IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent **v.** **ROMAN FLUGENCIO GONZALEZ,** Defendant and Appellant.	**No. S207830** Court of Appeal No. D059713 San Diego County Superior Court No. SCD 228173

ON REVIEW FROM
THE FOURTH APPELLATE DISTRICT, DIVISION ONE
AND THE SAN DIEGO COUNTY SUPERIOR COURT
THE HONORABLE ROGER W. KRAUEL, JUDGE

APPELLANT'S ANSWER BRIEF ON THE MERITS

Raymond M. DiGuiseppe
State Bar Number 228457

Post Office Box 10790
Southport, North Carolina 28461
Phone: 910-713-8804
Email: diguiseppe228457@gmail.com

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent **v.** **ROMAN FLUGENCIO GONZALEZ,** Defendant and Appellant.	**No. S207830** Court of Appeal No. D059713 San Diego County Superior Court No. SCD 228173

ISSUE PRESENTED

Was appellant properly convicted of both oral copulation of an unconscious person and oral copulation of an intoxicated person?

INTRODUCTION

The beauty of this case is that, at bottom, the answer to the central question at hand is quite simple. Much has been said and much more will be said about the various intricacies and nuances of the related legal issues. But when all is said and done, one simple undeniable fact inevitably compels one simple conclusion as the only fair, just, and reasonable result: appellant committed just one criminal offense because he committed a single act of oral copulation with a single objective against a single victim which was unlawful for the single reason that the victim was unconscious at the time and therefore unable to resist the act. The sole basis for carving out two crimes from this singular criminal act is that subdivision (f) of Penal Code section 288a[1] penalizes oral copulation of an *unconscious* person and subdivision (i) penalizes oral copulation of an *intoxicated*

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

person, and by happenstance, the victim here was unconscious *as a result of* being intoxicated and thus technically *both* unconscious and intoxicated.

Despite all of its efforts to justify *two* convictions for what is clearly just one criminal offense, at the end of the day even respondent cannot help but admit appellant was "arguably convicted of the '*same* offense' twice." (RBOM 19, italics added.) Indeed, there is no other way to label it. So respondent's thesis is essentially that the dual convictions are permissible *even though* they represent just one criminal offense because the express language of section 954 shows that the Legislature intended to permit multiple convictions on any and all charges the prosecution lists in the accusatory pleadings save for convictions on greater and lesser offenses. At the heart of respondent's thesis is an all-out assault upon this Court's opinion in *People v. Craig* (1941) 17 Cal.2d 453 (*Craig*), on which the Court of Appeal relied in striking down the dual convictions in this case. Respondent's condemns the Court's opinion as "nothing more than a house built on sand" whose "faulty," "unstable," "illogical," and "outdated" reasoning should be cast into the wasteland because it stands in the way of the expansive view of section 954 necessary to support a finding that the two counts of the "*same* offense" here can properly lead to two convictions.

Not surprisingly, though, the language of section 954 and the jurisprudence in this area over more than a century, including this Court's opinion in *Craig*, are in full accord with the result compelled under the most basic notions of fundamental fairness that drive every criminal case: while the prosecution could properly *charge* appellant with two counts of unlawful oral copulation based on subdivisions (f) and (i) of section 288a so as to avoid having to make a pretrial election between the two charges, he could only properly be *convicted* one criminal offense. Thus, the Court of Appeal was correct in its holding and the judgment should be affirmed.

///

STATEMENT OF THE CASE AND FACTS

During what apparently began as a consensual sexual encounter between appellant and Carolyn H. on the streets of downtown San Diego where they were both living as homeless people, Carolyn passed out at some point from the intoxicating effects of the pint of Vodka she had "chugged" earlier, and appellant continued the sexual contact by manipulating her head and mouth so as to cause her to orally copulate him after she had fallen unconscious. (2 RT 79-83, 90-91, 105, 107, 115, 133-134, 147-150, 154, 170-173, 188-189.) Based on this conduct, appellant was charged and convicted of oral copulation of an unconscious person (§ 288a, subd. (f); Count One) and oral copulation of an intoxicated person (§ 288a, subd. (i); Count Two). (CT 120-126.) The trial imposed a three year term on Count One and stayed the sentence on Count Two under section 654. (CT 89-90, 130.) On appeal, appellant argued that he could not properly stand convicted of both offenses, and the Court of Appeal agreed, consolidating the two convictions into one. (Slip Op. at p. 14.)

ARGUMENT

I

THE COURT OF APPEAL WAS UNDOUBTEDLY CORRECT IN HOLDING THAT APPELLANT CANNOT STAND CONVICTED OF TWO CRIMES FOR WHAT AMOUNTED TO JUST ONE OFFENSE

A. An Overview of the Law

"The issue of whether multiple convictions are proper is . . . reviewed de novo, as it turns on the interpretation of section 954." (*People v. Villegas* (2012) 205 Cal.App.4th 642, 646.) Under the earliest versions of section 954, a single prosecution could be based only upon "the same offense" or offenses that "all relate[d] to the same act, transaction, or event"

– "charges of offenses occurring at different and distinct times and places" could not be joined into a single prosecution. (Appendix A [Amendments to the Penal Code for the 1873-1874, 1880, and 1905 Legislative Sessions].) Effectively, the defendant was subject to only one conviction per prosecution based upon a single act or course of conduct, regardless of whether the same defendant may have committed other acts or conduct giving rise to additional offenses of a similar or related nature against the same or different victims. Then the statute was amended to permit, as it still does today, the prosecution to charge in a single proceeding "two or more different offenses connected together in their commission, or different statements of the same offense, or two or more different offenses of the same class of crimes or offenses, under separate counts" and for the defendant to be convicted "any number of the offenses charged." (Appendix B [Statutes of California, 1915 and 1927 Legislative Sessions].)[2]

---

[2] The current version, which is substantially similar to the other versions of the statute since the 1927 amendment, provides:

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

The obvious purpose of this change in the law was to promote efficiency and conserve judicial resources by avoiding the need for multiple prosecutions of the same defendant on charges that could be efficiently tried together in a single action. (See e.g., *People v. Elliott* (2012) 53 Cal.4th 535, 550-553 [approving prosecution of charges involving separate robbery-murder incidents under section 954 for these reasons].) "The purpose of section 954 is to govern 'the form of the information' (*People v. Brooks* (1985) 166 Cal.App.3d 24, 29) and to permit joinder of different offenses so as to prevent 'repetition of evidence and save[] time and expense to the state as well as to the defendant'" (*People v. Eid* (2013) 216 Cal.App.4th 740, 752, quoting *People v. Scott* (1944) 24 Cal.2d 774, 779; see also *People v. Valli* (2010) 187 Cal.App.4th 786, 795, quoting *Kellett v. Superior Court* (1966) 63 Cal.2d 822, 826 ["[B]y expanding the scope of permissible joinder under section 954, 'the Legislature has demonstrated its purpose to require joinder of related offenses in a single prosecution.'"]). It is clear that "joint trial 'ordinarily avoids the increased expenditure of funds and judicial resources which may result if the charges were to be tried in two or more separate trials.'" (*People v. Soper* (2009) 45 Cal.4th 759, 771-772, quoting *Frank v. Superior Court* (1989) 48 Cal.3d 632, 639.)

So joinder of such offenses is essentially required absent sufficient cause to try them in successive actions: "If needless harassment and the waste of public funds are to be avoided, some acts that are divisible for the purpose of punishment must be regarded as being too interrelated to permit their being prosecuted successively." (*People v. Valli*, *supra*, 187 Cal.App.4th at p. 795.) Thus, "[w]hen . . . the prosecution is or should be aware of more than one offense in which the same act or course of conduct plays a significant part, all such offenses must be prosecuted in a single proceeding unless joinder is prohibited or severance permitted for good cause. Failure to unite all such offenses will result in a bar to subsequent

prosecution of any offense omitted if the initial proceedings culminate in either acquittal or conviction and sentence." (*Id.* at pp. 795-796; see *People v. Britt* (2004) 32 Cal.4th 944, 954 [a sex offender must be prosecuted in a single action for violating section 290 by failing to timely register with authorities in a new county of residence and failing to notify authorities in the former county of residence of the move].) And '"[w]hen a crime can be committed in more than one way, it is standard practice to allege in the conjunctive that it was committed every way. Such allegations do not require the prosecutor to prove that the defendant committed the crime in more than one way.'" (*People v. Moussabeck* (2007) 57 Cal App.4th 975, 981, quoting *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1532-1533.)

An obvious logical corollary of the rule permitting the state to *charge* the defendant with multiple offenses based upon the same or related act or course of conduct, without the need to make an election among any of them, is that the defendant may be *convicted* of such multiple offenses. It would do no good to permit joinder of such offenses but then only permit the defendant to be convicted of one crime or crimes arising out of only one of the acts, transactions, or events at issue, as it had been in the past. So the current version of section 954 provides that "the defendant may be convicted of *any number of the offenses charged.*" (§ 954, italics added.)

But none of this means that a defendant may properly be convicted of each and every offense, or each and every alternative statement of an offense, that the prosecution lists in the accusatory pleading. Instead, the defendant may only properly be convicted of multiple *distinct* offenses – whether based upon a single act or course of conduct, or separate acts connected in their commission or constituting offenses of the same class.

This is clear enough from the face of the statute itself. The statute defines three categories of *charges* that may be joined into one action: "*different offenses* connected together in their commission," "*different*

statements of the same offense," and "*different offenses* of the same class of crimes or offenses, under separate counts." (§ 954, italics added.) The language concerning the charges of which the defendant may be *convicted* appears in a separate sentence, in the clause immediately following the statement concerning the prosecution's right to proceed without an election: "The prosecution is not required to elect between the *different* offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of *the offenses* charged." (§ 954, italics added.) One cannot divorce the second half of the sentence from the first and read it as a free standing statement regarding the permissibility of multiple convictions; rather, the most natural and logical reading of the full statement is that the reference to "the offenses" in the second clause of the sentence relates back to and is thus modified by the reference to "the different offenses or counts" in the first clause. (*Kurtin v. Elieff* (2013) 215 Cal.App.4th 455, 471 ["courts prefer a more natural reading of text to a less natural one"]; *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 743, internal quotes omitted, italics added ["qualifying words, phrases and clauses are to be applied to the words or phrases *immediately preceding* and are not to be construed as extending to or including others more remote"].)

Notably, the statute uses the term "different offenses" only in connection with two of the three categories of charges that may be joined into the proceeding: "*different offenses* connected together in their commission" and "*different offenses* of the same class of crimes or offenses, under separate counts." The third category of charges -- "*different statements* of the same offense" -- is wholly different than the other two since it concerns alternative means of pleading *the same offense* as opposed to separate offense, and is *not* referenced in the language concerning the charges of which the defendant may properly be *convicted.* Thus, the most reasonable construction of section 954 based upon the language of the

statute itself is that it authorizes conviction of any number of the charges or counts that set forth *different offenses*, but does *not* authorize multiple convictions based merely upon *different statements* of *the same* offense.

Courts have indeed recognized that, while section 954 "permits the *charging* of the same offense on alternative legal theories, so that a prosecutor in doubt need not decide at the outset what particular crime can be proved by evidence not yet presented" (*People v. Ryan* (2006) 138 Cal.App.4th 360, 368, italics added), the statute does not permit multiple *convictions* based simply upon alternate theories of the same offense: "'[T]he defendant may be convicted of any number of *the offenses* charged . . .'" (*People v. Coyle* (2009) 178 Cal.App.4th 209, 217, quoting section 954, emphasis original), which means "[m]ultiple convictions can be based on a single criminal act, *if the charges allege separate offenses*" (*People v. Smith* (2012) 209 Cal.App.4th 910, 915, emphasis added; accord *Coyle*, at p. 217, and *People v. Muhammad* (2007) 157 Cal.App.4th 484, 490).

The same principle is evident in the case law regarding the relationship between section 954 and section 654 – the "counterpart" that "prohibits multiple punishment for the same 'act or omission.'" (*People v. Sloan* (2007) 42 Cal.4th 110, 116.) "*When* section 954 *permits* multiple convictions, but section 654 prohibits multiple punishment," the solution is to "stay execution of sentence on the convictions for which multiple punishment is prohibited." (*Ibid.*, italics added.) But determining whether the remedy under section 654 sufficiently protects the defendant ultimately goes back to whether multiple convictions were proper in the first place, since section 654 does not come into play unless and until the defendant has suffered multiple convictions based on the same act or omission. So, once again, the focus is whether the offenses constitute distinct crimes of which the defendant may separately be convicted: "While jurisprudential considerations of double conviction and double punishment are similar, the

former is concerned more with *identity of offenses* as distinguished from identity of transactions from which they arise." (*People v. Harris* (1977) 71 Cal.App.3d 959, 969, italics added; accord *People v. Rouser* (1997) 59 Cal.App.4th 1065, 1073.) Hence the rule that "a person may be convicted of, although not punished for, *more than one crime* arising out of the same act or course of conduct." (*People v. Sloan*, *supra*, 42 Cal.4th at p. 114, emphasis added; accord *People v. Reed* (2006) 38 Cal.4th 1224, 1226.)

The uniformly recognized rule barring dual convictions of both a greater and lesser offense is grounded in the same fundamental concerns: preventing *two* convictions for what amounts to just *one* offense. (See *People v. Ortega* (1998) 19 Cal.4th 686, 692, quoting *People v. Pearson* (1986) 42 Cal.3d 351, 355, italics original ["'this court has long held that multiple convictions may *not* be based on necessarily included offenses"'].) "[T]he determination crime B is a lesser included offense of crime A amounts to an interpretation of the *verdict or judgment of conviction*: a conviction of A is deemed to include a conviction of B, so that double conviction is superfluous and the former can be reduced to the latter." (*Ortega*, at pp. 701-702, conc. opn. of Werdegar, J., italics original.) This rule is "logical": "If a defendant cannot commit the greater offense without committing the lesser, conviction of the greater is *also* conviction of the lesser. To permit conviction of both the greater and the lesser offense 'would be to convict twice of the lesser.' *There is no reason to permit two convictions for the lesser offense*." (*Ortega*, at p. 705, dis. opn. of Chin, J., quoting *People v. Fields* (1996) 13 Cal.4th 289, 306, second italics added; accord *People v. Medina* (2007) 41 Cal.4th 685, 701.)

The operation of this rule highlights another aspect of section 954 further showing that the Legislature envisioned multiple convictions based on the same act or course of conduct only for *separate and distinct* offenses. The last sentence provides, as it has since being added in 1927:

"An acquittal of one or more counts shall not be deemed an acquittal of any other count." (§ 954.) Read in isolation, this would mean an acquittal of *any* of the charged offenses would not constitute an acquittal of *any* of the other charged offenses, *even* with respect to charges that constitute lesser included offenses of the acquitted charge. This obviously does not jibe with the rule barring dual convictions of greater and lesser offenses. It has always been understood that an acquittal of a greater offense necessarily constitutes an acquittal of any lesser included offense. (*People v. Ng Sam Chung* (1892) 94 Cal. 304, 306 ["a conviction or acquittal of a higher offense is a conviction or acquittal of all lesser offenses necessarily included therein"]; accord *People v. Day* (1926) 199 Cal. 78, 83; *People v. Poon* (1981) 125 Cal.App.3d 55, 83.) The apparent conflict is easily resolved by reading section 954's rule that "[a]n acquittal of one or more counts shall not be deemed an acquittal of any other count" as applying only to "counts" that charge separate and distinct offenses.

That is how courts have interpreted this aspect of section 954: "This language clearly means that each count in an indictment or information, *which charges a separate and distinct offense* must stand upon its own merit, and that a verdict of either conviction or acquittal upon one such charge has no effect or bearing upon other *separate* counts which are contained therein." (*People v. Moon* (1935) 7 Cal.App.2d 96, 99, italics added; accord *People v. Amick* (1942) 20 Cal.2d 247, 252; see also *People v. Walker* (1983) 146 Cal.App.3d 34, 38, italics added [Walker's acquittal of one charge did not require reversal of the other because "his charged offenses consisted of *separate and distinct acts*."].) The essential underlying principles of double jeopardy themselves speak in terms of the distinctness of multiple offenses: "'[t]he Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or

spatial units.'" (*People v. Djekich* (1991) 229 Cal.App.3d 1213, 1223-1224, quoting *Brown v. Ohio* (1977) 432 U.S. 161, 169.)

This overview of the law shows there are clear limits on the reach and scope of the general rule permitting multiple convictions which restrict such convictions to charges involving *separate and distinct* offenses – consistent with the most reasonable interpretation of section 954 as authorizing multiple convictions for "different *offenses*," but not merely "different *statements* of the *same* offense" (§ 954, italics added), and consistent with the related rule barring separate conviction of an offense necessarily included within another convicted offense. An in-depth analysis of these principles as they apply to the situation in this case demonstrates decidedly that the Court of Appeal reached the correct result in finding appellant could not properly be convicted of *both* oral copulation of an unconscious person *and* oral copulation of an intoxicated person, because, however one slices it, there was but a *single* convictable offense.

B. Appellant Unquestionably Committed But One Criminal Offense for Which He is Subject to One Criminal Conviction

In light of the foregoing analysis, it is not surprising that, well before and well after the addition of the statement to section 954 concerning multiple convictions, courts have consistently recognized a defendant may not properly be convicted of multiple offenses based merely upon alternative theories or "different statements" of the *same* offense. Echoing century old authority of this Court: '"Although, when a man has done a criminal act, the prosecutor may carve as large an offense out of the transaction as he can, yet he is not at liberty to cut but once."' (*People v. Garcia* (2003) 107 Cal.App.4th 1159, 1161, quoting *People v. Stephens* (1889) 79 Cal. 428, 432.) And "'[w]here, in defining an offense, a statute enumerates a series of acts, either of which separately, or all together, may

constitute the offense, all such acts may be charged in a single count, for the reason that notwithstanding each act may by itself constitute the offense, all of them together do no more, and likewise constitute but one and the same offense.'" (*People v. Correa* (2012) 54 Cal.4th 331, 339 quoting *People v. Frank*, *supra*, 28 Cal. at p. 513; accord *People v. Ryan*, *supra*, 138 Cal.App.4th at pp. 366-367; see also *People v. Tenney* (1958) 162 Cal.App.2d 458, 461 ["When a single act relates to but one victim, and violates but one statute, it cannot be transformed into multiple offenses by separately charging violations of different parts of the statute."].)

Instead, multiple convictions are proper only "where the actus reus prohibited by the statute—the gravamen of the offense—has been committed more than once." (*Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, 349 [reversing all but one conviction of the six convictions of driving under the influence based on the defendant's having injured six people, because he committed the gravamen of the offense only once no matter how many persons were injured], superseded by statute on another ground as stated in *People v. Arndt* (1999) 76 Cal.App.4th 387, 393-394.) *Actus reus* means "[t]he wrongful deed that comprises the physical components of a crime and that generally must be coupled with *mens rea* to establish criminal liability." (Black's Law Dict. (7th ed. 1999) p. 37, col. 1.) Similarly, "gravamen" means "[t]he substantial point or essence of a claim, grievance, or complaint." (*Id.* at p. 708, col. 1; see also *Wilkoff*, at p. 351 [considering "whether the 'central element' of the offense -- the act prohibited by the statute -- had been committed more than once . . ."].)

The *actus reus* or *gravamen* of the charges leading to the two convictions at issue here -- oral copulation of an unconscious person (§ 288a, subd. (f)) and oral copulation of an intoxicated person (§ 288a, subd. (i)) – is undoubtedly the same. The very essence of both charges is engaging in the act with someone incapable of legally consenting to the act

on account of being in a state of mind that renders it difficult or impossible to resist. (*People v. Dement* (2012) 53 Cal.4th 1, 43, quoting *People v. Catelli* (1991) 227 Cal.App.3d 1434, 1450 ["the gravamen of the offense of oral copulation 'is the revulsion and harm suffered by one who is forced to unwillingly touch his or her mouth to the genitals of another"'].) And "the wrongful deed" is certainly no different from one charge to the next – the "physical components" of both involve simply performing this act at a time when the victim is in such a state of mind. The particular *causes* of this state of mind are of no consequence: whether the victim is "unconscious," "intoxicated," or both makes no difference; for the defendant clearly would have committed the gravamen of the offense only once in any case.

1. The Case Law Makes Clear that Multiple Convictions are Permissible Only for Multiple *Distinct* Offenses

The case law is replete with examples of analogous situations illustrating that the nature of such conduct simply cannot support two convictions based on the artificial concept that a single act violating subdivisions (f) and (i) of section 288a constitutes more than one offense. In fact, courts have rejected attempts to carve multiple crimes out of what amounts to just one essential offense even when the defendant's criminal enterprise has involved more than one act, more than one victim, or both.

So where a defendant was charged and convicted of three counts of evading a police officer for having fled from three officers during the police pursuit, the reviewing court reversed two of the three convictions to "stifle 'creative accounting' by a prosecutor who attempt[ed] to create multiple crimes out of just one." (*People v. Garcia*, *supra*, 107 Cal.App.4th at pp. 1161-1162, 1166.) The court recognized "the gravity of this offense, which puts pedestrians, other drivers, pursuing police officers, and property at severe risk." (*Id.* at p. 1164, fn. 2.) But it was compelled to conclude the

defendant was still guilty of just one offense: "The instant evading was equally deplorable whether appellant was pursued by one police officer, three police officers, or the entire police force." (*Id.* at p. 1163.)

A defendant involved in a felony hit and run vehicle accident may only properly be convicted of one offense – even if multiple people are injured as a result of the felonious conduct. (*People v. Newton* (2007) 155 Cal.App.4th 1000, 1002-1005 [reversing all but one of four such convictions based on the mere fact that four persons were injured].)

Brandishing a deadly weapon is but one offense, even if more than one person is present at the time of the brandishing. (*In re Peter F.* (2005) 132 Cal.App.4th 877, 878-881 [reversing two of four true findings on allegations that the minor had brandished a deadly weapon because, although he brandished the weapon in the presence of two persons on two separate occasions, he committed no more than two offenses].)

A defendant may be convicted of just one count of indecent exposure even if those to whom he exposed himself viewed him more than once during the same incident, because "[t]he gravamen of the offense is the exposure itself and not the number of observers or the number of observations." (*People v. Smith, supra*, 209 Cal.App.4th at pp. 915-917.)

Firing a bullet at a group of people with the intent to kill one of them, though no one in particular, constitutes just one convictable offense of premeditated attempted murder, although "[t]here is no doubt that defendant endangered the lives of every individual in the group into which he fired the single shot." (*People v. Perez* (2010) 50 Cal.4th 222, 224-225, 230-231, 234 [reversing all but one of seven such convictions based upon the defendant's having fired a single gunshot at a group of seven police officers whom he mistakenly believed to be rival gang members].)

A defendant may be convicted of just one count of forgery for any instrument on which a forged signature was made, even if the defendant

forged more than one signature. (See e.g., *People v. Kenefick* (2009) 170 Cal.App.4th 114, 116, 122, *People v. Martinez* (2008) 161 Cal.App.4th 754, 761-763, *People v. Morelos* (2008) 168 Cal.App.4th 758, 764, and *People v. Bowie* (1977) 72 Cal.App.3d 143, 146, 156-157.) The court in *People v. Ryan, supra,* 138 Cal.App.4th at 360, recognized the limitation on the scope of multiple convictions under section 954 in reversing two of four forgery convictions based on evidence that the defendant had forged two signatures on two instruments: "Under section 954, a defendant may be convicted of any number of the offenses charged. Since the commission of any one or more of the acts enumerated in section 470, in reference to the same instrument, constitutes but one offense of forgery (e.g., *People v. Frank* [(1865)] 28 Cal. [507,] 513), it follows that, under section 954, appellant could be *charged* with multiple counts of forgery with respect to the Staples and Gypsy Rose Antiques incidents, but could be *convicted* of only one such count with respect to each." (*Id.* at p. 371, italics original.)

Similarly, stealing more than one item from the same victim during a single incident constitutes just one theft crime. (*People v. Ortega, supra,* 19 Cal.4th at p. 699 ["When a defendant steals multiple items during the course of an indivisible transaction involving a single victim, he commits only one robbery or theft notwithstanding the number of items he steals."]; *People v. Marquez* (2000) 78 Cal.App.4th 1302, 1307-1310 [reversing one of two robbery convictions based on the defendant's forcing a waitress at gunpoint to give him cash from the cash register and the waitress's own tips, as "one seamless ill-conceived effort" involving a single larceny]; for similar cases, see *People v. Bailey* (1961) 55 Cal.2d 514, 519, *People v. Richardson* (1978) 83 Cal.App.3d 853, 858, 866 [disapproved on other grounds in *People v. Saddler* (1979) 24 Cal.3d 671, 682], *People v. Packard* (1982) 131 Cal.App.3d 622, 625-627, *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 363-364, *People v. Brooks, supra,* 166 Cal.App.3d at

p. 31, *People v. Gardner* (1979) 90 Cal.App.3d 42, 48, *People v. Tabb* (2009) 170 Cal.App.4th 1142, 1148, and *People v. Hall* (2010) 183 Cal.App.4th 380, 383.) The court in *People v. La Stelley* (1999) 72 Cal.App.4th 1396 took the prosecution to task for "attempt[ing] to squeeze two crimes" – theft and larceny – out of the single act of taking merchandise from a store, reversing the theft conviction because, although the defendant assaulted an employee in the process, "in reality there was but one offense" because he had the "single intent" of stealing the merchandise. (*Id.* at pp. 1401-1402.)

And the list of such cases goes on: Possession of multiple articles with defaced serial numbers is but one offense. (*People v. Harris*, *supra*, 71 Cal.App.3d at pp. 963, 970-971 [it is "nonsensical" and "unreasonable to fragment the simultaneous possession of the various articles described in Penal Code section 537e into separate acts of possession by category of the items enumerated"].) Possession of more than one weapon in a prison constitutes only one offense (*People v. Rowland* (1999) 75 Cal.App.4th 61, 63-67), as does possession of multiple controlled substances (*People v. Rouser*, *supra*, 59 Cal.App.4th at pp. 1071-1074 ["Carrying the Attorney General's argument to its logical extension, a prison inmate could be convicted under section 4573.6 of nine counts of unlawful possession for simultaneously having in his cell a smoking pipe, a hypodermic kit, marijuana cigarettes, methamphetamine, heroin, cocaine, a mirror, a razor blade, and LSD tablets."].) Possession of multiple images of child pornography on the same computer is also but one crime: "Like the 11 blank checks, the 9 different pieces of property with defaced or obliterated serial numbers, the 2 different kinds of controlled substances, or the 3 weapons of the same type, defendant violated a provision of the Penal Code by the solitary act of possessing the proscribed property. And like the courts in these varied types of possession cases, we are not at liberty to

fragment a single crime into more than one offense." (*People v. Hertzig* (2007) 156 Cal.App.4th 398, 399-403 [reversing all but one of numerous such counts based on the possession of 30 such images on one computer:]; accord *People v. Manfredi* (2008) 169 Cal.App.4th 622, 624-625, 629-632.)

So long as the defendant ultimately commits the gravamen of the offense but once with the same objective in mind, this limitation on multiple convictions even applies to a criminal enterprise comprised of multiple acts over a substantial period of time: "Absent express legislative direction to the contrary, where the commission of a crime involves continuous conduct which may range over a substantial length of time and [a] defendant conducts himself in such a fashion with but a single intent and objective, that defendant can be *convicted* of only a single offense." (*People v. Johnson* (2007) 150 Cal.App.4th 1467, 1474, internal quotations omitted; see *People v. Djekich*, *supra*, 229 Cal.App.3d at p. 1221 ["For example, a defendant can be only convicted once for failing to provide for a child pursuant to section 270 even though no support may have been provided for several continuous months."].)

This Court recently recognized the continuing vitality of this line of cases in *People v. Correa*, *supra*, 54 Cal.4th 331. In considering an issue concerning multiple punishment, the Court discussed the related issue of multiple convictions, harkening back to the general principles that "'cooperative acts constituting but one offense when committed by the same person at the same time, when combined, charge but one crime and but one punishment can be inflicted'" (*id.* at p. 340, quoting *People v. Roberts* (1953) 40 Cal.2d 483, 491), and "[w]here, in defining an offense, a statute enumerates a series of acts, either of which separately, or all together, may constitute the offense, all such acts may be charged in a single count, for the reason that notwithstanding each act may by itself constitute the offense, all of them together do no more, and likewise

constitute but one and the same offense'" (*id.* at p. 339, quoting *People v. Frank, supra*, 28 Cal. 507, 513). The Court cited a classic example:

> 'Thus, setting up a gaming table, it has been said, may be an entire offense; keeping a gaming table and inducing others to bet upon it, may also constitute a distinct offense; for either, unconnected with the other, an indictment will lie. Yet when both are perpetrated by the same person, at the same time, they constitute but one offense, for which one count is sufficient, and for which but one penalty can be inflicted.'

(*Id.* at p. 339, quoting *People v. Shotwell* (1865) 27 Cal. 394, 400-402.)

Then the Court discussed *People v. Nor Woods* (1951) 37 Cal.2d 584, where '"a used car dealer was convicted of two counts of grand theft for taking both a 1946 Ford and some cash in exchange for a 1949 Ford," and one of the convictions was reversed because "both the car and the money were taken at the same time as part of a single transaction whereby defendant defrauded [the victim] of the purchase price of the 1949 Ford."' (*People v. Correa, supra*, 45 Cal.4th at p. 339, quoting *Nor Woods*, at p. 586.) "There was, accordingly, only one theft, and the fact that the sentences were ordered to run concurrently does not cure the error." (*Correa*, at pp. 339-340, quoting *Nor* Woods, at pp. 586-587.)

This Court made clear that it viewed these authorities and their reasoning as directly pertinent and of continuing precedential value on the issue of multiple *convictions*, despite the references to "punishment" in the opinions: "While these cases all tangentially refer to punishment, they do so because each held that the defendants were wrongfully *convicted* of multiple offenses when only a single crime was committed. Naturally, because the convictions failed, any punishment based on them would also be set aside." (*People v. Correa, supra*, 45 Cal.4th at p. 340.) The sentence or "punishment" is "a necessary component of a judgment of conviction" anyway, so "punishment" must be the equivalent of a *criminal conviction*

and not simply the imposition of sentence." (*Ball v. United States* (1985) 470 U.S. 856, 861-862, italics added, internal quotations omitted.)

In fact, the cases in which courts have upheld multiple convictions based on the same act or course of conduct stand in stark contrast, as they all clearly involved more than one distinct criminal offense – based on distinct acts, distinct criminal objectives, or both. (See e.g., *Wilkoff v. Superior Court*, *supra*, 38 Cal.3d at p. 351 [robbing *two* persons during the one incident can properly lead to two convictions of robbery because "the central element of the crime of robbery as the force or fear applied to the individual victim in order to deprive him of his property"]; *People v. Harrison* (1989) 48 Cal.3d 321, 325-327 ["Since the defendant had made three separate penetrations of the victim's vagina, he had completed three separate violations of the statute, and three convictions were warranted."]; *People v. Cortez* (1981) 115 Cal.App.3d 395, 408-410 [three convictions of unlawful oral copulation while in state prison were "based on at least four separate acts of oral copulation committed against the victim by appellant and his co-defendants" and, specifically, Counts II and III "resulted from two separate acts comprising two distinct offenses"]; *People v. Catelli*, *supra*, 227 Cal.App.3d at pp. 1446-1447 [each of defendant's convictions of a sex crime was based upon a separate sex act]; *People v. Jaska* (2011) 194 Cal.App.4th 971, 984-985 [defendant was properly convicted of multiple thefts from the same victim based upon separate and distinct thefts perpetrated in different ways over a four year period]; *People v. Johnson*, *supra*, 150 Cal.App.4th at p. 1476 [multiple blows causing multiple injuries supported multiple convictions of corporal injuries to a cohabitant]; *People v. Sloan*, *supra*, 42 Cal.4th 110, 114 [same]; *People v. Sample* (2011) 200 Cal.App.4th 1253, 1257-1259 [possession of child pornography on two separate devices in two separate places supported two convictions]; *People v. Correa*, *supra*, 54 Cal.4th at pp. 334, 338 [defendant was properly

convicted of one count of unlawful firearm possession for each firearm in his possession when the statute criminalized possession of each].)

In the cases upholding dual convictions where the conduct was not clearly divisible as multiple distinct acts, the defendant harbored multiple criminal intents each of which constituted a separate crime when coupled with the *actus reus*. (See e.g., *People v. Ortega*, *supra*, 19 Cal.4th at p. 693 [defendants were properly convicted of both carjacking and grand theft for the taking of a van because the evidence showed they perpetrated this act with the requisite intent for each offense – "by means of force or fear" (carjacking) and to permanently deprive the owner of it (theft)]; *People v. Benavides* (2005) 35 Cal.4th 69, 98 [defendant was properly convicted of lewd acts upon a child, as well as rape and sodomy, where the evidence showed he possessed both the general intents for the rape and sodomy through his doing of those acts and the specific intent for a lewd act through other forms of touching]; *People v. Pearson*, *supra*, 42 Cal.3d at pp. 355-356 [upholding dual convictions of sodomy and lewd conduct for one act of sodomy for the same reason – having been convicted of both offenses, the defendant harbored the distinct requisite intents for each offense].)

2. There Is No Basis in Law, Reason, or Fact for Carving Up This Crime into Two Separate Offenses; Appellant Was Simply Convicted Twice of the *Same* Offense

This canvass of the case law shows that this Court's decision in *Craig*, *supra*, 17 Cal.2d 453, on which the Court of Appeal relied in finding the dual convictions improper in this case, is not some sort of rogue opinion leading lower courts down the wrong path with spurious and outmoded reasoning. (See RBOM 2, 4, 12, 15, 22, 28.) In holding that the defendant in *Craig* could not properly be convicted of *both* forcible rape and statutory rape based upon the forcible rape of a minor, this Court's decision was fully

in accord with the same longstanding fundamental principles regarding the propriety of multiple convictions that have dictated the results in these cases over the last 150 years: there was but *one* criminal act, but *one* gravamen of the offense, and but *one* criminal intent – the general intent required for the crime of rape – and thus there was clearly but *one* convictable offense of rape. (*Id.* at pp. 454-456.) This Court has indeed reaffirmed the same rationale in the same context long after its *Craig* decision in cases respondent conveniently ignores in painting *Craig* as an outlier – (*People v. Lohbauer* (1981) 29 Cal.3d 364, 371 [the subdivisions of former section 261 "do not state different offenses but merely define the different circumstances under which an act of intercourse constitutes the crime of rape"]; *People v. Maury* (2003) 30 Cal.4th 342, 427, italics original ["rape by means of violence is *not* a different offense from rape by means of force or fear; these terms merely describe different circumstances under which an act of intercourse may constitute the crime of rape"].)

It was this very sort of undeniable reality about the singular nature of the offense that led to the reversal in the case so remarkably similar to the case before this Court: *People v. Smith* (2010) 191 Cal.App.4th 199, where the defendant's dual convictions of rape of an *intoxicated* person and rape of an *unconscious* person – who, just as in this case, was unconscious *as a result of* being intoxicated -- simply could not stand because he had clearly perpetrated but one convictable offense of rape. (*Id.* at pp. 201-205). This is the only conceivably fair and just result in both *Smith* and here: If a defendant's criminal conduct can endanger the lives or offend the sensibilities of *multiple* victims and involve *multiple* criminal acts -- such as in the case of the defendant who injures several people in a hit and run, brandishes a weapon before multiple people instilling fear in all of them, steals several items of a person's property, forges several signatures, or possesses multiple weapons in prison or numerous images of child

pornography -- and yet only be subject to one criminal conviction for committing one criminal offense, how could a defendant who perpetrated a *single* act of oral copulation against a *single* victim who just happened to be *intoxicated to the point of unconsciousness* be convicted of *two* crimes on the mere basis that the victim was both intoxicated and unconscious?

Again, it is not as though one can point to evidence of different types or levels of criminal intent that might somehow divide the act into two different offenses or otherwise justify two separate criminal sanctions, such as in the case of dual convictions of sodomy and a lewd act upon a child where the trier of fact necessarily must find the defendant acted with two distinct criminal intents to convict him of both crimes. There is but a singular intent and criminal objective here – to perform the act of oral copulation. Whether the victim was intoxicated, unconscious, or both, that affords no basis in reason or common sense for dividing this singular act and singular criminal objective into two distinct criminal offenses. In fact, in the cases upholding multiple convictions based on the same act or course of conduct, the dividing line was *the defendant's conduct or intent* – the things *the defendant did* that exacted harm upon the victim and the criminal purpose for which the defendant did those things: *robbing* multiple people, *sexually penetrating* a child multiple times, *striking* a cohabitant multiple times, *forcibly stealing* a person's car with the intent to permanently deprive the owner of it, *sodomizing* a child to arouse sexual desires, etc.

So it is with the cases on which respondent attempts to rely in support of its campaign to salvage both convictions against appellant – the dual convictions were based on the distinctly dual nature of the defendant's conduct or intent (RBOM 6, 9): As already noted, *Pearson* involved the sodomy-lewd act dichotomy which necessarily meant the defendant harbored two distinct culpable criminal intents. (*People v. Pearson*, *supra*, 42 Cal.3d at p. 354.) The dual sex offender registration violations in

People v. Britt, *supra*, 32 Cal.4th 944, involved two distinct criminalized acts – the defendant first failed to notify authorities in the county of his then-current residence that he was moving to another county (§ 290, subd. (f)(1)) and then failed to register with the authorities in the new county of residence (§ 290, subd. (a)(1)). (*Id.* at pp. 951-952[3]; see also *People v. Villegas*, *supra*, 205 Cal.App.4th at pp. 644-649 [following *Britt* to uphold separate convictions for violating the "*separate*, albeit closely related, requirements" of notifying authorities of a move (§ 290.013, subd. (a)) and of the new address upon relocation (§ 290.013, subd (b)), each of which was a "*separate* criminal offense" with meaningfully distinct consequences because the defendant's failure to notify authorities of the move "caused law enforcement to continue to believe defendant's residence remained at the motel in Sylmar" and his failure to provide his new address "denied law enforcement the knowledge he had moved to another state"].)

In *People v. Lofink* (1988) 206 Cal.App.3d 161, which respondent also cites (RBOM 9), the defendant was convicted of four offenses for abuse of a child in his care -- two counts of corporal punishment (§ 273d) and two counts of willful cruelty to a child (§ 273a) – based on evidence that he had actually inflicted at *least four* separate injuries or sets of injuries at different times over a period at least two months: "potentially life threatening injuries" to the child's face; a fracture of the child's wrist; a fracture of his ankle; a fracture of his rib; and other unspecified injuries over a substantial period of time. (*Id.* at pp. 163-165.) Moreover, the two

---

[3] Technically, the discussion in *Britt* regarding the propriety of the multiple convictions has no direct application here because the Court was specifically concerned with the issue of multiple *prosecution* under section *654*, not multiple *convictions* under section *954* – i.e., whether the defendant could be *prosecuted* and *punished* for one of the offenses and later prosecuted in a different proceeding for the other. (*Britt*, at pp. 951-952; see *People v. Bellici* (1979) 24 Cal.3d 879, 888 ["cases, of course, are not authority for propositions not there considered."].)

offenses in *Lofink* involved different types or levels of criminal objectives – as section 273d is triggered only when the defendant "*willfully inflicts* upon a child any cruel or inhuman corporal punishment or an injury resulting in a traumatic condition" (§ 273d, subd. (a), italics added), while section 273a is triggered when the defendant merely "*willfully causes or permits*" a child to suffer such injury or even just "*willfully causes or permits that child to be placed in a situation* where his or her person or health is endangered." (§ 273a, subd. (a), italics added). So, as in the sodomy-lewd act situation, to be convicted of both crimes, the evidence must necessarily show that the defendant harbored two meaningfully distinct criminal objectives.[4]

While respondent further declares that "defendants are routinely (and properly) convicted of both [Vehicle Code section 23152,] subdivision (a) [driving under the influence of alcohol or drugs], and subdivision (b) [driving with a blood alcohol content of .08 or higher] for the same act of driving, and the court simply stays the punishment on one of the convictions under section 654," the only examples it offers are *People v. Martinez* (2007) 156 Cal.App.4th 851 and *People v. McNeal* (2009) 46 Cal.4th 1183. (RB 17). The issue in *Martinez* was *not* whether the defendant could be convicted of *these* two offenses; it was whether he could properly be convicted of driving under the influence and *driving on a suspended license*. (*Martinez*, at p. 857.) The answer was yes because they were two *distinct* offenses: "Martinez is not being penalized twice for one act, he 'is being penalized once for his act of driving with an invalid license

---

[4] Appellant notes that the court in *Lofink* appears to have misinterpreted section 954 by implying that the language stating the defendant may be convicted "of any number of the offenses charges" means the defendant may be *convicted* of "different *statements* of the same offense" (*People v. Lofink*, *supra*, 206 Cal.App.3d at p. 166), when, as explained, the language permitting multiple conviction only applies to the category of charges that state "different *offenses*" (§ 954, italics added).

and once for his independent act of driving while intoxicated."' (*Ibid.*, quoting *In re Hayes* (1969) 70 Cal.2d 604, 611.) And the specific issue in *McNeal* had nothing to do with the propriety of multiple convictions: the court was considering the very different issue of "how a generic DUI charge can be proven, or defended, at trial," and did not address or consider the propriety of dual convictions for violating both subdivisions (a) and (b) of Vehicle Code section 23152. (*McNeal*, at pp. 1188-1193.)[5]

In stark contrast to the cases upholding multiple convictions based on the *defendant's conduct or intent* which displayed multiple meaningfully distinct criminal acts or objectives, the sole *potentially* conceivable dividing line between oral copulation of an unconscious person and oral copulation of an intoxicated person has nothing whatsoever to do with the nature of the defendant's conduct or intent. Instead, the difference turns simply upon the nature of *the victim's state of mind* – that is, *his or her status* as being "intoxicated" versus "unconscious" – something over which the defendant has no control and for which the defendant is in no way responsible; the "difference" is of absolutely no significance to the criminal acts or intent.

This simply cannot serve as a valid means to carve two crimes out of one. If it could, then contrary to the soundly reasoned case law based on these longstanding principles, the man who engages in a single act of indecent exposure could be convicted twice of that crime merely because of

---

[5] Respondent also cites *People v. Wyatt* (2012) 55 Cal.4th 694, 704, *People v. Duff* (2010) 50 Cal.4th 787, 792-793, and *People v. Beamon* (1973) 8 Cal.3d 625, 639-640, as supportive cases. (RBOM 6.) But these citations are inapposite because the propriety of the multiple convictions was neither at issue nor even mentioned in those cases. (*Wyatt*, at pp. 698-704 [the issue was whether "the trial court prejudicially err[ed] in failing to instruct the jury sua sponte on simple assault"]; *Duff*, at pp. 792-793 [the issue was whether the defendant's presentence custody credits had been properly calculated given the stay of execution of sentence on a murder conviction]; *Beamon*, at pp. 639-640 [the issue was whether the defendant could properly be *punished* for both convictions under section *654*].)

the random circumstance that the observers looked at him twice through the window (contra *People v. Smith*, *supra*, 209 Cal.App.4th at pp. 915-917), the boy who brandishes a weapon could be convicted of 30 counts simply because 30 passengers on a city bus happened to pass by and see it (contra *In re Peter F.*, *supra*, 132 Cal.App.4th at pp. 878-881), and the number of convictions of evading a police officer could turn on the number of police officers who just happen to get involved in the pursuit (contra *People v. Garcia*, *supra*, 107 Cal.App.4th at pp. 1161-1162, 1166). And whatever artificial distinction may exist between the victim's status as being "intoxicated" or "unconscious" for purposes of such "creative accounting," it completely evaporates where, as here, the victim was unconscious *as a result of* being intoxicated. In such situations, the two states of mind necessarily collapse into one such that there is *no* difference at all and thus *no* conceivable means of even attempting to carve out two crimes.

The notion that appellant, or any other defendant who perpetrates an act of oral copulation upon a person intoxicated to the point of unconsciousness, could be convicted of two separate offenses is even more specious than the creative accounting of multiple murder charges recently struck down in *People v. Coyle*, *supra*, 178 Cal.App.4th 209. There, the defendant was convicted of three counts of murder for the killing of one victim -- murder during the commission or attempted commission of a burglary, murder during the commission or attempted commission of a robbery, and second degree murder. (*Id.* at p. 211.) The trial court's stay of punishment on two of the three counts was not enough, as only one count could stand. (*Id.* at p. 218.) In reversing the other two, the appellate court emphasized the crucial point that section 954's statement that the defendant may be convicted of any number of *the offenses* charged...." (*id.* at p. 217, italics original) means '"multiple charges and multiple convictions can be based on a single criminal act, *if the charges allege*

separate offenses'" (*ibid.*, quoting *People v. Muhammad*, *supra*, 157 Cal.App.4th at p. 490). "Here, the three counts charged a single offense: murder ... and simply alleged alternative theories of the offense." (*Ibid.*)

As artificial as the dividing line between the "murders" was in *Coyle*, at least that line was based upon the nature of the defendant's conduct – i.e., the particular manner in which he carried out the killing. Here we do not even have that because the only conceivable point of demarcation between the two "offenses" is simply the *status of the victim* as being either intoxicated or unconscious – and, again, she was *both* such that there is in reality no basis on which to even *conceptualize* a difference. It is difficult to find a comparably specious example. In *People v. Black* (1941) 45 Cal.App.2d 87, the court considered whether a statute making it unlawful "(1) to throw; (2) drop; (3) pour; (4) deposit; (5) release; (6) discharge; and (7) expose" hazardous materials in public could result in seven separate convictions for one who unlawfully disposes of such materials in a manner that might be characterized each way. (*Id.* at p. 97.) Of course, as simple common sense dictates, the court found that a charge of violating the statute in each of the seven enumerated means could lead to but one conviction: "[t]he means employed to put or place the substance is wholly immaterial, for the gravamen of the offense is the putting of the substance in a place of public assemblage." (*Id.* at pp. 97-98.)

Yet, as artificial as they too obviously are, the dividing lines between the different statements of the offense in *Black* at least focused upon *the defendant's conduct* and thus *still* serve as stronger bases on which to purportedly carve out multiple offenses than in the situation present here. There could, *in theory*, be a difference between *discharging* and merely *exposing* hazardous materials meaningful enough to possibly justify classifying them as separate or different offenses. But there is clearly *no* meaningful difference among the acts of oral copulation upon an

"unconscious" person, oral copulation upon an "intoxicated" person, and oral copulation upon a person intoxicated to the point of unconsciousness.

Whether the victim is "unconscious," "intoxicated," unconscious as a result of being intoxicated, or otherwise laboring under some sort of mental incapacity that renders it difficult or impossible to resist is "wholly immaterial" to the defendant's culpability, for the gravamen of the offense is simply performing the act upon the victim when he or she is in this vulnerable state of mind. *How* the victim fell into that state of mind is of no significance to the victim – whose sensibilities are identically offended whether she was intoxicated, unconscious, or both -- or the defendant, whose sole interest is perpetrating the act of oral copulation. In this sense, the basic rationale of *Craig* that "the victim was not doubly outraged" for "[t]here was but a single outrage and offense" (*Craig*, *supra*, 17 Cal.2d at p. 455), certainly does apply here, as the *Smith* court aptly recognized in applying the rationale to this type of situation (*People v. Smith*, *supra*, 191 Cal.App.4th at p. 205). That rationale applies even more powerfully in cases like this where the victim was unconscious *as a result of* being intoxicated such that there is no conceivable difference at all between the victim's state of intoxication and her state of unconsciousness.

3. Respondent's Assault Upon This Court's Opinion in *Craig* Is Misguided and Ultimately Unavailing

Respondent exerts tremendous time and effort waging a war of words against this Court's reasoning in *Craig*, as if proving the Court wrong there will necessarily destroy the sanctity of the result here. In fact, respondent has framed its entire analysis from this perspective – beginning with its statement of the issue in this case, which it frames as: "In light of this court's more modern application of sections 954 and 654, is *People v. Craig* (1941) 17 Cal.2d 453, still good law?" (RBOM 1.) Under a proper

framing of the issue, however, this Court's opinion in *Craig* serves as part of the relevant backdrop to the more fundamental question of whether appellant may properly stand convicted of both oral copulation of an unconscious person and oral copulation of an intoxicated person. Indeed, the Court itself has framed the issue as follows: "Was defendant properly convicted of both oral copulation of an unconscious person and oral copulation of an intoxicated person? (See *People v. Craig* (1941) 17 Cal.2d 453.)" (www.courts.ca.gov/documents/Aug1613crimpen.pdf ["Pending Issues Summary"].) The Court's use of "see" in referring to *Craig* shows the decision is to be considered as an illustration of how the relevant principles may or should be applied in determining the general issue, not as solely dispositive of the issue. (California Style Manual, 4th Ed. (2000), § 1.4, pp. 9-10, italics added ["When a case is cited as the source of a quotation, or *when a case directly supports the proposition stated in the text*, no introductory signal is appropriate. Citations to weaker support, however, should be introduced by the word 'see.' Thus, 'see' should precede citations to cases *that only indirectly support the text*, citations to supporting dicta, and citations to a concurring or dissenting opinion."].)

As is already apparent, this Court's opinion in *Craig* is the just product of the same longstanding principles that have driven the outcome in numerous cases in the decades before and after its publication. Indeed, respondent's primary complaint about *Craig* is that it is inconsistent with respondent's sweepingly broad interpretation of section 954 which would permit multiple convictions of any and all charges joined to the action, including those that merely constitute "different *statements* of the *same* offense. (§ 954, italics added; RBOM 5, 10, 18, 21-22.) That, however, is not the case, as the language of the statute and the case law make clear that

multiple convictions are proper only for multiple *distinct* criminal offenses, *not* merely different or alternative *statements* of the *same* offense.[6]

As for the convictions at issue in *Craig*, while respondent suggests this Court got the result wrong, it implicitly concedes that the convictions constituted just one offense. Specifically, in attempting to distinguish *Craig* from the situation here, respondent argues that *unlike* in *Craig*, the convictions in this case represent "different offenses because they contain different elements." (RBOM 11.) That is, respondent is saying that the offenses in *Craig* were *not* different and were instead just "one offense." (RBOM 11.) If that is so, the dual convictions *should* have been prohibited under the general principles discussed above, and the result in *Craig* was clearly correct. Respondent is only able to argue otherwise under its overly broad interpretation of section 954 as permitting convictions of "multiple counts where only one offense was committed . . ." (RBOM 11.)

The rest of respondent's arguments concerning the specific offenses at issue in *Craig* also miss the point, as they focus upon the language of the former rape statute at issue there, the elements of the subdivisions under that statute, and the status of the victim as being a minor. (RBOM 15, 28.) Here, of course, we are not dealing with the forcible rape of a minor victim; we are dealing with oral copulation of an adult victim intoxicated to the point of unconsciousness and whether dual convictions under subdivisions (f) and (i) of section 288a are permissible. So, as much as respondent

---

[6] Respondent tries to bolster its interpretation of section 954 with general language like: "'Sometimes a single act constitutes more than one crime. When that happens, the person committing the act can be convicted of each of those crimes, but Penal Code section 654 prohibits punishing the person for more than one of them.'" (RBOM 6-7, quoting *People v. Kramer* (2002) 29 Cal.4th 720, 722.) Of course that a single act "*can*" lead to multiple convictions does not mean that is *always* the case; if that were so, multiple convictions would also be proper for greater and lesser offenses, and even respondent acknowledges that is not proper. (RBOM 16.)

criticizes this Court's analysis in *Craig* as "outdated" based on respondent's speculations about the supposed shifts in public perception of the crime of raping a minor, this is all really beside the point. (RBOM 15.)

Respondent's other strategy of attack is to emphasize what it sees as supposed fallacies and problematic consequences of the particular segment of this Court's analysis in *Craig* – and, by extension, the segment in the Court of Appeal's analysis based on *Craig* – that focused upon the charges as being subdivisions of the same statute. (RBOM 2, 10, 17-18.) The point that the two charges are subdivisions of the same statute concerning the same offense is indeed pertinent to the extent it lends further support to a finding that a violation of both is nevertheless just one offense, as it does with respect to the specific statutory subdivisions at issue in cases like *Craig*, *Smith*, and here. But this was certainly not the sole or even the determinative point to the analysis in *Craig*. This Court also made abundantly clear in *Craig* that it firmly understood and was applying the general overriding principles prohibiting multiple convictions based upon what really amounts to just one convictable offense: "while the proof necessarily varies with respect to the several subdivisions of [the former rape statute] under which the charge may be brought, the sole punishable offense under any and all of them is the unlawful intercourse with the victim.'" (*Craig*, *supra*, 17 Cal.2d at p. 458.) The reference to punishment does not change this, since it is clear the Court held that the defendant was wrongfully *convicted* of multiple offenses when only a single crime was committed," and "[n]aturally, because the convictions failed, any punishment based on them would also be set aside." (*People v. Correa*, *supra*, 45 Cal.4th at p. 340, italics original; see also *People v. Ryan*, *supra*, 138 Cal.App.4th at p. 371, italics added ["Although *Craig* speaks in terms of 'punishable offenses,' we think it apparent that it proscribes more than one *conviction* under the circumstances before it . . ."].) It is clear that the

heart of the case in *Craig* was ensuring the correct result in light of the defendant's having committed only one convictable offense.

Moreover, this Court need not trouble itself with whether or the extent to which this point – that the two descriptions of the offense appear as subdivisions of the same statute – bears upon the analysis in such cases. It makes no difference whether this or some other specific *reason* cited in *Craig* or in the Court of Appeal's decision may be subject to criticism, so long as the *result* – i.e., the ultimate answer to the question whether the defendant was properly convicted of both charges – was correct, and it surely was. (*People v. Brown* (2004) 33 Cal.4th 892, 901, quoting *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19 ["'No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in laws, will not be disturbed on appeal merely because given for the wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the [lower] court to its conclusion.'"].) Regardless of whether the two charges at issue here are subdivisions of the same statute, as discussed above, it is clear under the longstanding principles of law governing these cases that a violation of both subdivisions constitutes but a single crime.

///

C. The Dual Convictions Are Impermissible for the Related, Though Independent Reason that the Violation of Section 288a, Subdivision (i), Was a Lesser, Necessarily Included Offense of the Violation of Section 288a, Subdivision (f)

In support of its position that appellant was properly convicted of both charges in this case, respondent emphasizes the argument that neither charge constitutes a lesser, necessarily included offense of the other. (RBOM 11.) This argument is fundamental to respondent's position; for it suggests that a dual conviction constituting a lesser necessarily included offenses is the *sole* exception to the rule permitting multiple convictions based upon the same act or course of conduct, and thus, so the argument goes, the Court of Appeal certainly got it wrong here. (RBOM 7, 11.) Of course, this is rooted in respondent's overly broad interpretation of section 954 as essentially permitting convictions of any and all other types of charges that the prosecution decides to allege – contrary to the language of the statute which expressly applies only to charges that allege "*different* offenses" (§ 954, italics added) and contrary to the innumerable illustrations in the case law reversing multiple convictions on the basis that the defendant committed but one offense irrespective of whether any of the charges qualified as a lesser necessarily included offense of another.

As noted, the rule prohibiting dual convictions of both a greater and lesser offense is a natural outgrowth of the general principles designed to prevent two convictions for what amounts to just one crime. Moreover, given that respondent has squarely placed the issue before this Court in advocating its position, and that the ultimate task is to answer the general question of whether the dual convictions are legally valid, the applicability of this rule to the charges in this case is pertinent to the analysis even though the Court of Appeal did not rely upon it in reaching its conclusion. (See *People v. Brown*, *supra*, 33 Cal.4th at p. 901, italics added ["If right

upon *any theory of the law* applicable to the case, [the lower court's decision] must be sustained regardless of the considerations which may have moved the [lower] court to its conclusion."].) And it is clear that the impropriety of convictions on both a greater and a lesser, necessarily included offense forms yet another basis on which to affirm the judgment.

"A judicially created exception to the general rule permitting multiple conviction 'prohibits multiple convictions based on necessarily included offenses'" (*People v. Correa*, *supra*, 54 Cal.4th at p. 337, quoting *People v. Montoya* (2004) 33 Cal.4th 1031, 1034) – i.e., a crime that "'cannot be committed without also necessarily committing a lesser offense'" (*Correa*, at p. 337, quoting *People v. Lopez* (1998) 19 Cal.4th 282, 288). "Under the elements test, if 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." (*People v. Reed*, *supra*, 38 Cal.4th at p. 1227.) The specific question is whether "'all the legal ingredients of the corpus delicti of the lesser offense [are] included in the elements of the greater offense.'" (*Lopez*, at p. 288.) The "greater offense" is "the offense with the most elements" and the "lesser" is "the one with the fewest elements." (*Montoya*, at p. 1034 ["Here, the greater offense, that is, the offense with the most elements, is carjacking. The lesser offense, which is the one with the fewest elements, is unlawfully taking a vehicle."].)

Appellant was charged and convicted, respectively, in Counts One and Two under subdivisions (f) and (i) of section 288a, which provided at the time of the crime (as they do now) as follows:

> (f) Any person who commits an act of oral copulation, and the victim is at the time *unconscious of the nature of the act and this is known to the person committing the act*, shall be punished by imprisonment in the state prison for a period of three, six, or eight years. As used in this subdivision, *"unconscious of the nature of the act" means incapable of resisting because the victim meets one of the following*

> *conditions*: [¶] (1) *Was unconscious or asleep.* [¶] (2) Was not aware, knowing, perceiving, or cognizant that the act occurred. [¶] (3) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact. [¶] (4) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraudulent representation that the oral copulation served a professional purpose when it served no professional purpose.
>
> (i) Any person who commits an act of oral copulation, where the victim is *prevented from resisting* by any intoxicating or anesthetic substance, or any controlled substance, *and this condition was known, or reasonably should have been known by the accused*, shall be punished by imprisonment in the state prison for a period of three, six, or eight years.

(§ 288a, subds. (f) & (i), italics added.)

Subdivision (f) is clearly "the offense with the most elements" and thus the "greater" offense, while subdivision (i) is "the one with the fewest elements" and thus the "lesser" offense. (*People v. Montoya*, *supra*, 33 Cal.4th at p. 1034.) Comparing the basic elements of the two subdivisions, the offense described in subdivision (f)(1) indeed subsumes, and thus includes, the offense described in subdivision (i). The only real differences between the two descriptions of the offense are the particular nature of the condition impeding the victim's ability to resist the act and what the defendant did or should have known about that condition. Subdivision (f)(1) requires that the victim be *incapable* of resisting the act on account of being *unconscious or asleep* and that the victim's condition be *known* to the defendant, while subdivision (i) merely requires that the victim be *prevented from* resisting by an intoxicating substance and that defendant knew *or reasonably should have known* of this condition.

Obviously, the particular mechanism that happens to cause the limitation on the ability to resist – i.e., whether the condition is induced by

an intoxicating substance or some other intrinsic or extrinsic factor – is not the matter of concern under either subdivision. What matters is the simple fact that the victim is experiencing this limitation on the ability to resist at the time the defendant perpetrates the act. So, from the perspective of the victim, the subdivisions basically just describe different states of mind along the same spectrum: on the one end, being *prevented from* resisting – i.e., limited to one degree or another in the ability to resist while still potentially being cognizant of the act – to on the other end, being *unconscious of the nature of the act* and thus completely *incapable of* resisting the act in any way. Surely, a state of mind in which a person is merely *prevented* from resisting to some degree while still potentially cognizant of the situation would necessarily be included within a state of mind in which a person is completely *incapable* of resisting on account of being *unconscious or asleep* and thus completely unaware of the act itself. Similarly, a situation in which the defendant knew *or reasonably should have known* of the condition impeding the ability to resist, which is all that is required under subdivision (i), would necessarily be included within the situation in which the defendant was *subjectively* aware of it, as is required under subdivision (f) (the condition must be "known" to the defendant).

In other words, a straightforward application of the "elements test" reveals that a violation of subdivision (f)(1) -- perpetration of the act when the victim was completely incapable of resisting on account of being unconscious or asleep and the defendant was subjectively aware of this, necessarily subsumes a violation of subdivision (i) -- perpetration of the act when the victim was merely prevented from resisting and the defendant knew or reasonably should have known of the victim's condition.

This clearly resonates as the only conceivably fair interpretation of the offenses described in the two subdivisions. Otherwise, a defendant could properly be convicted of *two* crimes where, as here, the victim just

happened to be *intoxicated to the point of unconsciousness* and the defendant was aware of the victim's condition, which unquestionably flies in the face of the longstanding principles prohibiting multiple convictions based upon such artificial distinctions and the basic notions of fundamental fairness which must drive the result in every case. Fundamental fairness is "the touchstone of due process" (*Gagnon v. Scarpelli* (1973) 411 U.S. 778, 790) and due process imposes upon the state the "sovereign obligation to ensure "that 'justice shall be done' in all criminal prosecutions" (*Cone v. Bell* (2009) 556 U.S. 449, 451, quoting *United States v. Agurs* (1976) 427 U.S. 97, 111). There is no "justice" in permitting a defendant to be convicted of two crimes based on what amounts to nothing more than a *coincidental circumstance* regarding the victim's *status* which the defendant in no way created, which in no way affected the defendant's actions, and which in no way caused further injury or offense to the victim – that is the antipathy of justice and fairness. Indeed, as explained, there is simply no meaningful difference at all between the offenses described in subdivisions (f) and (i) when the victim just so happens to be intoxicated to the point of unconsciousness at the time of the act.

This sets the case apart from those respondent cites in which the reviewing court upheld the dual convictions where the crimes clearly did not constitute convictions of greater and lesser offenses because again, unlike here, the convictions grew out of two distinct criminal offenses involving distinct acts or forms of criminal intent. (RBOM 6, citing *People v. Pearson*, *supra*, 42 Cal.3d at pp. 355-356 [sodomy and lewd acts], *People v. Montoya*, *supra*, 33 Cal.4th at pp. 1034-1035 [carjacking and unlawful taking of a vehicle]; *People v. Sanchez* (2001) 24 Cal.4th 983, 988-991 [gross vehicular manslaughter and second degree murder].)

///

D. Respondent's Specter of Chaos and Confusion is Unfounded

The same analysis speaks to respondent's complaints about potential complications in the sentencing process and the possibility of unfair "windfalls" for sex offenders. (RBOM 26.) The irony of respondent's entire line of arguments here is that it paints a picture of defendants like appellant simply attempting to throw a wrench into a well-oiled machine for the purpose of escaping criminal responsibility or generally thwarting justice, when in reality it is the prosecution who creates the situation requiring a sentencing remedy post-trial. While section 954 may allow the defendant to be *charged* in multiple ways or with multiple offenses based upon a single act or course of conduct, in doing so where that act or course of conduct legally constitutes but one crime, the prosecution itself sets up the case for the possibility of impermissible multiple convictions. So the prosecution cannot complain when one of the convictions must fall.

Nor can the setting aside of an *impermissible* dual conviction be characterized as some sort of inappropriate or unfair "windfall." (RBOM 26.) The concern over preserving both of two convictions based upon the same act or course of conduct obviously only applies to *legitimate* dual convictions: "Where one of two multiple convictions *valid under section 954* is overturned on appeal or habeas corpus, the remaining and intact conviction, even though it arose from the same facts or indivisible course of conduct as the conviction that is being reversed, may be substituted in its stead, with the stay of execution of sentence lifted at resentencing, so that punishment on *the valid conviction* can be imposed in the interests of justice." (*People v. Sloan*, *supra*, 42 Cal.4th at p. 122, italics added.) This Court has specifically rejected the application of this rationale in cases where the defendant has *improperly* been convicted of two offenses. (See *People v. Medina*, *supra*, 41 Cal.4th at p. 701 [where this Court rejected the People's request "to permit courts to stay, instead of strike, convictions for

lesser included offenses to prevent defendants from receiving a windfall if a greater offense conviction is reversed or otherwise rendered unenforceable," because dual convictions of such offenses are improper].)

And while respondent portrays the situation as a one way street in which the potential effect of a reversal upon the People is all that matters, defendants clearly face substantial prejudice in the event of an affirmance. The mere presence of a second conviction on the defendant's record, whether imposition of sentence is stayed or run concurrently, carries significant potentially adverse consequences: "For example, the presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction." (*Ball v. United States*, *supra*, 470 U.S. at pp. 864-865; see also *People v. Tenney*, *supra*, 162 Cal.App.2d at p. 463, internal quotations omitted [rejecting respondent's claim that concurrent sentences sufficiently protected the defendant because "[t]he dual judgment may very well adversely affect appellant's rights when he comes before the proper authorities to have his definite terms fixed"].)

Respondent's attempt to paint a picture of mass confusion and needlessly burdensome complications for sentencing courts if dual convictions of this nature are not simply allowed to stand is also unavailing. (RBOM 22-23, 26-28.) Sentencing courts are no strangers to the basic process of modifying a judgment to deal with improper dual convictions – this is often a routine part of the sentencing process given the need to remedy dual convictions of greater and lesser offenses. (See *People v. Ortega*, *supra*, 19 Cal.4th at p. 703, conc. opn., Werdegar, J. [explaining the well settled process of vacating the conviction of the lesser offense].) Respondent's hypothesized problematic sentencing scenarios involve

different offenses in subdivisions of the same statute, which are intended to highlight what it sees as the problematic "subdivisions of the same statute" aspect of the *Craig* analysis on which the Court of Appeal relied. (RBOM 22-23.) Again, this Court need not decide the significance of the nature of the offenses as being subdivisions of the same statute to resolve this case. We are not concerned with all the conceivable scenarios in which one may properly be convicted of two subdivisions of the same statute. We are concerned only the offenses described in subdivisions (f) and (i) of section 288a. And, as explained, it is abundantly clear under the longstanding general principles of law in this area that both convictions cannot stand.

Moreover, respondent's specter of disparate sentencing and endless problems with the "consolidation" procedure is really a just red herring. First, it rests upon the erroneous notion that "[i]f a single act violates two statutes, both of which are considered strike offenses, defendant should stand convicted of two strike offenses *no matter the act he committed*" (RBOM 23, italics added) – i.e., a defendant may properly be convicted of any and all charges levied against him regardless of whether the conduct may legitimately be divided into multiple acts or objectives. And respondent's hypothesized problematic consolidation scenarios use statutory provisions that, *unlike* here, *do* involve a course of conduct involving multiple, meaningfully distinct acts or criminal objectives. (RBOM 22-23, 26.) Because such scenarios *could* properly lead to multiple convictions, in reality, there would no need to "consolidate" them. In any event, there are clearly no such problems with consolidating the dual convictions *at issue* under subdivisions (f) and (i) of section 288a. Indeed, because these subdivisions of section 288a qualify as greater and lesser offenses, the problem could also be remedied through the simple alternative means of vacating the conviction under subdivision (i) and affirming the conviction under subdivision (f). Either is a sufficient remedy, because

both ultimately result in a single conviction of subdivision (f), and the Court of Appeal achieved this result in consolidating the convictions.

To the extent this Court may find it necessary to go on and address the appropriate remedy in cases involving improper dual convictions of offenses other than those described in the subdivisions at issue here, there are certainly other easy solutions for dealing with such problems. Where, as here, there is no difference in the sentence or collateral consequences between the two convictions, consolidation would also be appropriate. As far as selecting which conviction will be reflected in the judgment, the prosecution could be permitted to make that selection. After all, it is the prosecution who charged the defendant with the multiple offenses and, this way, it can be satisfied that the ultimate conviction reflects its view of the defendant's culpability based upon its theory of his criminal liability. When consolidation is not appropriate because one conviction carries a greater sentence or more severe collateral consequences, the court could be required to impose judgment upon that one and vacate the other, which would certainly satisfy the People's interest in seeing that the defendant receives the greatest degree of potential punishment for the crime.

To whatever degree potential difficulties or possibilities of unfair "windfalls" in sentencing may remain in such cases, they certainly cannot outweigh or justify minimizing or dispensing with the protections underlying the principles prohibiting dual convictions of this nature. The overriding concern that must drive the outcome is fundamental fairness; for "[d]ue process *guarantees* that a criminal defendant will be treated with "that fundamental fairness essential to the very concept of justice.'" (*United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 872, quoting *Lisenba v. California* (1941) 314 U.S. 219, 236, italics added.) Whether one arrives there through the general principles governing the propriety of multiple convictions, the principles governing dual convictions of greater

and lesser offenses, or both, the only just result in a case involving dual convictions of oral copulation of an unconscious person and oral copulation of an intoxicated person is to hold that the defendant has committed only one offense and thus may only properly be convicted of one offense. This is especially true in a case like this, where the victim was unconscious *as a result of* being intoxicated; for no amount of "creative accounting" can change the fact that the defendant committed a single convictable offense.

E. The Judgment is Accordingly Correct As It Now Stands

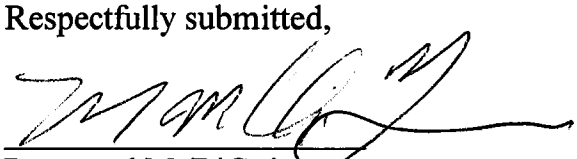
In sum, this Court's opinion in *Craig* is not the problem here; *Craig* is the product of longstanding principles of continuing vitality in this area, which cannot and should not be discarded – particularly in light of the important doctrine of stare decisis. (See *People v. Garcia* (2006) 39 Cal.4th 1070, 1080.) The only problem is that the prosecution tried to carve two crimes out of what clearly constitutes but one offense. The Court of Appeal properly rectified this problem in consolidating the two convictions into one. Even if some particular aspect of *Craig* is subject to abrogation, such as the "subdivisions of the same statute" aspect of the analysis with which respondent takes so much exception, that would not change the result here. Unquestionably, under the longstanding principles of continuing vitality – which were at the heart of the decision in *Craig* – appellant cannot properly stand convicted of both Count One and Count Two.

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Dated: September 17, 2013

Respectfully submitted,



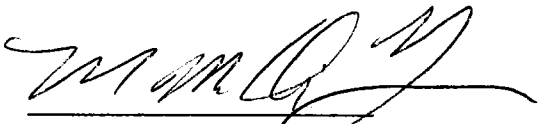
Raymond M. DiGuiseppe,
Attorney for Defendant and Appellant

CERTIFICATE OF COMPLIANCE

I certify that the attached Appellant's Brief on the Merits is prepared with 13 point Times New Roman font and contains 13,882 words.

Dated: September 17, 2013

Respectfully submitted,



Raymond M. DiGuiseppe

APPENDIX A

ACTS

AMENDATORY OF THE CODES,

PASSED AT THE

Twentieth Session of the Legislature,

1873-74,

BEGAN ON MONDAY, THE FIRST DAY OF DECEMBER, EIGHTEEN HUNDRED AND SEVENTY-THREE, AND ENDED ON MONDAY, THE THIRTIETH DAY OF MARCH, EIGHTEEN HUNDRED AND SEVENTY-FOUR.

SACRAMENTO:
G. H. SPRINGER, STATE PRINTER.
1874.

ACTS

AMENDATORY OF

THE PENAL CODE,

PASSED AT THE

TWENTIETH SESSION OF THE LEGISLATURE.

AN ACT TO AMEND THE PENAL CODE.

[Approved March 30th, 1874.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section seven of the Penal Code is amended to read as follows:

Terms, etc. defined.

Section Seven. Words used in this Code in the present tense include the future as well as the present; words used in the masculine gender include the feminine and neuter; the singular number includes the plural, and the plural the singular; the word "person" includes a corporation as well as a natural person; writing includes printing; oath includes affirmation or declaration; and every mode of oral statement under oath or affirmation is embraced by the term "testify," and every written one in the term "depose;" signa-

Section Eight Hundred and Ninety-seven. The challenges mentioned in the last three sections may be oral or in writing, and must be tried by the Court. How made, etc.

SEC. 43. Section nine hundred and three of said Code is amended to read as follows:

Section Nine Hundred and Three. The following oath must be administered to the Foreman of the Grand Jury: Oath to Foreman.

"You, as Foreman of the Grand Jury, will diligently inquire into, and true presentment make, of all public offenses against the people of this State, committed or triable within this county, of which you shall have or can obtain legal evidence. You will keep your own counsel, and that of your fellows and of the Government, and will not, except when required in the due course of judicial proceedings, disclose the testimony of any witness examined before you, nor anything which you or any other Grand Juror may have said, nor the manner in which you or any other Grand Juror may have voted on any matter before you. You will present no person through malice, hatred, or ill-will, nor leave any unpresented through fear, favor, or affection, or for any reward, or the promise or hope thereof; but in all your presentments you will present the truth, the whole truth, and nothing but the truth, according to the best of your skill and understanding, so help you God."

SEC. 44. Section nine hundred and fifty-four of said Code is amended to read as follows:

Section Nine Hundred and Fifty-four. The indictment must charge but one offense, but the same offense may be set forth in different forms under different counts, and, when the offense may be committed by the use of different means, the means may be alleged in the alternative in the same count. Indictment to charge one offense.

THE

ACTS AMENDATORY

OF THE

CODES OF CALIFORNIA

PASSED AT THE

TWENTY-THIRD SESSION OF THE LEGISLATURE,

1880.

BEGAN ON MONDAY, JANUARY FIFTH, AND ENDED ON FRIDAY, APRIL SIXTEENTH, ONE THOUSAND EIGHT HUNDRED AND EIGHTY.

SACRAMENTO:
STATE OFFICE : : : J. D. YOUNG, SUPT. STATE PRINTING.
1880.

ACTS AMENDATORY

OF

THE PENAL CODE

PASSED AT

THE TWENTY-THIRD SESSION OF THE LEGISLATURE.

CHAPTER I.

An Act to repeal section four hundred and twenty of the Penal Code.

[Approved February 7th, 1880.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section four hundred and twenty of the Penal Code is hereby repealed. Repealing.

SEC. 2. This Act shall take effect and be in force from and after its passage.

CHAPTER III.

An Act to amend the Penal Code by adding two new sections thereto, to be known as sections one hundred and seventy-eight and one hundred and seventy-nine, prohibiting the employment of Chinese by corporations.

[Approved February 13th, 1880.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. A new section is hereby added to the Penal Code, to be numbered section one hundred and seventy-eight. Officers of corporations not to employ Chinese.

178. Any officer, director, manager, member, stockholder, clerk, agent, servant, attorney, employe, assignee, or contractor of any corporation now existing, or hereafter formed under the laws of this State, who shall employ, in any man-

A. D. eighteen ——. A. B. is accused by the grand jury of the County of ——, by this indictment (or by the District Attorney by this information), of the crime of (giving its legal appellation, such as murder, arson, or the like, or designating it as felony or misdemeanor), committed as follows: The said A. B., on the —— day of ——, A. D. eighteen ——, at the County of —— (here set forth the act or omission charged as an offense), contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the people of the State of California.

SEC. 17. Section nine hundred and fifty-three of said Code is hereby amended so as to read as follows:

When defendant is indicted by fictitious name, etc.

953. When a defendant is charged by a fictitious or erroneous name, and in any stage of the proceedings his true name is discovered, it must be inserted in the subsequent proceedings, referring to the fact of his being charged by the name mentioned in the indictment or information.

SEC. 18. Section nine hundred and fifty-four of said Code is hereby amended so as to read as follows:

What indictment or information must charge.

954. The indictment or information must charge but one offense, but the same offense may be set forth in different forms under different counts, and, when the offense may be committed by the use of different means, the means may be alleged in the alternative in the same count.

SEC. 19. Section nine hundred and fifty-five of said Code is hereby amended so as to read as follows:

Statement as to time when offense was committed.

955. The precise time at which the offense was committed need not be stated in the indictment or information, but it may be alleged to have been committed at any time before the finding or filing thereof, except where the time is a material ingredient in the offense.

SEC. 20. Section nine hundred and fifty-seven of said Code is hereby amended so as to read as follows:

Construction of words used in an indictment or information.

957. The words used in an indictment or information are construed in their usual acceptance in common language, except such words and phrases as are defined by law, which are construed according to their legal meaning.

SEC. 21. Section nine hundred and fifty-eight of said Code is hereby amended so as to read as follows:

Construction of words used in a statute.

958. Words used in a statute to define a public offense need not be strictly pursued in the indictment or information, but other words conveying the same meaning may be used.

SEC. 22. Section nine hundred and fifty-nine of said Code is hereby amended so as to read as follows:

Indictment or information, when sufficient.

959. The indictment or information is sufficient if it can be understood therefrom:

1. That it is entitled in a Court having authority to receive it, though the name of the Court be not stated.

2. If an indictment, that it was found by a grand jury of the county in which the Court was held, or if an information, that it was subscribed and presented to the Court by the District Attorney of the county in which the Court was held.

3. That the defendant is named, or, if his name cannot be discovered, that he is described by a fictitious name, with a

THE

STATUTES OF CALIFORNIA

AND

AMENDMENTS TO THE CODES

PASSED AT THE

THIRTY-SIXTH SESSION OF THE CALIFORNIA LEGISLATURE

1905

BEGAN ON MONDAY, JANUARY SECOND, AND ENDED ON FRIDAY, MARCH TENTH,
NINETEEN HUNDRED AND FIVE

SACRAMENTO:
W. W. SHANNON, : : : : SUPERINTENDENT STATE PRINTING.
1905.

to range where it is likely to come in contact with other animals not so affected, is guilty of a misdemeanor, and punishable by a fine of not more than five hundred dollars for each offense.

CHAPTER DLXXIV.

An act to amend sections nine hundred and fifty-four, one thousand and four, one thousand and eight, and one thousand and twenty of the Penal Code, and to add two new sections thereto to be numbered nine hundred and sixty-nine and one thousand and twenty-five, all relating to pleadings in criminal cases.

[Approved March 22, 1905.]

The people of the State of California, represented in senate and assembly, do enact as follows:

Rules of pleading.

SECTION 1. Section nine hundred and fifty-four of the Penal Code is hereby amended to read as follows:

May charge different offenses under separate counts relating to same act.

954. The indictment or information may charge different offenses, or different statements of the same offense, under separate counts, but they must all relate to the same act, transaction, or event, and charges of offenses occurring at different and distinct times and places must not be joined.

Prosecution not required to elect between different counts.

The prosecution is not required to elect between the different offenses or counts set forth in the indictment or information, but the defendant can be convicted of but one of the offenses charged, and the same must be stated in the verdict.

SEC. 2. A new section is hereby added to said code, to be numbered nine hundred and sixty-nine and to read as follows:

Previous conviction of another offense.

969. In charging in an indictment or information the fact of a previous conviction of a felony, or of an attempt to commit an offense which, if perpetrated, would have been a felony, or of petit larceny, it is sufficient to state, "That the defendant, before the commission of the offense charged in this indictment or information, was in (giving the title of the court in which the conviction was had) convicted of a felony (or attempt, etc., or of petit larceny)." If more than one previous conviction is charged, the date of the judgment upon each conviction must be stated, but not more than two previous convictions must be charged in any one indictment or information.

SEC. 3. Section one thousand and four of said code is hereby amended to read as follows:

Demurrer, grounds for.

1004. The defendant may demur to the indictment or information, when it appears upon the face thereof either:

1. If an indictment, that the grand jury by which it was found had no legal authority to inquire into the offense charged, by reason of its not being within the legal jurisdic-

NOTES ON CERTAIN AMENDMENTS TO THE CODES.

The following notes refer to the sections of the Codes, amended, revised, added, or repealed, as recommended by Hon. John F. Davis, Commissioner for the Revision and Reform of the Law, and are taken from the reports to the Legislature by the Assembly Committee on Revision and Reform of Laws:

CIVIL CODE.

SECTION.

51, 52. The statute of 1897, page 137, relating to the rights of persons, is codified in the two sections above named.

53, 54. The statute of 1893, page 220, relating to the rights of persons, is codified in the sections above named.

58. The provisions of this section are contained in the present section 82. The section is therefore unnecessary.

60. The change consists in the insertion of the word "mongolians" after the word "negroes."

68. The change consists in the substitution of the word "others" for "other" before "than"; the substitution of "a party" for "the parties" after "than"; and the substitution of "it" for "that marriage" after "invalidate." The meaning of the section is unchanged.

79a (79½). The change consists in the omission of the words "procuring a license and" after "to," thus requiring a license in every case, but leaving the mode of celebrating the marriage as at present. The section is renumbered 79a.

84. The design of the amendment is to make the rule declared in this section applicable to all judgments adjudging marriage null, the present section applying only to cases where a marriage is annulled *on the ground that a former husband or wife was living.*

226. The first two sentences of this section have been recast with the design of making the proceeding for adoption judicial, thereby supporting it by the same intendments which are indulged in favor of other proceedings conducted in courts of record.

227. The change consists in the substitution of the word "court" for the word "judge," and in the addition of the last sentence, said sentence being added for the purpose of making it clear that the papers constituting part of the adoption, or of the proceeding therefor, must be filed and preserved by the clerk.

242, 243, 244, 245. The provisions of the above sections, relating to guardian and ward, are controlled by sections 1747, 1758, and 1793 of the Code of Civil Procedure. They are, therefore, unnecessary and misleading.

246. The change consists in the addition of subdivision 4, which is a codification of the statute of 1873-4, page 297, relating to the care of orphan and abandoned children. The penal provisions of that act are, however, omitted as they do not properly find a place in this Code.

247. The subject-matter of this section is provided for in section 1753 of the Code of Civil Procedure.

248, 249. The provisions of these sections are included in sections 1753 and 1770 of the Code of Civil Procedure.

258. This section, which prescribed the mode of placing insane persons in the asylum, has been supplanted by later legislation (see statute of 1897, page 311, relative to the establishment of a lunacy commission, and Political Code, sections 2136 to 2199).

264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276. These sections codify the statute of 1875-6, page 842, relative to masters and apprentices, as amended in 1880, page 28, the old chapter being repealed and the provisions of the acts above referred to substituted in place thereof. In this codification section 1 of the statute has been made section 264; sections 2 and 7, 265; sections 3, 4, 5, and 12, 266; section 6, 267; section 8 and the latter part of section 9, 268; the first clause of section 9 and all of section 10, 269; section 11, 270; section 13, 271; section 14, 272; section 15, 273; sections 16 and 17, 274; section 19, 275; section 20, 276. It will be

PENAL CODE—Continued.

SECTION.

600.—*Continued.*
stands, leaves a large class of cases unprovided for. The word "ten," on the fourth line of subdivision 1, has been changed to "five," so that where the punishment for a first conviction would be six, seven, eight, nine, or ten years, some penalty shall attach; for a second conviction for an offense punishable, say by seven, or even ten years, entails no penalty. Judge Carroll Cook called the attention of the Commissioner to the error, and requested the amendment.

777. The amendment declares that the jurisdiction of any public offense not otherwise specially provided for is within the county where it was committed. Although this has always been understood to be the law, the Code seems to contain no express declaration upon the subject. The change consists in the addition, after the words "United States," of the words "and except as herein otherwise provided, the jurisdiction of any public offense is in the county wherein it is committed."

778a. The section is designed to provide for the punishment of persons who in this state do an act culminating in the commission of a crime in another state.

778b. The object of this section is to provide for the punishment of persons who, being out of the state, encourage the commission of crimes within this state, and are afterwards found within this state.

784. The change consists in the substitution of the word "eighteen" for "twenty-five," after "of"; in the substitution of the word "eighteen" for "sixteen," after "of"; and in the insertion of the word "brought" in place of "taken."

788. The change consists in the insertion of the words "or embezzling," after "stealing," and of the words "or embezzled," after the word "stolen."

840. The purpose of the amendment is to authorize an officer to arrest without a warrant at night-time for a misdemeanor committed in his presence. The change consists in the addition of the words "except when the offense is committed in the presence of the arresting officer."

872. The change consists in the substitution of the word "complaint" for "deposition," and in the omission of the words "and committed to the sheriff of the county of blank," at the end of the section.

882. The change consists in the insertion of the words "and such deposition may be used upon the trial of the defendant, except in cases of homicide, under the same condition as mentioned in section 1345," after the word "discharged."

907, 908, 909, 910. These sections purport to authorize the court, if an offense is committed during a term of court, but after the grand jury has been discharged, to summon another grand jury. There are now no "terms of court," and any necessity which may arise after one grand jury has been discharged can be met by the drawing of another.

915. The change consists in the omission of the words "either by presentment or," after "court." The change is made for the reason that grand juries no longer have authority to prefer presentments.

916. This section relates to and defines presentments by grand juries, and, as they no longer have authority to prefer a presentment, the section is superfluous and misleading.

919. The change consists in the omission of the words "for the purpose of either presentment or indictment," after "charge." The change is made because grand juries have no longer authority to prefer presentments.

923. The change consists in the substitution of the word "or," in place of "and," between "willful" and "corrupt."

925. The statute of 1871-2, page 510, authorizing the grand jury or district attorney to require the attendance of an interpreter, is omitted in the last sentence.

931, 932, 933, 934, 935, 936, 937. These sections compose Chapter IV of Title IV of Part II of the Penal Code. They relate solely to the proceedings after finding a presentment, and since the adoption of the Constitution of 1879 have been inoperative.

954. The amendment is designed to authorize an offense to be set forth under different counts, and to excuse the prosecution from electing between them. Justice Shaw of the Supreme Court strongly urges the change.

969. This is the section as it existed prior to its repeal in 1880. It is believed that no good reason for such repeal existed.

1004. The change consists in the insertion of the words "except as provided in section 1054," after "warden." The object of the amendment is to make this section conform to the proposed change in section 1054.

1008. The purpose of the amendment is to authorize, where a demurrer to an indictment is sustained, the resubmission of the charge to the grand jury which found the original indictment, if it has not been discharged. This amendment changes the rule announced in Terrill vs. Superior Court

APPENDIX B

STATUTES OF CALIFORNIA

PASSED AT THE

FORTY-FIRST SESSION OF THE LEGISLATURE

CHAPTER 1.

An act to provide for the government of irrigation districts having an area of more than five hundred thousand acres and to enable such irrigation districts to construct levees and to protect the lands within such districts from damage resulting from floods and the overflow of rivers and for that purpose to provide additional powers for boards of directors within such irrigation districts.

[Approved January 21, 1915. In effect immediately.]

The people of the State of California do enact as follows:

Power of board of directors.

SECTION 1. The board of directors of irrigation districts having an area of more than five hundred thousand acres may expend such sums as may to them seem necessary for the protection of the canal system of such district or of lands within such districts from damage by flood and from the overflow of rivers and may contribute funds for that purpose to be expended by or jointly with the government of the United States of America, or other governments or persons benefited by the same protective work or works. The board of directors of any such irrigation district may also do all things necessary to insure such irrigation system and the lands within such district from any such damage by flood or overflow without first receiving a petition of land owners or freeholders for holding an election to authorize such expenditure.

Borrowing money.

SEC. 2. When the issuance of bonds of any such district has been authorized by vote of the electors of such district, for the purpose of protection against floods but have not been sold, the board of directors thereof may borrow for such purpose, at the rate of interest not exceeding seven per cent per annum, the amount of such authorized bond issue, but when such bonds have been sold, the amount borrowed under the provisions of this section must be repaid.

Borrowing for flood protection.

SEC. 3. In addition to the powers conferred by the last section, the board of directors of any such district shall have power to borrow for flood protection purposes, in any one year not to exceed two hundred thousand dollars at a rate of interest not greater than seven per cent per annum.

dollars per annum and expenses, as supervisor and road commissioner not to exceed twenty cents per mile each way for traveling to and from his residence while engaged in the performance of the duties of supervision of public road as road commissioner, or other business of the county, said expenses not to exceed fifty dollars in any one month.

CHAPTER 451.

An act to repeal an act entitled "An act to regulate the erection of public buildings and structures," approved April 1, 1872.

[Approved May 22, 1915. In effect August 8, 1915.]

The people of the State of California do enact as follows:

Repealed. SECTION 1. An act entitled "An act to regulate the erection of public buildings and structures," approved April 1, 1872, is hereby repealed.

CHAPTER 452.

An act to amend section nine hundred fifty-four of the Penal Code of the State of California, relating to charging two or more different offenses in indictments and informations.

[Approved May 22, 1915. In effect August 8, 1915.]

The people of the State of California do enact as follows:

SECTION 1. Section nine hundred fifty-four of the Penal Code is hereby amended to read as follows:

Two or more offenses in one indictment. 954. The indictment or information may charge two or more different offenses connected together in their commission, or different statements of the same offense, or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more indictments or informations are filed in such cases the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the indictment or information, but the defendant may be convicted of any number of the offenses charged, and each offense upon which the defendant is convicted must be stated in the verdict; *provided*, that the court, in the interest of justice and for good cause shown, may, in its discretion, order that the different offenses or counts set forth in the indictment or information be tried separately, or divided into two or more groups and each of said groups tried separately.

STATUTES OF CALIFORNIA

PASSED AT THE

FORTY-SEVENTH SESSION OF THE LEGISLATURE

CHAPTER 1.

An act to amend section six hundred twenty-six of the Penal Code, relating to the protection of game.

[Approved by the Governor January 13, 1927. In effect immediately.]

The people of the State of California do enact as follows:

Stats. 1925, p. 680, amended.

SECTION 1. Section 626 of the Penal Code is hereby amended to read as follows:

Protection of waterfowl, rail, wood duck, wild pigeon, shore bird, crane, quail, rabbits, grouse and doves.

626. Every person who between the first day of February and the fifteenth day of October, both dates inclusive, of any year, hunts, pursues, takes, kills or destroys or has in his possession any kind of wild duck, or goose, or brant or mud-hen or gallinule, or Wilson snipe; or who, at any time hunts, pursues, takes, kills or destroys or has in his possession any rail, or wood duck or wild pigeon or any shore bird, except Wilson snipe, or any sandhill crane, whooping crane or little brown crane; or who, between the first day of January and the thirtieth day of November, of any year, both dates inclusive, hunts, pursues, takes, kills or destroys or has in his possession any mountain, desert or valley quail, or cottontail or brush rabbits; or who, between the fifteenth day of October and the fourteenth day of September, both dates inclusive, of the following year, hunts, pursues, takes, kills or destroys or has in his possession any grouse; or who, between the first day of October and the thirty-first day of August, both dates inclusive, of the following year, hunts, pursues, takes, kills or destroys or has in his possession, any dove is guilty of a misdemeanor; *provided*, that in fish and game districts four, four and one-half, and four and three-quarters every person who between the first day of November and the thirty-first day of August, of the year following, both dates inclusive, hunts, pursues, takes, kills or destroys or has in possession, any dove is guilty of a misdemeanor; or who, between the sixteenth day of August and the thirty-first day of July, both dates inclusive, of the following year, hunts, pursues, takes, kills or destroys or has in his possession, any sage hen, is guilty of a misdemeanor; *provided*, that in fish and game district one and one-half every person who, between the first day of January and the thirty-first day of October, both dates inclusive, of any year, hunts,

2. If an indictment, that it was found by a grand jury of the county in which the court was held, or if an information, that it was subscribed and presented to the court by the district attorney of the county in which the court was held.

3. That the defendant is named, or, if his name cannot be discovered, that he is described by a fictitious name, with a statement that his true name is to the jury or district attorney, as the case may be, unknown.

4. That the offense was committed at some place within the jurisdiction of the court, except where the act, though done without the local jurisdiction of the county, is triable therein.

5. That the offense was committed at some time prior to the time of the finding the indictment or filing of the information.

CHAPTER 611.

An act to amend sections nine hundred fifty-four and nine hundred fifty-six of the Penal Code, relating to pleadings and form of indictment, information, or complaint in criminal cases.

[Approved by the Governor May 18, 1927. In effect July 29, 1927.]

The people of the State of California do enact as follows:

Stats. 1915, p. 744, amended.

SECTION 1. Section 954 of the Penal Code is hereby amended to read as follows:

Two or more offenses in one indictment.

954. An indictment, information, or complaint may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more indictments or informations are filed in such cases the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the indictment or information, but the defendant may be convicted of any number of the offenses charged, and each offense upon which the defendant is convicted must be stated in the verdict; *provided*, that the court in the interest of justice and for good cause shown, may, in its discretion, order that the different offenses or counts set forth in the indictment or information be tried separately, or divided into two or more groups and each of said groups tried separately. A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count.

Original section amended.

SEC. 2. Section 956 of the Penal Code is hereby amended to read as follows:

Statement as to person injured.

956. When an offense involves the commission of, or an attempt to commit a private injury, and is described with sufficient certainty in other respects to identify the act, an

DECLARATION OF SERVICE

Re: ***People v. Roman F. Gonzalez***
Supreme Court Case Number S207830
Court of Appeal Case Number D059713

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

On September 17, 2013, I served the foregoing **Appellant's Answer Brief on the Merits**, including the attached appendices, on each of the parties listed below, by placing a true copy of it in a sealed addressed envelope with postage fully paid and depositing it with the U.S. Postal Service in Southport, North Carolina:

Ramon Fulgencia Gonzalez
P.O. Box 1438
Bonsall, California 92003

Appellate Defenders, Inc.
555 W. Beech Street, Suite 300
San Diego, CA 92101
(copy electronically served to:
eservice-criminal@adi-sandiego.com)

Attorney General's Office
P.O. Box 85266
San Diego, CA 92186-5266
(copy electronically served to:
ADIEService@doj.ca.gov)

Clerk of Court
San Diego County Superior Court
Main Courthouse, Fifth Floor
220 West Broadway
San Diego, California 92101

Clerk of Court
Court of Appeal
Fourth Appellate Dist., Div. One
750 B Street, Suite 300
San Diego, California 92101

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 17, 2013, at Southport, North Carolina.

Raymond M. DiGuiseppe
Declarant

Signature