S216648

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

ANSWERING BRIEF ON THE MERITS

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

When a conviction is reversed for want of substantial evidence, two potential appellate remedies present themselves. One is that the judgment may be reduced pursuant to Penal Code section 1181(6) to reflect a conviction of a lesser included offense. Fire crimes to "property" are not lesser included offenses to fire crimes to "structures," inhabited or otherwise. Respondent has never wavered from this position. Therefore, a reduction to either arson of property or arson of inhabited property is not appropriate.

The additional questions on which this Court requested briefing are simply another way of asking whether when a conviction is reversed for want of substantial evidence, a conviction for a *related* offense may be substituted. Under Penal Code section 1181(6), it may not, no matter how guilty the defendant appears to be of the related offense. The answer does not change just because the two related offenses are set out in the same statutory subsection.

Even if there could be circumstances where a contrary rule would apply, this would not be one of them. Once the prosecutor repudiated her intention to seek a conviction on arson of inhabited property, appellant lacked notice that he could be convicted of that related offense. This affected his pre-trial negotiating posture. After the prosecutor withdrew the charge of arson of inhabited property, thereby committing herself to the

weak attempted murder charge and the novel arson theory that a motor home was a building, appellant turned down a favorable settlement offer. The record shows that appellant would have taken the offer if the charge of arson to inhabited property had still been in the case.

Where, as here, there is no lesser included offense to which appellant's conviction may be reduced, the appellate remedy is outright dismissal. The appellate remedy of a new trial is not authorized because it subjects the defendant to a new trial on the offense on which he was acquitted in violation of Double Jeopardy principles.

The question then becomes whether the prosecution may file a new case to charge arson of property. Respondent relies on cases holding that a defendant who acquiesces in the giving of instructions on related offenses may not complain if he is convicted. Those cases are irrelevant because appellant was not convicted of arson of property. Where, as here, the case is done, the jury is sent home, and the defendant's conviction is reversed for want of substantial evidence, the equation changes.

Because appellant has now been functionally acquitted of the charged crime of arson to an inhabited structure, the filing of a new case charging arson of property is barred by Penal Code section 654 as interpreted by this Court in *Kellett v. Superior Court* (1966) 63 Cal. 2d 822. The prosecution was clearly aware of the facts and circumstances that would have supported such a charge, not only as an alternative to the

charged crime but as the basis for a second conviction. It did not bring them before, and it may not bring them now. The same result follows for charges of arson to inhabited property, vandalism to Kathryn Burley's property, or any other charge that might be grounded in appellant's fire setting that night. Respondent's invitation to this Court to recognize the new concept of "continuation of the original prosecution" of neglected charges to skirt the commands of *Kellett* should be rejected.

Retrial of the charge of arson of property is also barred by Double Jeopardy principles because the jury was discharged unnecessarily 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. Contrary to respondent's suggestion, the Court of Appeal never repudiated reliance on Double Jeopardy principles. Because it reversed on state law *Kellett* grounds, it apparently did not deem it necessary to reach the constitutional issue on which it had requested briefing. If this Court holds that *Kellett* bars the filing of a new case, it need not address Double Jeopardy either. The truth is, however, that both *Kellett* and Double Jeopardy principles prevent the prosecution from filing a new case after this case is dismissed.

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.

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 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

[1] RT=Reporter's Transcript in two volumes. CT=Clerk's Transcript in two volumes. RBOM=Respondent's Brief on the Merits.

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.

Appellant filed a timely petition for rehearing on four issues, including whether arson to 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 that charge. Appellant obtained leave to file a response to this new argument and did so. On April 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. 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.

This Court then granted respondent's petition for review on the *Kellett* issue. Thereafter, it requested additional briefing on whether the jury's verdict and Court of Appeal's opinion establish that appellant is

guilty of violating Penal Code section 451(b) because he committed the crime of arson to inhabited property and, if so, whether the judgment should be affirmed on that basis.

ARGUMENT

I. APPELLANT'S PENAL CODE SECTION 451(B) CONVICTION MAY NOT BE UPHELD ON THE GROUND HE COMMITTED THE UNCHARGED RELATED OFFENSE OF ARSON TO INHABITED PROPERTY.

A. Additional Procedural Background

The following additional procedural history is relevant to both this issue and the *Kellett* issue on which this Court originally granted review.

1. Additional History Re Charging and Settlement Offers.

The prosecution filed its complaint on December 1, 2009. It alleged that appellant had committed arson of "an inhabited structure and inhabited property" in violation of Penal Code section 451(b). The complaint alleged a multiple structure enhancement under Penal Code section 452.1(a).[2] It did not yet allege attempted murder. Most significantly, it did not yet allege appellant's three prior strikes, serious felony priors under Penal Code section 667(a) or prison priors under Penal Code section 667.5(b). (1 CT 1-3.)

[2] Section 452.1(a) is actually the multiple structure enhancement for unlawful fire. Presumably, the prosecutor meant to allege the enhancement under Penal Code section 451.1(a).

Respondent correctly observes that the minutes for December 10, 2009 state that an offer was made to appellant in light of his total exposure and that he rejected the offer. (RBOM 19; 1 CT 8.) The terms of the offer are not part of the record on appeal.

The offer was made both before the preliminary hearing and well before the prosecution would have been obligated to produce discovery pursuant to Penal Code section 1054.7. Appellant's maximum exposure at this early stage of the case was a determinate sentence of 13 years served at half time, not the 48 years to life he ultimately received. Further, the order recites that immediately prior to the settlement discussions in chambers, a new attorney from the Conflict Panel had been appointed to relieve the Public Defender. (1 CT 8.)

The amended complaint was filed on December 11, 2009. It now alleged that appellant had committed arson of "an inhabited structure *or* inhabited property" in violation of Penal Code section 451(b). It added the charge of attempted willful, deliberate and premeditated murder, corrected the statute authorizing the multiple structure enhancement and added three prison priors. It still did not allege the strike priors or the serious felony priors. (1 CT 9-11.)

On December 14, 2009, immediately prior to the preliminary hearing, appellant rejected an offer of eight years in prison. (1 CT 12, 21.) At this time, the case still was not a Three Strikes case. Appellant's

maximum exposure on the recently added attempted murder charge, the charge on which appellant was ultimately acquitted, was life. His maximum exposure on the arson count with the prison priors was 16 years, assuming upper term sentences. Middle term sentences would have yielded 12 years. Upper and middle term sentences on an unlawful fire conviction with an enhancement and prison priors would have been ten and eight years, respectively.

After appellant was held to answer, the prosecution filed an information that was identical to the amended complaint. It still alleged that appellant had burned "an inhabited structure or inhabited property." It still did not allege that this was a Three Strikes case. (1 CT 14-17.)

On February 1, 2010, the prosecution filed its first amended information. This information deleted the reference to inhabited property in the arson charge, alleging only that appellant had burned "an inhabited structure." It also made the case a Three Strikes case for the first time, alleging the three prior strikes from 1976 and alleging that they also constituted three serious felony priors under Penal Code section 667(a). (1 CT 69-73.)

After abandoning the charge of arson to inhabited property, the prosecution made a final settlement offer. The minute order for June 4, 2010, which was approximately two weeks before trial, recites that an offer was made and rejected by appellant. The terms of the offer are not recited,

and the transcript is not part of the record on appeal; however, given that appellant was apparently reminded that this was a Three Strikes case, the offer presumably was for a determinate term substantially less than what he faced, ultimately received and would now receive if judgment was entered against him on the abandoned charge of arson to inhabited property. (1 CT 94.) Defense counsel later represented in court that the state of the arson charge was the only reason appellant took the case to trial. (1 RT 233, 240.)

2. Additional Procedural History Re Instruction on Lesser Offenses and Argument at Trial.

At the preliminary hearing, the prosecutor asked its arson expert, "What was the damage that was caused to the occupied motor home?" (1 CT 34-35.) The expert replied, "The damage that was—it was almost completely consumed by fire. You could still see the exterior wall to the west still intact, and all of her belongings were still intact and some of them were discernible." (1 CT 35.) No witness, including Katherine Burley herself, testified at the preliminary hearing that Burley's personal property was burned.

At trial, Burley testified that she had clothes, personal papers and other property in the motor home. (1 RT 45.) The arson investigator testified that when she investigated the motor home in which Katherine Burley lived, she saw burned personal property. (1 RT 207.) Neither witness testified explicitly that Katherine Burley's property was burned.

In the midst of trial, the parties had a lengthy argument about whether the jury should be allowed to find that a motor home is a structure and, if so, under what instruction. (1 RT 228-241.) The trial court concluded that it would not rule as a matter of law that a motor home was not a building and therefore not a structure. It deemed the issue a factual question for the jury. (1 RT 241.) Defense counsel then observed that in light of the just-concluded discussion, a motion for acquittal under Penal Code section 1118.1 would probably be futile but that he might file one anyway. (1 RT 241.) At the close of evidence, appellant did file a *pro forma* motion for acquittal of the arson charge, which the trial court denied in reliance on its earlier statements. (2 RT 326.)

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 allegedly lesser-included offenses: arson of a structure, arson to property of another, unlawful fire to an inhabited structure, unlawful fire to a structure, and

unlawful fire to property of another. (2 RT 315-319; 2 CT 130-134.) Defense counsel argued that appellant was guilty of, at most, unlawful fire to property of another. (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 to property of another 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 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.)

[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.

B. The Merits

1. Arson to Inhabited Property is a Related Offense to Arson to an Inhabited Structure. When a Conviction is Reversed for Want of Substantial Evidence, a Modified Judgment May Only Be Entered for Lesser Included Offenses, Not Related Offenses.

Respondent accuses the Court of Appeal of failing to affirm the judgment on this new theory for which respondent never argued. (RBOM 13.) Invoking principles of judicial estoppel, respondent accuses appellant in advance of playing inappropriate games by refusing to be convicted of a charge that the prosecution expressly repudiated. Respondent is the one playing a game. It is a game in which only the outcome, not the rules, seems to matter. The rules dictate that a judgment for the related offense of arson to inhabited property may not be entered.

In response to this Court's question, the jury's verdict does not establish that appellant committed the related offense of arson to inhabited property. As respondent has consistently argued and as the Court of Appeal held, property, along with structures and forest land are the three discrete things that Penal Code section 451 criminalizes the burning of. The jury's verdict establishes that he burned one of these three things, not either of the other two.

Assuming without conceding that appellant committed arson, the *evidence* at trial seems to show that he committed the related offense of arson to inhabited property. It also shows that he committed the related

offense of misdemeanor vandalism to Katherine Burley's property. There may be others. The judgment may not be modified to reflect a conviction for any of these related offenses.

There are two types of "lesser" offenses in the law: lesser included offenses and lesser related offenses. There are two tests for whether an offense is a lesser included offense.

> "An uncharged offense is included in a greater charged offense if *either* (1) the greater offense, as defined by statute, cannot be committed without also committing the lesser (the elements test), *or* (2) the language of the accusatory pleading encompasses all the elements of the lesser offense (the accusatory pleading test). (*People v. Parson* (2008) 44 Cal. 4th 332, 349.)

A lesser *related* offense is an offense that, though not necessarily included in the charged offense, "bear[s] some conceptual and evidentiary 'relationship' thereto." (*People v. Birks* (1998) 19 Cal. 4th 108, 112.)

The crime of arson of inhabited property under section 451, subdivision (b), is not a lesser included offense within arson of an inhabited structure. This is true because the statutory scheme defining the two offenses expressly provides that a "structure" and "property" are mutually exclusive. Section 450, subdivision (c), provides: "Property means real property or personal property other than a structure or forest land." (emphasis added.) Thus, under the statutory scheme a structure is not a type of property, but rather an alternative to property. From this it is apparent

that one who commits arson of an inhabited structure does not also commit arson of inhabited property. Accordingly, arson of inhabited property is a related offense, not an included offense within arson of an inhabited structure.

The fact that both related offenses are set out in Penal Code section 451(b) and have the same punishment is irrelevant. The crimes of arson to a structure and arson to forest land are both set out in Penal Code section 451(c) and are punished identically. No one would say that a failure to prove one of these offenses established proof of the other.

The conclusion that an offense is a related offense and not an included offense carries important consequences. 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; *People v. Elize* (1999) 71 Cal.App.4th 605, 615.) It may not instruct *sua sponte* on lesser related offenses because bringing the greater charge does not give the defendant notice of related offenses consistent with due process. (*People v. Birks*, *supra*, 19 Cal. 4th at p. 112.)

Of greater pertinence here, when a judgment is reversed for want of substantial evidence, the reviewing court may enter judgment against the defendant on a lesser included offense. (Pen. Code § 1186(6).) It may not enter judgment on a related offense. (*People v. Guion* (2013) 213

Cal. App. 4th 1426, 1435-1436.) Like arson of property, arson to inhabited property is a related offense to arson of an inhabited structure. Therefore, even though this offense, like the related offense of vandalism in violation of Penal Code section 594, would have been supported by the evidence, this Court may not enter judgment against appellant on it.

Arguing to the contrary, respondent cites a number of cases supporting what respondent calls the doctrine of concession. (RBOM 13-16.) None of these cases is on point. Each case involves circumstances under which an admission or stipulation to an element of the charge *before the court* may be implied from the defendant's conduct or positions taken. None of respondent's cases stand for the proposition that if a defendant does not dispute evidence that happens to prove up an uncharged related offense, the trial court may enter judgment on the related offense or a reviewing court may do so if the charge on which the defendant was convicted is not supported by substantial evidence.

2. Even if This Court Theoretically Could Enter Judgment on Arson to Inhabited Property, Doing so Here Would Deny Appellant Due Process of Law. The Prosecution Had Repudiated Any Intention of Convicting Appellant of that Crime, and Appellant Had Refused a Settlement Offer in Reliance on the Fact that this Charge was not in the Case.

Respondent argues at length that it is not unfair to enter judgment against appellant on the charge of arson to inhabited property because 1) he did not meaningfully contest at trial either that that the motor

home was property or that it was inhabited and 2) he refused certain settlement offers when the charge of arson to inhabited property was still part of the case. (RBOM 17-26.) This argument misses the mark because there is no equitable exception to the rule that, in reversing for want of substantial evidence, an appellate court may not enter judgment against the defendant for a related offense shown by the evidence.

It does not matter that the current record suggests that appellant would not have defended a charge of arson to inhabited property any differently. It would still be a denial of due process to enter judgment against him on that uncharged offense. This Court has stated:

> "It may be very difficult to ascertain from developments which occur during trial whether a defendant is 'misled to his prejudice' and 'prevented from preparing an effective defense.' It may never be known with any confidence after a conviction what defenses might have been asserted had defendant been given adequate and advance notice of the possible offenses for which he was criminally vulnerable." (*People v. Lohbauer* (1980) 29 Cal. 3d 364, 370.)

Respondent is also grossly mistaken about the settlement context of this case. Actual prejudice lies in the fact that appellant rejected a settlement offer and went to trial *after* the prosecution had abandoned the charge of arson to inhabited property, which was its best supported theory of guilt, and had committed itself solely to an ambitious attempted murder charge and an overreaching, if not absurd, theory of arson liability.

Respondent's recitation of the settlement history of this case ignores this final settlement offer. It also ignores the fact that while appellant rejected settlement offers while the charge of arson to inhabited property was still in the case, these offers occurred extremely early in the case, before the preliminary hearing, before the case was a Three Strikes case and immediately after new counsel had been appointed. Nothing about the timing of the making and rejection of these extremely early settlement offers demonstrates that appellant was committed to fighting a charge of arson to inhabited property to the bitter end. Defense counsel's statements at trial prove that this was not the case.

"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." (*People v. West* (1970) 3 Cal.3d 595, 612; *In re Hess* (1955) 45 Cal.2d 171, 175.) Preparation for trial necessarily includes a defendant's opportunity to make informed settlement decisions prior to trial to minimize his exposure. This principle is validated in other contexts as well. A defendant who is misadvised during the settlement stage and turns down a favorable plea bargain may seek relief for ineffective assistance of counsel if he is convicted even after a fair trial and receives a harsher sentence. (*Lafler v. Cooper* (2012) 132 S.Ct. 1376, 1387-1388.) Given the charging and settlement history in this case, to enter judgment against

appellant on arson to inhabited property now would be unfair in the extreme and a denial of due process.

II. THE CURRENT CASE MUST BE DISMISSED. THE FILING OF A NEW CASE IS BARRED BY PENAL CODE SECTION 654 AND *KELLETT*. A NEW PROSECUTION WOULD ALSO SUBJECT APPELLANT TO DOUBLE JEOPARDY.

A. Introduction

Respondent takes inconsistent positions on the effect of the charge of arson to property of another having been submitted to the jury as a lesser included offense. For *Kellett* purposes, respondent argues that because the charge was in the case, a new prosecution would simply be a continuing prosecution. For Double Jeopardy purposes, however, respondent argues that the charge was never really in the case at all.

This Court need not choose between legal fictions. The statutory and decisional law is overwhelmingly against respondent. Respondent fails to cite a single case that either compels or even comes close to persuading that there is such a thing as an "open charge" of a related offense that can be revisited after the prosecutor declined to charge it and then, when the trial court instructed on it, ignorantly failed to see it through to verdict. This Court should hold that a new prosecution alleging arson of property to another is barred both by *Kellett* and by Double Jeopardy.

B. Respondent's Misleading and Incomplete Assessment of Defense Counsel's Strategy and the Prosecutor's Actions.

Respondent observes that defense counsel did not object to the giving of the instruction on arson of property of another. (RBOM 32-33.) Respondent states that from the outset, "[a]ppellant's trial strategies allowed him to rebut the sentence enhancement allegation and admit some level of culpability, which was reasonable under the circumstances, but argue for the jury to convict him of the least offense of recklessly causing a fire of property." (RBOM 25.) Respondent has mischaracterized the defense strategy.

The only reason the arson charge was worth trying was to obtain a complete acquittal on the theory that a motor home was not a building and therefore not a structure as charged and that there were no lesser included offenses to which such a conviction might be reduced under Penal Code section 1181(6). The crime of arson to property is a straight felony and would have subjected appellant to a Three Strikes sentence. Every other lesser offense on which the trial court instructed, except unlawful fire to property, was at least a wobbler, which almost certainly would have been treated as a felony. (Pen. Code §§ 451, subds. (c)-(d); 452, subds. (b)-(d).) Thus, as the case was ultimately submitted to the jury, to escape a Three Strikes sentence, appellant would have had not only to get the jury to agree that a motor home was not a building, he would also

have to get them to agree that notwithstanding all of appellant's elaborate machinations with the second motor home, he was only guilty of acting recklessly. Going to trial in the belief that appellant had only committed unlawful fire would itself have been an act of recklessness.

Contrary to respondent's assumptions, defense counsel's strategy for avoiding a Three Strikes sentence was not enhanced once the trial court indicated that it would instruct on arson to property, it was undermined. Defense counsel stated that some of the proposed instructions had surprised him and he would have had to revise his argument. (2 RT 285-286.) The instructions on unlawful fire generally could not have both surprised him and required revision of his closing argument nor could the instruction on an uninhabited structure because the structure issue was already in the case.

The only instructions that could have surprised him were the instructions on arson to property of another and unlawful fire to property of another. Perhaps these instructions surprised him because the burning of Katherine Burley's property seemed not to have been clearly proved either at the preliminary hearing or at trial. Perhaps they surprised him because he did not believe fire crimes to property to be lesser included offenses to the charged crime because of the additional element that property of another be burned. For whichever reason, he was surprised, and the giving of these

instructions did not make it easier for appellant to avoid a Three Strikes sentence; it made it harder.

Respondent generally assumes that counsel knew that arson to property of another was a lesser related offense and that he attempted to exploit an unexpected windfall of instructional error. That may be. However, as noted above, defense counsel's argument at trial was not a windfall. Rather, it was making the best of a bad situation after the trial court unexpectedly had allowed the issue of whether a motor home is a building to go to the jury.

Respondent understandably downplays the prosecutor's actions here. However, they bear summarizing. By amending the information, the prosecutor first repudiated any interest in a conviction for arson to inhabited property. She never attempted to reinstate this charge, either as an included offense or as a related offense. When the trial court was discussing lesser included offenses and correctly omitted arson to inhabited property, the prosecutor did not request an instruction on that offense. The prosecutor did not object, as she was entitled to do, to the instruction on the lesser offense of arson to property of another on the theory that it was a related offense, not an included offense.[4] The prosecutor also did not ask that the information be amended to charge arson

[4] A defendant is not entitled to an instruction on lesser related offenses unless the prosecution consents. (*People v. Birks*, *supra*, 19 Cal. 4th at p. 136.)

to property of another in addition to the charge before the court. At argument, the prosecutor said absolutely nothing about arson to property of another even though she would have understood it to require a sentence of 43 years to life. Respondent clings to this related offense now, but as far as the prosecutor was concerned at trial, it was never in the case.

C. The Only Appropriate Appellate Remedy in this Case Involving a Single Conviction Reversed for Want of Substantial Evidence is Dismissal.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution bars retrial of a criminal defendant after 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.)

Among its permitted remedies after reversing a judgment, a reviewing court in California may order a new trial. (Pen. Code § 1260.) The general powers set out in section 1260 are subject to specific limitations in other statutes. (*People v. Adams* (1990) 220 Cal. App. 3d 680, 688.) *Adams* held that the general power set out in section 1260 of an appellate court to reduce and modify judgments subject to the specific limitation in section 1181(6) that such modifications may only be to lesser included offenses. (*Ibid.*) Similarly then, the general power to grant a new trial is subject to the specific limitations of Penal Code section 1180.

Section 1180 provides that the granting of a new trial:

> "*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].)

Under section 1180, new trials are only granted with respect to charges on which there have been verdicts and findings. In this case, the only charge on which there has been a verdict is being reversed for want of substantial evidence. Retrial on that charge is barred.

There is no other charge on which a new trial may be granted. Because there has been no verdict or finding on the charge of arson to property of another, the appellate remedy of a new trial to pursue that charge is not appropriate. This case must be dismissed. The *Kellett* and Double Jeopardy inquiries address whether a new case may be filed.

D. <u>The Merits: A New Prosecution is Barred by Penal Code Section 654 and *Kellett*.</u>

> "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. (*In re Kellett* (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 here triggers the application of section 654 and *Kellett*. The alleged burning of Katherine Burley's property was transactionally related to the crime of arson of an inhabited structure that the prosecutor did charge. The charge of arson to property of another 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 appellant with arson of property.

None of respondent's arguments dictate a contrary result. Respondent first purports to distinguish *Sanders*, arguing that *Kellett* was violated because the prosecutor's failure to charge the disputed crimes had made it "legally impossible" for the jury to convict Sanders of any of those crimes. (RBOM 30-31.) The argument lacks merit.

This case is no different from respondent's characterization of *Sanders*. The prosecutor's failure to recognize that arson to inhabited property was a related offense that belonged in this case, if at all, as a related offense that charged a second crime, also made it legally impossible for the jury to convict appellant of that charge if it convicted appellant of the greater charged offense. As the prosecutor saw the matter, this charge was never in the case.

The same *Kellett* bar would follow if appellant's conviction for arson to an inhabited structure had been affirmed or had gone unappealed. In that situation, if the prosecutor were to wake up one morning having realized that arson to property of another was a related offense rather than an included offense, section 654 and *Kellett* would prevent her from filing a new case to charge that crime in search of a second conviction.

Respondent's other arguments are equally unavailing. Respondent discusses *People v. Valli* (2010) 187 Cal. App. 4th 786 at some length for reasons that are not apparent. (RBOM at 31-32.) Respondent appears to be suggesting either that *Kellett* is not implicated in this case because the charges at issue are not sufficiently related or because prudential concerns about separation of powers and prosecutorial charging discretion should trump section 654 and *Kellett*.

The first argument is not supported by the record here. The second finds no support in *Kellett*. Indeed, invocations of prosecutorial charging discretion hardly serve respondent's cause. The prosecutor did not charge the related offense of arson to property of another in the first instance. Under section 654 and *Kellett*, her discretionary charging decision will be affirmed.

Respondent's consent theory fares no better. 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. (RBOM 33-38.) Appellant agrees that if he had been convicted of arson to property of another, 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 a case that is in the current posture.

The consent or acquiescence in the *Toro* cases is not global consent to be convicted of a related offense in any manner in which the prosecution might elect now or in the future, however often the prosecutor might elect it. If a defendant's "consent" to be convicted at trial trumped all other considerations, then a defendant who did not demur to an original charge and was ultimately acquitted could be retried because, after all, his lack of legal objection to the charge was an eternal consent to allow the prosecution to convict him, notwithstanding Double Jeopardy and however long it took.

Nothing in the *Toro* cases compels such absurdity. Indeed, with the exception of the *Orlina* case, which will be discussed below, none of the *Toro* cases has anything to do with the circumstances in which the granting of a new trial or the filing of a new case is permitted. Nothing in the *Toro* cases compels the logical leap that a prosecutor may ignorantly and indifferently refuse to request that the jury resolve a charged related offense and then get a second chance on the novel theory that the neglected charge remains "open."

The *Orlina* case also does not support the concept of the "open" charge that went undecided due to prosecutorial neglect. (RBOM 35-36.) In *Orlina v. Superior Court* (1999) 73 Cal. App. 4th 258, the

defendant 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, therefore, was permitted. (*Orlina v. Superior Court*, *supra*, 73 Cal. App. 4th at pp. 262-264.)

Orlina provides no support for retrying or recharging an "open charge" that went neglected at trial. The outcome in *Orlina* was grounded in Penal Code section 1160, which provides in pertinent part,

> "Where two or more offenses are charged in any accusatory pleading, if the jury cannot agree upon a verdict as to all of them, they may render a verdict as to the charge or charges upon which they do agree, and the charges on which they do not agree may be tried again."

The decision in *Orlina* took *Stone's* interpretation of section 1160 full circle.

In *Stone*, this Court noted that 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.) 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. The statutory language is clear. It has nothing to do with open or forgotten charges. It authorizes rendition of a partial verdict and retrial on charges on which the jury is deadlocked. It does not authorize retrial or the filing of a new case on charges that, due to

prosecutorial ignorance and neglect, the jury never considered. Respondent has cited neither statute nor case law that does.

E. Had the Trial Court Not Erred by Denying Appellant's Motion for Acquittal, the Charge of Arson to Property of Another Never Would Have Appeared in the Case, and it Would be Undisputed that Refiling was Barred by *Kellett*.

A section of respondent's brief is entitled "Appellant's Trial Strategy Depended Upon the Jury's Consideration of the Lesser Offense." (RBOM 38-39.) Respondent's focus is too narrow. As shown earlier, the lesser related offense instruction on unlawful fire to property of another—as opposed to arson to property of another—only became useful after the trial court denied appellant's motion to acquit on the charge of arson to an inhabited structure. Respondent fails to appreciate the significance of the trial court's error.

A motion for acquittal under Penal Code section 1118.1 should be granted when "the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal." The Court of Appeal's reversal of appellant's conviction for arson to an inhabited structure on substantial evidence grounds establishes that the trial court should have granted appellant's motion for acquittal on that charge under Penal Code section 1118.1.[5]

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[5] Respondent may argue that the defendant in *Orlina* was acquitted of the charged greater offense. The situations are not identical. There is a

Had that happened, one of two things would have followed. Either the trial court would have entered judgment for appellant on the arson count, or it would have substituted one or more charges of lesser included offenses that were supported by the evidence. (*People v. Powell* (2010) 181 Cal. App. 4th 304, 311.) There was, however, no such charge to be substituted.

Fire crimes to property are not lesser included offenses, and fire crimes to uninhabited structures would have lacked evidentiary support because a motor home is not a building. Any motion at that stage to amend the information to add related offenses would have been objectionable on notice grounds in light of the charging and settlement history of the case. Therefore, if the trial court had properly granted the motion for acquittal, the arson prosecution would have ended right there. The filing of a new case charging related arson offenses would then have been barred by *Kellett.*

The current situation may lack this clarity, but it is functionally the same. To the extent it appears otherwise, the fault lies with the trial court, not appellant or his counsel.

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difference between a jury verdict of acquittal and a judgment of acquittal as a matter of law under Penal Code section 1118.1.

F. Penal Code Section 1164 Has Nothing to Do With This Case.

Respondent argues that because appellant did not object to the discharge of the jury without reaching a verdict on the charge of arson to property of another, he has forfeited any claim of error under Penal Code section 1164.[6] (RBOM 40-44.) Because appellant has made no claim under section 1164, he has forfeited nothing. Section 1164 does not apply to this case.

Penal Code section 1164 provides in pertinent part:

> "No jury shall be discharged until the court has verified on the record that the jury has either reached a verdict or has formally declared its inability to reach a verdict on all issues before it, including, but not limited to, the degree of the crime or crimes charged, and the truth of any alleged prior conviction whether in the same proceeding or in a bifurcated proceeding." (Pen. Code § 1164, subd. (b).)

The duties laid out in this subsection complement the statutory commands set out in Penal Code sections 1025 and 1157. The former requires that prior conviction allegations be tried to the jury that tried the question of guilt. (Pen. Code § 1025, subd. (b).) The latter provides that if the jury fails to specify the degree of a conviction, judgment shall be entered for the crime of the lesser degree. (Pen. Code § 1157.)

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[6] In making this argument, respondent once again relegates the prosecutor to the role of potted plant with no apparent responsibility to comprehend the legal nuances of the People's case or see it responsibly through to completion.

Section 1164 was not violated here. The jury resolved all the issues that it was instructed to resolve. Unlike in *People v Saunders* (1993) 5 Cal. 4th 580, which respondent discusses at length, (RBOM 41-42,) the trial court did not discharge the jury and then empanel a new jury to decide prior conviction allegations or other unresolved charges while appellant sat silently waiting to sandbag the opposition on appeal. Appellant has no claim of error under section 1164. There was nothing for him to forfeit.

Respondent seems to be arguing that because appellant did not clarify that arson to property of another was a related offense and demand that the jury convict him of that also before it was discharged, he has by analogy forfeited any right to object to this Court allowing the prosecutor to file a new case. (RBOM 42-43.) This argument is meritless for several reasons.

Neither section 1164 nor *Saunders* dictates what the remedy is when a case is reversed for want of substantial evidence. Neither says anything about *Kellett*. *Saunders does*, however, confirm that its holding that an objection is required to preserve claims under section 1164 does not extend to Double Jeopardy claims. (*People v. Saunders*, *supra*, 5 Cal. 4th at p. 589, fn. 5.)

Saunders also confirms that respondent's analogy is unwarranted. The case involved a confused back and forth discussion about whether the defendant would waive a jury trial in bifurcated proceedings on

his prior convictions. Perhaps unintentionally, the defendant let the trial jury be discharged, and a second jury was convened to try the prior convictions. (*Id.* at pp. 586-587.) In affirming, this Court responded to the dissent's concern that its holding required defendants to help prosecutors convict them.

> "[O]ur conclusion does not require the defense to remind the prosecution to present its evidence in a timely manner, but merely requires the defense to object to the discharge of the jury in the event it wishes to assert its statutory right to have the same jury that found defendant guilty also determine the truth of the prior conviction allegations." (*Id.* at p. 591, fn. 7.)

Section 1164 has nothing to say about this case.

G. Because the Jury Was Discharged Without Reaching a Verdict on Arson to Property of Another, a New Trial is Also Barred by Double Jeopardy.

The Double Jeopardy clause of the Fifth Amendment to the United States Constitution provides, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb[.]" Jeopardy attaches in a case when the jury is sworn. (*Martinez v. Illinois* (2014) 134 S.Ct. 2070, 2075; *United States v Martin Linen Supply Co.* (1977) 430 U.S. 564, 569; *Downum v. United States* (1963) 372 U.S. 734, 737.) Here, a jury was sworn, and the charge of arson to property of another was submitted to it. Jeopardy clearly attached as to that charge.

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*, 31 Cal. 3d at p. 517; *People v. Sullivan*, *supra*, 217 Cal. App. 4th at p. 246.)

Respondent argues that by not objecting to the instruction on arson to property of another, appellant consented to resolution of the charge either by conviction or acquittal, no matter how long it might take. (RBOM 48.) As observed before, appellant also "consented" to be convicted of arson to an inhabited structure by not demurring to the charge. That does not mean he waived the protections of the Double Jeopardy Clause.

Respondent's theory that the Double Jeopardy protections are not triggered unless there has been a conviction or an acquittal is incorrect. In *Downum*, the trial court discharged the jury because the prosecution had been unable to proceed and had not sought a continuance. The Supreme

Court held that this barred retrial and that the defendant's conviction by a new jury was unconstitutional. (*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.)

Most recently, in *Martinez*, the U.S. Supreme Court held that the granting of a directed verdict of acquittal after the prosecution was unwilling to participate in the trial barred further prosecution. (*Martinez v. Illinois*, *supra*, 134 S.Ct. at pp. 2076-2077.) Although *Martinez* involved an acquittal, which is a resolution on the merits, an acquittal is not necessary to bar retrial following an unjustified discharge of the jury. *Downum* and *Sullivan*, which did not involve acquittals in connection with the discharge of the jury, establish this. Citing *Downum*, *Martinez* observed that even if the jury had been discharged pursuant to an order of dismissal or mistrial, Double Jeopardy probably would also bar retrial. (*Id.* at p. 2076, fn. 4.)

Here, appellant was placed in jeopardy on the charge of arson to property of another. The jury did not return a verdict on it. The trial court 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 argues that retrial is permitted because by not objecting to the instructions and the outcome, appellant "consented" to discharge of the jury without its having returned a verdict on arson to property of another. (RBOM 49-50.) The argument is meritless. It is worth noting that respondent fails to posit a coherent alternative scenario. The trial court was obligated to instruct on lesser included offenses it believed to be supported by the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) If, while the prosecutor presumably said nothing, appellant had objected that arson to property of another was a related offense and been overruled, this case would be in the exact same posture except that respondent would be heaping more blame on the trial court. If appellant had succeeded in getting the charge out of the case, jeopardy might not have attached to it, but the *Kellett* bar would be unmistakable.

The consent argument is also legally unsound. The defendants in *Martinez*, *Downum* and *Sullivan* all consented to the termination of their respective cases. None of these cases hold that a defendant must request to

be prosecuted further to obtain the benefits of the Double Jeopardy Clause. The fact that the trial court may have made a mistake of law here is also irrelevant and did not impose a duty on appellant to object. (*See, e.g., Evans v. Michigan* (2013) 133 S.Ct. 1069, 1075-1076; *Fong Foo v. United States* (1962) 369 U.S. 141, 143.)

This Court has squarely rejected the view that defendants forfeit Double Jeopardy protections in cases such as this by failing to weaken their position by objecting. As respondent acknowledges, (RBOM 46-48,) if the prosecution wants to avoid the consequence of a Double Jeopardy bar, the prosecutor bears the burden of objecting to an incomplete verdict at trial, a burden that encompasses making informed choices to maximize what the prosecution hopes to get out of the case. (*People v. Fields* (1996) 13 Cal. 4th 289, 311.) Respondent suggests this obligation only applies in cases involving lesser included offenses, not lesser related offenses, but the posited distinction makes no sense. (RBOM 48.) The prosecution must know the law and its case.

This Court was even more adamant on the subject in the earlier case of *People v. Marks* (1991) 1 Cal. 4th 56. In *Marks*, the defendant's murder conviction was deemed to be second degree murder by operation of Penal Code section 1157 because the first jury had not specified the degree of the murder. The second degree murder conviction was reversed on appeal. This Court held that Double Jeopardy barred the

state from retrying the defendant for first degree murder. (*Id.* at pp. 71, 74-76.) Pertinent here, this Court held specifically that the defendant had not forfeited Double Jeopardy protections by failing to remind the trial court that the jury had not specified the degree of his murder conviction. (*Id.* at p. 77, fn. 20.) It observed generally that when a trial court proposes to discharge a jury without legal necessity, the defendant has no duty to object to the discharge. (*Ibid.*)

None of respondent's California case law dictates a contrary result. The case of *In re Colford* (1924) 68 Cal. App. 308 (RBOM 50) held that when the jury fails to fix the degree of a robbery conviction, the verdict is void and the defendant may be retried to determine the degree of his offense without offending Double Jeopardy principles. (*Id.* at p. 311.) *Colford* treated the jury's mistake as a species of trial error, to which the defendant was obligated to object if he wanted to preserve his Double Jeopardy protections. (*Ibid.*) The case is outdated, not on point and contradicted by this Court's opinion in *Marks*.

The verdict and judgment in appellant's case were not void for uncertainty. Further, *Colford* was decided well before the 1949 amendment to Penal Code section 1157 added the sentence providing that the failure to fix the degree of the conviction requires entry of judgment for the crime of the lowest degree. It is reasonable to think this enactment was prompted at least in part by Double Jeopardy concerns. Finally, this Court

made it clear in *Marks* that the defendant's silence in such situations is not a waiver of Double Jeopardy protections. Rather, it is the prosecution's responsibility to get the maximum value out of its case the first time around.

Respondent also relied on *People v. Ham Tong* (1909) 155 Cal. 579. (RBOM 48-49.) In addition to not being on point, that case, like *Colford*, has been rendered outdated by legislation that calls into question its conclusions about Double Jeopardy. It does not support respondent's position.

Respondent's recitation of the procedural posture of *Ham Tong* is incorrect. Respondent states that "the trial court erroneously determined the information charged robbery, when it actually charged larceny." (RBOM 48.) While *Ham Tong's* procedural summary is not a model of clarity, the case did not involve a formal pleading of larceny that was allowed to languish without meaningfully being set before the jury as respondent characterizes the charge of arson to property of another here.

According to *Ham Tong*, the posture there was identical to that in a Court of Appeal case, *People v. Ho Sing* (1907) 6 Cal. App. 752, which apparently involved a co-defendant. (*People v. Ham Tong*, *supra*, 155 Cal. at. p. 180.) *Ho Sing* makes it clear that the information in the case charged robbery and only robbery. The defendant was convicted of that offense. (*People v. Ho Sing*, *supra*, 6 Cal. App. at p. 752.) The pleading

was legally insufficient to charge robbery but would have sufficed to plead larceny if that charge had been brought. (*People v. Ho Sing*, *supra*, 6 Cal. App. at pp. 753-754.) *Ham Tong* disagreed with *Ho Sing's* holding that Double Jeopardy barred a new trial on the larceny charge, deeming such a result unfair to the prosecution. (*People v. Ham Tong*, *supra*, 155 Cal. at p. 584-585.)

Assuming *Ham Tong* was correct, it is distinguishable. Unlike the charge of arson to property here, the charge of larceny was never formally pled or submitted to the jury, which means jeopardy would not have attached on it. *Ham Tong* does not support respondent's view that the prosecutor can bring a charge into a case, have jeopardy attach on it, neglect to see it through to a verdict and then get a second chance.

A case like *Ham Tong* could never arise today. A judgment of conviction would not be overturned on the grounds that the trial court erred in overruling a demurrer alleging that a charge did not state a public offense. (Pen. Code § 1004(4).) Review of such trial court action is typically by petition for writ of mandamus. (*See, e.g., Robert L. v. Superior Court* (2003) 30 Cal. 4th 894, 898.) This is appropriate because when a demurrer is sustained, the prosecution is allowed to amend its pleading. (Pen. Code § 1007.) In this way, a case like *Ham Tong* would wind up properly charged and tried.

Additionally, *Ham Tong* was decided prior to the 1927 amendments to Penal Code section 1181(6) that authorized reduction of a conviction not supported by substantial evidence to a lesser included offense. Theft is a lesser included offense to robbery. (*People v. Reeves* (2001) 91 Cal. App. 4th 14, 51.) Today, if a defendant argued on appeal that his demurrer to robbery should have been sustained, the reviewing court would hold that the issue was not appealable. If the defendant also made a substantial evidence argument, and if the evidence introduced actually did not prove up a robbery, it would reduce the conviction to theft, thereby obviating any Double Jeopardy problems. *Ham Tong* does not support the remedy respondent seeks.

Higgins v. Superior Court In and For Los Angeles County (1960) 185 Cal. App. 2d 37, 42 is also not on point. (RBOM 50.) In *Higgins*, the defendant was charged with robbery. Without objection, the trial court instructed on assault by means likely to produce great bodily injury, apparently believing it to be a lesser included offense. The defendant was convicted of that charge and was ultimately granted a new trial on it. The Court of Appeal held, correctly given current case law, but for reasons that do not seem clear, that the defendant could be retried on that offense without offending Double Jeopardy. (*Id.* at pp. 38-39.)

At least in its result, *Higgins* is unremarkable in that it seems to foreshadow *Toro*. If a defendant, believing an offense to be an included

offense, does not object to instructions on what is actually a lesser related offense, he may not complain when he is convicted of that crime. As with any conviction, the defendant may have it overturned for trial error and get a new trial without offending Double Jeopardy. That is not this case.

Respondent cites *Higgins* for the same waiver point that *Colford* was cited: a defendant's failure to object to a defective verdict waives Double Jeopardy protections. (RBOM 50.) The defect in the two cases was different. In *Higgins*, the waiver was along the lines of that in *Toro*: not objecting to instructions on the charge on which the defendant was ultimately convicted. Again, that is not this case. Also again, appellant's general view that a defendant must object in some unspecified way at the conclusion of his case to preserve Double Jeopardy protections is contradicted by *Marks* and *Fields*.

Respondent cites *People v. Garcia* (1984)36 Cal. 3d 539, 558 fn. 13 and *People v. Shirley* (1982) 31 Cal. 3d 18, 71. (RBOM 50-51.) Both citations suffer from the same flaw. Respondent suggests that the cases stand for the proposition that "trial error does not trigger application of the rule against double jeopardy." (RBOM 50.) This abstract proposition does not derive from either case or apply to appellant's case.

As respondent notes, in *Garcia*, this Court ordered retrial of a special circumstance for instructional error, noting in passing that the proof that the prosecution had introduced at trial on the issue "may be

insufficient." (*People v. Garcia, supra*, 36 Cal. 3d at p. 558, fn. 13.) This Court did not, however, hold that the proof *was* insufficient, which clearly would have barred retrial. In the same vein, this Court held in *Shirley* that the admission of the only evidence on an issue was contrary to law. Rather than reverse on substantial evidence grounds, it ordered a retrial. (*People v. Shirley, supra*, 31 Cal. 3d at p. 71.)

Nothing relevant to appellant's case happened in *Garcia* or *Shirley*. This Court granted new trials on issues as a remedy for trial court error. Neither case supports respondent's position that the unjustified discharge of the jury without reaching a verdict on a charge is just another species of trial error. This view is contradicted by the U.S. Supreme Court's decisions in *Downum* and *Martinez*.

Respondent focuses on the fact that the jury was instructed not to render a verdict on arson to property of another if it convicted appellant of arson to an inhabited structure. (RBOM 50.) This is essentially an argument that Double Jeopardy is not offended because, practically speaking, appellant was not at "risk of conviction." *Martinez* explicitly rejected such an argument.

> "The Illinois Supreme Court's error was consequential, for it introduced confusion into what we have consistently treated as a bright-line rule: A jury trial begins, and jeopardy attaches, when the jury is sworn. We have never suggested the exception perceived by the Illinois Supreme Court—that jeopardy may not

> have attached where, under the circumstances of a particular case, the defendant was not genuinely at risk of conviction. Martinez was subjected to jeopardy because the jury in his case was sworn." (*Martinez v. Illinois*, *supra*, 134 S.Ct. at p. 2075.)

The Court then rejected Illinois's related argument that because the defendant was never meaningfully at risk of conviction, the disposition of the case was of no consequence for Double Jeopardy purposes. (*Id.* at pp. 2076-2077.)

Here, too, respondent inappropriately attempts to absolve the prosecutor of any responsibility for what occurred. Respondent suggests that the "true nature" of the charge of arson of property was "overlooked." (RBOM 50.) Respondent is much more forgiving here than in cases where defense counsel has overlooked something. Such oversights are usually condemned as waiver, forfeiture and even invited error. Respondent distinguishes this case from *Downum* and *Martinez*, noting that this was not a case where the prosecutor proceeded without having her witnesses and evidence ready. (RBOM 51.) That is true. The prosecutor's sin here was different; it was not knowing or, perhaps, not caring to know, the applicable law and the maximum value of the prosecution's case.

Double Jeopardy jurisprudence is not forgiving of prosecutorial sloppiness. In *Martinez*, the Court stated,

> "On the day of trial, the court was acutely aware of the significance of swearing a jury. It

> repeatedly delayed that act to give the State additional time to find its witnesses. It had previously granted the State a number of continuances for the same purpose. See *supra* at ___, 188 L. Ed. 2d, at 1114. And, critically, the court told the State on the day of trial that it could 'move to dismiss [its] case' before the jury was sworn. Tr. 3. Had the State accepted that invitation, the Double Jeopardy Clause would not have barred it from recharging Martinez. Instead, the State participated in the selection of jurors and did not ask for dismissal before the jury was sworn. When the State declined to dismiss its case, it '"took a chance[,] . . . enter[ing] upon the trial of the case without sufficient evidence to convict."' *Downum v. United States*, 372 U.S. 734, 737, 83 S. Ct. 1033, 10 L. Ed. 2d 100 (1963). Here, the State knew, or should have known, that an acquittal forever bars the retrial of the defendant when it occurs after jeopardy has attached." (*Martinez v. Illinois*, *supra*, 134 S.Ct. at pp. 2076-2077.)

This Court in *Fields* puts the burden of ensuring desired convictions on the prosecution. It was even more emphatic in *Marks*.

> "We perceive no unfairness to the People in our holding. The prosecution is not deprived of its 'one complete opportunity to convict those who have violated [the] laws.' When the verdict is 'deemed of the lesser degree' by operation of law, the prosecution bears at least partial responsibility. The consequences of an irregular verdict are well settled, and nothing precludes the prosecution from calling the deficiency to the court's attention before it discharges the panel. (See § 1161-1164.) Since any failure to do so results from neglect rather than lack of notice and opportunity to be heard, the People's right to due process is accordingly not offended. The United States Supreme Court has repeatedly counseled against subjecting a

> defendant to further proceedings to allow the prosecution the opportunity to ameliorate trial deficiencies, evidentiary or procedural, that could have been otherwise timely corrected." (*People v. Marks*, *supra*, 1 Cal. 4th at p. 77 [citations and footnotes omitted].)

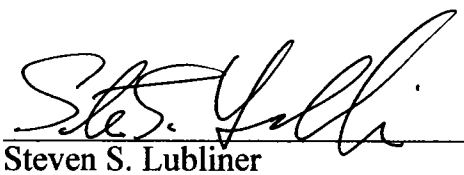
As in *Marks*, if the prosecutor wanted to obtain or preserve the ability to obtain a conviction for arson to property of another in the event of reversal, it was her burden to do so.

While, as respondent notes, Double Jeopardy cases do speak of concern with harassment and oppressive practices, controlling cases such as *Martinez* and *Downum* establish that the rule is really quite mechanical. Where the Double Jeopardy clause 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.) In many cases, a second trial might not look like harassment with a capital H, but for constitutional purposes, it is still harassment, and it is still forbidden. The Court in *Martinez* deemed the Illinois Supreme Court's attempt to find a way around the constitutional bar "understandable, given the significant consequence of the State's mistake, but it runs directly counter to our precedents and to the protection conferred by the Double Jeopardy Clause." (*Martinez v. Illinois*, *supra*, 134 S.Ct. at p. 2077.) The same must be said here.

CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Appeal's judgment reversing appellant's conviction and sentence. It should order this case dismissed and hold that the filing of a new case charging arson to property of another or any other transactionally related offense is barred.

Dated: November 17, 2014



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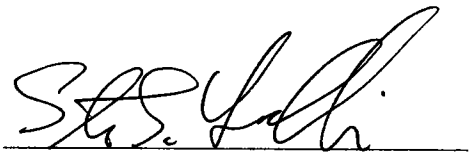
CERTIFICATION

Pursuant to Rule 8.520(c)(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 12,055 words (exclusive of the table of contents, the table of authorities, the proof of service and this certificate).

Dated: November 17, 2014



STEVEN S. LUBLINER
Attorney for Appellant
Richard James Goolsby

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

ANSWERING BRIEF ON THE MERITS

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

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Riverside, CA 92501

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 November 17, 2014 at 1:00 p.m. to the following entities:

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

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

Executed on November 17, 2014 at Petaluma, California.