KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF JUSTICE

110 WEST A STREET, SUITE 1100
SAN DIEGO, CA 92101
P.O. BOX 85266
SAN DIEGO, CA 92186-5266

Public: (619) 645-2001
Telephone: (619) 645-2291
Facsimile: (619) 645-2191
E-Mail: Elizabeth.Carino@doj.ca.gov

March 28, 2014

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

RE: *People v. Reynaldo Junior Eid et al.*
California Supreme Court, Case No. S211702
Fourth Appellate District, Division Three, Case No. G046129
Orange County Superior Court, Case No. 05HF2101

Dear Mr. McGuire:

On March 19, 2014, this Court ordered the parties to file simultaneous letter briefs addressing the significance, if any, of the decision in *People v. Solis* (Mar. 7, 2014, B244487) ___ Cal.App.4th ___ [2014 WL 897865, *1] (*Solis*), to the instant case. In *Solis*, the Second District, Division 8, Court of Appeal addressed the following issue – "whether a defendant may be convicted of two separate, uncharged, lesser related offenses of a single charged offense." (*Ibid.*)

I. Introduction

As set forth below, *Solis* highlights the failed reasoning of the Court of Appeal in the instant case. The court in *Solis* is significant because it similarly created a new limitation on section 1159 by erroneously expanding this Court's narrow holding in *People v. Navarro* (2007) 40 Cal.4th 668 (*Navarro*), beyond its evident scope. Moreover, in reaching its holding, the *Solis* court considered factors not applicable to the instant case. Specifically, the notion of consent does not exist in the context of necessarily included offenses because notice is inherent within the greater charged crime. Additionally, the *Solis* court's concern with notice of potential strike convictions does not apply to this case where appellants' maximum exposure was not greater than they expected. Even assuming for the sake of argument that appellants here had been

convicted of two strike offenses, such a result would not be prohibited because the determination of whether multiple convictions were proper does not involve a consideration of potential future sentencing consequences. Accordingly, any remedy that vacates a conviction based on issues related to punishment is inappropriate.

II. The Decision In *People v. Solis*

In *Solis*, the defendant was charged with attempted murder (Pen. Code[1], §§ 664, 187, subd. (a)), along with other crimes. With the agreement of the parties, the trial court instructed the jury with four uncharged lesser offenses, including the lesser related offenses of mayhem (§ 203) and assault with a deadly weapon (§ 245, subd. (a)(1)). (*Solis*, *supra*, at p. *1.) The jury found the defendant not guilty of the greater offense, and convicted him of both lesser related offenses stemming from that charge. The trial court imposed a third strike term of 25 years to life for mayhem and stayed the sentence for assault with a deadly weapon pursuant to section 654. (*Id.* at p. *3.) On appeal, the defendant claimed that his convictions for two uncharged lesser related offenses were unauthorized. (*Id.* at p. *1.) The court in *Solis* agreed and modified the judgment by striking the conviction for assault with a deadly weapon. (*Ibid.*)

In reaching its holding, the *Solis* court found that conviction "of two distinct, uncharged lesser related offenses from a single charged greater crime was not authorized by statute or case law." (*Solis*, *supra*, at p. *6.) Relying on this Court's reasoning in *Navarro*, the *Solis* court concluded that section 1159 does not allow multiple convictions of lesser offenses to result from one charge. (*Solis*, *supra*, at p. *4.) It also found that although the parties expressly agreed to instruct the jury with multiple lesser offenses, the defendant did not "explicitly agree to being convicted of two lesser related offenses in lieu of one greater offense." (*Id.* at pp. *2, *6.) The *Solis* court was further concerned with the potential consequences of the multiple convictions in future criminal prosecutions. Specifically, it found the result unjust because the defendant "had no reason to expect that he could suffer two strike convictions when charged only with a single strike offense." (*Id.* at p. *6.)

III. *Solis* Simply Highlights The Failed Reasoning Of The Court Of Appeal In The Instant Case

Solis presents another example where a reviewing court wrongly extrapolated from this Court's decision in *Navarro* – a case involving a separate and distinct issue – to justify creating an arbitrary limitation on multiple convictions. (*Solis*, *supra*, at pp. *4, *6.) In fact, *Solis* created an even more expansive rule by interpreting section 1159 as

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

as limiting convictions of all uncharged lesser offenses to one per count (*Solis*, *supra*, at p. *4), notwithstanding the fact that it expressly authorizes convictions "of any offense, the commission of which is necessarily included in that with which he is charged[.]" (§ 1159.) *Solis*, like the instant case, relied solely on *Navarro* to interpret section 1159. (*Solis*, *supra*, at pp. 3-4.) As discussed in respondent's opening brief on the merits, and for the reasons set forth therein, *Navarro* is inapposite to cases involving a jury's ability to convict a defendant of multiple uncharged lesser offenses. (RBOM 28-32.) Because the *Solis* court's reliance on *Navarro* fails for the same reasons, its holding does not support appellants' position. To the contrary, it simply underscores the need for this Court to base its decision in the instant case on the statutory language and legislative purpose of section 1159.

IV. The *Solis* Court's Concern Regarding The Defendant's Notice And Consent Do Not Exist In The Instant Case

The issue in *Solis* involved an additional factor not present in the instant case – namely, the notion of consent. The *Solis* court acknowledged that "instructions on lesser related offenses must be agreed to by both parties." (*Solis*, *supra*, at p. *5.) Under principles of due process, a defendant may not be convicted of a lesser related offense where he has not expressly or impliedly consented to its consideration by the jury. (*People v. Toro* (1989) 47 Cal.3d 966, 973 (*Toro*), disapproved on other grounds in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3.) In *Toro*, this Court held that failure to object to lesser related offense instructions and verdict forms constituted implied consent to the jury's consideration of the offenses, satisfying the notice requirement. (*Toro*, *supra*, 47 Cal.3d at p. 976.) Although the parties in *Solis* expressly agreed to the instructions and verdict forms, the *Solis* court declined to apply the holding in *Toro*. Instead, it found that the defendant did not consent to "being convicted of two separate offenses stemming from one greater[.]" (*Solis*, *supra*, at p. *5.)

On the other hand, a defendant's consent is irrelevant with respect to necessarily included offenses; the requisite notice is afforded by virtue of charging the greater, and conviction of the included offense is expressly authorized by section 1159. (*People v. Lohbauer* (1981) 29 Cal.3d 364, 369.) In fact, the notion of consent in this case is a fallacy since neither party can request or preclude the jury from considering lesser included offenses that are supported by the evidence. (See *People v. Birks* (1998) 19 Cal.4th 108, 118 [the trial court has a sua sponte duty to instruct on necessarily included offenses supported by substantial evidence]; cf. *Toro*, *supra*, 47 Cal.3d at p. 973 [defendant may not be convicted of an uncharged lesser related offense without his consent, even where the evidence supports such conviction].) Indeed, appellants conceded that charging the greater offense of kidnapping for ransom necessarily put them on notice that they could also be convicted of the lesser included offenses. (Eid ABOM

14-15; Oliveira ABOM 21.) Thus, the due process notice requirement was satisfied to permit such convictions in the instant case. (*People v. Bailey* (2012) 54 Cal.4th 740, 751 [due process merely requires that a defendant receive notice of the charges].)

Moreover, the *Solis* court's concern that the defendant "had no reason to expect that he could suffer two strike convictions when charged with only a single strike offense," does not exist here where appellants' punishment was not greater than they expected. Neither misdemeanor false imprisonment nor attempted extortion is a strike eligible offense. Notably, even appellants' maximum exposure based on the two lesser included offenses was significantly less than their potential sentence of life with the possibility of parole if convicted of the greater. (§ 209, subd. (a).) Hence, appellants had every incentive to vigorously defend against the charges. In fact, appellants were successful in their defense, given that the jury acquitted on the greater charges.

V. Even Assuming That Appellants Had Been Convicted Of Two Strike Offenses, The Flawed Reasoning In *Solis* Would Not Preclude Both Convictions

Even assuming for the sake of argument that appellants had been convicted of two strike offenses, the determination of whether the multiple convictions were authorized would not be affected by *Solis*. The reasoning in *Solis* fails because it relies, in part, on a factor unrelated to the issue of multiple convictions – i.e. the potential consequences of strike offenses in future prosecutions – to find that the multiple lesser offense convictions were unauthorized. (*Solis*, *supra*, at p. *6.) It is well settled that multiple convictions and multiple punishment are separate and distinct issues. (*People v. Sloan* (2007) 42 Cal.4th 110, 113 (*Sloan*) [delineates the difference between multiple conviction and multiple punishment]; *People v. Kramer* (2002) 29 Cal.4th 720, 722 [multiple convictions may be proper even where multiple punishment is barred].)

This Court's analysis in *Sloan*, *supra*, 42 Cal.4th 110, exposes the flawed reasoning in *Solis*. In that case, the defendant was convicted of multiple charged offenses and enhancement allegations. (*Id.* at p. 113.) On appeal, he claimed that two of his convictions, which qualified as strike offenses, were barred because they were necessarily included in another charge by virtue of the accusatory pleading. (*Id.* at p. 115.) The reviewing court agreed, vacating the convictions on grounds that they violated the prohibition against multiple convictions and section 654. (*Id.* at p. 115.) The reviewing court also found that the potential for future multiple punishment supported its conclusion that the convictions were improper. This Court reversed the judgment after finding that the multiple convictions were authorized. In its analysis, this Court explained that the mere possibility of multiple punishment in future criminal proceedings is not a basis for determining that multiple convictions were unauthorized. (*Id.* at pp. 120-121.)

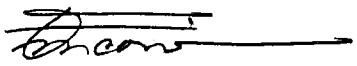
Although *Sloan* involved charged offenses, it applies with equal force to the *Solis* court's analysis in making its determination. Like the reviewing court in *Sloan*, *Solis* impermissibly relied on an unrelated factor – the future sentencing ramifications of strike offenses – as a basis for its determination that the multiple lesser related offense convictions were improper. (*Sloan*, *supra*, 42 Cal.4th at p. 114.) Because there is "no evidence the defendant has reoffended or faces multiple punishment due to recidivist sentencing in any unrelated criminal proceeding," the *Solis* court's argument that improper punishment under the Three Strikes Law might arise in the future, raises a question that is purely speculative. Instead, resolution of that question "must await a case in which it is squarely presented." (*Id.* at p. 114.) How that issue is ultimately decided is beside the point.

The court in *Solis* attempted to solve a future hypothetical problem before it has even occurred. Application of its holding "would require that multiple convictions otherwise permissible under section [1159] must always be vacated in a present criminal proceeding simply because they may lead to future impermissible multiple punishment *if* the defendant reoffends, and *if* the prosecution then seeks to use those convictions as a basis for sentence enhancement in the future criminal proceeding." (*Sloan*, *supra*, 42 Cal.4th at p. 122, emphasis in original.) Such a result contradicts this Court's decision in *Sloan* and constitutes unsound judicial policy. The precedent set forth in *Solis* further blurs the line between lesser included and lesser related offenses and confuses the issue of multiple conviction and multiple punishment. Indeed, whether or not an offense constitutes a potential strike has no impact on whether the defendant may properly be convicted of the offense. As such, vacating a conviction that is supported by the evidence and conforms with the facts as the jury found them, is not the appropriate remedy. Thus, even if appellants' lesser included offense convictions had been strike offenses, they would not be barred by *Solis*. Instead, the determination of whether the multiple convictions were authorized is independently governed by section 1159.

VI. Conclusion

In sum, *Solis* simply highlights the failed reasoning of the Court of Appeal in the instant case. Accordingly, for the reasons set forth in respondent's opening brief on the merits, reply 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 expressly authorizes multiple convictions of uncharged lesser included offenses arising out of a single charged offense, where those offenses are not necessarily included in each other.

Sincerely,



ELIZABETH M. CARINO
Deputy Attorney General
State Bar No. 285518

For Kamala D. Harris
Attorney General

EMC:na
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DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

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 that same day in the ordinary course of business.

On **March 28, 2014**, I served the attached **SUPPLEMENTAL LETTER BRIEF** 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 of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

California Court of Appeal, Fourth
Appellate District, Div. Three
601 W. Santa Ana Blvd.
Santa Ana, CA 92701

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

and, furthermore I declare, in compliance with California Rules of Court, rules 2.25(i)(1)(A)-(D) and 8.71 (f)(1)(A)-(D), I electronically served a copy of the above document from Office of the Attorney General's electronic service address ADIEService@doj.ca.gov on **March 28, 2014**, to Appellate Defenders, Inc.'s electronic service address eservice-criminal@adi-sandiego.com and to Appellants' attorneys Richard Jay Moller's electronic service address jaym@humboldt.net, and attorney Siri Shetty's electronic service address shetty208812@gmail.com by 5:00 p.m. on the close of business day.

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 **March 28, 2014**, at San Diego, California.

N. Abundez
Declarant

N. Abundez
Signature

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