IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. ALAOR DOCARMO OLIVEIRA Defendant and Appellant.	No. S211702

APPELLANT OLIVEIRA'S ANSWER BRIEF ON THE MERITS

Fourth District, Division Three, No. G046129
Orange County Superior Court No. 05HF2101
Honorable M. Marc Kelly, Judge

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STATEMENT OF THE CASE

An amended Information was filed, charging Mr. Oliveira and Mr. Eid with two counts of kidnapping for ransom. (Pen. Code, §209, subd. (a).)[1] (1 Supp. CT 4-5.)

At the first trial, the jury returned guilty verdicts on both counts as to each defendant. (1 CT 60-61, 194-195.) The trial court imposed concurrent terms of life imprisonment with the possibility of parole. (1 CT 68-70, 205-205.) But the court of appeal reversed the convictions. (2 CT 313-340.)

Upon retrial, the jury acquitted both defendants of the greater crime of kidnapping for ransom in counts 1 and 2, but returned guilty verdicts on the lesser included offenses of felony attempted extortion and misdemeanor false imprisonment on each count. (3 CT 631-642; 5 RT 1157-1162.)

The trial court imposed an aggregate term of 4 years 6 months imprisonment based on consecutive terms of 2 years imprisonment for the attempted extortion on count 1, 6 months imprisonment on the attempted extortion on count 2, and 1 year imprisonment on each false imprisonment count. (5 RT 1191.)

Appellant timely filed a notice of appeal. (2 RT 658.) On appeal, appellant argued, *inter alia*, that his convictions for two lesser included

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[1]All further references will be to the Penal Code, unless otherwise noted.

uncharged offenses based on a single charged crime were not authorized.

In a published decision filed on May 22, 2013, and originally reported at *People v. Eid* (2013) 216 Cal.App.4th 740, Division Three of the Court of Appeal for the Fourth Appellate District agreed, and vacated appellants' convictions for misdemeanor false imprisonment.

On July 2, 2013, the Attorney General filed a petition for review. On September 18, 2013, this Court granted the petition.

STATEMENT OF FACTS

Where the issues before this Court relate solely to the interpretation of statutory provisions, the facts underlying the convictions are not germane. Accordingly, the summary of the case provided in the Court of Appeal's opinion provides an adequate factual background. (Slip. Op. at pp. 2-7.)

ARGUMENT

I.
Consistent with the Text and Historical Application of Section 1159, as Well as Sound Judicial Policy, the Court of Appeal Correctly Ruled That a Defendant May Not Sustain More Than One Uncharged Included Conviction for a Single Charged Crime

"It is ancient doctrine of both the common law and of our [Federal] Constitution that a defendant cannot be held to answer a charge not contained in the indictment brought against him." (*Schmuck v. United States* (1989) 489 U.S. 705, 717 [109 S. Ct. 1443; 103 L. Ed. 2d 734].) Nevertheless, "[a]t common law the jury was permitted to find the defendant

guilty of any lesser offense necessarily included in the offense charged." (*Beck v. Alabama* (1980) 447 U.S. 625, 633 [100 S. Ct. 2382; 65 L. Ed. 2d 392].)

From its earliest days as a state, California embraced this exception and provided by statute that a defendant could sustain a conviction for any uncharged offense that was necessarily included in the offense charged. (See *People v. Birks* (1998) 19 Cal.4th 108, 126, citing Stats. 1851, ch. 29, § 424, p. 258.) As the Court of Appeal observed, "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 p. 11.) "[I]n its current guise, section 1159 has been in effect since 1872 . . . . and has received only technical amendments in the intervening [142] years." (*Birks,* 19 Cal.4th at p. 126.)

Although the statute expressly authorizes a conviction for an uncharged lesser included offense, neither its text nor historical application suggests that it permits a defendant to sustain multiple convictions for uncharged included offenses based on a single charged crime. Rather, in authorizing a jury to convict a defendant for "any offense . . . necessarily included" in the charged crime, section 1159 allows a conviction on any *one* of the lesser uncharged offenses embraced by the charged greater offense.

Such interpretation is neither arbitrary nor at odds with the purpose of the statute. Thus, as the Court of Appeal properly held, appellants could not sustain four convictions for two charged counts, and two convictions must be vacated.

A. The plain, commonsense meaning of section 1159 permits one uncharged conviction for each charged crime

In asserting that the phrase "any offense . . . necessarily included" must be construed as only equivalent to "all included offenses," respondent ignores the most common usage and widely understood meaning of such language. (Respondent's Brief on the Merits "RBOM" 7-8.) In general, the word "any" may be "used as an adjective qualifying a noun, or as a pronoun standing in place of a noun." (Bergan Evans, Cornelia Evans, A Dict. of Contemporary American Usage (1957) p. 36.) It may be singular or plural, depending on the context. (See *ibid.*)

Although, as respondent asserts, "any" can denote "all" or "every" or "an indeterminate number" (RBOM 7-8), it also is defined as:

- "one" (Webster's English Language Desk Reference (2nd ed. 2005) p. 430; Random House Webster's English Language Desk Reference (1997) p. 394);
- "one out of many" (1 Bouvier's Law Dict. (1914) p. 205);
- "one, no matter which" (Chambers Concise Dict. (2nd ed. 2009) p. 51; Webster's New World College Dict. (4th ed. 2007) p. 64; 1 Webster's New World Dict. of the American Language (1951) p. 65; The Penguin Dict. Of American English Usage And Style (2000) p. 20);

- "one or another selected at random" (American Heritage Dict. (2nd college ed. 1976) p. 117);

- "a" or "an" or "any one" (Funk & Wagnell's New Standard Dict. Of the English Language (1963) p. 127).

And when "any" modifies a singular noun, either "one" or "one out "many" is the most common meaning. *People v. Fontaine* (1965) 237 Cal.App.2d 320,[2] a decision cited by respondent (RBOM 8), is illustrative. In that case, the defendant challenged the admission of tape recorded conversations between he and an informant. (See *id.* at pp. 328-329.) He argued, *inter alia,* that the secret recordings by the authorities violated section 653j, which set forth a criminal penalty for "[e]very person . . .who, intentionally and without the consent of *any party* to a confidential communication, by means of any . . . recording device, eavesdrops upon or records a confidential communication[.]" (*Id.* at p. 329, fn. 7, quoting §653j, emphasis added.) According to defendant, the plain meaning of "without the consent of any party" indicated that the statute prohibited eavesdropping without the consent of both parties to the conversation. (See *ibid.*)

After holding that section 653j was not otherwise applicable, the Court of Appeal for the First Appellate District observed that "any party to a confidential communication" under that statute could not be interpreted, as

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[2]Cert. granted, judg. vacated *sub nom. Fontaine v. California* (1967) 386 U.S. 263 [87 S.Ct. 1036, 18 L.Ed.2d 45].)

defendant argued, to be equivalent to "every party" or "all parties." (*People v. Fontaine, supra,* 237 Cal.App.2d at p. 331.) As the court noted, where the original draft of the legislation read "all parties," "the change to 'any party' must necessarily indicate that one party's consent will suffice." (*Ibid.*) In addition, given that the terms "all" and "every" appeared in other parts of the statute, a reviewing court:

> must infer that the Legislature meant something other than 'all' when it used the word 'any' in subdivision (a) of section 653j; obviously it meant 'one,' this being the most common meaning of the word 'any' and the meaning which is appropriate in the particular context of this statute.

(*Ibid.*, citing Webster's Third New Internat. Dict.)

In so observing, *People v. Fontaine, supra,* did not suggest that the lack of "every" or "all" in a statute compels, as respondent contends, an inference that "any" must mean "all." (RBOM 8.) While the presence of "all" and "any" in a statute suggests that "any" must mean one, the converse cannot be inferred simply because a single sentence statute such as section 1159 is phrased entirely in the singular. Rather, the prevalence of "every" and "all" in other parts of the Penal Code and the modification of "all [plural noun] to "any [singular noun]" in a provision such as 653j, suggests that the Legislature generally does not view those terms as equivalent.

Indeed, the phrase "any offense or offenses" appears in other provisions of the Penal Code, suggesting not only that the Legislature

recognizes a distinction between "any offense" and "any offenses," but also that it intends the former to denote only one. (See former § 667.11, subd. (g) [providing that a life sentence would be imposed on the defendant "once for any offense or offenses" under specified circumstances; § 739 [permitting the district attorney to allege "any offense or offenses" in an Information; §2933.5 (a)(1) [mandating custody credit ineligibility for qualifying defendants who have previously sustained at least two convictions and served two separate prison terms for "any offense or offenses" listed in the statute].)

Such usage is not limited to modern statutes; in 1880, the Legislature amended the Penal Code to include former section 809, which established that a district attorney could prosecute "any offense or offenses" in an Information. (Amdts 1880 ch 47 § 12.) In former section 809, and its subsequent iteration in section 739, "any offense" clearly refers to one out of many available offenses, while the plural "any offenses" refers to multiple offenses. And in 1880 and again in 1951, when section 739 replaced former section 809 (Stats 1951 ch 1674 § 6), the Legislature amended section 1159; although some words were added or deleted, "any offense" remained unchanged. (Amdts 1880 ch 47 § 83 [deleted "in the indictment" after "he is charged"; Stats 1951 ch 1674 § 111 [added ", or the judge if a jury is waived," after "The jury"].)

In short, consistent with its grammatical structure, "any offense" means one, and should be accorded its plain meaning in the context of section 1159.

B. In light of the Legislature's recognition that "any offense" is not equivalent to "any offenses" and the reference in section 1159 only to "any offense" in the singular, respondent's reliance on section 7 is unavailing

Although section 7 provides that "the singular number includes the plural and the plural the singular" (§ 7), it also cautions that "[w]ords and phrases must be construed according to the context and the approved usage of the language[.]" (§ 7, subd. 16.) In addition, all provisions of the Penal Code "are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice." (§ 4.) Thus, this court has declined to apply section 7 where holding that the singular includes the plural "would lead to an interpretation that runs counter to the legislative purpose of the statutory scheme and subsequent historical practice." (*People v. Navarro* (2007) 40 Cal.4th 668, 680 [notwithstanding section 7, sections 1181 and 1260 did not authorize a reviewing court, upon finding evidence insufficient to support greater charged crime, to modify judgment to reflect two uncharged lesser included offenses].)

Given the grammatical structure and historical application of section 1159, it is inappropriate to apply section 7 to read "any offense" to mean "all

offenses." As the Court of Appeal recognized, no published California case has held that a defendant may sustain two uncharged lesser included offenses for a single greater charged crime. (Slip Op. at p. 10.) And respondent has not cited any California precedent that has applied section 1159 in the context of two uncharged lesser offenses per greater charged offense.

To the contrary, since its inception, section 1159 has been uniformly applied in the context of a one for one modification. (See, e.g., *Ex parte Donahue* (1884) 65 Cal. 474, 475 [assault with a deadly weapon necessarily includes the offense of assault; "[a]nd a person accused of the greater offense may be convicted of the lesser"]; *People v. Ah Lung* (1905) 2 Cal.App.278, 279 [defendant charged with rape properly convicted of uncharged included offense of attempted rape]; *People v. Wetzel* (1908) 9 Cal.App. 223 ["The jury [properly] returned a verdict finding the defendant guilty of petit larceny under an information charging him with grand larceny"]; *People v. Duncan* (1945) 72 Cal.App.2d 423, 426 ["Thus when the evidence warrants, a defendant charged with robbery may be found guilty either of simple assault or assault with a deadly weapon. A defendant on trial for robbery is entitled to have the jury instructed that it may find him guilty of either of these lesser offenses which may be included within the charge of robbery"; defendants charged with assault with intent to commit

robbery properly sustained conviction for included offense of assault with a deadly weapon].)

That all prior authority under section 1159 has applied the statute to justify a single lesser included conviction of a greater crime further underscores that "any offense" always has been understood to mean one out of many. (Cf. *People v. Navarro, supra*, 40 Cal.4th at p. 679 [noting that every case that had applied section 1181 and 1260 had involved a reviewing court substituting a single greater offense with a single lesser offense; "these cases constitute an acknowledgment of the long-standing historical understanding" of the corrective purpose of those statutes and militated against a determination that the two for one modification adopted by the Court of Appeal was appropriate].)

And some courts have implicitly recognized that a defendant may sustain only one conviction per count. For example, in *People v. Escobar* (1996) 45 Cal.App.4th 477, the jury found a defendant guilty both of the charged offense of grand theft of an automobile and the lesser related offense of receiving stolen property. But the parties and the reviewing court agreed that the conviction for the uncharged lesser related offense should be stricken because the jury returned two guilty verdicts for a single count. (*Escobar, supra,* 45 Cal.App.4th at p. 483, fn. 2.) Likewise, in *People v. Wissenfeld* (1951) 36 Cal.2d 758, the reviewing court noted that where the

jury returned two guilty verdicts for one count, the trial court committed no misconduct in properly instructing the jury that it could not return convictions on both, and to clarify which offense it had chosen. (*Id.* at p. 766.)

As such cases indicate, it is generally assumed that a defendant may sustain no more than one conviction per charge. Indeed, in paraphrasing section 1159, reviewing courts have described "any offense" as "a" uncharged offense or "the" uncharged offense. (See *People v. Sloan* (2007) 42 Cal.4th 110, 116 [recognizing that determining whether an offense is included in another commonly arises in "deciding whether a defendant charged with one crime may be convicted of *a* lesser uncharged crime," and that under section 1159, "[a] defendant may be convicted of an uncharged crime if, but only if, *the* uncharged crime is necessarily included in the charged crime", emphasis added]; see also *People v. Spreckels* (1954) 125 Cal.App.2d 502, 512-513 [in enacting section 1159, Legislature provided that "a jury or court might find a defendant guilty of *a* lesser offense necessarily included in the offense charged"] emphasis added.) In other words, California courts have not generally distinguished "any" from "a" in the context of section 1159.

Furthermore, although a jury's conviction of a greater offense necessarily implies that it also found a defendant guilty of all necessarily

included offenses, this court has held that a reviewing court may not substitute two uncharged lesser included offenses where it finds the evidence insufficient to support a single greater charged crime. (See *People v. Navarro, supra,* 40 Cal.4th at p. 680 [court of appeal erred in modifying judgment to reflect convictions for attempted carjacking and attempted kidnapping after determining that evidence was insufficient to support greater kidnaping for carjacking crime].) As the Court of Appeal observed, "[i]t 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 p. 12.)

In short, this Court should decline to apply section 7 to interpret section 1159 "so broadly as to establish an arguably unexpected innovation in criminal jurisprudence." (Slip. Op. at p. 12.)

C. The Legislature has never manifested an intent to expand the historical application of the included offense exception to permit a defendant to sustain multiple uncharged convictions for a single charged crime

When the Legislature intends to alter the application of a common law rule, it has done so explicitly. For example, the common law rule against dual convictions for receiving stolen property and theft "evolved from the premise that a 'thief cannot receive from himself.'" (*People v. Ceja* (2010)

49 Cal.4th 1, 6, quoting *People v. Stewart* (1986) 185 Cal.App.3d 197, 204.) In short, it was "founded on the notion that it is logically impossible for a thief who has stolen an item of property to buy or receive that property for himself." (*Id.* at pp. 4-5.) "By this logic, commission of the theft excludes the possibility of a receiving conviction." (*Id.* at p. 6.)

But application of the common law rule varied; some courts applied it narrowly "to prohibit only convictions of the two offenses" while others read it "sometimes more broadly, to preclude a conviction of receiving stolen property when there was *evidence* implicating the defendant in the theft." (*People v. Ceja, supra*, 49 Cal.4th at p. 5, emphasis in original.) In 1992, the Legislature amended the definition of stolen property to provide that "'no person may be convicted both pursuant to this section and of the theft of the same property.'" (*Id.* at pp. 4-5, quoting §496, subd. (a).) This amendment "effectively abrogated the broad form of the common law rule, and adopted the narrow form barring only dual convictions." (*Id.* at p. 5.) In short, the express prohibition under section 496 reflected legislative intent to ensure narrow application of the common law rule. (See *ibid.*)

Under these circumstances, where the limitation existed at common law and the amendment narrowed its application, it cannot be read more broadly, as respondent contends, to support an inference that "[w]here 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." (RBOM 9.) Neither the common law rule or its codification under section 496 was based on any considerations related to lesser included offenses. (See *People v. Ceja, supra*, 49 Cal.4th at p. 6.) That a thief may not logically receive the property that he has stolen does not illuminate whether a defendant may sustain multiple convictions for every uncharged offense included in a single greater crime.

Rather, the amendment to section 496 is relevant to the instant case only to the extent that it suggests that when the Legislature intends to clarify any uncertainty in the application of a common law rule, it has done so expressly. As noted *ante*, section 1159 has remained virtually unchanged since its enactment in 1872. The statute was amended only twice, and neither modification altered "any offense" to "any offense or offenses." Under these circumstances, it cannot be inferred that the Legislature has departed from the common meaning and historical understanding of "any" as denoting one out of many.

D. Section 1159 cannot be read to preclude conviction of a lesser included offense only where a defendant sustains a conviction for attempting to commit the greater offense; where such purported exemption cannot be inferred from the statute, the statutory maxim *expressio unius exclusio alterius* remains inapplicable

In providing that a defendant may be found 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" section 1159 permits a defendant to sustain a conviction for an uncharged attempt to commit the greater offense only where such attempt is necessarily included in the greater charge. (See *People v. Bailey* (2012) 54 Cal.4th 740 [where attempted escape is not a necessarily included crime of a completed escape, reviewing court correctly held that it could not substitute a conviction for the former after finding evidence insufficient to support the latter].)

As this Court has observed, although the disjunctive language of section 1159 "appears to support the claim a trial court may reduce a defendant's conviction to an uncharged attempt if supported by the evidence[,]" it nevertheless cannot be construed as deeming all attempted offenses as necessarily included in the greater charged offense. (*People v. Bailey, supra,* 54 Cal.4th at p. 752.) Rather, consistent with other precedent interpreting that statute, such language must be read to permit a defendant to sustain a conviction for "an uncharged crime if, but only if, the uncharged crime is necessarily included in the charged crime." (*Ibid.*, quotations and citations omitted.)

If the disjunctive "or" cannot be read to distinguish an attempt as a distinct and independent category of a permissible uncharged offense, nor may it reasonably be interpreted to imply a limited prohibition involving only a lesser included offense and an attempt to commit the greater offense.

(RBOM 9-10.) Respondent cites no authority for reading "or" in section 1159 as carving out a distinction between an uncharged attempted offense and an included offense. Its interpretation is neither sensible nor in accord with any precedent. (Cf. *People v. Daniels* (1971)71 Cal.2d 1119, 1130 ["All laws should receive a sensible construction."].)

Where a specific exemption related to attempted offenses is not articulated under section 1159, the Court of Appeal's construction of "any offense" as limited to one uncharged offense does not implicate this Court's recognition that "'if exemptions are specified in a statute [a court] may not imply additional exemptions unless there is a clear legislative intent to the contrary." (RBOM 10, quoting *People v. Oates* (2004) 32 Cal.4th 1048, 1057.)

E. Even assuming that the plain terms of section 1159 also may reasonably support respondent's interpretation, the rule of lenity compels the contrary construction adopted by the court of appeal

If the phrase "any offense" is truly susceptible of two interpretations, including the one set forth by respondent, the rule of lenity nevertheless compels the conclusion that section 1159 only permits the jury to convict a defendant of any *one* uncharged offense that is necessarily included in the charged crime. As this Court has recognized, "[t]he defendant is entitled to the benefit of every reasonable doubt, whether it arise out of a question of fact, or as to the true interpretation of words or the construction of language

used in a statute." (*In re Tartar* (1959) 52 Cal.2d 250, 257.) Thus, "[w]here the statute is susceptible of two reasonable constructions . . . a defendant is ordinarily entitled to that construction most favorable to him. " (*Bowland v. Municipal Court* (1976) 18 Cal.3d 479, 487–488.) In short, any ambiguity in section 1159 must be resolved in favor of appellants.

F. A one conviction per count rule is consistent with California's overall statutory scheme and protects a defendant's right to notice of the number of convictions he may sustain

As the Court of Appeal recognized, to interpret section 1159 to permit multiple uncharged convictions would contravene section 954, which permits a prosecutor to "'charge two or more different offenses connected together in their commission . . . under *'separate counts*' and specifies that a 'defendant may be convicted of any number of the offenses *charged*." (Slip. Op. at p. 8, emphasis in original, quoting § 954.) "Taken literally, this language permits one conviction per charge." (Slip. Op. at p. 11.)

That sections 954 and 1159 permit a defendant to sustain multiple lesser included convictions for a greater crime only where such offenses are charged, is not inconsistent with the purpose or history of either provision. Like section 1159, section 954 was first enacted in 1872 as part of the Penal Code. From its inception until 1905, section 954 only authorized a prosecutor to allege one offense per charging document. (See, e.g., *People v. Cooper* (1879) 53 Cal. 647, 649 [holding that trial court should have

sustained demurrer to the indictment on the ground that it charged more than one offense].) Thus, in the 18th and early 19th century, a defendant in California could effectively sustain only one conviction per Indictment or Information. (See, e.g., *People v. Alibez* (1875) 49 Cal. 452 [reversing murder conviction where indictment charged defendant with the murder of three people, thereby alleging three offenses contrary to section 954].)

Although the statute was amended in 1905 to permit a prosecutor to allege multiple offenses arising from the same transaction in separate counts, it nevertheless prohibited joinder of offenses that occurred at "different and distinct times and places" and explicitly provided that a defendant could only "be convicted of but one of the offenses charged." (Stats 1905, ch. 574, §1.) If section 954 only authorized one conviction per charging document for several decades after its inception, "any offense . . . necessarily included" within the meaning of section 1159 could not have been understood to permit more than one conviction for an uncharged lesser offense, regardless of the number of included offenses embraced by the greater crime.

Indeed, an appellate court in 1909 reasoned that the 1905 amendment permitting a prosecutor to allege two offenses relating to the same act or transaction could not be regarded as improper or illogical given that a jury had long been authorized "in a case where the offense charged embraces more than one crime" including "assault with intent to murder, within which

is included assault with a deadly weapon and often simple assault – to return a verdict of guilty of any *one* of the offenses comprehended within the *one* charged which the evidence justifies or warrants." (*People v. Piner* (1909) 11 Cal.App. 542, 546, emphasis added.) In short, the history of section 954 underscores that "any offense . . . necessarily included" was understood to mean one out of many.

Although section 954 was amended in 1915 to permit joinder of distinct offenses in separate counts as well as to state "as it does now, that a defendant 'may be convicted of any number of offenses charged'" (RBOM 15, citing Stats 1915, ch. 452, §1), the change did not reflect legislative intent to expand the number of permissible uncharged convictions. Indeed, the language is not ambiguous; read naturally, it permits multiple convictions only where such offenses are charged.

Furthermore, the purpose of the 1915 amendment is obvious: to promote efficiency and conserve judicial resources by allowing joinder of multiple offenses by the same defendant in a single action. (See *Kellett v. Superior Court* (1966) 63 Cal.2d 822, 826 ["By a series of amendments to section 954 that have greatly expanded the scope of permissible joinder, the Legislature has demonstrated its purpose to require joinder of related offenses in a single prosecution."]; see also *People v. Scott* (1944) 24 Cal.2d 774, 779 [section 954 permits joinder in order to prevent "repetition of

evidence and save[] time and expense to the state as well as to the defendant."].) The preference for multiple convictions for all offenses charged is consistent with that purpose; indeed, it would not be logical or efficient to permit joinder of distinct offenses but then only allow the defendant to be convicted of one crime out of multiple transactions.

But this does not mean that section 954 may be construed to subject a defendant to an unlimited number of uncharged offenses arising from one act or transaction. Although section 954 was amended to allow conviction of "any number of offenses charged," section 1159 remained unchanged. The Legislature did not — but easily could have — modify "any offense" to "any number of offenses . . . necessarily included" or simply "any offense or offenses." That section 1159 has not been so amended suggests that the Legislature did not intend to alter the traditional understanding that a defendant could sustain no more than one uncharged offense for a single greater crime.

That section 954 permits multiple parallel lesser included convictions only if such offenses are charged, while section 1159 precludes such result where such offenses remain uncharged, does not produce an arbitrary result. (RBOM 25.) As the Court of Appeal recognized, one purpose of section 954 "is to govern the form of the information." (Slip. Op. at p. 11, citations and quotations omitted.) And "an information plays a limited but important role:

It 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." (Slip Op. at p. 12, quoting *People v. Butte* (2004) 117 Cal.App.4th 956, 959, emphasis in original.) In short, the focus on charged offenses protects a defendant's right to notice of the number of convictions he may sustain in a prosecution. Under these circumstances, as the Court of Appeal observed, section 954 cannot be construed as "a blanket authorization allowing the number of convictions to exceed the number of charges." (Slip Op. at p. 12.)

G. An interpretation of section 1159 that permits one uncharged conviction per count is neither unexpected nor burdensome

Section 1159 does not implicate a prosecutor's charging discretion or reduce its charging flexibility. (RBOM 25-26.) A prosecutor has long retained and will continue to retain discretion to charge or not charge lesser included offenses in separate counts. Indeed, as respondent notes, 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." (RBOM 15, quoting *People v. Ryan* (2006) 138 Cal.App.4th 360, 368.) And nothing constrains a prosecutor from seeking to dismiss any charged lesser included offense at trial where he or she believes the record only warrants conviction on the

greater offense. (See §1385, subd. (a) ["The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed."]; cf. *People v. Alverson* (1964) 60 Cal.2d 803, 807 [where prosecutor believed co-defendant was not guilty, it could have moved to dismiss against him during trial under section 1385 rather than asserting such opinion during closing argument].)

Furthermore, a one conviction per count rule does not impact many criminal proceedings in this state. (RBOM 27.) As the Court of Appeal recognized, this issue does not arise very often because few crimes subsume included offenses that are parallel rather than hierarchical. (Slip. Op. at p. 10.) The possibility of multiple lesser included convictions that are related but not included to each other generally only arises in limited contexts, such as compound crimes such as kidnapping to commit specified crimes (§§ 209, 209.5) or assault with intent to commit specified crimes (§ 220).

Although respondent complains that "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" (RBOM 26) even a cursory electronic search of aggravated kidnapping and assault cases indicates that prosecutors frequently charge the non-hierarchical lesser offenses in separate counts,

suggesting that the rule endorsed by the court of appeal is neither innovative nor particularly burdensome. (See, e.g., *People v. Stephen Dyser* (2012) 202 Cal.App.4th 1015, 1019 [defendant convicted of various separately charged counts, including assault with intent to commit rape during the commission of a first degree burglary, first degree burglary, and assault with intent to commit rape; latter two charged convictions vacated as necessarily included in greater charged aggravated assault]; *People v. Towne* (2008) 44 Cal.4th 63, 72 [defendant charged with kidnapping to commit carjacking, kidnapping to commit robbery, carjacking, kidnapping, robbery, grand theft of an automobile, criminal threats, and joyriding, arising from a single incident with one victim]; *Williams v. Superior Court* (1983) 34 Cal.3d 584, 587 [defendants charged with "murder with special circumstances, rape, burglary, kidnaping, kidnaping for robbery and robbery" of one victim].)

Nor does the rule articulated by the Court of Appeal undermine the "legitimate future use of multiple convictions." (RBOM 20.) First, this concern is implicated only where multiple convictions are authorized. The setting aside of an unauthorized conviction cannot be characterized as inappropriate or unfair. (Cf. *People v. Medina* (2007) 41 Cal.4th 685, 701 [rejecting Attorney General's request to permit courts to stay rather than strike convictions for included offenses based on assertion that defendants otherwise receive a windfall when the greater offense is reversed].) And

there is no prejudice to the prosecution if a trial court strikes all but one uncharged conviction; "if [that conviction] is reversed on appeal, [another] lesser included conviction may be revived by operation of law." (*Id.* at p. 702.)

In sum, respondent has not identified any persuasive policy reasons to justify departing from the interpretation of section 1159 adopted by the Court of Appeal.

H. The Third Circuit's analysis of the federal equivalent to section 1159 is unpersuasive

Federal Rule of Criminal Procedure 31(c) ("Rule 31") provides that "[t]he defendant may be found guilty of an offense necessarily included in the offense charged." (Fed. R. Crim. Pro. 31, subd. (c).) As with section 1159, the federal rule embodies the common law principle that a defendant may sustain a conviction on an uncharged offense if such offense is necessarily included in the greater charged crime. (*Schmuck v. United States*, *supra*, 489 U.S. at pp. 718-719.)

As respondent notes, one federal appellate court has interpreted Rule 31 to permit multiple uncharged lesser included offenses for a single charged crime. (RBOM 21-22, citing *United States v. Lacy* (3d Cir. 2006) 446 F.3d 448.) But "[d]ecisions of lower federal courts interpreting federal law are not binding on state courts." (*People v. Williams* (1997) 16 Cal.4th 153, 190,

[declining to following Ninth Circuit case].)

More importantly, *United States v. Lacy, supra,* "is not apposite." (*People v. Williams, supra,* 16 Cal.4th at p. 190.) In *Lacy, supra*, 446 F.3d at p. 450, the defendant was charged with a single drug trafficking count, but the jury returned convictions for two lesser included simple possession offenses. Noting that Rule 31 is phrased in the singular and permits conviction of "an offense . . . included" rather than "offenses . . . included", the defendant argued that he could sustain only one lesser included offense for each greater crime charged. (*Id.* at p. 452.)

In rejecting that contention, the federal appellate court observed that an earlier version of the rule had permitted a conviction for "any offense . . . necessarily included" and asserted that the term "'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." (*United States v. Lacy, supra*, 446 F.3d at p. 452.) And based only on that interpretation of "any," that appellate court found that "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[.]" (*Ibid.*) Thus, where the current version of Rule 31 was intended simply as a "restatement of existing law" that court reasoned that "the change in the text from 'any offence' to 'an offense' does not appear to

reflect a change in its meaning." (*Ibid.*)

But in interpreting Rule 31, the federal appellate court did not adhere to or even address any accepted canons of statutory construction. Although its conclusion that Rule 31 embodied a "tradition" of multiple convictions only rested on its understanding of the term "any", it did not cite any dictionary definitions of that term, or reference any precedent interpreting its meaning. Nor did the court examine the construction of "any offense" or "an offense" in the context of other federal laws or regulations.

By contrast, this Court has emphasized that "'[t]he words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context.'" (*People v. King* (2006) 38 Cal.4th 617, 622, quoting *Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 818.) In other words, "[w[hen interpreting statutes, [this court] begin[s] with the plain, commonsense meaning of the language used by the Legislature." (*People v. Rodriguez* (2012) 55 Cal. 4th 1125, 1131 [plurality opinion].) And such analysis requires something more than simply the bare assertion that a word "suggests" a particular meaning. For example, as noted *ante*, and as confirmed by a dictionary, "any" must be construed in context and is often employed to mean one. (See *People v. Fontaine, supra*, 237 Cal.App.2d at p. 331.)

In addition, this Court has never identified a purported tradition

absent reference to some precedent or other authority. Nor does this Court ever construe a statute in isolation: rather, it "read[s[every statute with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness." (*People v. Pieters* (1991) 52 Cal.3d 894, 898–899, quotations and citations omitted.)

Not only is *Lacy's* cursory analysis inconsistent with this Court's approach to statutory construction, its holding is premised in part on its concern that "a finding that Rule 31(c) supports only a single lesser included offense conviction would require [it] in cases where more than one lesser included offense [is involved], to develop some mechanism for selecting which offense should be charged." (*United States v. Lacy*, *supra*, 446 F.3d at p. 452.) But no such concern is present under California law. Where multiple parallel uncharged offenses are embraced by the charged greater crime, reviewing courts may select, as the court of appeal did here, the offense that yields the lengthiest term of imprisonment. (Slip Op. at p. 13.; cf. *People v. Navarro, supra*, 40 Cal.4th at p. 681 ["where 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."].)

In sum, *United States v. Lacy*, *supra*, which appears to be the only published federal case to hold that Rule 31 authorizes multiple lesser included convictions for a single charged crime, is neither persuasive nor apposite. Thus, its rationale should not guide this Court's analysis of section 1159. Rather, consistent with its ordinary usage as well as the overall statutory scheme, "any offense . . . necessarily included" must be interpreted to permit a defendant to sustain only one uncharged conviction for a single greater charged crime. Accordingly, the Court of Appeal properly vacated two of appellant's four convictions as unauthorized, and the judgment should be affirmed.

II.
Appellant Joins in Co-Appellant's Arguments

Pursuant to California Rules of Court, rule 8.200, Mr. Oliveira joins in and adopts all the arguments set forth in the answering brief filed by co-appellant Eid.

CONCLUSION

The judgment of the Court of Appeal striking the misdemeanor false imprisonment conviction should be affirmed.

Dated: January 14, 2014

Respectfully submitted,

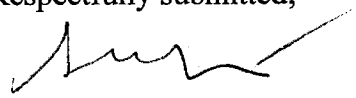
SIRI SHETTY
Attorney for Appellant

CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, rule 8.520(c)(1), I certify that this brief contains 6121 words, based on the word-count feature of my word processing program.

DATED: January 14, 2014

Respectfully submitted,



SIRI SHETTY
Attorney for Appellant

DECLARATION OF SERVICE

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

I declare: I am employed in the County of San Diego, California. I am over 18 years of age and not a party to the within entitled cause; my business address is PMB 421, 415 Laurel Street, San Diego, California 92101.

On January 14, 2014, I served the attached ANSWER BRIEF ON THE MERITS of which a true and correct copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

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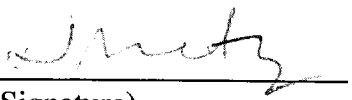
Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at San Diego, California on January 14, 2014.

I also electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doi.ca.gov, and to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com..

I declare under penalty of perjury that the foregoing is true and correct, and this declaration was executed at San Diego, California, on January 14, 2014.

SIRI SHETTY
(Typed Name)



(Signature)