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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff & Respondent,* **v.** **RICHARD GOOLSBY,** *Defendant & Appellant.*	Case No. E052297

Fourth Appellate District, Division Two, Case No. E052297
San Bernardino County Superior Court, Case No. FSB905099
The Honorable BRYAN F. FOSTER, Judge

PETITION FOR REVIEW

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PETITION FOR REVIEW

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Petitioner, the People of the State of California, respectfully petitions this Court to grant review, pursuant to rule 8.500 of the California Rules of Court, of the above-entitled matter, following the issuance of a published divided opinion on January 14, 2014, by the Court of Appeal, Fourth Appellate District, Division Two, reversing the conviction of appellant Richard James Goolsby, for arson of an inhabited structure (Pen. Code,[1] § 451, subd. (b)). As relevant here, the majority found this Court's opinion in *Kellett v. Superior Court* (1966) 63 Cal.2d 822 (*Kellett*) bars retrial of a lesser related offense for arson of property. Although the jury was instructed on this lesser related offense, it was also erroneously instructed not to reach a verdict on this charge if it found appellant guilty of arson of an inhabited structure. A copy of the Court of Appeal's opinion is attached.

ISSUE PRESENTED

Does section 654 and this Court's rule in *Kellett* bar retrial when a defendant impliedly consents to instructing the jury with a lesser related offense, but the jury does not return a verdict on that charge based on erroneously-given instructions?

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

STATEMENT OF THE CASE

After several arguments with his girlfriend one night, appellant used a vehicle to push an inoperable motor home next to the one in which he and his girlfriend were living, and where his girlfriend was then was sleeping. (1 RT 42, 48-54, 95-97.) Appellant doused the inoperable motor home with gasoline and set it on fire. His girlfriend, who was awakened by her dogs, smelled smoke and gasoline, and heard crackling sounds and glass popping. She looked out the window and saw flames coming from the inoperable motor home, about four feet away. (1 RT 55-56, 62, 202.) She saw appellant walking from the inoperable motor home to the other side of the lot. (1 RT 58.) Fleeing the motor home, she got out with her dogs just before the fire spread and engulfed it. The fire destroyed both motor homes. (1 RT 63-64, 103, 105, 107-108, 126-129.)

The San Bernardino County District Attorney charged appellant with attempted murder (§§ 664/187) and arson of an inhabited structure (§ 451, subd. (b)). (1 CT 69-73 [First Amended Petition].) Because the court and both parties believed that arson of property (§ 451, subd. (d)) was a lesser included offense of arson of an inhabited structure, the trial court instructed the jury on the lesser offense, and instructed it not to reach a verdict on the lesser offense if it found appellant guilty of arson of an inhabited structure.

The jury found appellant not guilty of attempted murder, but guilty of arson of an inhabited structure. In accordance with the trial court's instructions, the jury did not return a verdict on the lesser offense of arson of property. The jury also returned a true finding that appellant caused multiple structures to burn (§ 451.1, subd. (a)). (1 CT 126-127, 260.) Subsequently, the trial court found true that appellant had previously suffered a residential burglary and two robbery prior convictions in 1976, which constituted "strikes" and serious felony convictions (§§ 667, subd. (a)(1), (b)-(i), 1170.12, subd. (a)-(d)). It also found true prison prior

allegations concerning appellant's convictions in 1998 and 2001 for firearms violations, and in 2004 for grand theft (Pen. Code, § 667.5, subd. (b)). (1 CT 97, 262-265.)

The trial court sentenced appellant under the Three Strikes law to a 25-year-to-life sentence plus a determinate term of 23 years. The determinate term was comprised of a five-year enhancement for the burning of multiple structures, plus three consecutive five-year terms for each serious prior felony, and three consecutive one year terms for each prison prior. (2 CT 297-298, 311-314.) Appellant appealed.

On February 14, 2013, the Court of Appeal filed an unpublished opinion that affirmed but modified the judgment. The court held that the evidence did not support the arson of an inhabited structure conviction, reasoning the motor home that was burned in this case was not a "structure" within the meaning of the arson law. Having rejected appellant's argument he did not act with malice in burning the motor home, the court exercised its authority under section 1181, subdivision (6), modified the verdict and reduced appellant's conviction to the lesser offense of arson of property (§ 451, subd. (d)). Because the court reduced appellant's offense to arson of property, it struck the burning multiple structures enhancement. The court also struck two of the serious prior felony enhancements because the offenses were not brought and tried separately as required by section 667, subdivision (a).

The court subsequently granted appellant's petition for rehearing on the issue of whether arson of property is a lesser included offense of arson of an inhabited structure such that it could exercise its discretion under section 1181, subdivision (6), and reduce appellant's conviction from the greater offense to the lesser offense.

In an opinion filed April 30, 2013, the court found that arson of property was a lesser related offense of arson an inhabited structure and,

therefore, outside the scope of its authority to modify the conviction under section 1181, subdivision (6). In reversing and remanding the case with directions to dismiss, the court concluded that permitting a new trial on the lesser related offense "would violate the constitutional prohibition against placing a person twice in jeopardy for the same offense."

Respondent petitioned for rehearing, arguing that double jeopardy did not prevent a retrial of the lesser related offense.

The Court of Appeal granted rehearing and issued a third (now divided) opinion that reversed and remanded to the trial court with directions to dismiss the case. (Appendix, *People v. Goolsby,* Fourth App. Dist., Div. Two, Case No. E052297, Slip Opinion, pub. Jan. 14, 2014 (hereinafter, "Opn.").) Writing for the majority, Justice McKinster first held the motor home was not a structure and, therefore, could not support a charge of arson of an inhabited structure. The majority further concluded that retrial on the lesser related offense of arson of property is barred under section 654's prohibition against multiple prosecutions for the same act following an acquittal or conviction. The majority no longer relied upon principles of double jeopardy. Instead, the majority looked to *Kellett* and concluded retrial constituted a new and separate prosecution of the same act. (Opn. at p. 9.) The Court of Appeal acknowledged that the offense was before the jury in the trial court's instructions, however, it reasoned:

> Had the prosecutor charged the defendant with the lesser related offense in this case, the jury would have been instructed to render verdicts on both the greater and lesser charges. Because the prosecutor did not do so, there is no unresolved or pending charge on which to remand this matter to the trial court.

(Opn. at p. 10.)

In dissent, Justice Richli disagreed with the majority's holding to dismiss the case and provide appellant with a "get out of jail free" card. (Dis. Opn. at p. 1.) The dissent focused its analysis on the implicitly

amended charges. Relying on authority from this Court and the Fourth District, the dissent concluded that "the prosecution did effectively charge defendant with arson of property, because the jury was instructed on this offense, and because defense counsel did not object." (Dis. Opn. at p. 2; *People v. Toro* (1989) 47 Cal.3d 966, 976 (*Toro*), disapproved on another ground in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3; *Orlina v. Superior Court* (1999) 73 Cal.App.4th 258, 263-264.) The dissent found that because the jury did not return a verdict on the offense of arson of property, the charge is unresolved and still pending; the instructional error mischaracterizing the lesser related offense as a lesser included one did not implicate the concerns articulated in *Kellett*. (Dis. Opn. at pp. 2-3.)

ARGUMENT

I. REVIEW SHOULD BE GRANTED TO SETTLE WHETHER THIS COURT'S DECISION IN *KELLETT* BARS RETRIAL WHEN A DEFENDANT IMPLIEDLY CONSENTS TO ADD A LESSER RELATED OFFENSE TO THE ORIGINAL CHARGE AND BY REASON OF INSTRUCTIONAL ERROR, THE JURY DOES NOT RETURN A VERDICT ON THE OFFENSE

Relying on this Court's opinion in *Kellett, supra*, 63 Cal.2d 822, the Court of Appeal majority held that retrial of the lesser related offense of arson of property is barred by section 654's prohibition against multiple prosecutions. (Opn. at p. 10.) However, section 654 is not implicated where charges are properly joined in the original prosecution. Because appellant impliedly consented to add the lesser related offense to the original charge by agreeing to the jury instructions and verdict form, the concerns related to successive prosecutions articulated by this Court in *Kellett* are not involved. The lesser related offense of arson of property was never decided based on a simple instructional error. The instruction erroneously told the jury not to reach a verdict if it found appellant guilty

of arson of an inhabited structure, which is what it did. Consequently, arson of property remains an open charge and the *Kellett* rule does not apply to this case. Review is appropriate because this Court is uniquely situated to speak to the meaning of its prior decision in *Kellett.* As important, the Court of Appeal's published decision results in a windfall for appellant, who is a dangerous arsonist and who will otherwise escape justice based on a mere instructional error.

A. *Kellett* Does Not Apply to Prevent Retrial of Charges Properly Before the Jury in the Original Prosecution

This Court's opinion in *Kellett* is concerned with new and separate prosecutions of offenses that were never before considered by a jury, but are based on the same act or conduct for which an earlier prosecution failed. (*Kellett, supra*, 63 Cal.2d 822.) In that case, Kellett was charged with misdemeanor brandishing of a firearm (§ 417), and in a second case based on the same facts, with possessing a concealable weapon by a felon (§ 12021). After pleading guilty to the misdemeanor, Kellett sought to dismiss the second case against him. In holding the section 12021 charge should have been dismissed under section 654, this Court reasoned that where joinder of offenses is proper, closely related crimes based on the same act or conduct "must be prosecuted in a single proceeding" and if they are not brought in "the initial proceedings" subsequent prosecution is barred. (*Id.* at 827; see § 954 [requiring joinder of related offenses in a single prosecution].) The purpose of this rule is to prevent needless harassment and the waste of public funds. (*Ibid.*) But as this Court emphasized, "our holding herein will not open the door to the escape of defendants from punishment for serious crimes because of convictions or acquittals of closely related minor crimes." (*Id.* at p. 828.)

In the present case, the majority applied *Kellett* in a wholly new context. The majority concluded *Kellett* foreclosed retrial even where the trial court instructed the jury on a lesser related offense, but the jury did not return a verdict as to that offense. The majority stated that the only reason the jury was instructed on the offense of arson of property was because the trial court and both parties believed that it was a lesser included offense of arson of an inhabited structure. According to the majority, if the prosecutor had charged appellant with the lesser related offense, the jury would have been instructed to render verdicts as to both counts. (Opn. at pp. 9-10; *Kellett, supra*, 63 Cal.2d at p. 827.)

But as Justice Richli pointed out in dissent, the majority failed to recognize that the jury instructions and verdict form on arson of property, to which the defense consented by tacit agreement, effectively amended the charges to include the lesser related offense of arson of property. (*People v. Birks* (1998) 19 Cal.4th 108, 136, fn. 19; *Toro, supra*, 47 Cal.3d at p. 976; *Orlina v. Superior Court, supra*, 73 Cal.App.4th at pp. 263-264.) The amended charge is the very fact that distinguishes the error described in *Kellett*. Review is necessary to settle the dichotomy in the law created by the Court of Appeal's published opinion.

1. A Charge Is Effectively Amended With a Lesser Related Offense When the Defendant Consents to Jury Instruction and Verdict Form by Tacit Agreement

Generally, a defendant may be convicted of an uncharged crime only if it is a lesser included offense of a charged crime. (*People v. Reed* (2006) 38 Cal.4th 1224, 1227; see § 1159.) The rule limiting convictions of uncharged crimes to lesser included offenses of charged crimes satisfies the due process requirement that an accused be given adequate notice of the

charges so as to have a reasonable opportunity to prepare and present a defense. (*People v. Reed, supra*, 38 Cal.4th at p. 1227.)

When a lesser offense is not necessarily included in the original charge, the parties may nevertheless agree that the defendant may be convicted of such offense. (*People v. Birks, supra,* 19 Cal.4th at p. 136 fn. 19.) A defendant's agreement may be express or he may impliedly consent or acquiesce to have the trier of fact consider an uncharged offense. (*Toro, supra,* 47 Cal.3d at p. 973; *Orlina v. Superior Court, supra,* 73 Cal.App.4th at pp. 263-264; *People v. Haskin* (1992) 4 Cal.App.4th 1434, 1438.) Consent to conviction of a lesser charge has been found when a defendant requests an instruction on the lesser offense or urges conviction on the lesser. (*People v. Ramirez* (1987) 189 Cal.App.3d 603, 623 (*Ramirez*), disapproved on another point in *People v. Russo* (2001) 25 Cal.4th 1124, 1137.) Additionally, a defendant is considered to have acquiesced in the jury's consideration of a lesser related offense when he fails to object to the jury instructions or verdict form relating to that offense. (*Toro, supra*, 47 Cal.3d at pp. 976-977.)

In this case, appellant impliedly agreed to have the jury consider the arson of property offense. During the instructional conference, the trial court described a "decision tree" that the jury might utilize to eliminate the greater crime before finding guilt on a lesser crime. The prosecutor explicitly agreed to the lesser offense instructions and verdict options proposed by the trial court, which included arson of property and identified the lesser offenses as lesser included offenses. (2 RT 284-287.) The defense spoke on the matter also. In response to the trial court inquiry concerning the proposed instructions and verdict forms, appellant's attorney stated he "understood where [the trial court was] going." (2 RT 285.) The trial court identified the lesser offenses as lesser included offenses of arson of an inhabited structure. Appellant had ample

opportunity to object to the instructions but did not. Reasonably construed, appellant's statement that he "understood" combined with his failure to object demonstrates implied consent to the lesser offense instructions. (*Toro, supra*, 47 Cal.3d at pp. 973, 976-977.) Appellant's implied consent to the lesser offenses is further supported by his urging the jury to convict him of burning property. (2 RT 354-356, 358, 368-369; *Ramirez, supra,* 189 Cal.App.3d at p. 623.) Appellant's counsel focused the jury's attention on the crimes of arson of property and unlawful burning of property. (2 RT 354-356.) Appellant's counsel conceded that appellant was guilty of unlawfully causing a fire and urged the jury to "[c]onvict him of what he did[.]" (2 RT 369.)[2]

In sum, because appellant's statement and conduct reasonably implied his consent to the additional count, and because "adding a new offense at trial by amending the information" is the functional equivalent of "adding the same charge by verdict forms and jury instructions[]." (*Toro, supra*, 47 Cal.3d at p. 976, fn. omitted), the charge was properly amended with the lesser offense of arson of property.

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[2] It is worth noting that appellant had tactical reasons for agreeing to the additional instructions and arguing accordingly. Appellant benefitted from the addition of the arson of property count because if the jury found it was true, the multiple structure enhancement allegation would not apply. (§ 451.1, subd. (a).) Even more significant, instruction on the arson of property gave rise to an additional lesser offense that would otherwise not have been available to the defense. Namely, as a result of adding the arson of property, the jury was also instructed on the lesser included offense of misdemeanor unlawful burning of property. (*People v. Schwartz* (1992) 2 Cal.App.4th 1319, 1325 ["Unlawfully causing a fire is a lesser included offense of arson."].) Had the jury been persuaded by appellant's arguments that he burned mere property, and did so recklessly, he would have been convicted of a misdemeanor, and therefore outside the reach of Three Strikes sentencing despite his violent and lengthy criminal record. (See, *e.g.*, 2 CT 300 [appellant's prior criminal record detailed in Probation Officer's report], 419-420 [appellant's out-of-state prior convictions for arson, burglary, grand larceny, and escape from Nevada state prison].)

2. The Principles Articulated in *Kellett* Do Not Support Barring Retrial of a Lesser Related Offense Added to the Original Charge by Amendment But Mistakenly Identified as a Lesser Included Offense

In cases where a defendant is charged with and convicted of an offense, and that offense is reversed on appeal, an issue arises as to whether section 654 poses a bar to the defendant being charged with a related offense for the same act. The rule set out in *Kellett*, *supra*, 63 Cal.2d 822, generally stands for the proposition that when the prosecution is or should be aware of multiple offenses arising out of the same course of conduct, "[f]ailure to unite all such offenses will result in a bar to subsequent prosecution of any offense omitted if the initial proceedings culminate in either acquittal or conviction and sentence." (*Id.* at p. 827; see also *Sanders v. Superior Court* (1999) 76 Cal.App.4th 609, 614, 616-617 [after reversal of conviction on ten counts of grand theft of real property, prosecution cannot file new case charging forgery and filing false documents when based on the same acts].) The provision of section 654 prohibiting multiple prosecutions "is a procedural safeguard against harassment." (*Kellett, supra*, 63 Cal.2d at p. 825.) This Court explained in *Kellett*, "It would constitute wholly unreasonable harassment in such circumstances to permit trials seriatim until the prosecutor is satisfied with the punishment imposed." (*Id.* at pp. 825-826.)

Under *Kellett*, a defendant should not be allowed to claim retrial of a lesser related offense amounts to unreasonable harassment by the prosecution when the defendant has agreed to be placed in jeopardy for that offense and, by reason of instructional error, the jury does not return a verdict for that offense so that neither acquittal nor conviction and sentence exist. That is what occurred here. The trial court instructed the jury on the offense of arson of property as a lesser included offense so that when the

jury returned its verdict on the greater offense, it did not return a verdict on the lesser. As the Court of Appeal majority concluded, the trial court as well as both parties shared the mistaken belief the arson of property offense qualified as a lesser included offense, when it is actually a lesser related offense of arson of an inhabited structure. (Opn. at pp. 9-10.) But that mistake does not warrant application of *Kellett* to bar retrial. As the dissenting justice concluded, *Kellett* is not concerned with the mistake that occurred here, but rather is implicated only "when the prosecution has *failed to charge* [an] offense in a previous proceeding." (Dis. Opn. at p. 3, emphasis in original.) Because the charge here was effectively amended, there was no failure in this regard.

Finally, retrial of the lesser related offense does not offend state and federal constitutional principles of double jeopardy. (*Richardson v. United States* (1984) 468 U.S. 317, 325 [104 S.Ct. 3081, 82 L.Ed.2d 242] [double jeopardy protection applies only if there has been an event, such as acquittal, that terminates the original jeopardy].) The discharge of the jury before a verdict is reached is tantamount to an acquittal unless the jury was discharged with the defendant's consent. (*Stone v. Superior Court* (1982) 31 Cal.3d 503, 516.) In this context, consent can be implied from defense counsel's conduct. (*Stanley v. Superior Court* (2012) 206 Cal.App.4th 265, 288.) Appellant's counsel stated he "understood" the instructions and verdict forms that detailed the process by which the jury would return its verdict. (2 RT 285.) The defense did not lodge any objection to the process, which included instructing the jury not to reach a verdict on the lesser charge. Rather, appellant's counsel argued that the jury should convict him of a lesser offense. (2 RT 354-356, 369.) He thereby consented to the jury being discharged without declaring a verdict on the lesser count if the jury found guilt on the greater. It cannot be said that retrial would subject such a defendant to the hazards the doctrine of double

jeopardy was designed to protect against. (*People v. Saunders* (1993) 5 Cal.4th 580, 593.) Notably, although the Court of Appeal relied on principles of double jeopardy as compelling reversal in its second opinion, the majority no longer mentioned double jeopardy in reaching its third decision.

In short, this case was tried under a legal misunderstanding apparently common to all parties. It does not follow that retrial should be barred on a ground put in issue by the defendant and as to which the jury did not render a verdict because of a shared legal misunderstanding. Under these circumstances, retrial is not unfair to the defendant, any more than it would be after routine mistrial or after reversal, at the defendant's behest, based on any other trial error. Conversely, barring retrial is unfair to the public, without effectively serving any countervailing interest in discouraging future prosecutorial overreaching or harassment. Review is warranted so that this Court may speak to the Court of Appeal majority's unprecedented extension of this Court's decision in *Kellett* and avoid an unmerited windfall to a dangerous arsonist.

CONCLUSION

Respondent respectfully requests that this petition for review be granted.

Dated: February 20, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13-point Times New Roman font and contains 3,695 words.

Dated: February 20, 2014

KAMALA D. HARRIS
Attorney General of California

FELICITY SENOSKI
Deputy Attorney General
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APPENDIX

See Concurring and Dissenting Opinion

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RICHARD JAMES GOOLSBY, Defendant and Appellant.	E052297 (Super.Ct.No. FSB905099) OPINION

APPEAL from the Superior Court of San Bernardino County. Bryan Foster, Judge. Reversed and remanded with directions to dismiss.

Steven S. Lubliner, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Lilia E. Garcia, Barry Carlton and Felicity Senoski, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Richard James Goolsby, defendant and appellant (hereafter defendant), guilty of arson of an inhabited structure in violation of Penal Code section 451, subdivision (b),[1] and further found true the allegation that he caused more than one structure to burn within the meaning of section 451.1, subdivision (a)(4), based on evidence that defendant set a fire that caused two motor homes to burn.[2] Because the felony conviction constituted defendant's third strike, the trial court sentenced him to the mandatory term of 25 years to life in state prison, and also imposed various enhancements after first finding those allegations true.

Defendant raises various challenges to the jury's verdict and to his sentence. We agree with his assertion that his motor home is not a structure.[3] Therefore, the evidence that defendant set fire to his motor home does not support the jury's verdict finding defendant guilty of committing arson of an inhabited structure, and also does not support the jury's true finding on the multiple structure enhancement. Moreover, arson of property (§ 451, subd. (d)), the only other crime on which the trial court instructed the jury, is a lesser related, not a lesser included, offense to the charged crime. Therefore, we cannot exercise our authority under section 1181, subdivision 6, to modify the judgment by reducing defendant's conviction to a lesser included crime. For that same reason, i.e.,

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[1] All further statutory references will be to the Penal Code unless otherwise indicated.

[2] The jury found him not guilty of attempted murder.

[3] For purposes of arson, "'Structure' means any building, or commercial or public tent, bridge, tunnel, or powerplant." (§ 450, subd. (a).)

because it is a lesser related crime, we also cannot remand the matter to the trial court for a new trial on the arson of property charge. Our only option, under the circumstances of this case, is to reverse the judgment based on insufficiency of the evidence and direct the trial court to dismiss the charge.

FACTS

The facts are undisputed, and only a few are necessary for our resolution of the issues defendant raises on appeal. Defendant and Kathleen Burley lived together in what was one of several motor homes defendant owned and had parked on a vacant lot. On November 28, 2009, defendant and Burley got into an argument. Sometime not long after the argument, in which defendant and Burley each called the police on the other, defendant used a vehicle to push an inoperable motor home next to the one in which he and Burley were living and where Burley then was sleeping. Defendant used gasoline to set the inoperable motor home on fire. After Burley got out with her dogs, the fire spread to the motor home in which she had been sleeping. The fire destroyed both motor homes.

Additional facts will be recounted below as pertinent to the issues defendant raises on appeal.

DISCUSSION

1.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE JURY'S VERDICT FINDING DEFENDANT GUILTY OF ARSON OF AN INHABITED STRUCTURE

Defendant contends, and we agree, that the evidence was insufficient to show that the motor home in which he and Burley were then living was a structure. Therefore, the evidence that he set fire to or caused that motor home to burn does not support the jury's verdict finding him guilty of arson of an inhabited structure in violation of section 451.

Under section 451, "A person is guilty of arson when he or she willfully and maliciously sets fire to or burns or causes to be burned . . . any structure, forest land, or property." Section 451 sets out "different levels of punishment, depending on the subject matter of the arson. [Citation.] These statutory categories, in descending level of punishment, are: (1) arson resulting in great bodily injury (five, seven, or nine years); (2) arson to [*sic*] 'an inhabited structure or inhabited property' (three, five, or eight years); (3) arson of a 'structure or forest land' (two, four, or six years); and (4) arson to other types of property (16 months, two, or three years). (§ 451, subds. (a), (b), (c) & (d).) By creating these different levels of punishment, the Legislature intended to impose punishment '"in proportion to the seriousness of the offense,"' and, in particular, 'according to the injury or potential injury to human life involved . . . .' [Citation.]" (*People v. Labaer* (2001) 88 Cal.App.4th 289, 292 (*Labaer*).)

The district attorney in this case charged defendant with arson of an "inhabited structure" in violation of section 451, subdivision (b). Defendant pointed out in the trial court that according to section 450, which defines the terms used in the arson chapter, "'Structure' means any building, or commercial or public tent, bridge, tunnel, or powerplant." (§ 450, subd. (a).) The trial court, at the district attorney's urging, focused on whether defendant's motor home was a dwelling, i.e., a place in which defendant and Burley intended to live more or less permanently. Based on that focus, the trial court permitted the jury to determine whether, in this case, a motor home is a structure for purposes of the arson statute.

Whether the crime is arson of a structure in violation of section 451 does not turn on whether a dwelling is involved, as clearly evidenced by the statutory definition of the term "structure." Of the several types of structures included in the statutory definition, only a building is relevant here. As Division One of this court observed in *Labaer*, "The Penal Code does not define 'building' for purposes of arson; we therefore apply the plain meaning of the word. [Citation.]" (*Labaer*, *supra*, 88 Cal.App.4th at p. 292.) In *Labaer*, the defendant argued the mobilehome he had partially dismantled and then set on fire was "property" not a building and, therefore, not subject to the increased punishment for arson of a structure. In rejecting that claim, the court observed, "Labaer does not dispute that the mobilehome—as it existed during the months before the fire—constituted a 'building' [and therefore a structure] under the arson statutes. The evidence established the [mobile]home was fixed to a particular location, could not be readily moved, and had been used as Labaer's residence for several months. (*Ibid.*)

The prosecutor did not present evidence to show that the motor home in which he and Burley then lived was fixed to a particular location and, therefore, had the attributes of a building. The common feature of the things included in the statutory definition of structure is that they are affixed to the ground and either cannot be moved at all or cannot be moved without first being dismantled and detached from the ground.[4] A motor home is a vehicle, the very purpose of which is to move from location to location. Absent evidence to show the motor home was somehow fixed in place, such a vehicle cannot, as a matter of law, be a structure within the meaning of the arson statute.[5] More importantly, and as defendant also pointed out in the trial court, the punishment for arson of an inhabited structure and the punishment for arson of inhabited property is exactly the

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[4] The Attorney General argues that the ability to move is not the determining factor because a commercial or public tent can be dismantled and transported in a truck. The obvious response is that when dismantled, a commercial or public tent is not a structure; it is property.

[5] The Attorney General argues, as the district attorney did in the trial court, that "[b]uildings commonly have walls and a roof. In general, their function is to hold people and property. Although a motor home has wheels and is not fixed to the ground, it is functionally a building, as it serves all the normal purposes of a building, and shares critical design features, such as walls and a roof, and even interior rooms. It is manifestly intended to hold people." The definition of the term "structure" set out in section 450 does not turn on purpose or function, it turns on permanence or immobility, the very attribute of a motor home the Attorney General would have us disregard. Moreover, section 451, the arson statute in question, does not focus on protecting people in buildings as the Attorney General contends. The statute applies to inhabited structures which the Legislature stated means not only buildings but bridges, tunnels, and powerplants. In addition, the severe punishment the Attorney General cites as evidence of the Legislature's intent applies not only to inhabited structures but also to inhabited property, which by definition is everything other than a structure, i.e., a motor home. The only reason the severe punishment for arson of inhabited property does not apply in this case is that the district attorney inexplicably failed to charge it.

same,[6] unlike in *Labaer*, in which arson of a structure that is not inhabited carries a greater punishment than arson of property that is not inhabited.[7]

For purposes of the arson statute, defendant's motor home is property, which by statutory definition "means real property or personal property, other than a structure or forest land." (§ 450, subd. (c).) The district attorney only charged defendant with arson of an inhabited structure under section 451, subdivision (b), even though that section also applies to arson of "inhabited property."[8]

In short and simply stated, the motor home at issue in this appeal is not a structure, as that term is defined in the arson statutes and as the trial court instructed the jury.[9] Therefore, the prosecutor's evidence that defendant set fire to a motor home that caused a second inhabited motor home to catch fire was insufficient as a matter of law to support the jury's verdict finding defendant guilty of arson of an inhabited structure. Nor does

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[6] Imprisonment in state prison for three, five, or eight years. (§ 451, subd. (b).) Because section 451, subdivision (b), includes both inhabited structures and inhabited property, we must reject defendant's claim that arson of inhabited property is a lesser included offense on which the trial court should have instructed the jury.

[7] Arson of a structure is punishable by two, four, or six years in state prison (§ 451, subd. (c)); arson of property is punishable by 16 months, two, or three years in state prison (§ 451, subd. (d)).

[8] The original felony complaint and original information, as well as an amended felony complaint charged defendant with arson of an inhabited structure or property, but then the district attorney filed an amended information that only alleged arson of an inhabited structure.

[9] The trial court instructed the jury according to the statutory definition that a structure is any building, bridge, tunnel, powerplant, or commercial or public tent.

the evidence support the jury's true finding on the enhancement that defendant "caused multiple structures to burn during the commission of the arson." The next issue we must address is the appropriate remedy.

2.

REVERSAL WITH DIRECTIONS TO DISMISS IS THE PROPER REMEDY

The prosecutor, as previously noted, elected to charge defendant only with arson of an inhabited structure. The trial court instructed the jury on the lesser offense of arson of property in violation of section 451, subdivision (d). Arson of property is a lesser related, but not a lesser included, offense to the charged crime of arson of an inhabited structure because, as the Attorney General concedes, the charged crime does not include all the elements of the lesser. (*People v. Hughes* (2002) 27 Cal.4th 287, 365-366 ["'An offense is necessarily included in another if . . . the greater statutory offense cannot be committed without committing the lesser because all of the elements of the lesser offense are included in the elements of the greater'"].) "In other words, when the greater crime 'cannot be committed without also committing another offense, the latter is necessarily included within the former.' [Citation.]" (*Id.* at p. 366.)

Arson of property as defined in section 450, subdivision (d), includes arson of everything *except* a structure or forest land. Moreover, as defendant points out, arson of property requires proof the property either did not belong to the defendant (because it is not unlawful to burn one's own personal property), or in burning or causing one's own property to burn, "there is an intent to defraud or there is injury to another person or another person's structure, forest land, or property." (§ 451, subd. (d).) Arson of a

structure is unlawful regardless of whether the defendant owns the structure. (§ 451, subd. (c).) Because it is possible to commit arson of a structure without also committing arson of property, the latter is not a lesser necessarily included offense of the charged crime in this case. Because arson of property is not a lesser necessarily included offense of the charged crime of arson of a structure, we cannot exercise our authority under section 1181, subdivision 6, to reduce defendant's conviction from the greater to that offense.

Nor can we remand this matter to the trial court for a new trial on the lesser related offense of arson of property. Multiple prosecutions for the same act are prohibited under section 654;[10] or as the Supreme Court put it in *Kellett v. Superior Court* (1966) 63 Cal.2d 822, "When, as here, the prosecution is or should be aware of more than one offense in which the same act or course of conduct plays a significant part, all such offenses must be prosecuted in a single proceeding unless joinder is prohibited or severance permitted for good cause. Failure to unite all such offenses will result in a bar to subsequent prosecution for any offense omitted if the initial proceedings culminate in either acquittal or conviction and sentence." (*Id.* at p. 827.) Although the trial court instructed the jury on the crime of arson of property, it did so only because the court and both attorneys believed it was a lesser necessarily included offense to the charged crime

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[10] Section 654, subdivision (a), states, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars prosecution for the same act or omission under any other."

of arson of an inhabited structure. Consequently, the jury did not render or attempt to render a verdict on that crime because they had been instructed to do so only if they acquitted defendant on the charged greater offense. (Cf. *Orlina v. Superior Court* (1999) 73 Cal.App.4th 258, 263-264 [retrial not barred under section 654 where jury acquitted on charged offense and deadlocked on lesser related offense].) Had the prosecutor charged defendant with the lesser related offense in this case, the jury would have been instructed to render verdicts on both the greater and lesser charges. Because the prosecutor did not do so, there is no unresolved or pending charge on which to remand this matter to the trial court. (*Ibid.*) Any new or subsequent trial in this matter would constitute a new prosecution of defendant based on the same evidence used to prosecute the original charge. Such a prosecution would violate section 654, subdivision (a). (See *Sanders v. Superior Court* (1999) 76 Cal.App.4th 609, 616.)

We conclude the prosecution, as a matter of law, failed to prove its case against defendant. Under the circumstances of this case, retrial is prohibited. We have no alternative but to reverse defendant's conviction with directions to the trial court to dismiss the charges.

DISPOSITION

The judgment is reversed, and the matter is remanded to the trial court with directions to dismiss the charge and all enhancements based on insufficiency of the prosecution's evidence to prove the charged crime.

CERTIFIED FOR PUBLICATION

McKINSTER
Acting P. J.

I concur:

CODRINGTON
J.

[*People v. Goolsby*, E052297]

RICHLI, J., Concurring and dissenting.

I concur with the majority's holding that, on the facts of this case, defendant's motor homes were not "structures" within the meaning of the arson statutes. I respectfully dissent, however, from the majority's conclusion that defendant is now entitled to a "get out of jail free" card.

I am willing to assume, without deciding, that we cannot simply reduce the offense from arson of an inhabited structure (Pen. Code, § 451, subd. (b)) to arson of property.[11] But even if so, defendant could lawfully be retried for arson of property.

Under Penal Code section 654, as construed in *Kellett v. Superior Court* (1966) 63 Cal.2d 822, all offenses arising out of a single act or course of conduct must be

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[11] This proposition is by no means clear.

Arguably, arson of an inhabited structure and arson of property are simply different degrees of arson, a single statutory offense. That would make arson analogous to murder (see *People v. McKinzie* (2012) 54 Cal.4th 1302, 1354) and theft (see *People v. Ortega* (1993) 19 Cal.4th 686, 693-699). We have the power to reduce a conviction for a higher degree of an offense to a lesser degree. (Pen. Code, § 1181, subd. 6.) *People v. Capps* (1984) 159 Cal.App.3d 546 held that a court has this modification power even when the lesser degree of the offense has an element that the higher degree does not; specifically, it held that a court could modify a conviction from first degree murder to second degree murder, even though the jury may have relied on a felony murder theory and thus may never have made any finding of malice. (*Id.* at pp. 551-553.) Under this reasoning, we could reduce defendant's conviction from arson of an inhabited structure to arson of property, even though the latter has elements that the former does not.

I have some reservations, however, about whether *Capps* is still good law in the wake of *Apprendi v. New Jersey* (2000) 530 U.S. 466 and its progeny. Hence, I choose not to rely on it.

prosecuted in a single proceeding, if the prosecution is or should be aware of them. (*Id.* at p. 827.) "Failure to unite all such offenses will result in a bar to subsequent prosecution of any offense omitted if the initial proceedings culminate in either acquittal or conviction and sentence." (*Ibid.*, fn. omitted.)

The protection of *Kellett* has been held to apply, not only when the initial proceedings culminate in acquittal or conviction, but also when they culminate in a reversal on appeal based on insufficient evidence; in that event, too, the prosecution is barred from trying the defendant on new or different charges arising out of the same act or course of conduct. (*Sanders v. Superior Court* (1999) 76 Cal.App.4th 609, 616-617; *People v. Tatem* (1976) 62 Cal.App.3d 655, 658-659.)

Here, however, the prosecution did effectively charge defendant with arson of property, because the jury was instructed on this offense, and because defense counsel did not object. As the Supreme Court stated in *People v. Toro* (1989) 47 Cal.3d 966, disapproved on another ground by *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3: "There is no difference in principle between adding a new offense at trial by amending the information and adding the same charge by verdict forms and jury instructions." (*Id.* at p. 976.) The defendant forfeits any lack of notice by failing to object. (*Id.* at p. 978.)

Orlina v. Superior Court (1999) 73 Cal.App.4th 258 is on point. There, the defendant was charged with assault on a child under eight, resulting in death. (Pen. Code, § 273ab.) At the defendant's request, the jury was also instructed on involuntary manslaughter (Pen. Code, § 192, subd. (b)) as a lesser related offense. The jury acquitted

the defendant on the greater but deadlocked on the lesser. (*Orlina*, *supra*, at p. 260.) The appellate court held that the defendant could be retried on the lesser: "By requesting the jury be instructed on the lesser offense, be it an included or related one, a defendant asks to be tried on a crime not charged in the accusatory pleading. By doing so, the defendant implicitly waives any objection based on lack of notice. . . . [A] defendant who requests the jury be instructed on an uncharged offense consents to be treated as if the offense had been charged." (*Id.* at pp. 263-264.)

The majority attempts to distinguish *Orlina* on the ground that here, the jury did not deadlock on the lesser; rather, it was instructed that, if it convicted defendant on the greater, it should not return a verdict on the lesser, and so it did not. However, this is a distinction without a difference. *Kellett* is the controlling authority, and under the rationale of *Kellett*, whether the jury deadlocked on the lesser is irrelevant. *Kellett* precludes a trial on an offense only when the prosecution has *failed to charge* that offense in a previous proceeding. Here, defendant *was charged* with arson of property. Moreover, because the jury never returned a verdict on the lesser (for whatever reason), this charge is still "unresolved" and "pending." (Cf. maj. opn. at p. 10.) Under these circumstances, *Kellett*'s concerns about "preventing harassment, . . . avoid[ing] needless repetition of evidence and sav[ing] the state and the defendant time and money" (*Kellett v. Superior Court*, *supra*, 63 Cal.2d at p. 826) simply are not implicated.

RICHLI

J.

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *People v. Richard James Goolsby*
No.: **E052297**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On February 20, 2014, I served the attached **PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope 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:

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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 February 20, 2014, at San Diego, California.

STEPHEN MCGEE
Declarant

Signature

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