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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. S187020

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

OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

COURT RULES

ISSUE

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

INTRODUCTION

Defendant Robin Bailey was charged by information with escape and attempted escape from prison, a violation of Penal Code section 4530, subdivision (b). A jury convicted him of escape. The Court of Appeal for the Sixth Appellate District held that the evidence proved only attempted escape. The court reversed the judgment, finding it lacked the power to modify a conviction of a substantive crime that requires general intent to a conviction of attempt when the jury is not instructed on specific intent.

Because attempted escape was charged in the information and proved at trial, Penal Code sections 1159, 1181, subdivision (6) and 1260 provided the Court of Appeal with the power to modify the escape conviction to attempted escape. Alternatively, even if attempt constituted an uncharged crime, the lower court could exercise that modification power because attempted escape under section 4530 is, substantively, a general intent crime undifferentiated from escape. Any erroneous failure of the trial court to instruct on attempt was invited and harmless. The judgment of the Court of Appeal should be reversed with directions to make the modification and to remand for resentencing.

STATEMENT OF THE CASE

A. Information

The information charged defendant as follows: "On or about June 18, 2008, the crime of ESCAPE FROM CUSTODY, in violation of Section 4530(b) of the Penal Code, a FELONY, was committed by ROBIN BAILEY, who at the time and place last aforesaid, did willfully and

unlawfully escape and attempt to escape from CORRECTIONAL TRAINING FACILITY. (CT 20.)[1]

B. Prosecution Evidence

On June 18, 2008, shortly before 8:00 a.m., Officer Munoz was the assigned roof gunner on the O Wing roof, inside the California Training Facility in Soledad (CTF). (RT 30, 45.) His job was keeping five Administrative Segregation inmate yards secure and preventing fights and escapes. (RT 31.) Officer Munoz saw defendant, an inmate, hiding behind a Connex, a large storage unit, in a locked maintenance area, where inmates

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[1] Penal Code section 4530 (hereafter all statutory citations are to this code) provides as follows:

> (a) 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. The second term of imprisonment of a person convicted under this subdivision shall commence from the time he would otherwise have been discharged from prison. No additional probation report shall be required with respect to such offense. [¶] (b) Every prisoner who commits an escape or attempts an escape as described in subdivision (a), without force or violence, is punishable by imprisonment in the state prison for 16 months, or two or three years to be served consecutively. No additional probation report shall be required with respect to such offense.

are not ordinarily found without an officer or supervisor. (RT 30-33, 35, 37, 38, 43.) Defendant looked around the side of the Connex, "darting his head back and forth." (RT 43.) When Officer Munoz asked what he was doing, defendant said that he was waiting for his supervisor, who was over by the silver truck. (RT 40.) The response seemed unusual as no one was by the truck and Officer Munoz knew the driver, Officer Stephens, had "already entered underneath Central." (RT 40.) Officer Munoz telephoned Officer Stephens in the tunnel underneath the Central Facility and alerted him to the unsupervised inmate. (RT 45, 49-51, 53.) Officer Stephens, the inmate day labor boss in charge of a 15-member construction crew, went to the Connexes, found defendant, and noticed he had on gray sweatpants, rather than state-issued denim pants. (RT 49-51, 54.) Asked what he was doing, defendant replied that "his boss let him in there." (RT 53.) The explanation made no sense because the area was fenced and keys were required to get in. (RT 53.)

Meanwhile, Officers Doglietto and Netro were investigating a report of a break-in at the carpentry shop and had found a cut in the fence between the maintenance area and the Connexes after discovering tools missing from CTF Central's maintenance area. (RT 56, 50–61, 90.) When a staff electrician pointed out the inmate in the fenced area accessible through the locked pedestrian gate, Officers Doglietto and Netro joined Officer Stephens there, and Netro handcuffed defendant. Netro noticed defendant's California Department of Corrections (CDC) jacket had the standard bright yellow lettering "CDC Prisoner" blacked out. (RT 53, 57-59, 62, 81.)

Correctional officers found the G Wing fence cut and the bars cut out of defendant's cell window in G Wing. (RT 63-64, 77, 133-134, 178-180.) The window panes in the cell had been removed and the outer metal grate covering the windows cut through. (RT 133, 178–180.) Blankets covered some clothing piled on the upper bunk of the cell. (RT 180.) Additional

fencing was cut on the roof above the textile building that led to a fenced walkway. (RT 64–65.) Correctional staff ultimately located holes cut in the fence next to the chapel's patio, the fence in the G Wing yard, the fence above the textile building above the stairs, and the fence on the west end of the maintenance yard. (RT 149.)

Sergeant Soekardi went to the maintenance area and admonished defendant with the *Miranda* rights. (RT 85-87.) Defendant admitted a plan to escape that had begun at 12:30 a.m. (RT 87-88.) Earlier, defendant had obtained hacksaw blades and sawed through his cell window bars over a two-day period. (RT 87-88.) He had planned to cut through a fence behind G Wing and "make his way towards North Facility," cut through its double fence, and then meet someone who was supposed to be waiting there to pick him up. (RT 89.) Defendant was unable to execute the plan because it took him "so long to cut out of the G Wing fence," and it was "so loud" he knew it would not work. He hid in the family visiting building and devised a different plan. (RT 89, 98, 101.) He cut the fence by the chapel, scaled a wall to get on top of another fence, then went to the east end of the Central Facility where the maintenance yard was located. (RT 89, 96-97.)

Officers later found a hacksaw blade on top of a Connex and two tools underneath the Connex. (RT 109, 126.) Wire strippers were near the breach in the maintenance area fence. A thorough search of defendant's cell the next day revealed hidden hacksaw blades. (RT 111, 113.) According to Sergeant Soekardi, three inner towers between the Central Facility and the North Facility (Towers Five, Six, and Seven) are guarded "24/7," but the roof is not. No officers were stationed in the maintenance yard fence area "at [the] time of [defendant's] attempt." (RT 101, 104-105.) The jury viewed a videotape of the route through the facility grounds that defendant would have taken. (RT 237-239.)

C. Defense Evidence

Defendant testified that he did not escape or intend to escape and that the maintenance area was his "final destination." (RT 261-262.) He was seeking to stab inmate "Charles Queen," in revenge for a prior incident and planned to return to his cell while officers attended to "Queen" that morning. (RT 271, 274, 276-277, 281.) Defendant cut through three fences and jumped over the razor-wire fence while wearing three pairs of pants; the video fairly portrayed his route. (RT 278, 280, 287.) If he had been escaping, defendant testified, he would have gone out the back, where the towers were not manned after 10 p.m. (RT 279–280.)

"Charles Queen" did not appear at trial.

Before trial, defendant had written letters to his son and daughter describing how he tried to escape but misjudged the strength of the fence wire, stating, "Just think we would have all been together right now," and reporting, "I was moments away from freedom." (RT 282–285; see also RT 330-331 [prosecutor reading letters in argument].) In one letter, he wrote: "I cut the bars out the cell window, and I made one major mistake.. I misjudged the strength of the fence wire. My cutters were not big enough to cut the fence quickly. It was taking me too long to cut the fencing. That plan failed. So I roamed all over the prison all night searching for a different way out. I had to use the roof so the gun towers would not see me. [¶] Man, I am so hurt that my plan for freedom failed." (RT 284-285.) Defendant testified he wrote the letters so the investigators would find them to "enhance my story I was trying to escape." (RT 286.)

D. Instructions

During trial, the prosecutor informed the court, "I don't know if it's going to be an issue because, . . . , I'm trying this case as an escape. If there was evidence that the escape was only an attempted escape, it's the

same charge. If anyone wants to argue attempted escape, we will need an attempt instruction," and that the relevant attempt instruction would be CALCRIM No. 460, "should that become necessary." (RT 92.) Defense counsel said nothing in response (*ibid.*); defense counsel's instruction list requested CALCRIM No. 2760, but no specific intent instruction. (CT 24.) At a conference on instructions in which the court reminded counsel of the earlier discussion about attempt, it noted that attempts "generally are lessers of virtually every type of charge," that under CALJIC No. 2760 attempt is punishable the same as actual escape, and that in this case "we have an admission of a completed act." (RT 299.) Neither counsel wanted an attempt instruction, and the court agreed not to give one. (RT 299.) The court instructed on CALJIC No. 2760 by eliminating the bracketed portions that refer to attempted escape and also instructed on general intent for escape under CALCRIM No. 250.[2] (CT 118, 124-126; RT 294-295, 298, 325.)

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[2]As read to the jury, CALCRIM No. 2760 stated: "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."

As relevant to this case, the current BENCH NOTES and AUTHORITY for CALCRIM No. 2760 reflect that (1.) the last two sentences of the above-quoted instruction are given if there is an issue as to whether the defendant went far enough to constitute an escape. (See *People v. Lavaie* (1999) 70 Cal.App.4th 456, 459-461); (2) if the defendant is charged with attempt, CALCRIM No. 460 should be given on specific intent (*People v. Gallegos* (1974) 39 Cal.App.3d 512, 517); and (3) specific

(continued...)

During argument to the jury, the prosecutor objected when defense counsel interpreted CALCRIM No. 2760 to mean escape occurs only by passing the outer barrier keeping an inmate on prison property. (RT 336-338.) Outside the jury's presence, defense counsel presented the court with a copy of *People v. Lavaie*, *supra*, 70 Cal.App.4th 456, a recently decided case. (RT 338-340.) The prosecutor objected that the argument was improper and untimely in view of the defense's failure to seek an attempt instruction and agreement to CALCRIM No. 2760 as given by the court. (RT 339-340.) After examining the decision and the statute, the court observed that section 4530 did not define escape or attempted escape, and that while CALCRIM is not a dispositive statement of the law, *Lavaie* also did not, in its reading of that case, necessarily control over other earlier case law, though the new case did make the distinction between escape and attempted escape "a little more muddled." (RT 344.) In view of the uncertainty in the law, the court offered the prosecutor an opportunity to reinstate attempted escape as an issue in the case and to allow brief arguments on the question whether defendant did or did not intend to return to prison. (RT 344-345.) Defense counsel objected, claiming that defendant had based his defense on the case being tried as a "straight escape," that everything the defense had done in this regard represented tactical decisions, and that counsel preferred to withhold his legal theory of the CALJIC instruction in closing argument so that the jury would not consider attempted escape. (RT 345-346, 348.) In response to the prosecutor's objection, the court recounted that in the earlier instructions conference, the parties stipulated an attempt instruction should not be given

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(...continued)
intent is not an element of completed escape (*People v. George* (1980) 109 Cal.App.3d 814, 819).

on a representation that the CALCRIM instruction reflected leaving a cell could be a completed escape; the court had not been aware of a dispute about the law; and it declined to rule *Lavaie* was more limited than defense counsel suggested or was wrong in the absence of clear precedent. (RT 346-347, 349-350.) As to defense counsel's objection to an attempt instruction, the court indicated that absent an offer of proof, it was unable to see how the instruction would change the defense strategy; it doubted allowing an amendment to show attempt would be a problem on appeal "because that was the charging document" (RT 347) and "it would be the same [defense] strategy all along, that in fact [defendant] intended to return and that there was no intent to escape," (RT 347-348); and reopening would "simply allow escape in the words of the statute to be back in" (RT 351). On inquiry by the court, defense counsel confirmed that in lieu of the jury considering attempt escape, the defense would restrict its argument by not asserting its theory of the CALCRIM instruction to the jury. (RT 348.) Both counsel completed their arguments and the matter was submitted on the existing instructions. (RT 351-356.)

E. Verdict and Sentence

The jury convicted defendant of escape from a state prison facility without force or violence, pursuant to section 4530, subdivision (b). (CT 43; RT 360.) In a bifurcated trial, the jury found true five prior strike allegations. (CT 41, 44-48, 405-408.) Under section 1170.12, the court sentenced defendant to a Three Strikes law term of 25 years to life, to be served consecutive to his current indeterminate life term. (Typed opn. at p. 9; CT 49, 91, 118-120.)

F. Court of Appeal Decision

On appeal, defendant argued that the evidence did not prove escape and that a modification of the conviction to attempted escape was precluded

because the jury was not instructed on attempt. (Typed opn. at p. 1) The Court of Appeal agreed. The court construed escape under section 4530 to require proof that the inmate went beyond the boundary of the prison facility having custody of the inmate. (*Id.* at p. 13.) Because defendant remained on prison grounds, it held that the evidence failed to support the jury's verdict. (*Id.* at pp. 6-8.)

The appellate court acknowledged that "the evidence was more than ample to establish an attempt to escape from prison." (*Id.* at p. 13.) However, it held that the absence of an instruction on specific intent meant that "[a]ttempt to escape is not a lesser-included offense of escape based upon the elements of the offense impliedly found true by the jury," because attempted escape requires specific intent under section 21a and *People v. Gallegos*, *supra*, 39 Cal.App.3d at page 517. (Typed opn. at p. 13, & fn. 4.)[3] Acknowledging the statutes that authorize a modification of a conviction unsupported by sufficient evidence to a lesser included offense or a lower degree (§§ 1159, 1181, subd. 6, 1260), the court held a modification to attempted escape would deprive the defendant of a jury trial on specific intent in violation of the Sixth and Fourteenth Amendment rights. (*Id.* at pp. 13-14.) It concluded: "Because the trial court failed to instruct regarding an attempt to escape from prison and the evidence is not sufficient to support the conviction of escape, we must reverse." (*Id.* at p. 14.) In denying a rehearing on petition of the People, the appellate court distinguished decisions by this Court involving defendants with the

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[3] Penal Code section 21a, provides:

> An attempt to commit crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission.

requisite intent who fail to complete the substantive crime due to unforeseen circumstances, explaining that here "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." (Order on Denial of Rehg, at pp. 2-3.)

SUMMARY OF ARGUMENT

A reviewing court is authorized to reduce a conviction where the evidence fails to establish prison escape but supports a conviction of an attempted prison escape under Penal Code section 4530, subdivision (b). The Court of Appeal had the statutory power to reduce the conviction to an attempt as reflected in decisions by this Court and the Courts of Appeal. Attempted prison escape was charged in the accusatory pleading and was proved at defendant's trial. Moreover, even if attempt were deemed an uncharged offense in this case, despite the accusatory pleading expressly charging it, the modification power of the appellate court survives because a violation section 4530 is satisfied by general intent whether or not the defendant succeeds in an escape.

Assuming specific intent is required for a conviction of attempted escape under section 4530, however, the absence of an instruction on specific intent did not preclude a modification of the conviction to an attempt, since any erroneous failure to instruct the jury was both invited and harmless.

ARGUMENT

I. A REVIEWING COURT HAS POWER TO REDUCE A CONVICTION OF PRISON ESCAPE WHERE THE EVIDENCE AT TRIAL ESTABLISHES ATTEMPTED PRISON ESCAPE UNDER SECTION 4530

The Court of Appeal held that it lacked the power under sections 1181 and 1260 to reduce the conviction to attempted escape from escape as

found by the jury. The appellate court conclusion that attempted escape is not an offense necessarily included in escape in this case rests upon two principles: (1.) the test of whether an offense is a lesser included offense of the charged crime is determined by the elements impliedly found true by the jury in light of the instructions defining the charged crime; (2.) because attempted escape is a specific intent crime unlike the substantive crime of escape, defendant was not charged with attempted escape for lack of a jury instruction defining that crime as one requiring specific intent.

Neither principle is correct. First, in this case, attempted escape is a necessarily included offense because the information charged section 4530 in the statutory language, which includes attempted escape. Furthermore, attempt is included in every crime including general intent crimes under section 1159. Second, any instructional failure with respect to specific intent under the Court of Appeal's apparent assumption that the instructions "uncharged" defendant with an attempt is irrelevant to the court's modification power, in view of the reviewing court's power under sections 1159 and 1260 to modify the conviction to attempt. In any event, by operation of law, specific intent is not a material element of attempted escape from prison in section 4530.

A. The Court Had Power to Reduce the Conviction to Attempted Escape as a Necessarily Included Offense Under Sections 1181, Subdivision (6) And 1260

The appellate court had the power to modify the escape conviction to attempted escape under sections 1181 and 1260. (See *People v. Navarro* (2007) 40 Cal.4th 668, 678 (*Navarro*).)

Subdivision 6 of section 1181 provides that a trial court may grant a new trial "[w]hen 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. . . ." (Emphasis added.) Since section 1181's amendment in 1927, it has been the law in California that when a conviction is unsupported by sufficient evidence, the conviction may be reduced to a lesser offense included within the greater offense as long as the evidence is sufficient to support the latter. (See *Navarro*, *supra*, 40 Cal.4th at pp. 676-677; e.g., *People v. Edwards* (1985) 39 Cal.3d 107, 118 [affording prosecution the option of a reduction from second degree murder to involuntary manslaughter]; *People v. Holt* (1944) 25 Cal.2d 59, 93 [modifying first degree murder verdict to second degree murder]; *People v. Howard* (1930) 211 Cal. 322, 329-330 [same].)

A 1949 amendment to section 1260, which allowed an appellate court modification of a judgment or reduction of degree of the offense or the punishment imposed (§ 1260, as amended by Stats. 1949, ch. 1309, § 1. p. 2297), "did no more than bring section 1260 into accord with section 1181(6) with respect to reduction of the degree . . . ." (*People v. Odle* (1951) 37 Cal.2d 52, 58.) Section 1260 provides in part: "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 . . . ."

When the jury improperly decides the degree of the crime on insufficient evidence, the purpose of the statutes is served when the court replaces the greater offense with a lesser included offense. "Under the scheme provided by those statutes, "'the power to change the offense is as unlimited as the power to change the degree.'" (*Navarro*, *supra*, 40 Cal.4th at p. 678, quoting *People v. Enriquez* (1967) 65 Cal.2d 746, 749, internal quotation omitted.) "[S]uch a modification merely brings the jury's verdict

in line with the evidence presented at trial." (*People v. Navarro, supra*, 40 Cal.4th at p. 680.)

In *People v. Martinez* (1999) 20 Cal.4th 225, this Court modified the defendant's conviction from kidnapping to attempted kidnapping under Penal Code section 1181, subdivision 6. (*Id.* at p. 241). The defendant had grabbed the victim and announced that someone was going to pay for what had been done to him. (*Id.* at p. 231.) He forced the victim at knife-point through various rooms of her house, then outside across a 15-foot porch, the backyard, and a parking area, which bordered on a five-acre vacant lot. Officers spotted defendant and the victim between two trees about 40 to 50 feet from the back of the residence. (*Ibid.*) This Court reversed the kidnapping conviction because the defendant had not moved the victim a sufficient distance under then applicable law. In reducing the conviction to attempted kidnapping, the Court said that the evidence "shows that, but for the prompt response of the police, the movement would have exceeded the minimum asportation distance. . . ." (*Id.* at p. 241.) *Martinez* may be understood as holding a reduction to attempted kidnapping is proper and appropriate under Penal Code section 1181, subdivision (6) where the evidence establishes movement that while insubstantial under the test for sufficiency of the evidence would naturally and probably result in a completed kidnap had the incident continued without interruption. The same result as in *Martinez* applies in this case.

The test for lesser included offenses in this state is established law. "'Under California law, a lesser offense is included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser.'" (*People v. Jennings* (2010) 50 Cal.4th 616, 668, quoting *People v. Birks* (1998) 19 Cal.4th 108, 117.)

"'Courts should consider [both] the statutory elements and accusatory pleading in deciding whether a defendant received notice, and therefore may be convicted, of an uncharged crime, but only the statutory elements in deciding whether a defendant may be convicted of multiple charged crimes.' (*People v. Reed* (2006) 38 Cal.4th 1224, 1231.) Under the 'elements' test, we look strictly to the statutory elements, not to the specific facts of a given case. (See, e.g., *People v. Murphy* (2007) 154 Cal.App.4th 979, 983-984.) We inquire whether all the statutory elements of the lesser offense are included within those of the greater offense. In other words, if a crime cannot be committed without also committing a lesser offense, the latter is a necessarily included offense." (*People v. Ramirez* (2009) 45 Cal.4th 980, 985, brackets original and parallel citations omitted.) As the Court's description of these tests makes clear, the "accusatory pleading" and "statutory elements" tests do not turn on the particular instructions given in the defendant's case. The question is one of law considered in the abstract. (See generally *People v. Reed*, supra, 38 Cal.4th at p. 1227.)

Here, the charge in the language of section 4530 expressly includes attempt to escape. The accusatory pleading charged defendant in the statutory language. (CT 20.) As the trial court noted, under the charge of an escape and attempt to escape, the jury not only had the power to return a guilty verdict based upon attempt, defendant would be punished the same on such a finding as on a finding of escape.[4] (RT 347, 351.)

In *People v. George*, *supra*, 109 Cal.App.3d 814, the defendant was charged with escape and attempted escape under section 4530, subdivision (b). "In order to conform to the proof, the prosecution, following the

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[4] The legislative unification of the two means of violating the statute postdates the doctrine of lesser included offenses. (See *In re Culver* (1968) 69 Cal.2d 898, 900-903 [recounting legislative history of the escape statutes].)

conclusion of its case in chief, moved to amend the information by striking the charge of attempted escape." (*Id.* at p. 818.) "The trial court granted the motion and simultaneously therewith ruled that evidence as to [defendants'] motivation for leaving the prison camp and their intent to return to their confinement after [a] 'booze run' was irrelevant and therefore inadmissible. (*Ibid.*) On appeal, defendants claimed the amendment improperly reconstituted the charge because it eliminated defense evidence of diminished capacity. (See *ibid.*) The Court of Appeal found "it is clear that the amendment did not change the offense charged in the original information. While the prosecution lessened the burden of [defendants'] defense by omitting the charge of attempted escape, the primary charge of escape, the backbone of both the criminal complaint and the information, has remained unchanged." (*Id.* at p. 819.)

In the present case, there was no amendment to the accusatory pleading. Attempted escape was not deleted from the information. That is why the prosecutor offered an attempt instruction if one were deemed to be needed. (RT 92.) No change in the charge was made. Thus, the charge of attempted escape and escape remained the "backbone" of the accusatory pleading.

Overwhelming evidence establishes that defendant's apprehension by correctional officers interrupted and prevented his escape after an unauthorized movement from the boundaries of confinement that if not interrupted would naturally and probably result in a complete escape. The bars of defendant's cell window were cut through with a hacksaw and the windowpanes were removed. (RT 133-134, 178-180.) He concealed his absence from the cell inferentially to give himself more time. (RT 180.) He cut fences in four locations. (RT 64-75, 149.) He wore his own pants as opposed to state-issued denim, and he had blacked out the yellow letters "CDC" on the back of his jacket. (RT 58-59, 62, 81.) Upon being caught

inside a locked maintenance yard, he confessed. 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 and said he intended to go through the double fence where someone would pick him up. (RT 85-87, 89, 96-98.) The charge of escape and attempted escape in the accusatory pleading contained all the elements of section 4530, which includes an attempt to escape.

The jury did not receive an instruction on attempt. However, that implicates the correctness of the instructions—a different question from whether a charged attempt constitutes a necessarily included offense for purposes of the appellate court's modification powers.[5] Because the defendant was charged with escape and attempted escape in the accusatory pleading, attempted escape was a necessarily included offense for purposes of sections 1181, subdivision (6) and 1260.

B. The Court Also Had Power to Reduce the Conviction to Attempted Escape Under Section 1159

Where the evidence proves attempt but not the completed crime, sections 1181 and 1260 do not exhaust the power of the reviewing court to modify the conviction in a way that "brings the jury's verdict in line with the evidence presented at trial." (*People v. Navarro*, *supra*, 40 Cal.4th at p. 680.) Under sections 1159 and 1260, the reviewing court can modify a section 4530 conviction for escape to a section 4530 conviction of an *uncharged* attempt to escape.

Section 1159 provides: "The jury, or the judge if a jury trial is waived, may find the defendant guilty of any offense, the commission of which is

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[5] As shown in argument II, the Court of Appeal below ultimately acknowledged that attempt was an offense included in the escape charge by reversing, in part, for the lack of an instruction on attempt as a lesser included offense

necessarily included in that with which he is charged, *or of an attempt to commit the offense*." (Emphasis added.) Under that statute, "[a] defendant may be convicted of an uncharged crime if, but only if, the uncharged crime is necessarily included in the charged crime. (§ 1159; *People v. Lohbauer* (1981) 29 Cal.3d 364, 368-369.) The reason for this rule is settled. '"This reasoning rests upon a constitutional basis: 'Due process of law requires that an accused be advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial.' [Citation.]"' (*People v. Lohbauer*, *supra*, at p. 368.) The required notice is provided as to any charged offense and any lesser offense that is necessarily committed when the charged offense is committed. (*Id.* at pp. 368-369.)" (*People v. Sloan* (2007) 42 Cal.4th 110, 116, parallel citations omitted.)

But a conviction of attempt to commit the substantive crime is deemed a lesser included offense of the charged substantive offense, by operation of section 1159 itself. This principle is reflected in long-standing precedent. (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. 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"]; cf. *People v. Strunk* (1995) 31 Cal.App.4th 265, 267 [dicta stating: "While the same sua sponte jury instruction rule generally applies to attempts as well as to lesser included offenses (see, e.g., § 1159), an attempt is a specific intent crime and does not fit within the definition of a necessarily included offense of a general intent crime"; case holds no evidence supported an instruction on attempt].)

The *Strunk* dicta that attempt to commit a general intent crime does not fit the definition of a lesser included offense flouts the literal language of section 1159, which makes all attempts "fit" as respects the factfinder's power to return a finding of guilt of an uncharged attempt. Moreover, *Strunk* is incorrect in principle. An attempt to commit an offense can be a lesser included offense in cases where the substantive crime requires only general criminal intent. "For example, attempted rape, a specific intent crime, is a lesser included offense of rape, a general intent crime." (*People v. Atkins* (2001) 25 Cal.4th 76, 88, citing *People v. Osband* (1996) 13 Cal.4th 622, 685 and *People v. Kelly* (1992) 1 Cal.4th 495, 526, 528.) In *People v. Kelly supra*, 1 Cal.4th 495, due to instructional error, this Court reduced a rape conviction to attempted rape under section 1260, because some evidence showed the defendant, despite his admission to the contrary, killed a victim at one location and had sexual intercourse with her body in another. (*Id.* at p. 528.)

With respect to the court' s modification powers under section 1159 and 1260, nothing distinguishes attempted escape, even assuming that crime, like attempted rape, required specific intent. The Court of Appeal offered no authority for its holding that the specific intent element of an attempt renders that crime not included within a substantive crime requiring general intent for purposes of section 1159 and 1260. Nor did it offer any explanation how one could commit a prison escape without necessarily attempting to escape. This Court's approval of modifying the conviction of a substantive offense when the evidence supports only a conviction of attempt obligated the Court of Appeal to follow suit as a matter of stare

decisis. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.)[6]

C. Attempt Under Section 4530 Meets the Statutory Elements Test of a Lesser Included Offense Because the Intent Is the Same As Escape Under the Statute

Sections 1159, 1181 and 1260 do not contain a restriction against modifying a conviction for a general intent crime to an attempt. However, even if a modification were only allowed when an uncharged attempt has a mental state that is identical to or subsumed within the mental state needed for the substantive offense, an attempt to escape prison requires the same general intent as escape under section 4530.

This Court in *People v. Toledo* (2001) 26 Cal.4th 221 contemplated the possibility, not presented there, of the Legislature codifying an offense using language that, for purposes of construing the law of attempt, "should be treated differently from virtually all other crimes as to which the attempt provisions are applicable." (*Id.* at p. 232.) Section 4530 is such an instance. We challenge the Court of Appeal's holding that an attempt to escape, at all times and in all circumstances, requires a specific intent to escape. (Typed Opn. at pp. 13-14.)

People v. Gallegos, *supra*, 39 Cal.App.3d 512, 517 (*Gallegos*) is to the contrary of our position—and requires disapproval. It held that a trial court erred by not "instruct[ing] that the crime of attempt to escape [under section 4532] required a specific intent . . . to escape from the jail, plus a

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[6] Cases in other states have reached a similar conclusion. For example, in *People v. Neely* (1998) 670 N.Y.S.2d 993, 248 A.D.2d 996, the appellate court held the evidence did not support the crime of second degree escape where the defendant had fled the courtroom during sentencing but was apprehended on the same floor of the courthouse by court officers. (*Id.* at p. 994.) The court however, modified the conviction to attempted escape. (*Id.* at p. 995.)

direct, unequivocal act to effect that purpose." It reasoned that section 21a has to apply because if attempted escape is "moved out of the class of attempts of which a specific intent is an element, to the status of a substantive crime that requires only a general intent to commit the act," it raises "the possibility that there is such a crime as an attempt to attempt to escape, [which] leads onto a logical merry-go-round." (*Id.* at p. 516.) This reasoning is flawed because there is no merry-go-round. An "attempt to commit an attempt," e.g., attempted assault, which was a deductive impossibility at common law, is not a crime in this state. (*In re James M.* (1973) 9 Cal.3d 517, 521-522.) The merry-go-round legislatively stops with section 4534, which penalizes any person who willfully assists a prisoner who escapes or attempts to escape but does not establish any crime of attempting to assist an attempted escape. (*People v. Bishop* (1988) 202 Cal.App.3d 273, 279-282.)

Contrary to the holding in *Gallegos* that attempted escape is a specific intent crime, we see no convincing indication of legislative intent to apply section 21a to section 4530.[7] When the Legislature enacts a specific statute like section 4530 covering much the same ground as more general laws, an indication exists that the Legislature intended the specific provision alone to apply. (See *People v. Jenkins* (1980) 28 Cal.3d 494, 505-506.) The proper goal of statutory construction "is to ascertain and effectuate

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[7] In footnote dicta, this Court has quoted *Gallegos* to the effect that "'the essential elements of an attempt to commit a crime, so as to make the attempt itself punishable, are present in an attempt to escape as well as in those attempts made punishable under Penal Code section 664.'" (*People v. Lancaster* (2007) 41 Cal.4th 50, 94, fn. 7, quoting *People v. Gallegos*, *supra*, 39 Cal.App.3d at p. 516.) But *Lancaster* only decided that the presence of a handcuff key in the defendant's cell was a preparatory act rather than evidence of an attempted escape for purposes of a statutory death penalty aggravating factor. The mental element of attempted escape under section 4530 was not decided.

legislative intent, giving the words of the statute their usual and ordinary meaning. When the statutory language is clear, we need go no further. If, however, the language supports more than one reasonable interpretation, we look to a variety of extrinsic aids, including the objects to be achieved, the evils to be remedied, legislative history, the statutory scheme of which the statute is a part, contemporaneous administrative construction, and questions of public policy." (*People v. Ramirez* (2009) 45 Cal.4th 980, 986, citations omitted.) Since nothing in section 4530 reflects that it is governed by section 21a, we look to section 4530 itself.

Section 4530 applies to any inmate who has been convicted of a felony and been placed under the custody of the state until the expiration of a prison sentence. It includes both escape and attempt to escape. It draws no distinction between the two in terms of the respective elements. The punishment provided for escape and attempted escape is identical. The statute distinguishes instead inmates who employ force and violence from those who do not.[8]

The statute adds, "No additional probation report shall be required with respect to such offense." No additional probation report is required because a conviction, whether for escape or attempted escape, requires the court to order the sentence to be served consecutive to the sentence the prisoner was serving. (See Pen. Code, §§ 1370.5, 4530, 4532).

The implication from the statutory language is not limited to the obvious legislative indifference as to whether or not an escape succeeds. The affirmative indication is that any act beyond mere preparation speaks for itself exactly like a completed escape. In section 4530, attempt is not

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[8] "This lack of differentiation is the Legislature's established practice in statutes dealing with unauthorized departures from places of confinement or detention." (*People v. Bishop*, *supra*, 202 Cal.App.3d at p. 280.)

just part and parcel of the substantive crime, but the equal of it. In this statute, what is equal does not become unequal with the venture's interruption or frustration.

As regards the inmate's immediate plan at the time of his apprehension outside his authorized place of confinement, e.g., whether he intends to cut another inmate or to cut another fence, that appears to be irrelevant. This is reflected by the equality of the punishment for the undifferentiated conduct violating the statute and the absence of any need for a probation report without regard to the exact nature of the inmate's plan. The ultimate consequences the inmate endeavors to produce at the time the venture goes astray is largely beside the point. Provided the general intent has been manifested to willfully do an act that if continued without interruption would naturally and probably result in escape, the policy of the law is to treat the conduct as punishable under section 4530 whether or not the defendant surmounts the last obstacle in his path. Put in slightly different terms, whether or not the inmate actually manages to depart the grounds of the facility, the state's penal system has been assaulted once the defendant's general intent conjoins with an act beyond mere preparation. The appropriate analogy, then, is not to specific intent crimes but to the crime of assault.

Assault was defined historically as an attempted battery. (*People v. Wright* (2002) 100 Cal.App.4th 703, 706.) Assault, even though defined as an attempt to commit a battery, is a general intent offense. (*People v. Williams* (2001) 26 Cal.4th 779, 787.) Assault "does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." (*Id.* at p. 790.)

By analogy, attempt to escape from prison occurs when (1.) an act exceeding mere preparation is performed by one (2.) with knowledge of the facts sufficient to establish that the unlawful and willful departure of a prisoner from the physical limits of his or her custody would directly, naturally, and probably be exceeded. That is true even assuming the inmate has other more immediate plans in mind than immediately leaving prison. Every perpetrator of an escape from prison is a prisoner, and every willful action exceeding mere preparatory steps taken by a prisoner, knowing the act furthers the potential for an actual escape, whether completely successful or not, injures governmental authority to punish prisoners with confinement in general and inflicts actual harm to the security of the institution in particular. Because all prison escape attempts systemically threaten the state's ability to punish effectively those convicted and sentenced for crime, neither the success of the individual's venture, nor the details of the individual's "plan" at the moment of its frustration or prevention, determine the punishable quality of the willful acts that preceded it, as section 4530 reflects.

Gallegos rejected the analogy to general intent for assault. It did so on two grounds, neither of which survives analysis. First, the court stated, "It does not follow that the only intent required for commission of the crime of attempted escape is the intent to attempt to commit an escape. It is not possible to attempt to escape without intending to escape." (*Id.* at p. 516.) This point merely reiterates the "merry-go-round" strawman discussed above. Nobody argues for "intent to attempt to commit escape," least of all the state.

Second, the court observed: "The introduction into the concept of attempt to escape of a requirement of intentionally doing an act, the direct, natural and probable consequence of which, if successfully completed, would be an escape, too narrowly limits the application of the statute. Such

an act could be to pass part way through a door, window or other opening to the outside of the place of confinement before falling back, being pulled back or disabled. [¶] In *People v. Fritz* [(1967)] 250 Cal.App.2d 55, 57, the court noted that the jury was entitled to believe the defendant had 'attempted to squeeze through the jail window For the purpose of escape.' (Emphasis added.) [¶] The Legislature has not proscribed the doing of any single defined act as an attempt to escape. Many acts, including some non-criminal in themselves, might be conducive toward carrying out an intention to escape, and the scope of the statute proscribing such an attempt should not be limited to specifically designated acts." (*Id.* at pp. 516-517, parallel citation omitted.)

It is true that attempt to escape from prison can include a wide range of conduct. (See, e.g., *People v. Mason* (1991) 52 Cal.3d 909, 954-956 [cuts through screen in cell window but guards discovered cuts before defendant could leave]; *People v. Gallego* (1990) 15 Cal.3d 115, 155, 196 [note outlining escape plan, torn bed sheets, and a shank]; *People v. Boyde* (1988) 46 Cal.3d 212, 248-250 [defendant solicited another inmate to help him escape from the jail roof and the plan involved the other inmate leaving a gun on the roof for the defendant's use in subduing a guard if necessary]; cf. *People v. Lancaster, supra,* 51 Cal.4th at p. 94 [possession of handcuff keys alone without any other evidence does not rise to the level of attempted escape].) But *Gallego* mistakenly assumed that a conviction of attempt based on general intent necessarily would require an *act* which, if successfully completed, would directly constitute escape. That assumption confuses act with intent and does not follow.

In refusing to draw a clear boundary between the offense of escape and attempted escape in section 4530 (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 took

note of the wide continuum of conduct involved and decided to treat attempted escape as the equal of the substantive offense. A jury finding that a defendant in fact completed the crime of escape necessarily is a finding the defendant attempted the escape. It is not possible to escape without an escape attempt.

If this Court finds attempted escape is a general intent crime, rather than a specific intent crime, the power of a reviewing court to modify a conviction of escape to attempted escape under section 4530 cannot be doubted. (Pen. Code, §§ 1159, 1181, subd. 6, 1260.) Defendant's jury necessarily did find all required elements for a conviction of attempted escape under section 4530.

II. ANY ERROR IN FAILING TO INSTRUCT ON ATTEMPTED ESCAPE IS INVITED AND HARMLESS

The Court of Appeal reversed the judgment for insufficiency of the evidence and also "[b]ecause the trial court failed to instruct the jury regarding an attempt to escape from prison . . . ." (Typed Opn. at p. 14, fn. omitted.) The court did not address the fact that defendant's reply brief expressly stated that defendant was not raising error in the failure to instruct on attempt as a ground for reversal. (Reply Br. at p. 11.)

The decision below contains a lengthy footnote identifying the nature of the instructional error. First, the Court of Appeal quoted section 1159, which as discussed *ante*, allows the factfinder to find the defendant guilty of any offense, the commission of which is necessarily included in the charge or of an attempt to commit the offense. (Typed opn. at p. 14, fn. 5.)

The appellate court next said that the rule requiring the court to instruct sua sponte on necessarily included offenses when the evidence would support the lesser but raises a question as to the greater, "presumably extends to attempts." It included a citation reading, "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.']." (Typed opn. at pp. 14-15, fn. 5.)

Lastly, the court approvingly quoted from *People v. St. Martin* (1970) 1 Cal.3d 524, 533, *People v. Barton* (1995) 12 Cal.4th 186, 196 and *People v. Sedeno* (1974) 10 Cal.3d 703, 716, overruled on another ground in *People v. Breverman* (1998) 19 Cal.4th 142, 149, 165 and *People v. Flannel* (1979) 25 Cal.3d 668, 684-685, fn. 12. The point of these citations was the familiar one that a party's tactical decisions, even a defendant's express objection based on trial strategy, does not supplant the trial court's sua sponte obligation to instruct on lesser included offenses when the evidence supports the instruction. (Typed opn. at p. 15, fn. 5.)

As defendant observed in his reply brief below (Court of Appeal Reply Br. at p. 11), the instructional error identified in the court's decision below is not grounds for reversal. Indeed, as defendant acknowledged in his reply brief, it is barred by the invited error doctrine. (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1234.) "The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest. If defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal." (*People v. Wickersham* (1982) 32 Cal.3d 307, 330.)

Defense counsel expressly declined an attempt instruction. (RT 299) During the arguments to the jury, defense counsel made an express on-the-record tactical decision to refrain from arguing to the jury his interpretation of CALJIC No. 2760, which the court had modified to eliminate the bracketed language addressing attempt to escape. Counsel made that decision in order to induce the court not to reopen the instructions and argument to allow the jury to consider a verdict of attempted escape. Based upon defense counsel's decision not to argue his interpretation of the existing instruction, the court refrained from allowing arguments and

instruction on attempt. (RT 345-351.) The record establishes that an express objection by defense counsel to an attempt instruction (RT 299, 345), made as a conscious tactical choice (RT 348), induced the trial court not to give such an instruction (RT 351). Thus, any instructional defect in this regard was invited error. (*People v. Duncan* (1991) 53 Cal.3d 955, 969-970; *People v. Cooper* (1991) 53 Cal.3d 771, 826-827; cf. *People v. Bradford* (1997) 14 Cal.4th 1005, 1057.)

Regardless, the import of the appellate court's discussion at pages 14 to 15 of its opinion is that the trial court had to instruct on attempted escape, over defense objection, pursuant to the lesser included offense doctrine and section 1159. One page earlier the court stated that an attempt to escape "is not a lesser-included offense of escape based upon the elements of the offense impliedly found true by the jury." (Typed opn. at p. 13, fn. omitted.) A crime cannot be both a lesser included offense triggering a trial court's obligation to instruct, but not a lesser included offense triggering a reviewing court's power to modify a conviction. It is either one or the other. The Court of Appeal got it right the second time and wrong the first time: attempted escape is a lesser included offense of escape in section 4530.

Assuming that the trial court should have instructed on attempted escape over defendant's objection and that defendant could take advantage of the error, the failure to instruct is harmless under the applicable state law test. (See *People v. Breverman*, *supra*, 19 Cal.4th at p. 165 [concluding that the failure to instruct sua sponte on a lesser included offense is an error of state law not subject to reversal "unless an examination of the entire record establishes a reasonable probability that the error affected the outcome"].)

The evidence overwhelmingly refutes defendant's testimony that he was on a roundtrip to stab "Charles Queen." (RT 261-262, 271, 274, 276,

281) Very strong evidence showed defendant tried to escape. (RT 64-75, 149.) The bars of his cell window had been cut through with a hacksaw and the windowpanes removed. (RT 133-134, 178-180.) Fences had been cut in four different locations. (RT 64-75, 149.) Apprehended inside a locked maintenance yard, defendant confessed that 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, intending to go through the double fence where someone would pick him up. (RT 85-87, 89, 96-98.) He was wearing nonprison clothes, had blacked out the yellow letters "CDC" on the back of his jacket, and had arranged his bed to make it appear that he was still in it. (RT 58-59, 62, 81, 180.) Defendant wrote letters addressed to his children in which he admitted that he searched all night for a way out of prison but failed. (RT 284-285.)

Stealing tools, hiding blades in the cell, breaking the bars of the cell, removing the windows, leaving clothing in the bed to resemble a person, cutting through wire fencing, wearing extra pants to jump over a razor-wire fence, blacking out the moniker on prison clothing, entering a locked off maintenance area when nobody is there, and confessing an escape plan all evidence an escape effort, not a plan to stab someone and attract no attention while returning to a cell.

No reasonable probability exists that a jury instructed on attempt would have reached a result different from the jury that heard the evidence. Given the trial record, no rational jury would fail to find attempted escape under Penal Code section 4530, subdivision (b). Therefore, the trial court's failure to instruct on attempted prison escape was harmless. (*People v. Breverman, supra,* 19 Cal.4th at p. 165.)

CONCLUSION

The judgment of the Court of Appeal should be reversed with directions to modify the conviction to attempted prison escape and to remand for resentencing.

Dated: March 11, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 8,279 words.

Dated: March 11, 2011

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Robin Bailey**
No.: **S187020; 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 **OPENING BRIEF ON THE MERITS** 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.

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Declarant

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