In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

BILLY CHARLES WHITE,

Defendant and Appellant.

Case No. S228049

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

RESPONDENT'S REPLY BRIEF

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INTRODUCTION

Nearly as important as what this case *is* about, is what this case *is not* about. This case *is* about preserving a factual record that accurately captures appellant's criminal conduct and preserving appellate remedies. It *is not* about punishment. Vacating appellant's conviction for rape of an unconscious victim, as the Court of Appeal did here, is inconsistent with the Legislature's intent to have appellant's convictions reflect the full extent of his criminal behavior. Appellant's two rape convictions in no way saddle him with criminal liability that unfairly exaggerates or misrepresents his actual conduct, as determined by a unanimous jury beyond a reasonable doubt.

As explained in the opening brief, application of the traditional rules of statutory interpretation to the modern rape statute (Pen.Code[1], § 261) demonstrates the Legislature's intent to define rape of an intoxicated victim and rape of an unconscious victim as separate offenses, just as the Legislature intended oral copulation of an intoxicated victim and oral copulation of an unconscious victim to be separate offenses. (*People v. Gonzalez* (2014) 60 Cal.4th 533 (*Gonzalez*).) Appellant argues these familiar canons of statutory construction do not demonstrate such an intent, and instead, he contends the *Legislature's* intent is best expressed through a nearly 80-year-old *judicial* construction of section 261, and the Legislature's subsequent silence on the matter. But the Legislature's failure to specifically address a judicial interpretation of section 261 that is nearly eight decades old cannot be read as an adoption of the construction, and is a thin reed upon which to rely. In any event, the Legislature has not been silent. It has repeatedly and explicitly sought to align the oral copulation statute with the rape statute. Given that this court has already

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

determined the Legislature intended the oral copulation statute to define separate offenses, its consistent effort to bring the oral copulation statute in line with the rape statute leads to the inexorable conclusion that the rape statute should be interpreted similarly. The absurd consequences which would naturally flow from a contrary reading of section 261 resolve any doubt regarding the Legislature's intent.

Further, even if this court determines the subdivisions of section 261 do not define separate offenses, but rather articulate "circumstances" of a single offense, appellant's two convictions here are still valid as section 954 permits multiple convictions for different statements of the same offense. Appellant's contrary reading of section 954 is inconsistent with the historical developments of that provision, and with its clear intent to relax pleading and joinder requirements.

Appellant also urges this court to apply the rule of lenity to read section 261 in the manner he proposes. The rule of lenity is inapplicable because the Legislature's intent is not ambiguous. What is more, lenity is not implicated here because, again, neither of the two proposed interpretations of section 261 has any impact on appellant's punishment—there is, therefore, no leniency to afford.

Finally, appellant argues that if this court finds both convictions may stand, the rule should not be applied retroactively as to his two convictions. This too should be rejected as the law has not changed; appellant's convictions have always been valid. Further, even if this court concludes the 1941 judicial interpretation created confusion about the potential criminal liability a defendant could face in these circumstances, appellant is only entitled to the remedy originally imposed which was consolidation of his convictions, not vacation of count 2 to which he now insists he is entitled.

ARGUMENT

I. APPLICATION OF THE TRADITIONAL CANONS OF STATUTORY CONSTRUCTION REVEAL A CLEAR LEGISLATIVE INTENT TO DEFINE SEPARATE RAPE OFFENSES

The Legislature's intent to define different offenses is expressed in its use of different elements to define rape of an intoxicated victim and rape of an unconscious victim. This intent is further buttressed by the imposition of different punishments for different forms of rape. And, finally, there is a long and consistent legislative history that shows an unmistakable intent to treat the four major sex offenses (rape, oral copulation, sodomy and penetration by foreign object) similarly.

Appellant argues all of this evidence of the Legislature's intent should be ignored in favor of the judicial interpretation of section 261 in *People v. Craig* (1941) 17 Cal.2d 453 (*Craig*), and the Legislature's subsequent silence. (AAB[2] 9-10.) But, the Legislature's failure to act is almost never sufficient, by itself, to show a Legislative intent to adopt a judicial construction of a statute. And the Legislature's failure to act here is easily explained by the context under which the issue first arose, the Legislature's concern with more pressing matters, and its tendency to allow courts to correct their own errors. Further, the positive indicators of legislative intent (i.e. what the Legislature has done) support reading the rape statute consistently with the oral copulation statute. Finally, appellant argues this court should ignore the consequences which would flow from his proposed interpretation. But the consequences which would naturally flow from a proposed statutory construction are a proper consideration when discerning legislative intent. Here, the consequences are absurd and contrary to the

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[2] "AAB" refers to Appellant's Answering Brief, and "ROBM" refers to Respondent's Opening Brief on the Merits.

purpose of the statute. This is a strong indicator that the Legislature did not intend section 261 to define one offense, as appellant claims.

A. The plain language of the statute shows an intent to define multiple criminal offenses

Initially, appellant argues the plain language of section 261 supports the holding in *Craig*, that the statute defines one offense, not distinct offenses. But his entire argument regarding the plain language urges this court to adopt an approach that would ignore the elements of the offense at issue.

As this court explained in *Gonzalez*, the question of multiple convictions is ultimately one of legislative intent. (*Gonzalez*, *supra*, 60 Cal.4th at p. 537.) Just as the court may not make two crimes out of one, (*Ibid.*), it also may not make one crime out of two. The starting point for the analysis regarding legislative intent is the plain language of the provision itself. With respect to statutes defining crimes, this means the elements that comprise the offense at issue. (*Id.*, at p. 538.) As explained in the opening brief, the use of differing elements to define crimes is a strong indication the Legislature sought to define distinct offenses. (ROBM 8-10, 12-15.)

This is precisely how the court applied the elements test to denote the legislative intent behind the plain text of section 288a in *Gonzalez*: "These offenses differ in their necessary elements...and neither offense is included within the other." (*Gonzalez*, *supra*, 60 Cal.4th at p. 539.) Contrary to this application of the plain text analysis, appellant argues that the legislative intent to define distinct crimes is not discerned from examination of the elements. (AAB 23, 25, 28, 30). Instead, appellant argues courts must discern legislative intent to define "truly separate" offenses without looking to the elements. (AAB 23.) In support of this argument, appellant reiterates the following passage from *Craig*: "'A defendant may be

convicted of two separate offenses arising out of the same transaction when each offense is stated in a separate count and when the two offenses differ in their necessary elements and one is not included *within the other*." (*Gonzalez, supra*, 60 Cal.4th at p. 539, citing *Craig, supra*, 17 Cal.2d at p. 457, emphasis original.) On its face, the proposition is actually supportive of respondent's argument that where two provisions define criminal conduct comprised of different elements, it is a strong indicator that they are different offenses. (See e.g., *Blockburger v. United States* (1932) 284 U.S. 299, 304, [52 S.Ct. 180, 76 L.Ed. 306].) But appellant argues this passage shows courts have created a two-part test. He argues that a defendant can only be convicted of two separate offenses if they 1) are "truly separate offenses," *and*, 2) are set out in different counts and comprised of different elements.

Appellant's proposed reading of the "elements test" is undermined by the lack of any guidance or authority on how to determine initially if two offenses are "truly separate." According to appellant, the fact that the two offenses contain distinct elements is not a consideration in the first determination regarding whether the Legislature intended the two offenses be "truly separate." (AAB 23.) But he fails to explain what a court would look to, if not the elements, to determine whether the two counts describe "truly separate offenses." The Legislature defines criminal conduct with elements, so consideration of the elements is absolutely necessary to determine if two provisions define the same crime or different crimes. By way of analogy, appellant's argument is akin to asking if two words are synonymous without permitting consideration of their definitions.

Plainly, the elements of the offenses are different, and neither offense is a lesser included offense of the other. The Legislature could not have given a clearer indication that the two crimes are distinct offenses than defining them differently. By itself, distinct elements may or may not be a

sufficient indicator of a legislative intent to define two crimes. Here, the distinct elements are not the only indicator of legislative intent. Just as with the oral copulation statute, and as explained in the opening brief, certain rape offenses carry different punishments, and the structure of section 261 mirrors section 288a in ways that indicate the legislature sought the two statutes be interpreted similarly. (ROBM 16-22.) Because of these additional indicators of intent, this court need not decide in this case whether distinct elements would alone be sufficient to establish a legislative intent to define different crimes. (See e.g. *People v. Snow* (2003) 30 Cal.4th 43, 96 ["We need not decide whether that is a correct statement of the law (citation) because the issue is not presented here."]; *Mateel Environmental Justice Foundation v. Edmund A. Gray Co.* (2003) 115 Cal.App.4th 8, 20, fn. 6 ["In an emerging area of the law, [courts] do well to tread carefully and exercise judicial restraint, deciding novel issues only when the circumstances require."].)

B. The Legislature's post-*Craig* silence on this issue is not indicative of its adoption of the judicial construction

In 1941, the court in *Craig* held that the defendant could not be convicted of two punishable rape offenses for one act of sexual intercourse because the subdivisions of former section 261, "merely define[d] 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." (*Craig, supra*, 17 Cal.2d at p. 455.) The Legislature has never explicitly addressed this holding from *Craig*, although it has moved one of Craig's rape offenses out of section 261, and into a distinct provision, section 261.5, unlawful intercourse with a minor.

Appellant argues that the Legislature's silence in the wake of *Craig* is evidence that it adopted the judicial construction of section 261 that permits only one rape conviction. But, as noted, the Legislature has not been silent.

Even if the Legislature has been silent as to the specific issue now before this court (i.e. the legislative intent to define a single rape offense), its silence cannot reasonably be construed as a tacit approval of the holding in *Craig*.

Due to legislative recasting in 1970 to remove the stigma of a rape label in cases of statutory rape, statutory rape was removed from section 261, renumbered (§ 261.5) and relabeled "unlawful intercourse." (*Johnson v. Dep't of Justice* (2015) 60 Cal.4th 871, 885, citing Sen. Bill No. 497 (1970 Reg. Sess.) chaptered as Stats. 1970, ch. 1301, §§ 1, 2, pp. 2405–2406.). Appellant is correct that the legislative history, as discussed in *Johnson*, does not indicate that the Legislature's action was an explicit response to *Craig*. But, to the extent the Legislature did act, it has done so in a manner that undermines *Craig*, and supports respondent's position, not the other way around. The recasting of statutory rape as unlawful sexual intercourse demonstrates the Legislature did not consider all forms of rape to be the same offense; indeed, it recast statutory rape because it considered it less reprehensible than the other forms of rape. That it did not also recast the other forms of rape into separate statutes should not be read as an affirmation of *Craig* with respect to the remaining subdivisions because *Craig* itself did not address the other subdivisions. Essentially, the Legislature's action in 1970 took a scalpel to section 261 instead of a meat clever. The action it did take demonstrates disagreement with the construction of section 261 in *Craig*, even if it did not go so far as to address the import of *Craig's* holding in contexts not expressly at issue in the case. And to the extent the Legislature's failure to address the other subdivisions shows it viewed those forms of rape as similarly reprehensible, that view does not lead to the conclusion that they are in fact the same offense. After the 1970 recasting of statutory rape, the Legislature reasonably would have assumed that the issue in *Craig* had been addressed

by moving one of the two rape convictions at issue out of section 261 and into section 261.5. Thus, its silence following *Craig* is best explained as a result of its assumption that any problem had been fixed, and no further action was necessary.

Beyond this specific action in 1970, respondent agrees that the Legislature has not addressed, explicitly or implicitly, the judicial construction of section 261 in *Craig*. But as explained below, this silence cannot fairly be read as support for or adoption of *Craig's* one conviction rule for section 261.

A now-familiar adage bears repeating: "[L]egislative inaction is a weak reed upon which to lean...." (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1156.) It is true that "[l]egislative silence might support an arguable inference of acquiescence or passive approval, but something more than mere silence is needed to elevate the acquiescence to a species of implied legislation. In construing statutes, it is generally more fruitful to examine what the Legislature has done than what it has not done. (*People v. King* (1993) 5 Cal.4th 59, 76-77 (*King*), citing *People v. Escobar, supra*, 3 Cal.4th at p. 751, internal quotation marks omitted.)

As this Court noted recently in *People v. Whitmer* (2014) 59 Cal.4th 733, 741, "[t]he Legislature's failure to act may indicate many things other than approval of a judicial construction of a statute: the sheer pressure of other and more important business, political considerations, or a tendency to trust to the courts to correct their own errors....'" (*Ibid.*, citing *King, supra*, 5 Cal.4th at p. 75; see also *County of Los Angeles v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 391, 404.)

Appellant claims the Legislature's silence is persuasive here because the judicial interpretation of section 261 permitting only one rape conviction is reflected in more than just *Craig*, and can be fairly characterized as, "long settled" and "firmly embedded." Appellant's

argument is premised on the opinions in six cases over this court's nearly 170-year history. Upon closer examination, the sum total of these cases is not a consistent judicial interpretation of section 261 as permitting only one rape conviction where the act is covered by different subdivisions comprised of different elements. Instead, the cases are more accurately read as unique, individual attempts to resolve the specific legal issue before the court. Because the legal issue in nearly each case was different, the outcomes cannot be read together in the manner suggested by appellant.

In *People v. Vann* (1900) 129 Cal.118, 120-121, relying on an even earlier case, *People v. Snyder* (1888) 75 Cal.323, the court addressed the *pleading* requirements for rape cases. In both cases, the court held evidence that the defendant committed a rape by means other than that alleged in the charging document was admissible at trial, because the six subdivisions of the rape statute were merely six types of the same offense, and not separate offenses.

People v. Jailles (1905) 146 Cal.301, on which appellant also relies, is likewise a pleading case. In *Jailles*, the defendant was charged in separate counts with forcible and statutory rape based on the same act of intercourse. (*Id.* at p. 303.) Rejecting the defendant's argument that he could not be charged with both crimes for the same act, the *Jailles* court concluded that the two counts were permissible because they were simply different statements of the same offense, which was permissible under section 954. (*Ibid.*) Respondent has made this alternate argument as well (see section II, post). Further, a careful reading of the opinion in *Jailles* reveals the court interpreted "offense" to mean "transaction," and thus, because the accusatory pleading contained two charges based on a single "transaction," the *Jailles* court concluded the two charges were "different statements of the same offense."

> The allegations of each show the offense of rape, committed on the same person on the same day, and indicate that the district attorney was simply endeavoring to set forth the same *transaction* in different ways so as to bring the case within either subdivision 1 or subdivision 3 of section 261 of the Penal Code, as the evidence on the trial might show it to have been.

(*Jailles, supra,* 146 Cal. at p. 304.) This court has since rejected this holding: "The test, however, is the identity of the offenses and not the identity of the occurrence from which they arise. A defendant may be convicted of separate offenses arising out of the same transaction when each charge is separately stated and the offenses differ in their elements and one is not included in the other." (*Rodriguez v. Superior Court of City and County of San Francisco* (1946) 27 Cal.2d 500, 501; see also *People v. Reed* (2006) 38 Cal.4th 1224, 1226 (*Reed*) ["In general, a person may be convicted of, although not punished for, more than one crime arising out of the same act or course of conduct." Indeed, in *Gonzalez*, this court concluded the two charges constituted different offenses even though the act at issue was indisputably one transaction (a single act of unlawful oral copulation). (*Gonzalez, supra*, 60 Cal.4th at p. 536.)

Following *Jailles* was *Craig*. *Craig* was the first case to address the propriety of multiple *convictions*. And, the *Craig* court concluded, based on former section 261, that the statute defined a single offense that could be committed under varying "circumstances." *Craig*'s holding was applied to a nearly identical case three years later in *People v. Scott* (1944) 24 Cal.2d 774. Scott was charged in three separate counts with three different violations of subdivisions of section 261, based on a single act of unlawful intercourse. And, like Craig, Scott's sentences were run concurrently. Relying exclusively on *Craig*, the *Scott* court held that "a single act of intercourse amounts to only one punishable offense of rape...," (*Scott*, at p. 777), and thus, the court consolidated the three counts.

Appellant also cites *People v. Marshall* (1957) 48 Cal.2d. 394, in support of his contention that this court has consistently interpreted the legislative intent behind section 261 as permitting only one rape conviction. But *Marshall* is a robbery case, not a rape case. The issue was whether former Vehicle Code section 503 was a lesser included offense of robbery, the charged offense. (*Id.*, at p. 397-398.) When deciding whether to apply the accusatory pleading test, or the elements test, the court looked to how courts had addressed the issue in the context of the rape statute (and cited *Craig*), but the case in no way reaffirmed *Craig*'s interpretation of section 261. (*Marshall*, at p. 401-402.)

Finally, in *People v. Collins* (1960) 54 Cal.2d 57, 59-60, the court overruled *Vann*, *Snyder*, and *Jailles*, to the extent they permitted charging a defendant with one form of rape, and convicting him of a different form. *Collins* concluded such a variance between the information and the proof at trial violated due process unless the defendant had notice of the alternative means by which he was accused of having committed the offense. It is true that the *Collins* court reiterated *Craig's* 1941 holding that the subdivisions of section 261 "did not state different offenses, but merely circumstances under which an act of intercourse constitutes the crime of rape." (*Collins, supra*, 54 Cal.2d at p. 59, citing *Craig, supra*, 17 Cal.2d at p. 455.) But, the reiteration of this principle was not to affirm it. Instead, the opinion in *Collins* points out that *even though Craig* held the subdivisions are not different offenses, the defendant is still entitled to notice of the provision he is alleged to have violated. *Craig* was merely a starting point for the analysis because the holding in *Craig* differentiated the issue in *Collins* from other cases where the issue had been decided – i.e. it was already well settled that a defendant could not be charged with one crime, but convicted of another. The actual holding of *Collins*—that the defendant is entitled to notice—supports respondent's position that where the two provisions

contain distinct elements, they are different offenses, which is why a defendant must be given notice.

Importantly, this court has also expressly called *Craig's* holding into question, and limited its applicability. In *Ex parte Hess*, the court noted,

> Although it was stated in the *Craig* case that the 6 subdivisions of section 261 of the Penal Code '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', (quoting *Craig, supra*, 17 Cal.2d at page 455), that statement must be read in light of the problem then before the court, that is, whether the defendant could be doubly punished for a single act. Under section 654 of the Penal Code it is clear that double punishment would be improper, (citations), regardless of whether there is but one offense or six different offenses of rape.

(*Ex parte Hess* (1955) 45 Cal.2d 171, 174.) Perhaps the most reasonable explanation for the Legislature's post-*Craig* silence is that it read *Hess* as correcting the problem by limiting *Craig* to the issue before it—one concerning multiple punishment, not multiple convictions. Indeed, section 261 was not amended at all in the 14 years between the two opinions, showing the Legislature never confronted the *Craig* interpretation while amending the rape statute prior to *Hess'* limitation on *Craig*. Once *Hess* had effectively limited *Craig*, the Legislature reasonably concluded there was nothing left from *Craig* which required its attention or action.

Following these cases, *Craig's* one-conviction rule lay essentially dormant until *People v. Smith* (2010) 191 Cal.App.4th 199, 205, where the court followed *Craig*, as it must, and struck the defendant's conviction for rape of an unconscious victim because he had also been convicted of rape of an intoxicated victim. (See *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.)

All of this demonstrates that the interpretation of section 261 adopted by this court in *Craig*, is not "firmly embedded" in the precedent from this

court. *Craig*'s holding has been cited by other courts but nearly always on a collateral issue, as dicta, or as the starting point for an analysis. *Craig*'s determination of legislative intent is not echoed by other courts, and has been expressly limited to the multiple punishment context. Appellant's attempt to parse out of these cases a "long-settled" and "firmly-established" judicial construction of section 261 must be rejected.

Further, these cases do not bolster appellant's claim that the Legislature's silence on the issue should be interpreted as approval of the judicial construction of section 261. As demonstrated above, the cases appellant relies upon do not obviously highlight the issue now before this court. *Vann*, *Snyder*, and *Collins* all addressed an issue with the pleading of a case where the evidence showed a defendant committed a rape offense not initially charged. The issue was more accurately viewed as one involving a due process right to notice, and the legal requirements for pleading cases. *Jailles* again was a pleading case and its holding, that a defendant could properly be charged with two rape offenses is consistent with respondent's position. *Craig* and *Scott* arguably presented the issue now before this court, but in the context of much concern over punishable offenses (as explained in ROBM at pp. 32-34; see also *Hess, supra*, 45 Cal.2d at p. 174; and *In re Wright* (1967) 65 Cal.2d 650, 655-656). The concern over how to avoid double punishment in this context was put to rest with this court's adoption of the current section 654 stay procedure in *In re Wright*, supra, 65 Cal.2d at pp. 655-656. At the time of *Craig* and *Scott*, the Legislature would not have recognized the need to fix anything since both cases resolved the legal issue in a manner that was consistent with its intent regarding punishment. (See § 654.) And in *Marshall*, the issue the Legislature would have been aware of was whether Vehicle Code section 503 was a lesser included offense of robbery. Nothing about the opinion can be fairly read to put the Legislature on notice of the flaw in the

judicial interpretation of section 261 with which this court is now confronted.

To the extent the Legislature is presumed to be aware of case law interpreting a statute, it can only be presumed to be aware of the opinion in the context of the issue addressed by the deciding court. Adopting appellant's argument that the Legislature silently acquiesced to this judicial construction of section 261 by failing to address it would be to require of the Legislature unreasonable foresight in predicting the legal consequences of issues raised tangentially or cursorily in all judicial opinions. Had the Legislature disagreed with the specific holdings in these cases regarding the pleading and proof requirements, the lawful punishment for a single act of rape, or applying the accusatory pleading test to determine if a crime is a lesser included offense, it may have been inclined to act. But, according to appellant, the Legislature should also have anticipated that the holdings would be used to prevent multiple convictions in cases where the evidence shows a defendant violated two provisions which, by all accounts, were appropriately charged in the pleading document. This is an unreasonable extension of the principle permitting a court to find evidence of legislative intent to adopt a judicial construction through the Legislature's silence and inaction.

In addition, admittedly, the stakes in most cases *appear* relatively low. As respondent has consistently conceded, a defendant cannot be punished for both rape convictions where they are based on a single act of rape. (See § 654.) Further, the likelihood of the remaining conviction getting overturned on appeal is small, as is true with all convictions on appeal. The problem is that there is no way to accurately predict, ahead of the appellate process, which convictions may be subject to reversal. Because the two rape convictions are legal, proper, and accurately reflect the extent of the defendant's criminal conduct (as determined by the jury), it is critically