SUPREME COURT
FILED

JAN 16 2014

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Deputy

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

No. S211702

vs.

Orange County Superior Court # 05HF2101

COA No. G046129

REYNALDO JUNIOR EID, et al.,
Defendants and Appellants/

On Appeal From Judgment Of The Superior Court Of California

Orange County

Honorable M. Marc Kelly, Trial Judge

APPELLANT EID'S ANSWER BRIEF ON THE MERITS

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Supreme Court

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IN THE SUPREME COURT OF THE

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PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

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Orange County Superior Court # 05HF2101

COA No. G046129

REYNALDO JUNIOR EID, et al.,
Defendants and Appellants/

APPELLANT'S ANSWER BRIEF ON THE MERITS

ISSUE PRESENTED

Whether, under Penal Code sections 954[1] and 1159,[2] a court must strike a conviction for the less serious of two uncharged lesser included offenses where a defendant is convicted of these two lesser included offenses arising out of a single charged offense, but where the two lesser included offenses are not necessarily included in each other?

[1] Penal Code section 954 provides, in relevant part, that (1) a defendant may be charged in a single pleading with "two or more different offenses connected together in their commission"; (2) the prosecution need not elect between those offenses; and (3) "the defendant may be convicted of any number of the offenses charged ...."

[2] Penal Code section 1159 states: "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."

STATEMENT OF APPEALABILITY

This timely appeal is from a final judgment following a jury trial that finally disposes of all issues between the parties and is authorized by Penal Code section 1237.[3]

STATEMENT OF THE CASE

On March 5, 2008, the Orange County District Attorney filed an amended information, charging appellant, Reynaldo Junior Eid, and co-defendant, Alaor Docarmo Oliveira, Jr., with two counts of kidnapping for ransom for their role in handling two illegal aliens smuggled into the United States. (Pen. Code § 209(a).) (1-CT 31; Supp-CT 4-5.)

On March 19, 2008, the jury found Eid and Oliveira guilty of both counts. (1-CT 60-61, 194-195.)

On March 6, 2009, the court sentenced each defendant to concurrent terms of life in prison with the possibility of parole. (1-CT 69-70, 205-206.)

On August 19, 2010, the court of appeal reversed Eid's and Oliveira's convictions in a published decision. (*People v. Eid* (2010) 187 Cal.App.4th 859.)

On December 3, 2010, the trial court denied Eid's and Oliveira's motions to dismiss under section 1385. (1-CT 76.)

On November 1, 2011, Eid's and Oliveira's second jury trial began. (1-CT 87.)

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[3] All further statutory references are to the Penal Code unless otherwise indicated. For easier reading, Eid will not use the word "subdivision" or the abbreviation "subd." in statutory citations that include a reference to a subdivision.

On November 21, 2011, after about 10 hours of deliberations over three days, the jury found Eid and Oliveira guilty of both lesser included counts of attempted extortion (Pen. Code § 664(a)/518/520), and both lesser included misdemeanor counts of false imprisonment. (Pen. Code § 236/237(a)). (1-CT 124-130; 3-CT 631-642.)

On November 22, 2011, the court sentenced Eid and Oliveira under Penal Code section 1170(h) to the upper term of two years for attempted extortion, count 1, and a consecutive one-third the mid-term, or six months, for the second count of attempted extortion, and two consecutive one-year terms for misdemeanor false imprisonment, for a total of four years and six months. (1-CT 132.)

The court waived all fees in the interest of justice, and gave Eid six years of credit for actual days and six years of good conduct credit. (1-CT 133.) The court ordered Eid to pay restitution of $5020. (1-CT 133.) The court released Eid subject to an immigration hold. (1-CT 133.)

On November 28, 2011, Eid and Oliveira timely filed notices of appeal. (1-CT 133; 3-CT 652.)

On May 22, 2013, the Fourth Appellate District, Division Three, filed a published opinion, affirming the judgment of the superior court, but striking Eid's and Oliveira's convictions for misdemeanor false imprisonment because the jury had improperly convicted them of *two* uncharged lesser included offenses for each charge of kidnapping for ransom. (*People v. Eid* (2013) formerly at 216 Cal.App.4th 740, slip op. at 8-13.)

On September 18, 2013, this Court granted the state's petition for review.

STATEMENT OF THE FACTS

Eid believes that the state has adequately set out the prosecution case, and the court of appeal has adequately presented both the prosecution and defense cases, which details are tangential to the issue presented. (Respondent's Brief on the Merits [hereafter RB] at 2-3; slip op. at 2-8.)

ARGUMENT

I. THE COURT OF APPEAL CORRECTLY HELD THAT ONLY ONE LESSER INCLUDED CONVICTION PER COUNT IN THE PLEADING IS PERMISSIBLE UNDER SECTIONS 954 AND 1159, AND CORRECTLY MODIFIED THE JUDGMENT BY STRIKING TWO COUNTS OF MISDEMEANOR FALSE IMPRISONMENT

A. Introduction

The jury convicted Eid of two uncharged lesser included offenses (attempted extortion and misdemeanor false imprisonment) for each charge of kidnapping for ransom in the information. (1-CT 124-130; 3-CT 631-642.) The court of appeal correctly held that only one lesser included conviction per count in the pleading was permissible under sections 954 and 1159, and modified the judgment by striking the misdemeanors. (Slip op. at 8-12.)

The state argues at length that because attempted extortion and misdemeanor false imprisonment are not lesser included offenses of each other, the jury properly convicted Eid of both crimes for each count, and the court properly gave him consecutive sentences. (RB at 1-2, 5-32.) Eid believes that the court of appeal has the better of the argument. Eid also believes that counsel for Oliveira has persuasively explained how the legislative history and case law strongly supports the court of appeal's decision about the proper construction of sections 954 and 1159. (Oliveira's Answering Brief on the Merits (OAB) at 2-23; California Rules of Court, Rule 8.200(a)(5).) Therefore, Eid will focus on the state's other arguments that merit discussion.

The state is presumably more concerned about future prosecutions, however rare,[4] than about losing these two misdemeanor convictions and the one-year consecutive sentences, when both defendants have actually served six years, and the stricken misdemeanor convictions are virtually irrelevant in light of their felony convictions. (1-CT 132-133.)

"Despite the seemingly absolute language of section 954," courts have long recognized "an exception to the general rule permitting multiple convictions," when one offense is necessarily included in the other. (*People v. Ortega* (1998) 19 Cal.4th 686, 692.) For purposes of determining whether a charged crime is a lesser included offense of a separately charged greater offense, only the statutory elements test for a lesser included offense applies. (*People v. Reed* (2006) 38 Cal.4th 1224, 1229.)

The parties agree that attempted extortion is a lesser included offense of kidnapping for ransom. (RB at 17, 19; see *People v. Serrano* (1992) 11 Cal.App.4th 1672, 1677 ["Holding one for ransom is an attempt at a form of extortion, which is 'the obtaining of property from another, with his consent, or the obtaining of an official act of a public officer, induced by a wrongful use of force or fear, or under color of official right.'"].)

The parties also agree that false imprisonment is a lesser included offense of kidnapping for ransom. (RB at 17, 19; *People v. Eid* (2010) 187 Cal.App.4th 859, 870-871 & fn. 9; 876, fn. 13; *People v. Chacon* (1995) 37 Cal.App.4th 52, 65 [false imprisonment is a lesser-included offenses of kidnapping for ransom]; see also *People v. Magana* (1991) 230 Cal.App.3d 1117, 1120-1121.)

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[4] As the court of appeal remarked: "Presumably the issue does not arise very often." (Slip op. at 10.)

The parties also do not dispute the court of appeals' conclusion that "[a]t most, the lesser included offenses are lesser *related* offenses of each other." (RB at 17-18; slip op. at 9.) "A lesser *related* offense is *not* "necessarily included in the stated charge, but merely bear[s] some conceptual and evidentiary 'relationship' thereto." (Slip op. at 9, citing *People v. Birks* (1998) 19 Cal.4th 108, 112.)

The state recognizes that this unusual circumstance of striking one of two lesser included offenses can be avoided in the future if the prosecutor separately charges all but one of the lesser included offenses that are not lesser included offenses of each other. (RB at 25-26.) There is nothing "arbitrary" about requiring the prosecution to plead the number of convictions it is seeking. (RB at 25.) Thus, in a case like Eid's, where the prosecutor has possibly overreached by charging kidnapping for ransom, and realizes that convictions for both attempted extortion and misdemeanor false imprisonment are a possibility, and actually cares about a possible misdemeanor conviction when the charged crime carries a life sentence, then the prosecutor can charge all but one of the lesser included offenses that are not lesser included offenses of each other.

The state acknowledges that this is one of the consequences of the court of appeals' ruling, but complains that "in order to preserve possible convictions" it "compels prosecutors to separately plead, defendants to defend against, and juries to consider, all conceivable lesser included offenses unnecessarily." (RB at 27-28.) Not so. There is no compulsion for the prosecutors to do anything, as many prosecutors will not care about all conceivable lesser included offenses, including misdemeanors, that are not lesser included offenses of each other. In contrast, it is necessary to provide defendants adequate notice of the *number* of their

possible convictions. (Slip op. at 12.) As the court of appeal in this case explained:

> An information tells a defendant what kinds of offenses he is charged with (usually by reference to a statute violated), and it states the number of offenses (convictions) that can result from the prosecution.'" (*People v. Butte* (2004) 117 Cal.App.4th 956, 959, quoting from Justice Sims's concurring opinion in *People v. Gordon* (1985) 165 Cal.App.3d 839, 870, parts of which were quoted with approval by this Court in *People v. Jones* (1990) 51 Cal.3d 294, 317.) Section 954 is not a blanket authorization allowing the number of convictions to exceed the number of charges. (Slip op. at 12.)

Thus, this "problem" can be easily remedied by the prosecutor charging lesser included offenses in those unusual situations where there is more than one which are not lesser included offenses of each other. The state's proposed remedy for this "problem" is to try to distinguish the holding and reasoning of this Court's decision in *People v. Navarro* (2007) 40 Cal.4th 668, 674-675 (*Navarro*). (RB at 28-32.) Eid disagrees and urges this Court to apply *Navarro* to these facts. If the court of appeal's reasonable statutory construction of sections 954 and 1159 -- in light of *Navarro* -- is such a big problem, it is a "problem" the Legislature can fix.

B. Standard of Review

An appellate court independently determines whether multiple convictions are proper under section 954. (*People v. Villegas* (2012) 205 Cal.App.4th 642, 646.)

C. The Court Of Appeal Correctly Held That Only One Lesser Included Conviction Per Count In The Pleading Was Permissible Under Sections 954 And 1159

The court of appeal explained:

> Under sections 954 and 654, "[i]n general, a person may be convicted of, although not punished for, more than

> one crime arising out of the same act or course of conduct." (*People v. Reed* (2006) 38 Cal.4th 1224, 1226-1227 (*Reed*).) By its terms, section 954 permits the People to "charge two or more different offenses connected together in their commission . . . *under separate counts*," and specifies "the defendant may be convicted of any number of the offenses *charged*." (*Ibid.*, italics added.) (Slip op. at 8.)

The state agrees, noting that 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." (RB at 15, citing *People v. Ryan* (2006) 138 Cal.App.4th 360, 368.)

In contrast to section 954's general rule permitting multiple convictions of charged crimes, a defendant may be convicted of an uncharged crime only if it is a lesser included offense of a charged crime. (*People v. Reed, supra*, 38 Cal.4th at 1227; *People v. Pearson* (1986) 42 Cal.3d 351, 355 ["a defendant may not be convicted of both a greater and lesser included offense"].) The rule limiting convictions of uncharged crimes to lesser included offenses of charged crimes satisfies the due process requirement that an accused be given adequate notice of the charges so as to have a reasonable opportunity to prepare and present a defense. (*People v. Reed, supra*, 38 Cal.4th at 1227.) The "'specific language of the accusatory pleading adequately warns the defendant that the People will seek to prove the elements of the lesser offense,'" even though the lesser offense has not been separately charged. (*Id.* at 1229.)

The state argues, and Eid agrees, that "[a]llowing 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." (RB at

11, 10-14.) The court of appeal's rule, however, does nothing to limit the jury's consideration of all available charges or to undermine "the integrity of a criminal trial." The court of appeal simply struck the less serious lesser-included offense of the charged offense.

The state also complains about the "undeserved windfall for defendants charged solely with the greater offense." (RB at 26-27.) Nonsense. Prosecutors always have the discretion to decide on "the number and type" of charges to bring. If the prosecution is so worried about the possibility of a defendant escaping conviction of two misdemeanors in a prosecution with charges carrying a life sentence, or any prison sentence, then the prosecutor can charge one of the lesser included offenses that is related to another lesser included offense. And, as stated before, Eid did not receive a windfall: he served six years actual time on a sentence of four years and eight months. (1-CT 132.)

D. Under *Navarro,* Neither A Court Nor A Jury May Convict On More Than One Lesser Included Offense Per Charge In The Pleading

The state fails in its attempt to distinguish the holding and reasoning of this Court's decision in *Navarro*. (RB at 28-32.) The court of appeal persuasively explained why *Navarro* compelled its holding:

> *Navarro* interpreted two statutes: (1) section 1260, which empowers an appellate court to modify a judgment or reduce the degree of an offense; and (2) section 1181, subdivision (6), which permits a court (including appellate courts) to modify a judgment (in lieu of ordering a new trial) when a defendant has been convicted of a crime but the evidence supports guilt of only a lesser degree of the crime or a lesser included offense. (*Navarro*, at p. 671). *Navarro* reversed the Court of Appeal's modification of judgment pursuant to the foregoing statutes, which modification had replaced the defendant's *single* conviction for attempted kidnapping during carjacking with

> *two* lesser included offense convictions for attempted carjacking and attempted simple kidnapping. (*Id.* at p. 674.) Our Supreme Court explained that sections 1181 and 1260 "do *not* authorize an appellate court to modify a judgment to reflect convictions for *two* lesser included offenses upon finding insufficient evidence of a *single* greater offense, and the Court of Appeal's two-for-one modification of the judgment . . . was improper." (*Navarro*, at pp. 680-681, italics added.)
>
> *Navarro* observed that, historically, courts have uniformly interpreted and applied sections 1181 and 1260 to permit replacement of "a single greater offense with a single lesser offense," or, in other words, "a one-for-one modification." (*People v. Navarro*, *supra,* 40 Cal.4th at 679.) In this respect, this Court noted that "both statutes repeatedly refer to 'the crime' or 'the offense' in the singular." (*Id.* at 680.) (Slip op. at 10-11.)

The state contends that "any offense," unambiguously means "any offenses." (RB at 7-10.) Not so. If the statute intended to mean the plural, it would have been simple to use the plural: "any offenses." The word "any" refers to the *kind* of lesser included offenses, not the *number* of lesser included offenses for each charged offense that the court or jury can find. As the court of appeal further explained: "Section 954 specifies that a "defendant may be convicted of any number of the offenses *charged*." (*Ibid.*) Taken literally, this language permits one conviction per charge." (Slip op. at 11.)

The state, however, urges this Court to rely on the Penal Code's general provision (§ 7) that "the singular number includes the plural, and the plural the singular." (RB at 31-32.) The court of appeal, however, correctly relied on *Navarro*, which considered section 7 "to be a slim reed upon which to support the Court of Appeal's unprecedented action" in modifying one greater offense to reflect convictions for two lesser offenses. (Slip op. at 11, citing *People v. Navarro*, *supra,* 40 Cal.4th at

680.) *Navarro* noted that, when section 1181, subdivision 6 was enacted to permit one-for-one modification, the statute was considered to be "'a complete departure in our criminal jurisprudence'" and "a 'startling innovation.'" (*People v. Navarro, supra,* 40 Cal.4th at 676, 680). The court of appeal correctly interpreted *Navarro*:

> "There is little doubt that modifying one greater offense to reflect convictions for two lesser offenses would have been an even greater 'departure in our criminal jurisprudence' and an even more 'startling innovation.' As we have stated, 'it should not "be presumed that the Legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication."'" (Slip op. at 11, citing *People v. Navarro, supra,* 40 Cal.4th at 680 [citation omitted].)

Applying *Navarro's* reasoning, section 1159, which authorizes conviction of a lesser included crime, permits a fact finder to find a defendant guilty of "any offense . . . necessarily included" in a charged crime, using the word "offense" in the singular. (Slip op. at 11, citing *People v. Navarro, supra,* 40 Cal.4th at 680.)

The court of appeal was correct to follow *Navarro*, and "decline to interpret sections 954 and 1159 so broadly as to establish an arguably unexpected innovation in criminal jurisprudence:"

> Under *Navarro, supra*, 40 Cal.4th 668, if the court, in ruling on a new trial motion, concludes the evidence is insufficient to sustain the jury's conviction on the greater charged offense, it may not impose a conviction on more than one lesser included offense. It would be anomalous to allow a jury to do what the judge may not, i.e., to conclude that the evidence does not sustain a conviction on the greater offense, but then to convict on more than one lesser included offense. (Slip op. at 12.)

The state argues that because "the jury actually determined appellants were guilty of the lesser included offenses of attempted extortion and misdemeanor false imprisonment beyond a reasonable doubt," the jury verdicts should not be limited to a "one conviction per count," allegedly because it "would frustrate the statute's legislative purpose." (RB at 30, 32.) Eid disagrees. The state repeatedly uses this phrase about "frustrating" the "legislative purpose," which begs the question about what that "legislative purpose" is. The state cites no legislative history that suggests that sections 954 and 1159 permit conviction of two lesser-included offenses arising out of one charged offense. No California court or the California Legislature has considered this rather unusual issue. (See slip op. at 10.) And as Oliveira persuasively argues, the legislative history and case law strongly supports the court of appeal's decision. (OAB at 2-23.)

E. The State's Other Concerns Do Not Undercut The Court Of Appeal's Ruling That Neither A Court Nor A Jury May Convict On More Than One Lesser Included Offense Per Charge In The Pleading

The state relies on *People v. Scheidt* (1991) 231 Cal.App.3d 162, 170-171, for the proposition that the reason for not permitting convictions for a charged offense and an offense that is necessarily included in the other is not applicable "where a defendant is convicted of two related crimes, neither of which includes all the statutory elements of the other." (RB at 24-25.) True, but the facts of *Scheidt* support Eid's argument that it matters whether lesser related offenses are actually charged in the information.

In *Scheidt*, the prosecutor had charged both possession of a sawed-off shotgun (section 12020, subdivision (a)) and being a felon in

possession of a concealable firearm (section 12021.1), but specified that Scheidt possessed the same sawed-off shotgun. (*People v. Scheidt, supra,* 231 Cal.App.3d at 165.) The court in *Scheidt* unremarkably held that if Scheidt had been charged with violations of sections 12020, subdivision (a) and 12021.1, in the exact language of the respective statutes, he could have been convicted of both lesser related crimes. (*People v. Scheidt, supra,* 231 Cal.App.3d at 170-171.) Thus, the court rejected Scheidt's argument that the count II pleading, which specified the firearm as the same shotgun, should "immunize him from conviction of one or the other offense," because it "would be irrational and would frustrate the strong legislative purpose behind both statutes." (*Ibid.*)

Similarly, if the prosecutor had charged Eid with one of the lesser included offenses, which was lesser related to the other possible lesser included offense, Eid could have been convicted of both lesser included offenses after the jury had rejected the primary charge. Unlike *Scheidt*, the information in Eid's case charged only the greater crime of kidnapping for ransom, and did not charge either of the two lesser included offenses, which were related to each other. *Scheidt* did not consider or rule on the issue presented in Eid's case about the proper interpretation of sections 954 and 1159 in light of *Navarro.*

With respect to notice, the state mentions that "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." (RB at 19.) Eid is not complaining about notice of both lesser included charges or that the jury considered both lesser included charges. Eid is simply

arguing that he was entitled to notice about the *number* of convictions he was facing, and that two uncharged lesser included convictions arising from a single charged crime was not statutorily authorized.

The state imagines that the court of appeal's application of *Navarro* disallows the jury from considering "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." (RB at 12, 10-14, citing *People v. Birks* (1998) 19 Cal.4th 108, 119 [emphasis in original].) Not true. The court of appeal's holding simply precludes conviction of two lesser-included offenses arising out of one charged offense. Both lesser-included offenses can go to the jury, as before. But, just as the law prohibits convictions for both a greater offense and a necessarily included offense, the law should prohibit more than one conviction per charged offense. (*People v. Medina* (2007) 41 Cal.4th 685, 702; *People v. Fields* (1996) 13 Cal.4th 289, 306.)

The state also complains that "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." (RB at 19-20.) The state reiterates this concern, stating that "[a]llowing both convictions to stand ... ensures that a defendant would not escape liability in a case where a conviction is later overturned on appeal." (RB at 25.)

This concern is also illusory. There is no prejudice to the state if a court strikes the conviction, because if the more serious offense is reversed on appeal, the lesser included offense may be revived by operation of law. (*People v. Medina* (2007) 41 Cal.4th 685, 702, citing §

1260; see *People v. Kelly* (1992) 1 Cal.4th 495, 528 [prosecutor has option to retry greater offense or accept reduction to lesser included offense]; *People v. Edwards* (1985) 39 Cal.3d 107, 118 [same].) Similarly, if the more serious of the lesser-included offenses is reversed on appeal, there is no reason that the stricken lesser included offense would not be revived by operation of law.

The state makes the rather desperate claim that 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." (RB at 20.) Even after striking the misdemeanor false imprisonment convictions, Ana and Iago were clearly victims of the attempted extortion. Eid demanded payment of $14,000 from Ana's husband, Jefferson, to send Ana and his son Iago to Florida. (1-RT 230-231; 2-RT 389-390.) Eid and Oliveira told Ana that if Jefferson failed to pay, they would take her to New York so she could work for them to pay off the debt. (2-RT 395.) As the object of the attempted extortion, they were direct victims. (Slip op. at 10, citing *People v. Eid* (2010) 187 Cal.App.4th 859, 868 [kidnapping for ransom involves a primary victim (who is kidnapped) and a secondary victim (who is subjected to a ransom or extortion demand); see *People v. Martinez* (1984) 150 Cal.App.3d 579, 602 [the victim's successful resistance to the defendant's attempt to gain control of her as a hostage prevented the crime of kidnaping for extortion, but not other crimes].)

In any event, Ana and Iago would be entitled to restitution for their personal losses.

> "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. [¶] Restitution shall be ordered from the convicted persons *in every case*, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss, unless compelling and extraordinary reasons exist to the contrary.' (Cal. Const., art. I, § 28, subd. (b).)., italics added.) *People v. Soria* (2010) 48 Cal.4th 58, 65, fn. 7.)

In keeping with the "unequivocal intention," set out in Article I, section 28 of the California Constitution, that victim restitution be made, statutory provisions implementing the constitutional directive have been broadly and liberally construed. (*People v. Lyon* (1996) 49 Cal.App.4th 1521, 1525; *In re Johnny M.* (2002) 100 Cal.App.4th 1128, 1132; Cal. Const., art. I, § 28, subd. (b).).)

As this Court pointed out in *People v. Giordano* (2007) 42 Cal.4th 644, 656-657:

> A "victim" is defined to include "[t]he immediate surviving family of the actual victim" and "[a]ny person who has sustained economic loss as the result of a crime and who . . . [¶] [a]t the time of the crime was the parent, grandparent, sibling, spouse, child, or grandchild of the victim." (Pen. Code, § 1202.4, subd. (k)(1), (3)(A).) A "victim" also may be "[a]ny person who is eligible to receive assistance from the Restitution Fund." (*Id.*, subd. (k)(4).) Persons who are eligible to receive assistance from the Restitution Fund, include "derivative victims" (Gov. Code, § 13955, subd. (a)(2)), who are defined as "individual[s] who sustain[] pecuniary loss as a result of injury or death to a victim." (*Id.*, subd. (c).) (*People v. Giordano*, *supra,* 42 Cal.4th at 656-657.) ...

In short, there is no reason to interpret sections 954 and 1159 as the state urges because Ana and Iago, the wife and son of the direct victim of the attempted extortion, and victims themselves, were entitled to restitution even after the court struck the misdemeanor convictions relating to their false imprisonment.

F. One Federal Appellate Case Does Not Trump *Navarro*

The state relies on one federal case holding that an analogous federal rule, Federal Rule of Criminal Procedure 31(c),[5] permits conviction for more than one lesser included offense arising out of a single charged offense. (RB at 21-23, citing *United States v. Lacy* (3d Cir. 2006) 446 F. 3d 448, 451-453.) The *Lacy* court explained:

> Lacy argues that, because the rule is phrased in the singular, it prohibits conviction on more than one lesser included offense for each offense charged. If Congress and the Supreme Court had intended to allow multiple convictions for lesser included offenses under the rule, he contends, they would have said that a defendant may be found guilty of "offenses," not "an offense," "necessarily included in the offense charged."
>
> We disagree that the rule is so limited, for several reasons. First, the advisory committee notes to Rule 31(c) indicate that the rule "is a restatement of existing law." 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.'" *Schmuck v. United States*, 489 U.S. 705, 719, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989) (quoting Act of June 1, 1872, ch. 255, § 9, 17 Stat. 198) (emphasis added). 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.
>
> Second, Lacy has not advanced, and we cannot fathom, any principle that would prevent us from applying

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[5] Federal Rule of Criminal Procedure 31(c) [hereafter Rule 31(c)] provides: "A defendant may be found guilty of . . . an offense necessarily included in the offense charged."

> the rule according to this tradition. We are satisfied that defendants' rights are adequately protected by existing limitations on the application of the rule. ...
>
> Third, a finding that Rule 31(c) supports only a single lesser included offense conviction would require us, in cases where more than one lesser included offense satisfies the *Schmuck* elements test, to develop some mechanism for selecting which offense should be charged. Lacy has not explained what criteria should guide this choice, and, because this issue has not been addressed in the case law, we would be arbitrarily creating such a test. We think the sounder practice is to conclude, consistent with the history of Rule 31(c), that all lesser included offenses that satisfy the test established by the Supreme Court may be charged simultaneously, and may support separate convictions, as long as the various lesser included offenses relate to different conduct, *i.e.,* are not lesser included offenses of one another. (*United States v. Lacy, supra,* 446 F. 3d at 451-453.)

Aside from the fact that federal appellate court cases are not binding on California state courts (see *People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3), the primary difference between Rule 31(c) and sections 954 and 1159 is the reasoning of *People v. Navarro, supra,* 40 Cal.4th at 680. Moreover, in California, there would be no need "to develop some mechanism for selecting which offense should be charged," and no need to "arbitrarily" create "criteria" to "guide this choice," issues which worried the *Lacy* court. (*United States v. Lacy, supra,* 446 F. 3d at 452-453.) Eid concedes that the state can choose to charge whatever lesser included offenses it wants and have the jury consider all lesser included charges; it simply cannot obtain a conviction for more than one uncharged lesser included offense for each charged offense. As the court of appeal correctly held: "Section 954 is not a blanket authorization allowing the number of convictions to exceed the number of charges." (Slip op. at 12.)

If the prosecutor wants the option of obtaining more than one conviction per charge in those unusual cases where there are more than one lesser included offenses which are not lesser included of each other, the prosecutor simply has to charge one of them, giving the defendant notice of the number of convictions he is facing.

G. Assuming There Was Error, The State Does Not Dispute That It Was Prejudicial Because Eid Suffered Four Convictions Based On An Information Containing Only Two Counts

The state does not dispute that -- assuming the correctness of the court of appeal's ruling -- the error was prejudicial because Eid "suffered four convictions based on an information containing only two counts." (Slip op. at 12, citing *People v. Powell* (2013) 214 Cal.App.4th 106, 109 ["error was prejudicial because it allowed the jury to convict Powell of an offense of which he had no reasonable notice"].)

H. Assuming There Was Error, The State Does Not Dispute That The Court Of Appeal Properly Struck Eid's Misdemeanor False Imprisonment Convictions Because Attempted Extortion Carries A Longer Prison Term Than Misdemeanor False Imprisonment

The state does not dispute that -- assuming error—the court of appeal correctly struck Eid's misdemeanor false imprisonment convictions, because attempted extortion carries a longer prison term than misdemeanor false imprisonment. There was no need for a remand because the trial court had sentenced Eid to the high term for attempted extortion.

In *Navarro*, this Court instructed the court of appeal to strike the attempted kidnapping conviction, explaining: "[W]here there are multiple lesser included offenses supported by the evidence at trial, a court

exercising its discretion to modify the judgment pursuant to these provisions should choose the offense with the longest prescribed prison term so as to effectuate the fact finder's apparent intent to convict the defendant of the most serious offense possible." (*People v. Navarro, supra*, 40 Cal.4th at 681; see also *People v. Medina* (2007) 41 Cal.4th 685, 701-702 [rejecting People's request that "the rule against multiple convictions based on necessarily included offenses" be modified "to permit courts to stay, instead of strike, convictions for lesser included offenses"].)

II. PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.200(a)(5), EID JOINS IN THE ANSWERING BRIEF OF HIS CO-APPELLANT

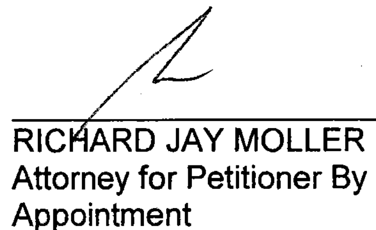
Eid hereby joins in the arguments raised in the answering brief of his co-appellant, Oliveira. (See California Rules of Court, Rule 8.200(a)(5) ["a party may join in or adopt by reference all or part of a brief in the same or a related appeal"].)

CONCLUSION

Eid respectfully requests that this Court affirm the judgment of the court of appeal.

Dated: January 9, 2014

Respectfully submitted,



RICHARD JAY MOLLER
Attorney for Petitioner By Appointment

PROOF OF SERVICE and WORD COUNT CERTIFICATION

I, RICHARD JAY MOLLER, declare that I am, and was at the time of the service hereinafter mentioned, at least 18 years of age and not a party to the above-entitled action. My business address is P.O. Box 1669, Redway, CA 95560-1669. I served the foregoing APPELLANT EID'S ANSWER BRIEF ON THE MERITS on January 13, 2014, by depositing copies in the United States mail at Honolulu, Hawaii, with postage prepaid thereon, and addressed as follows:

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I declare under penalty of perjury under the laws of California that the foregoing is true and correct and that according to Microsoft Word the word count on this brief is 5706 words and that this declaration was executed on January 13, 2014, at Honolulu, Hawaii.

RICHARD JAY MOLLER