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

RESPONDENT'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

This Court granted review in this case to decide whether appellants were properly convicted of two separate, uncharged, lesser included offenses of a single charged offense where the lesser offenses are not necessarily included in each other. A jury acquitted appellants of two counts of kidnapping for ransom, but found them guilty of the uncharged lesser included offenses of felony attempted extortion (Pen. Code,[1] §§ 664, subd. (a), & 518) and misdemeanor false imprisonment (§§ 236 & 237, subd. (a)) on each count. Relying on *People v. Navarro* (2007) 40 Cal.4th 668 (*Navarro*), the Court of Appeal struck the convictions for misdemeanor false imprisonment, holding that sections 954 and 1159 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 those offenses were merely "related" to each other in a non-hierarchical way and therefore are not prohibited under the common law multiple convictions bar.

Respondent argued in the opening brief that section 1159 permits multiple convictions of uncharged lesser included offenses per count; such an interpretation effectuates the Legislature's intent and constitutes sound judicial policy. Further, respondent argued that the Court of Appeal created an arbitrary rule by erroneously extending this Court's narrow holding in *Navarro*.

In an attempt to justify the Court of Appeal's holding, appellants assert that the "one conviction per count" rule is consistent with the text and historical application of section 1159. Appellants' argument against the application of section 7 to include the plural form of the word "offense"

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

in section 1159 is unpersuasive. Applying section 7 to the phrase "any offense" leads to an interpretation that furthers the legislative purpose of section 1159. Moreover, the rule of lenity does not apply because interpreting section 1159 in appellants' favor would be contrary to the legislative intent. In addition, appellants' claim that the "one conviction per count" rule is consistent with *Navarro* and the overall statutory scheme lacks merit. As discussed in respondent's opening brief, *Navarro* is inapposite to the instant case. Further, allowing multiple convictions of uncharged lesser included offenses would supplement section 954's rule that permits multiple convictions of charged offenses.

In response to the policy concerns advanced by respondent in the opening brief, appellants broadly assert that these concerns do not undercut the Court of Appeal's ruling. Notably, appellants ignore the existing constitutional 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. Instead of addressing the existing limitations on lesser included offenses, appellants attempt to expand the principles of due process by claiming that the "one conviction per count" rule protects a defendant's right to notice of the number of convictions he may sustain. However, respondent has not found, nor have appellants cited, any authority to support this proposition. Appellants misunderstand the requirements of due process. To satisfy due process, a defendant must receive adequate notice of the charges in order to have an opportunity to defend against them. It is well settled that charging the greater offense provides a defendant with notice of any necessarily included offenses. As the requisite notice was provided here, appellants' due process rights were not violated.

Finally, appellants contend that *United States v. Lacy* (3d. Cir. 2006) 446 F.3d 448 (*Lacy*), is not binding. In interpreting a federal statute similar to section 1159, the Third Circuit held in *Lacy* that a defendant may sustain multiple convictions of uncharged lesser included offenses arising out of a single charged offense. The *Lacy* court based its decision on the language and historical application of the rule, the policy considerations affected by the rule, and the negative implications of interpreting the rule as permitting only "one conviction per count." Notably, appellants do not address the policy considerations, which played a significant role in the Third Circuit's decision. Instead, in attempting to distinguish *Lacy*, appellants assert that the Third Circuit's concern with a "one conviction per count" rule is not present under California law. Appellants are mistaken. The *Lacy* court's concern in creating an arbitrary rule is likewise present in the instant case. Accordingly, the Third Circuit's reasoning and analysis provides helpful guidance in construing section 1159.

For the reasons explained in respondent's opening brief on the merits and herein, section 1159 should be interpreted as permitting multiple convictions of uncharged lesser included offenses arising out of a single charged offense, where those offenses are not necessarily included in each other.

ARGUMENT

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

Respondent and appellants agree that section 1159 expressly authorizes a jury to convict a defendant of uncharged lesser included offenses. The dispute lies with the number of convictions that may arise out of a single charged offense. Applying the rule of statutory construction

enunciated in section 7 – that the singular includes the plural – to the word "offense" in section 1159, leads to an interpretation consistent with the Legislature's intent and the overall statutory scheme. Additionally, allowing multiple convictions of *uncharged* lesser included offenses under section 1159 supplements section 954's rule permitting multiple convictions of charged offenses. A broad interpretation of section 1159 constitutes sound judicial policy. Moreover, construing section 1159 to allow multiple uncharged lesser included offense convictions is consistent with the interpretation of a federal statute containing nearly identical terms.

A. Applying Section 7 to Include the Plural Form of the Word "Offense," is Consistent with the Language of Section 1159 and Effectuates the Legislature's Intent

Section 1159 provides that a defendant may be convicted "of *any* offense, the commission of which is necessarily included in that with which he is charged [.]" (Emphasis added.) Appellant Oliveira acknowledges that the word "any" may be singular or plural, depending on the context. (Oliveira ABOM 4.) As respondent explained in the opening brief, "any" is defined as "one or *some*." (RBOM 7.) The fact that one conviction may suffice under section 1159 does not preclude multiple convictions. They are not mutually exclusive as "one" is inherently included within "some."

Appellant Oliveira relies on *People v. Fontaine* (1965) 237 Cal.App.2d 320 (*Fontaine*), for the proposition that where "any" modifies a singular noun, it must be interpreted to mean "one." (Oliveira ABOM 5.) In *Fontaine*, the court interpreted the phrase "any party" to mean "one party" because the words "all" and "every" were used in other parts of the statute. As respondent discussed in the opening brief, the *Fontaine* court inferred that the Legislature meant something other than "all" when it used the word "any" in the *same* statute. (RBOM 8.) Additionally, as appellant

Oliveira notes, the original draft of the *Fontaine* statute read "all parties," and "the change to 'any party' must necessarily indicate that one party's consent will suffice." (Oliveira ABOM 6, quoting *Fontaine*, *supra*, 237 Cal.App.2d at p. 331.) Here, the phrase "any offense" in section 1159 has remained unchanged; and unlike the statute in *Fontaine*, the words "all" or "every" do not appear in other parts of section 1159. That the phrase "any offense or offenses" appears in other penal statutes (Oliveira BOM 6-7), does not suggest the Legislature intended to limit the meaning of "any offense" in section 1159 to "one offense." Generally, "[c]ourts exercise caution in applying the rule that one statute may correspond to analogous but unrelated statutes, because an inclusion or exclusion may show an intent, or convey a meaning, exactly contrary to analogous legislation." (2B Singer & Singer, Sutherland Statutory Construction (7th ed. 2012 rev.) Statutes and Statutory Construction, § 53:5, pp. 394-395 (hereafter, 2B Singer & Singer).) Accordingly, the word "any" should be given its plain meaning – that is, an indeterminate number encompassing "all."

Appellant Oliveira claims that "section 1159 has been uniformly applied in the context of a one for one *modification*." (Oliveira ABOM 9, emphasis added.) However, section 1159 does not govern the procedure with which a jury's verdict may be *modified*. (Cf. *Navarro*, *supra*, 40 Cal.4th 668 [sections 1181, subdivision 6 and 1260 permit a one-for-one modification of the judgment].) Instead, section 1159 authorizes a jury to return guilty verdicts on uncharged lesser included offenses, a procedure separate and distinct from modification. For the reasons stated in respondent's opening brief, cases like *Navarro*, which address a court's authority to modify the judgment after finding insufficient evidence of the greater offense, are inapplicable to the issue here. (RBOM 28-32.) Significantly, the Court of Appeal did not find that the evidence was insufficient to support the lesser included offense convictions in this case.

Appellant Oliveira has failed to provide a compelling reason why section 7 should not apply in the instant case. Specifically, he cannot establish that its application 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) Appellant Oliveira maintains, "[N]o published California case has held that a defendant may sustain two uncharged lesser included offenses for a single charged crime." (Oliveira ABOM 9.) In light of the dearth of state court authority, appellant Oliveira cites various cases in an attempt to illustrate that the "historical application of section 1159" supports an interpretation that limits lesser included convictions to one per charge. (Oliveira ABOM 9-10.) However, the cases relied on by appellant Oliveira never considered or decided the pertinent issue in this case. For example, in *Ex parte Donahue* (1884) 65 Cal. 474, *People v. Ah Lung* (1905) 2 Cal.App. 278, and *People v. Wetzel* (1908) 9 Cal.App. 223, the jury found the defendants guilty of one lesser included offense arising out of a single charge. That those defendants were not convicted of more than one uncharged lesser included offense does suggest the existence of a limitation on the number of permissible convictions.

Additionally, *People v. Duncan* (1945) 72 Cal.App.2d 423, 426 (*Duncan*), *People v. Escobar* (1996) 45 Cal.App.4th 477, 483, fn. 2 (*Escobar*), and *People v. Wissenfeld* (1951) 36 Cal.2d 758 (*Wissenfeld*), are legally and factually distinguishable from the instant case. In those cases, the defendants were improperly convicted of both a greater and a lesser offense. (*People v. Reed* (2006) 38 Cal.4th 1224, 1227 (*Reed*) [the multiple convictions bar prohibits multiple convictions based on necessarily included offense]; *People v. Pearson* (1986) 42 Cal.3d 351, 355, overruled on other grounds in *People v. Fields* (1996) 13 Cal.4th 289, 308, fn. 6.) For example, in *Duncan*, the court held, "Thus when the evidence warrants, a

defendant charged with robbery may be found guilty *either* of simple assault or assault with a deadly weapon." (*Duncan*, *supra*, 72 Cal.App.2d at p. 426, emphasis added.) This limitation existed because simple assault is a lesser included offense of assault with a deadly weapon. (*People v. Golde* (2008) 163 Cal.App.4th 101, 115.) As such, a defendant cannot be convicted of both. In *Escobar*, the jury convicted the defendant of the charged offense of grand theft of an automobile and the lesser offense of receiving stolen property. The *Escobar* court struck the receiving stolen property conviction because the defendant was also convicted of the greater offense. (*Escobar*, *supra*, 45 Cal.App.4th at p. 483, fn. 2.) Similarly, in *Wissenfeld*, although the jury was instructed to return only one guilty verdict, it convicted the defendant of the charged offense of grand theft of an automobile and the uncharged lesser included offense of taking an automobile without consent. (*Wissenfeld*, *supra*, 36 Cal.2d at p. 766.) However, here, appellants were not convicted of kidnapping for ransom in addition to attempted extortion and misdemeanor false imprisonment; further, neither offense is a lesser included offense of the other. Accordingly, the cases cited above lend no support to the issue in the instant case.

Moreover, appellant Oliveira's argument against the application of the statutory maxim *expressio unius est exclusio alterius*[2] is unpersuasive. (Oliveira ABOM 14.) According to appellant Oliveira, an exemption is not articulated in section 1159 because "an attempt [is not] a distinct and independent category of a permissible uncharged offense," thus, the

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[2] "'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.]" (RBOM 10, quoting *People v. Oates* (2004) 32 Cal.4th 1048, 1057 (*Oates*), emphasis in original.)

statutory maxim does not apply. (Oliveira ABOM 15-16.) He relies on *People v. Bailey* (2012) 54 Cal.4th 740 (*Bailey*), to support the proposition that "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." (Oliveira ABOM 15.) The issue in *Bailey* was "whether, after finding insufficient evidence to support a conviction for escape from state prison, an appellate court may reduce the conviction to attempt to escape, notwithstanding the trial court's failure to instruct the jury on attempt." (*Id.* at p. 744.) This Court held that a reviewing court could not modify the judgment under sections 1181, subdivision 6 and 1260 because attempt to escape is not a lesser included offense of escape. (*Ibid.*)

As noted above and in the opening brief (RBOM 28-32), cases addressing modification of the judgment are inapposite to the instant case. Moreover, the holding in *Bailey* does not implicate the application of the maxim *expressio unius est exclusio alterius*. Respondent asserted in the opening brief that the Legislature's use of the disjunctive "or" in section 1159, prohibits convictions of *both* a necessarily included offense and an attempt to commit the charged offense. (RBOM 9-10.) The plain and ordinary meaning of the word "or" in a statute is to mark an alternative, i.e., either this or that. "In other words, it means one or the other of two propositions . . . . [Citation.]" (*In re Jackson* (1928) 90 Cal.App. 349, 350 [statute providing for fine "or" imprisonment contemplates alternative penalties].) "[T]here is a significant difference between a necessarily included offense, which involves one or more completed crimes in the process of the commission of the charged crime; and an attempt to commit the charged crime, which requires the specific intent to commit the charged offense, and which frequently involves conduct which would not be

criminal without the existence of that specific intent." (CALJIC Appendix C, *Lesser Offenses to the Offense Charged* (2013).) Indeed, the Legislature's use of the word "or" denotes a distinction between the two categories of offenses and limits convictions to either one or the other.

Here, appellants cannot be convicted of both attempted kidnapping for ransom in addition to any necessarily included offense because such convictions are prohibited by the common law multiple convictions bar. (*Reed, supra*, 38 Cal.4th at p. 1227 [The only exception to section 954's general rule permitting multiple convictions prohibits multiple convictions based on necessarily included offenses.].) For example, if the jury convicted appellants of attempted kidnapping for ransom and attempted extortion, or attempted kidnapping for ransom and misdemeanor false imprisonment, appellants would essentially stand convicted of the same crime twice. *People v. Medina* (2007) 41 Cal.4th 685 (*Medina*), is instructive in this regard. In *Medina*, the defendant was convicted of attempted kidnapping during the commission of a carjacking, and attempted carjacking. (*Id.* at p. 691.) This Court held that the defendant cannot be convicted of both offenses because attempted carjacking is a lesser included offense of attempted kidnapping during the commission of a carjacking. (*Id.* at pp. 701-702.) Similarly, here, appellants cannot be convicted of both an attempt to commit the greater and a necessarily included offense. Because this limitation appears on the face of section 1159, this Court should not imply additional exemptions. (*Oates, supra*, 32 Cal.4th at p. 1057.)

Furthermore, contrary to appellant Oliveira's assertion (Oliveira ABOM 16), the rule of lenity does not apply in the instant case. "'The rule [of lenity] applies only if the court can do no more than guess what the legislative body intended; there must be an egregious ambiguity and

uncertainty to justify invoking the rule.' [Citation.]" (*People v. Avery* (2002) 27 Cal.4th 49, 58.) As this Court has explained, "although true ambiguities are resolved in a defendant's favor, an appellate court should not strain to interpret a penal statute in defendant's favor if it can fairly discern a contrary legislative intent." (*Avery*, *supra*, 27 Cal.4th 49, 58.) Here, this Court need not guess what the Legislature intended in enacting section 1159. As respondent explained in the opening brief, section 1159 abolished the All-or-Nothing Doctrine by expanding the jury's authority to convict beyond the charged offenses. (RBOM 10-13.) The Legislature intended to increase the jury's verdict options by allowing convictions of lesser included offenses. As such, under section 1159, the jury can more accurately determine the degree of a defendant's guilt. (RBOM 11.) The legislative purpose of section 1159 supports an interpretation that allows multiple convictions of uncharged lesser included offenses. The rule of lenity does not compel a different result; especially where appellants' limited interpretation would frustrate the statute's legislative purpose.

Because appellant Oliveira has failed to show that application of section 7 would run counter to the purpose and subsequent historical practice of section 1159 (Oliveira ABOM 8-12), this Court should apply section 7 to include the plural form of the word "offense." (*People v. Jones* (1988) 46 Cal.3d 585, 593 ["The rule of construction enunciated in section 7 is no mere rubric – it is the law."].) Construing "any offense" as allowing multiple convictions of uncharged lesser included offenses is consistent with the express language and statutory purpose of section 1159.

B. Allowing Multiple Convictions of Uncharged Lesser Included Offenses Arising out of a Single Charged Offense does not Contravene Section 954

According to appellant Oliveira, "sections 954 and 1159 permit a defendant to sustain multiple lesser included convictions for a greater crime

only where such offenses are *charged* [.]" (Oliveira ABOM 17, emphasis added.) Citing the Court of Appeal's opinion, he contends that interpreting section 1159 to permit multiple uncharged lesser included offense convictions would contravene section 954. (Oliveira ABOM 17.) Appellant Oliveira is mistaken. As respondent explained in the opening brief, under section 954, a "defendant may be convicted of any number of the offenses charged," even when they arise from a single act or course of conduct. (RBOM 14, quoting § 954.) On the other hand, section 1159 governs convictions of *uncharged* lesser included offenses. By its very terms, it authorizes a jury to convict beyond the charged offenses. (*Reed, supra*, 38 Cal.4th at p. 1227 [section 1159 allows defendant to be convicted of uncharged crime that is necessarily included in the charged crime].) Nothing in the language of section 1159 requires the lesser included offenses to be charged.

Further, appellant Oliveira's analogy to the 1905 version of section 954 is unpersuasive. Specifically, appellant Oliveira contends, "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." (Oliveira ABOM 18.) However, the 1905 version of section 954, expressly stated that a defendant could only be "convicted of but *one* of the offenses charged." (Stats. 1905, ch. 1024, § 1, emphasis added.) Section 1159 does not contain similar language limiting the number of convictions to "but one." Instead, as discussed above and in respondent's opening brief, the word "any" means "one or some, regardless of kind, quantity, or number." (RBOM 7, fn. 5.) Significantly, in 1915, section 954 was amended 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.) Although this amendment may very well promote judicial economy (Oliveira ABOM 19) by allowing for joinder, it also reflects the Legislature's preference for multiple convictions. Thus, the word "any," as found in sections 954 and 1159, should be given the same meaning. Such an interpretation would not contravene section 954. To the contrary, section 1159 would supplement section 954's rule allowing multiple convictions of charged offenses by allowing multiple *uncharged* lesser offense convictions.

C. A Broad Interpretation of Section 1159 Constitutes Sound Judicial Policy

"Public policy considerations exert a significant influence in the process of judicial statutory interpretation." (2B Singer & Singer, *supra*, § 56:1 at p. 483.) "Where a public interest is affected, courts prefer an interpretation which favors the public." (*Id.* at p. 486.) "'[O]ne of the purposes of the criminal law is to protect society from those who intend to injure it. [Citation.]' [Citation.]" (*Medina*, *supra*, 41 Cal.4th at p. 698.) Thus, holding defendants accountable for *each* crime they committed, ensures the integrity of our criminal justice system and serves the public interest. (See *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 347-348 [recognizing that there is a public interest in holding probationers accountable for both violation of the terms of their probation and commission of newly alleged crimes].)

Appellant Eid broadly claims that respondent's "other concerns do not undercut the Court of Appeal's ruling." (Eid ABOM 13.) Specifically, he points out that *People v. Scheidt* (1991) 231 Cal.App.3d 162, "did not consider the issue presented in [this] case about the proper interpretation of sections 954 and 1159[.]" (Eid ABOM 14.) Ironically, appellant Eid heavily relies on and urges this Court to adopt *Navarro*, a case that also did

not consider the issue presented here. Respondent cited *Scheidt* merely to illustrate that upholding related offense convictions (i.e., false imprisonment and attempted extortion), furthers the legislative purpose behind each separate crime. (RBOM 24.) Although both offenses in *Scheidt* were charged, the policy considerations underlying related offenses applies with equal force to the instant case.

Notably, appellant Eid does not dispute that by striking the misdemeanor false imprisonment convictions, Ana and Iago were no longer "victims" of that crime, thereby losing any restitution resulting from their false imprisonment. (See *People v. Holman* (2013) 214 Cal.App.4th 1438, 1467 ["[T]he dismissal of the charge means that defendant does not have a conviction; in the absence of a conviction, the basis for imposing the restitution fine no longer applies."].) Instead, he argues that "Ana and Iago were clearly victims of the attempted extortion" because they were the object of that crime. (Eid ABOM 16.) Appellant Eid cites the Court of Appeal's opinion for the proposition that "kidnapping for ransom – involves a primary victim (who is kidnapped) and a 'secondary victim (who "is subjected to a ransom or extortion demand").' [Citation.]" (Slip Op. at p. 10.) However, appellants were not convicted of kidnapping for ransom in this case. Here, there is only one victim of attempted extortion, and that is Jefferson. The prosecutor recognized at sentencing that the jury "came back with verdicts that [appellants] were attempting to extort Jefferson." (5 RT 1181-1182.) Further, the Court of Appeal explained that the "amended information sufficiently identified *the* extortion *victim* as 'another person.'" (Slip Op. at p. 13, fn. 3, emphasis added.) Significantly, in the Court of Appeal, Oliveira noted, "the extortion offenses clearly relate to [Jefferson]." (Oliveira RB 11.) As such, it is sufficiently clear that Ana and Iago were not direct victims of the attempted extortion convictions. Even if, as appellant Eid asserts (Eid ABOM 17), Ana and Iago qualify as

"victims" under section 1202.4, subdivision (k)(3)[3], by virtue of their relationship to Jefferson, they nonetheless lost their right to any restitution connected to the false imprisonment convictions. Moreover, persons qualifying as "victims" under this section are limited to the direct victim's family members, primary caretaker, and cohabitants. Thus, if Ana and Iago were merely Jefferson's close friends, they would be completely foreclosed from collecting restitution resulting from the attempted extortion convictions. Given the expansive policy reasons underlying victim restitution[4], section 1159 should be interpreted broadly in order to protect the rights of victims in California.

In response to respondent's concern regarding defendants escaping liability where a conviction is later overturned on appeal (RBOM 25), appellant Eid contends, "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. [Citations.]" (Eid ABOM 15.) Generally, this involves cases where the greater offense is itself reversed by operation of law, i.e. by virtue of some legal infirmity. (*People v. Kelly* (1992) 1 Cal.4th 495, 528 [after reversing defendant's rape conviction based on instructional error, this Court modified the judgment to reflect a conviction of attempted rape].) However, this rule is inapplicable to cases where, as here, appellants were *acquitted* of the greater offense and instead convicted of two necessarily included offenses. Here, there are no lesser included offenses of attempted

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[3] Under section 1202.4, subdivision (k)(3)(A), a "victim" shall include the direct victim's spouse or child who have sustained economic loss as the result of the crime.

[4] "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 the losses they suffer." (Cal. Const., art. I, § 28, subd. (b).)

extortion and misdemeanor false imprisonment. Because there are no offenses that may conceivably be revived by operation of law in a case like this, the prosecution loses convictions that are supported by the evidence and that conform with the facts as the jury found them. Indeed, the instant case illustrates precisely why appellant Eid's argument fails.

D. Allowing Multiple Convictions of Uncharged Lesser Included Offenses does not Violate a Defendant's Due Process Right to Notice

Conceding that the information charging them with kidnapping for ransom necessarily put them on notice that they could also be convicted for a lesser included offense, appellants nonetheless argue that they had no notice of the number of possible convictions that could result from the prosecution. (Eid ABOM 14-15; Oliveira ABOM 21.) Respondent has not found, nor have appellants cited, any case holding that a defendant's due process right is violated solely because he lacked notice of the number of possible convictions he was facing. In support of this argument, appellants cite *People v. Butte* (2004) 117 Cal.App.4th 956: "'[A]n 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.' [Citation.]" (*Id.* at p. 959, emphasis in original.) However, this quote does not stand for the proposition appellants assert. In *Butte*, the court held that the preliminary hearing transcript, not the accusatory pleading, "'is the touchstone of due process notice to a defendant.' [Citation.]" (*Ibid.*) Contrary to appellants' characterization of the quote above, there is no due process requirement to include in the information, the number of possible convictions that may arise from lesser included offenses. (§ 950 [an accusatory pleading must contain the title of the action, name of the court and parties, and a statement of the offenses charged].)

Instead, due process merely requires that "a defendant received *notice* of the charges against him in order to have a reasonable opportunity to prepare and present his defense." (*Bailey*, *supra*, 54 Cal.4th at p. 751, emphasis in original.) Here, as the Court of Appeal recognized, "The rule limiting convictions of *uncharged* crimes to lesser included offenses of charged crimes satisfies the due process requirement[.]" (Slip Op. at p. 9, citing *Reed*, *supra*, 38 Cal.4th at p. 1227.) Section 1159, by its terms, does not require the lesser included offenses to be specifically pleaded in the information. Nor do constitutional principles of due process require that lesser included offenses be separately charged. It is well settled that an accusatory pleading stating the charged offense provides the defendant not only with notice of the offense actually charged, but also with notice of any necessarily included offenses. (*People v. Toro* (1989) 47 Cal.3d 966, 973 [there is no due process obligation to separately allege necessarily included offenses]; see *Lacy*, *supra*, 446 F.3d at p. 452 [test to determine necessarily included offense ensures that defendants have constitutionally sufficient notice].) The fact that appellants may not have been aware of the specific number of convictions they faced, had no effect on their ability to properly defend against the charges. Notably, appellants' exposure based on the two lesser included offenses was still substantially less than their potential exposure of life with the possibility of parole if convicted of the greater. (§ 209, subd. (a).) Hence, they had every incentive to vigorously contest the charges. As such, appellants' due process rights were not violated.

E. *Lacy* Provides Helpful Guidance in Resolving the Issue in the Instant Case

Appellants first argue that lower federal court decisions are not binding on state courts. (Eid ABOM 19; Oliveira ABOM 24.) Respondent acknowledges that *Lacy*, *supra*, 446 F.3d 448, addressed a different statute,

namely Federal Rules of Criminal Procedure, rule 31(c)[5]. (*Lacy*, *supra*, 446 F.3d at p. 453.) However, as this Court has recognized, rule 31(c) and section 1159 contain nearly identical terms. (*People v. Birks* (1998) 19 Cal.4th 108, 124.) Similar to the present case, the court in *Lacy* was also tasked with interpreting a statute to determine whether a defendant may be convicted of multiple uncharged lesser included offenses arising out of a single charged offense. (*Lacy*, *supra*, 446 F.3d at p. 449.) Because the Third Circuit's policy concerns also apply to the instant case, its reasoning and analysis provides helpful guidance in construing section 1159.

As previously discussed in respondent's opening brief (RBOM 21-23), 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.) In reaching its holding, the Third Circuit found that: (1) the language and history of rule 31(c) supported this interpretation; (2) allowing multiple convictions of uncharged lesser included offenses does not violate a defendant's constitutional rights; and (3) creating a rule that limits lesser included offense convictions to one per count would be arbitrary. (*Id.* at p. 452.)

In attempting to distinguish *Lacy*, appellant Eid contends, "the primary difference between rule 31(c) and sections 954 and 1159 is the reasoning of *Navarro*, *supra*, 40 Cal.4th at 680." (Eid ABOM 19.) However, he fails to explain what that difference is. Appellant Oliveira argues that in interpreting rule 31(c), the Third Circuit failed to adhere to the canons of statutory construction by not citing any dictionary definitions of the word "any," and not examining "the construction of 'any offense' or 'an offense' in the context of other federal laws or regulations."

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

(Oliveira ABOM 26.) Although the *Lacy* court did not cite to a dictionary definition of "any," a word commonly used in the English language, or compare the use of the word in other federal laws and regulations, the court based its interpretation on the history of rule 31(c). (*Lacy*, *supra*, 446 F.3d at p. 452.)

Appellants fail to address the policy reasons underlying the Third Circuit's holding. In *Lacy*, the court held that a defendant's constitutional rights were adequately protected by existing limitations on the application of rule 31(c). Specifically, it found that the test to determine necessarily included offenses ensures that the defendant has "constitutionally sufficient notice" and the common law multiple convictions bar "neutralizes any potential prejudice to the defendant by prohibiting multiple lesser included offense convictions for the same acts." (*Lacy*, *supra*, 446 F.3d at p. 452.) Notably, in the opening brief, respondent advanced similar policy considerations related to section 1159, which have also been ignored by appellants. (RBOM 18-19, 22-23.)

Finally, appellants argue that the Third Circuit's concern relating to a "one conviction per count" rule does not exist under California law. The *Lacy* court was specifically concerned that:

> [A] finding that Rule 31(c) supports a single lesser included offense conviction would require us, in cases where more than one lesser included offense satisfies the *Schmuck*[6] 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.

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[6] Under *Schmuck v. United States* (1989) 489 U.S. 705, 716 [109 S.Ct. 1443, 103 L.Ed.2d 734], "one offense is not 'necessarily included' in another unless the elements of the lesser offense are a subset of the elements of the charged offense."

(Lacy, supra, 446 F.3d at pp. 452-453.) According to appellant Oliveira, "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." (Oliveira ABOM 27, citing *Navarro*, *supra*, 40 Cal.4th at p. 681.) The mechanism articulated in *Navarro* – selecting the offense that yields the lengthiest term of imprisonment – applies to modification of the judgment. (*Navarro*, *supra*, 40 Cal.4th at p. 681 ["[W]here there are multiple lesser included offenses supported by the evidence at trial, a court exercising its discretion to modify the judgment . . . 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."].) This does not apply to the prosecution's charging discretion. The *Lacy* court recognized that adopting the defendant's "one conviction per count" rule would require prosecutors, in cases where the greater offense encompasses multiple lesser offenses, to separately plead all conceivable lesser included offenses in order to preserve possible convictions. As quoted above, the Third Circuit acknowledged the absence of any test or "mechanism for selecting which offense should be charged" in a case like that. (*Lacy*, *supra*, 446 F.3d at pp. 452-453.)

Appellant Eid, on the other hand, concedes that the prosecutor "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." (Eid ABOM 19.) The fact that a prosecutor "can choose to charge whatever lesser included offenses it wants," cannot possibly be construed as the "mechanism" the Third Circuit alluded to in *Lacy*. Contrary to appellants' assertion (Eid ABOM 7), a prosecutor's ability to separately charge multiple lesser included offenses under section 954, does

not undermine the issue in the instant case. Respondent discussed at length in the opening brief, the negative implications of compelling prosecutors to separately plead necessarily included offenses. (RBOM 25-28.) The "one conviction per count" rule, would, in effect, defeat the purpose of an *uncharged* lesser included offense. It is clear that under California law, there also exists no mechanism that would guide prosecutors in selecting which of the lesser included offenses to separately charge in addition to the greater crime. This would, in turn, yield arbitrary results as articulated in respondent's opening brief. (RBOM 25-27.) Because the Third Circuit's concern is likewise present in the instant case, and because appellants have failed to adequately distinguish *Lacy*, this Court should adopt its reasoning and analysis in interpreting section 1159.

CONCLUSION

For the reasons explained in respondent's opening brief on the merits and herein, respondent respectfully requests that this Court reverse the judgment of the Court of Appeal and find that section 1159 permits multiple convictions of uncharged lesser included offenses arising out of a single charged offense, where those offenses are not lesser included offenses of each other.

Dated: February 5, 2014

Respectfully submitted,

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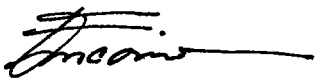

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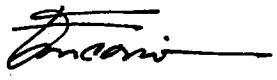
CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 5,794 words.

Dated: February 5, 2014

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE BY FACSIMILE AND 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. My facsimile machine telephone number is (619) 645-2271.

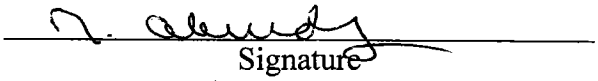
On February 5, 2014, I served the attached **RESPONDENT'S REPLY BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office ofthe Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

The Honorable Tony J. Rackauckas District Attorney Orange County District Attorney's Office 401 Civic Center Drive West Santa Ana, CA 92701	The Honorable M. Marc Kelly Judge Orange County Superior Court Central Justice Center 700 Civic Center Dr. West Department C-39 Santa Ana, CA 92701
California Court of Appeal, Fourth Appellate District, Div. Three 601 W. Santa Ana Blvd. Santa Ana, CA 92701	

and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on February 5, 2014, to Richard Jay Moller, moller95628@gmail.com, Siri Shetty, shetty208812@gmail.com and to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com .

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 February 5, 2014, at San Diego, California.

N. Abundez
Declarant


Signature

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