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

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
STEVE OETTING
Supervising Deputy Attorney General
MEREDITH S. WHITE
Deputy Attorney General
State Bar No. 255840
600 West Broadway, Suite 1800
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 738-9069
Fax: (619) 645-2044
Email: Meredith.White@doj.ca.gov
Attorneys for Plaintiff and Respondent

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

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

---

[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

important that both convictions be preserved in every case to guard against the risk that some defendant will receive an unjust windfall in post-conviction proceedings and walk away with no rape conviction at all.

Because of the small number of cases that may present this issue, the Legislature reasonably could have determined its attention was required to address more pressing matters. (*Whitmer*, *supra*, 59 Cal.4th at p. 741.) In the end, appellant's entire argument regarding *legislative* intent rests on the Legislature's silence regarding the *judicial* interpretation of section 261 in *Craig*, not positive indications from the Legislature about its intent with respect to the rape statute. To be blunt, without *Craig*, this issue would not exist. Section 954 permits the charging of and conviction for different offenses in different counts or different statements of the same offense. The two provisions at issue in this case clearly fall into one of those two categories. Thus, without *Craig*, this would be a very straightforward application of sections 954 and 654. The Legislature has never indicated an intent to deviate from that straightforward application when it comes to the rape statute. And, the Legislature would need to clearly and unmistakably give that instruction because the result is inconsistent with the provisions as they apply in nearly every other criminal statutory context. (See e.g. § 496, subd. (a) [Legislature explicitly indicated intent to prohibit multiple convictions for receiving stolen property and theft] , and see § 459.5, subd. (b) [prohibiting multiple charges and convictions for shoplifting and burglary or theft of the same property].) Legislative acquiescence can be an indicator of legislative intent, but the persuasiveness of the Legislature's silence is relative in nature to the proposed interpretation's deviation from the norm.

Appellant also argues that because the Legislature has silently adopted the *Craig* interpretation, it is the Legislature's mistake to correct. (AAB 26-29.) But, this court has noted that the Legislature can, "trust to the

courts to correct their own errors." (*Whitmer, supra*, 59 Cal.4th at p. 741.) Given that the construction at issue was judicial, and the problem the construction created was not inherent or obvious initially, it is more reasonable to assume that the Legislature's silence is attributable to the "press of more important business," and the "tendency to trust the courts to correct their own errors." (*Ibid.*; see also *King, supra*, 5 Cal.4th at p. 77 ["In short, this court created the *Culbreth* rule; this court can reexamine it."].) In *People v. Daniels* (1969) 71 Cal.2d 1119, 1128, the court explained its continuing duty to interpret statutes in light of changing conditions which may better expose the legislative intent:

> [W]hile the Legislature may thus choose to remain silent, we may not. It continues to be our duty to decide each case that comes before us; in so doing, we must apply every statute in the case according to our best understanding of the legislative intent; and in the absence of further guidance by the Legislature, we should not hesitate to reconsider our prior construction of that intent whenever such a course is dictated by the teachings of time and experience.... Respect for the role of the judiciary in our tripartite system of government demands no less.

(*Ibid.*; see also *People v. Mendoza* (2000) 23 Cal.4th 896, 919.)

C. The Legislature's affirmative actions demonstrate a clear intent to treat oral copulation and rape similarly

This court has already concluded that the Legislature intended oral copulation of an intoxicated victim and oral copulation of an unconscious victim to be distinct offenses because the two crimes have different elements and other forms of unlawful oral copulations carry different punishments. (*Gonzalez, supra*, 60 Cal.4th at p. 540.) The exact same can be said about the rape statute. If the Legislature intended to treat rape differently, despite defining the rape crimes with the same differing elements it used to define the oral copulation crimes, and despite punishing some forms of rape differently, exactly as it does with oral copulation, that

curious and disparate intention would be stated explicitly and without equivocation. (See e.g. *King, supra*, 5 Cal.4th at p. 76 ["If the Legislature had intended to adopt the *Culbreth* rule, surely it would have found a less obscure way to signal that intent."].)

To the contrary, the Legislature's affirmative actions demonstrate an unmistakable intent to treat oral copulation and rape similarly. For example, in 1967, the Legislature added aggravated forms of rape, sodomy and oral copulation by creating new offenses where a defendants "acted in concert" with others to commit the offense. (Sen. Bill No. 759 (1967 Reg. Sess.) § 1.)

In 1977, the Legislature expanded the definitions of unlawful oral copulation and sodomy to include acts "when the victim is at the time unconscious of the nature of the act..." The legislative history materials[3] show that this provision was added to the oral copulation statute and to the sodomy statute to bring those two offenses in line with the rape statute, as rape already covered an act of intercourse where the victim was unconscious of the nature of the act. (Assem. Com. on Criminal Justice, Analysis of Sen. Bill 877 (1977 Reg. Sess.) as amended June 21, 1977.)

In 1980, the Legislature expanded the definitions of all four major sexual offenses (rape, sodomy, oral copulation, and penetration by foreign object) to include acts where the victim was prevented from resisting due to threats to a third party, not just the victim herself or himself, as the law had previously provided. In addition, for rape, the threats had to be of "great and immediate bodily harm" and, "accompanied by apparent power of execution." The 1980 legislation also adopted this same standard for oral

---

[3] By separate motion respondent has requested this court take judicial notice of relevant portions of the legislative history materials for the Senate and Assembly bills discussed herein.

copulation, sodomy, and penetration by foreign object in an effort to make them consistent with the rape statute. (Assem. Com. on Crim. Justice, Bill Analysis of Sen. Bill 1930 (1979-1980 Reg. Sess.) as amended April 16, 1980, referencing Assembly Bill 3420, (Ch. 409, 1980 [foreign object]).)

In 1982, the Legislature added section 261.6, which defines consent for all four major sex offenses. When section 261.6 was amended in 1991, and section 261.7, also related to the definition of consent, was added in 1994, both changes were likewise applicable to all four of the major sexual offenses. (Sen. Com. on the Judiciary, Report on Assem. Bill 2721 (1981-1982 Reg. Sess.) as amended April 15, 1982.)

In 1986, the Legislature passed Assembly Bill 3485 which amended all four major sex crime statutes in various ways. The stated purpose of this bill was to, "conform the criteria used to determine the commission of each of the four major sex offenses: rape, sodomy, oral copulation, and foreign object rape; thus, the elements of these crimes relating to force, consent, and violence would be consistent." (Sen. Com. on the Judiciary, Report on Assem. Bill 3485 (1985-1986 Reg. Sess.) as amended June 30, 1986.)

In 1994, the Legislature deleted the requirement that intoxicating substances had to be administered by the defendant. Again, the change in the elements applied to all four major sexual offenses (rape, sodomy, oral copulation, and penetration by foreign object). (Sen. Com. on the Judiciary, Report on Assem. Bill 85x (1993-1994 Reg. Sess.) as amended May 12, 1994.)

In 2002, Senate Bill 1421 added the same provision to all four major sex crimes making each act unlawful where the victim was not aware of the "essential characteristics of the act due to the perpetrator's fraudulent representation that [the act] served a professional purpose when it served no professional purpose." (Sen. Rules Com., Office of Senate Floor Analysis,

Unfinished Business-Sen. Bill 1421 (2001-2002 Reg. Sess.) as amended July 1, 2002.)

In 2013, in companion bills, the Legislature again expanded the definition of all four major sex crimes to include acts committed by fraud or impersonation where the victim submitted under the belief the defendant was someone other than himself. Previously, the law had criminalized acts committed by fraud or impersonation of the victim's "spouse." Senate Bill 59 made this change with respect to oral copulation and sexual penetration, and Assembly Bill 65 made the identical change with respect to rape and sodomy. (Sen. Rules Com., Unfinished Business-Sen. Bill 59 (2013-2014 Reg. Session) as amended July 3, 2013; Assem. Floor Analysis of Assem. Bill 65 (2013-2014 Reg. Sess.) as amended June 25, 2013.)

In addition to all of the legislative history behind the amendments to the major sex offenses, the statutes themselves and the schemes of which they are a part provide a strong indication that the Legislature intended these crimes all be treated similarly. As explained in the opening brief, the four major sex offenses have common elements and common punishments. (ROBM 22-23.) The Legislature's intent to treat these crimes similarly is reflected in the Legislature's use of the same criminal elements to define each and its imposition of similar punishments for each type of sexual offense. "In construing statutes, it is generally more fruitful to examine what the Legislature has done than what it has not done." (*King, supra,* 5 Cal.4th at p. 76-77.) Here, the consistent message from the Legislature is an unmistakable intent to treat rape and oral copulation similarly. If the Legislature intended oral copulation of an intoxicated victim and oral copulation of an unconscious victim be separate offenses, it must have intended a similar reading of the rape statute.

D. The consequences of adopting *Craig's* interpretation of section 261 are an appropriate consideration because courts avoid interpreting statutes in a manner that would have absurd consequences

Appellant also implicitly recognizes that reading section 261 in the manner he proposes would create "anomalies" and "potential complications." (ABM 29, 40.) Instead of resolving or explaining the justification for the anomalies and complications, appellant simply asserts that the existence of the "complications" cannot be used as a reason to permit multiple convictions in this context, and thus should not be considered when determining legislative intent. (ABM 40-41.) He claims any anomalies must be the result of reasoned decisions by the Legislature, but offers no evidence as to what those reasons might be. (ABM 29.)

Contrary to appellant's assertion, the consequences which would flow naturally from his proposed reading of section 261 cannot be ignored and are an appropriate consideration because, "[i]n construing legislative intent, it is fundamental that a statute should not be interpreted in a manner that would lead to absurd results." (*Central Pathology Service Medical Clinic, Inc. v. Superior Court* (1992) 3 Cal.4th 181, 191; see also *People v. Canty* (2004) 32 Cal.4th 1266, 1277 ["We therefore apply the principles that pertain where statutory ambiguity exists, adopting the interpretation that leads to a more reasonable result."].) Even where the plain meaning of the statute suggests a particular interpretation, courts will reject that interpretation if it, "would inevitably frustrate the manifest purposes of the legislation as a whole or lead to absurd results." (*In re Ge M.* (1991) 226 Cal.App.3d 1519, 1523.) Contrary to appellant's argument, "[t]o the extent that uncertainty remains in interpreting statutory language, '*consideration should be given to the consequences that will flow from a particular interpretation*' [citation], and both legislative history and the 'wider

historical circumstances' of the enactment may be considered. " (*People v. Moore* (2004) 118 Cal.App.4th 74, 78, citing *People v. Cruz, supra*, 13 Cal.4th at p. 782; see also *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 305.)

As explained in detail in respondent's opening brief, the complications which arise from appellant's reading of section 261 are numerous. (ROBM 24-26.) And those complications are wholly inconsistent with the apparent legislative intent to define certain conduct as criminal. Under appellant's construction, his conviction for rape of an unconscious woman would be stricken.[4] This would render it unavailable to replace the existing conviction (count 1) should count 1 ever be overturned on review. (Cf. see *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1128–1129 [stay procedure "preserv[es] the possibility of imposition of the stayed portion should a reversal on appeal reduce the unstayed portion of the sentence."]; see also *People v. Niles* (1964) 227 Cal.App.2d 749, 756 ["if [the trial court] dismisses the count carrying the lesser penalty, and the conviction on the remaining count should be reversed on appeal, the defendant would stand with no conviction at all . . . [which would] risk [] letting a defendant escape altogether"].)

Second, without a conviction on count 2, appellant's criminal conduct would not be accurately reflected by the judgment. As there is no additional penal consequence to appellant, it furthers justice to have an accurate record of appellant's convictable conduct. (See *In re Wright*

---

[4] Notably, appellant does not argue that his convictions should be *consolidated*, the remedy afforded the defendant in *Craig*. (See AAB 42, fn. 14.) While consolidation is certainly more preferable than simply striking the conviction, it is unnecessary because a traditional section 654 stay would accomplish the exact same thing and would avoid creating and litigating an entirely new procedure ("consolidation") which serves no distinct function than the procedure already in existence.

(1967) 65 Cal.2d 650, 656 [stay procedure "protect[s] the rights of both the state and the defendant"].) An accurate record of the facts, as determined by the jury, also matters to the victim. She was not just raped while intoxicated to the point she could not consent, she was also raped while *unconscious*. The jury's verdict on count 2 was supported by substantial evidence,[5] and the verdict is consistent with the victim's testimony regarding the events of that night. The victim is entitled to the validation that the jury's verdict on each charge represents. (See generally, Cal. Const. Art. 1, § 28, subd. (a)(2) [Noting the Legislature's intent to "ensure[] that crime victims are treated with respect and dignity."].) Having the court strike count 2 after the fact and without explanation violates the jury's verdict by excising a factual finding made beyond a reasonable doubt. The Legislature did not intend this result.

Appellant argues these complications can be easily circumvented by instructing juries that the two crimes are "alternate charges." (AOB 38.) Not so. First, a defendant may be guilty of one or the other (alternate), but based on the evidence presented here (and in similar cases), this defendant was guilty of *both*. Appellant's proposed instruction, CALCRIM 3516, includes the following statement, "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." (Emphasis added.) It is illogical to instruct a jury that it must find the defendant *not guilty* of a crime the jury determines he committed. And it constitutes a perversion of the criminal justice system to allow defendants, guilty by all accounts of a defined rape offense, to receive a "not guilty"

---

[5] In his original appeal, appellant raised a sufficiency of the evidence claim as to both counts 1 and 2. The Court of Appeal rejected both claims. (*People v. White* (Apr. 10, 2013, No. D060969) 2013 WL 1444254, at *5.) Appellant did not petition for review of either claim.

verdict in these circumstances. "The paramount purpose of a trial is to provide a reliable process for determining the truth of the charges, not to provide the best possible opportunity for one party to obtain a particular result." (*People v. Bryant* (2014) 60 Cal.4th 335, 439.)

Taken to its logical conclusion, the idea that juries should be instructed to pick one of the two rape counts demonstrates an absurdity the Legislature simply could not have intended. As explained in Respondent's Opening Brief, (ROBM 25), appellant's argument applies with equal force to all of the rape crimes included in section 261. So, according to appellant, a defendant charged with use of force upon a minor over 14 years old (§ 261, subd. (a)(2) & 264), and rape of a developmentally disabled person (§ 261, subd. (a)(1)), based on the same act of unlawful intercourse, could only be convicted of one rape offense. And, to determine which offense the defendant should be convicted of, appellant suggests we instruct the jury to pick one, but offers no guidance on what or how the jury should be instructed to choose. These two crimes carry different punishments – rape by force upon a minor has a sentencing triad of 7, 9, and 11 years, and rape of a developmentally disabled person has a sentencing triad of 3, 6, and 8 years. Thus, appellant's suggestion that the jury be instructed to select one of the two charges must include a suggestion that the jury also be informed of the punishments associated with each. Otherwise, how would a jury make an informed decision? This would necessarily call upon the jury to consider punishment before rendering its verdict, an outcome that violates the well-settled proposition that "[a] defendant's possible punishment is not a proper matter for jury consideration." (*People v. Holt* (1984) 37 Cal.3d 436, 458, citing *People v. Honeycutt* (1977) 20 Cal.3d 150, 157, fn. 4; see also CALCRIM No. 706 ["In your deliberations, you may not consider or discuss penalty or punishment in any way when deciding whether a ... charge[ ] has been proved."].) Additionally,

instructing a jury to select one of the two charges without any guidance on what factors should inform that decision creates an absurd (and potentially unconstitutional) situation where identically situated defendants will be convicted of different crimes, and punished differently based on what essentially amounts to a "coin toss" by the jury with no direction from the court or Legislature.

Appellant argues that vacating a conviction in this context is no different than vacating a lesser included offense conviction. (AAB 41.) He is wrong. The fundamental and critical difference is that the vacation of count 2 in this case eliminated from the record a finding of fact made by the jury – i.e. that the victim was raped while she was unconscious. By definition, vacating the conviction for a lesser included offense does not eliminate any factual finding, because all of the elements of the lesser offense are included in the greater offense. (*People v. Reed* (2006) 38 Cal.4th 1224, 1227 ["[I]f the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former."].) Lesser included offenses are simply duplicative. But the charges at issue in this case were not duplicative, each had a distinct fact[6] that had to be proven beyond a reasonable doubt.

---

[6] Respondent refers to the facts which must be proven to constitute a crime as "elements." In the context of section 261, appellant refers to these same facts as "circumstances." It is not clear to respondent, and appellant has failed to explain how these two terms are actually different. Both are facts necessary to show the violation of the criminal provision at issue. Both must be proved beyond a reasonable doubt to a unanimous jury. While the oral copulation statute does not use the term "circumstances," the legislative history materials demonstrate that the Legislature treats the elements in section 288a exactly as it treats the "circumstances" in section 261. (Sen. Com. on Judiciary, Report on Sen. Bill 1930 (1979-1980 Reg. Sess.) ["This bill expands the definition of rape to include the *circumstance* in which the perpetrator prevents a victim's resistance with threats to

(continued...)

Elimination of count 2 from the record also eliminated the attendant factual finding included in count 2 (i.e. that the victim was unconscious), but not reflected in count 1.

"One ferrets out the legislative purpose of a statute by considering its objective, the evils which it is designed to prevent, the character and context of the legislation in which the particular words appear, the public policy enunciated or vindicated, the social history which attends it, and the effect of the particular language on the entire statutory scheme. [Citations.]" (*Santa Barbara County Taxpayers Assn. v. County of Santa Barbara* (1987) 194 Cal.App.3d 674, 680.) "An interpretation which is repugnant to the purpose of the initiative would permit the very 'mischief' the initiative was designed to prevent. [Citation.] Such a view conflicts with the basic principle of statutory interpretation,..., that provisions of statutes are to be interpreted to effectuate the purpose of the law." (*Id.*, at p. 681.) Under appellant's proposed reading of section 261, rapists would be permitted to select the most vulnerable victims with impunity. Where a defendant chooses an intoxicated, unconscious, and developmentally disabled victim, not only is his punishment restricted by section 654 for the single act, but the historical fact of his commission of two of those three

---

(...continued)
another person. The bill also makes changes in the definitions of the crimes of sodomy and oral copulation to make them conform to the *circumstances* that define rape."].) The Legislature has also used the two terms interchangeably. The stated purpose of the 1986 legislation was to "conform the criteria used to determine the commission of each of the four major sex offenses." (Sen. Com. on the Judiciary, Report on Assem. Bill 3485 (1985-1986 Reg. Sess.) as amended June 30, 1986.) And, the report from the Senate Committee on the Judiciary refers to "two of the *circumstances* of rape" and "the *element* of false of fraudulent representation" with respect to penetration by foreign object. (Sen. Com. on the Judiciary, Report on Assem. Bill 3485 (1985-1986 Reg. Sess.) as amended June 30, 1986.)

crimes would be wiped from the record. The rape statute was designed to prevent rape, and it seeks to protect the most vulnerable victims in society. Adopting appellant's construction of section 261 would permit the very "mischief" it seeks to prevent. Section 261 ought to be read in a manner that effectuates the purpose of the law, not in a manner that undermines it.

II. EVEN IF SECTION 261 ONLY DEFINES ONE OFFENSE, SECTION 954 PERMITS CHARGING AND CONVICTING A DEFENDANT OF DIFFERENT STATEMENTS OF THE SAME OFFENSE

As shown above, and in the Opening Brief, rape of an intoxicated person and rape of an unconscious person are different offenses because the Legislature defined the two crimes with different elements, punishes some rape offenses differently and has selected a statutory structure indicating distinct offenses. (ROBM 16-22.) But if this court were to determine that they are not different offenses, respondent alternatively argues that section 954 still permits the dual convictions in this case because the two rape offenses are—at the very least—"different statements of the same offense." (OBM 37-39, citing § 954; see also *People v. Lofink* (1988) 206 Cal.App.3d 161, 166 (*Lofink*) [section 954 expressly allows prosecutors to charge and convict of multiple counts where the counts are different statements of the same offense].)

Appellant asserts that section 954 should be read to permit *charging* the two offenses at issue here, but that the statute only allows for conviction on one such charge. (ABM 36.) Appellant's interpretation of section 954 is incorrect. The plain language of that provision—especially viewed in light of its historical development—permits separate convictions for each different statement of the same offense.

Section 954 permits the prosecution to charge a defendant in separate counts on three bases: (1) "two or more different offenses connected together in their commission[]"; (2) "different statements of the same

offense"; or (3) "two or more different offenses of the same class of crimes or offenses[.]" It goes on to provide that "[t]he 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." A clear reading of section 954 is that it permits the prosecution to charge in separate counts on any of these three bases, it does not require the prosecution ever to elect between counts, and that a jury may convict on any of the counts as charged.

That this is the most natural reading of section 954 is shown by the fact that this court has read it this way. In *People v. Ortega* (1998) 19 Cal.4th 686 (*Ortega*), the court summarized section 954 as follows: "Section 954 states that, '[a]n accusatory pleading may charge . . . different statements of the same offense' and 'the defendant may be convicted of any number of the offenses charged.'" (*Ortega*, at p. 692, ellipses original.) The implication is that multiple convictions are permissible where the multiple counts are based on different statements of the same offense.

Similarly, in *Pearson*, this court considered whether a defendant could be convicted of lewd conduct on a child (§ 288, subd. (a)) and sodomy (§ 286, subd. (c)) for the same singular act of sodomy. (*People v. Pearson* (1986) 42 Cal.3d 351, 354–355.) The court summarized section 954 as follows:

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

(*Pearson*, at p. 354, italics original.) The court went on to conclude that the defendant was properly charged with both crimes because, "such charges clearly constitute 'different statements of the same offense' and thus are authorized under section 954." (*Ibid.*) And finally, the *Pearson* court, reading section 954 in the manner proposed by respondent, stated, "It also appears the court was authorized to convict defendant of both offenses for each act; the statute clearly provides that the defendant may be convicted of 'any number of the offenses charged.'" (*Ibid.*)

Appellant reads section 954 as requiring each separate conviction to be based on a "different offense." (ABM 35-36.) Yet nothing in section 954 mandates this. While section 954 says that "the defendant may be convicted of any number of the offenses charged," this does not mean that each separate conviction must be anchored to a distinct offense. In other words, section 954 does not contain a limitation on the number of permissible *convictions*; rather it describes today—as it always has—the permissible number of *offenses* for which a defendant may be convicted. This distinction, while subtle, is the key to making sense of section 954.

For example, consider an information that contained three counts, two of which described "different statements of the same offense" of X and one of which described a "different offense" of Y. Nothing in section 954 would prevent convictions on all three counts because that provision simply states that a defendant "may be convicted of any number of the offenses charged" without setting a limitation on the number of total convictions the defendant could receive. In other words, a defendant who is convicted of those three counts still stands convicted of only the "offenses charged," which are two. Section 954 does not say—as appellant advocates (AOB 32-38)—that each conviction has to be based on a different offense, but simply that a defendant may be charged with and convicted of multiple offenses. Simply put, multiple convictions for different statements of the

same offense in no way contravenes section 954's pronouncement that a defendant may be convicted of "any number of the offenses charged."

The historical development of section 954 further shows this to be correct. In contrast to today's version, the original version of section 954 provided: "The indictment must charge but one offense, and in one form only, except that when the offense may be committed by the use of different means, the indictment may allege the means in the alternative." (§ 954 (1872).) This language preserved a common law rule disfavoring the joinder of multiple offenses in a single indictment because of the risk of undue prejudice to a defendant. (See *Pointer v. United States* (1894) 151 U.S. 396, 401 ["'In cases of felony, no more than one distinct offense or criminal transaction at one time should regularly be charged upon the prisoner in one indictment, because, if that should be shown to the court before plea, they will quash the indictment, lest it should confound the prisoner in his defense, or prejudice him in his challenge to the jury; for he might object to a juryman's trying one of the charges, though he might have no reason so to do in the other; and if they do not discover it until afterwards, they may compel the prosecutor to elect on which charge he will proceed'"], citations omitted; see also *People v. Bailey* (1863) 23 Cal.577, 579 (*Bailey*) [quoting section 954's predecessor version, section 241 of the Criminal Practice Act, as follows: "The indictment shall charge but one offense, but it may set forth that offense in different forms under different counts"].) The rule was about the number of different offenses that could be included in a single indictment; it was not about the number of counts for which a defendant could stand convicted. The number of counts in the indictment was inconsequential, and it was up to the prosecution whether it wished to allege the permissible sole offense in a single count or in different ways in multiple counts. (*People v. Frank* (1865) 28 Cal. 507, 513 ["Hence an indictment which charges all the acts

enumerated in the statute, with reference to the same instrument, charges but one offense, and the pleader may therefore at his option charge them all in the same count, or each in separate counts, and in either form the indictment will be good"].) Indeed, where multiple counts in an indictment all alleged versions of the same offense—as opposed to different offenses—the indictment was proper, and the prosecution was permitted to proceed to trial on all counts. (See *Bailey*, at p. 580 ["Whether the indictment intended to state but one act of embezzlement, under different counts, varying the amount and time, or whether it intended to set forth two separate and distinct acts of embezzlement, does not appear. If the former be the case, then a demurrer would not lie. If the latter, then the prosecuting attorney should be required at the trial to elect upon which charge he will proceed, and he will then be confined to that"].) The earliest versions of section 954 preserved this pleading-and-proof system. (See § 954, in 1872, 1874, and 1880.)

In 1905, section 954 was amended to permit for the first time joinder of different offenses in a single indictment or information, and provided that "[t]he prosecution [was] not required to elect between different offenses or counts set forth in the indictment or information, but the defendant [could] be convicted of but one of the offenses charged." (§ 954 (1905).) Thus, while section 954 now provided more liberal joinder of different offenses in a single information, it still maintained the rule that a defendant could only be convicted of one of the offenses in that information. Again, a plain reading of this provision reveals that the limitation set forth was on the number of different *offenses* for which a defendant could be convicted not on the number of *counts* or *charges* for which conviction could be had. In other words, in 1905—just as now—section 954 would permit multiple convictions for "different statements of

the same offense" because they still amounted to "convict[ion] of but one of the offenses charged." (§ 954 (1905).)[7]

In 1915, section 954 was amended to nearly the form it takes today, materially altering it from permitting that a defendant be "convicted of *but one* offense charged" (§ 954 (1905), italics added) to permitting that a defendant be convicted of "*any number of* offenses charged" (§ 954 (1915), italics added.) The historical purpose of section 954—to govern the rules of joinder—shows that it still did not describe the number of *convictions* a defendant might receive, but rather the number of *offenses* of which a defendant could be convicted in a single charging document: Before 1915, it was "but one offense charged," and since then, it is "any number of offenses charged." Today, just as in the days predating the Penal Code, nothing in section 954 prevents a defendant from being convicted of multiple counts reflecting "different statements of the same offense."

For these reasons, read in light of its purpose and historical evolution, section 954 does not place a limitation on the number of charges or counts that can result in conviction. This explains why it is of no consequence that

---

[7] Notably, this version was short-lived, lasting only a decade. It appears prosecutors did not take advantage of the 1905 amendments with great frequency; as one court observed years after the amendment, "In concluding this opinion we deem the occasion opportune to call attention to the provisions of section 954 of the Penal Code, as amended in 1905 (St.1905, p. 772). This section is clearly intended to permit the charging of different offenses in different counts of the same indictment or information, where different offenses all relate to the same act, transaction, or event. The section as it is now written has been the law of this state since 1905, and yet no case has yet been before this court where the prosecuting officer has availed himself of its provisions." (*People v. Miles* (1912) 19 Cal.App. 223, 228.) It is possible that prosecutors did not avail themselves of this rule because there was little incentive to combine different offenses in a single information if the defendant still would receive only conviction for one of the different offenses, even if based on different acts or omissions.

section 954 provides that "[t]he prosecution is not required to elect between the *different offenses or counts*" and then goes on to say that "the defendant may be convicted of any number of the *offenses* charged" without mentioning "counts" again. The number of charges or counts resulting in conviction does not matter; all that has ever mattered—although no longer today in light of the 1915 amendment—is the number of "*offenses charged*" for which a defendant may be convicted arising from a single accusatory pleading. Moreover, had the Legislature intended to create a new limitation on what counts in the information could lead to conviction and what counts could not, it would have said so. Yet to view section 954 this way, one has to presume that the Legislature sought to convey such a significant change by just omitting the words "or counts" at the end of the phrase "a defendant may be convicted of any number of offenses charged." It is unlikely the Legislature would create such a stark limitation simply by inconspicuously omitting the word "counts" from the phrase "offenses or counts."

Finally, it bears noting that the historical evolution of section 954 gives context to the word "but" in the sentence, "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[.]" (Italics added.) No matter how one reads this provision, the use of the word "but" is clumsy; indeed, this court has avoided it by quoting around it and inserting the word "and" in its place. (See, e.g., *Ortega*, *supra*, 19 Cal.4th at p. 692 ["Section 954 states that, '[a]n accusatory pleading may charge . . . different statements of the same offense' and 'the defendant may be convicted of any number of the offenses charged'"].) The "but" worked well when it first appeared in the 1905 version of section 954 because it served the contrastive function of explaining that a defendant could be charged with different offenses and

multiple counts "but" still could be convicted of "but one offense." (§ 954.) Yet when the Legislature implemented the dramatic substantive shift that expanded section 954 from permitting convictions on "but one offense" to permitting convictions on "any number of offenses," it did so by simply exchanging those few words alone, while leaving the rest of the sentence materially intact.[8] The use of "but" in today's version of section 954 is somewhat out of place given that the rest of the sentence now contains expansive language ("any number of offenses") instead of limiting language ("but one offense"). And reading the "but" as drawing a contrast between what can be charged and what can result in conviction does not comport with the Legislature's clear goal of relaxing joinder prohibitions to permit multiple charges and convictions deriving from a single accusatory pleading. (See *People v. Knowles* (1950) 35 Cal.2d 175 ["[a]n insistence upon judicial regard for the words of a statute does not imply that they are like words in a dictionary, to be read with no ranging of the mind" but instead the goal is to ascertain "what purpose did the Legislature seek to express as it strung those words into a statute" and to do so a court may look to "the history of the statute"]; see also *Baker v. Workers' Comp. Appeals Bd.* (2011) 52 Cal.4th 434, 442 [the court "begin[s] with the text of the statute as the best indicator of legislative intent, but [it] may reject a literal construction that is contrary to the legislative intent apparent in the statute . . ."], citations and quotations omitted; *In re Haines* (1925) 195 Cal. 605, 613 ["[i]n the interpretation of statutes, courts are not bound by grammatical rules, and may ascertain the meaning of words by the context"].) Notably, although keeping the word "but" was perhaps not the best grammatical construction, the Legislature may have chosen to leave it

---

[8] The only other alteration was the grammatical change of the word "can" to "may."

in place because it is nonetheless consistent with section 954's present meaning if one reads "but" with its denotation of "but rather." (See, e.g., Bible (King James Version) Matthew 6:13 ["And lead us not into temptation, but deliver us from evil"].) Read this way, section 954 makes perfect sense: The prosecution need not elect between the offenses or counts on which to proceed, but rather may seek conviction for all offenses, regardless of whether the offenses are each pled in one count or multiple.

Thus, even if this court concludes section 261 defines one offense, not different offenses, appellant's two convictions are still valid as they represent different statements of the same offense on which conviction for both is permitted.

III. THE RULE OF LENITY IS INAPPLICABLE

Appellant's fallback position is that section 261 is susceptible of two reasonable interpretations and thus, the rule of lenity requires this court to adopt the interpretation that is more favorable to appellant. But, the rule of lenity does not apply every time there are two or more reasonable interpretations of a penal statute. (*People v. Manzo* (2012) 53 Cal.4th 880, 889 (*Manzo*), citing *People v. Cole* (2006) 38 Cal.4th 964, 986.) Resorting to the rule of lenity is only required where, "the court can do no more than guess what the legislative body intended; there must be an *egregious* ambiguity and uncertainty to justify invoking the rule.'" (*Manzo, supra*, 53 Cal.4th at 889, citing *People v. Avery* (2002) 27 Cal.4th 49, 58, italics added in *Manzo*.) "In other words, 'the rule of lenity is a tie-breaking principle, of relevance when two reasonable interpretations of the same provision stand in relative equipoise....'" (*Manzo*, at p. 889, quoting *Lexin v. Superior Court,* (2010), 47 Cal.4th 1050, 1102, fn. 30.) "[A]mbiguities are not interpreted in the defendant's favor if such an interpretation would provide an absurd result, or a result inconsistent with apparent legislative intent. [Citation.]" (*People v. Moore* (2004) 118 Cal.App.4th 74, 78, citing

People v. Cruz, supra, 13 Cal.4th at p. 782; see also *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 305.) "[A]lthough true ambiguities are resolved in a defendant's favor, an appellate court should not strain to interpret a penal statute in defendant's favor if it can fairly discern a contrary legislative intent." (*People v. Avery* (2002) 27 Cal.4th 49, 58.)

As explained above, the interpretation of section 261 proposed by appellant runs counter to the plain language of section 954, and would lead to absurd, illogical, results. In these circumstances, the two competing interpretations cannot be said to "stand in relative equipoise." Contrary to appellant's suggestion, the rule of lenity "is not an inexorable command to override common sense and evident statutory purpose." (*Manzo*, at pp. 889-890, citations omitted.) Because common sense and the apparent legislative intent with respect to section 261 are clear, the rule of lenity is inapplicable.

What is more, when contrasting the interpretation of section 261 in *Craig* with the interpretation urged by respondent, the result, as far as appellant is concerned, is exactly the same. Under *Craig*, his convictions would be consolidated, but the record would still reflect his commission of both rape offenses. Under respondent's construction, his convictions would remain separate, but the record would likewise reflect his criminal conduct. The rule of lenity is inapplicable because there is no leniency at issue. Appellant's argument that leniency is implicated hinges either on the Court of Appeal's improper striking of the conviction in count 2, which was not the remedy created in *Craig*.

IV. THE DECISION SHOULD APPLY TO APPELLANT

Finally, appellant argues that if this court agrees with respondent regarding the legislative intent of section 261, the decision should not be applied to him retroactively. His argument is premised on the idea that

such a holding would constitute a "judicial enlargement" of criminal liability. (AABM 43-45.) But, a finding that section 261 defines different offenses, or that section 954 permits multiple convictions for different statements of the same offense would not constitute a change in the law or a "judicial enlargement" of criminal liability.

"To determine whether a decision should be given retroactive effect, the California courts first undertake a threshold inquiry: does the decision establish a new rule of law? If it does, the new rule may or may not be retroactive...; but if it does not, 'no question of retroactivity arises' because there is no material change in the law." (*People v. Guerra* (1984) 37 Cal.3d 385, 399 (*Guerra*), quoting *Donaldson v. Superior Court* (1983) 35 Cal.3d 24, 36 [plur. opn.].) When the decision does not announce a new rule of law, the opinion "simply becomes part of the body of case law of this state, and under ordinary principles of stare decisis applies in all cases not yet final. 'As a rule, judicial decisions apply 'retroactively.' [Citation.] Indeed, a legal system based on precedent has a built-in presumption of retroactivity.'" (*Guerra, supra*, 37 Cal.3d at p. 399, quoting *Solem v. Stumes* (1984) 465 U.S. 638, 642 [104 S.Ct. 1338, 79 L.Ed.2d 579].)

"Courts violate constitutional due process guarantees (U.S. Const., 5th and 14th Amends.; Cal. Const., art. I, § 7) when they impose *unexpected* criminal penalties by construing existing laws in a manner that the accused could not have foreseen at the time of the alleged criminal conduct." (*People v. Blakeley* (2000) 23 Cal.4th 82, 91-92, emphasis added, citing *United States v. Lanier* (1997) 520 U.S. 259, 266–267 [117 S.Ct. 1219, 137 L.Ed.2d 432].) Nothing about appellant's criminal liability was unexpected. Appellant was on notice that he could be charged with rape of an intoxicated victim and rape of an unconscious victim because section 261 clearly defined both offenses with distinct criminal elements. This court declined to apply the rule announced in *Whitmer* to the defendant in

that case because of an "uninterrupted series of Court of Appeal cases... that have consistently held that multiple acts of grand theft pursuant to a single scheme cannot support more than one count of grand theft." (*People v. Whitmer* (2014) 59 Cal.4th 733, 742.) As explained in the preceding sections, no such history exists for section 261. *Craig* was followed almost immediately by *Scott*, and those are the only two cases which are arguably on point. Both cases are more than seven decades old, and lay essentially dormant until *People v. Smith* (2010) 191 Cal.App.4th 199, 205. Further, this court appropriately limited *Craig*'s holding to one concerning the propriety of multiple punishments, not multiple convictions. (*Ex parte Hess, supra,* 45 Cal.2d at p. 174.)

In addition, consistent with *Pearson* and *Ortega*, appellant would have been on notice that he could suffer multiple convictions for different statements of the same offense, and thus could not reasonably have concluded that his conduct in this case would only result in one conviction where he raped a victim who was *both* intoxicated and unconscious.

Further, to the extent appellant was aware of or may have relied on *Craig*'s antiquated interpretation of section 261, he would have assumed he was entitled to *consolidation* of his convictions, not *vacation* of count 2 as was the remedy afforded him by the Court of Appeal. Respondent has consistently argued that consolidation is unnecessary because a traditional section 654 bar to multiple punishment accomplishes the same thing—it preserves the factual finding made by the jury but avoids multiple punishment. Thus, in effect, applying the opinion in this case to appellant does what the *Craig* court did with respect to the remedy in that case; it simply calls it something different.

For these reasons, this court's holding should apply retroactively to appellant.

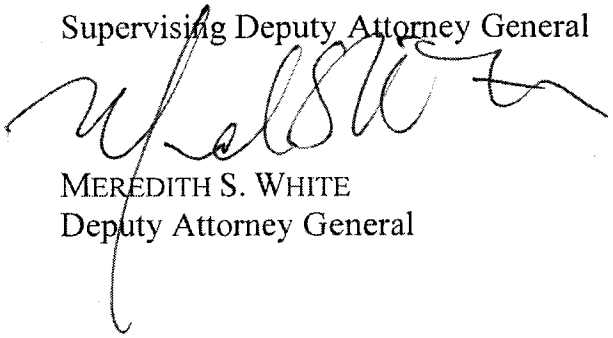
CONCLUSION

For all of the reasons above, respondent respectfully requests this court reverse the Court of Appeal's opinion in this case and reinstate appellant's valid conviction for rape of an unconscious victim.

Dated: August 4, 2016

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
STEVE OETTING
Supervising Deputy Attorney General



MEREDITH S. WHITE
Deputy Attorney General

MSW:cce
SD2015802578
71222012.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S REPLY BRIEF** uses a 13 point Times New Roman font and contains **11,541** words.

Dated: August 4, 2016

KAMALA D. HARRIS
Attorney General of California

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

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

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

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

On **August 4, 2016**, I served the attached: **RESPONDENT'S REPLY BRIEF**

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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

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

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

and, furthermore I declare, in compliance with California Rules of Court, rules 2.251(i)(1)(A)-(D) and 8.71(f)(1)(A)-(D), I electronically served a copy of the above document on **August 4, 2016**, by 5:00 p.m., on the close of business day to the following.

eservice-criminal@adi-sandiego.com
Appellate Defenders, Inc.'s

da.appellate@sdcda.org
San Diego District Attorney's Office

diguiseppe228457@gmail.com
Raymond M. DiGuiseppe
Attorney for Appellant Billy Charles White

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **August 4, 2016**, at San Diego, California.

C. Estrada
Declarant

C. Estrada
Signature

SD2015802578
81420646.doc