In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff & Respondent,* v. **RICHARD GOOLSBY,** *Defendant & Appellant.*	Case No. S216648

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

REPLY BRIEF ON THE MERITS

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
WILLIAM M. WOOD
Supervising Deputy Attorney General
STEVEN T. OETTING
Deputy Solicitor General
FELICITY SENOSKI
Deputy Attorney General
State Bar No. 195181
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2607
Fax: (619) 645-2271
Email: Felicity.Senoski@doj.ca.gov
Attorneys for Respondent

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTRODUCTION

Penal Code section 451, subdivision (b),[1] sets forth one offense, with alternative theories for conviction of the same degree. Specifically, it describes arson of either an inhabited structure or inhabited property. Here, the jury's verdict established the factual basis for appellant's conviction under the statute; the jury found appellant willfully and maliciously caused the motorhome in which he and his girlfriend lived, and in which she was then sleeping, to burn. Further, at trial, appellant conceded the motorhome was property. Ultimately, the Court of Appeal made the determination that the motorhome at issue in this case was property as a matter of law. An affirmance of the judgment does not require any modification of the verdict as appellant argues. The jury's factual findings in support of its verdict, appellant's concession, and the Court of Appeal's legal conclusion establish appellant is guilty of violating section 451, subdivision (b).

Under these circumstances, the fact that the district attorney filed a first amended information that omitted the "inhabited property" alternative and focused on the theory that appellant caused an inhabited structure to burn is not dispositive of the issue of due process. Appellant always had proper notice of the offense and all theories of criminal liability stated in section 451, subdivision (b), from the evidence presented at the preliminary hearing. First, the prosecutor's omission could not have affected appellant's defenses at trial because appellant was always on notice he could be held criminally liable under alternative theories of section 451, subdivision (b), and his defense at trial would have been the same had the omission not occurred. It is clear that the case was never about whether appellant caused the motorhome to burn, but rather, with what intent he did so. More specifically, at issue at the preliminary hearing, and later in the

[1] Future unlabeled statutory references are to the Penal Code.

trial court was whether appellant intended to kill his girlfriend when he set the motorhome on fire or whether the fire was accidental. The jury did not find an intent to kill existed, but concluded appellant committed arson by willfully and maliciously setting fire to the motorhome. In doing so, it rejected appellant's theory of the case that the burning was accidental and his conduct was merely reckless. Second, appellant's due process claim that he detrimentally relied upon the prosecutor's theory of the offense when he rejected an offer to settle is not supported by the record. He has made no showing he would have accepted the prosecutor's offer. The appellate record is insufficient to allow appellant to make this showing, and even if he could the appropriate remedy would not be to allow appellant to walk free. Instead, fairness would require he be given the prison term he claims he would have accepted.

In sum, the jury's factual findings beyond a reasonable doubt that appellant willfully and maliciously caused the motorhome where he lived with his girlfriend to burn constitute arson. These findings, appellant's concession the motorhome was property, and the Court of Appeal's legal conclusion the motorhome was property, establish appellant's guilt and his conviction under section 451, subdivision (b), should be affirmed.

If this court finds that appellant's conviction under section 451, subdivision (b), is not established by the jury's verdict and the Court of Appeal's opinion, and does not contain alternative theories of conviction of the same degree, it should remand the matter for retrial of the lesser related offense of arson of property, an offense for which appellant consented to be placed in jeopardy in the trial court. The Court of Appeal's decision reversing and dismissing the matter under section 654 as interpreted by this court's decision in *Kellett v. Superior Court* (1966) 63 Cal.2d 822, should be reversed. The Court of Appeal's opinion improperly expands *Kellett* by prohibiting retrial of a count that was before the jury in the original

prosecution. Retrial is necessary where appellant's jeopardy was not terminated because the count was left unresolved when the jury did not return a verdict on it as a result of instructional error. Such error should not provide appellant with a "get out of jail free" card.

ARGUMENT

I. APPELLANT'S CONVICTION FOR VIOLATING SECTION 451, SUBDIVISION (b), SHOULD BE AFFIRMED BECAUSE HE COMMITTED ARSON OF INHABITED PROPERTY AND HE HAD NOTICE OF THAT CHARGE

The jury's verdict, appellant's concession the motorhome was property, and the Court of Appeal's legal conclusion the motorhome was property establish appellant is guilty of violating section 451, subdivision (b). Because section 451, subdivision (b), describes alternative theories of arson of the same degree, it sets forth only one offense. Therefore, an affirmance of appellant's conviction does not constitute a modification of the judgment on a non-included, separate, related offense as appellant argues. Further, appellant received adequate notice of the offense even though the prosecution's theory of liability changed as stated in the first amended information, where it for the first time omitted reference to the motorhome as inhabited property, and focused on the motorhome as an inhabited structure as its theory of liability at trial. Based on the evidence presented at the preliminary hearing, appellant had notice he was subject to criminal liability for either theory of arson articulated in section 451, subdivision (b). More specifically, the prosecution's charging language that omitted "inhabited property" did not have a detrimental affect on appellant's settlement decisions or defense at trial. Nor can it be said affirmance based upon an alternate theory of guilt amounts to an ambush

because appellant's defense would have been no different had the inhabited property language been left in the information.

A. Appellant's Guilt Under Section 451, Subdivision (b), of Arson of Inhabited Property Is Established

This court has explained, "[t]he proscribed acts within the statutory definition of arson are to: (1) set fire to; (2) burn; or (3) cause to be burned, any structure, forest land, or property. (§ 451.)" (*People v. Atkins* (2001) 25 Cal.4th 76, 86.) The various subdivisions of section 451 describe different ways of committing the crime of arson.[2] "Consistent with the

---

[2] Section 451 states as follows:

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, counsels, or procures the burning of, any structure, forest land, or property.

(a) Arson that causes great bodily injury is a felony punishable by imprisonment in the state prison for five, seven, or nine years.

(b) Arson that causes an inhabited structure or inhabited property to burn is a felony punishable by imprisonment in the state prison for three, five, or eight years.

(c) Arson of a structure or forest land is a felony punishable by imprisonment in the state prison for two, four, or six years.

(d) Arson of property is a felony punishable by imprisonment in the state prison for 16 months, two, or three years. For purposes of this paragraph, arson of property does not include one burning or causing to be burned his or her own personal property unless there is an intent to defraud or there is injury to another person or another person's structure, forest land, or property.

(e) In the case of any person convicted of violating this section while confined in a state prison, prison road camp, prison forestry camp, or other prison camp or prison farm, or while confined in a county jail while serving a term of

(continued...)

purpose of the Determinate Sentencing Law, which is that punishment be 'fixed by statute in proportion to the seriousness of the offense' (Pen. Code, § 1170), section 451 fixes the terms of imprisonment for various degrees of arson according to the injury or potential injury to human life involved[.]" (*People v. Green* (1983) 146 Cal.App.3d 369, 378.)

Relevant here, subdivision (b) of section 451 governs the malicious burning of "an inhabited structure or inhabited property" and fixes the term of imprisonment for this particular degree of arson at three, five, or eight years. As discussed in respondent's opening brief on the merits, appellant was originally charged in the language of this subdivision. Upon filing the first amended information, the prosecutor omitted the reference to "inhabited property." (1 CT 70.) The disputed facts at trial were whether the motorhome was a structure and whether it was burned with the requisite intent for arson. (2 RT 341-345, 353-354, 359-360.)

At trial, appellant's counsel argued that a motorhome is not a structure. He maintained that a motorhome is a vehicle or property. Counsel set forth the defense theory that the burning of the motorhome was a reckless act caused by the "radiant heat" of the burning of the inoperable motorhome. Counsel claimed that because appellant owned the inoperable motorhome, it was not a crime to burn it.[3] However, counsel conceded that

---

(...continued)

> imprisonment for a felony or misdemeanor conviction, any sentence imposed shall be consecutive to the sentence for which the person was then confined.

[3] Counsel's statement appellant's conduct of setting fire to the motorhome was lawful is not entirely accurate. (E.g., Pen. Code, §§ 451, subd. (d), 452, subd. (d).) The jury was instructed that a person does not commit arson or does not unlawfully cause a fire "if the only thing burned is his or her own personal property, *unless* [...] *the fire also injures someone else or someone else's structure or property.* [Italics added.]"

(continued...)

appellant's girlfriend's property was burned. Counsel told the jury to "[c]onvict him of what he did. [Appellant] recklessly burned the property of another person by burning his own *property* which the jury instruction tells you he can do. [Italics added.]" (2 RT 354-358, 360-361, 364, 366-367.)

Whether the motorhome was a structure or property, the jury made the predicate factual finding that appellant caused it to burn. The jury ultimately found that the motorhome was a structure and that it was inhabited. It is clear from the jury's verdict that it rejected appellant's claim that he accidentally caused the motorhome where his girlfriend was sleeping to burn. Had the jury accepted this argument, it could have convicted appellant of unlawfully causing a fire to an inhabited structure on which it was instructed. (1 CT 120; see CALCRIM No. 1531.) Although the jury concluded the motorhome appellant caused to burn was a structure, the Court of Appeal deemed the motorhome property as a matter of law because there was no evidence showing it was "fixed in place" and,

---

(...continued)
(1 CT 118-121; see CALCRIM Nos. 1502, 1515, 1531, 1532.) The record established appellant's girlfriend had lived in the motorhome that caught fire for eleven months and kept all of her belongings there. (1 RT 41-42, 44-45; see 1 CT 30, 34, 36, 53-54 [preliminary hearing].) As noted, counsel conceded appellant's girlfriend's property was burned. (2 RT 355.) Additionally, the prosecutor pointed out in rebuttal that appellant's concession established it was unlawful for him to have burned his motorhome. (2 RT 372.)

Respondent notes that appellant repeatedly refers to a lesser offense he deems "arson to property of another" that solely implicates the burning of his girlfriend's personal property. (See, e.g., ABM 11-12, 21-22, 27-28, 34-37, 49-50.) However in doing so, appellant misconstrues the nature of the lesser offense at issue by stating it too narrowly. As made clear in the trial court, the lesser offense of *arson of property* referred to appellant's act of burning his motorhome, which as a consequence also caused his girlfriend's belongings to burn.

therefore, it could not be a structure "as that term is defined in the arson statutes[.]" (Opn. at pp. 6-7; see Evid. Code, § 310, subd. (a) ["All questions of law (including but not limited to questions concerning ... the construction of statutes ...) are to be decided by the court"]. The Court of Appeal's legal conclusion that the motorhome was property, the basis for its reversal of the conviction, did not negate the jury's factual findings that appellant had willfully and maliciously caused the motorhome to burn.

The Court of Appeal's legal conclusion is consistent with appellant's concession that the motorhome was property. This is significant because appellant's concession establishes an uncontested element of his conviction under section 451, subdivision (b). The disputed fact at trial was whether the motorhome was a structure. Appellant did not contest that it was property. (*People v. Moore* (1997) 59 Cal.App.4th 168, 185-186, fn. 18; *People v. Harris* (1994) 9 Cal.4th 407, 459, fn. omitted (conc. & dis. opn. of Kennard, J.).)

Given the jury's predicate factual finding that the motorhome in which appellant and his girlfriend lived was burned, its finding that appellant willfully and maliciously caused it to burn, appellant's concession the motorhome was property, and the court's legal conclusion the motorhome was property, "every fact necessary" to establish the elements of the offense of arson of inhabited property are present beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 25 L.Ed.2d 368].) The rule in *Winship* expresses society's interest that only the guilty are punished. (*Id.* at p. 372 (Harlan, J., concurring) ["it is far worse to convict an innocent man than to let a guilty man go free"].) Under the circumstances of this case where every fact necessary to support a conviction of arson of inhabited property exist, a reversal of the conviction does not promote the interest that the rule serves. Accordingly, appellant's conviction should be upheld.

B. Arson Under Section 451, Subdivision (b), Sets Forth One Offense With Alternative Theories of the Same Degree, Therefore This Court May Affirm Without Modifying the Judgment

As discussed above, the arson statute under which appellant was prosecuted and convicted sets forth one offense involving alternative statutory theories of arson of the same degree. The statute describes alternative ways to commit the offense by including the burning of either an inhabited structure or inhabited property.

In response to this court's questions, appellant states that even though the evidence at trial showed that he committed arson of inhabited property, the jury's verdict shows only that he committed the related offense of arson of an inhabited structure. Appellant argues that this court cannot modify the judgment to reflect a conviction of an uncharged, non-included or separate related offense because to do so would violate section 1181, subdivision (6). He asserts that it is irrelevant section 451, subdivision (b), sets forth one punishment. (ABM 13-16.) Appellant's argument that this court has no authority to modify the judgment to reflect the related offense of arson of inhabited property is wrong because only one offense is articulated by section 451, subdivision (b), not a set of related offenses. (*People v. Green*, *supra*, 146 Cal.App.3d at p. 378 [degrees of arson fixed according to injury or potential injury to human life involved].) Consequently, an affirmance of the conviction does not require this court to modify the judgment. In short, section 1181, subdivision (6), does not apply.

Nevertheless, appellant summarily dismisses as "irrelevant" the Legislature's intent to apply varying levels of punishment according to the level of culpability involved. (ABM 15.) "It is both the prerogative and the duty of the Legislature to define degrees of culpability and punishment, and to distinguish between crimes in this regard." (*People v. Turnage* (2012)

55 Cal.4th 62, 74.) Not surprisingly, the Legislature punishes more severely those arsons that hold the greatest potential for human injury. (§ 451, subd. (a).) For purposes of arson of an inhabited structure or inhabited property, the essential element that elevates culpability in the statutory scheme is not the thing burned, but whether it is inhabited because of the potential for harm to human life. (§ 451, subd. (b).) The Legislature's intent that the relative risk to human life is commensurate with the severity of the offense is manifest in its designating the burning of an inhabited structure or inhabited property in the same subdivision. Had the Legislature intended separate offense, it could have easily made two offenses simply by separating the alternatives into two different subdivisions. (See, e.g., *People v. Gonzalez* (2014) 60 Cal.4th 533, 540 [determination of separate offenses or different ways of committing same offense turns on Legislature's intent, here legislative intent that section 281a, subdivisions (f) and (i) sets forth two separate offenses].)

The United States Supreme Court's decision in *Schad v. Arizona* (1991) 501 U.S. 624 [111 S.Ct. 2491, 115 L.Ed.2d 555], is instructive. There, the defendant was prosecuted for first degree murder on alternative theories of premeditation and felony murder, and no instruction required the jury to be unanimous on which theory supported the defendant's guilt for first degree murder. (*Id.* at pp. 630-631.) The court reasoned that because the alternative theories were not inherently separate offenses, unanimity was not required. (*Id.* at pp. 643-645 [Opn. of Souter, J. with Rehnquist, C.J. and O'Connor and Kennedy, JJ.], 649 [conc. opn. of Scalia, J.].) A plurality of four justices reasoned: "If ... two mental states are supposed to be equivalent means to satisfy the mens rea element of a single offense, they must reasonably reflect notions of equivalent blameworthiness or culpability, whereas a difference in their perceived degrees of culpability would be a reason to conclude that they identified

different offenses altogether. Petitioner has made out no case for such moral disparity in this instance." (*Id.* at p. 643.) The court noted the same punishment for both means of committing first degree murder supported both means were a way to commit one offense. (*Id.* at p. 644 fn. 9.)

So too here, because arson of an inhabited structure or inhabited property "reasonably reflect[s] notions of equivalent blameworthiness or culpability" and proscribes the same punishment, a single offense exists under section 451, subdivision (b). Thus, a reversal of the Court of Appeal's opinion would not require this court to modify the judgment to reflect a related offense, it would necessitate only an affirmance of the conviction under section 451, subdivision (b). Appellant's claim that an affirmance would violate section 1181, subdivision (6), should be rejected.

C. Appellant Received Proper Notice of the Arson Offense Under Section 451, Subdivision (b); the Omission of "Inhabited Property" From the First Amended Information Did Not Undermine That Notice or Undermine Any Meaningful Defense to That Theory of Arson

As discussed in the opening brief on the merits, the evidence taken at the preliminary hearing clearly set out the offense of arson of an inhabited structure *or* inhabited property under section 451, subdivision (b). (1 CT 24-26, 36-39, 42-43, 50-55.; *People v. Holt* (1997) 15 Cal.4th 619, 672.) The prosecutor's theory of liability at trial that appellant burned an inhabited structure does not render inadequate the notice of the alternative theory that he burned inhabited property. Because the constitutional requirement of notice is established, appellant may be properly convicted of arson under either theory.

On this record, it is clear appellant always had the opportunity to prepare and present a meaningful defense to arson under section 451,

subdivision (b). In this case, appellant's defense would not have been any different had both theories of arson under 451, subdivision (b), been presented. Appellant still would have argued that a motorhome was not a structure but property to avoid the multiple structure burning enhancement and he still would have advanced the argument that he did not maliciously and willfully set the motorhome on fire to avoid a conviction of the charge altogether. Notwithstanding appellant's attempt to dispel the significance and application of these defenses under either charging scenario (ABM 16-17), the fact that appellant's defense would have remained consistent demonstrates that his due process right to an adequate defense was not prejudiced.

At trial, appellant's defense focused on defeating the attempted premeditated murder charge. Additionally, appellant's counsel recognized appellant had some level of culpability for the fire. Appellant's counsel developed a strategic defense to the arson count that centered on appellant's mental state. Appellant's counsel acknowledged before the jury that appellant had engaged in criminal conduct by causing the motorhome to burn but attempted to mitigate the conduct to the least culpable degree. Appellant's counsel argued to the jury that appellant had not willfully and maliciously set the fire to the inoperable motorhome. Counsel told the jury that appellant was "sending [his girlfriend] a message" when he set fire to the inoperable motorhome because he wanted her to get out. The spreading of the fire to the one in which she slept, counsel argued, was accidental. Lastly, he told the jury appellant's conduct under the law was, at most, reckless burning of property. (2 RT 357.)

Thus, counsel's strategy involved proving appellant innocent of attempted premeditated murder, admitting the conduct in setting the motorhome on fire was wrongful to the extent his exposure to the Three Strikes law was shielded, and rebutting the sentence enhancement that

alleged appellant "caused multiple structures to burn." (§ 451.1, subd. (a)(4).) Even if the charging language had not been changed and continued to alternatively charge arson of an inhabited structure or inhabited property, and the jury had been so instructed, the defense arguments would not have been any different.

The United States Supreme Court's recent opinion in *Lopez v. Smith* (2014) ___ U.S. ___ [135 S.Ct. 1], a federal habeas corpus case, is instructive. In the state court, the prosecutor proceeded on the theory that Smith killed his wife as a direct perpetrator. At the close of evidence however, the trial court granted the prosecutor's request for an instruction on aiding and abetting liability and presented to the jury the additional theory that Smith could be found guilty of murder based upon his status as an aider and abettor. The jury convicted Smith of first degree murder without specifying a theory of guilt. (*Id.* at p. 2.) The state court concluded Smith received adequate notice of the possibility of conviction as an aider and abettor. The state court reasoned, "even if this case required greater specificity concerning the basis of defendant's liability, the evidence presented at his preliminary examination provided it." (*Id.* at p. 3.) Even though Smith "was initially adequately apprised of the offense against him," because "the prosecutor focused at trial on one potential theory of liability at the expense of another[,]" on federal habeas the Ninth Circuit Court of Appeals found notice constitutionally inadequate and granted Smith relief. In doing so, the Ninth Circuit relied on its own decision in *Sheppard v. Reese* (1989) 909 F.2d 1234 [where prosecution raised new theory of case at conclusion of trial, court concluded defense denied adequate notice]. (*Smith, supra*, at p. 3.) Assuming without deciding that a defendant is entitled to notice of the possibility of conviction on an aiding and abetting theory, the Supreme Court concluded that the grant of habeas relief could only be affirmed if its "cases clearly establish that a defendant,

once adequately apprised of such a possibility, can nevertheless be deprived of adequate notice by a prosecutorial decision to focus on another theory of liability at trial." (*Id.* at p. 3.) Finding *Sheppard* irrelevant, the Supreme Court held there was no established case law that notice was constitutionally inadequate under such circumstances. (*Id.* at p. 5.) It therefore concluded the Ninth Circuit "had no basis to reject the state court's assessment that [Smith] was adequately apprised of the *possibility* of conviction on an aiding-and-abetting theory." (*Ibid.*, italics added.)

The result is the same in this case. Pleading and proof requirements were satisfied by the evidence taken at the preliminary hearing. The rule is that "a defendant may not be prosecuted for an offense not shown by the evidence at the preliminary hearing or arising out of the transaction upon which the commitment was based." (*People v. Burnett* (1999) 71 Cal.App.4th 151, 165-166,; see Cal. Const., Art. I, § 14 ["Felonies shall be prosecuted as provided by law, either by indictment or, after examination and commitment by a magistrate, by information."].) The prosecutor filed a first amended information that omitted the "inhabited property" language; however, appellant, like Smith, was adequately apprised of the possibility of conviction on this theory because the evidence supporting it was presented at the preliminary hearing. (*Smith*, *supra*, 135 S.Ct. at p. 5.)

Appellant does not appear to dispute that the evidence at the preliminary hearing was sufficient to provide notice rather, he argues in his answering brief that if this court affirms the judgment a due process violation would result because he turned down a pre-trial settlement offer in reliance on the fact the prosecutor omitted "inhabited property" from the first amended information. (ABM 17-19.) However, any claim that he detrimentally relied on the prosecutor's omission in taking the matter to

trial is not supported by the record. Therefore, appellant fails to make a sufficient showing of reliance and prejudice.

As appellant points out in his answering brief on the merits, there was a pre-trial settlement offer made on June 10, 2010. (1 CT 94.) By that time, the first amended information had been filed and appellant was on notice it was a Three Strikes case. (1 CT 70.) Appellant states that the other offers made prior to trial were "extremely early." He appears to argue that those offers cannot be considered and that the only relevant offer was the one made on June 10, 2010. (ABM 18.) Appellant observes the terms of that offer are not part of the record on appeal. (ABM 10.) He points to counsel's statement midtrial at an instructional conference that he decided not to settle the case because of the way the prosecutor charged the arson count in the first amended information. (ABM 18; 1 RT 233 ["[A] lot of our decisions on whether or not we were going to trial were based upon the fact that the district attorney did not use the proper (*sic*) and could not meet the facts or elements of this case."].) However, counsel's bare statement in the heat of argument during the instructional conference is not enough to show a due process violation would result from an affirmance. Having gone to trial is the prejudice appellant now alleges. In order to establish that he was prejudiced by relying on the prosecutor's omission, he would have to show that he would have agreed to the plea offer but for the omission. (Cf., *In re Alvernaz* (1992) 2 Cal.4th 924, 937-938 ["[A] defendant's self-serving statement—after trial, conviction, and sentence—that with competent advice he or she *would* have accepted a proffered plea bargain, is insufficient in and of itself to sustain the defendant's burden of proof as to prejudice, and must be corroborated independently by objective evidence." (Original italics)]; *Lafler v. Cooper* (2012) ___ U.S. ___ [132 S.Ct. 1376, 1385, 182 L.Ed.2d 398] [prejudice resulting from rejection of plea offer requires showing defendant would

have accepted plea, court would have accepted its terms, the conviction or sentence or both under the terms of the offer would have been less severe than the judgment and sentence actually imposed].) Aside from counsel's bare assertion, there is nothing in the appellate record to show the factors appellant considered when he rejected the prosecutor's June 10 offer, only that appellant rejected it like all of the other offers. A determination as to appellant's reliance cannot be made.

To be sure, all the record in this case demonstrates is that appellant was never interested in settling the matter. Appellant consistently rejected *all* settlement offers. He rejected offers where he was charged with attempted murder and alternatively with arson of inhabited structure or inhabited property and the attendant multiple structures enhancement; where he was charged with attempted premeditated murder and alternatively with arson of inhabited structure or inhabited property and the attendant multiple structures enhancement; where he was charged with attempted premeditated murder and arson of inhabited structure and the attendant multiple structures enhancement, and where the prosecutor charged Three Strikes allegations. (1 CT 1-3, 8-11, 21, 94.) Even when appellant faced exposure to life in prison, he chose to reject settlement offers.

Moreover, under any combination of the charges and allegations noted, appellant faced a substantial risk that the jury would find him guilty of the arson offense under section 451, subdivision (b), based on the undisputed facts that he caused the motorhome in which his girlfriend slept to burn. Yet, appellant made a tactical decision that he could beat the charges and a Three Strikes sentence—especially when he refused the final offer, a decision he claimed was based upon the prosecutor's omission. But it was never a foregone conclusion that he would win in the trial court on an acquittal motion or be acquitted by the jury because it concluded a

motorhome was not a structure. The fact that he was "acquitted" by the Court of Appeal of burning an inhabited structure is beside the point. At the time of trial, there was no legal precedent that a motorhome was not a structure. Appellant still had to make that argument to prevail at trial. Thus, in refusing the prosecutor's final settlement offer, appellant gambled that he would be able to persuade the trial court that a motorhome was not a structure, and if unsuccessful, he gambled that ultimately he would be able to persuade the jury.

It cannot be concluded on this record that appellant was denied due process or prejudiced in connection with his decisions that led to his rejection of the prosecutor's offers to settle the matter. From the first instance, appellant received constitutionally adequate notice that he was subject to criminal liability under the different theories of arson articulated in section 451, subdivision (b), by the evidence taken at the preliminary hearing and there is no showing that he detrimentally relied upon the prosecutor's omission of "inhabited property" when he declined the final settlement offer. Appellant cannot meet his burden of showing he was prejudiced by going to trial and has never requested a limited remand in order to make that showing. As this Court has observed, "'[W]hen the validity of a conviction depends solely on an unresolved or improperly resolved factual issue which is distinct from issues submitted to the jury, such an issue can be determined at a separate post-judgment hearing and if at such hearing the issue is resolved in favor of the People, the conviction may stand.' [Citation.]" (*People v. Moore* (2006) 39 Cal.4th 168, 176-177.) Were appellant to satisfy his burden at a post-judgment hearing by showing he rejected the offer based on the manner in which the prosecutor charged the offense, the remedy would not be "to grant a windfall" and dismiss the case. (*Lafler v. Cooper*, *supra*, 132 S.Ct. at p. 1389.) The

correct remedy under those circumstances would be to order the prosecutor to reoffer the June 10 plea agreement. (*Id.* at p. 1391.)

In sum, the jury's verdict, appellant's concession at trial the motorhome was property, and the Court of Appeal's legal conclusion the motorhome was property establish appellant's guilt for the offense in section 451, subdivision (b). Based on the evidence at the preliminary hearing, appellant had adequate notice and a meaningful opportunity to defend against a charge of violating section 451, subdivision (b), even in light of the prosecutor's later decision to omit "inhabited property" from the first amended information and focus on the alternative and equally culpable theory that appellant burned an inhabited structure. As discussed, had the language of the charge not been omitted, his defense would have been no different. Appellant fails to show that his right to due process would be violated by an affirmance. Accordingly, this court should reverse the Court of Appeal's ruling and affirm appellant's arson conviction under section 451, subdivision (b).

II. PENAL CODE SECTION 654 DOES NOT PREVENT RETRIAL OF AN OFFENSE PROPERLY ADDED IN THE ORIGINAL PROSECUTION, BUT WHERE AN INSTRUCTIONAL ERROR RESULTED IN NO VERDICT BEING RETURNED

Alternatively, when a defendant impliedly consents to being placed in jeopardy of a conviction on a uncharged lesser related offense by failing to object to instructions on that offense and urging the jury to so convict as an alternative to the greater offense, and an instructional error occurs that results in no verdict being returned, a retrial of the lesser related offense to resolve the question of guilt is proper because it constitutes a continuation of the original prosecution, rather than a new, successive prosecution barred by section 654. Because the jury here did not make a finding on arson of property as instructed, jeopardy has not terminated as to that offense.

Therefore, a retrial on the offense of arson of property does not implicate, and is not prevented by, state or federal principles of double jeopardy. Contrary to appellant's arguments, retrial to resolve the issue of guilt is proper under such circumstances.

A. This Court's Decision in *Kellett* Construing Section 654 Does Not Apply to Prevent Retrial of Charges Properly Before the Jury in the Original Prosecution

This case does not pose the problem that arises when a defendant is charged with and convicted of an offense, that offense is reversed on appeal, and subsequently the defendant is newly charged with a related offense for the same act. Under such circumstances a new prosecution exists and is barred by section 654 as construed by this court in *Kellett*.[4] The holding in *Kellett* is concerned with new and separate prosecutions of offenses that were never before considered by a jury, but are based on the same act or conduct of an earlier prosecution. (*Kellett, supra*, 63 Cal.2d at p. 827.) Clearly the rule in *Kellett* does not apply to this case because the offense in issue—arson of property—was before the jury. (1 CT 118-119; see CALCRIM No. 1515, Arson.) Appellant ignores the effect of the instruction but ultimately cannot avoid its import. The majority acknowledged that the trial court instructed the jury on the offense of arson of property, but it relied exclusively on the rule in *Kellett* when it reversed.

---

[4] Section 654 states as follows:

> 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.

(Opn. at p. 9.) This was error. More specifically, where, as here, a defendant has agreed to an uncharged lesser offense and, because of an instructional error, the jury does not return a verdict on it, leaving it unresolved, retrial does not result in unreasonable harassment that *Kellett* was designed to protect against. (*Kellett, supra*, 63 Cal.2d at p. 827.) In short, retrial serves to resolve the matter without implicating any of the concerns raised by a new and successive prosecution within the meaning of section 654 as construed by *Kellett*.

B. The Lesser Offense of Arson of Property Was Before the Jury Without Objection by the Defense; Any Claim the Jury Was Improperly Discharged When It Failed to Declare a Verdict as to This Offense Is Forfeited, and the Issue of Appellant's Guilt Should Be Resolved by Retrial

During discussions on the jury instructions, appellant's counsel did not object to the jury's consideration of the lesser related offense of arson of property and by failing to do so, impliedly consented to putting the offense before the jury. (2 RT 285.) A defendant need not explicitly request that a jury instruction be given for an amendment to occur. It is well settled that a defendant is considered to have impliedly consented to an amendment of the charge when he fails to object to the jury instructions or verdict form that gives rise to a nonincluded offense. (*People v. Toro* (1989) 47 Cal.3d 966, 976-977.) This court held in *Toro*, "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 dissent in this case properly concluded that the charge was effectively amended by way of jury instruction and could be "'treated as if the offense had been charged.'" (Dis. Opn. at pp. 2-3, quoting *Orlina v. Superior Court* (1999) 73 Cal.App.4th 258, 263-

264 (*Orlina*).) In *Orlina, supra*, 73 Cal.App.4th 258, the court addressed whether the state may retry a defendant on an uncharged lesser related offense following acquittal of the charged offense and a deadlocked jury on the lesser offense. (*Id.* at p. 260.) The Court of Appeal concluded the defendant's request that the jury be instructed on the lesser related offense effectively amended the information to add a count:

> 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. Such defendants in effect ask the court to treat them as if the pleading had been amended. [...] [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.) Appellant goes to great length to distinguish *Orlina* (ABM 29-31), because there, unlike this case, the jury deadlocked on the charge sought to be retried. Respondent agrees that this distinction exists but neither the dissent nor respondent relies on *Orlina* for the proposition that charges on which the jury has deadlocked may be retried. (See Dis. Opn. at 2-3; BOM 35.) Rather, *Orlina*'s applicability to the current case relates to the amendment of the charge and demonstrates the case falls within the rule of *Toro* because the charge here was effectively amended based on the instruction.

Consent to conviction of a lesser related offense has been found not only when a defendant requests an instruction on the lesser offense, or when he impliedly consents to such instruction by failing to object as in the *Toro* line of cases, but also when he urges conviction on the lesser. (*People v. Ramirez* (1987) 189 Cal.App.3d 603, 623 (*Ramirez*), disapproved on another point in *People v. Russo* (2001) 25 Cal.4th 1124, 1137.) The record shows that appellant impliedly consented to the charge by urging the jury to convict him of a lesser count. (2 RT 354-356, 358,

368-369.) The argument was reasonable because when the parties litigated the motorhome-is-a-structure issue midtrial, the trial court was not persuaded by appellant's argument that the motorhome was not a structure but instead a vehicle or property. (1 RT 241.) Appellant's theory of the case focused on his mental state and that the motorhome, along with its contents, was mere property. Aside from a complete acquittal, which was unlikely, the arson of property offense and any lesser offenses to it had to be before the jury for the defense to argue he should suffer the least degree of culpability in an attempt to achieve the best possible result. (*People v. Taylor* (1969) 273 Cal.App.2d 477, 485-486.) Nevertheless, appellant asserts that the instructions provided by the trial court made it "harder" for him to avoid a Three Strikes sentence. (ABM 20-22.) That is not so. The hardest hurdle for appellant was always complete acquittal. Had the jury found him guilty of simple arson of property (§ 451, subdivision (d)), a felony, appellant still would have been in a better position to argue the trial court should exercise its discretion to strike one or more prior strikes. (§ 1385.) The lesser offense instructions could not have made it more difficult for appellant; they only could have benefitted him. Indeed, appellant would have been able to successfully defeat the Three Strikes allegations had the jury been persuaded by his arguments that he burned mere property and did so recklessly. He then would have been convicted of a *misdemeanor* (§ 452, subdivision (d)), and therefore would have been outside the reach of the Three Strikes law under which he was ultimately sentenced. (1 CT 97, 262-265; 2 CT 297-298, 311-314.) In the end, the jury chose to convict him of the greatest arson offense, consequently the lesser offenses ultimately did not matter. Whether the claimed hardship existed or not, the fact remains that appellant failed to object to the trial court's proposed instructions and instead lent his tacit agreement to them.

Viewing the instructional conference in this way, it does not follow that the prosecution's charging decision is the reason the trial court misinstructed the jury. (Opn. at p. 10 ["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."].) The Court of Appeal and appellant lay the blame at the prosecutor's feet for not having charged the offense of arson of property.[5] However, the instruction mischaracterizing the offense so that the jury failed to return a verdict on it was not the result of the prosecution's charging decision; it was the result of an error during trial in which appellant had full and fair opportunity to object rather than acquiesce. In short, it is precisely because the prosecutor had *not* charged the offense that appellant *could have* objected. (*People v. Birks* (1998) 19 Cal.4th 108, 136, fn. 19 [an uncharged related offense can only be added to the charge by mutual consent of the parties].) His failure to do so sealed his fate. The effect of the failure to object to instructional error allowed the jury to be discharged without declaring a verdict on the lesser related offense and delayed resolution of the charge, it did not prevent retrial. In the words of the dissent, the charge is still "pending" and appellant can "lawfully be retried for arson of property." (Dis. Opn. at pp. 1, 3.)

Appellant makes an additional claim that places blame on the trial court for denying his motion for acquittal on the arson count "and any lessers that require the burning of a structure," which was based upon his

---

[5] As noted in respondent's opening brief on the merits, arson of property under section 451, subdivision (d), is not a lesser included offense of arson under section 451, subdivision (b), because the limitation of burning one's own property in section 451, subdivision (d), does not exist in section 451, subdivision (b). (BOM 26 fn. 6.)

motorhome-is-not-a-structure argument. (ABM 32-33; 2 RT 326.)[6] He relies on the Court of Appeal's determination that "the motorhome is a vehicle" and property under the arson statutes to show the trial court erred in denying his motion. (Opn. at p. 6-7.) However, the Court of Appeal's legal conclusion does not resolve whether a retrial is proper.

Further, appellant's failure to object to the trial court's instructions and, importantly, to the jury's discharge without rendering a verdict on the arson of property count, amounts to forfeiture of a claim that the discharge was improper. (§ 1164; *People v. Saunders* (1993) 5 Cal.4th 580, 590; *People v. Anzalone* (2013) 56 Cal.4th 545, 550.) Appellant's reliance on the language of section 1180 relating to the granting of a new trial and requiring "a former verdict" to prevent this court from ordering retrial of the arson of property offense misses the point. (ABM 23-24.) Absent any objection below, appellant cannot now claim that the absence of a verdict prevents retrial. He is not entitled to a "'get out of jail free card'" because the jury was discharged without a verdict on the lesser count of arson of property. (Dis. Opn. at p. 1.)

C. The Principles of Double Jeopardy Do Not Prevent Retrial of a Lesser Related Offense Mistakenly Identified as a Lesser Included Offense in the Jury Instructions and for Which the Jury Did Not Return a Verdict as Instructed

Appellant agreed to be placed in jeopardy of the lesser related offense. As noted in the preceding section, his consent to the jury instructions included allowing the jury to be discharged without rendering a verdict on the arson of property offense. The consequence of this instruction is that

---

[6] When appellant made his motion for acquittal, the trial court had already provided its instructions to the jury. (2 RT 315.)

appellant's jeopardy for the offense has not terminated. As such, federal and state double jeopardy protections are not violated by retrial to resolve the question of guilt.

"The Fifth Amendment to the United States Constitution provides that '[n]o person shall ... be subject for the same offense to be twice put in jeopardy of life or limb....' This guarantee is applicable to the states through the Fourteenth Amendment. [Citations.] Similarly, article I, section 15, of the California Constitution provides: 'Persons may not twice be put in jeopardy for the same offense....'" (*People v. Saunders*, *supra*, 5 Cal.4th at pp. 592-593.) The state's constitutional double jeopardy protection is codified in section 1023 which states: "When the defendant is convicted or acquitted or has been once placed in jeopardy upon an accusatory pleading, the conviction, acquittal, or jeopardy is a bar to another prosecution for the offense charged in such accusatory pleading, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that accusatory pleading."

The Double Jeopardy Clause provides a defendant three basic protections: "'[It] protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.' [Citations.]" (*Ohio v. Johnson* (1984) 467 U.S. 493, 497-498 [104 S.Ct. 2536, 81 L.Ed.2d 425].) As the high court has further stated, "the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." (*Richardson v. United States* (1984) 468 U.S. 317, 325 [104 S.Ct. 3081, 82 L.Ed.2d 242].) "However, when a trial produces neither an acquittal nor a conviction, retrial may be permitted if the trial ended 'without finally resolving the merits of the charges against the

accused.'" (*People v. Anderson* (2009) 47 Cal.4th 92, 104, quoting *Arizona v. Washington* (1978) 434 U.S. 497, 505 [98 S.Ct. 824, 54 L.Ed.2d 717].) Federal and California state courts have taken the position that retrial is proper following the discharge of the jury before rendering its verdict based upon legal necessity or a defendant's consent. (*Ibid.*; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 516; *People v. Sullivan* (2013) 217 Cal.App.4th 242, 256.)

In this context, the defendant's consent can be implied from defense counsel's conduct. (*Stanley v. Superior Court* (2012) 206 Cal.App.4th 265, 288.) Appellant's failure to object to the trial court's instructions on the lesser offense that allowed the jury to not return a verdict on the lesser offense of arson of property if it found guilt on the greater offense of arson of an inhabited structure is reasonably construed as implied consent to the process by which the jury was discharged. By logical extension, he agreed to both the jury instructions and their consequence: the jury was discharged without rendering a verdict. However erroneous those instructions were, appellant's consent is still valid. The principle that a defendant is entitled to a fair trial, not a perfect one, even where he has been exposed to substantial penalties, resonates under the circumstances. (See *People v. Marshall* (1990) 50 Cal.3d 907, 945; *People v. Hamilton* (1988) 46 Cal.3d 123, 156; see also *Schneble v. Florida* (1972) 405 U.S. 427, 432 [92 S.Ct. 1056, 31 L.Ed.2d 340]; see, e.g., *United States v. Hasting* (1983) 461 U.S. 499, 508-509 [103 S.Ct. 1974, 76 L.Ed.2d 96] ["[G]iven the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and ... the Constitution does not guarantee such a trial."].) Appellant's trial was not perfect, but he cannot now point to those imperfections in which he acquiesced to escape retrial.

Nor would it be fair to the People for this court to reverse appellant's arson conviction and dismiss the matter on the basis of double jeopardy. Indeed, this court recognized the United States Supreme Court's pragmatic application of double jeopardy protection in *Saunders*: "Courts 'have disparaged "rigid, mechanical" rules in the interpretation of the Double Jeopardy Clause.' [Citation.]' [Citation.] 'The exaltation of form over substance is to be avoided.' [Citation.] The standards for determining when a double jeopardy violation has occurred are not to be applied mechanically. [Citations.]" (*People v. Saunders*, *supra*, 5 Cal.4th at p. 593.) No state or federal constitutional principle of double jeopardy is violated when a defendant is subjected to retrial of a lesser related offense after he has agreed to be placed in jeopardy for that offense and, by reason of instructional error for which appellant did not object, the jury does not return a verdict for the offense so that neither acquittal nor conviction and sentence exist. Conversely, to the extent the prosecutor was silent on the matter of the jury's discharge, her silence does not trigger application of the double jeopardy prohibition.

Nevertheless, appellant argues prosecutorial "sloppiness" requires retrial to be barred by double jeopardy principles. He relies on this court's earlier decision in *People v. Superior Court (Marks)* (1991) 1 Cal.4th 56 (*Marks*), in his effort to avoid the potential outcome of retrial. (ABM 22-23, 40-41, 48-49.) In that case, this court addressed the issue of whether principles of double jeopardy limited the scope of re-prosecution. (*Id.* at p. 62.) Marks was originally tried for capital murder, convicted and the jury imposed a verdict of death. This court reversed based on the trial court's failure to hold a competency hearing. This court also found that jury's failure to specify the degree of murder of which Marks was convicted contravened section 1157, which requires the degree of crime to be specified and where not specified, reduces the offense to the lesser

degree. After Marks' competency was restored, the prosecutor reinstated the charge of first degree murder. Marks invoked the prohibition against double jeopardy. (*Id.* at pp. 62-63.) This court held that section 1157 operated like an implied acquittal of first degree murder and by operation of law his murder conviction was reduced to second degree. The resulting consequence was that the prosecutor was limited to re-prosecuting Marks on a charge of second degree murder. (*Id.* at pp. 74-76.) Under such circumstances, this court "perceive[d] no unfairness to the People [...] [w]hen the verdict is 'deemed of the lesser degree' by operation of law, the prosecution bears at least *partial* responsibility." (*Id.* at p. 77, italics added.)

The issue in *Marks* centered on the proper scope of re-prosecution by operation of law and specifically, an implied acquittal under section 1157. (See *People v. Fields* (1996) 13 Cal.4th 289, 295 [after jury deadlock, retrial of greater offense barred by section 1023 where jury returned verdict on lesser included offense in same proceeding].) This case is different because here the jury *convicted* appellant of the greater offense. The jury's silence on the lesser offense of arson of property that was based upon an instructional error does not constitute an implied acquittal of that offense by operation of law or otherwise. Rather, the count is "unresolved" and still "pending." (Dis. Opn. at p. 3.)

Even if *Marks* applied, re-prosecution under *Marks* is limited, not barred. To the extent the limitation on re-prosecution was deemed appropriate in *Marks*, the same may be said here. Like Marks, appellant cannot be re-prosecuted for greater offense of arson of inhabited property because of the principles of double jeopardy. But a total bar to retrial would result in "unfairness to the People." Granting retrial on the offense of arson of property effectively limits re-prosecution in this case to the lesser offense and comports with the reasoning in *Marks* that "the

prosecution bear[] at least partial responsibility" for not calling the error in the jury's discharge to the trial court's attention. (*Marks*, *supra*, 1 Cal.4th at p. 77.)

Additionally, the cases relied upon by appellant to prevent retrial are distinguishable in another aspect: this not a case where the prosecutor can be faulted for moving forward without sufficient evidence to convict appellant so that retrial is improper. (ABM 37-38; see, e.g., *Downum v. United States* (1963) 372 U.S. 734, 737-738 [83 S.Ct. 1033, 10 L.Ed.2d 100] [retrial improper following first trial where jury discharged at prosecution's request because one of its key witnesses was absent and had not been found and the prosecutor allowed the jury to be sworn and selected under these circumstances, rather than move to dismiss its case before the jury was sworn and jeopardy attached]; *Martinez v. Illinois* (2014) ___ U.S.___ [134 S.Ct. 2070, 188 L.Ed.2d 1112] (per curiam) [Double Jeopardy Clause barred state's appeal of trial court's directed verdicts of not guilty on charges of aggravated battery and mob action, entered after State declined to present evidence against defendant after jury was sworn, since the directed verdicts constituted acquittals].) Here, the prosecution did move forward and proceeded through trial as evidenced by the jury's verdict for the "greater" offense.

Further, appellant agreed he may be convicted of the lesser offense of arson of property. Indeed, he urged the jury to convict him of burning property. (2 RT 354-358, 360-361, 364, 366-367; *People v. Ramirez*, *supra*, 189 Cal.App.3d at p. 623.) He agreed to the jury instructions on the offense of arson of property and their necessary consequence—the way in which the jury was discharged. (*Toro*, *supra,* 47 Cal.3d at pp. 976-977; *Orlina*, *supra*, 73 Cal.App.4th at p. 263-264; *People v. Sullivan*, *supra*, 217 Cal.App.4th at p. 256.) Thus, he "has no constitutional interest in preventing his retrial" for arson, and "there is an important public interest

in finally determining whether he committed that offense." (*Stone v. Superior Court, supra,* 31 Cal.3d at p. 522.) The instructional error that occurred has delayed resolution of the lesser related count. Because appellant's original jeopardy has not terminated, retrial for resolution of the lesser related offense is proper. This court should reverse the holding of the Court of Appeal and find that when a defendant consents to be placed in jeopardy for an uncharged lesser related offense and an instructional error subsequently occurs for which the defendant fails to object that renders the issue of guilt on that offense unresolved, the prosecutor may retry the offense.

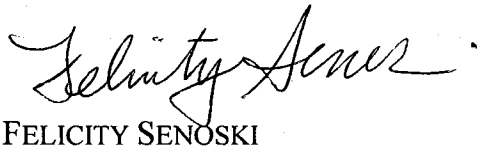
CONCLUSION

For the reasons explained in respondent's opening brief on the merits and herein, respondent respectfully requests that this court affirm appellant's conviction under section 451, subdivision (b), because the jury's verdict, appellant's concession the motorhome was property and the Court of Appeal's opinion establish appellant's guilt. Alternatively, this court should remand the matter for retrial of arson of property, an offense that was properly before the jury by way of appellant's consent, yet left unresolved as a consequence of instructional error.

Dated: December 23, 2014

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
WILLIAM M. WOOD
Supervising Deputy Attorney General
STEVEN T. OETTING
Deputy Solicitor General



FELICITY SENOSKI
Deputy Attorney General
Attorneys for Respondent

FS:swm
SD2014808005
71000550.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF ON THE MERITS uses a 13-point Times New Roman font and contains 9,175 words.

Dated: December 23, 2014

KAMALA D. HARRIS
Attorney General of California

FELICITY SENOSKI
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Goolsby***
No.: **S216648**

I declare:

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

On December 24, 2014, I served the attached **REPLY BRIEF ON THE MERITS**, by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

STEVEN S LUBLINER
ATTORNEY AT LAW
P O BOX 750639
PETALUMA CA 94975-0639

Attorney for Appellant
Richard James Goolsby
(2 Copies)

KEVIN J LANE CLERK
DIV TWO FOURTH APP DIST
CALIFORNIA COURT OF APPEAL
3389 TWELFTH ST
RIVERSIDE CA 92501

CLERK OF THE COURT
FOR HON BRYAN F FOSTER
SAN BERNARDINO CO SUPER COURT
401 N ARROWHEAD AVE
SAN BERNARDINO CA 92415-0063

APPELLATE SERVICES UNIT
OFFICE OF THE DISTRICT ATTORNEY
412 W HOSPITALITY LN 1ST FLR
SAN BERNARDINO CA 92415-0042

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 24, 2014, at San Diego, California.

STEPHEN MCGEE
Declarant

Signature

SD2014808005
71000558.doc