court granted respondent's petition for review and held the case pending disposition of the *Gonzalez* case, which was then still considering whether section 288a permits dual convictions of oral copulation based upon a single act of unlawful oral copulation under similar circumstances. After the Court held that section 288a permits such dual convictions, it transferred the matter back to the Court of Appeal for reconsideration of White's case. The Court of Appeal majority reconsidered the matter accordingly and again concluded that section 261 precludes White's conviction on Count 2. This Court granted respondent's petition for review on the issue now presented.

ARGUMENT

I

THE JUDGMENT REVERSING COUNT 2 MUST BE AFFIRMED BASED UPON THE LONG SETTLED, LEGISLATIVELY ADOPTED INTERPRETATION OF SECTION 261 AS A UNITARY OFFENSE THAT PERMITS JUST ONE CONVICTION FOR ONE ACT OF NONCONSENSUAL SEXUAL INTERCOURSE

Just when a single act or course of conduct may properly give rise to more than one criminal conviction, even if not multiple punishments under section 654,[2] has been a subject of some complexity within the courts which

---

[2] Section 654, subdivision (a), provides:

> An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of

have applied varying tests and analyses depending upon the context. While the means have varied, the end goal is simple, and always the same: to effectuate the apparent legislative intent behind the statutes defining the crimes involved. All the interpretative devices for discerning the intent behind section 261 demonstrate it was intended to create a unitary offense for which only one conviction of rape is permissible for one act of nonconsensual intercourse, and that is what must dictate the outcome here.

A. The Intent Behind Section 261 Ultimately Determines the Propriety of Multiple Convictions Based Upon a Single Act

Courts have recognized numerous situations in which multiple convictions based upon a single act or course of conduct are prohibited. One such bar applies to "necessarily included offenses." (See e.g., *People v. Reed* (2006) 38 Cal.4th 1224; *People v. Ortega* (1998) 19 Cal.4th 686, 692-693.) Sometimes referred to as the "elements test," the basic rule is that if one charged offense cannot be committed without necessarily committing another charged offense, the latter is considered included within the former and cannot be the basis of a separate conviction. (*People v. Montoya* (2004) 33 Cal.4th 1031, 1034.) Language in some cases has implied that this is the only prohibition against multiple convictions based upon a single act or course of conduct. (See *Reed*, at p. 1229 ["only a statutorily lesser included offense is subject to the bar against multiple convictions in the same proceeding . . ."].) While it is always true that lesser necessarily included offenses cannot serve as the basis for multiple convictions based upon a

---

> imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.

single act or course of conduct, it is clear that the converse is *not* always true: the mere existence of different elements between or among the charged offenses does not mean multiple convictions are necessarily permissible.

Where, as here, the charged offenses are based upon a single act or course of conduct that violates different subdivisions of the same statute defining a particular criminal offense, courts have found multiple convictions precluded if the apparent legislative intent is to create a unitary offense. For example, it is settled that a person may not be convicted of both assault with a deadly weapon (§245, subd. (a)(1)) and assault by means of force likely to produce great bodily injury (§245, subd. (a)(4)), even though the latter is "certainly not an offense lesser than and included within" assault with a deadly weapon, because this statute '"defines only one offense'" (*People v. McGee* (1993) 15 Cal.App.4th 107, 114, quoting *In re Mosley* (1970) 1 Cal.3d 913, 919, fn. 5). Also, "the commission of any one or more of the acts enumerated in section 470, in reference to the same instrument, constitutes but one offense of forgery," even though the subdivisions describing the various ways to commit forgery are not necessarily included offenses of one another. (*People v. Ryan* (2006) 138 Cal.App.4th 360, 371.) Similarly, the numerous acts listed in section 550, subdivision (a), creating the crime of insurance fraud, "simply describe different means of committing the single crime of insurance fraud," and yet they also are not offenses necessarily included within one another because they are based on different elements. (*People v. Zanoletti* (2009) 173 Cal.App.4th 547, 556, fn. 3.)

Where the multiple charged offenses are based upon the same provision of the same statute allegedly violated multiple times, one line of cases follows the rationale of *Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, reaffirmed in *People v. Whitmer* (2014) 59 Cal.4th 733, that "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*, at p. 349.) The focus is solely upon the "separate and distinct" nature of the acts. (See e.g., *Whitmer*, at pp. 740 ["separate and distinct" thefts as part of a singular criminal enterprise justified separate convictions]; *People v. Zanoletti*, *supra*, 173 Cal.App.4th at pp. 559-560 [separate acts of fraud as part of a singular enterprise supported separate convictions]; *Wilkoff*, at p. 349 [one act of driving under the influence causing injury permits only one conviction, however many persons injured]; *People v. Newton* (2007) 155 Cal.App.4th 1000, 1002-1004 [only one conviction for one act of fleeing an accident, regardless of how many persons injured]; *People v. Wilson* (2015) 234 Cal.App.4th 193, 199-202 [only one conviction for making criminal threats during a single episode no matter how many threats]; *People v. Smith* (2012) 209 Cal.App.4th 910, 915-917 [only one conviction of indecent exposure for each exposure however many observers]; *People v Garcia* (2003) 107 Cal.App.4th 1159, 1161-1162 [only one conviction of evading a police officer however many officers involved].)

Another line of these cases has held that "a defendant may be convicted of multiple crimes – even if the crimes are part of the same impulse, intention or plan – as long as each conviction reflects a completed act" – with exception of those to which the "converse *Bailey* doctrine" would apply. (*People v. Kirvin* (2014) 231 Cal.App.4th 1507, 1518.) The converse *Bailey* doctrine has been invoked in various contexts to preclude multiple convictions based upon crimes "unified by a single intent, impulse or plan" or that permit the prosecution to "aggregate" the harm or injury. (*Ibid.*)

Where the multiple charged offenses are based upon alleged violations of entirely distinct criminal statutes during a single incident, the courts have also focused upon the existence of separate and distinct completed criminal acts in determining the propriety of multiple convictions. (See *People v. Harrison* (1989) 48 Cal.3d 321, 325-327 [illustrating case examples upholding multiple convictions for each completed sex act during

a single episode in violation of separate criminal statutes, such as rape and sodomy]; *People v. Catelli* (1991) 227 Cal.App.3d 1434, 1446-1447 [same]; *People v. Pearson* (1986) 42 Cal.3d 351 [finding the same act properly supported convictions of the distinct offenses of sodomy and lewd conduct].)

The key factor ultimately driving the outcome in all these cases has been the apparent legislative intent behind the criminal statutes involved. (See *Gonzalez*, *supra*, 60 Cal.4th at p. 537 [whether the subdivisions of section 288a create separate offenses permitting multiple convictions for a single act "turns on the Legislature's intent in enacting these provisions . . ."]; *Whitmer*, *supra*, 59 Cal.4th at p. 743, conc. opn. of Liu, J. [this is ultimately "a question of legislative intent that arises when interpreting any criminal statute"]; *People v. Garcia* (2016) 62 Cal.4th 1116, 1123-1127 [determining the propriety of multiple convictions by giving effect to "the Legislature's intended purpose" in defining burglary]; *People v. Harrison*, *supra*, 48 Cal.3d at p. 332-333 [noting the legislative intent controls this inquiry because a "court is not to sit as a 'super-legislature' altering criminal definitions"].) And so it must be in determining the propriety of multiple rape convictions under section 261 based upon a single act of intercourse.

B. The Textual, Structural, and Contextual Analysis of Section 261 Demonstrates It Continues to Define a Unitary Offense of Rape

It is solely the prerogative of the Legislature to "make conduct criminal" (*Gonzalez*, *supra*, 60 Cal.4th at p. 537; §6), to "determin[e] which class of crimes deserves certain punishments and which crimes should be distinguished from others" (*People v. Flores* (1986) 178 Cal.App.3d 74, 88), and to "assess the competing interests and to determine public policy" (*Willis v. State of California* (1994) 22 Cal.App.4th 287, 293). In determining the legislative intent, "[w]e begin by examining the statute's words, giving them a plain and commonsense meaning. We do not, however, consider the

statutory language in isolation." (*Gonzalez*, at p. 537.) Rather, "we construe the words in question in context, keeping in mind the nature and obvious purpose of the statute . . . 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.*) "If, however, the statutory language is susceptible of more than one reasonable construction, we can look to legislative history in aid of ascertaining legislative intent." (*Ibid.*)

1. The Legislature is Presumed to be Fully Aware of, and By Now to Have In Fact Adopted, the Long Settled Case Law Interpreting Section 261 as Creating a Unitary Offense

"[T]he Legislature is presumed to be aware not only of the general laws which it has enacted . . . , but also of the judicial decisions interpreting those laws . . ." (*Stone St. Capital, LLC v. California State Lottery Comm'n* (2008) 165 Cal.App.4th 109, 120-121; accord *People v. Harrison*, *supra*, 48 Cal.3d at p. 329.) It is "conclusively presumed to have enacted the new laws in light of existing laws having direct bearing upon them." (*McLaughlin v. State Bd. of Educ.* (1999) 75 Cal.App.4th 196, 212.) However, "'[i]t should not be presumed that the legislative body intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication.'" (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1156, quoting *People v. Davenport* (1985) 41 Cal.3d 247, 266; accord *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1149-1150.) "[I]nstead it will be presumed that the Legislature took such principles for granted rather than sought to alter them by omitting any specific provision for their application." (*Cmty. Cause v. Boatwright* (1981) 124 Cal.App.3d 888, 903.)

i. The Historical Interpretations of Section 261

While section 261 has been modified numerous times since its enactment in 1872, throughout it all, the Legislature has preserved the salient feature on which the courts have repeatedly relied to conclude it is intended to create a unitary offense permitting a single conviction for a single act of intercourse: a preamble stating the general act involved (intercourse with a non-spouse), followed by a list of circumstances, which, when read with the preamble, state one crime perpetrated by the same essential means of procuring nonconsensual intercourse. Or, as the Court of Appeal put it, "the primary elements of rape, under the applicable section 261, remain the same as the former section 261: (1) an act of sexual intercourse (2) with a person not the spouse of the perpetrator (3) without the consent of the victim. The various subdivisions of the applicable section 261 (subd. (a)(1)-(7)) merely describe the way in which lack of consent can be shown." (Slip Opn. 16.)

The judicial construction of section 261 as creating such a unitary offense has become firmly embedded over more than a century now. Way back at the beginning of the last century, this Court noted that section 261 is not intended "to create six different kinds of crime" (*People v. Vann* (1900) 129 Cal. 118, 121) and simply states a single crime that may be committed "in different ways" (*People v. Jailles* (1905) 146 Cal. 301, 304). The next judicial pronouncement came in 1941, when this Court specifically held again, in *Craig*, that as a general principle "[t]hese subdivisions merely define the circumstances under which an act of intercourse may be deemed an act of rape; they are not to be construed as creating several offenses of rape based upon that single act." (*People v. Craig* (1941) 17 Cal.2d 453, 455.) It also reaffirmed the decision in *Jailles*, noting the outcome there was still correct even though the version of section 954 then in effect prohibited multiple convictions of different offenses in a single prosecution, because the multiple charges were "based on a single act of intercourse that constituted

but one offense."[3] (*Id.* at pp. 456-457.) Four years later, in *People v. Scott* (1944) 24 Cal.2d 774, this Court found again that the defendant "c[ould] not be convicted on three separate counts of rape, all based on a single act of intercourse" under section 261, "even though it be accomplished under more than one of the circumstances enumerated in that section." (*Id.* at p. 777.)

These pronouncements also lay undisturbed until 1957, when this Court reaffirmed the holding in *Craig* and further noted the existing cases "[c]onfirm[ed] the view that the six subdivisions of section 261 of the Penal Code do not proscribe six distinct offenses, but rather that they describe six different ways in which the one crime of rape can be committed." (*People v. Marshall* (1957) 48 Cal.2d 394, 402.) A few years later in *People v. Collins* (1960) 54 Cal.2d 57, the Court reiterated "[t]he subdivisions of section 261 do not state different offenses but merely define the different circumstances under which an act of intercourse constitutes the crime of rape," and it went on to *reject* the claim that *Craig* was no longer good law. (*Id.* at p. 58.)

---

[3] The current version of section 954, which is substantially similar to the version in effect at the time of *Craig*, provides in pertinent part:

> 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; . . . An acquittal of one or more counts shall not be deemed an acquittal of any other count.

ii. The Legislative Activity During Development of the Judicial Interpretations of Section 261

Ten years after *Collins*, in 1970, the Legislature amended section 261 for the first time since 1913. (Stats.1970, ch. 1301, §§1, 2, pp. 2405–2406.) This action removed intercourse with an underage female from the definition of "rape" under section 261, relabeled it "unlawful sexual intercourse," and placed it into the newly created section 261.5. This change served the distinct purpose of reducing the punishment and eliminating the stigma of being a "rapist" for those involved in a consensual sexual relationship with a near-adult minor. (*Johnson v. Dept. of Justice* (2015) 60 Cal.4th 871, 884-885.) There is no indication it was intended to refute the 70 years of case law construing the circumstances of section 261 as creating a unitary offense.

In fact, when the Court addressed this change in the 1981 opinion of *People v. Lohbauer* (1981) 29 Cal.3d 364, it noted the creation of section 261.5 had abrogated the *Collins* decision only insofar as one could no longer say that pleading a general charge of rape under section 261 would provide adequate notice of an intent to prosecute for "unlawful sexual intercourse with a minor under section 261.5." (*Id.* at pp. 371-372.) The Court went on to essentially reaffirm the basic precept that the circumstances enumerated in section 261 for the crime of rape establish a single crime. (*Id.* at p. 372.)

Over the next decade, other state courts cited this California case law in likewise construing their similarly structured rape statutes. (*State v. LaMere* (1982) 103 Idaho 839, 842 [following *Collins* and *Lohbauer* to find the provisions of Idaho's "nearly identical" rape statute "do not state different offenses but merely define the different circumstances under which an act of intercourse constitutes the crime of rape"]; *State v. Banks* (1987) 113 Idaho 54, 56-57 [740 P.2d 1039] [citing *Collins* and *Craig* in reaffirming "the unitary offense nature of our rape statute"]; *Biggus v. State* (1991) 323 Md. 339, 343 [593 A.2d 1060] [citing *Craig* and *Collins* in holding a Maryland

sexual offense statute creates a single offense that permits a single conviction for a single act even if more than one enumerated circumstance is involved].)

Then, significantly, in 1993 the Legislature completely redesigned section 262 to essentially mirror section 261 for each of the enumerated circumstances constituting spousal rape. (Stats.1993, c. 595, §1.)[4] This recasting of section 262 in a substantially identical manner unavoidably implies an intent to adopt the judicial interpretation of section 261. (See *People v. Harrison*, *supra*, 48 Cal.3d at p. 329 ["Where a statute is framed in language of an earlier enactment on the same or an analogous subject, and that enactment has been judicially construed, the Legislature is presumed to have adopted that construction."]; *Pac. Intermountain Express v. Nat'l Union Fire Ins. Co.* (1984) 151 Cal.App.3d 777, 783 ["the Legislature is presumed to use words in the same sense as given by previous judicial construction of statutes on an analogous subject, unless the Legislature clearly expresses a contrary intent"].) At the least, given the absence of any express intent to "overthrow" these "long-established principles of law" (*Weeks v. Baker & McKenzie*, *supra*, 63 Cal.App.4th at p. 1156), one must presume the Legislature did not intend to *refute* them, and instead "took such principles for granted" (*Cmty. Cause v. Boatwright*, *supra*, 124 Cal.App.3d at p. 903).

More cases followed, reaffirming this interpretation of section 261 with no intervening contrary legislative action. In *People v. Maury* (2003) 30

---

[4] The quite different former version of section 262 provided in pertinent part: "Rape of a person who is the spouse of a perpetrator is an act of sexual intercourse accomplished against the will of the spouse by means of force or fear of immediate and unlawful bodily injury on the spouse or another, 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. As used in this subdivision 'threatening to retaliate' means a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death."

Cal.4th 342, this Court invoked *Collins* as the foundation for its holding that dual rape convictions could not stand because the statute "merely describ[ed] different circumstances under which an act of intercourse may constitute the crime of rape." (*Id.* at p. 427.) Then, as the Court of Appeal observed here, in *People v. Smith* (2010) 191 Cal.App.4th 205, the appellate court squarely held, based on *Craig*, in a situation "identical to the case bar," that the defendant could not properly stand convicted of two counts of rape for his single act of intercourse with the victim. (Slip Opn. at p. 22.)[5]

In essence, "[a]lthough the section has been amended a number of times since *Craig*, the statute *still* defines a single crime." (Slip Opn. at p. 23, italics added.) This century-long, unbroken track record of case law so interpreting section 261 means we must presume the Legislature has intended and still intends for section 261 to be interpreted and applied in that manner.

2. The Textual Features of Section 261 Are Consistent with This Settled Interpretation of that Statute

Additional textual features support this interpretation of the statute. The preamble subdivision describes the sexual act in terms of "*an* act of sexual intercourse" accomplished with a non-spouse. (§261, subd. (a), italics added.) "An" is an indefinite article that modifies the *singular* form of a noun (American Heritage Dict. (4th ed. 2000), p. 63) and thus, in context, should be read to describe merely a single act of rape (see *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1131 ["[W]henever possible, significance must be given to every word [in a statute] in pursuing the legislative purpose . . ."];

---

[5] The Oregon courts have also recently held that Oregon's similarly structured sex offense statutes create unitary offenses even though the underlying act may violate more than one of the enumerated circumstances constituting the crime. (*State v. Parkins* (2009) 346 Or. 333, 355 [211 P.3d 262]; *Bumgarner v. Nooth* (2012) 254 Or.App. 86, 93-94 [295 P.3d 52].)

see also *People v. Velasco* (2015) 235 Cal.App.4th 66, 76 [holding the article "*that*" in "that gang" implies a singular meaning in section 186.22]; *Biggus v. State*, *supra*, 323 Md. at p. 346 [a statute's preamble stating "that one is guilty of *a* sexual offense in the third degree if he engages in sexual conduct in the following ways, on its face appears to create a single offense"]).

The end of the preamble, stating "under *any* of the following circumstances" (§261, subd. (a), italics added), also connotes singularity. Before 1979, this used to say "under *either* of the following circumstances." (Stats.1979, ch. 994, §1.) As the Court of Appeal noted (Slip Opn. 18-19), the change likely was prompted by the recognition that "any of" is more grammatically consistent with a list of more than two enumerated items since "either" more commonly refers to "any one of two." (American Heritage Dict. (4th ed. 2000), p. 572.) The word "any" is most commonly understood to mean "[o]ne, some, every, or all *without specification*" (*id.* at p. 81, italics), and thus, as used in the preamble of section 261, indicates the enumerated circumstances create a list of ways that a singular act of "rape" may be committed. (See *State v. Barrett* (1999) 331 Or. 27, 35 ["any of" in the preamble to the list of circumstances constituting aggravated murder indicates "the legislature intended to define a single crime"].)[6]

There is also precedent that the Legislature takes action when the singular import of "any" results in an unintended preclusion of multiple convictions. When an appellate court held that former section 12021 (now

---

[6] Respondent previously argued this change reflected an intent to reject the prior case law. (Resp. Pet. Rev. 6; Resp. Supp. Brief, Ct. of Appeal 6-7.) Respondent has not pursued this claim on the merits, and rightly so. It is an unsupported "leap of logic." (Slip Opn. 19.) If the Legislature sought to refute the notion that section 261 creates a unitary offense, it would not have sat idly by as 79 years of contrary law filled the annals, only to then just change "either" to "any of," creating a *stronger* connotation of singularity.

section 29800), prohibiting possession of "*any* firearm" by felon, permitted a single conviction regardless of how many firearms possessed, the Legislature responded with section 12001, subdivision (k) (now section 23510), to provide "*notwithstanding* the fact that 'any firearm' may be used [in this prohibition], each firearm . . . constitutes a distinct and separate offense." (*People v. Correa* (2012) 54 Cal.4th 331, 345-347; §23510.) Through this change, the Legislature "made clear that multiple convictions *were* permissible." (*Id.* at p. 348, conc. opn. of Werdegar, J, italics added.)

3. The Settled Interpretation of Section 263 Further Reflects a Legislative Design of a Unitary Offense in Section 261

"The section which describes the basic elements and circumstances attending the crime of rape (§261) is modified by companion language in section 263." (*People v. Harrison*, *supra*, 48 Cal.3d at p. 328.) It provides: "The essential guilt of rape consists in the outrage to the person and feelings of the victim of the rape. Any sexual penetration, however slight, is sufficient to complete the crime." Section 263 has remained essentially the same since 1872 when it was enacted alongside section 261. (*Id.* at p. 328.)[7] "Obviously, *one* purpose of the 'slight penetration' language" is to clarify "that prolonged or deep insertion, or emission or orgasm, is unnecessary to 'complete' the crime." (*Id.* at p. 329.) It is also obvious that actual "outrage" of the victim or an intent inflict "outrage" is unnecessary to prove the crime. (*Id.* at p. 333, fn. 9.) What these aspects of section 263 mean in the context of defining the crime of rape under 261 is that the "outrage" peculiar to rape "is deemed to occur" and is thus "complete" "*each time* the victim endures *a new*,

---

[7] The sole amendment occurred in 1979, to change "the feelings of *the female*" to "the feelings of *the victim*." (Stats.1979, c. 994, p. 3384, §3.)

unconsented sexual insertion," regardless of how "slight." (*Id.* at p. 330, italics added; accord *People v. Scott* (1995) 9 Cal.4th 331, 341.)

"The Legislature, by devising a distinctly harsh sentencing scheme, has emphasized the seriousness with which society views *each separate* unconsented sexual act, even when all are committed on a single occasion." (*People v. Harrison*, *supra*, 48 Cal.3d at p. 330, italics added.) The "distinctly harsh" consequence the Legislature devised for this crime is that an act of penetration to any degree without the victim's consent is enough to complete the crime, and each such *separate* act even during a single uninterrupted episode warrants a separate conviction. (*Id.* at p. 331.) So, consistent with the settled interpretation of section 261 as permitting only a *single* conviction for a *single* act of nonconsensual intercourse, companion section 263 shows the Legislature envisioned the "harshness" of the rape statute to result in multiple convictions based upon *multiple* acts of even the "slightest" penetration during a single assault – not multiple convictions for *one* such act.

4. Lack of Self-Containment is Another Supportive Factor

Another contextual factor further supporting the settled judicial construction of section 261 is that the various subdivisions are not "self-contained" – each does not "set[] forth all the elements of a crime" and prescribe a specific punishment for the offense described. (*Gonzalez*, *supra*, 60 Cal.4th at p. 539.) As the Court of Appeal noted (Slip Opn. 16-17), the "self-contained" nature of section 288a influenced this Court's conclusion in *Gonzalez* that the subdivisions of the statute were intended to establish separately convictable offenses based on one act. Notably, with the exception of the rape and spousal rape statutes, and one other (section 266i), all the sex offense statutes that create crimes (as opposed to merely enhancements for aggravated forms of sex crimes) are similarly "self-contained." (See §§ 243.4, 265, 266, 266a, 266b, 266c, 266d, 266e, 266f, 266g, 266h, 266j, 267,

288, 288a, 288.2, 288.3, 288.4, 288.5, 289, 289.5, 289.6, 647.6.)[8] As far as White's research reveals, courts have specifically considered the multiple-conviction issue with respect to two of these sections: 288a and 647.6; and both have been held to permit multiple convictions based on single act. (*Gonzalez*, at p. 539 [section 288a]; *People v. Phillips* (2010) 188 Cal.App.4th 1383, 1396-1397 [section 647.6].) By contrast, section 266i, which prohibits "pandering," and like the rape statute is *not* "self-contained," has been construed to create a unitary offense. (*People v. Leonard* (2014) 228 Cal.App.4th 465, 490 ["The subdivisions of the [pandering] statute do not state different offenses but merely define the different circumstances under which the crime of pandering may be committed."].)

The rape and spousal rape statutes also stand apart from the lot of other sex offense statutes in that the punishments are not only not within the individual subdivisions of each but are not even within the statute. Instead, they are set forth in section 264, an entirely separate statutory provision. That the Legislature has consistently adhered to a structure fundamentally different from the structure employed for virtually all other sex offense statutes, and similar to the one other sex offense statute that has also been construed to permit a single conviction for a single act, can only further indicate it has adopted and chosen to maintain the long settled judicial construction of section 261 as permitting a single conviction for a single act.

---

[8] While section 261.5's general structure is "self-contained" in a technical sense, its subdivisions obviously would never overlap and give rise to a situation of more than one charge or conviction based upon a single act of intercourse, since each simply targets "an act" of intercourse with a minor based upon a specific age difference between the victim and the perpetrator.

C. The Legislative History Solidifies the Presumptions that the Judicial Interpretation of Section 261 Has Been Adopted

A closer look at the legislative activity concerning rape and the other major sex offense statutes, "in aid of ascertaining legislative intent" (*Gonzalez, supra*, 60 Cal.4th at p. 537), confirms that the Legislature has not, "by express declaration or necessary implication" (*People v. Davenport, supra*, 41 Cal.3d at p. 266), ever attempted to refute or even expressed any concern about the long settled interpretation of section 261. This further solidifies the presumptions about the intent of the Legislature. (*Ibid.*)

Again, the first legislative action taken concerning section 261 since 1913 came in 1970, 29 years after *Craig* and 10 years after the reaffirmation of *Craig* in *Collins*. "[I]n separating and renaming the offense of unlawful sexual intercourse, the Legislature sought to eliminate, for section 261.5 offenses, the social stigma associated with the rape label so that offenders could more readily obtain employment and support children conceived as a result of such intercourse." (*Johnson v. Dept. of Justice, supra*, 60 Cal.4th at pp. 884-885.) This action had nothing to do with multiple convictions based upon a single act. Similarly, the activity in 1979 just rendered section 261 gender neutral, substituted "any of" for "either of" in the preamble, and enacted section 262 to cover spousal rape. (Stats.1979, c. 994, p. 3383, §1.)

There was more attention to sections 261 and 262 the next year with Assembly Bill 2899, which eliminated the requirement of "resistance" for rape and spousal rape. (Stats.1980, c. 587, p. 1595, §1).) Proponents described how they and "dozens and dozens" of other people, including "judges, defense attorneys, and prosecutors," "spent countless hours evaluating" and "carefully scrutiniz[ing]" "every word in the bill." (Exh. 1, p. 16.)[9] Yet, there was no mention of any other concerns about these statutes.

---

9 See White's contemporaneously filed a request for judicial notice.

It was the same sort of situation the following year, when the Legislature took up section 261 again and just added the use of threats of future retaliation as another circumstance of rape. (Stats.1981, c. 849, p. 3270, §1.)

The Legislature considered the statute two years later with Senate Bill 1094, just a couple of years after *Lohbauer* issued. (Stats.1983, c. 949, §1.) This time, the Legislature addressed the references in the statute ("lunacy" and "unsoundness of mind"), which it saw as "antiquated" and "outmoded," and "moderniz[ed]" them with "more contemporary terms" to describe persons with mental and physical disabilities. (Exh. No. 2, pp. 20, 23, 26, 29.) Despite this "modernizing" focus, there was no indication at all that anything within the statute was "antiquated," "outmoded," or otherwise out of step with the Legislature's view of how the statute should be interpreted concerning the number of convictions arising from a single act of intercourse.

There was more focus upon the rape statute in 1984, 1985, and 1986, with amendments adding more circumstances as other forms of rape (Stats.1984, c. 1634, §1; Stats.1984, c. 1635, §79.5), clarifying the need for "legal" consent (Stats.1985, c. 283, §1), and further updating the terminology used to describe victims with mental and physical disabilities (Stats.1986, c. 1299, §1). Four years later, in 1990, the Legislature added the use of "menace" and "duress" as forms of rape, in response to an appellate court decision highlighting the anomaly that rape was the only major sex offense which could not be committed by such means. (Stats.1990, c. 630, §1; Exh. No. 3, pp. 67, 74-75.) Still, no mention of any concern about the decades of case law interpreting the structure of the statute as precluding multiple convictions based upon a single act of intercourse. Instead, as noted, in 1993 the Legislature adopted that structure in revamping section 262. (Stats.1993, c. 595, §1.) This pattern continued between 1994 and 2010, as the Legislature considered section 261's definition of rape three more times, but just amended it along with other major sex offense statutes to address distinct

isuses about the definition of and punishment for these crimes. (Stats.1993-94, 1st Ex.Sess., c. 40, §1; Stats.2002, c. 302, §2; Stats. 2010, ch. 219, §4.)

The latest legislative change occurred in 2013. (Stats.2013, c. 259, §1). This most recent amendment also sought to "update" the language of section 261 to "better reflect the modern society we live in" – this time by eliminating the "archaic," "anachronistic," and "anomalous" requirement that someone who submits to intercourse under a mistaken belief about the identity of the perpetrator must believe the perpetrator is his or her spouse. (Exh. 4, pp. 98, 108, 111.) This was in response to a case in which the then-current definition had prevented prosecution because the non-married victim submitted under the mistaken belief that the perpetrator was her boyfriend. (Exh. 4, pp. 99, 106.) We must presume the Legislature was also aware of the 2010 *Smith* case, again applying *Craig* to preclude dual convictions of rape based upon a single act; yet that case evidently raised no such concerns.

In the midst of all the other activity dealing with section 261, the lack of any mention of *Craig*, its progeny, or any concerns at all about the well settled principle for which they stand demonstrates continued legislative approval; at the least, it is a further illustration that the Legislature has not taken any and evidently does not intend to take any action to refute it. In fact, the four most recent bills introduced concerning the rape statutes also do not contain even a hint of concern about the framework or substance of section 261, 262, or 263 that has led the courts to interpret section 261 as permitting a single conviction for a single act of intercourse: Assembly Bill 860 concerns abuse of a professional capacity to perpetrate a sex act (Exh. 5); Assembly Bill 1276 was introduced to make non-substantive changes to section 261 but later amended to deal with a different subject (Exh. 6); Assembly Bill 2599 concerns the "resisting" requirement (Exh. 7); and Senate Bill 22 was introduced to make non-substantive changes to section 263 but later changed to address a different subject (Exh. 8).

With the Legislature's continuous and exacting scrutiny of the rape statutes all over these years, this could not just be the result of mere oversight. (See *Whitmer*, *supra*, 59 Cal.4th, at p. 741 [the failure to act may sometimes be the result of "sheer pressure of other and more important business, political considerations, or a tendency to trust the courts to correct their own errors . . ."].) All the evidence points to the conclusion that the Legislature has by now "t[aken] such principles for granted" regarding section 261. (*Cmty. Cause v. Boatwright*, *supra*, 124 Cal.App.3d at p. 903.)

D. Properly Framed and Analyzed, the Opposition's Claims Highlight More Reasons Why This Interpretation is Controlling

Respondent and the dissent essentially stand alone in their contention that section 261 compels multiple convictions based upon a single act of intercourse that implicates more than one of the enumerated circumstances constituting rape. They do not, and cannot, cite any case authority that has ever read section 261 this way. In urging for reversal here, and in the other cases on review which follow the long line of contrary authority (see RBOM 39, fn. 19 [urging reversal in *People v. Soria* (S228653), *People v. Brown* (S230134), and *People v. Mesinas* (S227887), on grant-and-hold review]), they contend their interpretation is compelled by the "elements test," potential consequences flowing from the settled interpretation of section 261 that they see as problematic and inconsistent with the "modern" view of rape, and the general pleading provision of section 954. Their efforts to dismantle the firm institution of section 261 case law ultimately just serve to further illustrate why it must remain standing as it is unless and until the Legislature – having exclusive province over such matters – says otherwise.

1. The "Elements Test" *Precludes* the Multiple Convictions

Respondent and the dissent ground their attack against the settled case law on the notion that all determinations of whether a single act may give rise to multiple convictions are driven by "the elements" test. From there, they reason that multiple convictions are permissible in all cases, with the *sole* exception of those that constitute necessarily included offenses or those that fall within the express prohibition under section 496 prohibiting dual convictions of theft and receiving stolen property. (RBOM 2, 7, 11-13, 15, 23, 31; Slip Opn., dis. opn. of Benke, J., 2, 5, 10-11 ("Dissent").)

Again, the mere existence of different elements between or among the charged offenses does not *ipso facto* render them permissible as multiple convictions since it is the intent behind the statute defining the crime that ultimately controls. (Section I.B.1., *ante*; *State v. Hughes* (2009) 166 Wash.2d 675, 683 [while the elements of the two rape convictions "facially differ[ed]," only one could stand based upon the single act of nonconsensual sexual intercourse]; see also *People v. Robinson* (May 23, 2016, S220247) ___ Cal.4th ___ [2016 WL 2956884] *1 [illustrating the limitations of the elements test when the same proof is offered to satisfy all the elements of both offenses].) And an express prohibition is clearly not required. While section 496, subdivision (a), happens to contain one, few of the other recognized prohibitions do, and they are no less valid. Indeed, sections 148 (obstructing an officer), 215 (carjacking), and 23510 (firearm possession) contain provisions expressly *allowing* multiple convictions (§§148, subd. (e), 215, subd. (c), 23510), which shows the Legislature also takes action to *permit* this when it sees the need to expressly clarify such an intent. Anyway, the Legislature is not expected to undertake the task of inserting into each criminal statute an express statement one way or the other. Rather, the intent is generally determined by examining the text, structure, and context. (See

People v. Jones (2012) 54 Cal.4th 350, 369, fn. 10 [the provisions of Health and Safety Code section 11370.4 "impliedly settle" that only one conviction is permissible for possession of a controlled substance based upon total weight, however many packages into which the substance may be divided].)

In any event, the "elements test," properly applied, would necessarily *preclude* multiple convictions here. In *Gonzalez*, this Court endorsed the formulation of the elements test as articulated in *Craig*: "[a] defendant may be convicted of two separate offenses arising out of the same transaction when each offense [i.e., each of the two separate offenses] is stated in a separate count and when the two offenses differ in their necessary elements and one is not included within the other." (*Gonzalez*, *supra*, 60 Cal.4th at p. 539, italics omitted, underlining added.) This test *presumes* at the outset that the charged offenses are in fact *separate* offenses and permits multiple convictions of each such *separate* offense when (1) they are charged separately *and* (2) neither is necessarily included within the other. That is, the existence of different elements between the two charged offenses does not *prove* their "separate" nature. Different elements are a necessary condition of such multiple convictions, but that alone is not sufficient. The charged offenses must in and of themselves be truly "separate offenses" based upon the Legislature's intent to create two *distinct* crimes, and that is determined by an examination of the statute in context "in order to determine the scope and purpose of the provision." (*Gonzalez*, at pp. 537-538.)

This is surely what the Court of Appeal meant when it said "[i]n the case of truly separate offenses arising from a single act, multiple convictions are permitted, even if multiple punishments are not," but respondent's analysis "is flawed at the starting point" because it is based on "the premise that section 261, subdivisions (a)(3) and (a)(4) are separate offenses" when the statute "only defines one crime." (Slip Opn. 23, 24.) This focus upon the "truly separate" nature of charged offenses is also undoubtedly at the bottom

of the cases precluding other multiple convictions despite the existence of different elements: a contextual interpretation indicates the charged offenses were not intended to be "separate" crimes, just as in the case of section 261.

2. Respondent's Extrinsic Evidence Just Proves This Point

Respondent cites the legislative activity over the last several decades, arguing the various changes collectively reflect some kind of gradual or implicit effort to refute the settled construction of section 261. (RBOM 2, 20-21, 22, 23, 26-27, 29.) While the Legislature certainly has been modernizing the definitions of and punishments for sex offense crimes to best reflect prevailing legislative aims and social norms, as illustrated in Section I.C., *ante*, its acute sensitivity to such matters and repeated pattern of remedial actions to weed out all it has seen as "outmoded" or "outdated" actually presents a completely different picture. It shows the Legislature knows how to and does respond when the language of these statutes is construed in a manner inconsistent with the prevailing views of appropriate liability and punishment, and thus the picture can only portray a Legislature that has effectively adopted the now long settled judicial constructions of the statute.

Respondent also emphasizes the legislative actions enhancing punishments and creating different collateral consequences for certain forms of rape under section 261 – other than those at issue here, since subdivisions (a)(3) and (a)(4) are identical in that regard. (See RBOM 21; §§ 264 [rape punishments], 667.6, subd. (e) [consecutive sentencing], 667.61, subd. (c) ["one-strike" law], 290.008, subd. (c)(2) [sex offender registration], 290.46, subds. (b) & (c) [online information about rape convictions], 1203.065, subds. (a) & (b) [probation]; Veh. Code, §13377, subd. (a)(2) [licensing].) Such factors do not serve to rebut the strong presumptions compelled by the lack of any express or implied concern about the case authority concerning the distinct issue of permissibility of multiple convictions. The possibility of

such disparities could exist in myriad other contexts where multiple convictions are prohibited, such as with the assault crimes under section 245, subdivision (a)(1) and (a)(4), since the former is a "serious" felony whereas the latter is not, and with the subdivisions of section 550 defining insurance fraud, since some constitute felonies and others do not. (§550, subs. (a)-(d).)

3. The Majority Opinion is Properly Designed to Achieve the Ultimate Aim of Effectuating the Legislative Intent

Respondent and the dissent contend the Court of Appeal majority erred in "abandoning" the elements test and basing its analysis entirely upon a "comparison test" of section 261 and 288a and the degree to which each is "self-contained." (RBOM 17, 30-31; Dissent 4, 10, 11.) The majority relied upon self-containment as one important factor in analyzing section 261 (Slip Opn. 16-18), as it should have since it was ordered to reconsider the case in light of *Gonzalez*, where this Court relied upon the "self-contained" nature of the statute in deciding the same issue with respect to section 288a (*Gonzalez*, *supra*, 60 Cal.4th at p. 539).[10] But the primary focus of the opinion was that section 261 retains the same basic features it had at the time of *Craig* which had given rise to the initial interpretations of the statute as creating a unitary offense and which have been reaffirmed. (Slip Opn. 17-18, 21.) The court cited the basic elements test as it was articulated in *Craig* (and reaffirmed in *Gonzalez*), while aptly recognizing that the mere existence of different elements did not permit rejection of this settled body of case law because it was evident that the statute was not intended to create "truly separate" offenses permitting multiple convictions. (Slip Opn. 20-23.)

---

[10] Respondent likewise relies upon a comparison of section 261 with section 288a; it just argues for a different conclusion. (RBOM 19.)

4. *Craig* Remains Consistent with the Prevailing Legislative Intent; Any Criticisms that It is "Outdated" or "Unwise" Should be Addressed to the Legislature, Not the Courts

A focal point of the attack upon the judgment here is this Court's opinion in *Craig*, as it was in *Gonzalez*. (See *Gonzalez*, *supra*, 60 Cal.4th at p. 538.) Respondent and the dissent characterize *Craig* as a relic of a bygone society based on "abandoned" and "outdated" views of rape which "lay essentially dormant for decades" until "resurrected" in 2010 by the appellate court in the *Smith* case. (RBOM 2, 11-13, 29, fn. 15; Dissent 6, 11.)

As we have seen, *Craig's* interpretation of section 261 as creating a unitary offense of rape has actually remained alive and well in the case law between the time of *Craig* and *Smith*, and in the six years since *Smith*.

It is also inaccurate to characterize the enactment of section 261.5 in 1970 as some sort of legislative intent – formed 29 years later – to "abandon" the rationale of *Craig* that a minor forcibly raped is "not doubly outraged, once because she was forcibly attacked and once because she was under 18 years of age." (RBOM 11-12; Dissent 6; *Craig*, *supra*, 17 Cal.2d at p. 455 [relying upon this point in finding dual convictions of forcible rape and rape of a minor impermissible].) Again, this change served entirely distinct purposes. And section 261.5 is designed to address the distinct situation of *consensual* sexual relationships between near-adult minors; it would have no application to *forcible rape* of a minor. (See *People v. Avila* (2000) 80 Cal.App.4th 791, 798 ["Outrage, however, is not a consideration where a sexual act is consensual."].) That circumstance would continue to be prosecuted as a *single* offense under section 261, subdivision (a)(2) [forcible rape], with the attendant penalty under section 264, subdivision (c) [enhanced penalty for forcible rape of a minor under §261, subd. (a)(2)]).

And *Craig* did not fail to apply the "elements test." (RBOM 13.) The Court clearly applied the elements test it articulated. (*Craig*, *supra*, 17 Cal.2d

at pp. 457-458 [applying "the above test for determining whether one or more offenses result from the same act or transaction," through illustrations of permissible multiple convictions].)[11] While respondent also claims that this Court "mistakenly" viewed the two subdivisions at issue there as lesser included offenses (RBOM 13-14, citing *Craig*, at p. 457 [where the Court noted the two charged offenses "necessarily crystallize[d] into one 'included' or identical offense"]), it appears this was just a figurative illustration of the key point that the charged offenses represented a singular offense. And the Court's recognition that this was the case *even though* the proof is necessarily "dual in character" and "varies with respect to the several subdivisions" shows it properly applied the discernable legislative intent to create a single offense as the ultimately determinative factor. (*Id.* at pp. 457, 458.)

The extensive criticisms of *Craig* based upon its references to "punishable" offenses and the existence of a different sentencing scheme at the time are also misguided. (RBOM 23; Dissent 1, 14-19.) First, the Court's use of the term "punishable" was obviously synonymous with "convictable" since the entire point of the case was that the defendant could not be *convicted* of two crimes under section 261. (*Craig*, *supra*, 17 Cal.2d at p. 457, italics added [focusing upon when "[a] defendant may be *convicted* of two separate offenses"]; *People v. Ryan*, *supra*, 138 Cal.App.4th at p. 371 ["Although *Craig* speaks in terms of 'punishable offenses,' we think it apparent that it proscribes more than one *conviction* under the circumstances before it . . ."].) And the Court certainly interpreted *Craig* this way in the recent *Gonzalez* case. (See *Gonzalez*, *supra*, 60 Cal.4th at p. 539.)

Second, as for the claims that *Craig's* analysis should be disregarded as the product of sentencing concerns that no longer exist since the

---

[11] In fact, Justice Benke herself writes in dissent: "*Craig's* significance is its application of the elements test." (Dissent 11, emphasis added.)

development of the "staying" practice under 654 (see *People v. Correa*, *supra*, 54 Cal.4th at p. 337 ["When section 954 permits multiple convictions, but section 654 prohibits multiple punishment, the trial court must stay execution of sentence on the convictions for which multiple punishment is prohibited"]), these criticisms rest upon the faulty premise that the convictions constitute *separate* offenses. By its terms, section 654 only applies to "[a]n act or omission that is punishable in different ways by *different* provisions of law." (§654, subd. (a), italics added; see *People v. Sloan* (2007) 42 Cal.4th 110, 114, emphasis added ["a person may be convicted of, although not punished for, *more than one* crime arising out of the same act or course of conduct"].) Where the charged offenses do not constitute "two *separate* offenses" (*Craig*, *supra*, 17 Cal.2d at p. 457), there is only *one* crime to which *one* punishment applies; there is nothing to "stay." So reliance on cases permitting multiple convictions for "truly separate offenses" subject to section 654 is just "misplaced." (Slip Opn. 23-24.)

For all these criticisms leveled at *Craig*, there is not even *a hint* of disapproval in this Court's most recent analysis of it. *Gonzalez* actually approved the holding, and impliedly approved the reasoning, in finding "the conclusion" in *Craig* "*flowed naturally* from the wording and structure of former section 261." (*Gonzalez*, *supra*, 60 Cal.4th at p. 539, italics added.) And this is not the forum for debates over policy or wisdom: "the legislative body or the electorate that enacted the legislation must be entrusted to weigh *whatever* harms and benefits result from the legislation in determining whether that legislation should be amended or abrogated." (*Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 970; *Willis v. State of California*, *supra*, 22 Cal.App.4th at p. 293 [courts "must follow the language used by the Legislature whatever may be thought of the wisdom, expediency, or policy of the act"]; *Whitmer*, *supra*, 59 Cal.4th at p. 747 [to

the extent the *Bailey* rule may provide a "felony discount" to defendants, "it is up to the Legislature to determine whether the rule should be otherwise"].)

5. Any Disparities in the Penal Consequences Flowing from Violations of Section 288a and Section 261 Are Also Matters Reserved for the Legislature

Respondent and the dissent make much out of potential disparities in treatment of those convicted under section 288a of unlawful acts of oral copulation upon a victim who is both intoxicated and unconscious and those convicted under section 261 of rape involving similar circumstances, arguing the existence of such "anomalies" means this Court can and should equalize the treatment by construing section 261 to reach the same result it reached in the *Gonzalez* case concerning section 288a. (RBOM 18-19, 22; Dissent 9.)

The Legislature has been scrutinizing the rape statutes for decades and responding with the changes it has deemed necessary and appropriate to eliminate the "anomalies." The Legislature is, of course, presumed to have investigated and ascertained the facts bearing upon the issue of multiple convictions under section 261, including the consequences flowing from the judicial interpretations. (See *Higgins v. City of Santa Monica* (1964) 62 Cal.2d 24, 30; *Schabarum v. California Legislature* (1988) 60 Cal. App. 4th 1205, 1219.) The courts are not "super-legislatures," which reweigh such "peculiarly legislative" determinations. (*American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, 372; *Schabarum*, at p. 121.) "To allow a court . . . to say that the law must mean something different from . . . its language, because the court may think that its penalties are unwise or harsh would make the judicial superior to the legislative branch of the government, and practically invest it with lawmaking power." (*Willis v. State of California, supra*, 22 Cal.App.4th at p. 293.) "[W]hen the claim at issue involves fundamentally moral and philosophical questions as to which there

is no clear answer, courts must remain tentative, recognizing the primacy of legislative prerogatives." (*Am. Acad. of Pediatrics v. Lungren* (2007) 16 Cal.4th 307, 419-420, dissenting opn. of Brown, J., quoting Hand, The Bill of Rights (Harv.U.Press 1958), p. 70.) Thus, at this point, any complaints or concerns about the nature of the sentencing and punishment consequences flowing from the settled and accepted interpretation of the rape statutes must be addressed to the Legislature, because "[t]he remedy . . . is not in interpretation but in amendment or repeal." (*Willis*, at p. 293.)

In any event, the existing penal consequences are indeed "harsh" given the settled interpretation of section 263 to permit as many convictions as there are "completed" acts of penetration, "however slight," during a single incident. There is also nothing to prevent the prosecution from charging, and even convicting, the defendant of violating other sex offense statutes based upon the same act of intercourse so long as they represent *truly separate* offenses. (See §§ 264, subd. (c)(3) ["this subdivision does not preclude prosecution under Section 269 [aggravated sexual assault of a child], 288.7 [sexual intercourse with a child 10 years of age or younger], or any other provision of law"]; *Craig*, *supra*, 17 Cal.2d at p. 458 [indicating a single act of intercourse upon a child could properly support convictions of both rape and lewd acts].) And, of course, the enhanced penalties for aggravated forms of sex crimes already apply to rape. (§§ 667.51 [prior conviction enhancement], 667.61 ["one-strike" life term enhancement].)

The origins of the oral copulation statute and the historical perceptions of that form of sexual activity are also worth noting. Justice Werdegar recently conducted an in-depth analysis of the origins of the oral copulation and sodomy statutes in her dissent from an equal protection decision concerning the registration requirements for those convicted of unlawful oral copulation of a minor. (*Johnson v. Dept. of Justice*, *supra*, 60 Cal.4th 871, dis. opn. of Werdegar, J. (joined by Justice Liu).) The origins trace back to a

period "when oral copulation and sodomy were regarded as abhorrent sexual perversions closely associated with homosexuality and were therefore outlawed regardless of the participants' ages." (*Id.* at p. 890.) Both acts were considered "sex perversions," "crimes against nature," "forbidden," and "unnatural," and oral copulation specifically was considered "the [v]ilest of [a]ll [o]ffenses," and a "debasing immorality." (*Id.* at pp. 899-901.)

The "clear message" was that "vaginal intercourse is the only morally acceptable form of penetrative sexual behavior." (*Johnson*, *supra*, 60 Cal.4th at p. 900.) "[H]eterosexual intercourse with pubescent minors, even when it violates the law, has often been viewed as proceeding from morally and psychologically normal impulses." (*Id.* at p. 902.) "[O]ral copulation was disfavored in comparison to sexual intercourse because the former act was regarded as a perversion engaged in by homosexuals." (*Id.* at p. 905.) In dissent's view, this "difference in attitudes towards oral copulation and sexual intercourse" subsists to this day, as "a historical atavism" from 30 years ago when the law "treated all oral copulation as criminal regardless of age or consent." (*Id.* at pp. 899, 902.) And the Legislature simply has yet to reevaluate the matter and purge the law of this historical bias. (*Id.* at p. 904.)[12]

Perhaps the differences in apparent legislative intent concerning the permissibility of multiple convictions under section 288a and section 261 based on a single act are rooted in this yet-to-be-reevaluated "historical bias." But this case is just not a search for a "rational basis" in support of the differences (RBOM 22); the merits of their differences are considerations distinctly reserved for the Legislature. Unless and until it decides to change things, the law must be enforced as it stands. This also sidelines the matter

---

12 To this day, both the oral copulation and sodomy statutes remain in a different chapter than the rape offense statutes – the chapter titled "Bigamy, Incest, and the Crime Against Nature." (Pen. Code, Title 9, Ch. 5.)

of how such issues might be resolved under other sex offense statutes. (See RBOM 31, fn. 6 [hypothesizing a resolution of this issue under the sexual penetration statute].)[13] Those are matters to be resolved in light of the Legislature's intent as to those statutes, when they become ripe for review.

6. Section 954 Is Not a Means to Circumvent This Preclusion or Any Other Preclusion of Multiple Convictions, Whether the Charged Offenses Are Considered "Different Offenses" or "Different Statements of the Same Offense"

The final observation about the contrary position of respondent and the dissent reveals another foundational flaw: they characterize section 954 as establishing an express authorization or legislative mandate in favor of multiple convictions based upon a single act or course of conduct, for not only "different offenses" but also merely "different statements of the same offense" arising out of a single act or course of conduct, which thus proves their claim that the multiple convictions here are proper. (RBOM 5-8; Dissent 18.) Respondent goes so far as to claim 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." (RBOM 38-39.)

This Court has yet to "definitively" decide anything in that respect, having just made clear in *Gonzalez* that this remains an open question. (*Gonzalez*, *supra*, 60 Cal.4th at p. 537 ["we need not determine whether section 954 allows conviction of different statements of the same offense"].) And, as we have seen, the existence of different elements between or among the charged offenses is simply not determinative in this context; it is the

---

[13] Anyway, respondent's hypothetical result is rooted in the notion that the Court of Appeal relied solely upon the self-contained nature of section 288a, which, as discussed, is simply not the case. (See Section I.D.3.)

legislative intent behind the statutes defining the crimes that controls. The form in which charged offenses are pleaded or characterized under section 954 – as "different offenses" or "different statements of the same offense" – cannot somehow dictate a result contrary to that legislative intent.

Indeed, respondent made similar claims in the recent case of *People v. Garcia*, *supra*, 62 Cal.4th 1116, which concerned whether two convictions of burglary were proper based upon the defendant's having robbed a cashier in one room of the store and raped her in another. (*Id.* at p. 1131.) As the Court put it, respondent "rel[ied] heavily on section 954," "suggest[ing] that this section reflects a legislative 'preference' for multiple convictions that should guide [the Court's] hand" in determining whether they were proper. (*Ibid.*) The Court found these observations "largely beside the point" because section 954 "offers no insight into what constitutes an offense under the Penal Code in the first place . . ." (*Ibid.*) Further, when it resolved the multiple-conviction issue under section 288a in *Gonzalez*, this Court did not characterize section 954 as the *basis of authority* for the dual convictions, but as simply presenting "*no impediment*" to those convictions. (*Gonzalez*, *supra*, 60 Cal.4th at p. 539, italics added.) The Court made clear that whatever section 954 may indicate about the propriety of the multiple convictions, "if the Legislature meant to define only one offense, we may not turn it into two." (*Id.* at p. 537; see also *People v. Wilson*, *supra*, 234 Cal.App.4th at p. 199, fn. 4 [although "[t]he parties focus[ed] much of their briefing on sections 954 and 654," the court found that framework simply could not be used to resolve the propriety of the dual convictions at issue].)

These constructions of section 954 as having limited utility in the resolution of such issues highlights the key point here: it is not a freestanding provision of substantive law generally authorizing multiple convictions based upon a single act or course of conduct. It is, instead, a *pleading* statute (chaptered under "*Rules of Pleading*, in Title 2, Chapter 5), which simply

authorizes *a form of pleading* that *may* result in multiple convictions based upon a single act or course of conduct *if and when* such convictions are permissible based upon the intent behind *the statute defining the crime*.

So respondent's claim that the multiple convictions here are permissible because "at the very least" they constitute "different statements of the same offense" under section 954 is entirely misdirected. (RBOM 48.) The convictions are impermissible regardless of whether this is true, because they are prohibited by *section 261* based upon the intent behind *that statute*.

Anyway, section 954 does not even contemplate, much less *authorize*, such convictions based merely upon "different statements of the same offense." As originally designed, this pleading provision only permitted the prosecution of "different offenses, or different statements of the same offense" "related to the same act, transaction, or event" in a single action, and expressly provided that the defendant could be convicted of "but one of the offenses charged." (Stats.1905, c. 574, p. 772, §1.) The joining of any "charges of offenses occurring at different and distinct times and places" was prohibited. (*Ibid.*) In 1915, section 954 was changed to permit the prosecution in a single proceeding of charges of "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." (Stats.1915, c. 452, p. 744, §1.) Like under the former version, the prosecution was "not required to elect between the different offenses or counts." However, consistent with the change permitting the prosecution in a single proceeding of "two or more different offenses" arising out of the same incident or involving the same class of crimes, the statute provided "the defendant may be convicted of any number of the offenses charged." (*Ibid.*) This language remains in substantially the same form today. (Stats.1951, c. 1674, p. 3836, §45.)

The obvious purpose of these changes was to promote efficiency and conserve judicial resources by permitting prosecution of the same defendant in the same proceeding on related charges. "The purpose of section 954 is to govern 'the form of the information' [citation] 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. Eid* (2013) 216 Cal.App.4th 740, 752, quoting *People v. Scott*, *supra*, 24 Cal.2d at p. 779; accord *People v. Soper* (2009) 45 Cal.4th 759, 771-772.) It seems clear enough that the language contemplating the possibility of conviction on "any number of the offenses charged" was simply intended to refute the previous *express prohibition* against the same, with an express statement that there *could* be multiple convictions against the same defendant in the same case.

The language concerning multiple convictions also makes clear that it is expressly limited to two or more "*different* offenses" – it says "[t]he prosecution is not required to elect between the *different* offenses or counts set forth in the indictment or information, but the defendant may be convicted of any number of the *offenses* charged." One cannot divorce the second half of the sentence from the first and read it as a free standing statement regarding permissibility of multiple convictions; the most natural and logical reading of the full statement is that the reference to "the offenses" in the second clause of the sentence relates back to and is thus modified by the reference to "the different offenses or counts" in the first clause. (*Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 743 ["qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including others more remote"].) The statute uses the term "different offenses" only in connection with two of the three categories of charges that may be joined: "*different offenses* connected together in their commission" and "*different offenses* of the same class of crimes or offenses." The third category of charges –

"*different statements* of the same offense" – is wholly different than the other two categories since it concerns alternative means of pleading *the same offense* as opposed to separate offense, and is *not* referenced in the language concerning the charges of which the defendant may properly be *convicted.*

Thus, the most reasonable construction of section 954 is that it only contemplates such convictions based upon *different* offenses – a matter determined (i.e., *authorized*) by the underlying criminal statutes themselves. Courts have in fact said, while section 954 "permits the *charging* of the same offense on alternative legal theories" to avoid the need for a pretrial election (*People v. Ryan, supra,* 138 Cal.App.4th at p. 368, italics added), it does not permit multiple *convictions* based upon alternate theories of the same crime: "[m]ultiple convictions can be based on a single criminal act, *if* the charges allege *separate* offenses" (*People v. Smith, supra,* 209 Cal.App.4th at p. 915, italics added; accord *People v. Coyle* (2009) 178 Cal.App.4th 209, 217).

The cases of *People v. Ortega, supra,* 19 Cal.4th 686 and *People v. Pearson, supra,* 42 Cal.3d 351 do not provide any "definitive" evidence to the contrary. When this Court quoted section 954 in *Ortega,* saying '"[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,"' that was in the context of determining whether the two convictions at issue were lesser included offenses. (*Ortega,* at p. 692.) The Court neither considered nor resolved the distinct question of whether section 954 permits multiple convictions of "different statements of the same offense." (See *People v. Belleci* (1979) 24 Cal.3d 879, 888 ["cases, of course, are not authority for propositions not there considered"].)

In *Pearson,* this Court said: "It is undisputed that defendant was properly *charged* with statutory sodomy and lewd conduct for each act; such charges clearly constitute 'different statements of the same offense' and thus are authorized under section 954. 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."' (*People v. Pearson, supra*, 42 Cal.3d at p. 354.) Sodomy and lewd conduct consist not only of entirely distinct elements but also occupy entirely distinct criminal statutes serving entirely distinct policies. (§§ 286, 288.) Unlike in the context of the rape statute, it does not appear a court has ever held this set of dual convictions is impermissible. Indeed, the supporting case examples in *Pearson* also involved dual convictions based upon entirely separate and distinct criminal offenses. (*Pearson*, at p. 354, citing *People v. Miller* (1977) 18 Cal.3d 873, 884-885 [robbery (§211) and burglary (§459)], and *People v. Beamon* (1973) 8 Cal.3d 625, 639-640 [robbery (§211) and kidnapping for robbery (§209)]; see also *Craig, supra*, 17 Cal.2d at p. 458 [indicating dual convictions of rape and lewd conduct would be permissible based upon their nature as distinct offenses arising under distinct statutes].)

So the dual convictions in *Pearson* were proper because they involved clearly "*different* offenses," not because section 954 permits dual convictions based on merely "different statements of the *same* offense." *Pearson* simply does not stand for any such general proposition. The primary issue there concerned the distinct matter of whether all the convictions "could be used at a later date to enhance a subsequent sentence should the defendant commit another crime." (*People v. Haney* (1994) 26 Cal.App.4th 472, 476.)

The last sentence of section 954 further indicates the Legislature envisioned multiple convictions based on the same act or course of conduct only for *separate and distinct* offenses. It provides, as it has since being added in 1927: "An acquittal of one or more counts shall not be deemed an acquittal of any other count." (§954.) In isolation, this would mean an acquittal of *any* of the charged offenses would not constitute an acquittal of *any* of the other charged offenses, *even* with respect to charges that constitute lesser included offenses of the acquitted charge. But it is long settled that an

acquittal of a greater offense necessarily constitutes an acquittal of any lesser included offense. (*People v. Ng Sam Chung* (1892) 94 Cal. 304, 306 ["a conviction or acquittal of a higher offense is a conviction or acquittal of all lesser offenses necessarily included therein"]; *People v. Day* (1926) 199 Cal. 78, 83; *People v. Poon* (1981) 125 Cal.App.3d 55, 83.) This is resolved by reading "[a]n acquittal of one or more counts shall not be deemed an acquittal of any other count" as applying only to "counts" charging separate and distinct offenses. Courts have recognized this: "This language clearly means that each count in an indictment or information, *which charges a separate and distinct offense* must stand upon its own merit, and that a verdict of either conviction or acquittal upon one such charge has no effect or bearing upon other *separate* counts which are contained therein." (*People v. Moon* (1935) 7 Cal.App.2d 96, 99, italics added; accord *People v. Amick* (1942) 20 Cal.2d 247, 252; see also *People v. Walker* (1983) 146 Cal.App.3d 34, 38, italics added [Walker's acquittal of one charge did not require reversal of the other since "his charged offenses consisted of *separate and distinct acts*."].)

E. Treating These Charges as What They Are – *Alternate* Charges – Would Avert Complications of Improper Dual Convictions

The consequences respondent and the dissent forecast as flowing from the settled construction of section 261 and infecting the entire class of these cases with problems and complications at the post-verdict phase would be headed off at the pass by treating the charges as what they are – *alternate* charges based upon a single criminal act for which only one conviction is permissible – and *so instructing the jury* before deliberations. The potential issues all stem from treating the charges as *separate and distinct* offenses and instructing the jury accordingly (as was done here) by telling it that: "Each of the counts charged in this case is a separate crime. You must consider each count separately and return a separate verdict for each crime." (CT 66

[CALCRIM 3515 – "Multiple Counts: Separate Offenses"].) The Bench Notes to this instruction specifically counsel the trial court to give it "on request if the defendant is charged with multiple counts *for separate offenses*." (*Ibid.*, italics added.) On the other hand, the court is told, "[i]f the prosecution has charged, in the alternative, *more than one offense for the same event*, give CALCRIM No. 3516, Multiple Counts: Alternative Charges for One Event—Dual Conviction Prohibited." (*Ibid.*, italics added.)

CALCRIM 3516 specifically contemplates a situation like the present case, where "the law does not specify which crime must be sustained or dismissed if the defendant is found guilty of both," and advises the court should instruct the jury as follows in such situations: "The defendant is charged in Count _____ with <insert name of alleged offense> and in Count _____ with <insert name of alleged offense>. These are alternative charges. If you find the defendant guilty of one of these charges, you must find (him/her) not guilty of the other. You cannot find the defendant guilty of both." (CALCRIM 3516.) The instruction has alternative language for cases in which the two charges at issue are theft and receiving stolen property.

So long as the jury abides by the instruction, this would avert any complications associated with sorting out the judgment and sentencing consequences of dual convictions based upon the single act of intercourse: The prosecution could initially allege both charges separately without the need for a pretrial election; the jury would be instructed on the specific elements of each charged offense so it could make the appropriate factual findings relative to each; it would be told only one conviction is permissible; and it would then determine which of the two on which to convict based on the facts as it finds them to be under the circumstances of the case. The proceedings would end as they should: with a single conviction of rape.

F. The Existence of Complications in the Return of Dual Convictions Cannot Somehow Permit or Justify Allowing Both to Stand

Of course, in cases where the jury nevertheless returns improper dual convictions, both cannot stand. The potential complications about which respondent and the dissent express so much concern – verdict "nullification," unfair "windfalls," and sentencing disparities – all presume the existence of *two* otherwise *valid* convictions based upon the single act of intercourse (RBOM 20, 23, 25; Dissent 16) – again circling back to the same faulty premise. There is and can be just a single conviction; necessarily then, an "upset" in the dual convictions cannot result in any sort of inappropriate meddling with jury verdicts or a "windfall" to the defendant. The consequences flowing from the actions rectifying the dual convictions – including any potential disparities in the nature of the direct and indirect penal consequences as between the two convictions, however undesirable or problematic respondent may find them – simply cannot be turned around and used to permit or justify retaining the *improper* dual convictions.

Surely, one could make similar complaints about other situations in which the verdicts result in a set of impermissible multiple convictions. All such situations require "judicial nullification" of a verdict and many could involve disparate penal consequences. In addition to the existence of such disparities in the situation of the assault crimes under section 245 and insurance fraud under section 550, this would arise in cases where the defendant is improperly convicted of both continuous sexual abuse of a child under section 288.5 and of the underlying discrete sex offenses. (See § 288.5, subd. (c)). The trial court must determine which to vacate, and the penal consequences could vary significantly between the continuous abuse conviction and the convictions on the wide variety of underlying sex offenses that may serve as the basis for the abuse conviction. (See §1203.66, subd. (b).) Ultimately, these matters are simply neither determinative of, or really

even directly relevant to, the resolution of the primary substantive question as to whether the multiple convictions are permissible in the first instance. Unless and until the Legislature decides to permit multiple convictions in cases where they are now prohibited, this is the law that must be followed.

Meanwhile, the trial courts are not without the experience and tools necessary to deal with improper multiple convictions. The process of vacating a conviction in such situations is certainly not unfamiliar territory given the long established rule prohibiting convictions of lesser included offenses. And once it is clarified for trial courts that section 261 does not permit multiple convictions based upon a single act, we must presume those courts would properly apply the law by instructing the jury accordingly under CALCRIM 3516 that only one conviction is proper and taking appropriate action to rectify any improper dual convictions that may result. Thus, the trial judge would deal with the matter in the first instance and from the best perspective of the facts and circumstances bearing upon it. Trial courts are vested with broad discretion to make such determinations. (See §1260.) The general objectives of sentencing empower them to "consider which objectives are of primary importance in the particular case," based upon "statutory statements of policy, the criteria in the[] rules [of court], and the facts and circumstances of the case," as well as any other "reasonably related" criteria. (Cal. Rules of Court, rules 4.408(a) & 4.410(b).) And their decisions are entitled to substantial deference: "a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 376, 377.)

Even in cases like this, where the charges are closely related in nature, in many situations, there will be differences in the degree and relative strength of the evidence that form the basis for the trial court to reasonably determine which conviction best reflects the nature of the defendant's ultimate culpability. Here, for example, the evidence in support of Count 1

(rape of an intoxicated person) was stronger than the evidence in support of Count 2 (rape of an unconscious person). While Stephanie was indisputably intoxicated throughout the incident (1RT 47, 68-69, 100-103, 267), it appears she experienced different levels of awareness or "consciousness" during the sexual activity with White (1RT 48-49, 59, 78, 83, 101). This could have supplied a reasonable basis for the trial court to vacate the conviction on Count 2 in favor of Count 1. After all, it is clear that the intoxication was *the cause* of any "unconsciousness." And that is precisely how the Court of Appeal handled the matter in vacating the conviction on Count 2. So the problem with the dual convictions here was appropriately resolved.[14] In cases where additional fact-finding may be appropriate or necessary in determining which conviction to vacate, the matter could be remanded. (See *State v. Hughes*, *supra*, 166 Wash.2d at p. 686, fn. 13 [remanding because "which conviction to vacate necessitate[d] further fact-finding by the trial court"].)

G. Any Doubt Should be Resolved in White's Favor

"When language which is reasonably susceptible of two constructions is used in a penal law ordinarily that construction which is more favorable to

---

[14] In *Craig*, this Court appears to have chosen consolidation of the rape convictions based upon the nature of the proceedings peculiar to that case. It was not a jury trial, but a bench trial, at the conclusion of which the court entered a "separate judgment" on each count. (*Craig*, *supra*, 17 Cal.2d at p. 455.) It made sense to first "consolidat[e] them into a single judgment" in disposing of the problem. (*Id.* at p. 458.) And, unlike here, where the charges were initially alleged in separate counts, the prosecution had actually charged the offenses "as separate statements of the same offense." (*Id.* at p. 454.) This appears to be why the Court ultimately left the convictions in a consolidated form that reflected both subdivisions of section 261 at issue, "being separate statements of the same offense," as opposed to just striking one of them. The disposition in *Craig* further illustrates that multiple convictions under section 261 based on a single act are impermissible in either form – whether considered "different offenses" or "different statements of the same offense."

the offender will be adopted." (*In re Christian S.* (1994) 7 Cal.4th 768, 780; accord *People v. Arias* (2008) 45 Cal.4th 169, 177; *In re T.B.* (2009) 172 Cal.App.4th 125, 129 ["[A]ny doubts as to the correct interpretation of the statutory prohibition must be resolved in [defendant's] favor."].) While respondent will surely now contend that its interpretation is the only reasonable one, in the pending *Soria* case (S228653) involving precisely the same issue, respondent initially *conceded* this very point. Based squarely upon the rationale of the *Craig* and *Smith* cases with which it now takes so much issue, respondent argued "*notwithstanding* the remedy provided by section 654," the rationale of those cases applies such that "both convictions cannot stand." (Resp. Brief, Court of Appeal No. C070238, 31-32, italics added.) Respondent is, of course, entitled to change its position. But that change of position after formally advocating for the opposite conclusion at the least demonstrates the matter is "reasonably susceptible of two constructions," thus invoking the rule of lenity. (*Christian S.*, at p. 780.)

H. Any Reversal Now of This Long Settled Interpretation of Section 261 Cannot Fairly be Applied Against White

"[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law. . ." (*Bouie v. Columbia* (1964) 378 U.S. 347, 353-354.) If a construction is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue, it must not be given retroactive effect" (*Ibid.*) California recognizes this. (*People v. Martinez* (1999) 20 Cal.4th 225, 238 ["[i]t is settled that a state Supreme Court, no less than a state Legislature, is barred from making conduct criminal which was innocent when it occurred, through the process of judicial interpretation"]; *Whitmer*, *supra*, 59 Cal.4th at p. 742 [declining to retroactively apply the judicial interpretation for this reason].)

White's extensive research has not unearthed a single published opinion interpreting section 261 in the manner respondent seeks this Court to adopt, and neither respondent nor the dissent cites such a case. Rather, as illustrated above, in the more than 100 years since the *Jailles* case, to this day, it is apparent that all the published case authority concerning this issue has consistently interpreted section 261 as creating a unitary offense. Neither White nor any similarly situated defendant (like the defendants in the *Soria*, *Brown*, and *Mesinas* cases) has had any fair warning that his *single* act of unlawful intercourse could result in *two* rape convictions. The law at the time of their acts clearly indicated only one conviction would occur. Thus, any holding that section 261 permits such a result would constitute "an unforeseeable judicial enlargement of a criminal statute" that cannot properly be applied retroactively. (*People v. Blakely* (2000) 23 Cal.4th 82, 91.)

Just as the existence of potential disparities in the penal consequences flowing from dual convictions based upon a single act cannot drive the analysis of whether the dual convictions are permissible in the first place, neither can the degree to which the defendant is or is not "prejudiced" by the two convictions in the event one of them is "stayed" under section 654. (See Dissent 13-17 [emphasizing the ostensible lack of prejudice in such situations].) But it is worth noting that saddling the defendant with *two* convictions instead of one does matter. Carrying an additional conviction on one's criminal record surely increases the social stigma one experiences while concomitantly decreasing his or her future prospects of obtaining future employment and thus reentering society as a productive citizen. A "stay" under section 654 does nothing to ameliorate these practical effects. The existence of multiple convictions can also impede the defendant's opportunity to reenter society in the first place. A conviction under either of the two subdivisions that served as the basis for the convictions here (§261, subds. (a)(3) & (a)(4)) does *not* render the defendant ineligible for probation

(See §1203.065, subd. (a).) If *two* convictions are allowed to stand based upon the individual subdivisions, surely the trial court could and likely would take into account the *multiple* convictions in determining whether to grant probation based on "[t]he nature, seriousness, and circumstances of the crime" as well as "[t]he vulnerability of the victim," and thus be more likely to deny probation than if the defendant stood convicted of just one crime. (Cal. Rule of Court, rule 4.414(a)(1), (a)(3) [Criteria affecting probation].)

CONCLUSION

For all these reasons, the firmly established interpretation of section 261 should dictate the result here as well. But if this Court decides it can and should reverse that interpretation so as to permit multiple convictions based upon a single act of nonconsensual sexual intercourse, such a new rule could only be applied prospectively. The judgment should therefore be affirmed.

Dated: June 10, 2016

Respectfully submitted,

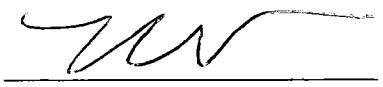
Raymond Mark DiGuiseppe,
Attorney for Defendant and Appellant

CERTIFICATE OF COMPLIANCE

I certify that the attached Appellant's Answer Brief on the Merits is prepared with 13 point Times New Roman font and contains 14,684 words.

Dated: June 10, 2016

Respectfully submitted,



Raymond Mark DiGuiseppe

DECLARATION OF SERVICE

Re: ***People v. Billy Charles White*, Case Number S228049**

I, Raymond Mark DiGuiseppe, declare that I am over the age of 18 and not a party to this case. My business address is: P.O. Box 10790, Southport, NC 28461.

On June 10, 2016, I served the foregoing **Answer Brief on the Merits** on each of the parties listed below, either by placing a true copy of it in a sealed addressed envelope with postage fully paid and depositing it with the Postal Service in Southport, North Carolina, or by serving it through the approved electronic process, as indicated below:

Billy Charles White
c/o Mrs. Phyllis Duncan
22520 County Road 49
Silverhill, Alabama 36576

Attorney General's Office
Electronically served to:
ADIEService@doj.ca.gov

Appellate Defenders, Inc.
Electronically served to:
eservice-court@adi-sandiego.com

San Diego County Superior Court
Electronically served to:
Appeals.Central@SDCourt.ca.gov

San Diego County Public Defender
Electronically served to:
ppd.eshare@sdcounty.ca.gov

San Diego County District Attorney
Electronically served to:
DA.Appellate@sdcda.org

Theresa Osterman Stevenson
(Court of Appeal Appellate Counsel)
Electronically served to:
tstevenson@tosterlaw.com

Court of Appeal
Fourth Appellate District, Division One
750 B Street, Suite 300
San Diego, California 92101

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and was executed on June 10, 2016.

Raymond Mark DiGuiseppe
Declarant

Signature

DECLARATION OF SERVICE

Re: ***People v. Billy Charles White*, Case Number S228049**

I, Raymond Mark DiGuiseppe, declare that I am over the age of 18 and not a party to this case. My business address is: P.O. Box 10790, Southport, NC 28461.

On June 10, 2016, I served the foregoing **Answer Brief on the Merits** on each of the parties listed below, either by placing a true copy of it in a sealed addressed envelope with postage fully paid and depositing it with the Postal Service in Southport, North Carolina, or by serving it through the approved electronic process, as indicated below:

Billy Charles White
c/o Mrs. Phyllis Duncan
22520 County Road 49
Silverhill, Alabama 36576

Attorney General's Office
Electronically served to:
ADIEService@doj.ca.gov

Appellate Defenders, Inc.
Electronically served to:
eservice-court@adi-sandiego.com

San Diego County Superior Court
Electronically served to:
Appeals.Central@SDCourt.ca.gov

San Diego County Public Defender
Electronically served to:
ppd.eshare@sdcounty.ca.gov

San Diego County District Attorney
Electronically served to:
DA.Appellate@sdcda.org

Theresa Osterman Stevenson
(Court of Appeal Appellate Counsel)
Electronically served to:
tstevenson@tosterlaw.com

Court of Appeal
Fourth Appellate District, Division One
750 B Street, Suite 300
San Diego, California 92101

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and was executed on June 10, 2016.

Raymond Mark DiGuiseppe
Declarant

Signature