IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOHN R FONTENOT, Defendant and Appellant.	No. S247044 Court of Appeal No. B271368 (Los Angeles County Superior Court No. NA093411)

OPENING BRIEF ON THE MERITS

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QUESTION PRESENTED

Is attempted kidnapping a lesser included offense of kidnapping? (See *People v. Bailey* (2012) 54 Cal.4th 740, 753; *People v. Martinez* (1999) 20 Cal.4th 225, 241.)

STATEMENT OF THE CASE

The information charged Fontenot with kidnapping (Pen. Code, § 207, subd. (a)). (CT 69.) After a court trial, the court found Fontenot not guilty but found him guilty of the uncharged crime of attempted kidnapping. (CT 74-75.)

On appeal, Fontenot argued that the trial court violated his federal constitutional due process and trial rights by convicting him of an uncharged crime that was not necessarily included the charged crime of kidnapping. (AOB 9.) Specifically, Fontenot argued that *People v. Martinez, supra,* 20 Cal.4th 225 (*Martinez*), which treated attempted kidnapping as a lesser included offense of kidnapping, was no longer controlling authority in light of *People v. Bailey, supra,* 54 Cal.4th 740 (*Bailey*) and *People v. Robinson* (2016) 63 Cal.4th 200 (*Robinson*).

The court of appeal affirmed, holding that it was compelled by *Martinez* to treat attempted kidnapping as a lesser included offense of kidnapping until this court directed otherwise. (Slip opn. at p. 15, citing *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 and disagreeing with *People v. Braslaw* (2015) 233 Cal.App.4th 1239.)

On April 11, 2018, this court granted review.

ARGUMENT

I. Attempted Kidnapping is Not a Lesser Included Offense of Kidnapping Because a Kidnapping Charge Does Not Provide Constitutionally Adequate Notice of the Need to Defend Against a Charge of Attempted Kidnapping.

Attempt to escape is not a lesser included offense of escape. (*Bailey, supra,* 54 Cal.4th at p. 747.) Attempt to possess a controlled substance is not a lesser included offense of possessing a controlled substance. (*People v. Hamernik* (2016) 1 Cal.App.5th 412, 422.) Attempt to rape is not a lesser included offense of rape. (*People v. Braslaw, supra,* 233 Cal.App.4th at p. 1252.) Attempted sexual intercourse with a child, attempted sodomy with a child, and attempted oral copulation of a child are not lesser included offenses of the completed crimes. (*People v. Mendoza* (2015) 240 Cal.App.4th 72, 82-83.) Each of those attempts fails the tests this Court has established for a lesser included offense, and so does attempted kidnapping.

Under California law, a trier of fact can convict a defendant of an uncharged crime–but the crime must be necessarily included in a charged crime. (Pen. Code, § 1159; *Bailey, supra,* 54 Cal.4th at p. 752.) Similarly, a reviewing court may modify a conviction for one crime to a different crime, but only if the different crime is a lesser included offense of the first crime. (Pen. Code, § 1181, subd. (6).) These "lesser included offense" provisos are necessary to protect the defendant's right to notice under the Fifth and Fourteenth Amendments and to trial under the Sixth Amendment.

Here, attempted kidnapping requires proof the defendant *specifically intended* to move the victim a substantial distance against the victim's will by means of force or fear, whereas kidnapping, as a

general intent crime, requires "no specific mental state, only a general criminal intent." (*Bailey, supra,* 54 Cal.4th at p. 749.)

Attempted kidnapping cannot be a lesser included offense of kidnapping because a charge of kidnapping does not provide the defendant with notice that the prosecution will need to prove a specific mental state or an opportunity to try that question before the trier of fact. The necessary mental state may require the prosecution to prove the defendant intended to commit additional acts that never happened. Moreover, once the defendant's specific mental state is an issue, the defendant will have additional defenses that are not available for the general intent crime.

Because the charge of kidnapping does not inform a defendant that these future intentions and defenses will be at issue, neither our State law nor the federal constitution will permit a conviction for attempted kidnapping when only kidnapping has been alleged and tried. For these reasons, attempted kidnapping cannot be a lesser or necessarily included offense of kidnapping.

A. The Federal Constitution Governs Whether Attempted Kidnapping May Be a Lesser Included Offense of Kidnapping.

In relevant part, the federal constitution guarantees that "No State shall ... deprive any person of life, liberty, or property, without due process of law ... ." (U.S. Const., 14th Amend.) The constitution also guarantees "the right to a speedy and public trial ... and to be informed of the nature and cause of the accusation ... ." (U.S. Const., 6th Amend.)

1. Lesser Included Offenses Must Protect the Federal Constitutional Right to Due Process and an Opportunity to Present a Defense.

"It is ancient doctrine of both the common law and of our Constitution that a defendant cannot be held to answer a charge not contained in the indictment brought against him." (*Schmuck v. United States* (1989) 489 U.S. 705, 717.) This stricture is based on due process principles of notice and a defendant's right to present evidence at trial. (*Id.* at p. 718; see U.S. Const., 6th and 14th Amends.) If a prosecutor could ask for a verdict on an offense whose elements were not charged, the defendant's "right to notice would be placed in jeopardy." (*Schmuck v. United States, supra,* at p. 718.) Accordingly, a defendant may not be convicted of an uncharged offense unless the uncharged offense was necessarily included, and "To be necessarily included in the greater offense the lesser must be such that it is impossible to commit the greater without first having committed the lesser." (*Id.* at p. 719.)

In California, by statute the trier of fact may find the defendant guilty of an uncharged offense only if that offense was "necessarily included in that with which he is charged, or of *an attempt to commit the offense.*" (Pen. Code, § 1159, italics added.) "The disjunctive language appears to support the claim a trial court may reduce a defendant's conviction to an uncharged attempt if supported by the evidence." (*Bailey, supra,* 54 Cal.4th at p. 752.) Despite the plain language, however, the statute allows the trier of fact to find the defendant guilty of an uncharged attempt only if the attempt was "necessarily included in the charged crime." (*Bailey, supra,* 54 Cal.4th at p. 752.)

The attempt must be "necessarily included" or the statute would violate federal constitutional due process. (*People v. Lohbauer* (1981) 29

Cal.3d 364, 368-369 (*Lohbauer*).) This court described as "fundamental" the principle that the defendant could not be convicted "of an offense that is neither charged nor necessarily included in the alleged crime." (*Lobhauer, supra,* 29 Cal.3d at p. 368, quoting *People v. West* (1970) 3 Cal.3d 595, 612.) Due process required it. (*Lohbauer, supra,* at p. 368.) The accused had a right to "be advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his defense ... ." (*Ibid.*, quoting *People v. West, supra,* 3 Cal.3d at p. 612.)

Similarly, if a reviewing court believes the evidence was insufficient to support a conviction, the court may modify the verdict to show a conviction for another crime only for another crime that is "a lesser degree thereof, or of a lesser crime included" within the crime. (Pen. Code, § 1181, subd. (6).) "This latter provision is based upon due process considerations: A criminal defendant must be given fair notice of the charges against him in order that he may have a reasonable opportunity properly to prepare a defense and avoid unfair surprise at trial." (*People v. Anderson* (1975) 15 Cal.3d 806, 809.)

3. A Defendant's Constitutional Rights to Notice, to Present a Defense, and to Try Every Element Necessary to the Conviction are Protected by the Statutory Elements Test.

The statutory elements test protects a defendant's constitutional rights to adequate notice of a charge, to defend against that charge, and to try every element of the charge. The test establishes "whether an offense is necessarily included within another." (*Bailey, supra,* 54 Cal.4th at p. 752.) The attempt to commit a crime is not necessarily included in the completed offense unless "the statutory elements of the greater offense include all of the statutory elements of the lesser

offense, such that all legal elements of the lesser offense are also elements of the greater." (*Bailey, supra,* 54 Cal.4th at p. 748.) This test protects a defendant from being convicted of a crime without adequate notice (*Schmuck v. U.S., supra,* 489 U.S. at pp. 717-718), being twice put in jeopardy for the same crime (*Harris v. Oklahoma* (1977) 433 U.S. 682, 682-683 [97 S.Ct. 2912, 2913, 53 L.Ed.2d 1054], and suffering a conviction without a jury determination of all the elements of the crime (*Bailey, supra,* 54 Cal.4th at p. 752).

B. Attempted Kidnapping is Not a Lesser Included Offense of Kidnapping Because it Does Not Satisfy the Statutory Elements Test.

Attempted kidnapping is not a lesser included offense of kidnapping because attempted kidnapping requires an additional element, specific intent, which kidnapping, a general intent crime, does not. (Compare *People v. Fields* (1976) 56 Cal.App.3d 954, 956 [attempted kidnapping requiring specific intent to kidnap] and *People v. Bell* (2009) 179 Cal.App.4th 428, 435, fn. 2 [kidnapping is a general intent crime that does not require proof of specific intent.].)

"Because the act constituting a criminal attempt 'need not be the last proximate or ultimate step toward commission of the substantive crime,' criminal attempt has always required 'a specific intent to commit the crime.'" (*People v. Chance* (2008) 44 Cal.4th 1164, 1170, quoting *People v. Kipp* (1998) 18 Cal.4th 349, 376.) "Section 21a states that '[a]n attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission.'" (*People v. Bailey, supra,* 54 Cal.4th at p. 749; Pen. Code, § 21a.) "When a specific intent is an element of the offense it presents a question of fact which must be proved like any

other fact in the case ... and no presumption of law can ever arise that will decide it." (*People v. Cole* (1985) 165 Cal.App.3d 41, 48.)

Here, the additional specific intent requirement of attempted kidnapping means that the statutory elements of the greater offense, kidnapping, does not include all of the statutory elements of the lesser offense, attempted kidnapping. And without this identify of statutory elements, attempted kidnapping is not a lesser included offense of kidnapping. (*People v. Robinson, supra,* 63 Cal.4th at p. 207; *Bailey, supra,* 54 Cal.4th at p. 748.)

C. Treating Attempted Kidnapping as a Lesser Included Offense of Kidnapping Would Violate the 6th and 14th Amendments Because a Kidnapping Charge Does Not Provide a Defendant with Constitutional Adequate Notice or Opportunity to Present a Defense to Attempted Kidnapping.

Attempted kidnapping is not a lesser included offense of kidnapping because a kidnapping charge does not provide constitutionally adequate notice of the allegations or a constitutionally adequate opportunity to defend against them. (*Schmuck v. U.S., supra,* 489 U.S. at pp. 717-718)

1. The Specific Intent Element of Attempted Kidnapping Puts Additional Factual Questions into Controversy.

The specific intent requirement of attempted kidnapping places into controversy a question that would not be relevant in a prosecution for kidnapping: the question of what the defendant intended when he acted. (See *Bailey, supra,* 54 Cal.4th at p. 749 ["attempt to escape is not a lesser included offense of escape since it requires additional proof that the prisoner actually intended to escape."])

Bailey illustrated the importance of the specific intent requirement. (*Bailey, supra* 54 Cal.4th at pp. 744-745.) A prosecution for escape required only proof of what the inmate did; the crime of attempted escape required additional proof of what the inmate intended. The facts established what the defendant had done: he used a purloined hacksaw to saw through the bars of his cell window, removed a windowpane, cut through a metal window screen, and breached four fences–but what was his state of mind when he did all this? What did he intend to do next? Did he "saw[] through four layers of prison security to attack another inmate, against whom he held a grudge," or did he intend to escape from custody? (*Id.* at p. 745.) A different prisoner may have stolen a pair of wire cutters from the prison shop, but "did he intend to use them as a weapon to attack another inmate, or to cut through the outer perimeter fence of the prison institution" in order to escape custody. (*Id.* at p. 751.)

Likewise with attempted kidnapping. The charge of kidnapping does not provide notice to the defendant that his intentions will be be in issue. Charged with kidnapping, the defendant's intentions are immaterial. The only relevant questions relate to what the defendant did and what their impact was on the victim: did the defendant move the victim a substantial distance and did the victim move because of the application of physical force or out of fear. A kidnapping charge does not place into controversy what the defendant intended to do if other forces had not intervened.

2. A Specific Intent Element Provides the Defendant with Additional Defenses.

Crimes requiring proof of specific intent also provide the defendant with defenses that are not available to general intent crimes.

(*Bailey, supra,* 54 Cal.4th at p. 749.) Escape, a general intent crime, requires only "that the defendant intentionally do the act which constitutes the crime." (*Ibid.*) Accordingly, a defense such as voluntary intoxication would be "generally immaterial" in a prosecution for escape but not in a prosecution for attempted escape. (*Ibid.*) "Intoxication can negate the required mental state of a specific intent crime ... ." (*Braslaw, supra,* 233 Cal.App.4th at p. 1250.) Because the defendant's actual intent is in issue in a specific-intent case, the defense may also argue "a good faith, *unreasonable* mistake-of-fact defense." (*Id.* at p. 1249, italics in original.) By contrast, general intent crimes are "subject to a mistake-of-fact defense *only* if the mistake was objectively reasonable." (*Id.* at p. 1250, italics in original.)

D. People v. Martinez *Should Not Have Modified the Kidnapping Conviction to Attempted Kidnapping because Attempted Kidnapping is Not a Lesser Included Offense of Kidnapping, and Modification was not Authorized by Penal Code Section 1181, Subdivision 6.*

In *Martinez,* this Court modified a kidnapping conviction to attempted kidnapping pursuant to Penal Code section 1181, subdivision 6, impliedly finding that attempted kidnapping was a lesser included offense of kidnapping. (*People v. Martinez, supra,* 20 Cal.4th at p. 241.)

This implied finding cannot be reconciled with this court's more recent decisions in *Robinson* and *Bailey,* which set out the tests for determining whether one offense was a lesser included offense of another. (*People v. Robinson, supra,* 63 Cal.4th 200 and *Bailey, supra,* 54 Cal.4th 740; see *People v. Braslaw, supra,* 233 Cal.App.4th at p. 1252.)

1. Martinez *Did Not Analyze Whether Attempted Kidnapping Met the Statutory Elements or Accusatory Pleading Tests, But Treated Attempted Kidnapping as a Lesser Included Offense of Kidnapping Because a Kidnapping Would Likely Have Resulted But for the Intervention of the Police.*

In *Martinez,* the defendant forced open a bathroom door with a knife in his hand and told his 13 year old daughter to take him to his 15 year old daughter, to whom he had earlier made "sexual overtures." (*People v. Martinez, supra,* 20 Cal.4th at pp. 229-230.) He led the 13 year old daughter out of the home, took her across a 15-foot porch, and "a backyard and parking area, which bordered on a 5-acre vacant lot." (*Id.* at p. 230.) Police then intervened at a point where the defendant had taken the girl "approximately 40 to 50 feet from the back of the residence." (*Ibid.*) This Court found the evidence did not satisfy the asportation standard in place at the time of the kidnapping and reversed the kidnapping conviction. (*Id.* at p. 239.)

This Court, though, modified the kidnapping conviction to attempted kidnapping. (*People v. Martinez, supra,* 20 Cal.4th at p. 241, citing Pen. Code, § 1181, subd. (6).) This Court believed there was sufficient evidence to prove that "but for the prompt response of the police, the movement would have exceeded the asportation distance set by *Brown* and *Green.*" (*People v. Martinez, supra,* 20 Cal.4th at p. 241.)

Martinez, however, did not analyze whether attempted kidnapping met either the statutory elements or accusatory pleadings tests for a lesser included offense. (*People v. Martinez, supra,* 20 Cal.4th at p. 241.)

2. Bailey *Did Not Answer Whether* Martinez *Remained Good Law.*

In *Bailey,* the Attorney General argued that every attempt was a lesser included offense of the completed crime. (*Bailey, supra,* 54 Cal. 4th at pp. 752-753.) The Attorney General cited *Martinez* as one instance where this court treated an attempt as a lesser included offense.[1] (*Id.* at p. 753.)

Without disavowing or overruling any of these earlier authorities, this Court rejected the Attorney General's argument. (*Bailey, supra,* 54 Cal.4th at p. 753.) Hesitating to make any general statement regarding the law of attempt, this Court merely held that the cases cited did not apply to the crime of escape, because attempted escape included "a particularized intent that goes beyond what is required by the completed offense." (*Ibid.)*

3. Martinez's *Implied Holding that Attempted Kidnapping was a Lesser Included Offense of Kidnapping Must be Overruled Because Attempted Kidnapping Requires a Specific Intent that Goes Beyond What is Required by the Completed Crime of Kidnapping.*

Martinez should be overruled insofar as it holds that attempted kidnapping is a lesser included offense of kidnapping because attempted kidnapping has an additional element, and a kidnapping charge does not provide constitutionally adequate notice of that element. (See above at I.B and I.C.)

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[1] The other was *People v. Kelly* (1992) 1 Cal.4th 495. (*Bailey, supra,* 54 Cal.4th at p. 753.) One court of appeal has already refused to follow *Kelly,* finding that *Bailey* controlled the question. (*People v. Braslaw, supra,* 233 Cal.App.4th at p. 1252.)

E. Fontenot's Conviction for Attempted Kidnapping Must be Reversed Because the Trial Court, Sitting as the Trier of Fact, Lacked Jurisdiction to Convict Fontenot of an Uncharged Crime that was Not Necessarily Included in a Charged Offense.

In Fontenot's case, the trial court, sitting as the trier of fact, lacked jurisdiction to convict him of an offense that was neither charged nor necessarily included in the charged offense. (*People v. Hamernik, supra,* 1 Cal.App.5th 412, 427, *People v. Lohbauer, supra,* 29 Cal.3d at p. 368, *People v. West, supra,* 3 Cal.3d at p. 612, *People v. Parks* (2004) 118 Cal.App.4th 1, 5-6.) Convictions for uncharged offenses, not necessarily included in a charged offense, may not be sustained regardless of whether there was sufficient evidence to prove the defendant committed the uncharged offense. (*People v. Lohbauer, supra,* 29 Cal.3d 364, 369.)

Here, the trial court found Fontenot guilty of an uncharged crime, attempted kidnapping, a crime that was not necessarily included in the charged crime of kidnapping. The court lacked jurisdiction to find Fontenot guilty of this crime, and the judgment must be reversed.

F. Retrial is Barred by Penal Code Sections 654 and Kellett v. Superior Court.

An acquittal under any one provision of law "bars a prosecution for the same act or omission under any other."[2] (Pen. Code, § 654, subd. (a).) Section 654 generally requires "all offenses involving the

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[2] In full: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other." (Pen. Code, § 654, subd. (a).)

same act or course of conduct to be prosecuted in a single proceeding." (*People v. Goolsby* (2015) 62 Cal.4th 360, 362, *Kellett v. Superior Court* (1966) 63 Cal.2d 822.) This Court held:

> When, as here, the prosecution is or should be aware of more than one offense in which the same act or course of conduct plays a significant part, all such offenses must be prosecuted in a single proceeding unless joinder is prohibited or severance permitted for good cause. Failure to unite all such offenses will result in a bar to subsequent prosecution of any offense omitted if the initial proceedings culminate in either acquittal or conviction and sentence.

(*Kellett v. Superior Court*, supra, 63 Cal.2d at p. 827.)

Here, an attempt to commit a kidnapping involved the same acts and course of conduct as the charged kidnapping. (See *People v. Hamernik, supra,* 1 Cal.App 5th at pp. 427-428 [attempted possession of controlled substances could not be retried after prosecution for possession of the controlled substances]; see also *People v. Lohbauer, supra,* 29 Cal.3d 364, 373 [misdemeanor entering a non-commercial dwelling without the consent of the owner could not be retried after prosecution for burglary of the non-commercial dwelling].)

The remedy is to dismiss the information. (See *People v. Lohbauer, supra,* 29 Cal.3d at p. 373.)

CONCLUSION

For the foregoing reasons, Fontenot asks that this court to hold that attempted kidnapping is not a lesser-included offense of kidnapping, to reverse his conviction for attempted kidnapping, and to remand to the trial court with directions to dismiss the information.

CERTIFICATION OF COMPLIANCE

I certify that the attached APPELLANT'S OPENING BRIEF ON THE MERITS uses a 13 point Century Schoolbook font and contains 3,510 words (excluding tables, declaration, proof of service, and this certificate), according to the word count of the word processing program. (Cal Rules of Court, rule 8.360(b)(1).)

Dated: Wednesday, August 8, 2018

Respectfully submitted,

Michael Allen - Attorney at Law
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DECLARATION OF SERVICE BY MAIL

Re: *People v. Fontenot* No. S247044

I, the undersigned, declare that I am over 18 years of age and not a party to the within cause; my business address is 12655 W Jefferson Blvd, Fl 4, Los Angeles CA 90066; my electronic service address is allenmichael.law@icloud.com.

On August 8, 2018, I served a true copy of the attached **Opening Brief on the Merits** on each of the following parties:

X BY ELECTRONIC TRANSMISSION - I transmitted a PDF version of this document by electronic mail to the party(s) identified below to the email address indicated:

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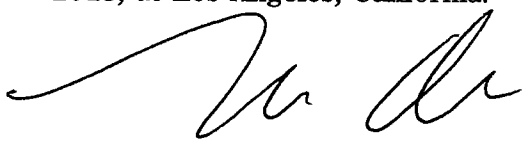
X BY MAIL - Placing a true copy thereof, enclosed in sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

John Fontenot
[Appellant]

Hon. Gary J. Ferrari
Los Angeles Superior Court
275 Magnolia
Long Beach CA 90802

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct. Executed on August 8, 2018, at Los Angeles, California.



Michael Allen