In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **JOHN REYNOLD FONTENOT,** Defendant and Appellant.	Case No. S247044

SUPREME COURT
FILED
OCT 15 2019
Jorge Navarrete Clerk
Deputy

Second Appellate District, Division Seven, Case No. B271368
Los Angeles County Superior Court, Case No. NA093411
The Honorable Gary J. Ferrari, Judge

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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ISSUE 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.)

INTRODUCTION

Attempted kidnapping is not a lesser included offense of kidnapping. *People v. Bailey* (2012) 54 Cal.4th 740, 747, instructs that where an attempt offense contains an element not present in the completed offense, the attempt is not a lesser included offense. Attempted kidnapping requires proof of specific intent to kidnap, an element not present in the completed crime. Accordingly, *Bailey* implicitly overruled the general holding in *People v. Martinez* (1999) 20 Cal.4th 225, that an invalid conviction for simple kidnapping is reducible on appeal to attempted kidnapping under Penal Code section 1181, subdivision 6, as a lesser included offense of kidnapping.

That answer, however, does not resolve this appeal. Appellant's central contention is that his bench trial conviction for attempted kidnapping violated his constitutional due process right to fair notice because he was charged only with the completed offense. *Bailey* did not address the issue of due process notice, and appellant presents no persuasive support for his assertion that such notice is satisfied only when the uncharged offense of conviction is a lesser included offense. To be sure, a defendant convicted of an uncharged lesser included offense cannot complain of lack of notice, because such an offense cannot be committed without necessarily committing the charged offense. But the due process test is broader than that. It is a flexible, pragmatic one that is intended to determine whether lack of notice deprived the defendant of a fair opportunity to prepare a defense without exposure to unfair surprise. This

Court has repeatedly emphasized the preeminent due process principle that a criminal defendant must be informed of the nature and cause of the accusation to provide a reasonable opportunity to prepare and present a defense without surprise by evidence offered at trial. (E.g., *People v. Seaton* (2001) 26 Cal.4th 598, 640-641.) Appellant not only received such notice, implicitly and actually, but forfeited the claim, and consented to, the attempt conviction.

As a matter of logic and common sense, an attempted kidnapping is inherent in the completed offense—a person who commits a kidnapping must have attempted to do so. Penal Code section 1159, which codifies that common-sense understanding, provided appellant with ample notice that the trier of fact "may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, *or of an attempt to commit the offense*." (Italics added.) Thus, having been charged with the completed offense, appellant had reasonable notice that the inchoate version of that offense was potentially in play for purposes of defending himself.

Appellant's due process contention independently fails because the record demonstrates that appellant was neither surprised nor disadvantaged by the absence of a formal charge of attempted kidnapping. Moreover, the same factors that undermine his constitutional notice claim also show forfeiture of that claim. At the close of evidence, appellant argued that the prosecution had proved an attempt, rather than the completed offense, because the prosecution had failed to present evidence of asportation. At no time did appellant contest the evidence of specific intent, despite the trial court's explicit finding of specific intent in support of its verdict. Nor did appellant object on the ground that the failure to charge him with the inchoate offense deprived him of the ability to defend himself on that basis. Appellant has not challenged the trial court's finding of specific intent to

kidnap the four-year-old victim in either this Court or the Court of Appeal, nor has he ever identified any potential defenses that might have raised a doubt about that intent. The Court of Appeal's judgment should be affirmed.

STATEMENT OF THE CASE

The Los Angeles County District Attorney charged appellant with kidnapping a child under age 14 (CT 21, 69; RT 90), along with six recidivist allegations, including prior convictions for burglary, robbery, and firearm assault (CT 21-22, 70-71). Appellant pleaded not guilty (CT 24) and waived jury trial (RT 1-2; CT 33-36, 39).

The evidence adduced at trial showed that between 9:00 or 10:00 p.m. on September 15, 2012, 12- or 13-year-old Destiny L., was babysitting a child named Madeline ("Maddie") in the lobby of a Long Beach apartment building. (RT 11-13, 15, 31, 34.) Maddie and two other girls, each about four years old, were playing with dolls. (RT 17-18, 27, 36, 57-58.) Appellant, who was often seen around the nearby alley, entered the building lobby wearing boxer shorts with pink and white hearts, but no shoes or trousers. (RT 19-20, 29, 36-38, 45, 47-49.)

Appellant approached the three girls, reached for Maddie, whispered "Come here," and grabbed her wrist. (RT 20-22, 40-41, 57.) Maddie dropped her doll and tried to escape. (RT 42-43.) She did not know appellant and was very scared. (RT 57-58.) Destiny stood up and told Maddie to come to her. (RT 22, 59.) Appellant pulled Maddie by the arm toward the doorway. (RT 22.) Destiny ran over and grabbed her other arm, trying to pull her away from him. (RT 23-26, 42-43.) As appellant opened the lobby door, Destiny pushed, hit, and kicked him while the other girls hit him on his sides with their dolls, causing appellant to lose his balance and release his grip on Maddie. (RT 24-27, 43-44.) Destiny pulled her toward Maddie's apartment. (RT 26, 32, 44.) She told the other girls to run. (RT

44.) Destiny picked up Maddie and screamed for Maddie's mother, who opened her door. (RT 44-45.) Appellant left the building. (RT 45.) Someone called the police. (RT 70.)

Around 11:00 p.m., a Long Beach police officer arrived. (RT 63, 68.) He found Maddie wrapped in a blanket, crying and shaking. (RT 64.) Despite the officer's attempts, she would not talk to him. (RT 64, 69.) Destiny, however, described appellant to the police. (RT 47, 49.) A couple of hours later, appellant returned to the crime scene and was detained. (RT 69-71.) Destiny identified appellant to the police as the assailant. (RT 28-29, 50, 66.) Maddie was afraid to come out of her house for weeks afterward. (RT 51.)

Testifying in his own defense, appellant claimed he never entered the apartment lobby that night and never saw, approached, talked to, or touched Maddie. (RT 74-76, 80.) He said he had been walking by the building that morning when some children started screaming, ran from him, and retreated inside. (RT 77-78.) Appellant testified that he was not using drugs that night and not unconscious at any time. (RT 75.)

On rebuttal, an investigating officer testified that appellant admitted entering the lobby earlier that day and seeing some little girls playing, but he denied contacting them. (RT 84-86.) After stating that the children ran from him, appellant denied having been in the lobby at all. (RT 87-89.)

At the close of evidence, defense counsel argued: "The only issue is[:] was this a kidnapping or attempted kidnapping. [¶] What could have happened versus what did happen is what distinguishes this from the actual crime to an attempt." (RT 93.) Invoking the elements of kidnapping, counsel focused entirely on asportation. She argued that Maddie was not moved at all and that appellant's conduct increased neither the danger nor the risk of harm to Maddie. (RT 94.) Absent evidence of asportation, "You have an attempt. And I'll submit it to the court. I think the evidence

is sufficient to show an attempt." (RT 94.) The prosecutor rejoined that appellant did move Maddie, increasing the risk of harm to her. (RT 95-97.)

The court agreed that Maddie was moved toward the door "a very, very short distance," but questioned how that movement could have increased the risk to Maddie. (RT 95, 97.) The court also noted:

> Others managed to extricate her[ ] from the situation. [¶] Isn't that the classic attempt? Aren't we talking about a classic attempt in this situation? [¶] Now, I would agree if he got her outside the door, that's a whole different ball game. But here we're talking an area rather confined and a rather small area.

(RT 98-99.) The court observed that Maddie was moved not very far and without substantially increasing the risk of harm to her or decreasing the likelihood of appellant's detection; the court added that no additional crimes occurred. (RT 100.)

Closing her argument, defense counsel reiterated that Maddie was not moved substantially and that since others were present, the risk to her was actually decreased. She concluded:

> It's an attempt and, like the court said, it's a classic attempt but for the intervening of Destiny and the other two little girls hitting him and him getting kicked, there might have been a completed crime. But the crime wasn't completed. Just that simple.

(RT 101.) The court ruled:

> I feel there was definitely a crime but I don't believe it was a completed kidnapping. I think it was an attempt and, of course, it goes from an attempt, all of a sudden becomes a specific intent crime, which I find was there and I'm going to find the defendant not guilty of the kidnapping but guilty of the attempt kidnapping.

(RT 101.) The defense did not object; it thanked the court instead. (RT 101.)

The next day, defense counsel sent a letter brief to the court and prosecutor. (1SCT 1-3.) Appellant admitted "the evidence did demonstrate an attempt to commit a crime," but noted that attempted kidnapping, a specific intent crime, was not a lesser included offense of kidnapping. (1SCT 1.) Because the prosecutor neither charged nor argued for attempted kidnapping, appellant argued the court lacked jurisdiction to find appellant guilty of that offense, even though "the facts might support such a conviction." (1SCT 2-3.) Appellant urged the court to terminate the proceedings. (1SCT 2-3.)

Construing the letter brief as a motion to dismiss, the court denied it the following day (RT 110), pointing out that in reaching its verdict it had acknowledged that attempted kidnapping required an additional finding, and that its express finding of specific intent "resolves the issue" (RT 108-109).[1]

On appeal, appellant urged that the trial court lacked jurisdiction to convict him of attempted kidnapping because that offense was neither charged in the accusatory pleading nor necessarily included in the crime of kidnapping. The Court of Appeal issued an unpublished opinion affirming the judgment. (*People v. Fontenot* (Jan. 9, 2018, Case No. B271368).) The court expressed doubt about its determination, reasoning "that the analysis in *Bailey* suggests that if an attempt requires a heightened mental state that is not required to prove the completed crime, it does not qualify as a lesser included offense," which was true of attempted kidnapping. (Opn. 14.) But the Court of Appeal considered itself bound by the "express finding" in *People v. Martinez*, *supra*, 20 Cal.4th at page 241, "that attempted kidnapping qualifies as a 'lesser included offense' of kidnapping" for

[1] At the hearing, the prosecutor pointed out that appellant had argued for attempted kidnapping; defense counsel disagreed. (RT 110.)

purposes of modifying a kidnapping conviction to attempted kidnapping based on insufficient evidence of asportation under then-existing law. (Opn. 16.) The Court of Appeal therefore requested of this Court "further guidance with regard to the issues surrounding attempted kidnapping." (Opn. 16, fn. 5.) Appellant petitioned for review, which the Court granted.

ARGUMENT

I. Under *Bailey*'s Reasoning, Attempted Kidnapping Is Not a Lesser Offense Included in Kidnapping; But *Bailey* Did Not Consider the Requirements of Due Process Notice, and Its Holding Does Not Suggest a Due Process Violation in This Case

Appellant's central contention is that he was deprived of his due process right to fair notice because he was found guilty of an uncharged attempt offense that contained a specific intent element absent from the charged, completed offense. (AOB 9, 18.) Although *Bailey* resolves the legal question posed by the Court, it does not support appellant's claim for relief. Not only was the issue of notice immaterial to *Bailey*'s holding, but the error identified in *Bailey* was not present in appellant's trial: conviction for the attempt offense was appropriate where the trial court expressly found the prosecution proved appellant's specific intent to kidnap.

In *People v. Martinez, supra*, 20 Cal.4th 225, this Court considered whether a movement of the victim for 40 or 50 feet constituted asportation substantial enough for the general intent crime of kidnapping, as the jury had found. (*Id.* at p. 229.) The Court expanded the test for asportation from distance alone to one including other factors, such as increased risk of harm, decreased likelihood of detection, and increased level of danger. (*Id.* at p. 237.) Applying the new standard prospectively, the Court in *Martinez* found the evidence of asportation insufficient and, pursuant to Penal Code section 1181, subdivision 6, modified the judgment to a conviction of

attempted kidnapping based on its finding that the attempt was a lesser included offense. (*Id.* at p. 241.)

People v. Bailey, supra, 54 Cal.4th 740, also addressed an appellate court's ability to reduce a conviction for a completed offense to an attempt under Penal Code section 1181. That decision held that it was improper to reduce a conviction of escape from custody, a general intent crime, to attempted escape because the latter was not a lesser included offense; attempted escape requires a finding of specific intent to commit the substantive crime. *Bailey* therefore calls *Martinez*'s holding into question.

To determine whether an offense is lesser and necessarily included in another offense, a court applies either the elements test or the accusatory pleading test. (*People v. Juarez* (2016) 62 Cal.4th 1164, 1174; *People v. Shockley* (2013) 58 Cal.4th 400, 404.) A lesser offense is necessarily included in a greater offense if the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all of the lesser offense's elements such that the greater offense cannot be committed without also committing the lesser. (*People v. Birks* (1998) 19 Cal.4th 108, 117; *People v. Clark* (1990) 51 Cal.3d 583, 636.) "As a general rule, '[t]he phrase "element of the offense" signifies an essential component of the legal definition of the crime, considered in the abstract.'" (*People v. Landry* (2016) 2 Cal.5th 52, 127, citation omitted.)

An attempt to commit a crime requires both specific intent to commit it and a direct but ineffectual act toward its commission. (Pen. Code, § 21a; *People v. Clark* (2011) 52 Cal.4th 856, 948.) It follows that all attempts require specific intent, even if the completed crime does not. (*People v. Ramos* (1982) 30 Cal.3d 553, 583.) Kidnapping is a general intent crime, requiring a taking by force or fear, lack of consent, and asportation. (*People v. Davis* (1995) 10 Cal.4th 463, 519; *People v. Bell* (2009) 179 Cal.App.4th 428, 435; see Pen. Code, § 207, subd. (a); CALCRIM No.

1215.) In contrast, attempted kidnapping is a specific intent crime because it requires an act in furtherance of a kidnapping, along with the additional element of specific intent to commit that offense. (*People v. Cole* (1985) 165 Cal.App.3d 41, 47-48; see Pen. Code, §§ 21a, 664.)

Bailey applied these settled principles to the question whether an appellate court finding insufficient evidence to support a conviction could, under Penal Code section 1181, subdivision 6, reduce a conviction of a general intent crime to an attempt if the inchoate offense requires additional proof of specific intent. In holding that the Court of Appeal "could not statutorily reduce the escape conviction to attempted escape," *Bailey* reasoned that the problem was *not* whether the "defendant received adequate notice of an attempt to escape charge." (*People v. Bailey*, *supra*, 54 Cal.4th at p. 752.) Rather, the impediment was that the factfinder never considered an element of the offense of conviction. Because the case was not tried as an attempt, "the trial court did not instruct on attempt to escape, and the jury was never required to make a finding of specific intent to escape, an element of attempt to escape." (*Ibid.*)

Under such circumstances, where the attempt contained an element absent in the completed offense, the jury "did not impliedly find all the elements of the attempt offense." (*Bailey*, *supra*, at p. 752.) Accordingly, *Bailey* implicitly invalidates *Martinez* to the extent *Martinez* permits an appellate court to reduce the conviction of a general intent crime to an attempt offense that requires additional proof of specific intent, absent a factfinder's determination on that intent element.

But *Bailey* is inapplicable to the ultimate resolution of this matter for three reasons. First, appellant's primary contention is that he was deprived of his constitutional right to notice—a question *Bailey* did not reach. *Bailey* "assume[d] that defendant received adequate notice of an attempt to escape charge," explaining that "concerns about notice are not at issue"

because the pertinent question was whether the jury "necessarily found all of the elements of attempt to escape" in reaching its verdict on the completed offense. (*People v. Bailey*, *supra*, 54 Cal.4th at p. 752.) Second, and more fundamentally, the factfinder in appellant's trial was well aware of the specific intent requirement and made an express finding that the prosecution proved the requisite intent. (RT 101, 109-110.) Third, while Bailey testified as to a defense that could have prevented his attempted escape conviction, appellant can point to nothing to negate his intent to kidnap.

In sum, the principal issue in this case – whether appellant received constitutionally adequate notice that he could be convicted of attempted kidnapping – is not resolvable under the statutory elements test. That test is designed for determining whether one offense is included in another in order to assess whether a verdict on a greater offense impliedly resolved all elements of a lesser offense. The question whether appellant received adequate notice is different and requires a separate analysis.

II. Due Process Requires Reasonable Notice of Criminal Charges to Prepare a Defense; Charging the Completed Offense Generally Provides Reasonable Notice of the Attempted Offense

Appellant's due process claim fails when the proper constitutional standard is identified and applied. Due process generally requires notice of the charges against the defendant. The right to reasonable notice of criminal charges is basic to our system of jurisprudence and is part of due process of law. (*Faretta v. California* (1975) 422 U.S. 806, 818; *In re Oliver* (1948) 333 U.S. 257, 273.) In California, the rule has long been that all accusatory pleadings must give proper notification of the charges to allow the defendant to prepare a defense. (*In re Hess* (1955) 45 Cal.2d 171, 175.) This Court has repeatedly emphasized that the due process inquiry is

a functional and pragmatic one, designed to prevent unfairness and surprise:

> "The 'preeminent' due process principle is that one accused of a crime must be 'informed of the nature and cause of the accusation.' [Citation.] Due process of law requires that an accused be advised of the charges against him so that he has a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial."

(*People v. Seaton*, *supra*, 26 Cal.4th at pp. 640-641, quoting *People v. Jones* (1990) 51 Cal.3d 294, 317; accord, *People v. Robinson* (2016) 63 Cal.4th 200, 207; *People v. Lohbauer* (1981) 29 Cal.3d 361, 368-369; *People v. Anderson* (1975) 15 Cal.3d 806, 809.)

Appellant argues, however, that conviction of an uncharged attempt satisfies due process *only* if the attempt is a lesser included offense. (AOB 10-11.) Neither this Court nor the United States Supreme Court has interpreted the due process standard so narrowly. While a defendant will always have adequate notice of a lesser offense that is included in the charged offense (*People v. Sloan* (2007) 42 Cal.4th 110, 116; *People v. Lohbauer*, *supra*, 29 Cal.3d at pp. 368-369), the notice requirement has always been applied flexibly and pragmatically to ensure that a defendant is not ambushed by unanticipated charges.

In California, Penal Code section 1159 prevents any such ambush by putting defendants on notice of potential liability for the inchoate version of the charged, completed offense. That statute, which has been in effect since 1872, provides that a judge or jury "may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, *or of an attempt to commit the offense*." (Italics added.) The court's jurisdiction to render a guilty verdict as to attempt is deeply rooted and predates the enactment of section 1159. (See *People v. English* (1866) 30 Cal. 214, 217.)

The disjunctive phrasing of Penal Code section 1159 makes it clear that a person charged with a substantive crime is on notice generally that an attempt to commit that crime is also in play, regardless of any additional specific intent requirement. Indeed, if the only attempts that could be considered as included charges were those attempts that are "necessarily included," then the latter language of section 1159 would be surplusage. (*People v. Hudson* (2006) 38 Cal.4th 1002, 1010 ["interpretations that render statutory terms meaningless as surplusage are to be avoided"].)

In *Bailey*, this Court rejected an interpretation of section 1159 that would authorize a conviction for an attempt offense without proof of an element of the attempt beyond a reasonable doubt. (*People v. Bailey*, *supra*, 54 Cal.4th at p. 752.)[2] As explained above, *Bailey* took pains to explain that notice was not at issue. For purposes of notice, however, the disjunctive language unambiguously informs those charged with a completed offense that they may be subject to conviction for the related attempt.

Statutory notice has alleviated due process concerns in other contexts. *People v. Lucas* (1997) 55 Cal.App.4th 721, is instructive. There, in the course of rejecting a due process challenge based on the prosecution's failure to identify the target crimes for the natural and probable consequences theory of liability at trial, the court observed that "since direct perpetrators and accomplices have long been treated by statute as principals equally liable under the law ([Penal Code,] §§ 31-32) and since a statute specifies that allegations of principal status suffice to proceed on accomplice theories ([Penal Code,] § 971), case law has long held due

[2] See *People v. Braslaw* (2015) 233 Cal.App.4th 1239, 1248 (recognizing, though ultimately discounting, that "the 'disjunctive language of section 1159 suggests *both* lesser included offenses and attempts should be treated equally when it comes to the obligation to instruct sua sponte").

process notice satisfied as to defendants prosecuted as aiders and abettors (*People v. Kennedy* (1953) 116 Cal.App.2d 273, 275-276), accessories after the fact (*People v. Nolan* (1904) 144 Cal. 75, 79-80) or conspirators (*People v. Gallego* (1990) 52 Cal.3d 115, 188)." (*People v. Lucas* (1997) 55 Cal.App.4th at p. 737, parallel citations omitted.)

Appellant seeks to rely on decisions suggesting that constitutional notice is satisfied *only* for charged and necessarily included offenses (e.g., *People v. Lohbauer, supra*, 29 Cal.3d at p. 368 ["'When a defendant pleads not guilty, the court lacks jurisdiction to convict him of an offense that is neither charged nor necessarily included in the alleged crime.'" (citation omitted)]). (AOB 10-11.) Yet neither this Court nor the United States Supreme Court has applied that restrictive rule to attempts. For instance, *Lohbauer* arose out of a bench trial in which the court acquitted the defendant of the charged offense of burglary, but convicted him of the uncharged, lesser related offense of entering a noncommercial dwelling without the owner's consent. *Lohbauer* pointed out that Penal Code section 1159 did not provide adequate notice of the uncharged offense because the statute's terms did not extend to lesser related offenses. (*People v. Lohbauer, supra*, 29 Cal.3d at p. 370.) Here, in contrast, appellant's attempt conviction was encompassed by the statute's plain terms.[3]

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[3] Appellant reliance on *Lohbauer* for the proposition that that the trial court "lacked jurisdiction" to convict him of attempted kidnapping because that crime was uncharged is similarly misplaced. (See AOB 18.) As this Court has explained, the term "jurisdiction" has two senses. "In its fundamental sense, 'jurisdiction' refers to a court's power over persons and subject matter." (*People v. Mower* (2002) 28 Cal.4th 457, 474, fn. 6.) It has also been applied in a less fundamental sense to refer "to a court's authority to act with respect to persons and subject matter within its power." (*Ibid.*) It is clear that the lack of jurisdiction referenced in *Lohbauer, supra*, 29 Cal.3d at page 368, concerning a conviction "of an offense that is neither charged nor necessarily included in the alleged
(continued...)

Independent of statutory notice, there is no significant danger of "ambush" when, as here, the uncharged crime is no more than an incomplete or unsuccessful version of the charged crime. In this circumstance, the specific intent element is not extraneous to but inherent in the completed offense. It is added to the attempt offense to ensure that the defendant's acts—which fell short of the completed offense—were intended to accomplish a kidnapping, instead of some other crime or innocent conduct. (See *People v. Bailey*, *supra*, 54 Cal.4th at p. 751.) Stated another way, as a matter of logic and common sense, one cannot commit a kidnapping without also attempting it. It follows that the presence of a specific intent element in an uncharged, inchoate version of the crime absent from the completed offense does not deprive a defendant of reasonable notice and fair opportunity to defend against an attempt.

Moreover, this Court has eschewed imposing such an unyielding, formalistic requirement. A defendant charged with sexual molestation is not denied fair notice when a general, not a specific, period of time is alleged. (*People v. Jones* (1990) 51 Cal.3d 294, 320.) A defendant charged with murder receives proper notice of the charge even if the actual murder theory is not identified in the information, so long as testimony at his preliminary hearing affords notice. (*People v. Diaz* (1992) 3 Cal.4th 495, 557.) An unalleged enhancement for use of a deadly weapon during a sex crime can be imposed on a defendant, provided the allegation of a lesser deadly weapon enhancement is found true. (*People v. Neal* (1984) 159

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crime" did not invoke the term in its fundamental sense because any such error would not undermine the court's personal or subject matter jurisdiction. Rather, *Lohbauer* implicated jurisdiction in the "less fundamental sense" that is typically subject to various bars, including waiver of known constitutional rights and forfeiture. (*Ibid.*)

Cal.App.3d 69, 72-73.) In all these instances, a pragmatic examination found that specific circumstances during the trial provided constitutionally adequate notice, despite formalistic deficiencies in the charging document.

Finally, appellant's reliance on *Schmuck v. United States* (1989) 489 U.S. 705, for the proposition that due process notice is satisfied only when an uncharged offense is necessarily included in a charged offense, is misplaced. (See AOB 10, 12-13.) Like *Lohbauer*, *Schmuck* did not address the question of uncharged attempts. It held that the right of a defendant to obtain lesser included offense instructions under rule 31(c)(1) of the Federal Rules of Criminal Procedure is limited strictly by the elements test. (*Id.* at pp. 715-721; see Fed. Rules Crim. Proc., rule 31(c)(1) [stating defendant may be found guilty of "(1) an offense necessarily included in the offense charged"].) The opinion said nothing about the right to obtain *attempt* instructions under rule 31(c)(2) or (c)(3), which allows defendants to also be convicted of "(2) an attempt to commit the offense charged; or (3) an attempt to commit an offense necessarily included in the offense charged, if the attempt is an offense in its own right." Appellant fails to identify—and respondent has not discovered—any federal authority that a conviction of an uncharged attempt violates a defendant's due process notice rights where, as in this case, the trier of fact determined all elements of the attempt.

III. The Record Shows No Due Process Violation; Appellant Was Neither Surprised Nor Disadvantaged by the Court's Verdict

In addition to statutory notice that satisfied due process, examination of the record in this case demonstrates that appellant received reasonable notice, consistent with due process requirements. Far from being ambushed

by an unanticipated reliance on an uncharged attempt by the prosecution, it was appellant who invited the court to consider the inchoate offense as an alternative. The court accepted the invitation, and, sitting as the trier of fact, made an explicit finding of specific intent when it convicted appellant of attempted kidnapping. (RT 101.) Appellant did not challenge that finding. As the defense well understood, the facts adduced at trial allowed for only two possibilities: either appellant never entered the lobby at all, much less approached Maddie, or else he grabbed her wrist and pulled her toward the exit until Destiny and the other children thwarted the kidnapping. (See RT 93.) In this respect, appellant's conduct closely parallels that in *People v. Martinez, supra*, 20 Cal.4th 225. This Court modified Martinez's conviction from kidnapping to attempted kidnapping because, "but for the prompt response of the police, the movement would have exceeded the [then-]minimum asportation distance." (*Id.* at p. 241.) Similarly, but for Destiny's intervention, appellant would have traveled far enough to complete the kidnapping.

The trial court's ruling vindicated the reliability of the fact-finding process. In a jury trial, the danger of omitting a lesser included offense instruction is conviction of the charged offense, even though the jury is not convinced of guilt beyond a reasonable doubt. (See, e.g., *Keeble v. United States* (1973) 412 U.S. 205, 206 [refusal to instruct on lesser included offense of simple assault].) No such danger arose in this case. The trial court rejected a kidnapping conviction and found appellant guilty of attempted kidnapping. In noting that attempts necessitate sua sponte jury instruction (RT 108), the court meant that as the trier of fact, it could consider the law of attempt as a jury would have, and could conclude that the specific intent element of the kidnapping attempt was proved. Appellant's invitation to consider attempted kidnapping, of course, made it easier for the court to rule.

The purpose of allowing convictions of lesser included offenses was explained in *People v. Barton* (1995) 12 Cal.4th 186:

> Truth may lie neither with the defendant's protestations of innocence nor with the prosecution's assertion that the defendant is guilty of the offense charged, but at a point between these two extremes: the evidence may show that the defendant is guilty of some intermediate offense included within, but lesser than, the crime charged. (*Id.* at p. 196.)

That result justly applies to convictions of lesser related offenses as well. "[J]urors should not be required, when the evidence shows guilt of some crime but not the one charged, to choose between convicting on the charged offense or acquitting the defendant altogether." (*People v. Le* (1995) 39 Cal.App.4th 1518, 1523.)

Here, the trial court expressly found the "particularized intent that goes beyond what is required by the completed offense." (See *People v. Bailey, supra*, 54 Cal.4th at p. 753.) The court ruled: "I don't believe it was a completed kidnapping. I think it was an attempt and, of course, it goes from an attempt, all of a sudden becomes a specific intent crime, which I find was there." (RT 101.) In fact, every indication in the record is that appellant had the specific intent to take Maddie.

Attempted kidnapping was similarly established in *People v. Fields* (1976) 56 Cal.App.3d 954. There, the defendant tried to force a 13-year-old girl into his car, but when she threatened to scream, he abandoned the attempt. (*Id.* at p. 956.) The victim was never physically moved, which barred a kidnapping conviction, but the defendant's conviction of attempted kidnapping was upheld. (*Id.* at pp. 956-957.) The court held that "the specific intent and the affirmative act required to constitute the crime of attempted kidnapping [we]re adequately manifested." (*Id.* at p. 956.)

Appellant's actions in approaching the little girls, reaching for Maddie, telling her to "come here," grabbing her wrist, and pulling her arm

toward the doorway left no reasonable doubt about his specific intent to commit a kidnapping. Under such circumstances, the failure to instruct sua sponte on a lesser included offense would not implicate the federal Constitution and would not be "subject to reversal unless an examination of the entire record establishes a reasonable probability that the error affected the outcome." (See *People v. Breverman* (1998) 19 Cal.4th 142, 165.) The only way the conviction of the uncharged offense would implicate appellant's due process notice rights would be if it deprived appellant of the opportunity to present a defense that might have defeated a finding of specific intent. Appellant, however, cannot make that showing.

Appellant was charged with kidnapping under section 209, subdivision (b). The information alleged that he did "forcibly and by instilling fear, steal, take, hold, detain and arrest Madeline C." (CT 69.) Appellant chose to defend against that charge by testifying that he never saw, approached, talked to, or touched Maddie. (RT 74-76, 80.) Consequently, the mental state required for attempted kidnapping, specific intent to kidnap, was never at issue in this case.

As this Court observed half a century ago, "[s]pecific and general intent have been notoriously difficult terms to define and apply, and a number of text writers recommend that they be abandoned altogether." (*People v. Hood* (1969) 1 Cal.3d 444, 456.) More recently, Justice Mosk wrote that the concepts of specific and general intent have "proved to be mischievous." (*People v. Cain* (1995) 10 Cal.4th 1, 84 (conc. opn.).) Nonetheless, the categories are firmly rooted in California law, and this Court's jurisprudence has distinguished general intent crimes from their attempts, which require specific intent.

But the "classification of offenses [as requiring specific or general intent] is necessary 'only when the court must determine whether a defense of voluntary intoxication or mental disease, defect or disorder is available,

whether evidence thereon is admissible, or whether appropriate jury instructions are thereby required. [Citation].'" (*People v. Rathert* (2000) 24 Cal.4th 200, 205, citing *People v. Hering* (1999) 20 Cal.4th 440, 446-447.) No such determination was invited by the evidence here.

Appellant contends that "the question of what he intended when he acted" is irrelevant in a prosecution for kidnapping. (AOB 13.) If his mental state had been in issue, appellant argues, he would have had additional defenses available. (AOB 9.) As explained more fully *infra*, appellant failed to preserve that claim by choosing not to seek a continuance to obtain such evidence or even to make that argument in the trial court. (See *People v. Seaton*, *supra*, 26 Cal.4th at pp. 640-641.) In any event, even if the defense were viewed entirely in terms of the completed version of kidnapping, appellant's mental state *was* in issue to the extent he could have proffered, for example, a mistake-of-fact defense. (See CALCRIM No. 3406.) That defense could have nullified his *general* intent to commit a kidnapping. Instead, appellant testified that he was not even present at the crime scene. (RT 74-80.)

There simply is no indication in the record that appellant was intoxicated, voluntarily or otherwise. He testified that he was "clean," not "high" or using drugs that night. (RT 75.) There is no indication that he suffered from any sort of mental impairment. He testified that he was not unconscious at any time. (RT 75.) At trial, no sidebar conferences were requested that might have borne on appellant's intent. No additional time to develop a new trial motion was sought.

Those facts call to mind *People v. Le*, *supra*, 39 Cal.App.4th 1518 and *People v. Wright* (2009) 209 Cal.App.3d 386. In each case the defendant, acquitted of robbery, challenged his conviction of an uncharged aggravated assault. In rejecting appellants' claims, the appellate courts cited the defendants' failure to seek additional time at trial, adduce more evidence, or

withdraw their simple assault instructions. (*Le, supra*, at pp. 1522-1533; *Wright, supra*, at pp. 393-394.)

Here, appellant's only affirmative defense was that he never went into the lobby at all—a defense suited equally well to the inchoate and completed offense. There was no suggestion that he had any defenses to specific intent at the time of trial, even at the hearing on his new trial motion. It is beyond cavil that appellant took Maddie forcibly and, on this record, beyond the limits of reason that he lacked the intent to do that. Appellant cannot credibly claim that he would have defended himself any differently if attempted kidnapping been separately charged.

IV. Appellant Forfeited His Notice Claim and Consented to the Verdict

Even if Penal Code section 1159 and the circumstances of this case did not give appellant adequate notice that he could be convicted of an attempt to commit the charged offense, examination of the record independently reveals the absence of a due process violation on the basis of forfeiture. Not only did appellant fail to object on notice grounds prior to entry of the verdict, but he argued in favor of the attempt conviction. Additionally, even after the trial court made the specific intent finding, appellant neither objected nor sought a continuance on the ground of surprise. (See *People v. Seaton, supra,* 26 Cal.4th at pp. 640-641 ["Here, assuming for the sake of argument that defendant's right to receive notice of the charges included the right to pretrial notice of the prosecution's two-beating theory, defendant never objected to the lack of notice at trial, nor did he seek a continuance to prepare sufficiently to respond to the theory. As a result, he has not preserved the right to assert the lack of notice on appeal"].)

It is well established that a defendant must object to being convicted of an uncharged crime or the issue is forfeited. "[A] constitutional right, or

a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to hear it." (*People v. Simon* (2001) 25 Cal.4th 1082, 1103, citations and internal quotation marks omitted.) The principle is illustrated in *People v. Toro* (1989) 47 Cal.3d 966, dictum on another point disapproved in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, footnote 3.

In *Toro*, the defendant was charged with both attempted murder and assault with a deadly weapon with a great bodily injury enhancement. (*People v. Toro*, *supra*, 47 Cal.3d at p. 970.) Without objection, and apparently by the court sua sponte, the jury was instructed on battery with serious bodily injury as well as the charged crimes. (*Id.* at p. 971 & fn. 3.) The jury acquitted Toro of assault with a deadly weapon, but convicted him of the battery as a lesser related offense of attempted murder. (*Ibid.*)

This Court upheld the conviction on review. It concluded that in failing to object to the jury instructions or verdict forms, the defendant impliedly consented to the jury's consideration of the uncharged offense. The Court explained that when an information is amended at trial to charge an additional offense, an objection based on lack of notice cannot be raised on appeal unless the defendant objected at trial or moved for a continuance. (*People v. Toro*, *supra*, 47 Cal.3d at p. 976.) The Court stated, "[t]here 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." (*Ibid.*) For purposes of notice, there is no material difference between the situation in *Toro* and appellant's.

Indeed, *Toro* recognized an exception to the general due process rule that when a defendant pleads not guilty, the court lacks jurisdiction to convict him of an offense that is neither charged nor necessarily included in the alleged crime. (*People v. Toro*, *supra*, 47 Cal.3d at p. 973, citing *In re Hess*, *supra*, 45 Cal.2d at pp. 174-175.) *Toro* qualified that rule to permit

conviction of lesser related offenses when a defendant consents, expressly or impliedly, to the conviction:

> [T]he due process notice requirement precludes conviction for a lesser related offense when the defendant has not consented to its consideration by the trier of fact, but fundamental fairness also requires that the trier of fact be permitted to consider the lesser related offense when the defendant requests it. Thus the law recognizes that instructions on lesser related offenses may be highly beneficial or prejudicial to the defendant, depending on the defendant's trial preparation, the nature of the defense presented, and other matters of trial strategy. Because the defendant, assisted by counsel, is the only person who can assess the impact of lesser related offense instructions in a given case, the decision to permit or preclude consideration of the lesser related offense is a right accorded to the defendant.

(*Toro, supra*, at p. 975; accord, *Orlina v. Superior Court (People)* (1999) 73 Cal.App.4th 258, 263 [where the defense requests jury instruction on lesser offense, "defendant implicitly waives any objection based on lack of notice"].)

Toro explained that its holding was not only consistent with defendants' legitimate due process right, but reflected sound policy. When the evidence shows guilt of some offense, even if not the charge chosen by the prosecutor, a factfinder would be forced to choose between outright acquittal and conviction of an offense on which there is a reasonable doubt in the absence of a lesser related offense option. (See *People v. Toro, supra*, 47 Cal.3d at p. 974.) The same policy should govern consideration of an unsuccessful or incomplete attempt to commit an offense.

In addition, appellant expressly consented to the attempt conviction. (*People v. Birks, supra*, 19 Cal.4th at p. 136, fn. 19 [where parties agree that the defendant may be convicted of a lesser offense not necessarily included in the original charge and "consent to such a procedure," "neither can claim unfairness"].) Here, appellant specifically asked for a verdict of guilty of attempted kidnapping. Defense counsel argued that an attempted

kidnapping had taken place, stating, "I think the evidence is sufficient to show an attempt." (RT 94.) In fact, counsel characterized as "the only issue" whether a kidnapping or an attempted kidnapping occurred. (RT 93.) "You have an attempt," she urged. "And I'll submit it to the court." (RT 94.) In the course of that argument, counsel never suggested that an attempt conviction would be impermissible or would result in unfair surprise.

To be sure, defense counsel retreated from that position after the verdict and before sentencing, but even then she did not claim unfair surprise based on lack of notice. (SCT 1-3.) The initial request for an attempted kidnapping verdict was reasonably designed to stave off conviction of the greater offense, and it appears that the court understood it that way. In contrast, seeking and obtaining leniency from the court and then challenging the result as impermissible would amount to gamesmanship by the defense. Regardless whether counsel's reversal was motivated by gamesmanship, the effect was the same. Even in his post-trial letter brief raising the issue of notice, appellant conceded that "the evidence did demonstrate an attempt to commit a crime." (SRT 1.) If the trial court erred, as appellant contends, it erred because he implored it to. (See *People v. Birks*, *supra*, 19 Cal.4th at p. 136, fn. 19 ["if the defendant wrongly persuades the trial court to instruct the jury on an uncharged, nonincluded offense . . . no complaint about the consequences can thereafter be raised on appeal"].)

As shown above, by arguing that appellant was guilty of an attempt instead of the charged offense, appellant placed the issue of attempt before the court. The trial court understood appellant's request in precisely that way, noting that it had a sua sponte duty to instruct juries on attempted offenses that were shown by the evidence. (RT 108.) Thus, appellant

expressly consented to a conviction for attempt, in addition to forfeiting any complaint about such a conviction.

CONCLUSION

Accordingly, respondent requests that the judgment be affirmed.

Dated: October 10, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 7,081 words.

Dated: October 10, 2018

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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **People v. John Reynold Fontenot**
No.: **S247044**

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 collecting and processing electronic and physical correspondence. 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. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On October 10, 2018, I electronically served the attached RESPONDENT'S ANSWER BRIEF ON THE MERITS by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on October 10, 2018, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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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 October 10, 2018, at Los Angeles, California.

L. Luna	/s/ L. Luna
Declarant	Signature

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