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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **ROBIN BAILEY,** **Defendant and Appellant.**	Case No. _____

Sixth Appellate District, Case No. H034382
Monterey County Superior Court, Case No. SS082741
The Honorable Timothy S. Buckley, Judge

PETITION FOR REVIEW

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The People of the State of California respectfully petition for review of the decision by the California Court of Appeal for the Sixth Appellate District, filed on August 26, 2010. A copy of the opinion is attached to this petition as Exhibit A. On September 17, 2010, the opinion was modified on denial of rehearing. (Exhibit B.) The opinion is published at 187 Cal.App.4th 1142. This petition for review is timely. (Cal. Rules of Court, rule 8.500(e).)

ISSUE PRESENTED

Whether a failure to prove prison escape compels reversal under Penal Code section 4530, subdivision (b) where an attempted escape appears under that statute.

STATEMENT

The opinion of the Court of Appeal summarizes the trial evidence, as follows:

"The parties stipulated that, on June 18, 2008, defendant was a prisoner who had been convicted of a felony. . . .

"Defendant Bailey was an inmate in CTF's Central Facility in Soledad. He was housed in a G Wing cell.

"A few minutes before 7:30 a.m. on June 18, 2008, Correctional Officer David Doglietto and Correctional Officer Joseph Netro were dispatched to CTF's Central maintenance area in response to a report of a break-in at the carpentry shop there. Tools were reported missing.

"Officer Doglietto discovered a cut in the fence between the maintenance area and an area containing Connexes. When Officer Netro went over to inspect the fence, a staff electrician pointed out an inmate beyond the fence in an area accessible through a locked pedestrian gate.

"At about 7:55 a.m. on June 18, 2008, Abel Munoz, a correctional officer at CTF assigned as an O Wing roof gunner, was stationed on top of the O Wing roof, an interior location. His job was to keep security of the five Administrative Segregation yards where inmates were housed and to prevent fights and escapes. From his position on the O Wing roof, Officer Munoz saw defendant Bailey, an inmate, hiding behind a Connex, a big storage unit.

"Defendant was looking around the side of the Connex, 'darting his head back and forth.' Inmates are not ordinarily in that area without an officer or supervisor. Officer Munoz asked defendant what he was doing and defendant replied that he was waiting for his supervisor. Defendant could not name his supervisor but told Munoz that his supervisor was over by the silver truck. This response seemed suspicious to Munoz who could not see anyone standing by the truck and knew that Correctional Officer Stephens, who drove that truck, had 'already entered underneath Central.' After the officer told defendant to stay put, defendant went behind the Connex. Officer Munoz telephoned Officer Stephens and alerted him to the unsupervised inmate.

"Officer Stephens was in Central tunnel, which is located underneath the Central Facility. Officer Stephens was the inmate day labor officer and was supervising a 15 member construction work crew. Officer Stephens went out to the Connexes by the O Wing yard and made contact with defendant Bailey.

"Defendant said that his boss had allowed him into the area. This explanation did not make sense to Officer Stephens because the area was fenced and keys were required to get in. Officer Doglietto and Officer Netro joined Officer Stephens. Officer Netro handcuffed defendant. Defendant was wearing a CDC jacket on which the standard bright yellow lettering 'CDC Prisoner' had been blacked out.

"Ismyanto Soekardi, the correctional sergeant, arrived at the maintenance area where Officer Netro had custody of defendant. The closest perimeter fence, which if scaled by an inmate would put him 'out on the streets,' was about 500 yards away.

"To arrive at the location where he was apprehended, defendant had hacksawed through the bars of his cell in the Central Facility G Wing, removed the windows, and cut through a metal screen. Defendant had breached four fences, including the G Wing perimeter security fence, the Central chapel yard gate, a rooftop fence on the Central Facility textile building, and the fence separating the Central maintenance area, where the carpenter shop was located, from the Connexes. He had made his way to the east end of the Central Facility. Defendant had actually gone deeper into the interior of the institution after breaking out of his cell.

"At trial, defendant admitted taking the reconstructed route shown in the DVD played for the jury. It showed the fence breaches and a path along the roof corridor. Defendant also said that he had leaped over a razor wire wearing three pairs of pants. He admitted that he had left the area in which he was confined.

"Later that same day, a hacksaw blade was discovered on top of a Connex. Two tools were located underneath the Connex. Wire strippers were found near the breach in the maintenance area fence. When officers examined defendant's cell, they found a lump of clothing in the upper bunk covered by blankets. A more thorough search of defendant's cell on June 19, 2008 uncovered hidden hacksaw blades.

"Sergeant Soekardi explained that between the Central Facility and the North Facility there are three inner towers, Towers Five, Six, and Seven, which were 'manned 24/7.' However, the roof is not staffed '24/7.' The sergeant stated that no officers were stationed in the area of the maintenance yard fences 'at [the] time of his attempt.'

"Sergeant Soekardi spoke with defendant after he had been apprehended. Defendant admitted to having a plan to escape. He said that his plan had been to cut through a fence behind G Wing and 'make his way towards North Facility,' cut through a double fence, and meet someone who was supposed to be waiting there to pick him up. He explained that he was unable to execute this plan because it took him 'so long to cut out of the G Wing fence' and because cutting the G Wing fence was 'so loud.' Defendant wrote letters to his daughter and son indicating he had tried to escape. At trial, however, defendant claimed that he had no intent to escape but rather he had merely planned to reach the maintenance area, where he intended to assault another inmate against whom he held a grudge, and then return to his cell."

The jury convicted defendant of escape from a state prison facility without force or violence, pursuant to section 4530, subdivision (b). In a separate trial, the jury found five prior strikes to be true; robbery with a firearm, assault with a firearm, robbery, assault with a deadly weapon, and residential robbery. (1CT 41, 44-48, 405-408.) Defendant was sentenced to 25 years to life in prison, consecutive to the indeterminate life term he was serving for Case No. SC056097. (1CT 49, 91, 118-120.)

Defendant appealed. In an opinion authored by Justice Elia and joined by Justices Premo and McAdams, the Court of Appeal found a failure of proof of escape from prison. The court reasoned that escape requires a showing that the prisoner went beyond the boundary of the prison facility having custody of that prisoner and that an inmate does not escape by breaking out of his cell and breaching interior security barriers but remaining within the bounds of the prison. (Exhibit A, pp. 6-8.)

The Court of Appeal found ample evidence of attempted escape but reversed the judgment. It held with defendant that it lacked the power to reduce the conviction to attempted escape because the jury was not

instructed on attempt under Penal Code section 4530, subdivision (b).[1] Finding attempted escape to be a specific intent crime under Penal Code section 21a, and escape a general intent crime, the court deemed the elements of the crime impliedly found true under the jury instructions did not comprehend attempt as necessarily included in escape. It recognized the past practice of reducing convictions to an attempt where the evidence sufficed to prove the attempt but not the completed crime. (See Pen. Code §§ 1159, 1181, subd. 6, 1260.) The appellate court declined to follow suit, invoking the Sixth and Fourteenth Amendment right of the defendant to have the conviction rest upon a jury determination of guilt as to each element of the crime beyond a reasonable doubt. (Exhibit A, pp. 13-15.) In denying rehearing, the Court of Appeal distinguished certain decisions of this Court as involving a defendant with the requisite intent who fails to complete elements of the substantive crime due to circumstances unknown to him, whereas in the present case "there was conflicting evidence whether defendant had specific intent to escape and the prosecution made a deliberate decision to not prosecute defendant for attempted escape." (Exhibit B, pp. 1-2.)

REASONS FOR GRANTING THE PETITION

1. Review is necessary in this case to secure uniformity of decision and to settle an important question of the appellate court's power to reduce a judgment where the evidence fails to establish prison escape but adequately supports a conviction of an attempted prison escape, under Penal Code section 4530, subdivision (b).

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[1] Penal Code section 4530, subdivision (b), provides: "Every prisoner who commits an escape or attempts an escape as described in subdivision (a), without force or violence, is punishable for 16 months, or two or three years to be served consecutively. No additional probation report shall be required with respect to such offense."

The Sixth District Court of Appeal's conclusion that it lacks the power to reduce the offense to one of attempted escape is contrary to statute and to decisions of this Court and the Courts of Appeal. First, attempt is a lesser included offense of the charged offense under both Penal Code section 1159 and the long-standing precedent of this Court. (See *People v. Vanderbilt* (1926) 199 Cal. 461, 464 [by operation of section 1159, an attempt to commit the charged offense constitutes a lesser included offense]; *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1627, fn. 4 [same]; *People v. Strunk* (1995) 31 Cal.App.4th 265, 267 [same]; *People v. Meyer* (1985) 169 Cal.App.3d 496, 506 [same]; *People v. Anderson* (1979) 97 Cal.App.3d 419, 424 [same]; *In re Sylvester C.* (2006) 137 Cal.App.4th 601, 609 ["attempt is a lesser included offense of any completed crime"]; see also *People v. Atkins* (2001) 25 Cal.4th 76, 88 [attempted rape is lesser included offense of rape, though rape is a general intent crime].)

Second, given the nature of the crime of escape, and the Legislature's unusual equating of attempted escape to escape in section 4530, a reviewing court must have the authority on a failure of proof as to the latter offense to modify the verdict to an attempted escape. The Court of Appeal reversed the conviction for escape because defendant, who had left the limits of his custody, was apprehended short of the outer boundaries of the prison. Although the Court of Appeal found "more than ample" evidence of an attempt to escape (Exhibit A at p. 13), it held that where a jury is not given a specific intent instruction, attempted escape is not necessarily included in the crime of escape. Specifically the Court of Appeal found that "attempt to escape is not a lesser-included offense of escape based upon the elements of the offense impliedly found true by the jury." (*Ibid.*)

The holding is flawed. To begin with, neither the "accusatory pleading" test nor the statutory "elements" test for necessarily included

offenses rest on the instructions given in a particular case. (See generally *People v. Reed* (2006) 38 Cal.4th 1224, 1227.)

More importantly, the offense of attempted escape from prison in section 4530 meets the statutory elements test because the intent is the same as escape under that statute. Every direct perpetrator of an escape from prison is a prisoner, and every action furthering the escape, whether completely successful or not, challenges governmental authority in general and the security of the institution in particular. Because all prison escapes represent a systemic threat to the state's ability to punish effectively those convicted and sentenced for crime, the success of the individual venture does not determine the punishment, as section 4530 reflects.

Put in that way, the general intent of a prisoner to escape and any volitional act toward that endeavor necessarily challenges the state's authority to punish. Whether or not the prisoner actually departs the grounds of the facility, the state's system of punishment is assaulted when that general intent and act conjoin. The appropriate analogy, then, is to the crime of assault. Under that analogy, the intent underlying both escape and attempt to escape is satisfied by the general intent to willfully commit an act which, if successful, would result in escape from prison. (See *People v. Williams* (2001) 26 Cal.4th 779, 787[assault, even though defined as an attempt to commit a battery, is a general intent offense].)

The Legislature sees it just that way. Not only does it punish attempted prison escape the same as the completed offense in the first sentence of section 4530, subdivision (b), the next sentence of that statute specifies: "No additional probation report shall be required with respect to such offense." The clear implication is that the offense, whether completed or attempted, speaks for itself under the circumstances.

It follows that even if its Sixth Amendment necessarily-included instructions test for necessarily included offenses were valid, the Court of

Appeal was authorized to modify the conviction to attempted escape in the exercise of its factual review power. (Pen. Code, §§ 1159, 1181, subd. 6, 1260.)[2] The Court of Appeal's undue narrowing of its review power contradicts this Court's precedent, like-minded Court of Appeal decisions, and the clear intent of the statute making escape and attempt to escape equivalent offenses. That holding merits this Court's reversal.

2. In *People v. Toledo* (2001) 26 Cal.4th 221, 232, this Court suggested that there may be circumstances in which the Legislature has codified an offense that "should be treated differently from virtually all other crimes as to which the attempt provisions are applicable." In section 4530, the Legislature expressly punished the offenses of attempted escape and escape from prison identically, and included both escape and attempt in the language defining the offense itself. The Legislature has strongly indicated an intent that section 4530 be treated differently from virtually all other offenses. The Court of Appeal gave inadequate weight to the statutory language of Penal Code section 4530.

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[2] Penal Code section 1181 provides in pertinent part: "When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only: [¶] . . . [¶] (6) When the verdict or finding is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict, finding or judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed."

Penal Code Section 1260 provides: "The court may reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense or the punishment imposed, and may set aside, affirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances."

The unique nature of the crime of escape supports a finding that the Legislature intended to treat the crime of escape differently from virtually all other offenses. Section 4530 applies only to those who have been convicted of a crime and have been placed under the custody of the state until the expiration of their prison sentence. The statute does not provide a definition for the term "escape" or draw distinctions between escape and attempted escape. Thus, a reviewing court that finds insufficient proof of escape —due only to an erroneous instruction as to the boundaries involved as in this case—but that also finds ample proof of the elements of attempt, must necessarily conclude that the jury would find all of the elements of attempt satisfied in convicting the defendant of the completed crime.

It is apparent that defendant was engaged in an escape when apprehended. The bars of his cell window were cut through with a hacksaw and the windowpanes were removed. (1RT 133-134, 178-180.) Fences had also been cut in four locations. (1RT 64-75, 149.) Upon being arrested inside a locked maintenance yard, defendant confessed to what he had done. He sawed through the bars of his cell's window, removed the windowpanes, climbed out of the window, scaled a wall, cut through the fences, and jumped over a razor-wire fence wearing additional pairs of pants. He informed prison officials that he intended to go through the double fence where someone would pick him up. (1RT 85-87, 89, 96-98.)

Defendant's intent to escape is apparent. Breaking through the bars of the cell, giving himself more time by leaving clothing in the bed stuffed to resemble a person, cutting through wire fencing, and wearing extra pants to jump over a razor- wire fence evidence such intent because those acts cannot be accidental or inadvertent. These facts reveal his intent to depart that which confines him, even though other controls, such as the perimeter fence, ultimately contained him within the facility. There can be no

reasonable doubt that when the jury convicted defendant of escape they necessarily concluded that he intended to escape.

Although defendant's conviction for escape from custody cannot stand, it does not follow that the judgment of conviction must be unconditionally reversed. In refusing to draw a clear boundary between the offense of escape and attempted escape (cf., *People v. Toledo*, *supra*, 26 Cal.4th at p. 232 [acknowledging the existence of the offense of attempted criminal threat under general principles of attempt]), the Legislature has expressly exhibited its intent to treat section 4530 attempts differently from other attempts. The Court's prior holdings reveal that criminal attempt is indeed a lesser included offense even of a general intent crime. (See, e.g., *People v. Vanderbilt*, *supra*, 199 Cal. at p. 464; *People v. Atkins*, *supra*, 25 Cal.4th at p. 88.) But even apart from that line of decisions, the Legislature has shown that the elements of escape and attempt to escape must be treated differently from other offenses. A jury finding that a defendant has in fact completed the crime of escape necessarily is a finding that he attempted to escape for purposes of section 1260, whether the offense is deemed a lesser included offense or an alternative formulation of a single offense. Where a prisoner clearly intends to breach the outer limits of his custody and the jury finds substantial steps taken toward that goal that through operation of law constitute only attempt, the jury has necessarily found that the defendant committed all of the required elements for a conviction under section 4530.

Here, the jury has found implicitly or explicitly all the needed elements of attempted escape. Reversal therefore is inappropriate. Under the court's reviewing power, where the evidence is insufficient to sustain the offense charged but shows that the defendant is guilty of a lesser included offense, or an attempt to commit the offense or a lesser degree of the offense, the court may reduce the crime rather than reverse outright.

(Pen. Code, §§ 1159, 1181, subd. 6, 1260; *People v. Kelly* (1992) 1 Cal. 4th 495, 526, 528 [reducing rape conviction to "the lesser included offense of attempted rape"]; *People v. Rojas* (1961) 55 Cal.2d 252, 257-261 [reducing receiving stolen property conviction to attempted receiving stolen property pursuant to section 1159]; *In re Hess* (1955) 45 Cal.2d 171, 174; *People v. Enriquez* (1967) 65 Cal.2d 746, 749.) By holding a different rule applies where the jury is not instructed on attempt, the Court of Appeal narrowed its reviewing power in contradiction to decisions of this Court and other Courts of Appeal. Review is necessary to correct the Court of Appeal's misconstruction and undue narrowing of its remedial powers.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests this Court grant the petition for review.

Dated: October 5, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 3,374 words.

Dated: October 5, 2010

EDMUND G. BROWN JR.
Attorney General of California

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EXHIBIT A

Filed 8/26/10

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ROBIN BAILEY, Defendant and Appellant.	H034382 (Monterey County Super. Ct. No. SS082741A)

Defendant Robin Bailey was initially charged in a single count with escape and attempt to escape from the Correctional Training Facility (CTF) in violation of Penal Code section 4530, subdivision (b).[1] An escape or an attempt to escape from prison constitutes a crime under section 4350, subdivision (b); both are subject to the same punishment. Apparently, with the court's approval, the parties agreed that the case would be tried solely as an escape. A jury found defendant guilty of escape. It also found true that defendant had five prior felony convictions within the meaning of section 1170.12, subdivision (c)(2). The court sentenced defendant to 25 years to life.

On appeal from the judgment, defendant challenges the sufficiency of the evidence to show the crime of escape. He maintains that this court cannot modify the conviction to an attempt to escape because the jury was not instructed on attempt. Defendant also

[1] All further statutory references are to the Penal Code.

argues that the trial court erred by "threatening" to give an attempt instruction and the trial court improperly limited defense counsel's closing argument in violation of his Sixth Amendment right to counsel when counsel began to intimate that escape from prison required the defendant to have left the prison facility. Lastly, defendant asks this court to correct the minutes and abstract of judgment to correctly reflect the $200 restitution fine imposed by the trial court.

We conclude that the evidence is insufficient to show a violation of section 4530 by escape from prison and reverse the conviction.

A. *Evidence*

The parties stipulated that, on June 18, 2008, defendant was a prisoner who had been convicted of a felony. The evidence properly viewed (see *People v. Story* (2009) 45 Cal.4th 1282, 1296; see *Jackson v. Virginia* (1979) 443 U.S. 307, 319 [99 S.Ct. 2781]) also showed the following.

Defendant Bailey was an inmate in CTF's Central Facility in Soledad. He was housed in a G Wing cell.

A few minutes before 7:30 a.m. on June 18, 2008, Correctional Officer David Doglietto and Correctional Officer Joseph Netro were dispatched to CTF's Central maintenance area in response to a report of a break-in at the carpentry shop there. Tools were reported missing.

Officer Doglietto discovered a cut in the fence between the maintenance area and an area containing Connexes. When Officer Netro went over to inspect the fence, a staff electrician pointed out an inmate beyond the fence in an area accessible through a locked pedestrian gate.

At about 7:55 a.m. on June 18, 2008, Abel Munoz, a correctional officer at CTF assigned as an O Wing roof gunner, was stationed on top of the O Wing roof, an interior location. His job was to keep security of the five Administrative Segregation yards

where inmates were housed and to prevent fights and escapes. From his position on the O Wing roof, Officer Munoz saw defendant Bailey, an inmate, hiding behind a Connex, a big storage unit.

Defendant was looking around the side of the Connex, "darting his head back and forth." Inmates are not ordinarily in that area without an officer or supervisor. Officer Munoz asked defendant what he was doing and defendant replied that he was waiting for his supervisor. Defendant could not name his supervisor but told Munoz that his supervisor was over by the silver truck. This response seemed suspicious to Munoz who could not see anyone standing by the truck and knew that Correctional Officer Stephens, who drove that truck, had "already entered underneath Central." After the officer told defendant to stay put, defendant went behind the Connex. Officer Munoz telephoned Officer Stephens and alerted him to the unsupervised inmate.

Officer Stephens was in Central tunnel, which is located underneath the Central Facility. Officer Stephens was the inmate day labor officer and was supervising a 15 member construction work crew. Officer Stephens went out to the Connexes by the O Wing yard and made contact with defendant Bailey.

Defendant said that his boss had allowed him into the area. This explanation did not make sense to Officer Stephens because the area was fenced and keys were required to get in. Officer Doglietto and Officer Netro joined Officer Stephens. Officer Netro handcuffed defendant. Defendant was wearing a CDC jacket on which the standard bright yellow lettering "CDC Prisoner" had been blacked out.

Ismyanto Soekardi, the correctional sergeant, arrived at the maintenance area where Officer Netro had custody of defendant. The closest perimeter fence, which if scaled by an inmate would put him "out on the streets," was about 500 yards away.

To arrive at the location where he was apprehended, defendant had hacksawed through the bars of his cell in the Central Facility G Wing, removed the windows, and cut

through a metal screen. Defendant had breached four fences, including the G Wing perimeter security fence, the Central chapel yard gate, a rooftop fence on the Central Facility textile building, and the fence separating the Central maintenance area, where the carpenter shop was located, from the Connexes. He had made his way to the east end of the Central Facility. Defendant had actually gone deeper into the interior of the institution after breaking out of his cell.

At trial, defendant admitted taking the reconstructed route shown in the DVD played for the jury. It showed the fence breaches and a path along the roof corridor. Defendant also said that he had leaped over a razor wire wearing three pairs of pants. He admitted that he had left the area in which he was confined.

Later that same day, a hacksaw blade was discovered on top of a Connex. Two tools were located underneath the Connex. Wire strippers were found near the breach in the maintenance area fence. When officers examined defendant's cell, they found a lump of clothing in the upper bunk covered by blankets. A more thorough search of defendant's cell on June 19, 2008 uncovered hidden hacksaw blades.

Sergeant Soekardi explained that between the Central Facility and the North Facility there are three inner towers, Towers Five, Six, and Seven, which were "manned 24/7." However, the roof is not staffed "24/7." The sergeant stated that no officers were stationed in the area of the maintenance yard fences "at [the] time of his attempt."

Sergeant Soekardi spoke with defendant after he had been apprehended. Defendant admitted to having a plan to escape. He said that his plan had been to cut through a fence behind G Wing and "make his way towards North Facility," cut through a double fence, and meet someone who was supposed to be waiting there to pick him up. He explained that he was unable to execute this plan because it took him "so long to cut out of the G Wing fence" and because cutting the G Wing fence was "so loud." Defendant wrote letters to his daughter and son indicating he had tried to escape. At trial,

however, defendant claimed that he had no intent to escape but rather he had merely planned to reach the maintenance area, where he intended to assault another inmate against whom he held a grudge, and then return to his cell.

B. *Procedural History*

As stated, the information originally charged attempt to escape and escape from CTF in violation of section 4530, subdivision (b). The People's trial brief stated that "[o]n June 18, 2008, defendant a prisoner at the Correctional Training Facility, Soledad, in Monterey County, attempted to escape." The defendant's trial brief stated that he had been charged in count one with escape and attempt to escape. During pretrial proceedings, the prosecutor told the court: "Although [the defendant] didn't make it outside the outer perimeter, I feel legally it qualifies as an escape since he sawed though the bars of his cell and made several holes in several fences and was where he was not authorized to be."

Before closing argument, the court gave instructions to the jury, including an instruction regarding escape: "The defendant is charged with escape, in violation of Penal Code section 4530 (b). To prove that the defendant is guilty of this crime, the People must prove that, one, the defendant was a prisoner who had been convicted of a felony; two, the defendant was confined in prison; three, and the defendant escaped from the prison. [¶] Escape means the unlawful departure of a prisoner from the physical limits of his or her custody. It is not necessary for the prisoner to have left the outer limits of the institution's property. However, the prisoner must pass beyond some barrier, such as a fence or wall, intended to keep the prisoner within a designated area."

In closing, the prosecuting attorney argued that the crime of escape did not require the prisoner to get outside that last fence and be home free and the prisoner did not have to leave the outer limits of the prison's property. She stated that the prisoner must pass beyond some barrier, such as a fence or a wall. She emphasized that defendant had

sawed through the bars of his cell and escaped his cell. She argued that the breached fences were supposed to keep defendant where he belonged within the prison.

Defense counsel implied that, contrary to the prosecution's argument, going through the bars or fences was not sufficient to show an escape. He told the jurors that, if they carefully looked at the escape instruction, they would see that no escape had occurred. The prosecuting attorney objected on the grounds that this argument was misleading and the court had defined "escape" in its instructions. After the court indicated that defense counsel was required to go over the entire instruction if he wanted to discuss the instruction, defense counsel read the instruction's definition of escape to the jury and then emphasized that the instruction said "property," implicitly referring to "the outer limits of the institution['s] property." Again, the prosecuting attorney objected on the ground the argument was misleading the jury.

In a discussion outside the presence of the jury, defense counsel cited *People v. Lavaie* (1999) 70 Cal.App.4th 456. Neither the court nor the prosecuting attorney was familiar with the case. The prosecuting attorney complained that the case contradicted the agreed upon instructions and asserted that "[t]he jury has been instructed according to CALJIC 2760, and any case law in contradiction of it is not the jury instruction." Defense counsel maintained that he was not contradicting the instruction and explained that the fact scenarios in the case law indicate that the wall or barrier at issue was the exterior perimeter of the institution.

The trial court indicated that it was willing to permit the People to again amend to charge both escape and attempt to escape and to allow counsel to briefly argue the point. The court indicated that, if the jury concluded defendant had not escaped from prison, it would then determine defendant's intent. Defense counsel objected and complained that it had been determined that the case would be tried as a "straight escape." Counsel stated, "If that's the Court's inclination, we would rather limit our closing argument and leave it

at that." Defense counsel reiterated that, "I'm saying that I would agree to limit my closing arguments." The court stated it had not realized "why there was such a ready acquiescence to eliminating the attempt at that time." The court acknowledged that there was no case holding that "an escape through the inner wall is an escape completed in and of itself." The court indicated that it could not see how trying the case as an escape, rather than as an attempt, had altered the defense's strategy and that it did not have "any big problem" with amending the information to charge attempt to escape. Defense counsel stated, "rather than go through that, I would gladly limit my closing argument."

After further discussion, the court asked defense counsel whether he was indicating that he would rather not argue the point and stay within the escape instruction. The defense counsel indicated that he would not argue the point. The court did not instruct the jury regarding attempt to escape.

C. Escape from State Prison

Section 4530, subdivision (a), provides: "Every prisoner confined in a state prison who, by force or violence, escapes or attempts to escape therefrom and every prisoner committed to a state prison who, by force or violence, escapes or attempts to escape while being conveyed to or from such prison or any other state prison, or any prison road camp, prison forestry camp, or other prison camp or prison farm or any other place while under the custody of prison officials, officers or employees; or who, by force or violence, escapes or attempts to escape from any prison road camp, prison forestry camp, or other prison camp or prison farm or other place while under the custody of prison officials, officers or employees; or who, by force or violence, escapes or attempts to escape while at work outside or away from prison under custody of prison officials, officers, or employees, is punishable by imprisonment in a state prison for a term of two, four, or six

years."[2] Section 4530, subdivision (b), provides for lesser punishment of a "prisoner who commits an escape or attempts an escape as described in subdivision (a), without force or violence . . . ." The crime of escape is a general intent crime for which no specific intent is required (see *People v. Hayes* (1971) 16 Cal.App.3d 662, 666-668; *People v. Richards* (1969) 269 Cal.App.2d 768, 777, fn. 10). The term "escape" is not defined by statute but has been interpreted by case law.

In *People v. Quijada* (1921) 53 Cal.App. 39, the defendant was prosecuted under former section 105, from which section 4530 was derived. (*Id.* at p. 40.) The defendant argued that the evidence did not show an "escape" but merely "an attempt to escape." (*Ibid.*) The evidence showed that the defendant, who was working in a prison's stoneyard, seized a locomotive with fellow prisoners. (*Id.* at pp. 40-41.) They ran the locomotive through the prison yard, through a large locked gate, and beyond the walls of the prison before they were recaptured on the prison's property. (*Id.* at pp. 40-41.) The appellate court, relying on two out-of-state cases, determined that the term "escape" means "the unlawful departure of a prisoner from the limits of his custody." (*Id.* at p. 41.) The appellate court stated: "When the defendant went beyond the prison walls without permission of the authorities he unlawfully departed from the limits of his custody, and it is immaterial that he did not get entirely beyond the territory connected with the prison grounds. It was his duty to remain within the walls as he very well knew, and when he transcended these limits he necessarily 'violated his lawful custody.' " (*Ibid.*)

In *People v. Sharp* (1959) 174 Cal.App.2d 520, the defendant argued that he had not escaped from prison within the meaning of section 4530 because he did not leave the

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[2] "A person is deemed confined in a 'state prison' if he is confined in any of the prisons and institutions specified in Section 5003 by order made pursuant to law, including, but not limited to, commitments to the Department of Corrections . . . ." (§ 4504.)

prison's grounds. (*Id.* at p. 522.) The evidence showed that "[t]he prison was surrounded by a fence," which "marked the outer limits of the security area." (*Ibid.*) "Inmates were authorized to be outside the fence only when under supervision following proper authorization." (*Ibid.*) The defendant, who was in the recreation yard inside the fence, scaled the fence and ran into the open field beyond the fence. (*Ibid.*) The defendant was apprehended in the field, which was prison property. (*Id.* at pp. 522-533.) The appellate court found the evidence sufficient to show escape, stating: "Going beyond that fence without permission would be an unlawful departure from the limits of an inmate's custody even though when apprehended he was in a field (beyond the fence) which also was prison property. (See *People v. Quijada*, 53 Cal.App. 39, 41 [199 P. 854].)" (*Id.* at p. 522.)

In *People v. Temple* (1962) 203 Cal.App.2d 654, the defendant contended that the trial court had misinstructed the jury regarding the definition of escape and he was not guilty of escape "since he did not get entirely off the prison premises . . . ." (*Id.* at p. 658.) The evidence showed that defendant was restricted to a security area in the North Facility of the Correctional Training Facility at Soledad, "which was surrounded by a security fence some 12 to 15 feet in height." (*Id.* at p. 655.) When the defendant was supposed to leave a patio located in the security area and return to the housing units, he and other prisoners, in accordance with their escape plan, climbed over the security fence and ran into the field beyond the security fence. (*Id.* at pp. 655-656.) He was apprehended before reaching the northern boundary of the prison's property. (*Id.* at p. 656.) The appellate court in *Temple* stated: "Since the decision in *People v. Quijada*, 53 Cal.App. 39 . . . it has been the settled law of this state that an escape is the unlawful departure of a prisoner from the limits of his custody. Here the defendant was restricted to a certain area of the prison at Soledad. He had no permission to leave the area where he was confined; with others, and pursuant to a plan, he climbed the fence and fled

several hundred yards across a field until halted by the fire of the guards. It is of no consequence that he had not completely escaped from the prison premises." (*Id.* at p. 658.)

In *People v. Lavaie*, *supra*, 70 Cal.App.4th 456, the defendant appealed from a conviction of escape from a state prison following a court trial. He challenged the sufficiency of the evidence on the ground that there was no proof he had left the prison camp where he was an inmate. (*Id.* at p. 457.) The evidence indicated that, sometime between 12:30 a.m. and 1 a.m., officers on patrol saw two men in an out-of-bounds area of Camp 19, a state correctional facility, but within the perimeter fence of the camp. (*Ibid.*) Following a search, the defendant was determined not to be in any area permitted to inmates at that time of night and was eventually seen "at 3:15 a.m., walking down the steps from the kitchen and dormitory area." (*Id.* at pp. 457-458.) The defendant "had not requested permission or authority to go into an out-of-bounds area that night." (*Id.* at p. 458.) The trial court's statements indicated that it found the "unlawful departure of a prisoner from the limits of his custody" based upon the defendant's "absence from the area where he was permitted to be, rather than from the camp itself." (*Id.* at p. 460.)

The appellate court in *Lavaie* determined that the trial court's interpretation of the crime of escape from prison was too broad. (*Ibid.*) It distinguished *Temple* and *Quijada*: "In both *Temple* and *Quijada*, the prisoner had gone beyond one barrier, either a wall or a fence, but had not left the outer limits of the prison property."[3] (*People v. Lavaie*, *supra*, 70 Cal.App.4th at p. 461.) The court stated: "We have found no cases recognizing an

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[3] The bracketed portion of the standard instructional definition of escape provides: "It is not necessary for the prisoner to have left the outer limits of the institution's property. However, the prisoner must pass beyond some barrier, such as a fence or wall, intended to keep the prisoner within a designated area." It was derived from this language in *Lavaie* and is supposed to be given when "there is an issue as to whether the defendant went far enough to constitute an escape. (See See Bench Notes foll. CALCRIM 2760 (2009 ed.) p. 694.)

escape when a prisoner remains within the camp or prison barriers, but is outside the particular area within the camp or prison where he is permitted to be." (*Ibid.*) It found the evidence insufficient to prove escape. (*Ibid.*) The court stated, "[w]hile this evidence may be sufficient to show that appellant violated prison rules, it is insufficient to support a conviction for escape." (*Id.* at p. 462.)

Defendant maintains that a prisoner's unlawful departure from the limits of his custody occurs only when the prisoner goes beyond the "secure perimeter" of a CDRC facility. He relies upon *Lavaie* and the California Code of Regulations, title 15, section 3000, which defines terms, including the terms "attempted escape," "custody of the department," "secure perimeter," and "security perimeter," as used in the regulations of Adult Operations and Programs. The People argued that defendant "intentionally broke through barriers that were erected to prevent escapes" and "effectively went beyond the limits of his confinement and escaped." The People assert that this case is more similar to *People v. Steele* (1988) 206 Cal.App.3d 703.

We recognize that "[t]he contemporaneous construction of a new enactment by the administrative agency charged with its enforcement, although not controlling, is entitled to great weight. [Citations.]" (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1388-1389.) But the administrative definitions cited by defendant are of no relevance here since they are completely unrelated to section 4530.

Steele, which was cited by the People, is also unhelpful. There was no sufficiency of the evidence issue in *Steele*. Steele's sole contention was that the trial court erred by refusing to give his requested instruction on the defense of duress. (*People v. Steele*, *supra*, 206 Cal.App.3d at p. 705.) The court did not discuss or decide the precise meaning of an"unlawful departure from the physical limits of custody" in the context of an alleged escape from prison. " 'It is axiomatic, of course, that a decision does not stand

for a proposition not considered by the court.' [Citation.]" (*Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 332.)

We now turn to this case. Defendant broke out of his cell and breached a number of interior barriers. These circumstances differentiate this case from *Lavaie*, which apparently involved a lower security camp. Nevertheless, as in *Lavaie*, defendant remained within the boundaries of the facility where he was incarcerated. By contrast in *Temple*, the defendant had impliedly left CTF's North Facility and was on his way to the northern boundary of the prison's property.

The evidence in this case did not demonstrate that defendant had managed to go beyond the bounds of CTF's Central Facility. Instead, the evidence was that he had gone further into CTF's interior after breaking out of his cell and had ended up in the east end of CTF's Central Facility. As the court instructed, to prove escape, the People were required to establish that, among other things, "the defendant escaped from the prison." While case law explicates the meaning of "escape," the statutory language at issue here still requires an escape from prison ("Every prisoner confined in a state prison who . . . escapes or attempts to escape therefrom"). Case law clearly establishes that it is not enough to have reached an unauthorized location or be out-of-bounds within the prison institution or facility.

The word "depart" means "to go away from" or "leave." (American Heritage College Dict. (3d ed. 1993) p. 372; see Webster's 3d New Internat. Dict. (1993) p. 604 ["depart" defined as "to go away from or out of" or "leave"].) The commonly understood meaning of the word "limits" is "[t]he boundary surrounding a specific area; bounds." (American Heritage College Dict. (3d ed. 1993) p. 787; see Webster's 3d New Internat. Dict. (1993) p. 1312 ["limits" defined as "the place or area enclosed within a boundary: BOUNDS"].) The "specific area" in this case is the prison facility having custody of the prisoner.

Under well established principles of statutory interpretation, courts should give meaning to every statutory word if possible and should avoid a statutory construction that renders any word surplusage. (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 249.) Thus, the meaning of "the unlawful departure of a prisoner from the limits of his custody" must be understood in reference to the "state prison" from which the prisoner allegedly escaped in violation of section 4530. Thus, proof of escape from prison requires a showing that the prisoner has gone beyond the boundary of the prison facility having custody of that prisoner. An inmate who remains within the bounds of the prison has not escaped that prison even if he has broken out of his cell and breached interior security barriers.

We agree that the evidence was insufficient to show an escape from prison within the meaning of section 4530. But the evidence was more than ample to establish an attempt to escape from prison. Defendant does not suggest otherwise but he maintains that this court cannot reduce the crime to attempt to escape because the jury was not instructed on attempt to escape and, consequently, the jury was required to either convict or acquit defendant of the crime of escape and this court may not reduce the conviction.

The California Supreme Court "has long recognized that under Penal Code sections 1181, subdivision 6 [fn. omitted], and 1260, an appellate court that finds that insufficient evidence supports the conviction for a greater offense may, in lieu of granting a new trial [on a lesser included offense], modify the judgment of conviction to reflect a conviction for a lesser included offense." (*People v. Navarro* (2007) 40 Cal.4th 668, 671.) Attempt to escape is not a lesser-included offense of escape based upon the elements of the offense impliedly found true by the jury.[4] In the past, courts have sometimes reduced a conviction of an offense to an attempt where evidence was

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[4] "Attempt to escape" from prison requires proof of specific intent to escape (see § 21a, see also *People v. Gallegos* (1974) 39 Cal.App.3d 512, 517.)

insufficient to prove the former but sufficient to prove the latter. (See *People v. Rojas* (1961) 55 Cal.2d 252, 260-261 [finding of receiving stolen property reduced to attempting to receive stolen property where, unbeknownst to the defendant, the property had been intercepted by police before receipt]; see also *People v. Layman* (1968) 259 Cal.App.2d 404, 409 [verdicts of grand theft reduced to attempts to commit grand theft].) As now understood, however, the right to due process and right to jury trial under the Sixth Amendment to the United States Constitution, made applicable to the states under the Fourteenth Amendment to the United States Constitution (see *Duncan v. State of La.* (1968) 391 U.S. 145, 149-150 [88 S.Ct. 1444]), "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt [fn. omitted]. *Sullivan v. Louisiana,* 508 U.S. 275, 277-278, 113 S.Ct. 2078, 2080-2081, 124 L.Ed.2d 182 (1993)." (*U.S. v. Gaudin* (1995) 515 U.S. 506, 510 [115 S.Ct. 2310]; see U.S. Const., 14th Amend. [states prohibited from depriving any person of liberty without "due process of law"]; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277 [113 S.Ct. 2078] [Sixth Amendment right to trial by jury includes the right to have jury, rather than judge, reach the finding of guilty; judge may not direct verdict for the state, no matter how overwhelming the evidence].)

Because the trial court failed to instruct the jury regarding an attempt to escape from prison[5] and the evidence is not sufficient to support the conviction of escape from prison, we must reverse. As a result, we do not reach the remaining contentions.

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[5] Under California law, the trier of fact "may find the defendant 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." (§ 1159.) "It is well settled that the trial court is obligated to instruct on necessarily included offenses-even without a request-when the evidence raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense." (*People v. Ramkeesoon* (1985) 39 Cal.3d 346, 351.) This rule presumably

The judgment of conviction is reversed.

ELIA, J.

WE CONCUR:

PREMO, Acting P. J.

McADAMS, J.

extends to attempts. (See *People v. Lopez* (1998) 19 Cal.4th 282, 287 ["A court must instruct sua sponte on general principles of law that are closely and openly connected with the facts presented at trial"].) "[A] defendant has no legitimate interest in compelling the jury to adopt an all or nothing approach to the issue of guilt. Our courts are not gambling halls but forums for the discovery of truth." (*People v. St. Martin* (1970) 1 Cal.3d 524, 533.) "[N]either the prosecution nor the defense should be allowed, based on their trial strategy, to preclude the jury from considering guilt of a lesser offense included in the crime charged." (*People v. Barton* (1995) 12 Cal.4th 186, 196.) "The obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given. [Citations.]" (*People v. Sedeno* (1974) 10 Cal.3d 703, 716, overruled on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 149, 165 and *People v. Flannel* (1979) 25 Cal.3d 668, 684-685, fn. 12.)

Trial Court:	Monterey County Superior Court
Trial Judge:	Hon. Timothy S. Buckley
Attorneys for Appellant:	Jonathan E. Berger, Under appointment by the Court of Appeal and William M. Robinson, Staff Attorney, Sixth District Appellate Program
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People v. Bailey

H034382

EXHIBIT B

Filed 9/17/10

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ROBIN BAILEY, Defendant and Appellant.	H034382 (Monterey County Super. Ct. No. SS082741A) ORDER

THE COURT:

The above captioned opinion, which was filed on August 26, 2010, is hereby modified as follows: Insert the following footnote on page 14, second line, after "(1961) 55 Cal.2d 252, 260-261": This court expresses no opinion regarding the application of *People v. Rojas*, *supra*, 55 Cal.2d 252 in circumstances different from those present here. *Rojas* has been cited for the proposition that "[w]here a defendant has the requisite criminal intent but 'elements of the substantive crime [are] lacking' due to 'circumstances unknown' to him, he can only be convicted of attempt-and not the substantive crime itself. (*People v. Rojas* (1961) 55 Cal.2d 252, 257-258 . . . [because the property was not actually stolen, defendants were guilty of attempted receipt of stolen property]; see also *People v. Camodeca* (1959) 52 Cal.2d 142, 147 . . . [because the victim was not deceived by and did not rely on the false representations, defendant was guilty of attempted grand theft by false pretenses].)" (*People v. Rizo* (2000) 22 Cal.4th 681, 685.) This case does not fit the *Rojas* scenario. Moreover, in this case, there was conflicting evidence whether

defendant had specific intent to escape and the prosecution made a deliberate decision to not prosecute defendant for attempted escape.

There is no change in the judgment.

The petition for rehearing is denied.

ELIA, J.

PREMO, Acting P. J.

McADAMS, J.

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Robin Bailey**
No.: **H034382**

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 October 5, 2010, I served the attached **PETITION FOR REVIEW** 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 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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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 October 5, 2010, at San Francisco, California.

Nelly Guerrero
Declarant

N. Guerrero
Signature

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