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

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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

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[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

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[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

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> 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.)

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[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

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[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 . . ."];

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[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].)