So'Hum Law Center Of
RICHARD JAY MOLLER
P.O. Box 1669
Redway, CA 95560-1669
Telephone: (707) 923-9199

March 28, 2014

Frank A. McGuire, Clerk of Court
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: **Supplemental Letter Brief** in *People v. Reynaldo Junior Eid et al.*, S211702, COA No. G046129, Orange County Superior Court # 05HF2101

Dear Mr. McGuire:

This letter brief is filed on behalf of both Eid and Oliveira (appellants) in response to this Court's order of March 19, 2014, which offered the parties an opportunity to file supplemental letter briefs on or before April 1, 2014, addressing the significance, if any, of *People v. Solis* (March 7, 2014, B244487) __ Cal.App.4th__ (*Solis*).

ARGUMENT

I. THE FACT SITUATION AND THE HOLDING OF THE COURT OF APPEAL'S DECISION IN *SOLIS* STRONGLY SUPPORTS APPELLANTS' CONTENTION THAT ONLY ONE LESSER INCLUDED CONVICTION PER COUNT IN THE PLEADING IS PERMISSIBLE UNDER PENAL CODE SECTIONS 954 AND 1159

In *Solis*, the facts are almost identical to the facts in appellants' case, except that in *Solis* the issue concerned two separate, uncharged *lesser related* offenses (which were not lesser included offenses of each other) stemming from one charged greater offense, while in *Eid* the issue concerned two separate, uncharged *lesser included* offenses (which were not lesser included offenses of each other) stemming from one charged greater offense). The *Solis* court explained:

> Solis stands convicted of two separate, uncharged lesser related offenses stemming from the one charged greater offense of attempted premeditated murder. Neither assault with a deadly weapon nor

> mayhem are lesser included offenses of attempted premeditated murder. In addition, assault with a deadly weapon is not a lesser included offense of mayhem, such that we can resolve this case by determining Solis was convicted of both a greater and a lesser offense thereby allowing us to simply dismiss the lesser. (*Solis, supra*, slip opn. at 9.)

Just as the *Eid* court had, the *Solis* court relied on *People v. Navarro* (2007) 40 Cal.4th 668, 680 (*Navarro*), because even though "*Navarro* did not arise in the same procedural context as Solis's current case, much of *Navarro's* reasoning may be applied to the multiple conviction issues raised here." (*Solis, supra*, slip opn. at 6-8.) There is no need to repeat why both the *Eid* and the *Solis* courts thought that the reasoning of *Navarro* requires a court to strike a conviction for the less serious of two uncharged lesser included or lesser related offenses where a defendant is convicted of both offenses arising out of a single charged offense, but where the two lesser included offenses or lesser related offenses are not necessarily included in each other. (*Ibid.;* Eid's Answer Brief On The Merits (EABM) at 8-13; Oliveira's Answer Brief On The Merits (OABM) at 8-12.)

The *Solis* court next discussed a claim that the state has not made in appellants' case, because instruction on lesser included offenses was mandatory in *Eid*:

> The main difference between instructing on lesser included and lesser related offenses lies in the fact that instruction on lesser included offenses is mandatory, while instructions on lesser related offenses must be agreed to by both parties. Seizing on the fact that a defendant must agree to the instruction on lesser related offenses, the Attorney General posits that a defendant impliedly agrees to the possibility of being convicted of two offenses when he agrees to instruction on two lesser related offenses. Applying that logic here, the Attorney General asserts that when Solis did not object to the court instructing on both mayhem and assault with a deadly weapon as lesser related offenses to attempted premeditated murder, he also agreed that he could be convicted of both offenses. (*Solis, supra*, slip opn. at 10.)

The *Solis* court correctly rejected this argument, holding that "there is a difference between impliedly consenting to being convicted of a single lesser related offense by failing to object to instructions on it [under *People v. Toro* (1989) 47 Cal.3d

966, 973] and being convicted of two separate offenses stemming from one greater, especially given that common practice has never anticipated such a result. (*Solis, supra,* slip opn. at 10.) Similarly, appellants never consented to being convicted of two separate offenses stemming from one greater when they agreed that the court could instruct on both. (See RBOM at 19; EABM at 14-15; OABM at 28.)

The heart of the *Solis* court's decision concerned basic due process and fairness, because permitting two lesser related convictions arising out of a single charged offense, but where the two lesser related offenses are not necessarily included in each other, could result in a two-strike case becoming a three-strike case, subjecting the defendant to a possible life sentence. (*Solis, supra*, slip opn. at 11-12.) The reasoning of the *Solis* court applies equally to appellants' situation of two lesser included convictions arising out of a single charged offense:

> [I]t is not a foregone conclusion that two strikes from a single prior act will not negatively impact a defendant in future criminal proceedings. In addition, the strike punishment consequences of Solis's multiple convictions are not our sole concern. We believe Solis had the right to know that he faced the potential of being convicted of two separate, uncharged lesser related offenses, both potential strikes, when charged with only one offense. Had Solis been so informed, he might have chosen to pursue different plea resolution avenues. It is also entirely possible Solis would not have agreed to a lesser related instruction at all if he had known he could be convicted of more than one.
>
> Ultimately, we find the result in Solis's current case is unjust because he had no reason to expect that he could suffer two strike convictions when charged with only a single strike offense. We decline to interpret section 1159, or the relevant case law, to authorize such an unexpected outcome. Allowing only one conviction for an uncharged lesser related offense of a greater charged offense also eliminates another issue Solis has raised, namely, whether a defendant has a constitutional due process right to notice of the number of potential convictions he or she may face based on a single charged offense. (*Solis, supra*, slip opn. at 11-12.)

The *Solis* court went on to explore other possibilities, all of which do not apply in appellants' case, as appellants did not "explicitly agree to being convicted of two lesser [included] offenses in lieu of one greater offense."

> We conclude the jury's convictions of Solis of two distinct, uncharged lesser related offenses from a single charged greater crime was not authorized by statute or case law. Under any standard, the error was prejudicial because Solis stands wrongly convicted of two offenses based upon an information charging only one offense. We do not foreclose the possibility, however, that a defendant may explicitly agree to being convicted of two lesser related offenses in lieu of one greater offense. The advantages of being convicted of two lesser related offenses may well be more desirable for a defendant in a given situation. We simply hold that in this case, it would be unfair for the defendant to suffer these consequences since there was no such agreement, and previous case law and statutory authority never dictated this result. (*Solis, supra*, slip opn. at 12.)

Thus, for the same reasons that "the jury's convictions of Solis of two distinct, uncharged lesser related offenses from a single charged greater crime was not authorized by statute or case law," the jury's convictions of appellants of two distinct, uncharged *lesser included* offenses from a single charged greater crime was not authorized by statute or case law.

II. THE *SOLIS* COURT CORRECTLY HELD THAT THE PROPER REMEDY IS TO STRIKE THE CONVICTIONS THAT CARRY A SHORTER TERM; SIMILARLY, STRIKING TWO COUNTS OF MISDEMEANOR FALSE IMPRISONMENT IS THE APPROPRIATE REMEDY FOR APPELLANTS

The state in appellants' case did not dispute that -- assuming error -- the court of appeal correctly struck appellants' misdemeanor false imprisonment convictions, because attempted extortion carries a longer prison term than misdemeanor false imprisonment. Similarly, the *Solis* court correctly held that the proper remedy is to strike the convictions that carry a shorter term:

> In *Navarro*, the Supreme Court stated: "[W]here there are multiple

> lesser included offenses supported by the evidence at trial, [an appellate] 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." (*Navarro, supra*, 40 Cal.4th at p. 681.) The Supreme Court remanded the case to the Court of Appeal with directions to strike its prior "two-for-one" modification to the extent it reflected a conviction for attempted kidnapping, the offense with the lesser punishment, and to remand the cause to the trial court for resentencing accordingly. (*Navarro, supra*, 40 Cal.4th at p. 681.)
>
> We find a similar remedy appropriate in Solis's current case. We earlier acknowledged that in Solis's case, we deal with different statutes than those in *Navarro*. Nevertheless, we find *Navarro's* "one-for-one" analysis makes equal sense here. This reasoning precludes multiple guilty verdicts on lesser related offenses stemming from one charged offense just as it did in *Navarro* to preclude modification of a judgment from one conviction into multiple convictions. We, as the Supreme Court in *Navarro*, will leave undisturbed the conviction with the longest prison term." (*Solis, supra*, slip opn. at 12-13.)

Similarly, there is no need for a remand because the trial court sentenced appellants to the high term for attempted extortion, and struck only the misdemeanors.

CONCLUSION

It is probably not a fluke that two courts of appeal have both unanimously construed *Navarro* to require a court to strike a conviction for the less serious of two uncharged lesser included or lesser related offenses where a defendant is convicted of both offenses arising out of a single charged offense, but where the two lesser included offenses or lesser related offenses are not necessarily included in each other. It would be a violation of due process to permit a defendant to "suffer two strike convictions when charged with only a single strike offense," as in *Solis,* or to subject appellants to two uncharged lesser included convictions arising from a single charged crime.

Dated: March 28, 2014

Respectfully submitted,

RICHARD JAY MOLLER
and SIRI SHETTY
Attorneys for Appellants 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 **Supplemental Letter Brief** on March 28, 2014, by depositing copies in the United States mail at Redway, California, with postage prepaid thereon, and addressed as follows:

Court of Appeal
Fourth Appellate District, Division 3
P.O. Box 22055
601 W. Santa Ana Blvd.
Santa Ana, CA 92701

Office of the Attorney General
110 West A Street, Room 1100
P.O. Box 85266
San Diego, CA 92186-5266

Orange County Superior Court
P.O. Box 1994
Santa Ana, CA 92702-1994

Office of the District Attorney
P.O. Box 808
Santa Ana, CA 92702

Reynaldo Junior Eid
562 Devon Street #1
Kearny, New Jersey 07032

Alaor Docarmo Oliveira
c/o Siri Shetty
PMB 421
415 Laurel Street
San Diego, CA 92101

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 letter brief is 1735 words, and that this declaration was executed on March 28, 2014, at Redway, California.

RICHARD JAY MOLLER

PROOF OF SERVICE BY ELECTRONIC SERVICE

Furthermore, I, RICHARD JAY MOLLER, declare I electronically served from my electronic service address of the **same referenced above document** on March 28, 2014, before 5:00 p.m. to the following entities:
SIRI SHETTY, shetty208812@gmail.com;
APPELLATE DEFENDERS INC, e-service-criminal@adi-sandiego.com;
ATTORNEY GENERAL'S OFFICE, ADIEService@doj.ca.gov;
CALIFORNIA SUPREME COURT, via e-submission.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on March 28, 2014, at Redway, California.

RICHARD JAY MOLLER