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SUPREME COURT, STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Appellant, v. GERARDO JUAREZ AND EMMANUEL JUAREZ, Defendants/Respondents.	)	No: RESPONDENT EMMANUEL JUAREZ'S PETITION FOR REVIEW G049037-CPR-Juarez

AFTER OPINION OF THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION THREE
JUNE 30, 2014
CASE NO. G049037 (Consolidated with G049038)

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
ORANGE COUNTY
SUPERIOR COURT CASE NO. 12CF3528

THE HONORABLE GREGG L. PRICKETT, JUDGE

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under the Appellate Defenders, Inc.
independent case system

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PETITION FOR REVIEW

TO THE HONORABLE CHIEF JUSTICE OF CALIFORNIA AND ASSOCIATE JUSTICES OF THE SUPREME COURT:

Appellant Emmanuel Juarez, pursuant to Rules 8.500 and 8.516 of the California Rules of Court, petitions for review of the Opinion of the Court of Appeal, Fourth Appellate District, Division Three filed June 30, 2014. (Exhibit A, attached.)

I. ISSUES PRESENTED FOR REVIEW

1. Under Penal Code section 1387, based on the same set of underlying facts, may the prosecution, after two dismissals, continue to file charges against a defendant an unlimited number of times, as long as the subsequent filings are not for the same, exact statutory offense?

2. Should the term "same offense" as used in Penal Code section 1387 be given a narrow interpretation or a broad interpretation?

II. REASONS WHY REVIEW SHOULD BE GRANTED

On two occasions, the People filed attempted murder charges against respondent. On two occasions those cases were properly terminated. Penal Code section 1387 provides that two terminations such as occurred here constitutes a bar to any other prosecution for the "same offense." Thus, the Superior Court in this matter properly dismissed the third case filed against respondent, a charge of conspiracy to commit murder, which was based on the same exact conduct and incident as the first two cases.

On appeal, relying on this Court's decision in *People v. Traylor* (2009) 46 Cal.4th

1205, 96 Cal.Rptr.3d 277, which gave the term "same offense" a narrow interpretation, the prosecution contended that it can suffer repeated dismissals yet still refile against a defendant an unlimited number of times, as long as the new charge is not the same statutory offense pled in a twice-dismissed case. Respondent, on the other hand, urged the Court of Appeal to apply a broad definition of "same offense," under which "...if the essence of the offense charged in the later filing is the same as the essence of the offense charged in the earlier filing, the latter filing is barred." (Op., p.7.) Under the compunction of *Traylor* – "our hands are tied" (Opinion, p.10) -- the Court of Appeal reluctantly agreed with the prosecution's argument and applied a narrow interpretation of "same offense."

But, the Court of Appeal was not happy with its decision. It stated that the language of Penal Code section 1387 "leaves much to be desired" (Op., p.4) and that "...permitting a refiling here *would* violate the policies supporting section 1387." (Op., p.6; italics original.) The Court of Appeal stated that, in the instant case:

> The policy goals of section 1387, on the other hand, unlike the facts of *Traylor*, militate in favor of application of section 1387....The refilings here were simply the result of the People failing to timely prepare to move forward. Thus they directly implicate defendant's right to a speedy trial. And while there is no evidence of intentional harassment here, the trial court's forceful questioning of the prosecutor raises legitimate concerns about the possibility of repeated filings if we only look at the elements of the crime. (Op. 6-7.)

Nevertheless, the Court of Appeal stated that it was "bound by" this Court's

decision in *Traylor*. (Op., p.7.) And:

> We recognize the result we reach is counterintuitive, and generally not in keeping with the policies section 1387 is supposed to represent. However, our hands are tied. The muddled language of section 1387 has not stood the test of time, and our high court's struggle to interpret that language has resulted in a law with narrow protection. If that protection is to be broadened, it is up to the Legislature. (Op., p.10.)

But, the narrow interpretation given to the statute by the decision in *Traylor* was this Court's interpretation. Thus, this Court, and not necessarily the Legislature, can change this interpretation. Therefore, review is required to reconsider *Traylor* in light of the Court of Appeal's legitimate concerns and to determine whether the term "same offense" used in section 1387 should be given a broad interpretation, more in keeping with the salutary policies underlying the statute.

III. STATEMENT OF THE CASE

On November 21, 2011, in case no. 11NF1767, an information was filed against Emmanuel Juarez and his brother, co-respondent Gerardo Juarez, charging them with, *inter alia*, violations of Penal Code section 664/187, subdivision (a) attempted murder (counts 1, 2). (1CT 90-92.)[1] All charges arose out of a single incident allegedly occurring on June 3, 2011. On July 16, 2012, the People dismissed the case. (1CT 15; 2CT 261.)

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[1] "CT" refers to the Clerk's Transcript in case no. G049038. "RT" refers to the Reporter's Transcript in case no. G049038.

On July 16, 2012, in case no. 12NF0057, the People filed a felony complaint against respondents once again charging them with, *inter alia,* attempted murder. These charges arose out of the same alleged June 3, 2011 incident that formed the basis of the information in case no. 11NF1767. (1CT 94-98.) An information alleging the same attempted murders was filed on July 30, 2012. (1CT 99-102.) On December 10, 2012, this case was dismissed because the prosecution was not prepared. (1CT 104-103; 2CT 133.)

On December 10, 2012, based on the same June 3, 2011 incident that formed the basis of the two previously dismissed informations, the prosecution for the third time filed charges against respondents (case no. 12CF3528). However, in an attempt to get around the two dismissal rule of Penal Code section 1387, the prosecution charged respondents with conspiracy to commit murder, a violation of Penal Code section 182. (1CT 109-112; 2CT 250-253.) On December 13, 2012, respondent filed a motion to dismiss case no. 12CF3528 pursuant to Penal Code section 1387. (1CT 14-112.) Co-respondent Gerardo joined. (1CT 113-114.) The prosecution filed opposition (2CT 260-264) and respondent filed a reply. (1CT 115-121.) On January 10, 2013, after a hearing on January 4, 2013 (2CT 274-298; RT 1-22), the motion was denied. (2CT 300.)

On February 7, 2013, respondent filed a petition for writ of mandate in the superior court seeking review of the denial of the section 1387 dismissal motion. (2CT 122-306.) On March 25, 2013, the prosecution filed an informal response. (2CT 307-311.) On

April 3, 2013, respondent filed a reply. (2CT 312-315.) On June 6, 2013, the prosecution filed a return to the petition. (2CT 316-333.) On July 1, 2013, respondent filed a traverse. (2CT 334-348.) On July 19, 2013, a hearing was held on that petition. (2CT 304-305; RT 23-33.) On July 25, 2013, the petition was granted and case no. 12CF3538 was dismissed. (2CT 305-306; RT 34-36.)

On September 19, 2013, the prosecution timely filed a notice of appeal. (2CT 349-350.)

On June 30, 2014, the Court of Appeal reversed the judgment. (Ex. A.)

IV. STATEMENT OF THE FACTS[2]

On June 3, 2011, at around 5:00 p.m., John Doe was driving a Toyota Camry in an alley behind their apartment complex. Jane Doe was in the front passenger seat. As they drove, their vehicle passed a Jeep Grand Cherokee. John Doe and respondent, the driver of the Jeep, stared at one another. Doe stopped and got out of his car. Respondent exited the Jeep. The two men went to the rear of the Toyota and had a brief conversation. Doe walked back to his car. As he was getting in, he said that he "did not mean to disrespect the other subject's son." Doe drove away. (2CT 181-184, 190, 193-194.)

John Doe and Jane Doe returned to their apartment and parked in the alley. At about 10:45 p.m., they exited the complex and walked into the alley where they saw

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[2] The statement of facts is based on the preliminary examination testimony of two police officers. It is not based on the testimony of actual percipient witnesses.

respondent and Gerardo Juarez. Respondent supposedly punched John Doe in the face. When Doe said, "let's throw down," respondent gave a black plastic bag to Gerardo and the two men started fighting. Jane Doe thought there was a gun in the bag. Gerardo, who looked uncomfortable while holding the bag, said to respondent, "you'd better fucking get him." (2CT 185-186, 190-191, 195-196.)

Jane Doe said that the two should not be fighting. Gerardo agreed. He took a gun out of the bag and handed it to respondent. Respondent purportedly shouted, "Long Beach Psychos" or "Long Beach Cyclones" and shot John Doe. (2CT 187, 196-197, 215.)

Jane Doe ran westbound through the alley to the front gate, which was locked. Doe saw the Jeep approaching. Gerardo was walking alongside the Jeep. He said, "Open the gate, bitch." Respondent exited the Jeep and opened the gate. Jane Doe asked Gerardo not to shoot her. Gerardo said, "Fuck you, bitch," and shot her in the upper thigh. Jane Doe ran. (2RT 187-189, 197-199, 215.)

V. ARGUMENT

PURSUANT TO PENAL CODE SECTION 1387, THE SUPERIOR COURT PROPERLY DISMISSED THE THIRD FILING OF CHARGES AGAINST RESPONDENT.

1. Introduction

Penal Code section 1387 provides that a second termination of an action bars a third prosecution for the same offense. "Section 1387 is generally intended to protect

against successive dismissals and refilings of accusatory pleadings....[S]ection 1387 'prevents the evasion of speedy trial rights through the repeated dismissal and refiling of the same charges.'" (*Berardi v. Superior Court* (2008) 160 Cal.App.4th 210, 225, 72 Cal. Rptr.3d 664, 675.) "The purpose of section 1387 is to prevent the prosecution from harassing defendants with successive prosecutions." (*Dunn v. Superior Court* (1984) 159 Cal.App.3d 1110, 1119, 206 Cal.Rptr.242, 248.)[3] Here, the prosecution sought to circumvent and evade these salutary purposes by filing charges a third time against respondent. The superior court, however, properly thwarted the prosecution's attempted end run around section 1387 by dismissing the third action, case no. 12CF3528. This ruling was correct in law and in basic fairness. It promoted the policy underlying section 1387. Nevertheless, being bound by this Court's decision in *People v. Traylor, supra,* 46 Cal.4th 1205, 96 Cal.Rptr.3d 277, the Court of Appeal grudgingly reversed the trial court's ruling. Review is therefore required to enable this Court to reconsider the decision in *Traylor*.

2. <u>The lower court's ruling dismissing the third action was correct</u>.

Penal Code section 1387, subdivision (a) states, in pertinent part, "An order dismissing an action pursuant to this chapter...is a bar to any other prosecution for the same offense if it is a felony...and the action has been previously terminated..."[4] Section

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[4] The parties agreed that there were two terminations falling within the ambit of section 1387.

1387 "...exist[s] to protect a defendant's right to a speedy trial and must be construed to serve that overriding purpose." (*Paredes v. Superior Court* (1999) 77 Cal.App.4th 24, 28, 91 Cal.Rptr.2d 350, 352.)

Appellant argued that, because attempted murder and conspiracy to commit murder are "not the 'same offense,'" the third case filed against respondent should not have been dismissed. (AOB 2-6.) Implicit in appellant's argument is the claim that the prosecution can refile charges against a defendant innumerable times after two dismissals as long as the same statutory offense is not charged. However, there is no authority for such a claim. And, such "ad infinitum" filing is prohibited by section 1387. (*Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1019, 22 Cal.Rptr.3d 876, 881 [Recognizing that felony charges cannot "be refiled ad infinitum."]; accord, *People v. Salcido* (2008) 166 Cal.App. 4th 1303, 1309, 83 Cal.Rptr.3d 561,565.) Further, appellant's novel theory of unlimited refiling defeats and frustrates the "purpose" of section 1387 which "...is to prevent successive attempts to prosecute a defendant." (*People v. Cossio* (1977) 76 Cal. App.3d 369, 372, 142 Cal.Rptr.781, 783; accord, *People v. Superior Court (Martinez)* (1993) 19 Cal.App.4th 738, 744, 23 Cal.Rptr.2d 733, 736 ["The basic purpose of this section [1387] is to limit improper successive prosecutions which harass a defendant."]) Thus, contrary to appellant's implicit claim, there is a limit to the number of permissible refilings, i.e., two, as provided for in section 1387.

Here, it is undisputed that the incident described in the statement of facts (*supra*)

gave rise to the charges in all three cases. The fundamental basis or essence of all three cases, whether charged as attempted murder or conspiracy to commit murder, is the claim that respondents tried to murder John Doe and Jane Doe. Neither attempted murder nor conspiracy to commit murder could have been committed without engaging in the conduct alleged in the third filing. In such a situation, the filing of charges a third time is barred by section 1387. As stated in *Wallace v. Muncipal Court* (1983) 140 Cal.App.3d 100, 107, 189 Cal.Rptr.886, 891, "The general rule...is that when the essence of the offense charged in a [third] action is the same as the essence of the offense in a previously dismissed action the [third] action will be barred."[5] This "essence" analysis was favorably cited in *Dunn v. Superior Court, supra,* 159 Cal.App.3d at 1118, 206 Cal.Rptr. at 247 and *People v. Traylor, supra,* 46 Cal.4th at 1216-1217, 96 Cal.Rptr .3d at 286.) Here, the essence of the attempted murder and conspiracy to commit murder charges is the same -- respondents' supposed effort or undertaking to murder the Does. Thus, under the above authorities, the third prosecution is barred by section 1387.

In *Dunn v. Superior Court, supra,* 159 Cal.App.3d 1110, 206 Cal.Rptr.242, the prosecution first charged the defendant with violations of Penal Code section 207, kidnapping, Penal Code section 220, assault with intent to commit rape, and Vehicle Code section 10851, theft of an automobile. This information was dismissed on the day

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[5] Although *Wallace* did not directly involve Penal Code section 1387, it discussed the statute. (140 Cal.App.3d at 106-107, 189 Cal.Rptr. at 891.)

set for trial.

The prosecution in *Dunn* filed a second complaint charging appellant with violation of Penal Code section 209, kidnapping for robbery, Penal Code section 211, robbery, Penal Code section 496, possession of stolen property, and Penal Code section 32, accessory to kidnapping, robbery, and auto theft. At the preliminary examination, all charges except accessory to auto theft were dismissed. This constituted the second termination of the case. The prosecutor, however, included all charges a third time in the information. The defendant filed a Penal Code section 1387 dismissal motion as to the kidnapping, robbery, and receiving counts. The motion was denied. The Court of Appeal reversed, holding that the kidnapping and robbery charges must be dismissed because they were of the essence of the previously dismissed charges:

> Section 1387 of the Penal Code is a bar to prosecution of an action which has been twice terminated whether at the request of the prosecution or by the dismissal of a magistrate....
>
> ***
>
> We turn now to the question of what "offenses" within the meaning of section 1387 were twice terminated. Although section 1387 bars charges of "the same offense," it is clear that this phrase does not simply mean that the district attorney is not permitted to charge violation of the same statute. The attorney general concedes as much by taking the position that the only offense twice terminated within the meaning of section 1387 is kidnapping although this "offense" had been charged under both sections 207 and 209 of the Penal Code. The attorney general, however, does not agree with petitioner that the charge of robbery is barred because of the prior terminations of auto theft and robbery involving the same vehicle....

In seeking a meaning of the term "the same offense" in section 1387, attention has been directed by petitioner to the case of *Wallace v. Municipal Court* [*supra*]....The court likened this bar [of section 853.6] to the bar of section 1387 and, after reviewing several cases, stated: "The general rule which can be distilled from these examples is that when the essence of the offense charged in a second action is the same as the essence of the offense in a previously dismissed action the second action will be barred." The court concluded that the essence of the two offenses before it was not the same. Although the court did not go on to provide a definition of "essence," it pointed out that either offense could be committed without committing the other and held that "[t]hus the essence of the two offenses is different...."

This cannot be said of the offenses of kidnapping and kidnapping for the purpose of robbery. Kidnapping for the purpose of robbery cannot be committed without committing the lesser offense of kidnapping. Two dismissals of kidnapping should bar a prosecution for kidnapping for the purpose of committing robbery on the theory that to charge the greater would be also to charge the lesser an additional and prohibited third time.

So too with the offenses of auto theft and robbery. Although every robbery does not include an auto theft, the concept of necessarily included offenses permits reference to the facts in the accusatory pleading. (*People v. Marshall* (1957) 48 Cal.2d 394, 398, 309 P.2d 456.) Thus, in *Marshall* auto theft was held to be a necessarily included offense in robbery where the property taken in the robbery was alleged in the information to be the automobile involved in the auto theft. Here, the essence of the auto theft and robbery is the same since the robbery was specifically alleged to be the taking of the same automobile.

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The purpose of section 1387 is to prevent the prosecution from harassing defendants with successive prosecutions...and, in part, to pressure the prosecution to bring the case to trial within the time limits of section 1382....

> Let a peremptory writ of mandate issue directing respondent court to dismiss counts charging petitioner with kidnapping and robbery. (159 Cal.App.3d at 1114, 1118-1119, 206 Cal.Rptr. at 244, 247-248.)

As *Dunn* demonstrates vis-a-vis the robbery and auto theft charges, the charges do not have to be for the same statutory offense before section 1387 applies. The term "'same offense'...does not simply mean...[a] violation of the same statute." (*id.*)

Appellant argued that, merely because the charge in the third complaint was not the same statutory offense, the refiling was proper. The argument is refuted in *Dunn, supra,* and in *People v. Salcido, supra,* 166 Cal.App.466 1303, 83 Cal.Rptr.3d 561. In *Salcido*, the first and second charging documents charged the defendant with a violation of Penal Code section 4501.5, battery by a prisoner on a nonconfined person. These two cases were dismissed. A third complaint, based on the same conduct as the previous two cases, charged the defendant with violations of Penal Code section 4501.5 and Penal Code section 4501, assault by a prisoner with a deadly weapon or by means of force likely to cause great bodily injury. The prosecution subsequently alleged a Penal Code section 12022.7, great bodily injury enhancement. The defendant's section 1387 dismissal motion was denied. The Court of Appeal reversed and ordered the case dismissed *with prejudice*, even though section 4501 was not the same statutory offense as section 4501.5. The Court stated, "...the section 1387 two-dismissal rule barred the People from filing a third complaint against Salcido based on the June 15, 2000 incident." (166 Cal.App.4th at 1312, 83 Cal.Rptr.3d at 567.) Regarding the great bodily injury enhancement, the

Court stated:

> The People cannot now add that allegation in a third filing of an accusatory pleading to avoid the two-dismissal rule. [Citation.] Because the People charged Salcido twice with nonviolent felony offenses arising out of his June 15, 2000, conduct and those charges were dismissed, section 1387's two-dismissal rule bars further prosecution of him for that conduct.... (166 Cal.App.4th at 1314, 83 Cal.Rptr.3d at 569.)

Thus, under *Salcido*, the two-dismissal rule applies even where the third complaint does not allege the same statutory offense.

Appellant's entire argument is based on *People v. Traylor, supra,* 46 Cal.4th 1205, 96 Cal.Rptr.3d 277.[6] While some of the language in *Traylor* may, at first glance, appear to support appellant's contention, the case must be read in light of the disparate facts of that case and the extremely narrow issue before the Court, an issue which is *not* before this Court in the instant case. As this Court stated in limiting its holding:

> We therefore hold that when the People initially file a felony complaint, which is then dismissed by a magistrate on grounds there is sufficient evidence only to support a lesser included misdemeanor offense, the subsequent filing of a second complaint containing such a reduced misdemeanor charge, comprising fewer than all the elements of the previously dismissed offense, is not barred by section 1387(a). Here, the dismissing magistrate specifically indicated his belief that while the evidence of felony vehicular manslaughter with gross negligence was insufficient, the evidence would support a different and lesser charge of

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[6] In the lower courts, appellant attempted to distinguish *Dunn* and other cases that support respondent's position. (2CT 260-263, 307-310, 327-330.) Appellant did not address *Dunn* or these other authorities in the opening brief.

> misdemeanor manslaughter that did not require proof of a grossly negligent act or omission. Under those circumstances, the People properly could, following the first felony dismissal, file a second complaint alleging the lesser included misdemeanor. FN10
>
> FN10 As the reader will notice, we have carefully limited our holding to the situation in which an initial *felony* charge, having been dismissed by a magistrate on grounds that the evidence supports only a lesser included misdemeanor, is followed by the filing of a second complaint charging that *misdemeanor* offense. We do not here confront, and expressly do not decide, how section 1387(a) should apply when dismissed felony charges are followed by one or more new complaints charging lesser included *felonies*, or when a dismissed *misdemeanor* charge is followed by a new complaint charging a lesser included *misdemeanor*. (46 Cal.4th at 1219-1220, 96 Cal.Rptr.3d at 288; footnote 9 omitted.)[7]

Thus, *Traylor* is not authority for the proposition argued for by appellant, i.e., that a more serious felony, conspiracy to commit murder, can be charged in a third prosecution based on the same conduct underlying two previously dismissed felony propositions.[8]

Further, the one-time refiling in *Traylor* "actually promote[d]" and did "not abuse" the salutary purposes of section 1387. (*Traylor, supra,* 46 Cal.4th at 1209, 96 Cal.Rptr.3d

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[7] In discussing footnote 10 of *Traylor*, the Court in *People v. Hernandez* (2010) 181 Cal.App.4th 404, 410, fn.14, 105 Cal.Rptr.3d 25, 29, fn.14 recognized that "...the court's holding is narrow..."

[8] The punishment for conspiracy to commit murder "...shall be that prescribed for murder in the first degree." (Penal Code sec.182, subd.(a).) The punishment for first degree murder is 25 years to life. (Penal Code sec.190, subd.(a).) Attempted murder is punishable by "life with the possibility of parole." (Penal Code sec.664, subd.(a).) A person serving a life sentence is eligible for parole after serving seven years. (Penal Code sec.3046, subd.(a)(1).) Thus, conspiracy to commit murder is the more serious offense.

at 435-436.) The refiling of a misdemeanor charge in *Traylor* "represent[ed] an ameliorative effort to charge a different offense that conforms to the actual evidence." (46 Cal.4th at 1214-1215, 96 Cal.Rptr.3d at 284.) Here, the prosecution's third refiling is not ameliorative of anything. By stark contrast to *Traylor,* it constitutes an abusive attempt to evade the protections of section 1387. *Traylor* does not stand for the proposition that the prosecution can repeatedly refile different charges after suffering successive dismissals for which the prosecution was responsible. In *Traylor*, the prosecution did nothing wrong. Here, on two occasions, the prosecution was not prepared.

Citing *Traylor,* appellant claimed offenses are the "same offense" for purposes of section 1387 when they have the same elements. (AOB 3.) But, this Court did not state that such an analysis was applicable where two felony informations have been dismissed and third has been filed based on the same underlying acts. *Traylor* involved the dismissal of a felony complaint based on insufficient evidence, after which a misdemeanor charge was filed which lacked an element necessary for the felony charge. The *Traylor* Court stated that "[u]nder these circumstances," the felony and misdemeanor were not the same offense. (46 Cal.4th at 1209, 96 Cal.Rptr. at 280.) These circumstances are not present in the instant case.

Although *Traylor* stated that section 1387, subdivision (a) "applies only to successive prosecutions 'for the same offense'" (46 Cal.4th at 1212, 96 Cal.Rptr.3d at

282), such statement must be read in light of the different facts and narrow and expressly limited issue before the Court in that case. (*Chevron U.S.A., Inc. v. W.C.A.B.* (1999) 19 Cal.4th 1182, 1195, 81 Cal.Rptr.2d 521, 528 ["It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered."]) In *Traylor*, there had been only one dismissal of a felony charge. The prosecution refiled a misdemeanor charge. The dismissal was not due to any failings of the prosecution. And the prosecution's refiling in that case "actually promote[d]" the purpose of section 1387"...to protect a defendant against harassment, and the denial of speedy trial rights that result from the repeated dismissal and refiling of identical charges." (46 Cal.4th at 1209, 96 Cal.Rptr.3d at 280.) Such cannot be said of the third refiling in the instant case.

Further, the *Traylor* Court (46 Cal.4th at 1216-1217, 96 Cal.Rptr.3d at 286) did not reject the "essence of the offense" test of section 1387. (*Dunn, supra,* 159 Cal.App.3d at 1118, 206 Cal.Rptr. at 242 ["'...when the essence of the offense charged in a second action is the same as the essence of the offense in a previously dismissed action the second action will be barred'"]; and see C.E.B., Calif. Crim. Law, Proc. and Prac. (2013) sec.25.47, p.750 [Charge may not be "...filed that is of the same essence as the twice-dismissed charges," citing *Dunn.*]) Nor did the *Traylor* Court reject the statement in *Burris, supra,* "...that successive prosecutions are 'for the same offense,' and are thus governed by section 1387, where 'the identical criminal act...underlies' each of the

prosecutions." (*Traylor,* 46 Cal.4th at 1212, 96 Cal.Rptr.3d at 282.) Rather, the *Traylor* Court considered and applied those logical, common sense concepts in analyzing the "same offense" issue. If the Court had felt those cases and their analyses of the issue were wrongly decided, or had intended to overrule them, it would have expressly said so. (See, e.g., *People v. Carpenter* (1997) 15 Cal.4th 312, 381-382, 63 Cal.Rptr.2d 1, 40 ["We certainly did not clearly overrule what we so recently said was settled law."]) Given the narrow issues before this Court in *Traylor*, its favorable view of the "essence" and "identical criminal act" concepts, its decision not to overrule *Dunn* and *Burris*, and the purposes underlying section 1387, the *Traylor* decision does not stand for the cut-and-dried, unlimited refiling position urged by appellant and reluctantly applied by the Court of Appeal.

Under *Traylor* (and *Dunn* , *Burris*, and other cases construing section 1387), in determining the applicability of section 1387, a court can properly consider the essence of the charges and the underlying criminal act, as well as whether the third refiling involves the same statutory offense. A consideration of all the circumstances furthers "'...the human intent that underlies the statute.'" (*Traylor, supra,* 46 Cal.4th at 1213, 96 Cal.Rptr. 3d at 282.) Section 1387 is not limited to situations where the same statutory offense is alleged in the third pleading, nor did *Traylor* so hold. Here, the Superior Court considered all applicable factors and properly found that section 1387 required dismissal with prejudice of the third case.

3. Conclusion

Respondent in this case has the due process right under the Fifth and Fourteenth Amendments to have the State follow its statutory procedures, here, to have the case against him dismissed pursuant to Penal Code section 1387. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 100 S.Ct. 2227; *Fetterly v. Paskett* (9th Cir.1993) 997 F.2d 1295, 1300 ["the failure of a state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state."]) Here, the Superior Court properly applied the salutary purposes of section 1387. Fundamental due process requires that its decision be affirmed. To that end, review is required.

VI. CONCLUSION

For the reasons stated above, review is required.

Dated: July 9, 2014

Respectfully submitted
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By _____
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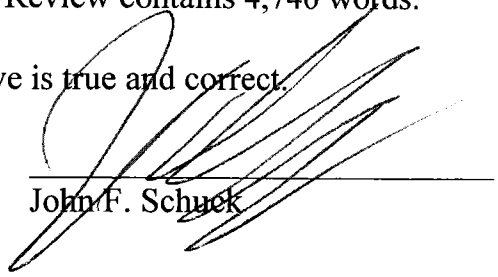
Attorney for Respondent
EMMANUEL JUAREZ
(Appointed by the Court)

CERTIFICATE OF WORD COUNT

In reliance on the word count of the computer program used to generate this brief, I, John F. Schuck, hereby certify that this Petition for Review contains 4,746 words.

I declare under penalty of perjury that the above is true and correct.

Dated: July 9, 2014



John F. Schuck

Filed 6/30/14 P. v. Juarez CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Appellant, v. GERARDO JUAREZ and EMMANUEL JUAREZ, Defendants and Respondents.	G049037 (consol. with G049038) (Super. Ct. No. 12CF3528) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregg Prickett, Judge. Reversed.

Tony Rackauckas, District Attorney, and Brian F. Fitzpatrick, Deputy District Attorney, for Plaintiff and Appellant.

Frank Davis, Alternate Defender, and Antony C. Ufland, Deputy Alternate Defender, for Defendant and Respondent Gerardo Juarez.

John F. Schuck for Defendant and Respondent Emmanuel Juarez.

* * *

EXHIBIT A

Penal Code section 1387[1] limits the number of times the People may file a complaint for the "same offense." In the case of a felony, the People may file twice. Here, twice the People filed attempted murder charges, and both cases were dismissed. The People then filed a third complaint. Instead of filing charges of attempted murder, which would be barred under section 1387, the People alleged *conspiracy* to commit murder, which arose out of the same underlying incident. The trial court held this was the "same offense," for purposes of section 1387, and dismissed the complaint. The People appealed.

We reverse. Our high court has narrowly defined "same offense" as an offense with identical elements. Defendants may attempt murder without conspiring to murder, and may conspire to murder without attempting to murder. Thus, they were not the same offense, and section 1387 did not bar the filing of the third complaint.

FACTS

In June 2011, the People filed their initial complaint against defendants Gerardo Juarez and Emmanuel Juarez, alleging, among other things, two counts of attempted murder against each defendant.[2] In November 2011, the court held a preliminary hearing that disclosed the following evidence.

This case arises from an incident in which defendant Emmanuel fought with victim John Doe. Prior to the fight, Emmanuel handed a gun to defendant Gerardo. During the fight, Gerardo handed the gun back to Emmanuel. Emmanuel then shot John

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2 Because the defendants share the same last name, we refer to them by first name to avoid confusion.

Doe. John Doe's companion, Jane Doe, attempted to flee, but defendants caught up with her and Gerardo shot her in the thigh.

After defendants were held to answer, the People filed an information alleging two counts of attempted murder (§§ 664, subd. (a), 187, subd. (a).) against both defendants, and one count of possession of a firearm by a felon (§ 12021, subd. (a)(1)) against Gerardo. Nearly eight months later, in June of 2012, the People filed an amended information that added counts for assault with a firearm (§ 245, subd. (b)). For reasons not disclosed in the record, in July 2012 the court granted the People's motion to dismiss the case.[3]

That same day, the People refiled the same charges. In November 2012, the People were not ready to proceed to trial and requested a continuance. The court granted the continuance to December 10, 2012, but warned that December 10 would be day 10 of 10. On December 10, the People were again not ready to proceed, so the court dismissed the case in its entirety.

The People then filed a third case against defendants, this time alleging two counts of conspiracy to commit murder. The facts recited in the complaint indicate the charges were based on the same incident as the previous complaints.

Defendants moved to dismiss this complaint under section 1387. The magistrate denied the motion without comment.

Defendant then petitioned the superior court for a writ of mandate or prohibition, which the court treated as a petition for writ of habeas corpus. During oral argument, the court posed the following questions to the People: "Where is the limit in regard to your theory of refiling? [¶] If we take assaultive conduct like attempted murder, you could have two dismissals for an attempted murder, and then you could have

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two dismissals for an assault with a deadly weapon, and then you could have two dismissals for an attempted vol[untary manslaughter], and then you could have two dismissals for assault by force likely to produce great bodily injury, and then you could have two dismissals for a [section] 243[, subdivision (d)] battery causing great bodily injury. Where would it end?" The court later granted the petition without further comment and dismissed the case. The People timely appealed.

DISCUSSION

Penal Code section 1387, subdivision (a), states, "An order terminating an action pursuant to this chapter, or Section 859b, 861, 871, or 995, is a bar to any other prosecution for the same offense if it is a felony or if it is a misdemeanor charged together with a felony and the action has been previously terminated pursuant to this chapter, or Section 859b, 861, 871, or 995, or if it is a misdemeanor not charged together with a felony." As the reader may note, this statutory formulation leaves much to be desired. Our Supreme Court has observed that section 1387 "has been amended nine times since its adoption in 1872, and the resulting 108-word, 13-comma, no period subdivision is hardly pellucid . . . ." (*Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1018 (*Burris*).) To oversimplify, what the statute means is that a felony complaint may be refiled once but a misdemeanor complaint may not.

The weakness in this oversimplification was exposed by the situation encountered in *Burris*, *supra*, 34 Cal.4th at page 1012. There, the People filed a misdemeanor complaint for driving under the influence, but later decided there was sufficient evidence to support a felony, so the People dismissed the misdemeanor complaint and refiled a felony complaint. (*Id.* at pp. 1015-1016.) The defendant moved to dismiss under section 1387. (*Burris*, at p. 1016.) Is this considered a misdemeanor for purposes of section 1387, such that refiling is impermissible, or a felony? The *Burris*

court held it was the second filing that determined which rule applied. (*Burris*, at p. 1019.) Since the second filing was a felony complaint, the refiling was permissible.

The logical consequence of that rule was tested in *People v. Traylor* (2009) 46 Cal.4th 1205 (*Traylor*), where the opposite occurred. The People filed a felony complaint for vehicular manslaughter with gross negligence. (*Id.* at p. 1210.) After the preliminary hearing, the magistrate dismissed the charge on the ground there was insufficient evidence of gross negligence, but expressed the view that the evidence would support a misdemeanor charge of negligent vehicular manslaughter. (*Id.* at p. 1210.) The People then refiled the misdemeanor charge, and the defendant moved to dismiss. (*Id.* at p. 1211.) Under the rule announced in *Burris*, since the misdemeanor charge was the second filing, the rule preventing a refiling of a misdemeanor charge applied.

To avoid that result, the *Traylor* court took a narrow view of the statutory phrase "same offense." Two charged offenses are the "same offense" only if they include "identical elements." (*Traylor*, *supra*, 46 Ca.4th at p. 1208.) The court made clear that the protection offered by section 1387 is "narrow," and emphasized that in interpreting the term "same offense," it is *not* the underlying criminal conduct that matters, but the elements of the offense charged. (*Traylor*, at p. 1213, fn. 6.) Since the subsequent misdemeanor charge did not require proof of gross negligence as the felony charge had, they were not the "same offense." (*Ibid.*)

The *Traylor* court supported its holding by noting the result comported with the policy goals of section 1387. "A primary purpose of section 1387[, subdivision (a)] is to protect a defendant against harassment, and the denial of speedy-trial rights, that results from the repeated dismissal and refiling of identical charges. In particular, the statute guards against prosecutorial 'forum shopping' — the persistent refiling of charges the evidence does not support in hopes of finding a sympathetic magistrate who will hold the defendant to answer. On the other hand, the statute was not intended to penalize the People when, following a magistrate's dismissal of a first felony complaint on the

grounds the evidence supports only a lesser included misdemeanor, they elect to refile that lesser charge *rather than exercise their undoubted statutory right to refile the felony.* Under such circumstances, prosecutors do not abuse, but actually promote, the statutory purposes." (*Traylor, supra*, 46 Cal.4th at p. 1209.)

Here we encounter the next antithesis in the dialectical process: attempted murder and conspiring to murder do not share identical elements, but permitting a refiling here *would* violate the policies supporting section 1387.

Conspiracy to commit murder requires an agreement to commit murder and an overt act by one or more of the parties in furtherance of the agreement. Our high court has specifically noted the distinction between conspiracy and attempt, stating, """As an inchoate crime, conspiracy fixes the point of legal intervention at [the time of] agreement to commit a crime," and "thus *reaches further back into preparatory conduct than attempt . . . .*""" (*People v. Morante* (1999) 20 Cal.4th 403, 417, italics added.) Attempted murder does not require any agreement. It "requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Lee* (2003) 31 Cal.4th 613, 623.) Thus the two charges do not share identical elements.[4]

The policy goals of section 1387, on the other hand, unlike the facts of *Traylor*, militate in favor of application of section 1387. "Section 1387 implements a series of related public policies. It curtails prosecutorial harassment by placing limits on

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[4] And although a conspiracy charge need not be pleaded, it cannot be said that the attempted murder charge impliedly set forth a conspiracy claim of conspiring to attempt murder. "This is because the targeted crime of the conspiracy, attempted murder, requires a specific intent to actually commit the murder, while the agreement underlying the conspiracy pleaded to contemplated no more than an ineffectual act. No one can simultaneously intend to do and not do the same act, here the actual commission of a murder. This inconsistency in required mental states makes the purported conspiracy to commit attempted murder a legal falsehood." (*People v. Iniguez* (2002) 96 Cal.App.4th 75, 77.)

the number of times charges may be refiled. [Citations.] The statute also reduces the possibility that prosecutors might use the power to dismiss and refile to forum shop. [Citations.] Finally, the statute prevents the evasion of speedy trial rights through the repeated dismissal and refiling of the same charges." (*Burris*, *supra*, 34 Cal.4th at p. 1018.) The refilings here were simply the result of the People failing to timely prepare to move forward. Thus they directly implicate defendant's right to a speedy trial. And while there is no evidence of intentional harassment here, the trial court's forceful questioning of the prosecutor raises legitimate concerns about the possibility of repeated filings if we only look at the elements of the crime.

Ultimately, however, we are bound by our Supreme Court. And while we believe the trial court has raised a legitimate concern, that concern is properly directed to our Supreme Court's narrow interpretation of the term "same offense." Also, though examining outcomes in light of policy goals may be a useful tool in interpreting otherwise ambiguous language (*Burris*, *supra*, 34 Cal.4th at pp. 1017-1018), there is nothing ambiguous about our high court's interpretation of "same offense," and we are not at liberty to deviate from that interpretation.

Defendants encourage us to apply a broader definition of "same offense" that would treat attempted murder and conspiring to murder as the same offense. They principally rely on *Wallace v. Municipal Court* (1983) 140 Cal.App.3d 100 (*Wallace*) and *Dunn v. Superior Court* (1984) 159 Cal.App.3d 1110 (*Dunn*), cases which defendants interpret as adopting a so-called "essence" test. Under defendants' proposed rationale, if the essence of the offense charged in the later filing is the same as the essence of the offense charged in the earlier filing, the latter filing is barred.

Wallace framed the issue before it as follows: "[S]ection 853.6, subdivision (e)(3), provides that the failure of the prosecutor to file the notice to appear or a formal complaint in the municipal or justice court within 25 days of the arrest shall bar prosecution of the misdemeanor charged in the notice to appear. The principal issue in this writ proceeding is whether, for the purposes of the bar of that section, the crime of driving under the influence of an alcoholic beverage or any drug in violation of Vehicle Code section 23152, subdivision (a), is the same offense as driving with a blood-alcohol level of 0.10 percent or more in violation of Vehicle Code section 23152, subdivision (b). We hold that it is not."[5] (*Wallace*, *supra*, 140 Cal.App.3d at pp. 102-103.) The *Wallace* court noted that it was applying the same concept as the "same offense" language used in section 1387. (*Wallace*, at p. 105.) In reaching its conclusion, the *Wallace* court stated, "The general rule . . . is that when the *essence* of the offense charged in a second action is the same as the essence of the offense in a previously dismissed action the second action will be barred." (*Id.* at p. 107, italics added.) Although *Wallace* did not define "essence," it went on to note that one can drive under the influence without having a blood-alcohol level of 0.10 percent or more, and vice versa, and thus the two are not the same offense. (*Id.* at p. 108.)

In *Dunn* the People first charged the defendant with, among other things, kidnapping (§ 207) and theft of an automobile (Veh. Code, § 10851). (*Dunn*, *supra*, 159 Cal.App.3d at p. 1113.) The People dismissed those charges and refiled charges of kidnapping for the purpose of robbery (§ 209) and robbery (§ 211). (*Dunn*, at p. 1114.) The magistrate did not hold those charges to answer. The district attorney then reinstated the charges in an information, and the defendant moved to dismiss under section 1387. (*Dunn*, at p. 1114.) The *Dunn* court held the third filing was barred. It mentioned the

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[5] At the time *Wallace* was decided, Vehicle Code section 23152, subdivision (b), prohibited driving with a blood-alcohol level of 0.10 percent or greater. That section was since amended to reflect 0.08 percent or greater.

"essence" test articulated in *Wallace* and stated, "Kidnapping for the purpose of robbery cannot be committed without committing the lesser offense of kidnapping. Two dismissals of kidnapping should bar a prosecution for kidnapping for the purpose of committing robbery on the theory that to charge the greater would be also to charge the lesser an additional and prohibited third time." (*Dunn*, at p. 1118.) With respect to the theft of an automobile and robbery charges, the court found they were in "essence" the same, stating, "Although every robbery does not include an auto theft, the concept of necessarily included offenses permits reference to the facts in the accusatory pleading. [Citation]. Here, the essence of the auto theft and robbery is the same since the robbery was specifically alleged to be the taking of the same automobile." (*Dunn*, at pp. 1118-1119.)

From these cases, Emmanuel contends "a court can properly consider the essence of the charges and the underlying criminal act, as well as whether the third refiling involves the same statutory offense," which Emmanuel goes on to describe as "[a] consideration of all the circumstances . . . ."

The problem is, *Traylor* extensively discussed *Dunn* and interpreted it as applying the same elements test. (*Traylor*, *supra*, 46 Cal.4th at pp. 1217-1218.) It interpreted *Dunn* as consistent with the same elements test because in *Dunn* the People initially charged lesser crimes, and the subsequent greater crimes contained all of the same elements as the earlier-charged crimes. (*Traylor*, at pp. 1217-1218.) Since the same elements test was satisfied, applying the bar of section 1387 was proper.

Further, the *Traylor* court expressly rejected the contention that "section 1387[, subdivision (a)] should apply to all charges arising from the *same conduct or behavior* of the defendant." (*Traylor*, *supra*, 46 Cal.4th at p. 1213, fn. 6.) Rather, the court held, "[A]n 'offense' is defined not by conduct, but by its particular definition as such in the Penal Code." (*Ibid.*)

Defendants' final argument is that a footnote in *Traylor* limits its scope. At the end of the opinion, the court added the following footnote: "As the reader will notice, we have carefully limited our holding to the situation in which an initial *felony* charge, having been dismissed by a magistrate on grounds that the evidence supports only a lesser included misdemeanor, is followed by the filing of a second complaint charging that *misdemeanor* offense. We do not here confront, and expressly do not decide, how section 1387[, subdivision (a)] should apply when dismissed felony charges are followed by one or more new complaints charging lesser included *felonies*, or when a dismissed *misdemeanor* charge is followed by a new complaint charging a lesser included *misdemeanor*." (*Traylor*, *supra*, 46 Cal.4th at p. 1220, fn. 10.)

In our view, this footnote does not significantly limit the application of *Traylor*. While the court's *holding* may have been narrow, the rationale it used to get there — that "same offense" means identical elements — is quite broad in its application. The examples the court gave of what it was *not* deciding (e.g. a felony followed by a refiled lesser included felony) are not at issue here. And in any event, given the court's rationale, we fail to see how a felony followed by a lesser included felony would have any different result than a felony followed by a lesser included misdemeanor.

We recognize the result we reach is counterintuitive, and generally not in keeping with the policies section 1387 is supposed to represent. However, our hands are tied. The muddled language of section 1387 has not stood the test of time, and our high court's struggle to interpret that language has resulted in a law with narrow protection. If that protection is to be broadened, it is up to the Legislature.

DISPOSITION

The judgment dismissing the case is reversed. The trial court is directed to reinstate the case.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

RYLAARSDAM, J.

PROOF OF SERVICE

I, John Schuck, declare:

I am a citizen of the United States and a resident of the County of Santa Clara; I am over the age of eighteen years and am not a party to the within action; my business address is 885 N. San Antonio Road, Suite A, Los Altos, CA 94022.

On July 9, 2014 I served the within:

PETITION FOR REVIEW

on the following interested persons in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Altos, California addressed as follows:

Emmanuel Juarez
AK9367
San Quentin State Prison
San Quentin, CA 94974

Orange County Superior Court
Central Justice Center - Criminal
700 Civic Center Drive West
Room K100
Santa Ana, CA 92702

Anthony Ufland
Orange County Alternate Defender's Office
600 W. Santa Ana Blvd., Suite 600
Santa Ana, CA 92701
(Attorney for co-respondent)

District Attorney
P. O. Box 808
Santa Ana, CA 92702

Miles David Jessup, Deputy Public Defender
Orange County Public Defender's Office
14 Civic Center Plaza
Santa Ana, CA 92701

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on the same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing affidavit.

PROOF OF SERVICE CONT'D.

Furthermore, I, Patricia Schuck, declare that I electronically served from my electronic service address of patmschuck@live.com the same referenced above document before 5:00 p.m. on July 9, 2014 to the following entities:

Appellate Defenders, Inc., eservice-criminal@adi-sandiego.com
Attorney General's office, ADIEService@doj.ca.gov.
Court of Appeal, Fourth Appellate District, via e-submission.

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

Executed at Los Altos, California on July 9, 2014.

John F. Schuck

Patricia Schuck

Patricia Schuck

Filed 6/30/14 Certified for publication 7/9/14 (order attached)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Appellant, v. GERARDO JUAREZ, Defendant and Respondent.	G049037 (Super. Ct. No. 12CF3528)
THE PEOPLE, Plaintiff and Appellant, v. EMMANUEL JUAREZ, Defendant and Respondent.	G049038 (Super. Ct. No. 12CF3528) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregg Prickett, Judge. Reversed.

Tony Rackauckas, District Attorney, and Brian F. Fitzpatrick, Deputy District Attorney, for Plaintiff and Appellant.

Frank Davis, Alternate Defender, and Antony C. Ufland, Deputy Alternate Defender, for Defendant and Respondent Gerardo Juarez.

John F. Schuck for Defendant and Respondent Emmanuel Juarez.

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We reverse. Our high court has narrowly defined "same offense" as an offense with identical elements. Defendants may attempt murder without conspiring to murder, and may conspire to murder without attempting to murder. Thus, they were not the same offense, and section 1387 did not bar the filing of the third complaint.

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After defendants were held to answer, the People filed an information alleging two counts of attempted murder (§§ 664, subd. (a), 187, subd. (a).) against both defendants, and one count of possession of a firearm by a felon (§ 12021, subd. (a)(1)) against Gerardo. Nearly eight months later, in June of 2012, the People filed an amended information that added counts for assault with a firearm (§ 245, subd. (b)). For reasons not disclosed in the record, in July 2012 the court granted the People's motion to dismiss the case.[3]

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The weakness in this oversimplification was exposed by the situation encountered in *Burris*, *supra*, 34 Cal.4th at page 1012. There, the People filed a misdemeanor complaint for driving under the influence, but later decided there was sufficient evidence to support a felony, so the People dismissed the misdemeanor complaint and refiled a felony complaint. (*Id.* at pp. 1015-1016.) The defendant moved to dismiss under section 1387. (*Burris*, at p. 1016.) Is this considered a misdemeanor for purposes of section 1387, such that refiling is impermissible, or a felony? The *Burris*

court held it was the second filing that determined which rule applied. (*Burris*, at p. 1019.) Since the second filing was a felony complaint, the refiling was permissible.

The logical consequence of that rule was tested in *People v. Traylor* (2009) 46 Cal.4th 1205 (*Traylor*), where the opposite occurred. The People filed a felony complaint for vehicular manslaughter with gross negligence. (*Id.* at p. 1210.) After the preliminary hearing, the magistrate dismissed the charge on the ground there was insufficient evidence of gross negligence, but expressed the view that the evidence would support a misdemeanor charge of negligent vehicular manslaughter. (*Id.* at p. 1210.) The People then refiled the misdemeanor charge, and the defendant moved to dismiss. (*Id.* at p. 1211.) Under the rule announced in *Burris*, since the misdemeanor charge was the second filing, the rule preventing a refiling of a misdemeanor charge applied.

To avoid that result, the *Traylor* court took a narrow view of the statutory phrase "same offense." Two charged offenses are the "same offense" only if they include "identical elements." (*Traylor, supra*, 46 Ca.4th at p. 1208.) The court made clear that the protection offered by section 1387 is "narrow," and emphasized that in interpreting the term "same offense," it is *not* the underlying criminal conduct that matters, but the elements of the offense charged. (*Traylor*, at p. 1213, fn. 6.) Since the subsequent misdemeanor charge did not require proof of gross negligence as the felony charge had, they were not the "same offense." (*Ibid.*)

The *Traylor* court supported its holding by noting the result comported with the policy goals of section 1387. "A primary purpose of section 1387[, subdivision (a)] is to protect a defendant against harassment, and the denial of speedy-trial rights, that results from the repeated dismissal and refiling of identical charges. In particular, the statute guards against prosecutorial 'forum shopping' — the persistent refiling of charges the evidence does not support in hopes of finding a sympathetic magistrate who will hold the defendant to answer. On the other hand, the statute was not intended to penalize the People when, following a magistrate's dismissal of a first felony complaint on the

grounds the evidence supports only a lesser included misdemeanor, they elect to refile that lesser charge *rather than exercise their undoubted statutory right to refile the felony.* Under such circumstances, prosecutors do not abuse, but actually promote, the statutory purposes." (*Traylor, supra*, 46 Cal.4th at p. 1209.)

Here we encounter the next antithesis in the dialectical process: attempted murder and conspiring to murder do not share identical elements, but permitting a refiling here *would* violate the policies supporting section 1387.

Conspiracy to commit murder requires an agreement to commit murder and an overt act by one or more of the parties in furtherance of the agreement. Our high court has specifically noted the distinction between conspiracy and attempt, stating, """As an inchoate crime, conspiracy fixes the point of legal intervention at [the time of] agreement to commit a crime," and "thus *reaches further back into preparatory conduct than attempt . . . .*""" (*People v. Morante* (1999) 20 Cal.4th 403, 417, italics added.) Attempted murder does not require any agreement. It "requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Lee* (2003) 31 Cal.4th 613, 623.) Thus the two charges do not share identical elements.[4]

The policy goals of section 1387, on the other hand, unlike the facts of *Traylor*, militate in favor of application of section 1387. "Section 1387 implements a series of related public policies. It curtails prosecutorial harassment by placing limits on

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[4] And although a conspiracy charge need not be pleaded, it cannot be said that the attempted murder charge impliedly set forth a conspiracy claim of conspiring to attempt murder. "This is because the targeted crime of the conspiracy, attempted murder, requires a specific intent to actually commit the murder, while the agreement underlying the conspiracy pleaded to contemplated no more than an ineffectual act. No one can simultaneously intend to do and not do the same act, here the actual commission of a murder. This inconsistency in required mental states makes the purported conspiracy to commit attempted murder a legal falsehood." (*People v. Iniguez* (2002) 96 Cal.App.4th 75, 77.)

the number of times charges may be refiled. [Citations.] The statute also reduces the possibility that prosecutors might use the power to dismiss and refile to forum shop. [Citations.] Finally, the statute prevents the evasion of speedy trial rights through the repeated dismissal and refiling of the same charges." (*Burris*, *supra*, 34 Cal.4th at p. 1018.) The refilings here were simply the result of the People failing to timely prepare to move forward. Thus they directly implicate defendant's right to a speedy trial. And while there is no evidence of intentional harassment here, the trial court's forceful questioning of the prosecutor raises legitimate concerns about the possibility of repeated filings if we only look at the elements of the crime.

Ultimately, however, we are bound by our Supreme Court. And while we believe the trial court has raised a legitimate concern, that concern is properly directed to our Supreme Court's narrow interpretation of the term "same offense." Also, though examining outcomes in light of policy goals may be a useful tool in interpreting otherwise ambiguous language (*Burris*, *supra*, 34 Cal.4th at pp. 1017-1018), there is nothing ambiguous about our high court's interpretation of "same offense," and we are not at liberty to deviate from that interpretation.

Defendants encourage us to apply a broader definition of "same offense" that would treat attempted murder and conspiring to murder as the same offense. They principally rely on *Wallace v. Municipal Court* (1983) 140 Cal.App.3d 100 (*Wallace*) and *Dunn v. Superior Court* (1984) 159 Cal.App.3d 1110 (*Dunn*), cases which defendants interpret as adopting a so-called "essence" test. Under defendants' proposed rationale, if the essence of the offense charged in the later filing is the same as the essence of the offense charged in the earlier filing, the latter filing is barred.

Wallace framed the issue before it as follows: "[S]ection 853.6, subdivision (e)(3), provides that the failure of the prosecutor to file the notice to appear or a formal complaint in the municipal or justice court within 25 days of the arrest shall bar prosecution of the misdemeanor charged in the notice to appear. The principal issue in this writ proceeding is whether, for the purposes of the bar of that section, the crime of driving under the influence of an alcoholic beverage or any drug in violation of Vehicle Code section 23152, subdivision (a), is the same offense as driving with a blood-alcohol level of 0.10 percent or more in violation of Vehicle Code section 23152, subdivision (b). We hold that it is not."[5] (*Wallace*, *supra*, 140 Cal.App.3d at pp. 102-103.) The *Wallace* court noted that it was applying the same concept as the "same offense" language used in section 1387. (*Wallace*, at p. 105.) In reaching its conclusion, the *Wallace* court stated, "The general rule . . . is that when the *essence* of the offense charged in a second action is the same as the essence of the offense in a previously dismissed action the second action will be barred." (*Id.* at p. 107, italics added.) Although *Wallace* did not define "essence," it went on to note that one can drive under the influence without having a blood-alcohol level of 0.10 percent or more, and vice versa, and thus the two are not the same offense. (*Id.* at p. 108.)

In *Dunn* the People first charged the defendant with, among other things, kidnapping (§ 207) and theft of an automobile (Veh. Code, § 10851). (*Dunn*, *supra*, 159 Cal.App.3d at p. 1113.) The People dismissed those charges and refiled charges of kidnapping for the purpose of robbery (§ 209) and robbery (§ 211). (*Dunn*, at p. 1114.) The magistrate did not hold those charges to answer. The district attorney then reinstated the charges in an information, and the defendant moved to dismiss under section 1387. (*Dunn*, at p. 1114.) The *Dunn* court held the third filing was barred. It mentioned the

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[5] At the time *Wallace* was decided, Vehicle Code section 23152, subdivision (b), prohibited driving with a blood-alcohol level of 0.10 percent or greater. That section was since amended to reflect 0.08 percent or greater.

"essence" test articulated in *Wallace* and stated, "Kidnapping for the purpose of robbery cannot be committed without committing the lesser offense of kidnapping. Two dismissals of kidnapping should bar a prosecution for kidnapping for the purpose of committing robbery on the theory that to charge the greater would be also to charge the lesser an additional and prohibited third time." (*Dunn*, at p. 1118.) With respect to the theft of an automobile and robbery charges, the court found they were in "essence" the same, stating, "Although every robbery does not include an auto theft, the concept of necessarily included offenses permits reference to the facts in the accusatory pleading. [Citation]. Here, the essence of the auto theft and robbery is the same since the robbery was specifically alleged to be the taking of the same automobile." (*Dunn*, at pp. 1118-1119.)

From these cases, Emmanuel contends "a court can properly consider the essence of the charges and the underlying criminal act, as well as whether the third refiling involves the same statutory offense," which Emmanuel goes on to describe as "[a] consideration of all the circumstances . . . ."

The problem is, *Traylor* extensively discussed *Dunn* and interpreted it as applying the same elements test. (*Traylor*, *supra*, 46 Cal.4th at pp. 1217-1218.) It interpreted *Dunn* as consistent with the same elements test because in *Dunn* the People initially charged lesser crimes, and the subsequent greater crimes contained all of the same elements as the earlier-charged crimes. (*Traylor*, at pp. 1217-1218.) Since the same elements test was satisfied, applying the bar of section 1387 was proper.

Further, the *Traylor* court expressly rejected the contention that "section 1387[, subdivision (a)] should apply to all charges arising from the *same conduct or behavior* of the defendant." (*Traylor*, *supra*, 46 Cal.4th at p. 1213, fn. 6.) Rather, the court held, "[A]n 'offense' is defined not by conduct, but by its particular definition as such in the Penal Code." (*Ibid.*)

Defendants' final argument is that a footnote in *Traylor* limits its scope. At the end of the opinion, the court added the following footnote: "As the reader will notice, we have carefully limited our holding to the situation in which an initial *felony* charge, having been dismissed by a magistrate on grounds that the evidence supports only a lesser included misdemeanor, is followed by the filing of a second complaint charging that *misdemeanor* offense. We do not here confront, and expressly do not decide, how section 1387[, subdivision (a)] should apply when dismissed felony charges are followed by one or more new complaints charging lesser included *felonies*, or when a dismissed *misdemeanor* charge is followed by a new complaint charging a lesser included *misdemeanor*." (*Traylor*, *supra*, 46 Cal.4th at p. 1220, fn. 10.)

In our view, this footnote does not significantly limit the application of *Traylor*. While the court's *holding* may have been narrow, the rationale it used to get there — that "same offense" means identical elements — is quite broad in its application. The examples the court gave of what it was *not* deciding (e.g. a felony followed by a refiled lesser included felony) are not at issue here. And in any event, given the court's rationale, we fail to see how a felony followed by a lesser included felony would have any different result than a felony followed by a lesser included misdemeanor.

We recognize the result we reach is counterintuitive, and generally not in keeping with the policies section 1387 is supposed to represent. However, our hands are tied. The muddled language of section 1387 has not stood the test of time, and our high court's struggle to interpret that language has resulted in a law with narrow protection. If that protection is to be broadened, it is up to the Legislature.

DISPOSITION

The judgment dismissing the case is reversed. The trial court is directed to reinstate the case.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

RYLAARSDAM, J.

Filed 7/9/14

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Appellant, v. GERARDO JUAREZ, Defendant and Respondent.	G049037 (Super. Ct. No. 12CF3528)
THE PEOPLE, Plaintiff and Appellant, v. EMMANUEL JUAREZ, Defendant and Respondent.	G049038 (Super. Ct. No. 12CF3528) O R D E R

Appellant has requested that our opinion, filed on June 30, 2014, be certified for publication. It appears that our opinion meets the standards set forth in California Rules of Court, rule 8.1105(c). The request is GRANTED.

The opinion is ordered published in the Official Reports.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

RYLAARSDAM, J.