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IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. RICHARD GOOLSBY, Defendant and Appellant	Court of Appeal No. E052297 San Bernardino County Superior Court No. FSB905099

ANSWER TO PETITION FOR REVIEW

Appeal from the Judgment of the Superior Court
of the State of California for the County of San Bernardino

HONORABLE BRYAN F. FOSTER, JUDGE

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INTRODUCTION

The only permitted remedy when a conviction is reversed for want of substantial evidence is dismissal. The Court of Appeal correctly held that any retrial or new trial is barred by Penal Code section 654 as interpreted by this Court in *Kellett v. Superior Court* (1966) 63 Cal. 2d 822. Although the Court of Appeal did not deem it necessary to reach the issue, retrial is also barred by Double Jeopardy principles because the jury was discharged without reaching a verdict on the lesser related offense of arson of property; ignorance of the law by the trial court and the prosecutor does not create the kind of "manifest necessity" necessary to permit retrial.

Respondent invites this Court to recognize a new legal concept: the "open charge" that, in a blunder that is usually dismissed by reviewing courts as invited error, the prosecution failed to insist be decided. This Court should decline the invitation because neither *Kellett* nor Double Jeopardy brooks such a creation. This Court should also decline the broader invitation to rescue the prosecutor from her unwillingness, in a case involving a defendant in his fifties, to consider settling for any Three Strikes sentence short of the 48-to-life sentence that she believed could be had if she could prevail on her view that a motor home was a building.

Respondent's petition for review should be denied. If review is granted this Court should also review appellant's claim that his arson

conviction fails for want of substantial evidence when properly analyzed under this Court's governing case, *In re V.V.* (2011) 51 Cal. 4th 1020.

STATEMENT OF THE CASE

Appellant was convicted by a jury of arson of an inhabited structure in violation of Penal Code section 451, subdivision (b). The jury also found that appellant had caused multiple structures to burn within the meaning of Penal Code section 451.1, subdivision (a). The jury acquitted appellant of attempted murder. In a bench trial, the trial court found that appellant had suffered three prior convictions that constituted "strikes" as well as serious felony priors within the meaning of Penal Code section 667, subdivision (a). The trial court also found that appellant had suffered three different convictions that constituted prison priors within the meaning of Penal Code section 667.5, subdivision (b). With enhancements, appellant received a Three Strikes sentence of 48 years to life. (2 RT 418-419; 2 CT 296-298, 311-314.)[1] He appealed. The case was briefed and argued at the Court's request.

Pertinent here, in its unpublished opinion of February 14, 2013, the Court of Appeal rejected appellant's argument that appellant had at most committed the lesser crime of unlawful fire rather than arson. It held that two of the three five year enhancements under Penal Code section

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[1] RT=Reporter's Transcript in two volumes. CT=Clerk's Transcript in two volumes. Pet.=Respondent's Petition for Review.

667(a) should not have been imposed because they were not brought and tried separately. It also held that because the motor homes that burned in this case are not structures, appellant was improperly convicted of arson of an inhabited structure. It set aside the five-year enhancement imposed under Penal Code section 451.1 for burning multiple structures, and it reduced appellant's conviction to arson of property. The effect of the first opinion was to reduce appellant's sentence from 48 to life to 33 to life.[2]

Appellant filed a timely petition for rehearing on four issues, two of which are relevant here: 1) the Court of Appeal's holding that substantial evidence supported the arson conviction; and 2) the issue of whether arson of property is a lesser included offense of arson of an inhabited structure so as to permit the reduction of appellant's conviction to that offense. On March 8, 2013, the Court of Appeal granted rehearing, vacated its opinion and requested letter briefs on the issue of whether arson of property was a lesser included offense to arson of an inhabited structure. In its briefing, respondent conceded that arson of property was not a lesser included offense of arson of an inhabited structure to which appellant's conviction could be reduced. Respondent argued, however, that the Court of Appeal should order a new trial on arson of property. Appellant obtained leave to file a response to this new argument and did so. On April

[2] Appellant seeks review of his claim that there was no substantial evidence to support his arson conviction. The Court of Appeal's most recent opinion, the only one currently in force, did not address this argument.

30, 2013, the Court of Appeal filed a published opinion holding that because arson of property was not a lesser included offense to arson of an inhabited structure, appellant's conviction could not be reduced to that offense. It held that a new trial was not a permitted remedy and ordered the case dismissed.

Respondent then filed a timely petition for rehearing, which the Court granted on May 20, 2013, vacating its published opinion. The Court requested further letter briefing on 1) the lesser included offense issue, 2) whether retrial would be barred by Penal Code section 654 as construed in *Kellett v. Superior Court* (1966) 63 Cal. 2d 822, 3) whether retrial would be barred by Double Jeopardy principles, and 4) any other issue the parties deemed relevant to the disposition of the case. In the briefs, respondent adhered to its position that arson of property was not a lesser included offense of arson of an inhabited structure but that retrial was the proper remedy. Appellant argued that retrial was barred by both *Kellett* and Double Jeopardy. Appellant also asked the Court to consider the arguments about his arson conviction from his petition for rehearing. After the conclusion of briefing, oral argument was held at the Court's request on November 5, 2013.

On January 5, 2014, the Court filed the current published opinion. The Court continued to hold that appellant did not commit arson of an inhabited structure. (Opinion at 4-8.) Addressing remedy, it held that

arson of property was not a lesser included offense to which appellant's conviction could be reduced and that retrial was barred by *Kellett*. (Opinion at 8-10.) It did not address Double Jeopardy. It ordered the case dismissed. (Opinion at 11.) One justice dissented.

ARGUMENT

I. <u>THE PETITION FOR REVIEW SHOULD BE DENIED. THIS CASE DOES NOT MEET THIS COURT'S STANDARDS FOR REVIEW. THE COURT OF APPEAL CORRECTLY DECIDED THE QUESTION OF REMEDY. RETRIAL IS ALSO BARRED BY DOUBLE JEOPARDY.</u>

A. <u>Procedural Background</u>

The prosecutor initially charged appellant in the alternative under Penal Code section 451, subdivision (b) with having committed arson of an inhabited structure or inhabited property. In subsequent filings, the prosecutor abandoned the alternative inhabited property charge. (Opinion at 7, fn. 8.) The prosecutor never charged the lesser related offense of arson to property.

During the conference on instructions, the court and counsel discussed the lesser included offense instructions that would be given. The prosecutor acceded to the trial court's proposals but did not expressly request lesser included offense instructions. (2 RT 284-288.) Defense counsel stated that he had not anticipated some of the proposed instructions and would have to revise his closing argument over lunch as he assumed

the prosecutor would. (2 RT 285-286.) The prosecutor replied, "I know what I'm going to argue for." (2 RT 286.)

The trial court instructed on the following lesser-included offenses: arson of a structure, arson of property, unlawful fire to an inhabited structure, unlawful fire to a structure, and unlawful fire to property. (2 RT 315-319; 2 CT 130-134.) Defense counsel argued that appellant was guilty of, at most, unlawful fire to property. (2 RT 354-356, 367.) The prosecutor never even hinted, even during rebuttal, that if the jury disagreed with the premise that a motor home was a building, it should at least convict appellant of arson of property. (2 RT 330-351; 369-375.)

At the time she made her closing argument, the prosecutor presumably understood that convicting appellant of arson of an inhabited structure as opposed to arson of property would have affected appellant's Three Strikes sentence in two ways. It would have increased it from 43-to-life to 48-to-life because of the multiple structure enhancement set out in Penal Code section 451.1(a).[3] It also would have limited appellant's good time presentence credit to 15 percent of actual time under Penal Code section 2933.1 because arson of an inhabited structure is a violent felony

[3] As noted, the Court of Appeal struck two of the three five-year priors under Penal Code section 667(a) that were charged and found true because all three convictions came out of the same case. They are factored in here because the prosecutor would have expected them to be imposed.

while arson of property is not. (Pen. Code § 667.5, subd. (c)(10).) Appellant was in his fifties at the time of the incident in 2009. (2 CT 299.)

B. <u>This Case Does Not Meet the Tests for Review.</u>

California Rules of Court, Rule 8.500, subdivision (a) sets out four grounds for review in this Court. The question here is whether review is "necessary to secure uniformity of decision or to settle an important question of law[.]" (California Rules of Court, Rule 8.500, subd. (b)(1). It is not.

This case does not create a conflict in published decisional law in the courts of appeal. Respondent cites no authority, published or unpublished, that reached a contrary result in the same procedural posture. The cases that respondent tries to link to this case do involve lesser related offenses. However, that is where the similarity ends.

Respondent relies on *People v. Toro* (1989) 47 Cal. 3d 966, 975-975, disapproved on other grounds in *People v. Guiuan* (1998) 18 Cal. 4th 558, 568, fn.3, and similar cases, which hold or observe that where a defendant requests, agrees to, or does not object to instructions on lesser related offenses at his trial, he may not afterwards complain about lack of notice if he is convicted of one of those offenses. (Pet. at 7-9.) Appellant agrees that if he had been convicted of arson of property, he could not argue on appeal that he lacked notice of the charge or that the charge had not been put before the jury.

That has nothing to do with this case. This case is about the prosecutor's neglect. The *Toro* cases have nothing to say about it. The consent or acquiescence in the *Toro* cases is not global consent to be convicted of a lesser related offense in any manner in which the prosecution might elect now or in the future. Nothing in the *Toro* cases compels the logical leap that a prosecutor may ignorantly and indifferently refuse to request that the jury resolve a charge and then get a second chance on the theory that the neglected charge remains "open."

Respondent also argues that the outcome here improperly deviates from that in *Orlina v. Superior Court* (1999) 73 Cal. App. 4th 258. (Pet. at 5, 7-8.) *Orlina* was, indeed, a case where a retrial of a lesser related offense was permitted. The similarity ends there.

In *Orlina*, the defendant at trial requested and received instructions on voluntary manslaughter, a crime that all parties and the trial court understood to be a lesser related offense to the charged crime. (*Id.* at pp. 260-261.) The jury was urged to reach a verdict on it. It acquitted the defendant on the charged crime but deadlocked on the charge of voluntary manslaughter. The trial court declared a mistrial on that charge. (*Id.* at p. 260.)

At issue in *Orlina* was whether retrial of the lesser related offense was permitted under the rationale of *Stone v. Superior Court* (1982) 31 Cal. 3d 503. (*Id.* at pp. 262-263.) *Stone* had held that when the jury

acquits a defendant of a greater offense but deadlocks on a lesser *included* offense on which it had been instructed, resulting in a mistrial, retrial of the lesser included offense does not offend California law or Double Jeopardy principles. (*Stone v. Superior Court*, *supra*, 31 Cal. 3d at pp. 517, 522.) *Orlina* held that retrial of the lesser related offense was permitted. Though it had not been initially charged, the lesser related offense became part of the case, the jury had deadlocked on it, and a mistrial had been declared. Retrial was clearly permitted. (*Orlina v. Superior Court*, *supra*, 73 Cal. App. 4th at pp. 262-264.)

The outcome in *Orlina* was unremarkable. Contrary to the Court's suggestion, the result there was not an extension of *Stone*; rather, it took *Stone* full circle. In *Stone*, the Court noted that Penal Code section 1160 provides that the jury may render verdicts on the counts on which it agrees and that the counts on which it is deadlocked may be retried. (*Stone v. Superior Court*, *supra*, 31 Cal. 3d at p. 517.) The novelty in *Stone* was extending this rule to lesser included offenses on which the jury was deadlocked notwithstanding Penal Code section 1023, which provides that an acquittal of a greater offense is a bar to a subsequent prosecution for a lesser included offense. (*Id.* at pp. 520-522.) By contrast, at the end of the day, *Orlina* is a straightforward application of Penal Code section 1160 because lesser related offenses are nothing more than non-included charges.

Section 1160 does not apply in appellant's case because there was no deadlock on arson of property.

Respondent presumably cites *Orlina* for its focus on the defendant's consent to be convicted of the lesser related offense. As with its discussion of the *Toro* cases, respondent mistakenly assumes that this is consent for any and all purposes. Nothing in *Orlina* or *Stone* suggests that the results apply other than where mistrials have been declared after a jury has deadlocked. Nothing in either case supports respondent's view that there is such a thing as an "open charge," lesser related or otherwise, that the prosecution gets a second chance at after failing to insist that the jury try to reach a verdict on it.

Because the Court of Appeal's opinion does not create a conflict in the law, this Court need not intervene to secure uniformity. There is also no question of law that this Court should grant review to settle. To the extent the unusual posture of this case is thought likely to recur, the Court of Appeal's published opinion, which was correctly decided, provides all needed guidance.

C. A New Trial May Not Be Granted After a Conviction is Reversed for Want of Substantial Evidence.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution bars retrial of a criminal defendant after a reversal of his conviction for want of substantial evidence. (*People v.*

Pierce (1979) 24 Cal. 3d 199, 209-10.) Such a reversal is equivalent to an acquittal or a directed verdict of acquittal at trial. (*Ibid., citing Burks* v. *United States* (1978) 437 U.S. 1, 10-11, 16.)

In California, the granting of a new trial as an appellate remedy:

> "*places the parties in the same position as if no trial had been had.* All the testimony must be produced anew, and the former verdict or finding cannot be used or referred to, either in evidence or in argument, or be pleaded in bar of any conviction which might have been had under the accusatory pleading." (Pen. Code § 1180 [emphasis added].)

Such a remedy would reopen the entire case and offend Double Jeopardy principles. The Court of Appeal was correct that this case must be dismissed. The next sections on *Kellett* and Double Jeopardy confirm that a new case may not be filed.

D. The Court of Appeal Correctly Held that Retrial is Barred by Penal Code section 654 and *Kellett*.

> "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. . . . " (Pen. Code § 954.)

> "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 a prosecution for the same act or omission under any other."* (Pen. Code § 654, subd. (a). [emphasis added])

The second sentence of section 654, read in light of the liberal joinder rule of section 954, bars successive prosecutions of transactionally related charges of which the prosecution was or should have been aware during the prior case. (*Kellett v. Superior Court* (1966) 63 Cal. 2d 822, 827.)

> "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 of any offense omitted if the initial proceedings culminate in either acquittal or conviction and sentence." (*Ibid.*)

For purposes of determining whether a new prosecution is barred, it does not matter if multiple *punishments* would have been permitted under section 654 if the charges had initially been joined. (*Id.* at p. 825.) "The rule against multiple prosecutions is a procedural safeguard against harassment and is not necessarily related to the punishment to be imposed[.] (*Ibid.*) Through section 654 and the liberal joinder provisions of section 954, "the Legislature has demonstrated its purpose to require joinder of related offenses in a single prosecution." (*Id.* at p. 826.)

The *Kellett* rule was applied in *Sanders v. Superior Court* (1999) 76 Cal. App. 4th 609 under circumstances similar to those here. In *Sanders*, the defendant's original convictions for ten counts of grand theft were reversed for want of substantial evidence. (*Id.* at pp. 613, 616.) The prosecution then filed multiple new charges of forgery and presenting false documents. (*Id.* at p. 612.) The evidence underlying these charges had figured prominently in the grand theft case. (*Id.* at p. 613.) Thus, the prosecution clearly was aware of the basis for the new charges. (*Id.* at p. 616.) The Court of Appeal issued a writ barring the new prosecution and ordering the information dismissed. (*Id.* at p. 617.)

A similar result is required here. The reversal for want of substantial evidence is functionally equivalent to an acquittal. (*Burks v. United States* (1978) 437 U.S. 1, 16-17; *People v. Hatch* (2000) 22 Cal. 4th 260, 272.) Thus, as in *Sanders*, the reversal of the conviction for arson of an inhabited structure triggers the application of section 654 and *Kellett*. Respondent has never argued that a prosecution for arson of the property of another was not transactionally related to the crime of arson of an inhabited structure that the prosecutor did charge. The charge simply involves slightly different consequences of the fire that the defendant was charged with setting. Thus, after this case is reversed and dismissed, the prosecution may not file a new case charging arson of property.

Respondent is upset about the consequences of an acquittal and the loss of the opportunity to convict appellant of *something*. This cannot be the sole focus of the case. If respondent's argument about *Kellett* and the "open charge" is correct, it would be correct even if appellant's conviction had been affirmed. The prosecutor, now understanding the law, would be able to file a new case to charge arson of property, with the goal of having a second trial so that a concurrent Three Strikes sentence might be imposed. That would not be countenanced under *Kellett*. Neither should the result respondent seeks.

This disposition is perfectly consistent with *Kellett*. It does not matter if under the *Toro* cases, the charge was technically part of the trial so as to permit a conviction had one occurred. Because there is no such thing as an "open charge," the analysis is different now.

On a policy level, *Toro* actually supports the disposition. One lesson of *Toro* is that if the defendant wants to minimize his exposure to conviction, he must know the law, pay attention and protect his interests. That is also *Kellett's* lesson to prosecutors whose goal is often *maximizing* a defendant's exposure to conviction. The prosecutor must know her case and have her ducks in a row. The prosecutor here did not. The Court of Appeal correctly laid responsibility for what occurred at her feet. (Opinion at 9-10.) Under *Kellett*, she does not get a new trial or the right to file a new case to cure her mistakes.

Respondent takes a "what's the harm approach" to the case, observing that new trials happen all the time, often "at the defendant's behest." (Pet. at 12.) Defendants can sometimes get new trials because the statutory and decisional law authorizes them if certain conditions are met. In this case, the statutory and decisional law forbids the new trial that respondent wants to have. That law must be followed.

E. Because the Jury Was Discharged Without Reaching a Verdict on Arson of Property, Retrial is Also Barred by Double Jeopardy.

Generally speaking, for purposes of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, jeopardy attaches in a case when the jury is sworn. (*United States v Martin Linen Supply Co.* (1977) 430 U.S. 564, 569; *Downum v. United States* (1963) 372 U.S. 734, 737.) When jeopardy has attached, and the jury is discharged without reaching a verdict, retrial is barred by the Double Jeopardy clause unless there is a "manifest necessity" or "legal necessity" for the discharge. (*United States v. Perez* (1824) 22 U.S. 579, 580; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 516; *People v. Sullivan* (2013) 217 Cal. App. 4th 242, 246.)

The typical scenario constituting a manifest necessity is the mistrial situation where the jury has been unable to agree on a verdict. (*Downum v. United States*, *supra*, 372 U.S. at p. 736.) The existence of a mistrial or other legal necessity is critical. If the trial court simply fails to

receive a verdict on certain charges after deliberations are complete, retrial is barred. (*Stone v. Superior Court*, *supra*, 321 Cal. 3d at p. 517; *People v. Sullivan*, *supra*, 217 Cal. App. 4th at p. 246.)

In *Downum*, discharge of the jury because the prosecution had been unable to proceed and had not sought a continuance barred retrial. (*Downum v. United States*, *supra*, 372 U.S. at pp. 737-738.) In *Sullivan*, the trial court had refused to accept a verdict on a robbery charge because the jury had declared itself hopelessly deadlocked on a great bodily injury enhancement. (*People v. Sullivan*, *supra*, 217 Cal. App. 4th at pp. 244-245.) In addressing arguments of ineffective assistance of counsel, the Court held that the subsequent robbery prosecution should have been barred by Double Jeopardy. Because the trial court should have accepted the verdict on the robbery charge and declared a mistrial on the enhancement, there was no legal necessity for the mistrial. (*Id.* at pp. 246-247.)

Here, although arson of property was not part of the case when the jury was sworn, once the charge was added and submitted to the jury, jeopardy attached on that charge. The jury was instructed on the charge, did not return a verdict on it, and did not declare a mistrial on it. The prosecutor never argued for a conviction on that charge in addition to a conviction on the charge of arson to an inhabited structure. Thus, no manifest or legal necessity permits retrial of that charge.

Respondent believes this outcome is unfair because the jury was instructed that it could not convict appellant of arson of property if it convicted him of arson to an inhabited structure. It does not matter. In the context of acquittals, it is well settled that the Double Jeopardy clause bars retrial even where the trial court directed a verdict because it made a clear mistake of law. (*See, e.g.*, *Evans v. Michigan* (2013) 133 S.Ct. 1069, 1075-1076; *Fong Foo v. United States* (1962) 369 U.S. 141, 143.) Thus, the trial court's failure to inform the jury that it had the power to convict appellant of the lesser related offense of arson of property in addition to arson of an inhabited structure does not defeat the finding of a Double Jeopardy bar. This was not a case involving a "properly granted mistrial." (*Evans v. Michigan*, *supra*, 133 S.Ct. at p. 1075.) It is closer to *Downum* in which the government lost the chance to convict after jeopardy had attached because the prosecutor was not ready to proceed.

Respondent suggests there is no Double Jeopardy problem because appellant consented to the outcome as in a mistrial situation. (Pet. 11.) The argument is meritless. In *Evans*, *Fong Foo*, *Downum* and, presumably, every other case where acquittals are entered, charges are dismissed or overlooked by the jury, etc., the defendant presumably does not oppose the outcome. That does not alter the fact that the charges may not be retried.

Respondent's consent argument also misapprehends the law on the giving of lesser included offenses. The trial court must instruct *sua sponte* on lesser-included offenses when the evidence raises a question whether all of the elements of the charged offense are present (*People v. Breverman* (1998) 19 Cal.4th 142, 154). The court must so instruct even if it is inconsistent with the defendant's theory of the case. (*Id.* at p. 159 ["'[t]he trial court must instruct on lesser included offenses ... [supported by the evidence] ... , regardless of the theories of the case proffered by the parties'"]; (*People v. Elize* (1999) 71 Cal.App.4th 605, 615 ["a lesser included instruction is required even though the factual premise underlying the instruction is contrary to the defendant's own testimony, so long as there is substantial evidence in the entire record to support that premise"].) Requiring instructions on lesser-included offenses "avoid[s] an unwarranted all-or-nothing choice for the jury and will ensure that the verdict is no harsher or more lenient than the evidence merits." (*People v. Wickersham* (1982) 32 Cal. 3d 307, 324, *overruled on other grounds*, *People v. Barton* (1985) 12 Cal. 4th 186, 201.)

Here, the trial court proposed lesser included offense instructions that both defense counsel and the prosecutor neither requested nor opposed, though defense counsel expressed some surprise. Had defense counsel objected to that arson of property was not a lesser included offense but been overruled, this case would have wound up in the exact

same posture, primarily due to the ignorance and indifference of the prosecutor, and respondent would still be blaming the trial court and arguing "open charge." Clearly, however, nothing would be different from the standpoint of Double Jeopardy. Respondent's "consent" argument should be rejected.

Respondent's "what's the harm" approach is even less appropriate here. (Pet. at 12.) There is no harmless error test under the Double Jeopardy clause. Where it applies, "its sweep is absolute. There are no 'equities' to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination." (*Burks v. United States* (1978) 437 U.S. 1, 11, fn. 6.)

F. Perceptions of Appellant's Dangerousness or Lack Thereof Cannot Dictate the Outcome.

Respondent urges this Court to reverse the Court of Appeal so that a dangerous arsonist will not escape justice. (Pet. at 6, 12.) Appellant has been in custody since 2009. Only someone who does not have to serve such time can dismiss it as a trivial loss of liberty. As explained in the next section, appellant believes he is guilty of, at most, the misdemeanor crime of unlawful fire to property. Therefore, any appeal to passion or to the equities of the case is, at best, a wash. Further, because one cannot be convicted of arson of property unless the property of another is burned, if Burley's personal effects had not apparently burned in the fire,

there could be no talk of a possible conviction for arson of property, even though reasonable people could still think that appellant was a reckless man based on his actions in burning his own property.

All this is to say that the law must be followed. The Court of Appeal correctly applied the law and reached the right result. Respondent's petition for review should be denied.

II. ADDITIONAL ISSUE PRESENTED FOR REVIEW: APPELLANT'S ARSON CONVICTION VIOLATED THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION AND CALIFORNIA LAW BECAUSE THERE WAS NO SUBSTANTIAL EVIDENCE THAT HE ACTED WITH THE MALICE REQUIRED FOR ARSON.

A. Introduction

A party filing an answer to a petition for review "may ask the court to address additional issues if it grants review." (California Rules of Court, Rule 8.500, subd. (a)(2).) Although it rejected it in its first unpublished opinion, the Court of Appeal's final opinion does not address appellant's argument that the prosecution failed to introduce substantial evidence that he committed arson as opposed to unlawful fire.

If this Court grants review of respondent's issue, it should review this issue as a corollary to that one. Because neither arson to property nor unlawful fire to property is a lesser included offense to arson of an inhabited structure, this Court could not reduce appellant's conviction to the misdemeanor of unlawful fire to property if his arson conviction was

not supported by substantial evidence. However, should this Court grant review and hold that retrial is not barred, the retrial would have to be limited to the charge of unlawful fire to property if the arson conviction was not supported by substantial evidence.

B. <u>Standard of Review</u>

Due process requires the prosecution to prove each element of a charged crime beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 364.)

> "The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. . . . [U]se of the reasonable doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." (*Id.* at p. 363-64.)

A defendant is denied due process under the Fourteenth Amendment to the United States Constitution if he is convicted of a crime without substantial evidence having been introduced to support the charge. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Under *Jackson*, the reviewing court must ask, "after viewing the evidence in the light most favorable to the prosecution, [whether] *any* rational trier of fact could have found the

essential elements of the crime beyond a reasonable doubt." (*Id.*, emphasis in original.)

The standard is the same under California law. A verdict will be upheld if it is supported by substantial evidence. (*People v. Rodriguez* (1999) 20 Cal. 4th 1, 11.) Substantial evidence is "evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*Ibid.*) In conducting substantial evidence review, the reviewing court analyzes the evidence in the record in the light most favorable to the judgment. (*Ibid.*)

C. Statement of Facts

Katherine Burley was having a dating relationship with appellant in November 2009. (1 RT 41.) She was living with appellant in his motor home located on a vacant lot located at 5th and Lankershim. (1 RT 41-42.) The lot had seven motor homes, two cars, two trucks, one travel trailer, one boat and one flatbed trailer. (1 RT 42, 91.)

At approximately 3:00 a.m., Burley and appellant had a disagreement that resulted in appellant and then Burley calling the police. (1 RT 46, 48 67, 91.) It was agreed that appellant would leave for the night. He got in a pickup truck and left, and Burley went back to sleep. (1 RT 48-49, 94, 96.)

Burley woke up when something bumped into the motor home. She heard a crash and motors going. (1 RT 49.) She looked out a

window on the left side of the motor home and saw appellant driving one of the other motor homes on the lot and using it to push yet another motor home on the lot next to the motor home that she was in. (1 RT 49-50.) The motor home that appellant drove had the word "Flair" written on the side. (1 RT 52.) The motor home that appellant pushed with the Flair was inoperable. (1 RT 54.)

After appellant finished pushing the motor home, Burley smelled gasoline. She saw appellant walking to the flatbed trailer with a Spic and Span bottle in his hand that she described as looking like a Windex bottle. (1 RT 56-57, 60.) He threw the bottle on the ground and kicked it a couple of times. (1 RT 58.) Appellant kept a number of containers on the trailer, some of which contained gasoline, including the Spic and Span bottle. (1 RT 58-61.)

After watching this, Burley lay back down and went to sleep but was later awakened by her dog. She smelled gasoline and smoke and heard crackling like glass popping. (1 RT 54-55.) She looked out the window on the left side and did not see anything at first. Then she looked out the front window and saw smoke and flames. (1 RT 56.) The flames were coming from the motor home that was next to the driver's side of the motor home that she was in. Her motor home was not yet on fire. (1 RT 63.) Burley grabbed her dogs and her purse and ran out the passenger side door. (1 RT 63-64.) There were no flames on that side. (1 RT 84.)

Burley went around the back of the motor home and saw appellant standing at the other end of the lot by the Flair. (1 RT 64, 88.) One of her dogs had run away, but she saw the lot manager, Randy Jauregui, who said he had her dog and then took her over to his house. (1 RT 65.) She did not see both motor homes on fire until she was at Jauregui's house. (1 RT 80.) Jauregui's testimony on when the second motor home caught fire was consistent with Burley's. (1 RT 111-112.)

At 6:38 a.m., both motor homes were engulfed in flames, and fire fighters were trying to put them out. (1 RT 126.) The motor homes were approximately four to five feet apart. (2 RT 260.) After the fire was out, an officer walked around the scene. He saw several empty containers lying on the ground between the flatbed trailer and the two burned motor homes. The containers all smelled of gasoline. (1 RT 128-129.) He also gathered the clothes appellant had been wearing for examination by an arson dog. Any piece of clothing that the dog alerted on was collected as evidence. (1 RT 135-139.) Another officer found a Bic lighter in appellant's pants pocket. (1 RT 152-153.)

Diesel, an arson dog, was brought to the scene and deployed. (1 RT 155-156, 159-160.) Diesel made four alerts on the interior of the first motor home that was set on fire. (1 RT 163.) He alerted on the exterior front of that motor home and on a number of the empty containers on and around the flatbed trailer, including the empty Spic and Span bottle.

(1 RT 166-171.) He also alerted on appellant's sports jacket, shoes and work pants. (1 RT 171-174.) Most of these items were subsequently tested and confirmed to contain gasoline residue. (2 RT 250-256.)

Diesel did not alert on the area between the two motor homes. (1 RT 189.) Diesel was not taken on a thorough search of the second motor home because he did not pick up any odors from it. If he had, he would have started to track them. (1 RT 189.)

The prosecution's arson expert opined that the fire to the first motor home started in the front areas that had sustained the most damage and it appeared to have been purposely set with a flammable, ignitable liquid. (1 RT 204.) The second motor home caught on fire due to the "intense heat," "extreme heat" and "radiant heat" coming from the other motor home. (1 RT 205, 211, 215.) The right passenger side of the second motor home had sustained less damage because it was not as close to the intense heat coming from the first motor home. (1 RT 207.)[4]

D. The Merits

"A person is guilty of arson when he or she willfully and maliciously sets fire to or burns or causes to be burned or who aids,

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[4] The prosecution introduced appellant's statements to police in which he explained how the first motor home caught fire accidentally when he was trying to wire the two motor homes together to share electricity. The arson expert then explained why this was implausible. As appellant's discredited explanation does not bear on the substantial evidence argument, it will not be summarized.

counsels, or procures the burning of, any structure, forest land, or property." (Pen. Code § 451.) Burning one's own "personal property" is not a crime "unless there is an intent to defraud or there is injury to another person or another person's structure, forest land, or property." (Pen. Code § 451, subd. (d)." "A person is guilty of unlawfully causing a fire when he recklessly sets fire to or burns or causes to be burned, any structure, forest land or property." (Pen. Code § 452.) Unlawful fire is punished less severely than arson, though as with arson, the punishment varies depending on the harm that results.

Section 450 defines the culpable mental states under the two statutes. "Willfully" "when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage." (Pen. Code § 7(1).) "Maliciously" "imports a wish to vex, defraud, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law." (Pen. Code § 450, subd. (e).) "Recklessly" "means a person is aware of and consciously disregards a substantial and unjustifiable risk that his or her act will set fire to, burn, or cause to burn a structure, forest land, or property. The risk shall be of such nature and degree that disregard thereof constitutes a gross deviation from the standard

of conduct that a reasonable person would observe in the situation." (Pen. Code § 450, subd. (f).)

Arson is a general intent crime. (*V.V.*, *supra*, 51 Cal. 4th at p. 1027; *People v. Atkins* (2001) 25 Cal. 4th 76, 85.) The prosecution need not prove that the defendant had the specific intent to burn the structure, forest land or property whose burning results in liability. (*Ibid.*) All that is required is the general intent to do the act that causes the fire with the further culpable mental state of malice. (*Ibid.*)

V.V. dispensed with inquiries into malice in fact and the subjective good or bad intentions of people charged with setting fires. (*V.V.*, *supra*, 51 Cal. 4th at p. 1030.) It did so over dissenting opinions to the contrary. (*Id.* at p. 1034 [Kennard, J., dissenting]; *id.* at p. 1036 [Werdegar, J., dissenting].) The inquiry is malice in law, and the Court set out several principles to guide the inquiry. "[F]or arson, malice will be presumed or implied from the deliberate and intentional ignition or act of setting a fire without a legal justification, excuse, or claim of right." (*Id.* at p. 1028, citing *Atkins*, *supra*, 25 Cal. 4th at pp. 88-89.) "[A]rson's 'willful and malice requirement ensures that the setting of the fire must be a deliberate and intentional act, as distinguished from an accidental or unintentional ignition or act of setting a fire.'" (*V.V.*, *supra*, 51 Cal. 4th at p. 1029, quoting *Atkins*, *supra*, 25 Cal. 4th at pp. 88-89.) Malice may be found where there is "a general intent to willfully commit the act of setting

on fire under such circumstances that the direct, natural, and highly probable consequences would be the burning of the relevant structure or property." (*Ibid.*) "[A] willful act that causes a fire without further evidence of the underlying circumstances [is] insufficient to establish malice." (*Id.* at p. 1031, fn. 6.)

V.V. emphasized that the language about natural and probable consequences is the essence of the malice inquiry as opposed to the willfulness inquiry. (*Id.* at p. 1031, fn. 6.) This test is particularly necessary and proper in cases such as *V.V.* and appellant's case where the initial setting on fire after the striking of the match was lawful. In *V.V.*, that lawful initial setting on fire was the boys' lighting of a firecracker that they ultimately threw into a field that caught fire. (*Id.* at pp. 1023-1024.) Here, it is appellant's burning of the first motor home, an act that was lawful because it was his own personal property. A focus on willfulness is most appropriate to cases where the initial setting on fire is unlawful, as in a cited case where a girl set a school's paper towels on fire and the fire eventually spread. (*Id.* at p. 1034 [Kennard, J., dissenting].)

The prosecution failed to prove that the burning of the second motor home was the natural and probable consequence of appellant's actions towards the first motor home as opposed to a foreseeable consequence of reckless behavior. It is undisputed that appellant did not set the second motor home on fire directly. No remnants of gasoline were

found on it or in it. No gasoline was found in the space between the motor homes. The arson expert made clear that the fire did not start in the second motor home. It caught fire from the radiant heat emanating from the first motor home. The expert offered no testimony that this phenomenon was the inevitable consequence of the fire that appellant set.

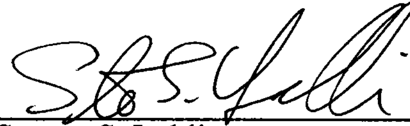
There was no other evidence from which the jury could rationally draw this conclusion. There was no evidence of how much gasoline appellant used to start the fire, and there was no evidence that any gasoline left in the tank of the first motor home exploded and facilitated the fire. Needless to say, appellant did not set the Flair or some other motor home with gas in the tank on fire. Had he done so, the first motor home would have gone up like a bomb, and there would be no issue here.

Any time one sets a fire, there is the risk that it will spread. The risk that the fire appellant set would spread to the second motor home was very real, and appellant clearly disregarded it. That, however, is all that the prosecution proved.

CONCLUSION

Respondent's petition for review should be denied. If it is granted, appellant's additional issue should be reviewed as well.

Dated: March 13, 2014



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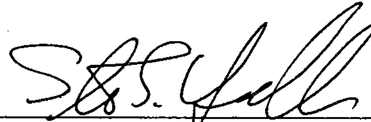
CERTIFICATION

Pursuant to Rule 8.504(d)(1) of the California Rules of Court, I hereby certify that the foregoing answer to a petition for review is produced in a proportional font (Times New Roman) of 13 point type and utilizes double line spacing, except in footnotes and extended quotations which are single-spaced. I further certify that, according to the word count of the word processing system used to prepare the brief, the brief includes 7,108 words (exclusive of the table of contents, the table of authorities, the proof of service and this certificate).

Dated: March 13, 2014



STEVEN S. LUBLINER
Attorney for Appellant
Richard James Goolsby

Filed 1/14/14

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.

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McKINSTER
Acting P. J.

I concur:

CODRINGTON
J.

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.

PROOF OF SERVICE BY MAIL
(Cal. Rules of Court, rules 1.21, 8.50)

Re: People v. Richard Goolsby, Case No. S216648

I, the undersigned, declare that I am over 18 years of age and am not a party to the within cause. My business address is P.O. Box 750639, Petaluma, CA 94975. I served a true copy of the attached

ANSWER TO PETITION FOR REVIEW

on each of the following, by placing same in an envelope(s) addressed as follows:

Hon. Bryan F. Foster
San Bernardino Cty. Sup. Ct.
351 N. Arrowhead Drive
San Bernardino, CA 92415

Richard Goolsby
[appellant]

Karen Khim, Esq.
Office of the District Attorney
316 N. Mountain View Avenue
San Bernardino, CA 92415

Richard L. Farquhar, Esq.
Suite 101B
1200 Nevada Street
Redlands, CA 92374

I then sealed each envelope and, with the postage thereon fully prepaid, I placed each for deposit in the United States Postal Service this same day at my business address shown above, following ordinary business practices.

PROOF OF SERVICE BY ELECTRONIC SERVICE
(Cal. Rules of Court, rules 2.251(i)(1)(A)-(D) & 8.71(f)(1)(A)-(D)

Furthermore, I, Steven S. Lubliner, declare I electronically served from my electronic service address of sslubliner@comcast.net the same referenced above document(s) on March 13, 2014 at 1:00 p.m. to the following entities:

Felicity Senoski, Esq., Office of the Attorney General (Respondent)
ADIEService@doj.ca.gov

Howard C. Cohen, Esq., Appellate Defenders, Inc.
eservice-criminal@adi-sandiego.com

I further declare that I have filed an electronic submission of this document in this Court at the web address of ww.courts.ca.gov/24590.htm.

I further declare that I have electronically served a copy of this document to the California Court of Appeal, Fourth Appellate District, Division Two, at the web address of www.courts.ca.gov/17381.htm.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 13, 2013 at Petaluma, California.