S219889

COPY

Case No.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff and Appellant,

vs.

GERARDO JUAREZ AND EMMANUEL JUAREZ
Defendants and Respondents,

RESPONDENT GERARDO JUAREZ' PETITION FOR REVIEW

From the Published Opinion of the Court of Appeal
Fourth District, Division Three, No. G049037

Orange County Superior Court No.: 12CF3528
The Honorable Gregg L. Prickett, Judge, Dept. C-5

ORANGE COUNTY ALTERNATE DEFENDER'S OFFICE

FRANK DAVIS
Alternate Defender
ANTONY C. UFLAND
Senior Deputy Alternate Defender
EMAIL: Tony.Ufland@altdef.ocgov.com
State Bar No. 157620
600 W. Santa Ana Blvd, #600
Santa Ana, California 92701
Telephone: (714) 568-4160
Fax: (714) 568-4200
Attorneys for Respondent
GERARDO JUAREZ

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff/Appellant* vs. GERARDO JUAREZ, EMMANUEL JUAREZ *Defendants/Respondents.*	No.: **RESPONDENT GERARDO JUAREZ' PETITION FOR REVIEW** From the published opinion of the Court of Appeal, Fourth District, Division Three DCA No.: G049037 OC S. Ct. No.: 12CF3528

FRANK DAVIS
Alternate Defender
ANTONY C. UFLAND
Senior Deputy Alternate Defender
EMAIL:
Tony.Ufland@altdef.ocgov.com
State Bar No. 157620
600 W. Santa Ana Blvd, #600
Santa Ana, California 92701
Telephone: (714) 568-4160
Fax: (714) 568-4200
Attorneys for Respondent
GERARDO JUAREZ

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

California Supreme Court:

California Court of Appeal:

Statutes

Penal Code:

Other

Rules of Court:

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff/Appellant* vs. GERARDO JUAREZ, EMMANUEL JUAREZ *Defendants/Respondents.*	No.: **RESPONDENT GERARDO JUAREZ' PETITION FOR REVIEW** From the published opinion of the Court of Appeal, Fourth District, Division Three DCA No.: G049037 OC S. Ct. No.: 12CF3528

TO: THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT

Respondent, Gerardo Juarez, pursuant to California Rules of Court 8.500 and 8.516, hereby petitions this honorable court for review to consider the published opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division Three, filed on June 30, 2014 and ordered published on July 9, 2014. The opinion reversed the

Orange County Superior Court's July 25, 2013 order, which granted Respondent's Petition for a Writ of Mandate/Prohibition, and holds that Penal Code section 1387 bar against third filings for the "same offense" only applies to repeated filings for violations of the exact same code sections. A true copy of the court's opinion is attached hereto as "Appendix A". A true copy of the July 9, 2014 Order Certifying the Opinion for Publication is attached hereto as "Appendix B".

A Petition for Rehearing was not filed in the Court of Appeal. (California Rules of Court 8.504(b)(3))

Co-respondent Emmanuel Juarez filed a Petition for Review in this consolidated appeal on August 11, 2014 under California Supreme Court case number S219889.

I. ISSUE PRESENTED FOR REVIEW

Does Penal Code[1] section 1387's prohibition on a third, successive felony prosecution for the "same offense" operate to bar a third prosecution of a defendant for precisely the same conduct at issue in two previously dismissed cases where no statutory exception applies, but where the prosecutor has elected to charge the exact same conduct under a different Penal Code section?

[1] All subsequent references to code sections are the California Penal Code, unless otherwise indicated.

II. REASONS WHY REVIEW SHOULD BE GRANTED

Respondent requests that this court grant review to settle an important issue of state wide import, with far reaching impact, which was expressly left unsettled by this Court in *People v. Traylor* (2009) 46 Cal.4th 1205, 96 Cal.Rptr.3d 277, and to settle a discrepancy between precedent established by the First District Court of Appeal, Division Four, in *Dunn v. Superior Court* (1984) 159 Cal.App.3d 1110, one hand, and the opinion issued by the Court of Appeal in this matter on the other.

Respondent was charged in two successive criminal informations with violations of section 664-187, subdivision (a), premeditated attempted murder for the same conduct which allegedly occurred on June 3, 2011. Each of those informations was dismissed prior to trial due to the prosecution's inability to proceed. After the second information was dismissed on December 10, 2012, the prosecution immediately filed a *third* case, regarding the exact same conduct, but this time charging the conduct as violations of section 182/187, conspiracy to commit murder, arguing that this was not a "third" filing, but rather a "new" filing.

If the Court of Appeal's opinion is allowed to stand, Respondent will face a third successive felony prosecution for his alleged conduct on June 3, 2011, despite the fact that the Court of Appeal recognized that such a prosecution would be "counterintuitive" and would be "generally not in

keeping with policies that section 1387 is supposed to represent". (DCA Op. at p. 10)

This Court is currently examining this exact issue in *Barbosa v. Superior Court (People)*, S219615.

III. STATEMENT OF THE CASES

11NF1767

On November 21, 2011 respondent and his brother, co-respondent Emmanuel Juarez, were charged in case 11NF1767 with, *inter alia*, violations of section 664/187(a), premeditated and deliberate attempted murder (counts 1, 2). (1CT 90-92.)[2] All charges arose out of a single incident allegedly occurring on June 3, 2011. On July 16, 2012 the prosecution dismissed the case. (1CT 15; 2CT 261.)

12NF0057

On July 16, 2012, respondent and his brother, co-respondent Emmanuel Juarez, were again charged, this time in case 12NF0057 with, *inter alia*, violations of section 664/187(a), premeditated and deliberate attempted murder. These charges arose out of the same alleged June 3, 2011 incident that formed the basis of the charging document in case 11NF1767. (1CT 94-98.) An information alleging the same attempted

[2] "CT" refers to the Clerk's Transcript in case no. G049037. "RT" refers to the Reporter's Transcript in case no. G049037.

murder charges was filed on July 30, 2012. (1CT 99-102.) On December 10, 2012, this case was dismissed because the prosecution was not prepared. (1CT 103-104; 2CT 133.)

12CF3528

On December 10, 2012, based on the same June 3, 2011 incident that formed the basis of the charges in cases 11NF1767 and 12NF0057, the prosecution filed a third case against respondents in case number 12CF3528. However, in an attempt to avoid the two dismissal rule of section 1387, the prosecution charged respondents with conspiracy to commit murder, violations of section 182/187(a). (1CT 109-112; 2CT 250-253.)

On December 13, 2012 co-respondent Emmanuel Juarez filed a Notice of Motion and Motion to Dismiss case number 12CF3528 pursuant to section 1387. On December 24, 2012 respondent filed a Notice of Joinder in co-respondent Emmanuel Juarez' Motion to Dismiss. 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 14, 2013, respondent filed a petition for a writ of mandate/prohibition in the superior court seeking review of the denial of the section 1387 dismissal motion. On July 25, 2013, the petition was granted and case 12CF3528 was dismissed. (2CT 305-306; RT 34-36.)

On September 19, 2013 the prosecution timely filed a notice of appeal. (2CT 349-350.) On January 2, 2014 the Court of Appeal consolidated the prosecution's appeal of respondent's case with the prosecution's identical appeal of co-respondent Emmanuel Juarez' case.

On June 30, 2014 the Court of Appeal reversed the judgment of the Orange County Superior Court, and on July 9, 2014 the Court of Appeal ordered the opinion published.

On August 11, 2014 a Petition for Review of the Court of Appeal's opinion was filed on behalf of co-respondent Emmanuel Juarez under California Supreme Court case number S219889.

IV. STATEMENT OF FACTS

Respondent Gerardo Juarez hereby incorporates by reference the brief statement of facts offered by co-respondent Emmanuel Juarez in his Petition for Review of this consolidated appeal, filed on August 11, 2014, in California Supreme Court case number S219889.

V. ARGUMENT

A. THE SUPERIOR COURT PROPERLY DISMISSED SUPERIOR COURT CASE 12CF3528, THE THIRD FILING AGAINST RESPONDENT.

Penal Code section 1387, subdivision (a), provides, in material part that:

> "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, except in those felony cases, or those cases where a misdemeanor is charged with a felony, where subsequent to the dismissal of the felony or misdemeanor the judge or magistrate finds any of the following...".

The term "same offense" has been interpreted not in a strict or technical manner, but rather broadly to effectuate the policies behind section 1387. Courts have frowned upon transparent attempts to evade the rule of section 1387 by creative recasting of charges despite no newly discovered facts.

Dunn

In *Dunn v. Superior Court* (1984) 159 Cal.App.3d 1110, the prosecution first filed a complaint charging the defendant with simple kidnapping (§ 207), assault with intent to commit rape (§ 220) and unlawful auto taking (Vehicle Code (VC) § 10851). The defendant was held to answer to all of the charges following the preliminary examination. The prosecution thereafter filed an information containing only kidnapping and assault charges, effectively dismissing the vehicle theft charge. On the morning set for trial, the prosecution obtained a dismissal of the information. They then refiled a second complaint with respect to the same incident, charging the defendant with kidnapping for robbery (§ 209), robbery (§ 211, with the object property being the car that was the subject of the VC § 10851), receiving stolen property (§ 496), and accessory to kidnapping, robbery and theft (§ 32). After a preliminary hearing the magistrate dismissed all of the charges except the violation of section 32, finding an insufficiency of evidence as to the kidnapping or robbery. When the prosecutor filed an information that included the dismissed counts the defendant moved under section 1387 to dismiss the kidnapping, robbery and receiving counts. The trial Court denied the defendant's section 1387 motion, however the Court of Appeal ultimately granted Dunn's petition

for a writ of mandate and ordered dismissal of the kidnapping and robbery counts. (*Dunn*, supra at p. 1119)

Dunn specifically stated, "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." (*Dunn*, supra, at pp. 1117-1118, emphasis added)

In determining the meaning of "same offense" *Dunn* discussed *Wallace v. Municipal Court* (1983) 140 Cal.App.3d 100, which stated that

> "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." (*Wallace,* supra, at p. 107)

While the *Wallace* case did not give a further definition of "essence", the *Dunn* Court found that kidnapping (§ 207) and kidnapping for robbery (§ 209(b)) were obviously of the same "essence". More importantly, the Court found that auto theft (VC § 10851) and robbery (§ 211), in the circumstances of that case, were of the same "essence" ["the "auto theft and robbery is the same since the robbery was specifically alleged to be the taking of the same automobile" (*Dunn*, supra, at pp. 1118-1119)].

The "conspiracy to commit murder" charges in 12CF3528 herein are the same "essence" as the previously twice dismissed "attempted murder" charges as they involved the same victims, the same specific intent, and the exact same actions/evidence that supported the attempted murder prosecutions.

Just as in *Dunn*, Respondent was held to answer as charged at his original preliminary hearing (Case 11NF1767), but the prosecution ultimately moved to dismiss the resulting information when faced with a speedy trial problem. Just as in *Dunn*, the prosecution here refiled a second complaint with respect to the same criminal incident with materially overlapping (§ 245(b)) and identical (§ 664(a)-187(a)) charges. Again, the prosecution ultimately dismissed their second information (Case 12NF0057) when faced with a speedy trial problem.

The *Dunn* court's final thoughts before ruling that the disputed charges must be dismissed went to the purposes of section 1387:

> "[T]he purpose of section 1387 is to prevent the prosecution from harassing defendants with successive prosecutions (*Lee v. Superior Court* (1983) 142 Cal.App.3d 637, 640) and, in part, to pressure the prosecution to bring the case to trial within the time limits of section 1382 (*Alex T. v. Superior Court* (1977) 72 Cal.App.3d 24, 30)." (*Dunn*, supra, at p. 1119.)

The court immediately went on to observe that Mr. Dunn had been twice subjected to preliminary hearings for taking a car, and each prosecution had ended in dismissal, so further prosecution was barred under section 1387. (*Id.*)

Although the *Dunn* court ruled that finding a charge of a necessarily included offense is sufficient to render that charge the "same offense" under section 1387, the court also ruled that a prior dismissal of a vehicle taking/driving (VC § 10851) charge was also considered the "same offense" under section 1387 as a later allegation of robbery (§ 211). The property alleged stolen in the robbery charge was the same vehicle as had been driven without permission of the owner in the vehicle taking charge. Clearly, if the analysis was limited to "lesser included" analysis the car taking-related charge in *Dunn* could not have been barred, as each dismissed crime includes elements not included in the other.

Dunn specifically stated, "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." (*Dunn*, supra, at pp. 1117-1118)

Traylor

Reliance on *People v Traylor* (2009) 46 Cal.4th 1205, to suggest that section 1387 ***only*** bars third prosecutions for the same code sections is erroneous. Penal Code section 1387 addresses bars to refilings in various situations. *Traylor* was a case where a magistrate dismissed a felony charge of gross vehicular manslaughter (§§ 192(c) (1)/193(c) (1)) following a preliminary examination and stated that there was insufficient evidence to support the gross negligence vehicular manslaughter, but there was sufficient evidence of a misdemeanor negligent vehicular manslaughter charge (§ 192(c) (2)). However, that charge was not included in the prosecution's charging document. The magistrate therefore ordered the prosecution to file a misdemeanor complaint alleging that charge. (*Traylor*, supra, at pp. 1210-1211)

It is important to note at the outset that *Traylor* is a case dealing with section 1387's ban on the refiling of misdemeanors. It had nothing to do with section 1387's ban on the refiling of twice dismissed felony offenses.

Traylor never indicated that section 1387 only bars the third filing, or re-filing, where the subsequently charged offenses contained the exact same elements. The fact that the subsequently filed section 192(c)(2) violation, in *Traylor*, did not contain exactly the same elements as the dismissed felony violation of section 192(c)(1) was only one factor in

determining that the refiling did not involve the "same offense". *Traylor* also stated that:

> "A primary purpose of section 1387(a) is to protect a defendant against harassment, and the denial of speedy-trial rights, that result 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." (*Traylor*, supra, at p. 1209)

Specific to the charges contained in that case, the *Traylor* Court noted that

> "[§ 1387] 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." (*Id.*)

In Respondent's case, the prosecution filed different (§ 182/187(a)) charges in the third filing specifically because they did not have a "statutory right" to file the previously twice dismissed section 664-187(a) charges.

> *Traylor's* holding was also very limited, as the Court stated, "Under these circumstances, we conclude, the filing and dismissal of the originally charged felony, followed in immediate succession by the filing of a lesser misdemeanor charge that lacked elements essential to the felony, did not constitute successive filings 'for the same offense.'" (*Id.*)

While *Traylor* ultimately ruled that the purposes behind section 1387 would not be served by dismissal in that case, the opinion discussed *Dunn*, supra, and in particular, the *Dunn* court's exploration of *Wallace v. Municipal Court* (1983) 140 Cal. App. 3d 100 (*Wallace*). (*Traylor*, supra, at pg. 1216.) *Traylor* explained that *Dunn* had recognized that a simple "same statute" analysis was insufficient for section 1387 and:

> "[f]or guidance about how much further the prohibition might go, the court turned to Wallace [citation], a case that had construed a somewhat analogous statute, the 1981 version of section 853.6, subdivision (e)(3)." (Id.)

Finally, a close reading of *Traylor* reveals that it does not expressly support the Court of Appeal's extremely narrow definition of "same offense". The Court of Appeal in the present case held that *Traylor* announced a bright-line rule that "[T]wo charged offenses are the 'same offense' ***only*** if they include 'identical elements". (Op. at p. 5, emphasis added, citing *Traylor,* supra, at p. 1208) *Traylor* did not actually go so far. At page 1208, *Traylor* stated that, "on the facts presented here" the filings were not for the "same offense", and that finding was based on "several grounds". (*Id.*) One of those grounds was the fact that the two offense did not contain identical elements. (*Id.*) *Traylor* went on to explain that "when two crimes have the same elements, they are the same offense for purposes

of...section 1387."(*Id.*, citing *Burris v. Superior Court* (2005) 34 Cal.4th 1012) *Traylor* did not state that identical elements is ***the only*** test.

Furthermore, *Traylor* discussed at length, with apparent approval, the *Dunn* case which held that charges with different elements (§207 and §209; and more importantly §211 and VC §10851) ***were*** the "same offense" for purposes of section 1387. The *Traylor* opinion merely distinguished *Dunn*, for the same reasons that this Court would likely distinguish the present case from *Traylor*.

After explaining the procedural history of the *Dunn* case, this Court stated:

> "At the outset, we note that neither *Dunn*, nor the decision on which it primarily relied, *Wallace*, involved a situation in which a successive charge was a *lesser included misdemeanor offense* of one or more previously dismissed felony charges. Indeed, *Dunn* presented *exactly the converse problem*, i.e. *greater* felony offenses charged *after* prior dismissals of *lesser included* offenses." (*Traylor*, supra, at p. 1217, emphasis original)

Salcido

Finally, in *People v. Salcido* (2008) 166 Cal. App. 4th 1303, the defendant, a state prison inmate, struck a corrections officer with a six-foot long board. The battery caused a two-inch laceration which required six stitches. Mr. Salcido was first charged, by complaint, with battery by a prisoner on a non-confined person (§ 4501.5). When that complaint was dismissed Mr. Salcido was charged in a second filing with the same section 4501.5 as well as an assault by a prisoner with a deadly weapon or by means likely to cause great bodily injury (§ 4501). That filing was also dismissed, and the prosecution filed on Mr. Salcido a third time, again charging the section 4501 and section 4501.5 offenses, but ultimately adding an allegation that Mr. Salcido inflicted great bodily injury during the commission of the aforementioned offenses (§ 12022.7). All of the filings were based on the same incident.

The *Salcido* opinion perfectly explained the critical policy considerations that underscore section 1387 and that are directly implicated by the prosecution's attempts to repeatedly charge Respondent for the same offense. These policies that are intended to be implemented by the statute are of critical importance when analyzing statutes like section 1387, which the California Supreme Court has described as "hardly pellucid". (*Traylor*, supra, at pg. 1212, citing *Burris*, supra, at pg. 1018)

The *Salcido* Court also discussed the fact that the filing of a different charge in the third charging document was not based on some new evidence, and was based entirely on the same evidence that twice before been used to support the section 4501.5 charges, and that:

> "Had the People believed Salcido's conduct on June 15, 2000, was appropriate for a section 12022.7, subdivision (a), allegation, they should have included that allegation in their prior accusatory pleadings. (Cf. *People v. Mancebo* (2002) 27 Cal.4th 735, 749 [prosecution's failure to allege an enhancement was a discretionary charging decision, resulting in waiver of that enhancement].) The People cannot now add that allegation in a third filing of an accusatory pleading to avoid the two-dismissal rule." (*Salcido*, supra, at pp. 1313-1314)

Salcido essentially held that the if the prosecution had been aware that the conduct supported a section 12022.7(a) allegation, which was used in the third filing, they should have included it in the earlier filings, and that the failure to do so was a discretionary charging decision which constituted a "waiver" of their ability to charge it in the third filing.

Applied to the present case, the charges contained in the third filing, section 182/187(a) violations, are based on the exact same conduct that gave rise to the charges alleged in the first two filings, which were alleged as violations of section 664-187(a). If those facts gave rise to charges of section 182/187(a) from the outset, the prosecution should have included those charges in their previous accusatory pleadings. The failure to do so is

a discretionary filing decision, which now constitutes a "waiver" of their ability to file the charges in a third complaint.

Whatever else it addressed, *Salcido* very accurately discussed the public policies that section 1387 was intended to implement. It does not matter that the case itself was primarily an analysis of section 1387.1.

B. THE POLICIES UNDERLYING THE TWO DISMISSAL RULE IN SECTION 1387 WOULD BE SERVED BY ENFORCEMENT OF THE RULE TO BAR PROSECUTION OF THE CHARGES IN THE THIRD COMPLAINT, AND THOSE POLICIES WOULD BE DISSERVED AND UNDERMINED IF THIS COMPLAINT WAS ALLOWED TO BE RE-INSTATED.

Section 1387 is firmly rooted in public policy considerations. It specifically implements a series of related public policies and enforces the rules and the will of the legislature.

In reversing the trial court and dismissing the section 4501 charge, the *Salcido* Court was unimpressed by the court below's acceptance of the People's efforts to evade the reach of section 1387 by amending to allege a violent felony. While citing *Dunn*, the *Salcido* court put no focus on the fact that the charge on which Salcido was convicted (§ 4501) was neither a twice dismissed charge nor in a lesser included category with respect to such a charge. *Salcido* focused instead on the fact that the conduct at issue

was the same, no new facts were discovered allowing a legitimate and material adjustment of the charges (cf., *Burris v. Superior Court* (2005) 34 Cal.4th 1012), the policies promoted by section 1387, and the opportunity for evasion of section 1387 by the People if cases such as this were permitted to stand. Interestingly, while the Court of Appeal in the present case stated that legitimate concerns regarding repeated filings were raised by the trial court, they were bound by the Supreme Court, and those concerns were properly directed to the Supreme Court's narrow interpretation of the term "same offense". (DCA Op. at p. 7)

The *Salcido* court devoted an entire page of their discussion to the purposes and public policies behind section 1387, and ultimately rejected the People's attempt to evade the two dismissal rule by (just like in the present case) filing a different but related charge. While the trial court had accepted these maneuvers, the *Salcido* Court of Appeals rejected them and concluded that section 1387's bar must be enforced in this situation to ensure fairness-related public policies:

> "'Section 1387 implements a series of related public policies. It curtails prosecutorial harassment by placing limits on 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. [Citations.]' (*Burris v. Superior Court* [(2005)] 34 Cal.4th at p. 1018.) 'The purpose of section 1387 is to prevent improper successive attempts to prosecute a defendant.' (People v. Cossio (1977) 76 Cal.App.3d 369, 372.)"(*People v. Salcido,* supra, at p. 1309 [other citations omitted in original].)

Even the *Traylor* Court explained the circumstances of that case below and the appropriate and non-manipulative charging decisions below, concluding that the purposes of section 1387 would not be served by its application to that case in those circumstances, and for this reason, the *Traylor* court refused to grant the defendant relief under section 1387. The People had filed and gone to preliminary hearing on a felony, but the magistrate had found that only the lesser included misdemeanor was proved up and not the felony as charged. Mr. Traylor complained that the People filed the misdemeanor that the judge had found righteous, rather than taking another run at the felony and then perhaps seeking to reduce it to a misdemeanor. (*People v. Traylor*, supra, at pp. 1208-1209.) Not surprisingly, the Court found this proper and not subject to dismissal under section 1387.

The contrast is obvious between the absolutely clean hands of the prosecutor in *Traylor* (whose only offense was doing what the independent magistrate expressly told him was fair, and did not manipulate charges to try to preserve the right to prosecute) verses *Dunn* (where the prosecutor

tried to churn the charges to different permutations to evade section 1387) or *Salcido* (where the prosecutor tried to add additional allegations to evade section1387 by availing himself of section 1387.1) or this case (where the prosecutor delayed the proceedings until dismissed in lieu of violating section 1382 and untimely Brady compliance, then actually violated section 1382 to accommodate a police witness, then recast the same crimes under an alternative code section). The prosecution's attempt to recast the exact same inchoate crime under a new code section for a parallel inchoate crime cannot be permitted to evade the public policy considerations underlying section 1387's two-dismissal rule.

Virtually every case that discusses section 1387 stresses the importance of considering the "human intent" behind the section and not relying simply on "grammatical arguments". The Court of Appeal's decision in the present case does exactly the opposite; it relies, at best, on a purely grammatical argument and completely ignores the human intent that underlies the statute.

C. DISMISSAL OF SUPERIOR COURT CASE 12CF3528 WAS REQUIRED BECAUSE THE CONSPIRACY TO COMMIT MURDER CHARGES CONTAINED THEREIN WERE "NECESSARILY INCLUDED OFFENSES" OF THE TWICE DISMISSED ATTEMPTED MURDER CHARGES.

Dunn, supra, held that two dismissals of kidnapping charges should also bar a prosecution for kidnapping for the purpose of robbery on the theory that to charge the greater would be also to charge the lesser an additional and prohibited third time. (*Dunn, supra*, at p. 1118) In the present case, dismissal of the conspiracy to commit murder (§ 182/187) was proper because it was a necessarily included, and greater, offense to the previously dismissed charges of attempted murder (§ 664-187).

There are two tests to determine if an offense is necessarily included in another. The first test is if the greater offense cannot be committed without committing the lesser because all of the elements of the lesser offense are included in all the elements of the of the greater[3], and the second test is whether the charging allegations of the accusatory pleading include language describing it in such a way that if committed in that manner the lesser offense must necessarily be committed.[4] (*People v. Clark* (1990) 50 Cal.3d 583; *People v. Barrick* (1982) 33 Cal.3d 115; *People v. Cannady* (1972) 8 Cal.3d 379) A lesser offense is necessarily included in a

[3] The "elements test".
[4] The "accusatory pleadings test".

greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser. (*People v. Birks* (1998) 19 Cal.4th 108, 117)

The complaint in case 12CF3528, the third filing at issue herein, charges Respondents with two counts of conspiracy to commit murder (Counts One and Two). The overt acts listed for Count One were pled as follows:

> Overt Act 1: In Orange County on June 3, 2011, Gerardo Juarez and Emmanuel Juarez obtain a loaded handgun.
>
> Overt Act 2: In Orange County on June 3, 2011, Gerardo Juarez and Emmanuel Juarez wait for John Doe by John Doe's car.
>
> Overt Act 3: In Orange County on June 3, 2011, Gerardo Juarez gives a loaded handgun to his brother Emmanuel Juarez.
>
> Overt Act 4: IN Orange County on June 3, 2011, Emmanuel Juarez takes the loaded handgun from his brother Gerardo Juarez.
>
> Overt Act 5: In Orange County on June 3, 2011, Emmanuel Juarez uses the handgun to shoot John Doe in the chest. (1CT 1-4; 2CT 246-249)

The overt acts listed for Count Two were pled as follows:

> Overt Act 1: In Orange County on June 3, 2011, Emmanuel Juarez gives a loaded handgun to his brother Gerardo Juarez.
>
> Overt Act 2: In Orange County on June 3, 2011, Gerardo Juarez takes the loaded handgun from his brother Emmanuel Juarez.
>
> Overt Act 3: In Orange County on June 3, 2011, Gerardo Juarez exits from a car driven by Emmanuel Juarez.

Overt Act 4: In Orange County on June 3, 2011, Gerardo Juarez uses the handgun to shoot Jane Doe. (1CT 1-4; 2CT 246-249)

The pleadings by the prosecution in case 12CF3528 describe the conspiracy to commit murder offenses in such a way that if they were committed in the manner described, the twice dismissed, lesser offenses of attempted murder would necessarily also have been committed.

Attempted murder (§ 664-187) requires (1) the specific intent to commit murder, and (2) a direct but ineffectual act done towards its commission. (CALCRIM 600)

Under the accusatory pleadings test, the conspiracy to commit murder charges contained in 12CF3528 would have been necessarily included offenses to the attempted murder offenses contained in cases 11NF1767 and 12NF0057. Under the holding of *Dunn*, which was reiterated by *Traylor* when the Supreme Court distinguished *Dunn*, filing of the greater included offenses in 12CF3528 violated section 1387's two dismissal rule.

Review of the cases cited above leads to the inescapable conclusion that section 1387's ban on third filings must also apply, at a minimum to "new" charges that are "necessarily included" offenses. The Court of Appeal's opinion does not address this argument at all as it applies to the defendants herein.

Even *Traylor* suggested that when one or more dismissed charges of a lesser offense are followed by a new charge of *the same or a greater inclusive offense*, the subsequent charge includes all the same elements as the earlier ones. (*Traylor*, supra, at p. 1218)

VI. CONCLUSION

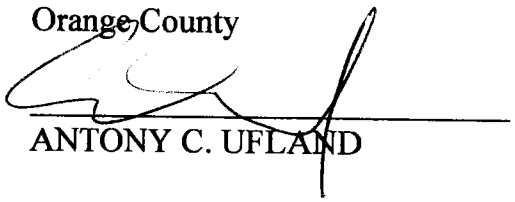
In its *Traylor* opinion, this Court expressly stated "we have carefully limited our holding to the situation in which an initial *felony* charge, having been dismissed by a magistrate on grounds that the evidence supports only a lesser included misdemeanor, is followed by the filing of a second complaint 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*...". (*Traylor,* supra, at fn. 10)

The present case represent the very question that *Traylor* expressly left open. If the Court is to give meaning to the public policies that underlie section 1387, and not simply rely on "grammatical arguments", then it must find that the charges in the third filing in the present case were

for the "same offense" as those contained in the first two filed and dismissed cases. For the reasons stated above, review is warranted.

Dated: August 13, 2014

Respectfully submitted
FRANK DAVIS
Alternate Defender
Orange County



ANTONY C. UFLAND

Senior Deputy Alternate Defender
Attorneys for Petitioner
Gerardo Juarez

APPENDIX A
(Court of Appeal Published Opinion)

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.

* * *

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

---

1 All statutory references are to the Penal Code unless otherwise stated.

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

---

3 During oral argument in the trial court, defense counsel claimed that the People dismissed the first time because they had not produced 800 pages of mandatory discovery at the time of trial.

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

---

[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

---

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.

APPENDIX B
(Court of Appeal Order Certifying the Opinion for Publication)

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 and EMMANUEL JUAREZ,

Defendants and Respondents.

G049037 (consol. with 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.

CERTIFICATE OF WORD COUNT

[California Rules of Court, Rule 28.1(e) (1)]

I certify that the text of Petitioner's Petition for Review consists of 5,294 words as counted by "Word", the word-processing program used to generate it.

Dated this 13th day of August, 2014

ANTONY C. UFLAND
Senior Deputy Alternate Defender

DECLARATION OF SERVICE

The People v. Gerardo Juarez
(Case No. G049037; O.C.S.Ct. No. 12CF3528)

STATE OF CALIFORNIA)
) ss
COUNTY OF ORANGE)

Antony Ufland, declares that he is a citizen of the United States, a resident of Orange County, over the age of 18 years, not a party to the above-entitled action and has a business address at 600 West Santa Ana Blvd, #600, Santa Ana, CA 92701.

That on the 13th day of August, 2014, I served a copy of the Petition for Review in the above-entitled action by depositing a copy thereof in a sealed envelope, postage thereon fully prepaid, in the United States Mail at Santa Ana, California. Said envelope was addressed as follows:

ATTORNEY GENERAL
State of California
P.O. Box 85266
San Diego, CA 92186-5266

CLERK OF THE COURT
COURT OF APPEAL
Fourth Appellate District, Div. 3
601 W. Santa Ana Blvd.
Santa Ana, CA 92701

TONY RACKAUCKAS
DISTRICT ATTORNEY
401 Civic Center Dr.
Santa Ana, CA 92701
Attn: Law & Motion

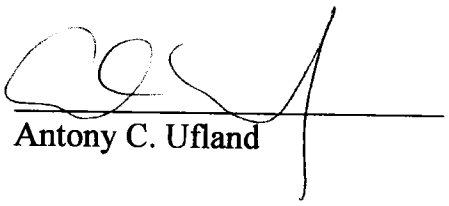
DEPUTY COUNTY CLERK
Attn: Hon. Gregg L. Prickett
Orange County Superior Court
Dept. C5
700 Civic Center Drive West
Santa Ana, CA 92701

GERARDO JUAREZ
1521 E. Harding St.
Long Beach, CA 90805

JOHN F. SCHUCK
Law Office of John Schuck
885 N. San Antonio Rd. Ste A
Los Altos, CA 94022

APPELLATE DEFENDERS, INC
555 W. Beech St., Ste 300
San Diego, CA 92101

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 13th day of August, 2014, at Santa Ana, California.



Antony C. Ufland