In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent,

v.

REYNALDO JUNIOR EID & ALAOR DOCARMO OLIVEIRA,

Petitioners.

Case No. S211702

Fourth Appellate District, Division Three, Case No. G046129
Orange County Superior Court, Case No. 05HF2101
The Honorable M. MARC KELLY, Judge

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ISSUE PRESENTED

Under Penal Code section 1159, may a jury convict a defendant of two uncharged lesser included offenses arising out of a single charged offense, where the two lesser included offenses are not necessarily included in each other?

INTRODUCTION

After smuggling a mother and son into the United States, appellants Reynaldo Junior Eid and Alaor Docarmo Oliveira Jr. demanded $14,000 in exchange for their release. Appellants were charged with two counts each of kidnapping for ransom (Pen. Code,[1] § 209). A jury acquitted appellants of kidnapping for ransom on both counts, but found appellants guilty of the uncharged lesser included offenses of felony attempted extortion (§§ 664, subd. (a), & 518) and misdemeanor false imprisonment (§§ 236 & 237, subd. (a)) on each count.

The Fourth District Court of Appeal, Division Three reversed appellants' convictions for misdemeanor false imprisonment. It concluded that section 1159, which authorizes a jury to convict a defendant "of any offense, the commission of which is necessarily included in that with which he is charged ..." (§ 1159), permits a jury to find a defendant guilty of only one lesser included offense, even where the evidence supports convictions for multiple lesser included offenses and the offenses are not necessarily included in each other. (Slip Op. at pp. 10-12.) In doing so, the Court of Appeal created an arbitrary rule that not only contradicts the language of section 1159, but also produces a result demonstrably at odds with the intention of the Legislature. Moreover, the "one conviction per count" rule

[1] All subsequent statutory references are to the Penal Code, unless otherwise noted.

undermines the public policies that preserve the integrity of the judicial system.

Consistent with the language and legislative purpose of section 1159, a jury should be permitted to convict a defendant of multiple uncharged lesser included offenses arising out of a single charged offense, where those offenses are not necessarily included in each other. The statutory scheme supports this conclusion as sections 954 and 654 expressly permit multiple *convictions* arising out of a single act or course of conduct. Allowing multiple convictions to stand serves an important and legitimate function in criminal sentencing. Moreover, the existing limitations on lesser included offenses – i.e., the "necessarily included offense" tests, the common law multiple convictions bar, and section 654's prohibition against multiple punishment – adequately protect a defendant's constitutional rights. Accordingly, a broad interpretation of section 1159 not only comports with the Legislature's intent and existing statutory and case law authority; such a rule also constitutes sound judicial policy.

FACTUAL & PROCEDURAL BACKGROUND

In 2005, Jefferson Ribeiro[2] arranged for his wife Ana and their five-year-old son Iago to be smuggled from Brazil to Florida. (1 RT 204, 207, 211, 216-217.) After being smuggled across the California border from Mexico, Ana and Iago were delivered to appellants in Orange County. (2 RT 352-353, 372-373.) Appellants told Ana that if the police found her, they would take her son away. Ana stayed willingly with appellants in a hotel room for a couple of days. (1 RT 204; 2 RT 384.) The plan was for

[2] For ease of reference, members of the Ribeiro family will be referred to by their first names only.

appellants to transport Ana and Iago to Florida where Jefferson lived. (2 RT 362.) However, appellants failed to do so. (2 RT 230-232.)

Instead, appellants called Jefferson and demanded $14,000 for the release of his family. (2 RT 230-234.) When Jefferson told appellants he did not have the money, appellants threatened to take Ana to New York so she could work off her debt. (RT 3 RT 395.) Appellants also took Ana and Iago's passports from them. (3 RT 399-401.) Jefferson asked Ana if she could escape, but Ana was afraid and said there was "no way" she could leave. (2 RT 235.) After Jefferson determined the location of his family, he asked a friend in Orange County to pick them up from the hotel. (1 RT 239-241.) Jefferson's friend arrived at the hotel to pick up Ana and Iago. (2 RT 405-406.) When appellants refused to release them, Jefferson's friend called the police. (4 RT 664, 666-675, 693.) Thereafter, appellants forced Ana and Iago into their van, ordered them to lie down in the backseat, and attempted to flee. Before they could escape, the police arrived and arrested appellants. (2 RT 413-414; 4 RT 670, 763.)

Appellants were charged with two counts each of kidnapping for ransom (§ 209). (1 CT 31.) In the second trial,[3] before submitting the cause to the jury, appellants expressly agreed to instructions on the lesser included offenses of felony attempted extortion (§§ 664, subd. (a), & 518) and misdemeanor false imprisonment (§§ 236 & 237, subd. (a)), among others. (3 RT 608-609.) The jury acquitted appellants of kidnapping for ransom on both counts, but found appellants guilty of the lesser included offenses of felony attempted extortion and misdemeanor false imprisonment on each count. (1 CT 129-130, 265-266; 3 CT 631-642.) The

[3] After the first trial, a jury found appellants guilty of two counts of kidnapping for ransom, but those convictions were reversed following a finding of instructional error on the issue of consent. (*People v. Eid* (2010) 187 Cal.App.4th 859; *People v. Oliveira* (Aug. 19, 2010, G042004) [nonpub. opn.].)

trial court found that section 654[4] did not apply because the crimes were separate and independent from one another. (5 RT 1191-1192.) The court sentenced appellants to prison for an aggregate term of four years and six months based on consecutive terms of two years for attempted extortion in count 1, six months for attempted extortion in count 2, and one year for each false imprisonment count. (1 CT 132, 268.)

On appeal, appellants contended the jury was permitted under section 954 to return only one conviction per count in the pleading and that the court had to modify the judgment by striking one conviction per count. On May 22, 2013, the Fourth District Court of Appeal, Division Three, issued a published opinion agreeing with appellants and reversing their convictions for misdemeanor false imprisonment as a result. The Court of Appeal held that sections 1159 and 954 do not authorize a jury to convict on more than one uncharged lesser included offense upon acquitting a defendant of the greater charged offense, even though the jury found the defendants guilty beyond a reasonable doubt of both lesser included offenses, and even though those offenses were not lesser included offenses of each other. (Slip Op. at pp. 10-12.)

Respondent petitioned this Court for review. On September 18, 2013, this Court granted respondent's petition.

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[4] Section 654 states in pertinent part:

> (a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.

ARGUMENT

I. SECTION 1159 PERMITS A JURY TO CONVICT A DEFENDANT OF MULTIPLE UNCHARGED LESSER INCLUDED OFFENSES ARISING OUT OF A SINGLE CHARGED OFFENSE, WHERE THOSE OFFENSES ARE NOT NECESSARILY INCLUDED IN EACH OTHER

In interpreting a statute, well-accepted principles of statutory construction require a court of review to turn first to the language of the statute to determine the Legislature's intent. Here, the express language of section 1159 reveals that the Legislature intended to allow a jury to convict a defendant of multiple uncharged lesser included offenses. Both the statutory scheme and legislative history of section 1159 also support this conclusion. Additionally, no statutory or judicially-created limitation exists barring multiple convictions of uncharged lesser included offenses arising out of a single charged offense, where those offenses are not necessarily included in each other. In fact, the Legislature has expressed its preference for allowing multiple convictions by enacting section 954. Moreover, the defendant's constitutional rights are adequately protected by the existing limitations on lesser included offenses. This broad interpretation is consistent with the statute's legislative purpose and constitutes sound judicial policy. In allowing multiple convictions of uncharged lesser included offenses that are supported by the evidence, section 1159 preserves the integrity of the trial by upholding the jury's fact finding role and ensuring that a defendant is held accountable for each crime he has committed.

A. The Express Language of Section 1159 Reveals the Legislature's Intent to Permit Multiple Convictions of Uncharged Lesser Included Offenses

The principles governing statutory construction are well established. As this Court has observed, "The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law." (*People v. Pieters* (1991) 52 Cal.3d 894, 898 (*Pieters*).) In approaching this task, a court "must first look at the plain and common sense meaning of the statute because it is generally the most reliable indicator of legislative intent and purpose." (*People v. Cochran* (2002) 28 Cal.4th 396, 400 (*Cochran*).) If there is "no ambiguity or uncertainty in the language, the Legislature is presumed to have meant what it said," and it is not necessary "to resort to legislative history to determine the statute's true meaning." (*Id.* at pp. 400-401.) However, "'[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.' [Citation.]" (*Pieters*, *supra*, 52 Cal.3d at p. 899.)

In search for legislative intent, courts look to the objective to be attained, the nature of the subject matter and the contextual setting. Thus, statutes are not construed in isolation, but rather as a whole with reference to the system of which it is part. (*Pieters*, *supra*, 52 Cal.3d at p. 899.) As such, a court reviews the policy behind the statute, the legislative history, and concepts of reasonableness along with the language of the statute in order to determine the legislative intent. (See *People v. Murphy* (2001) 25 Cal.4th 136, 142 (*Murphy*).)

"[S]ection 1159 descends directly from a predecessor law adopted in the state's earliest days.[5] [Citation.]" (*People v. Birks* (1998) 19 Cal.4th 108, 126 (*Birks*).) It provides as follows:

> The jury, or the judge if a jury trial is waived, may find the defendant guilty of *any* offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense.

(§ 1159, emphasis added.) Looking first to the plain meaning of the text, section 1159, on its face, does not prohibit multiple convictions of uncharged lesser included offenses. "Any" is defined as "one or some, regardless of ... quantity" or "an indeterminate number."[6] If the plain, common sense meaning of a word is unambiguous, such as here, the plain meaning controls. (*Cochran, supra*, 28 Cal.4th at p. 400.)

Moreover, various courts, including this Court, have acknowledged the expansive meaning of "any." For instance, this Court recognized that "the word 'any' means *without limit* and no matter what kind." (*Delaney v.*

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[5] "The 1851 law provided in pertinent part: 'In all cases the defendant may be found guilty of any offence, the commission of which is necessarily included in that with which he is charged in the indictment....' (Stats. 1851, ch. 29, § 424, p. 258.)." (*Birks, supra*, 19 Cal.4th at p. 126, fn. 14.)

[6] "Any" is defined as:

> 1. *One or some, regardless of kind, quantity, or number* (take any book you want);
>
> 2a. One or another selected at random (any child would do the same);
>
> 2b. One or another without restriction or exception (will accept any suggestion offered);
>
> 3. The whole amount of, all (will turn over any profit to charity);
>
> 4. *An indeterminate number or amount* (is there any soda).

(American Heritage Dict. (2d college ed. 1982) p. 117, emphasis added.)

Superior Court (1990) 50 Cal.3d 785, 798, emphasis added.) Similarly, the Ninth Circuit Court of Appeals has explained that "[t]he term 'any' is generally used to indicate *lack of restrictions or limitations* on the term modified. [Citation.]" (*U.S. ex rel. Barajas v. United States* (9th Cir. 2001) 258 F.3d 1004, 1011, emphasis added.) Further, "any" has been distinguished from "a," which is limited to "one." (*Harward v. Com.* (1985) 229 Va. 363, 366.)

As with any question of statutory interpretation, the meaning of "any" must be considered in the context of the particular statute. For example, where the words "all" and "every" are used in other parts of the statute, it can be inferred that the Legislature meant something other than "all" when it used the word "any" in the same statute. (*People v. Fontaine* (1965) 237 Cal.App.2d 320, 331, cert. granted, judg. vacated *sub nom. Fontaine v. California* (1967) 386 U.S. 263 [87 S.Ct. 1036, 18 L.Ed.2d 45].) Because the words "all" or "every" do not appear in section 1159, the word "any" should be given its plain meaning – that is, an indeterminate number encompassing "all."

That "any" modifies "offense" in the singular does not suggest the Legislature intended to limit either word.

> Common usage in the English language does not scrupulously observe a difference between singular and plural word forms. This is especially true when speaking in the abstract, as in legislation prescribing a general rule for future application. In recognition of this, it is well established, by statute and by judicial decision, that legislative terms which are singular in form may apply to multiple subjects or objects.

(2A Singer & Singer, Sutherland Statutory Construction (7th ed. 2007) Statutes and Statutory Construction, § 47:34, p. 493.) The California Legislature codified this principle in section 7, which provides that in interpreting criminal statutes, "the singular number includes the plural, and the plural the singular." As this Court has recognized, "The rule of

construction enunciated in section 7 is no mere rubric – it is the law." (*People v. Jones* (1988) 46 Cal.3d 585, 593 (*Jones*).) So long as its application does not "lead to an interpretation that runs counter to both the legislative purpose of the statutory scheme and subsequent historical practice," section 7 should apply. (See *People v. Navarro* (2007) 40 Cal.4th 668, 680 (*Navarro*).)

Although "offense" is written in the singular, the statutory construction rule enunciated in section 7 applies to include the plural form of the word. Here, "any offense" must not be viewed in isolation, but rather, "'"'in context, keeping in mind the nature and obvious purpose of the statute...." [Citation.]'" (*Murphy, supra*, 25 Cal.4th at p. 142.) Applying section 7 to the word "offense" in section 1159 leads to an interpretation that is consistent with the legislative purpose of the statute. (Cf. *Navarro, supra*, 40 Cal.4th at p. 680 [applying section 7 would run counter to the legislative purpose of statutory scheme].)

Where the Legislature intends to create a limitation on the number of offenses of which a defendant may be convicted, it has included language in the statute expressly prohibiting such a result. For example, the Legislature has specified that a defendant may not be convicted of both stealing and receiving the same property. (§ 496, subd. (a) ["no person may be convicted both pursuant to this section and of the theft of the same property."].) "[I]t is section 496(a) itself that limits the jury's choice to a single conviction." (*People v. Ceja* (2010) 49 Cal.4th 1, 7 (*Ceja*).) Here, nothing in the language of section 518 (extortion) precludes a conviction under section 236 (false imprisonment), and vice versa. Instead, the only limitation on the number of convictions in section 1159 is the Legislature's use of the disjunctive "or," prohibiting convictions of both a lesser included

offense and an attempt to commit the greater offense.[7] Had the Legislature also intended to limit the number of convictions of lesser included offenses, it would have done so. "'Under the maxim of statutory construction, *expressio unius est exclusio alterius,* if exemptions are specified in a statute, [a court] may not imply additional exemptions unless there is a clear legislative intent to the contrary. [Citation.]' [Citation.]" (*People v. Oates* (2004) 32 Cal.4th 1048, 1057, emphasis in original (*Oates*) [Section 12022.53, subdivision (f) "shows that the Legislature specifically considered the issue of multiple enhancements and chose to limit the number imposed only 'for each crime,' not for each transaction or occurrence and not based on the number of qualifying injuries."].) Similarly here, because there is no evidence of a contrary legislative intent, this Court should not imply an additional exemption to section 1159.

Accordingly, neither the express nor implied language of section 1159 prohibits multiple convictions of uncharged lesser included offenses arising out of a single charged offense. To the contrary, the broad use of the word "any" suggests the Legislature intended to allow convictions for all such offenses.

B. The Legislative Purpose of Section 1159 Supports an Interpretation That Allows Multiple Convictions of Uncharged Lesser Included Offenses

Even assuming there exists some ambiguity in the phrase "any offense," the legislative purpose of section 1159 is clear. (*People v. Avery* (2002) 27 Cal.4th 49, 58 ["although true ambiguities are resolved in

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[7] Section 1159 states in relevant part, "The jury, ... may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, *or* of an attempt to commit the offense." (Emphasis added.)

a defendant's favor, an appellate court should not strain to interpret a penal statute in defendant's favor if it can fairly discern a contrary legislative intent"].) The principle that a defendant, charged with a greater offense, can be convicted of an uncharged lesser included offense, has been codified by rule or statute in many jurisdictions. In California, section 1159 abolished the All-or-Nothing Doctrine, which provided the jury with limited options – either conviction or acquittal of the charged crime. (Comment, *Justice Is Not All or Nothing: Preserving the Integrity of Criminal Trials Through the Statutory Abolition of the All-or-Nothing Doctrine* (2002) 73 U. Colo. L.Rev. 289, 316 (hereafter, Comment).) By enacting this statute, the Legislature sought to expand the jury's options by authorizing convictions of offenses necessarily included in the charged offense. Allowing the jury to consider all available charges upholds the integrity of a criminal trial by preserving the jury's role as the ultimate fact finder, thereby protecting a defendant's right to independent jury determination of the facts. (*Id.* at p. 320.) An interpretation of section 1159 that limits rather than expands the jury's fact finding authority would run counter to the legislative purpose of the statute.

Traditionally, under the All-or-Nothing Doctrine, the jury was forced to choose one verdict or the other, without the option of considering other factually plausible offenses – namely, necessarily included offenses. (Comment, *supra*, 73 U. Colo. L.Rev. at p. 290.) The Legislature enacted section 1159 to effectively expand the jury's power to convict by authorizing convictions of lesser included offenses. (§ 1159.) Because this statute provides alternatives to acquittal or conviction of the charged offense, the jury can more accurately determine the degree of a defendant's guilt, if any, with this additional option. (See *Beck v. Alabama* (1980) 447 U.S. 625, 633 [100 S.Ct. 2382, 65 L.Ed.2d 392] [lesser included

offense instruction "'affords the jury a less drastic alternative'" than acquittal-conviction dichotomy].)

"[I]n its current guise, section 1159 has been in effect since 1872 ... [and] has received only technical amendments in the intervening 126 years." (*Birks*, *supra*, 19 Cal.4th at pp. 125-126.) For over a century, section 1159 has been interpreted and applied without limiting the jury's authority to convict on necessarily included offenses that are supported by the evidence. (See *People v. Mendoza* (2000) 24 Cal.4th 130, 184 [To warrant an instruction on a lesser included offense, there must be substantial evidence of the lesser included offense, that is, evidence from which a rational trier of fact could find beyond a reasonable doubt that the defendant committed the lesser offense.].) As this Court has explained, permitting convictions on lesser included offenses serves to benefit all parties:

> [T]he historical development of the California rule for instructions on lesser necessarily included offenses is founded to a considerable extent on the rule's benefits and burdens to *both* parties, and its evenhanded application to each. We have consistently held that neither party need request such instructions, *and neither party can preclude them,* because *neither* party has a greater interest than the other in gambling on an inaccurate all-or-nothing verdict when the pleadings and evidence suggest a middle ground, and *neither* party's "strategy, ignorance, or mistake[]" should open the way to such a verdict. [Citations.]

(*Birks*, *supra*, 19 Cal.4th at p. 127, emphasis in original.) "Where the evidence warrants, the rule ensures that the jury will be exposed to the full range of verdict options which, by operation of law and with full notice to both parties, are presented in *the accusatory pleading itself* and are thus closely and openly connected to the case." (*Id.* at p. 119, emphasis in original.) Thus, mandating the inclusion of available lesser included offenses under section 1159 ensures the integrity of the trial and the

reliability of its outcome by avoiding wrongful convictions and reducing the risk of improper jury compromise. (See Hoffheimer, *The Future of Constitutionally Required Lesser Included Offenses* (2006) 67 U. Pitt. L.Rev. 585, 634 [discussing the necessity of lesser included offense instructions].)

The right to trial by jury is a fixture in our criminal justice system, and courts should not tie the hands of the jurors. A defendant has a "countervailing right to independent jury determination of the facts bearing on his guilt or innocence[.]" (*People v. Rodriguez* (1986) 42 Cal.3d 730, 766 (*Rodriguez*).) The importance in protecting this historic right is clear from our criminal jurisprudence. It is well established that a court "'may not invade the province of the jury as the exclusive trier of fact. [Citation.]'" (*Id.* at p. 772.) For example, this Court has declared that "[t]he trial court may not, in the guise of privileged comment, withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate fact finding power." (*Id.* at p. 766.)

"[T]he function of the jury is not only to protect the individual rights of the accused, but to secure community confidence in the judicial system." (*In re Murchison* (1955) 349 U.S. 133, 136 [75 S.Ct. 623, 99 L.Ed. 942].) It is clear that the Legislature enacted section 1159 to allow the jury to perform its duty in the fullest and fairest manner by affording more options than the simple choice between conviction or acquittal of the charged offense. As this Court has acknowledged, "the rule encourages a verdict, within the charge chosen by the prosecution, that is neither 'harsher [n]or more lenient than the evidence merits.'" (*Birks*, *supra*, 19 Cal.4th at p. 119, citing *People v. Wickersham* (1982) 32 Cal.3d 307, 324.) Thus, in order to effectuate the Legislature's intent, section 1159 must be interpreted broadly

as permitting convictions for multiple uncharged lesser included offenses arising out of a single charged offense.

C. The Statutory Scheme Supports Multiple Convictions of Uncharged Lesser Included Offenses and No Statutory or Judicially-Created Limitation Exists Barring This Result

No statutory or judicially-created limitation bars multiple convictions of uncharged lesser included offenses where those offenses are not necessarily included in each other. In fact, section 954 generally permits multiple convictions arising from a single act or course of conduct. The only existing limitation precludes convictions of both the greater offense and an offense necessarily included therein. Even section 654, which bars multiple punishment, does not bar multiple convictions. Moreover, because uncharged lesser included offenses provide the requisite notice, convictions for such offenses do not implicate a defendant's due process rights. Thus, the statutory scheme and judicial decisions on lesser included offenses support an interpretation of section 1159 that permits multiple convictions of uncharged lesser included offenses arising out of a single charged offense, so long as those offenses are not included in each other.

The Legislature has expressed its preference for multiple convictions through section 954, which sets forth the general rule that defendants may be charged with and convicted of multiple offenses. It provides in relevant part:

> An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, ... 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*[.]

(Emphasis added.) Notably, this was not always the case. In 1905, even though a prosecutor could charge multiple counts for a single act, section 954 prohibited the *conviction* of a defendant for more than one of the multiple counts. Instead, a defendant could only be "convicted of but *one* of the offenses charged." (Stats.1905, ch. 1024, § 1, emphasis added.) The 1915 amendment changed the language so that it stated, as it does now, that a defendant "may be convicted of *any* number of the offenses charged." (Stats.1915, ch. 452, § 1, emphasis added.)

As it now stands, 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.) In accordance with section 954, this Court has affirmed multiple convictions for a single act or indivisible course of conduct. (See, e.g., *People v. Wyatt* (2012) 55 Cal.4th 694, 704 [involuntary manslaughter and assault on a child resulting in death for the same act of killing a child]; *People v. Sanchez* (2001) 24 Cal.4th 983, 989-991 [murder and gross vehicular manslaughter]; *People v. Beamon* (1973) 8 Cal.3d 625, 639-640 [kidnapping for the purpose of robbery and robbery].)

Even section 654, which bars multiple *punishment*, does not bar multiple convictions. (*People v. Pearson* (1986) 42 Cal.3d 351, 359 (*Pearson*), overruled on other grounds in *People v. Fields* (1996) 13 Cal.4th 289, 308, fn. 6 (*Fields*).) Section 654, subdivision (a) provides:

> An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, *but in no case shall the act or omission be punished under more than one provision.* An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.

(Emphasis added.) The purpose of the statute is to ensure that a defendant's punishment will be commensurate with his culpability. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1211 (*Latimer*).) This Court has stated explicitly, "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." (*People v. Kramer* (2002) 29 Cal.4th 720, 722, emphasis added.) Thus, "'[w]hen section 954 permits multiple convictions, but section 654 prohibits multiple punishment, the trial court must stay execution of sentence on the convictions for which multiple punishment is prohibited. [Citations.]'" (*People v. Sloan* (2007) 42 Cal.4th 110, 116 (*Sloan*); *In re Wright* (1967) 65 Cal.2d 650, 656, fn. 4 [noting that the stay procedure, "reasonably reconciles the policies involved in applying section 654 to protect the rights of both the state and the defendant."].)

The only exception to section 954's general rule permitting multiple convictions prohibits multiple convictions based on necessarily included offenses. (*People v. Reed* (2006) 38 Cal.4th 1224, 1227 (*Reed*).) However, the multiple conviction bar applies only where a defendant is convicted of both the greater and lesser included offenses. (*Pearson*, *supra*, 42 Cal.3d at p. 355.) The purpose of this rule is to prevent a defendant from being convicted of the *same crime* twice. (*People v. Medina* (2007) 41 Cal.4th 685, 702 (*Medina*).) Otherwise, it is appropriate for a defendant to be held accountable for each crime he committed. (*Latimer*, *supra*, 5 Cal.4th at p. 1211.)

In accordance with this rule, juries are generally instructed that they cannot convict a defendant "of both a greater and lesser crime for the same conduct." (CALCRIM No. 3517 [Deliberations and Completion of Verdict Forms: For Use When Lesser Included Offenses and Greater Crimes Are

Not Separately Charged and the Jury Receives Guilty and Not Guilty Verdict Forms for Greater and Lesser Offenses].) CALCRIM No. 3517 specifically instructs the jury that it may not return a guilty verdict on a lesser included offense unless it has first found the defendant not guilty of the greater offense. (*Fields*, *supra*, 13 Cal.4th at pp. 310-311.) However, nothing in the language of CALCRIM No. 3517 prohibits multiple convictions of uncharged lesser included offenses, where the offenses are not necessarily included in each other.

"The definition of a lesser necessarily included offense is technical and relatively clear." (*Birks*, *supra*, 19 Cal.4th at p. 117.) "'Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser. [Citations.]'" (*Medina*, *supra*, 41 Cal.4th at p. 701.) However, a court only considers the statutory elements to determine whether multiple convictions of charged offenses are proper. In other words, "'only a statutorily lesser included offense is subject to the bar against multiple convictions in the same proceeding. An offense that may be a lesser included offense because of the specific nature of the accusatory pleading is not subject to the same bar.' [Citation.]" (*Reed*, *supra*, 38 Cal.4th at pp. 1229-1230.)

Here, attempted extortion and misdemeanor false imprisonment are statutorily lesser included offenses because the greater offense of kidnapping for ransom cannot be committed without also committing both lesser offenses. (CALCRIM No. 1202 [listing both offenses as lesser included offenses of kidnapping for ransom].) However, attempted extortion and misdemeanor false imprisonment are not lesser included offenses of each other. Each offense contains distinct elements and can

be committed without necessarily committing the other. As the Court of Appeal acknowledged, "[a]t most, the lesser included offenses are lesser *related* offenses of each other." (Slip Op. at p. 9, emphasis in original.) And, because appellants were not convicted of the greater offense of kidnapping for ransom, the multiple convictions bar would not prohibit the multiple convictions in this case. (*People v. Ortega* (1998) 19 Cal.4th 686, 693, overruled on another point in *Reed, supra*, 38 Cal.4th at p. 1228 [a defendant properly may be convicted of two offenses if neither offense is necessarily included in the other].)

Moreover, there are no due process concerns in convicting defendants of multiple uncharged lesser included offenses. Although the lesser included offense may not be charged explicitly, the jury may still consider and convict on a necessarily included offense without any Sixth Amendment "notice" concerns. (*Sloan, supra*, 42 Cal.4th at p. 116.) Due process requires that "a defendant received *notice* of the charges against him in order to have a reasonable opportunity to prepare and present his defense." (*People v. Bailey* (2012) 54 Cal.4th 740, 751, emphasis in original.) Numerous procedural devices, including the information and the preliminary examination, are sufficient to preserve a defendant's due process right to notice of the charges against him. (*People v. Jones* (1990) 51 Cal.3d 294, 317-318.) "As to a lesser included offense, the required notice is given when the specific language of the accusatory pleading adequately warns the defendant that the [prosecution] will seek to prove the elements of the lesser offense. Because a defendant is entitled to notice of the charges, it makes sense to look to the accusatory pleading (as well as the elements of the crimes) in deciding whether a defendant had adequate notice of an uncharged lesser offense so as to permit conviction of that uncharged offense." (*Reed, supra*, 38 Cal.4th at p. 1229.)

Here, the specific language of the accusatory pleading provided sufficient and fair notice of the lesser included offenses. (*Reed, supra*, 38 Cal.4th at p. 1229.) As the Court of Appeal acknowledged, "[t]he amended information sufficiently identified the kidnapping victims as Ana and her son and the extortion victim as 'another person.'" (Slip Op. at p. 13, fn. 3.) In addition, appellants agreed to instructions on attempted extortion and misdemeanor false imprisonment as lesser included offenses of each count of kidnapping for ransom. (5 RT 1106-1111.) As the requisite notice was provided, the jury was permitted to convict appellants of multiple uncharged lesser included offenses. "However, even when the charge does not so specify, the requisite notice is nonetheless afforded if the lesser offense is 'necessarily included' within the statutory definition of the charged offense; in such event conviction of the included offense is expressly authorized (§ 1159)." (*People v. Lohbauer* (1981) 29 Cal.3d 364, 369.) As previously discussed, attempted extortion and misdemeanor false imprisonment are necessarily included within the statutory definition of kidnapping for ransom. (CALCRIM No. 1202 [listing both offenses as lesser included offenses of kidnapping for ransom].) Thus, the due process notice requirement was satisfied to permit such convictions in this case.

Finally, multiple convictions serve an important and legitimate function in sentencing. Because we cannot know which convictions will survive appeal, allowing multiple convictions preserves each conviction in case it is needed at a later date. For instance, as this Court has explained:

> 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.

(*Sloan*, *supra*, 42 Cal.4th at p. 122; accord, *Oates*, *supra*, 32 Cal.4th at p. 1059 [allowing an enhancement to be imposed as to all of the offenses].) As discussed, under section 654, the trial court must stay execution of sentence as to those convictions where multiple punishment is prohibited. (See *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1128-1129 [The stay procedure "preserv[es] the possibility of imposition of the stayed portion should a reversal on appeal reduce the unstayed portion of the sentence."].) This legitimate future use of multiple convictions would be undermined by the "one conviction per count" rule created by the Court of Appeal in this case. Indeed, the importance of allowing multiple convictions is especially clear under the instant facts, where the trial court imposed punishment under both lesser offenses because appellants operated with separate objectives and intents. (5 RT 1191-1192.) Moreover, as the Court of Appeal acknowledged, the crimes involved separate victims. (Slip Op. at p.10.) By striking the misdemeanor false imprisonment convictions, Ana and Iago were no longer "victims" of false imprisonment, thereby losing their right to any victim restitution.[8]

In sum, there is no legal or policy reason to bar multiple convictions of uncharged lesser included offenses that are not necessarily included in each other. Indeed, allowing a jury to convict a defendant of two or more uncharged lesser included offenses is consistent with the statutory scheme

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[8] Article I, section 28(b) of the California Constitution gives victims of crimes the right to receive restitution. It provides in pertinent part:

> It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to restitution from the persons *convicted of the crimes* for losses they suffer.

(Emphasis added.)

and serves a legitimate purpose in ensuring that a defendant is held accountable for the crimes he actually committed.

D. The Federal Equivalent of Section 1159 Allows Multiple Convictions of Uncharged Lesser Included Offenses

This Court has acknowledged that Federal Rules of Criminal Procedure, rule 31(c), and section 1159 contain nearly identical terms. (*Birks*, *supra*, 19 Cal.4th at p. 124.) Rule 31(c) provides in pertinent part: "A defendant may be found guilty of ... an offense necessarily included in the offense charged[.]" In *United States v. Lacy* (3d Cir. 2006) 446 F.3d 448 (*Lacy*), the Third Circuit Court of Appeals addressed an issue almost identical to that in this case – that is, whether a defendant may be convicted of multiple uncharged lesser included offenses arising out of a single charged offense. (*Id.* at p. 449.) Because Rule 31(c) is essentially the federal equivalent of section 1159, *Lacy* provides helpful guidance in resolving the issue in the instant case.

In *Lacy*, the Third Circuit held that Rule 31(c) permitted multiple convictions of uncharged lesser included offenses for each charged offense. (*Lacy*, *supra*, 446 F.3d at p. 453.) There, the jury acquitted the defendant of the charged offense of possession with intent to distribute five or more grams of cocaine (21 U.S.C. § 841(a) & (b)), but convicted him of two lesser included offenses: simple possession of cocaine (21 U.S.C. § 844) and possession with intent to distribute an unspecified amount (21 U.S.C. § 841(a)(1)). (*Lacy*, *supra*, 446 F.3d at p. 450.) On appeal, the defendant claimed that because Rule 31(c) is phrased in the singular, it does not permit conviction for more than one lesser included offense for each offense charged. (*Lacy*, *supra*, 446 F.3d at pp. 451-452.)

In rejecting the defendant's argument, the Third Circuit cited multiple legal and policy reasons. First, Rule 31(c) was merely a restatement of the common law that permitted such multiple convictions:

> Specifically, the rule replaced the provision in the Act of June 1, 1872 that stated that "'in all criminal cases the defendant may be found guilty of *any* offence the commission of which is necessarily included in that with which he is charged in the indictment.'" [Citation.] The word "any" suggests that a defendant may be found guilty of several offenses other than that charged in the indictment, so long as all such offenses are "necessarily included" in the charged offense. Thus, the idea that a defendant may be convicted of multiple lesser included offenses arising out of a single charge in an indictment is rooted in the history of the rule; the change in the text from "any offence" to "an offense" does not appear to reflect a change in its meaning.

(*Lacy*, *supra*, 446 F.3d at p. 452, emphasis in original.) Second, the Third Circuit could not identify any principle that would prevent applying Rule 31(c) in this manner. The existing limitations on the application of this rule adequately protected the rights of defendants. The elements test ensures that defendants "have 'constitutionally sufficient notice' that they face conviction on all lesser included offenses." (*Lacy*, *supra*, 446 F.3d at p. 452.) Further, any potential prejudice to the defendant is neutralized by the common law rule barring conviction for both a greater and a lesser included offense. (*Ibid.*)

The analysis and holding in *Lacy* suggests the appropriate outcome in the instant case. As discussed, the word "any" in section 1159 suggests that a defendant may be convicted of several offenses other than that charged. (Section I.A., *ante*.) Similar to Rule 31(c), "the idea that a defendant may be convicted of multiple lesser included offenses arising out of a single charge" is rooted in the history of section 1159 and the common law. (Section I.B., *ante*.) Likewise, the existing limitations on lesser included offenses – i.e., the elements and accusatory pleading tests, the multiple

convictions bar, and section 654 – adequately protect a defendant's constitutional rights. (Section I.C., *ante*.) Thus, section 1159 should be interpreted like Rule 31(c) as permitting conviction for more than one lesser included offense for each offense charged, so long as the offenses are not necessarily included in each other. (*Lacy*, *supra*, 446 F.3d at p. 453.) Such an interpretation is consistent with the language and history of section 1159 and constitutes sound judicial policy.

E. The Court of Appeal's Decision in the Instant Case Is Erroneous

In concluding that section 1159 only permits one conviction per count, the Court of Appeal created an arbitrary limitation, where none existed before. This "one conviction per count" rule deprives a criminal defendant of his right to independent jury determination of the facts. It also frustrates the Legislature's intent to allow separate convictions for crimes that are merely related to one another. Moreover, application of this rule will produce arbitrary results leading to a miscarriage of justice. Finally, the Court of Appeal created this rule by erroneously extending this Court's narrow holding in *People v. Navarro*, a case involving a separate and distinct issue.

1. The "one conviction per count" rule frustrates the Legislature's intent to allow separate convictions for crimes not necessarily included in each other

As previously discussed, the jury, as the exclusive trier of fact, must hear all of the charges available, so that it can assign guilt as it sees fit. (Section I.B., *ante*.) Here, the jury was instructed on all available lesser included offenses and found appellants guilty of attempted extortion and misdemeanor false imprisonment beyond a reasonable doubt. (5 RT 1106-

1111, 1157-1162.) Because nothing in the language of sections 236, 518 or 1159 prohibits multiple convictions, the jury properly made these findings. (Cf. *Ceja*, *supra*, 49 Cal.4th at p. 3 [section 496, subdivision (a) prevents a jury from convicting a defendant of both stealing and receiving the same property].) By striking appellants' convictions for misdemeanor false imprisonment, the Court of Appeal impermissibly usurped the jury's ultimate fact finding power. As such, the limitation created by the Court of Appeal directly interferes with a defendant's right to an independent jury determination of the facts.

Further, the "one conviction per count" rule frustrates the legislative purpose behind each separate crime. Although attempted extortion and misdemeanor false imprisonment are necessarily included in kidnapping for ransom, they are only *related* offenses of each other. A related offense "merely bear[s] some conceptual and evidentiary 'relationship' thereto." (*Birks*, *supra*, 19 Cal.4th at p. 112.) While the purposes of related statutes may overlap and serve similar goals, the fact that the elements are not identical reflects that the purposes are not identical. (*People v. Scheidt* (1991) 231 Cal.App.3d 162, 170-171 (*Scheidt*) [because the elements were not identical, possession of a sawed-off shotgun (§ 12020, subd. (a)) and possession of a concealable firearm by a felon (§ 12021.1) are not necessarily included in each other, even though the language of the pleading specified that both counts involved the same shotgun].) In contrast, when the Legislature defines a crime containing elements that are entirely included within the definition of another crime, it intends to protect the same interests by both statutes and thus only one conviction is intended by the Legislature. "The same cannot be said where a defendant is convicted of two *related* crimes, neither of which includes all the statutory elements of the other." (*Scheidt*, *supra*, 231 Cal.App.3d at p. 171, emphasis in original.)

The Legislature has separately defined the two offenses of which appellants were convicted – extortion and false imprisonment. Section 518, which prohibits using force or fear to obtain property from another person, has a different objective than section 236, which prohibits intentionally confining another person without consent. As such, convictions of both attempted extortion and misdemeanor false imprisonment advance the differing legislative purposes behind each offense. "To immunize [appellants] from conviction of one or the other offense ... would be irrational and would frustrate the strong legislative purpose behind both statutes." (*Scheidt, supra*, 231 Cal.App.3d at p. 171.) Allowing both convictions to stand advances the differing legislative purpose behind each crime and ensures that a defendant would not escape liability in a case where a conviction is later overturned on appeal. (*Sloan, supra*, 42 Cal.4th at p. 122; accord, *Oates, supra*, 32 Cal.4th at p. 1059.)

2. Application of this rule will produce arbitrary results leading to a miscarriage of justice

The "one conviction per count" rule is arbitrary and will lead to arbitrary results. For instance, if the prosecution separately charged attempted extortion and misdemeanor false imprisonment, there would be no bar to separate convictions for each lesser included offense. (§ 954.) But where, as here, the prosecution reasonably relied on the well-established principles that pleading the greater offense subjects the defendant to the lesser, the prosecution, and the jury, lose convictions that are supported by the evidence and that conform with the facts as the jury found them. To avoid this result, the prosecution would be compelled to charge the necessarily included offenses separately. However, the prosecution is not obliged to charge every offense supported by the evidence; but instead "has broad discretion to base its charging decisions on

all the complex considerations pertinent to its law enforcement duties." (*Birks*, *supra*, 19 Cal.4th at p. 129.) Accordingly, this rule would undermine the longstanding principle affording the prosecution flexibility in its charging decisions. (*Id.* at p. 118.)

By reducing charging flexibility, the "one conviction per count" rule would place prosecutors in an untenable position. "[T]he prosecution chooses the charges on the basis of the information then available. Indeed, those charges must conform to the evidence adduced in pretrial probable cause proceedings (§ 739 [information after preliminary examination]; see §§ 889, 939.8 [indictment by grand jury]), at which a full defense is rarely presented." (*Birks*, *supra*, 19 Cal.4th at p. 129.) Generally, evidence supporting a lesser included offense comes to light only in the course of trial, when the complete defense is first revealed. This directly affects which lesser included offenses, if any, would be presented to the jury as alternative verdict options. (*Id.* at p. 118 [A defendant is only entitled to instructions "on a lesser offense necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser."].) The defendant is not entitled to have the jury consider lesser offenses when there is no evidence that the offense was less than that charged. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) Because the evidence adduced at trial may not support all or some of the lesser included offenses, separately charging each offense before trial may encourage a verdict more lenient than the evidence merits. Such an over-inclusive rule is neither just nor rational.

Furthermore, the defendant who is charged only with the greater offense is thereby shielded from the full extent of his criminal culpability, while the defendant whose prosecutor separately pleads the lesser included offenses does not enjoy the same benefit. As illustrated by the instant case, application of this rule results in an undeserved windfall for defendants

charged solely with the greater offense. Not only do defendants stand to receive a windfall in terms of the number and type of convictions they sustain, but also in terms of the actual punishment they receive. As previously noted, here, the trial court expressly and properly declined to apply section 654 because it found that misdemeanor false imprisonment and attempted extortion were independent from each other and involved separate objectives and intents. (5 RT 1191-1192.) Accordingly, the trial court imposed consecutive sentences for *each offense*, yielding an aggregate term of four years and six months for each appellant. (1 CT 132, 268.) The Court of Appeal's "one conviction per count" rule reduced appellants' sentences by two years, further denying effect to the jury's determination concerning each defendant's culpability.

The Court of Appeal's decision directly impacts criminal proceedings across the state. This issue is likely to arise where the greater offense subsumes various lesser included offenses that are related to each other in a non-hierarchical way. For instance, aggravated kidnapping (§§ 209, 209.5), carjacking (§ 215), or assault with intent to commit specified crimes (§ 220) include various other crimes that are not lesser included offenses of each other. In those instances, defendants who are charged separately with the lesser included offenses would similarly face the possibility of multiple convictions, whereas those defendants like appellants, who were only charged with the greater offense, will enjoy a much more favorable outcome. As such, the "one conviction per count" rule would allow defendants committing these serious and dangerous crimes to escape liability based solely on the charging decisions of the prosecutor. As a consequence, prosecutors would feel compelled to separately plead all conceivable lesser included offenses in order to preserve possible convictions. This in turn would require defendants to defend against, and juries to consider, lesser included offenses that may not,

in the end, be supported by the evidence at trial. Thus, the Court of Appeal's decision, if it is allowed to stand, would lead to cumbersome and inefficient criminal proceedings.

3. This Court's narrow holding in *People v. Navarro* is inapposite to the instant case

The Court of Appeal erroneously created a new limitation on section 1159 by wrongly extrapolating from this Court's decision in *People v. Navarro*, which addressed a reviewing court's ability under sections 1181, subdivision 6,[9] and 1260[10] to *modify* a jury verdict found defective. However, *Navarro* addressed a separate and distinct issue from that in the instant case. In *Navarro*, this Court reversed a judgment of an appellate court that, after finding insufficient evidence of the greater offense of attempted kidnapping during the commission of a carjacking,

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[9] Section 1181, subdivision 6 provides:

> When the verdict or finding is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict, finding or judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed[.]

[10] Section 1260 provides:

> The court may reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense or the punishment imposed, and may set aside, affirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances.

modified the judgment to reflect convictions for attempted carjacking and attempted kidnapping (lesser included offenses of the greater charge, but not of each other) since "both offenses were supported by substantial evidence at trial." (*Navarro, supra*, 40 Cal.4th at p. 675.)

This Court in *Navarro* explained that the purpose of sections 1181, subdivision 6, and 1260 was to provide courts with a mechanism for correcting the jury's error in fixing the degree of the crime – by replacing a single greater offense with a single lesser offense. (*Navarro, supra*, 40 Cal.4th at p. 679.)

> [T]he Legislature added section 1181, subdivision 6, for the purpose of overturning the result in [*People v. Nagy* (1926) 199 Cal. 235], in which the court acknowledged that it may be appropriate under some circumstances to modify a judgment to reflect a conviction of a *single* lesser included offense shown by the evidence, but concluded it lacked the authority to do so.

(*Navarro, supra*, 40 Cal.4th at p. 679.) This Court noted that the modification procedure of section 1181 "'marked a complete departure in our criminal jurisprudence,' which constituted a 'startling innovation in our procedure.'" (*Navarro, supra*, 40 Cal.4th at p. 680.) Furthermore, this Court observed that, historically, courts have uniformly interpreted and applied sections 1181, subdivision 6 and 1260 to permit "a one-for-one modification,"[11] which merely brought the jury's verdict in line with the evidence presented at trial. (*Navarro, supra*, 40 Cal.4th at p. 679.) As such, this Court in *Navarro* held that allowing modification of the judgment to reflect a conviction for two lesser included offenses because the

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[11] Section 1181, subdivision 6 was first construed in *People v. Kelley* (1929) 208 Cal. 387, 392. This Court explained that under this provision, a reviewing court may modify the judgment "and remand the cause to the trial court for the sole purpose of enabling that court to prescribe the proper penalty in punishment for *the* crime the appellate court finds to have been committed.' [Citation.]" (*Navarro, supra*, 40 Cal.4th at pp. 676-677, emphasis added.)

reviewing court found a jury's verdict on the greater offense lacked sufficient evidence was contrary to the statutes' purpose of serving a "corrective function." (*Id.* at p. 680.) This Court found that in modifying the judgment in the manner it did, the appellate court had further expanded the corrective statute "beyond the scope of its evident purpose." (*Ibid.*)

Necessarily underlying this Court's ruling in *Navarro* is the concern that a reviewing court may deny a defendant his constitutional right to a trial and intrude upon the role of the fact finder when it modifies, or corrects, a judgment. (See *Navarro*, *supra*, 40 Cal.4th at p. 773, citing *People v. Cowan* (1941) 44 Cal.App.2d 155, 162 [an appellate court may make a modification, "'not by finding or changing any fact, but by applying the established law to the existing facts as found by the jury.'"].) In these types of cases – where the jury never actually found the defendant guilty of the lesser included offenses, but only did so impliedly by finding all of the elements of the greater offense – courts have exercised restraint in order to maintain the integrity of the trial, the judgment, and the defendant's constitutional "right to independent jury determination of the facts bearing on his guilt or innocence[.]" (See *Rodriguez*, *supra*, 42 Cal.3d at p. 766.) But here, the jury actually determined appellants were guilty of the lesser included offenses of attempted extortion and misdemeanor false imprisonment beyond a reasonable doubt, so no similar concerns arise.

Ironically, by limiting appellants' verdicts to "one conviction per count," the Court of Appeal's decision effects the very intrusion it appears *Navarro* sought to prevent. It substitutes the reviewing court's

determination of guilt for that of the jury, not based on any error or lack of evidence,[12] but based on an arbitrary rule, without any legal justification.

The Court of Appeal also erroneously relied on another aspect of this Court's decision in *Navarro* – the determination that section 7, which provides that "the singular number includes the plural," should not be applied to permit multiple convictions. (Slip Op. at pp. 11-12.) In *Navarro*, this Court declined to apply section 7 because it "would lead to an interpretation that runs counter to both the legislative purpose of the statutory scheme and subsequent historical practice." (*Navarro*, *supra*, 40 Cal.4th at p. 680.) As discussed, section 1181, subdivision 6, was enacted "to solve the problem presented in *Nagy*, a case involving a *one-for-one* modification[.]" (*Navarro*, *supra*, 40 Cal.4th at p. 679, emphasis added.) Additionally, every case that applied these provisions had modified a greater offense to a *single* lesser offense. (*Ibid.*) "Further underscoring the purpose of the statutory scheme, both statutes repeatedly refer to '*the* crime' or '*the* offense' in the singular." (*Id.* at p. 680, emphasis added.)

However, section 1159 does not use the word "the." Instead, it uses the word "any," which has been consistently defined as an indeterminate number, not limited to one. (Section I.A., *ante*.) Also, unlike the provisions at issue in *Navarro*, applying section 7 to section 1159 would lead to an interpretation that is consistent with the legislative purpose of the statutory scheme. (Sections I.B. & C, *ante*.) Further, the Court of Appeal's conclusion completely overlooks this Court's basis for construing sections 1181, subdivision 6, and 1260 narrowly; namely, the fact that taking such corrective action was a "marked and complete departure in criminal jurisprudence." (*Navarro*, *supra*, 40 Cal.4th at p. 680.) No such

[12] Notably, the Court of Appeal did not find that there was insufficient evidence to support the attempted extortion and misdemeanor false imprisonment convictions.

considerations exist here. In fact, not permitting the jury's verdicts to stand – when they are supported by substantial evidence and do not violate any statutory or constitutional right – presents another marked and complete departure in criminal jurisprudence. Notably, the *Navarro* court never suggested that multiple convictions were impermissible under *all* circumstances, i.e., under section 1159. Instead, this Court explicitly stated that Navarro addressed a "narrow question" and limited its analysis to a reviewing court's ability to modify the judgment. (*Navarro*, *supra*, 40 Cal.4th at p. 675.) Although this Court held that a *reviewing court* is limited to a "one-for-one modification," it never addressed whether a *jury* is likewise limited to a "one conviction per count" verdict. As such, the narrow holding in Navarro should not be expanded to apply to section 1159, especially where doing so would frustrate the statute's legislative purpose.

CONCLUSION

An interpretation of section 1159 that permits multiple convictions of uncharged lesser included offenses, where those offenses are not necessarily included in each other effectuates the Legislature's intent and constitutes sound judicial policy. This result is also in accord with the rule allowing multiple convictions arising out of a single act, which serves a future legitimate purpose in sentencing. Further, a defendant's rights are adequately protected by existing limitations on lesser included offenses. Accordingly, and for the reasons stated above, respondent respectfully requests that this Court reverse the judgment of the Court of Appeal.

Dated: November 14, 2013

Respectfully submitted,

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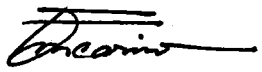

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF ON THE MERITS uses a 13-point Times New Roman font and contains 8,919 words.

Dated: November 14, 2013

KAMALA D. HARRIS
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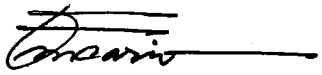

ELIZABETH M. CARINO
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *People v. Eid & Oliveira*
No.: **S211702**

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

On November 14, 2013, I served the attached **RESPONDENT'S BRIEF ON THE MERITS,** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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ORANGE CO SUPERIOR COURT
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SANTA ANA CA 92702-1994

HON TONY J RACKAUCKAS
DISTRICT ATTORNEY
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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 November 14, 2013, at San Diego, California.

STEPHEN MCGEE
Declarant

Signature

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