IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ROBIN BAILEY, Defendant and Appellant.	Case No. S187020

After a Decision by the California Court of Appeal,
Sixth Appellate District, Case No. H034382

Monterey County Superior Court No. SS082741
The Honorable Timothy S. Buckley, Judge

APPELLANT'S ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

This case presents the issue of whether a defendant's Sixth Amendment rights to due process and a jury trial would be violated if an appellate court, having determined that his conviction of escape from custody (Pen. Code,[1] § 4530, subd. (b)) was based on insufficient evidence that he actually escaped, were to modify the judgment to find him guilty of attempted escape, where the trial court failed to instruct the jury on attempt.

INTRODUCTION

Appellant, while incarcerated in state prison, exited from his cell by removing the window bars, cut his way through several internal fences within the boundaries of the institution, and was then apprehended in a maintenance yard. (1 RT 87-89, 101, 149, 286-287.) At no time did he go outside of the institution's outermost perimeter fence. (1 RT 100-101.)

[1] All undesignated statutory references are to the Penal Code.

At trial, conflicting evidence was presented regarding appellant's intent to escape, in the sense of leaving the institution's grounds: in particular, appellant testified that he had not been attempting to escape at all, but rather to make his way to another section of the prison in order to confront another inmate against whom he had a grudge. (1 RT 273-274, 281.) The jury was instructed on completed escape, but not on attempted escape. (1 RT 299; 2 RT 325.) Appellant was convicted of escape from custody without force or violence, in violation of section 4530, subdivision (b). (CT 43; 2 RT 360.)

Appellant appealed, and the Court of Appeal, Sixth Appellate District, reversed the conviction on the grounds that it was based on insufficient evidence of a completed escape, since no evidence showed that appellant had ever left the grounds of the institution, and that without such evidence, there was no proof that he had escaped. (Opinion of the Court of Appeal (hereafter "Opn.") at p. 13.) The Court of Appeal declined to modify the judgment to attempted escape, on the basis that the jury had not been instructed on attempt, and therefore had not determined whether or not appellant had the specific intent to complete the escape. (Opn. at 14.) Respondent contends that the Court of Appeal could, and should, have modified appellant's conviction to reflect guilt of attempted escape. Appellant contends that the Court of Appeal's analysis was correct.

STATEMENT OF THE CASE

Early in the morning of June 18, 2008, at about 12:30 A.M., appellant exited from his cell at the California Training Facility at Soledad ("CTF") by removing the window bars, which he had previously cut with a hacksaw. (1 RT 87-88, 286-287.) He cut his way through several internal fences within the institution, winding up in a maintenance yard. (1 RT 89-90, 101, 149.) He was discovered there by a prison guard a little before 8:00 A.M. (1 RT 31-33.) Appellant did not cut or penetrate the outermost fence surrounding CTF. In fact, the path he followed after leaving his cell took him deeper into the interior of the institution from his starting point, away from the outermost fence and not toward it. (1 RT 100-101.)

An information filed on January 12, 2009 charged appellant with a single count of violating section 4530, subdivision (b), described as "the crime of ESCAPE FROM CUSTODY." (CT 20, original emphasis.) The information also alleged five prior felony convictions within the meaning of section 1170.12, subdivision (c)(2). (CT 20-21.)

Jury trial began on April 6, 2009. Pursuant to the prosecutor's explicit agreement, the jury was instructed on the elements of completed escape, but not on the elements of attempted escape. (1 RT 299; 2 RT 325.) On April 8, 2009, the jury found appellant guilty of the single charge. (CT 43; 2 RT 360.)

On May 19, 2009, the court sentenced appellant to a prison term of 25 years to life, consecutive to the sentence he was already serving. (CT 49; 3 RT 607.)

On appeal, appellant argued that he had been convicted of escape on the basis of insufficient evidence, because while the record contained evidence showing that he had made his way to a part of the prison ground where he was not permitted to be, that was different from escaping, and that without evidence showing that he had gone past the outer perimeter fence of the institution, there was no proof that he had escaped. On August 26, 2010, the Court of Appeal filed an opinion reversing appellant's conviction. (Opn. at 13-14.) The Court of Appeal also agreed with appellant that it was unable to modify his conviction to reflect that he was guilty of attempted escape, because of the lack of a jury instruction on attempt, and the fact that the jury, not a judge, must determine every fact necessary for a guilty verdict beyond a reasonable doubt. (*Id.* at 14.)

On September 10, 2010, respondent filed a petition for rehearing. The Court of Appeal filed an order denying rehearing on September 17, 2010. (Order denying rehearing (hereafter "Ord.") at p. 2). The order noted that "there was conflicting evidence whether defendant had specific intent to escape and the prosecution made a deliberate decision to not prosecute defendant for attempted escape." (*Id.* at 1-2.)

Respondent filed a petition for review on October 5, 2010. On December 1, this Court granted review for the limited purpose of determining whether the Court of Appeal correctly determined that, in the absence of a jury instruction on the elements of attempted escape, and in particular on the requisite mental state, it would have violated appellant's Sixth Amendment rights to due process and jury trial by modifying the judgment to reflect guilt of attempted escape.

SUMMARY OF ARGUMENT

Respondent's argument is based on the fundamental premise that attempted escape is a lesser included offense of escape. That is incorrect. The statute at issue here, section 4530, subdivision (b), prohibits *both* escape *and* attempted escape. Therefore, attempted escape is not a lesser included offense of completed escape; rather, it is a different way to violate the same statute. Unlike completed escape, attempted escape is a specific-intent offense: in order to be guilty of attempted escape, the defendant must have the specific intent to complete the escape – that is, to go beyond the outermost perimeter fence of the institution in which he is incarcerated.

The prosecution made a conscious and deliberate choice to proceed on the basis that the statute was violated by a completed escape only. As a result of that choice, the jury was never instructed on the elements of attempt. In particular, it was never instructed that attempted escape included a specific-intent element. This would be an insuperable bar to a reviewing court modifying the judgment to guilty of attempted escape under any circumstances, but it is all the more so where, as here, the record contains conflicting evidence regarding appellant's intent.

The Court of Appeal did not have the authority to decide that the evidence proved beyond a reasonable doubt that appellant had the requisite specific intent for to support a judgment of guilt of attempted escape; that was a factual finding which needed to be made by the jury, and was not.

While the prosecution's decision to proceed solely on the basis of completed escape, which led directly to the lack of such a finding by the jury, may have been a bad one, it is not the function of the appellate courts to retroactively amend the prosecution's bad decisions. Because the Court of Appeal recognized this point and declined to do so, this Court should affirm its judgment.

If this Court does not do so, then this matter must be remanded to the Court of Appeal for consideration of an issue which was raised in the briefing but which the court did not reach.

ARGUMENT

I. THE LACK OF AN ATTEMPT INSTRUCTION DIVESTED THE COURT OF APPEAL OF THE POWER TO MODIFY THE JUDGMENT TO ATTEMPTED ESCAPE.

A. Attempted escape is not a lesser included offense of completed escape; rather, it is an alternative way of violating the same statute.

Respondent argues that attempted escape is lesser included offense of completed escape, citing numerous cases for the proposition that "a conviction of attempt to commit the substantive crime is deemed a lesser included offense of the charged substantive offense." (OBM 17.) However, none of these authorities address the unusual situation presented by section 4530, subdivision (b): it is a statute which explicitly prohibits both the completed escape and attempted escape, providing the same punishment for both of them. By defining the offense as "commits an escape or at-

tempts an escape," it subsumes the attempt within the substantive offense itself. Because of this definition, there can be no such thing as an "attempted 4530": "the argument, in opening the possibility that there is such a crime as an attempt to attempt to escape, leads onto a logical merry-go-round." (*People v. Gallegos* (1974) 39 Cal.App.3d 512, 516.) Escape and attempted escape are two different ways of violating the same statute.

It is a well-settled rule of statutory construction that a "special statute" is considered to be an exception to a more general rule of law. (*In re Williamson* (1954) 43 Cal.2d 651, 654.) The use of the term "attempt" must be taken as a deliberate legislative decision to put attempted escape on the same footing as completed escape. Thus, even if, as respondent argues, there is a general rule of law that an attempted crime is a lesser included offense of the corresponding completed offense, section 4530 is a "special statute" specifically addressing escape and attempted escape from prison, and is therefore an exception to that general rule.

While unusual, this type of statute is hardly unique. Numerous statutes prohibit multiple courses of conduct. One example is section 245, subdivision (a), which prohibits two different things: assault "with a deadly weapon or instrument other than a firearm," and assault "by any means of force likely to produce great bodily injury." These, again, are two different ways to violate the same statute. Although it is certainly possible to commit an assault which both employs a deadly weapon and is also likely to

produce great bodily injury, neither method of violating the statute is a lesser included offense of the other. As with section 4530, subdivision (b), the notion that either course of proscribed conduct is "lesser" than the other is belied by the point that both are punished by the same prison sentence and/or fine. (§ 245, subd. (a)(1).)

In *In re Brandon T.* (2011) 191 Cal.App.4th 1491, the juvenile defendant was convicted of assault with a deadly weapon in violation of section 245, subdivision (a)(1). (*Id.* at 1494.) The charges were based on his attack on a fellow high-school student, with what was described on the record as a "butter knife." (*Id.* at 1495.) The parties agreed that the butter knife was not an inherently deadly or dangerous weapon. (*Id.* at 1496.) The Court of Appeal reversed on the basis that there was insufficient evidence to show that the defendant had used the knife "in such a manner as to be capable of producing and likely to produce, death or great bodily injury." (*Brandon T., supra,* 191 Cal.App.4th at pp. 1496-1497, internal quotation marks removed, citing *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029.)

What the *Brandon T.* court did *not* do – and what, appellant submits, it lacked the power to do – was to decide that the butter knife was, after all, an inherently deadly or dangerous weapon, and modify the judgment to reflect that the defendant was guilty of violating section 245, subdivision (a) on the basis that he had committed an assault by the use of such a weapon,

even though the evidence failed to show that the assault was carried out in a manner that could produce great bodily injury. The opinion contains no hint that the court even considered doing such a thing, but the point is that the court could not have done so even if it wanted to, because of the lack of any factual finding below that the instrument used by the defendant conformed to the legal definition of "deadly or dangerous weapon."

What respondent is arguing that the Court of Appeal could and should have done here is precisely analogous. Like section 245, subdivision (a)(1), the statute at issue here identifies two different courses of conduct which constitute a violation: "commits an escape" and "attempts an escape." (§ 4530, subd. (b).) As in section 245, subdivision (a)(1), neither course of conduct is a "lesser offense" than the other, since both are punished in precisely the same way. (*Ibid.*) The Court of Appeal in the instant case had no more power than the *Brandon T.* court did to modify the judgment to reflect that the defendant had violated a statute by conduct never considered by the trier of fact, after finding insufficient evidence to support a conviction on the conduct that was.

People v. Curtin (1994) 22 Cal.App.4th 528 bears out this point. There, the defendant was convicted of several crimes, including theft (§ 484), after cashing a forged check at a bank by falsely identifying himself as one of the bank's depositors. (*Id.* at 530.) The jury was instructed on only one legal theory of theft: larceny by trick, which requires that the vic-

tim of the theft intended to transfer possession of the property at issue to the defendant, but not title to it. (*Id.* at 531.) On appeal, Curtin argued that there was no evidence to satisfy this element of the offense, since the bank teller who cashed the forged check, believing Curtin to be a legitimate customer, intended to transfer both possession and title to the money. (*Ibid.*) The evidence *would* have been sufficient to support a conviction for theft on a false-pretenses theory, which requires the fraudulent acquisition of *both* title *and* possession, but the jury was never instructed on this theory. (*Ibid.*) The Court of Appeal reversed the theft conviction, reasoning that "if the elements of theft by trick were not proven, the conviction cannot be affirmed on the ground the evidence showed defendant's guilt of false pretenses, which has additional required substantive elements, as well as a special corroboration requirement, upon which the jury was not instructed." (*Ibid.*)

Like *Curtin*, the instant case involves a statute which defines multiple theories of guilt: as explained above, completed escape and attempted escape are alternative theories of guilt for the offense of escape, subject to precisely the same punishment, just as larceny by trick and larceny by false pretenses are alternative theories of guilt for the offense of theft. As in *Curtin*, the jury here was instructed on only one theory of guilt, completed escape; there was no instruction on attempted escape. Finally, and again just as in *Curtin*, the theory of guilt on which the jury was not instructed has addi-

tional required elements over and above those of the theory on which it was instructed: as noted below, attempted escape requires the specific attempt to complete the escape, but completed escape does not.

The jury was never instructed to make a factual determination as to whether or not appellant had the specific intent to complete the escape.[2] Accordingly, the jury could not have found appellant guilty on the basis that he attempted to escape, because that specific intent is an "additional required substantive element[]" of attempted escape. (*Curtin, supra,* 22 Cal.App.4th at p. 531.) The Court of Appeal, despite its dictum that "the evidence was more than ample to establish an attempt to escape from prison," properly recognized that it was not entitled to make that factual determination on the jury's behalf. (Opn. at 13-15.)

B. The specific intent to complete an escape is a required element of attempted escape.

Escape is a general-intent offense. "[A] 'specific intent to escape' is not a necessary element of the crime proscribed by Penal Code section 4530, subdivision (b)." (*People v. Hayes* (1971) 16 Cal.App.3d 662, 667-668.) The prosecutor at trial expressly agreed that escape "is a general intent crime." (1 RT 267.)

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[2] The bench notes for CALCRIM No. 2760, the instruction on escape, say "If the defendant is charged with attempt, give CALCRIM No. 460, *Attempt Other Than Attempted Murder*." CALCRIM NO. 2760 was given, but CALCRIM No. 460 was not. (2 RT 325.)

In contrast, attempts are always specific-intent offenses, requiring the specific intent to commit the completed crime. (§ 21a; *People v. Snyder* (1940) 15 Cal.2d 706, 708.) The crime of attempt requires a specific attempt even thought the crime attempted does not. (*People v. Ramos* (1982) 30 Cal.3d 553, 583.) This is particularly true of attempted escape: "[i]t is not possible to attempt escape without intending to escape." (*People v. Gallegos* (1974) 39 Cal.App.3d 512, 516.) It is "error not to instruct that the crime of attempt to escape require[s] a specific intent on the part of [the defendant] to escape from the jail, plus a direct, unequivocal act to effect that purpose." (*Id.* at 517.)

Respondent, recognizing that the holding of *Gallegos* is "to the contrary of our position," argues that *Gallegos* is wrongly decided and should be reversed. (OBM at 19-25.) Respondent first argues that section 21a, which provides that "a specific intent to commit the crime" is an element of any attempted crime, does not apply to the "attempts an escape" prong of section 4530, subdivision (b). (OBM at 20-21.) Respondent's sole basis for this contention is the principle that a more specific statute controls over a more general one. But the phrase "attempts an escape" is not more specific than the provisions of section 21a; rather, the phrase uses a term, "attempt," which is defined in section 21a. Respondent's argument is equivalent to a contention that the word "willfully" in section 530.5, subdivision (a) does not mean what "willfully" is defined to mean in section 7,

subdivision (1), because the former statute, which concerns the theft of personal identifying information, is more specific than the latter, which merely defines the term. If this logic were correct, there would be no point in defining terms in the "Preliminary Provisions" section of the Penal Code (§§ 2 through 24) at all, because any statute which referred to one of the definitions would thereby supersede it.

Respondent then argues that the "commits an escape or attempts an escape" formulation of section 4530, subdivision (b) does not describe two different courses of conduct, each of which is proscribed by the statute, but merely signals a "legislative indifference as to whether or not an escape succeeds." (OBM at 21.) Respondent interprets "commits an escape or attempts an escape" as an "affirmative indication . . . that any act beyond mere preparation speaks for itself exactly like a completed escape." (*Ibid.*)

The obvious response to this argument is that the Legislature must be presumed to have had some good reason for choosing to use a common legal term, "attempt," whose well-established meaning is taught in every first-year Criminal Law class, and explicitly set forth in section 21a. Had the Legislature, as respondent suggests, intended to criminalize "any act beyond mere preparation," the Legislature was perfectly capable of saying so. But section 4530, subdivision (b) does not read "Every prisoner who commits any act, beyond mere preparation, which could lead to escape"; it

explicitly says "attempts." The legislative intent behind the use of this well-defined term of art is clear and unambiguous.

Moreover, it is difficult to understand how the Legislature could have intended to criminalize "any act beyond mere preparation which could result in an escape" without also requiring that the act be committed with the specific intent to complete the escape. In particular, it is unclear how an act could rise even so far as "mere preparation," let alone "beyond," in the absence of any intent to do the thing that the act is preparation for. For example, if a prisoner stole a pair of wire cutters from the prison shop, would that be an "act beyond mere preparation" which constituted an attempt to escape? It is impossible to answer that question without an inquiry into what the prisoner intended to do with the wire cutters – use them as a weapon to attack another inmate? Cut through the outer perimeter fence of the institution? But that is the very inquiry which respondent asserts that the Legislature has rejected. Appellant respectfully submits that respondent's position is logically inconsistent.

In summary, respondent has offered this Court no persuasive reason to overturn *People v. Gallegos*, or to suppose that "commits an escape or attempts an escape" does not mean precisely what it says in light of section 21a's well-established definition of "attempt": either actually moves outside the institution's outermost perimeter, or commits a direct but ineffectual act with the specific intent of doing so.

C. The record contains conflicting evidence regarding appellant's intent.

Regardless of the state of the evidence, it is the province of the jury, not an appellate court, to determine whether a defendant has the requisite mental state for criminal liability. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277 [judge may not direct a verdict for the state].) But this is even more true where, as here, the record contains evidence which, if believed by the jury, would have compelled the conclusion that appellant did *not* have the specific intent to complete the escape.

In particular, appellant took the stand in his own defense, and testified that he did not intend to leave the prison premises, but rather to make his way to the part of the prison where one Charles Queen was housed, in order to "assault this individual for revenge." (1 RT 274, 281.) Appellant testified that he intended to return to his cell after carrying out this assault. (1 RT 276.) The Court of Appeal, in its order denying rehearing, specifically noted that "there was conflicting evidence whether defendant had specific intent to escape." (Ord. at 1-2.)

If the jurors had been instructed to determine whether appellant specifically intended to escape (which, as noted below, they would have been if the prosecutor had not chosen to proceed on a completed-escape theory only), they would certainly have been at liberty to discredit this testimony, and to believe instead that appellant indeed intended to escape, and that he

ended up at a point deeper inside the institution than where he started merely because he got lost. (1 RT 100-101.) However, the jurors never made that determination, because they were not instructed that it made any difference whether appellant's intent was to escape or to confront Mr. Queen. The Court of Appeal's refusal to modify appellant's judgment to attempted escape was the direct result of its proper disinclination to make that determination on the jurors' behalf. (Opn. at 14, citing *Sullivan, supra,* 508 U.S. at pp. 277-278 [Fifth and Sixth Amendments require that criminal conviction "rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt"].)

D. The jury's verdict did not support a determination by the Court of Appeal that the jury had made a finding of specific intent to escape.

During her closing argument, the prosecutor said the following:

> Maybe a person who's not a juror, who had not been instructed [in] the law by the judge concerning what the law is would think, well, escape, doesn't he have to get outside that last fence and be home free? No, he doesn't. The judge has told you that under the law he has to – it's not necessary to leave the outer limits of the prison's property . . .

(2 RT 327.) The instruction the prosecutor was referring to, CALCRIM No. 2760, says that "it is not necessary for the prisoner to have left the outer limits of the institution's property," but, as defense counsel offered to explain to the jury, "outer limits" refers to the institution's property line,

not to the perimeter fence, which is frequently located well inside the property boundary. (2 RT 343-344.) The Court of Appeal has explained, and respondent does not contest, that indeed a prisoner does have to "go[] beyond the boundary of the prison facility" in order to complete an escape. (Opn. at 13.)

The prosecutor, who clearly did not grasp this point, was incorrectly informing the jury that appellant had completed an escape from prison – that is, that he had not only intended to escape, but had actually *done* so. In light of this misstatement of law by the prosecutor, it would have been entirely improper for a reviewing court to modify the conviction to attempted escape on the basis that the jury had impliedly decided that appellant intended to escape. Since the jurors were misinformed about what "escape" means in a legal context, they could hardly make a meaningful determination as to whether or not appellant intended to do so.

Shortly after that comment, the prosecutor directly addressed the issue of the degree of intent required for conviction:

> Even if he did not intend to violate the law and even if you believe his story that he did not intend to escape, that he was just going to go meet somebody so he could stab him, he left where he was lawfully confined without permission. He sawed his bars. He escaped. Plain and simple.

(2 RT 328.) This would have been a correct statement of law if it were true that "[leaving] where he was lawfully confined without permission" constituted a completed escape. As noted above, that is *not* true, but the

prosecutor's point in this passage was that completed escape is a general-intent offense: if appellant's conduct rose to completed escape, then as long as he intended to engage in that conduct, it was immaterial whether he intended to escape from prison, attack another inmate, or any other purpose.

However, as a result of this comment, not only were the jurors never instructed by the court that they needed to determine beyond a reasonable doubt that appellant had the specific intent to complete an escape, they were also affirmatively informed by the prosecutor, without contradiction by the court, that the only mental state they needed to determine was appellant's general intent to commit the acts that constituted the charged offense. Under these circumstances, again, it would have been impossible for the Court of Appeal to infer a finding of the requisite mental state for attempted escape from the jury's verdict.

II. THE LACK OF AN INSTRUCTION ON ATTEMPT WAS NOT HARMLESS ERROR.

Respondent argues that the lack of an attempt instruction "implicates the correctness of the instructions," and that "any error in failing to instruct on attempted escape is invited and harmless." (OBM at 16, 25-28.) Appellant respectfully submits that this section of respondent's argument attacks a straw man, in that the court's failure to instruct on attempt was not an error at all, but rather the result of a deliberate and valid exercise of prosecutorial discretion. If there was an error, it was not harmless, because it consisted of the failure to instruct the jury on an element of the defense, where the defendant contested that element and adduced evidence sufficient to support a contrary finding.

A. The lack of an instruction on attempt was not error at all, but rather a deliberate choice by the prosecution.

"[T]he prosecution, not the defense, is the party traditionally responsible for determining the charges." (*People v. Birks* (1998) 19 Cal.4th 108, 128.) "[T]he prosecuting authorities, exercising executive functions, ordinarily have the sole discretion to determine whom to charge with public offenses and what charges to bring." (*Id.* at 134.) "The prosecution's authority in this regard is founded, among other things, on the principle of separation of powers, and generally is not subject to supervision by the judicial branch." (*Ibid.*)

Here, again, the statute which appellant was charged with violating defines two different courses of conduct, attempted escape and completed escape, which constitute a violation. The prosecution had the "sole discretion" to decide which theory or theories of guilt to pursue. In particular, the prosecutor had the option of pursuing an attempt theory, but explicitly chose not to. (See, e.g., CT 20 [information charging "the crime of ESCAPE FROM CUSTODY" with no mention of attempt]; 1 RT 5 [prosecutor: "[a]lthough he didn't make it outside the outer perimeter, I feel legally it qualifies as an escape"]; 1 RT 92 [prosecutor: "I'm trying this case as an escape"]; 1 RT 299 [prosecutor responding affirmatively to "you feel an attempt [instruction] should not be given?"].) This decision may have been due to the prosecutor's firm but ultimately incorrect belief that "when he saws his way out of his cell and gets out of his cell, that's a completed escape" (1 RT 266-267), or it may have been influenced by her unwillingness to put the issue of appellant's intent before the jury in light of his testimony that he had never been trying to escape, but only to confront Mr. Queen. However, the prosecutor's reasons for exercising her discretion the way she did are irrelevant; her actions, not the reasons for them, are what matter. The Court of Appeal recognized that "the prosecution made a deliberate decision to not prosecute defendant for attempted escape." (Ord. at 2.) The clear implication is that the Court of Appeal was properly declining to second-guess the prosecutor's executive-branch decision. The

fact that the decision was ultimately bad for the prosecution's case does not make it any more amenable to "supervision by the judicial branch" than it would have been if it had turned out to be a good idea. (*Birks, supra*, 19 Cal.4th at p. 134.)

The trial court threatened (improperly, under the above-quoted *Birks* rule) to overrule the prosecutor on this point and give an attempt instruction despite her lack of a request for it, if defense counsel insisted on explaining to the jury his interpretation, ultimately ratified by the Court of Appeal, of the phrase "the outer limits of the institution's property" in CALCRIM No. 2760. (2 RT 338-351.) Defense counsel, presumably realizing that there was insufficient evidence before the jury to support a conviction for completed escape, responded to this threat by opting to merely appeal to the jury's common sense rather than explain the ordinary English meaning of the "outer limits" language. (2 RT 351-352.) Defense counsel, that is, was doing his best to turn the prosecutor's decision to proceed on a completed-escape-only theory to his client's advantage, which was surely his privilege. None of those points, however, obliged or even authorized the Court of Appeal to rescue the prosecution from the negative consequences of its valid exercise of discretion by modifying appellant's conviction to match what the prosecutor belatedly realized she should have sought in the first place.

As noted in the previous argument section, attempted escape is an alternate theory of guilt, not a lesser included offense. Therefore, there was no

reason for the trial court to instruct on it unless the prosecution chose to ask it to, which the prosecution did not do. This was not an error, invited or harmless or otherwise; it was, as the Court of Appeal correctly noted, a "deliberate decision" by the prosecution. (Ord. at 2.) Therefore, respondent's speculation that the jury, if instructed on attempt, would have determined that appellant specifically intended to escape (OBM at 27-28) is irrelevant, since it is part of a harmless-error analysis, and there is no error here to analyze.

B. If the failure to instruct on attempt was an error on the court's part, it was not harmless error.

In the alternative, if the court's failure to instruct the jury on attempted escape constituted an error on the court's part, it was not harmless.

A trial court has a duty, grounded in the Sixth and Fourteenth Amendments to the U.S. Constitution, to instruct the jury on all the elements of an offense; its failure to do so undermines the jury's fact-finding process and denies a defendant due process. (*In re Winship* (1970) 397 U.S. 358, 364; *United States v. Mendoza* (9th Cir. 1993) 11 F.3d 126, 128.) When an error affects a defendant's rights under the federal Constitution, reversal is required unless the prosecution can show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California* (1967) 386 U.S. 18, 24.) However, a more rigorous form of *Chapman* analysis applies to jury instructions which omit an element of the offense. In cases "where a defendant did not, and

apparently could not, bring forth facts contesting the omitted element, answering the question whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury trial guarantee." (*Neder v. United States* (1999) 527 U.S. 1, 19.) However, if the reviewing court "cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error – *for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding* – it should not find the error harmless." (*Ibid.*, emphasis supplied.)

As noted above, the specific intent to complete an escape is an element of attempted escape. (*Gallegos, supra*, 39 Cal.App.3d at p, 516.) The instruction which the court failed to give was CALCRIM No. 460. (See bench notes for CALCRIM No. 2760, the instruction on escape.) That instruction includes "[t]he defendant intended to commit [target offense]." Thus, the court's error, if error it was, constituted a failure by the court to instruct on attempt constituted an omission of an element of the offense.

The instant case is squarely on point with the example in the emphasized passage from *Neder* quoted above. Appellant took the stand and testified that his intention in leaving his cell and cutting through several fences was to get to another part of the prison in order to assault an inmate against whom he had a grudge. (1 RT 273-274, 281.) Under the definition of "escape" adopted by the Court of Appeal, and not contested by respon-

dent, that would not have constituted an escape: "proof of escape from prison requires a showing that the prisoner has gone beyond the boundary of the prison facility having custody of that prisoner." (Opn. at 13.) If appellant had confronted another inmate of the facility, as he testified that he intended to do, he would have remained within the boundary of the facility, and thus not escaped. Thus, appellant contested the "specific intent to escape" element of attempted escape, and raised evidence sufficient to support a finding that he had no such intent. Therefore, this Court "should not find the error harmless." (*Neder, supra*, 527 U.S. at p. 19.)

III. IF THIS COURT REVERSES THE COURT OF APPEAL, THE MATTER MUST BE REMANDED FOR CONSIDERATION OF AN UNREACHED ISSUE.

In his briefing in the Court of Appeal, appellant raised the issue that the trial court deprived him of his constitutional right to counsel by threatening to give a sua sponte instruction on attempt if defense counsel insisted on explaining to the jury that the "outer limits" language in CALCRIM No. 2760 refers to the prison institution's property line, not its perimeter fence. Because the Court of Appeal reversed on the basis of the insufficient evidence of completed escape, it did not reach that issue. (Opn. at 14.)

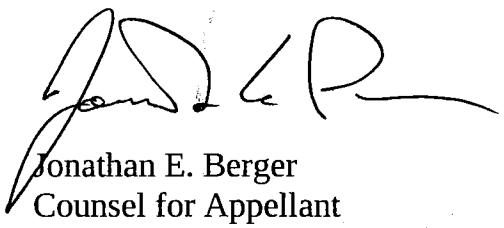
Therefore, if this Court disagrees with the arguments advanced herein and reverses the judgment of the Court of Appeal, this matter must be remanded to that court for consideration of the unreached issue.

CONCLUSION

For the reasons set forth above, this Court should affirm the judgment of the Court of Appeal.

Dated: June 12, 2011
Sebastopol, CA

Respectfully submitted,



Jonathan E. Berger
Counsel for Appellant

CERTIFICATE OF COMPLIANCE
[CRC 8.520(c)(1)]

I, Jonathan E. Berger, declare:

1. I am an attorney duly licensed to practice before the courts of the State of California. I represent the appellant in this appeal.

2. I am the author of the attached Appellant's Answer Brief on the Merits, which I prepared using Microsoft Word.

3. According to Microsoft Word's word-count tool, the length of the text portion of the attached Appellant's Answer Brief on the Merits, excluding the cover sheet and tables but including all footnotes, is 5,951 words.

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

Dated: June 12, 2011 Signature: _____
Sebastopol, CA Jonathan E. Berger

PROOF OF SERVICE BY U.S. MAIL

I, Jonathan E. Berger, declare:

I am over 18 years of age and not a party to this action. I am a citizen of the United States and a resident of Sonoma County, California. My business address is 1415 Fulton Road #205-170, Santa Rosa, California.

On June 13, 2011, I served the attached:

APPELLANT'S ANSWER BRIEF ON THE MERITS

by placing true and correct copies thereof in sealed envelopes, with first class postage fully prepaid thereon, and placing them in a United States Postal Service mailbox. The envelopes were addressed as follows:

Court of Appeal
Sixth Appellate District
333 West Santa Clara St., Suite 1060
San José, CA 95113

Appeals Clerk, Criminal Division
Monterey County Superior Court
240 Church Street, Room 318
Salinas, CA 93902-1819
Attn: Hon. Timothy S. Buckley

Office of the District Attorney
P.O. Box 1131
Salinas, CA 93902

Office of the Attorney General
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D-10636
California State Prison, Solano
P.O. Box 4000
Vacaville, CA 95696-4000

Sixth District Appellate Program
100 N. Winchester Blvd., Suite 310
Santa Clara, CA 95050

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

Dated: June 12, 2011 Signature: _____
Sebastopol, CA Jonathan E. Berger