ORIGINAL

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

April 4, 2014

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

RE: Respondent's Supplemental Reply Brief
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:

This Court has requested the parties to submit simultaneous reply briefs to the supplemental letter briefs that were filed in the instant case. In appellants' supplemental letter brief ("ASLB"), they argue that *People v. Solis* (Mar. 7, 2014, B244487) ___ Cal.App.4th ___ [2014 WL 897865, *1] (*Solis*), "strongly supports [their] contention that only one lesser included offense conviction per count in the pleading is permissible under Penal Code[1] sections 954 and 1159." (ASLB 1.) Appellants further contend that *Solis* "correctly held that the proper remedy is to strike the convictions that carry a shorter term." (ASLB 4.)

Appellants' reliance on *Solis* is of no avail. Aside from the fact that both courts of appeal erroneously construed *People v. Navarro* (2007) 40 Cal.4th 668 (*Navarro*) to prohibit multiple convictions, the heart of the *Solis* decision was based on notions of due process and fairness, concerns that do not exist here. In an attempt to analogize *Solis* to the instant case, appellants gloss over key differences between the two cases. As explained in respondent's supplemental letter brief, the decision in *Solis* was based largely on factors not applicable here – i.e., consent and notice of potential strike

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

convictions. (RSLB 1.) Finally, the remedy set forth in *Navarro* – to strike the conviction that carries a shorter term – is applicable only to cases involving modification of the judgment. As such, the *Navarro* remedy is inappropriate in the instant case.

Appellants maintain that "it is probably not a fluke that two courts of appeal have both unanimously construed *Navarro*" to prohibit multiple lesser offense convictions stemming from one charged offense. (ASLB 5.) Indeed, this illustrates the very reason why this Court should correct the unwarranted expansion of its holding in *Navarro*. As explained in respondent's supplemental letter brief ("RSLB"), *Solis* simply highlights the flawed reasoning of the Court of Appeal in the instant case. Because the *Solis* court's reliance on *Navarro* fails for the same reasons, its holding does not support appellants' contention. (RSLB 2-3.) To the contrary, it emphasizes the need for this Court to base its decision on the statutory construction of section 1159, instead of a case that addressed a completely different issue. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176 (*Alvarez*) [it is axiomatic that a case is not authority for propositions not considered].)

Furthermore, appellants make a blanket assertion that their convictions were unauthorized for the same reasons articulated in *Solis*. (ASLB 4.) In doing so, appellants discount the significant differences between *Solis* and the instant case – namely, the issue of consent and notice of potential strike convictions – that undoubtedly affected the *Solis* court's decision. Although appellants concede that instructions on the lesser included offenses here were mandatory, they nonetheless claim that like the defendant in *Solis*, "appellants never consented to being convicted of two separate offenses stemming from one greater when they agreed that the court could instruct on both." (ASLB 3.) As discussed in respondent's supplemental letter brief, the notion of consent is irrelevant with respect to instructions on lesser included offenses that are supported by the evidence. (RSLB 3.) Here, appellants' convictions were authorized under section 1159, irrespective of an explicit agreement to being convicted of two lesser included offenses in lieu of one greater. (ASLB 4.) Additionally, the decision in *Solis* was undeniably based, in part, on notions of fairness. The *Solis* court found the result unjust because the defendant "had no reason to expect that he could suffer two strike convictions when charged with only a single strike offense." (*Solis*, *supra*, at p. *6.) However, nothing about the instant case was unfair or unjust. Appellants had not been convicted of two strike offenses and their punishment was not greater than they expected.

Notably, *Solis* did not address "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*, at p. *6.) It is also significant that *Navarro* did not cite a defendant's due process right to notice of the number of potential convictions, as a concern for allowing a two-for-one modification. This is likely because a defendant, who receives adequate notice of the charges and has an opportunity to defend against

them, does not also have a due process right to notice based solely on the number of potential convictions he may sustain. Here, appellants had notice of the uncharged lesser included offenses by virtue of greater charged offense. (*People v. Birks* (1998) 19 Cal.4th 108, 118 ["the stated charge notifies the defendant, for due process purposes, that he must also be prepared to defend against any lesser offense necessarily included therein, even if the lesser offense is not expressly set forth in the indictment or information"].) 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 prepare and present their defense.

As discussed in respondent's supplemental brief, a mere potential for increased punishment sometime in the future is not enough to declare a violation of constitutional principles now. (RSLB 4-5.) As this Court has recognized, a determination of whether multiple convictions are proper does not involve a consideration of potential future sentencing consequences. (*People v. Sloan* (2007) 42 Cal.4th 110, 120-121 (*Sloan*); *People v. Sanchez* (2001) 24 Cal.4th 983, 993.) "'In the context of habitual criminal statutes, "increased penalties for subsequent offenses are attributable to the defendant's status as a repeat offender and arise as an incident of the subsequent offense rather than constituting a penalty for the prior offense." [Citation.]' [Citation.]" (*People v. Sipe* (1995) 36 Cal.App.4th 468, 479 [rejecting the argument that a defendant must be advised that his current conviction might be used in the future as a "strike"].)[2] As such, whether improper punishment under the Three Strikes Law might arise in the future is purely speculative and "must await a case in which it is squarely presented." (*Sloan, supra*, 42 Cal.4th at p. 114.) "A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." (*Navarro, supra*, 40 Cal.4th at p. 675, citing *Lyng v. Northwest Indian Cemetery Protective Assn.* (1988) 485 U.S. 439, 445 [108 S.Ct. 1319, 99 L.Ed.2d 534].) Because we are not faced with that question in the instant case, this Court need not address it here. Instead, the only issue here is whether appellants' multiple convictions were authorized under section 1159; this determination does not involve potential punishment. (*Sloan, supra*, 42 Cal.4th at p. 113 [multiple convictions and multiple punishment are separate and distinct issues].)

Finally, and contrary to appellants' assertion (ASLB 4-5), the remedy set forth in *Navarro* – to vacate the conviction that carries a shorter term – is not the proper remedy in the instant case. Because the holding in *Navarro* is inapplicable here, it would be

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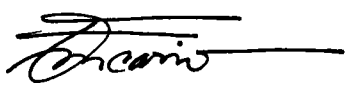
[2] The Three Strikes Law has been consistently applied to prior felony convictions predating its enactment. (*People v. Moenius* (1998) 60 Cal.App.4th 820, 827; *People v. Butler* (1996) 43 Cal.App.4th 1224, 1246; *Gonzales v. Superior Court* (1995) 37 Cal.App.4th 1302, 1311.)

illogical to use the remedy invoked in that case. It is clear that the remedy in *Navarro* is specific to cases involving modification of the judgment under sections 1181, subdivision 6, and 1260. (*Navarro*, *supra*, 40 Cal.4th at p. 681.) The *Navarro* court fashioned a remedy that would "effectuate the fact finder's apparent intent to convict the defendant of the most serious offense possible." (*Ibid.*) Applying that remedy here – by striking convictions that are supported by the evidence and conform to the facts as the jury found them – would not effectuate the jury's apparent intent to convict appellants of two separate lesser included offenses. In fact, it would directly contravene the jury's intent and authority to convict on lesser included offenses. Significantly, the *Navarro* court never suggested that multiple convictions were impermissible under *all* circumstances, i.e. under section 1159. Because a decision is not authority for propositions not considered, it would be inappropriate to apply the remedy in *Navarro* to the instant case. (See *Alvarez*, *supra*, 27 Cal.4th at p. 1176.)

In sum, appellants' reliance on *Solis* does not support their contention. *Solis* simply highlights the flaws in expanding the narrow holding in *Navarro* to apply to section 1159. Indeed, *Solis* underscores the need for this Court to base its decision in the instant case on the statutory language and legislative purpose of section 1159. Moreover, there are no due process notice concerns in convicting appellants of two uncharged lesser included offenses because the offenses are necessarily included within the greater charged offense. Nothing about the result of the instant case was unjust as appellants' maximum exposure based on the two lesser included offenses was substantially less than their potential sentence if convicted of the greater. Further, applying the inapposite remedy from *Navarro* to the instant case would be improper. Accordingly, for the reasons set forth in respondent's opening brief on the merits, reply brief on the merits, supplemental letter brief, and herein, respondent respectfully requests that this Court reverse the judgment of the Court of Appeal.

Sincerely,



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

For Kamala D. Harris
Attorney General

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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 April 4, 2014, I served the attached **RESPONDENT'S SUPPLEMENTAL REPLY 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:

The Honorable Alan Carlson
Chief Executive Officer
Orange County Superior Court
700 Civic Center Dr. West
Santa Ana, CA 92701

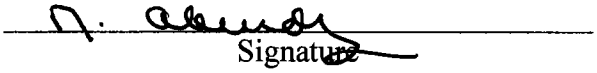
The Honorable Tony J. Rackauckas
District Attorney
Orange County District Attorney's Office
401 Civic Center Drive West
Santa Ana, CA 92701

California Court of Appeal,
Fourth Appellate District, Div.III
601 W. Santa Ana Blvd
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 April 4, 2014, to Appellate Defenders, Inc.'s electronic service address eservice-criminal@adi-sandiego.com to Appellant's attorneys Siri Shetty 's electronic service address shetty208812@gmail.com and to Richard Jay Moller's electronic service address moller95628@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 April 4, 2014, at San Diego, California.

N. Abundez
Declarant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