Case No. 219889

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' OPENING BRIEF ON THE MERITS

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

Case No. 219889

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' OPENING BRIEF ON THE MERITS

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

California Supreme Court:

California Court of Appeal:

Statutes

Penal Code:

Other

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.: S219889 **DEFENDANT/RESPONDENT GERARDO JUAREZ' OPENING BRIEF ON THE MERITS** From the published opinion of the Court of Appeal, Fourth District, Division Three DCA No.: G049037/G049038 OC S. Ct. No.: 12CF3528

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

ISSUE PRESENTED

Does California 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?

STATEMENT OF THE CASES

11NF1767

On November 21, 2011 defendant/respondent Gerardo Juarez, hereinafter "Gerardo", and his brother co-defendant/respondent Emmanuel Juarez, hereinafter "Emmanuel", were charged in Orange County Superior Case 11NF1767 with, *inter alia*, violations of section 664/187(a), premeditated and deliberate attempted murder (Counts One and Two). (1CT 90-92.)[2] All charges in this case arose out of a single incident which occurred on June 3, 2011. On July 16, 2012 the prosecution dismissed this case. (1CT 15; 2CT 254.)

[1] All subsequent references to code sections are to the California Penal Code, unless otherwise indicated.
[2] "CT" refers to the Clerk's Transcript in Court of Appeal case G049037.

12NF0057

On July 16, 2012, Gerardo and Emmanuel were again charged, this time in Orange County Superior Court 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 94-97.) An Information alleging the same attempted 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 to proceed to trial. (1CT 104-107; 2CT 136.)

12CF3528

On December 10, 2012, based on the same June 3, 2011 incident that formed the basis of the charges in cases 11NF1767 and 12 NF0057, the prosecution filed a third case against Gerardo and Emmanuel Juarez in Orange County Superior Court case 12CF3528. However, in an attempt to avoid the two dismissal rule of section 1387, the prosecution charged Gerardo and Emmanuel with conspiracy to commit murder, violations of sections 182/187(a). (1CT 109-112; 2 CT 246-248.)

On January 10, 2013 a jointly filed Motion to Dismiss case 12CF3528 as a violation of section 1387 was denied by a Superior Court magistrate. On February 14, 2013, Gerardo 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. (2 CT 311-312.)

On September 19, 2013 the prosecution timely filed a notice of appeal. (2 CT 366-367.) On January 2, 2014 the Court of Appeal consolidated the prosecution's appeal of Gerardo's case with the prosecution's identical appeal of Emmanuel's 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 Emmanuel Juarez, and on August 18, 2014 a similar Petition for Review was filed on behalf of Gerardo Juarez.

This Court granted the Juarez' Petitions for Review on September 10, 2014.

STATEMENT OF FACTS

The following is a brief statement of the facts that were used by the prosecution to support all three of the afore-mentioned cases:

At approximately 5:00 pm on June 3, 2011 Jane Doe and John Doe were driving thru the alley of their apartment complex when John Doe when they passed a Jeep Cherokee driven by Emmanuel Juarez. (1 CT 40; RT[3] 8.) Emmanuel and John Doe exited their vehicles and had a brief conversation. (1 CT 40-41; RT 9.)

At approximately 8:45 pm that same day John and Jane Doe were exiting the complex when Emmanuel was in the alley with another person identified as Gerardo Juarez. (1 CT 43-44; RT 12.) Emmanuel Juarez and John Doe got into a fistfight, with John Doe saying "Let's get down". (1 CT 44; RT 12.) Jane Doe stood next to Gerardo Juarez while Emmanuel and John Doe fought. Gerardo was holding a plastic bag that Emmanuel had handed to him. (1 CT 44-45; RT 12-13.)

Jane Doe told Gerardo that the two men should not be fighting, and Gerardo agreed with her. Gerardo then handed Emmanuel a handgun. Emmanuel then shot John Doe one time. (1 CT 46; RT 14.) Jane Doe ran through the alley to the front gate, which was locked. (1 CT 46-47; RT 14-15.)

[3] "RT" refers to the Reporter's Transcript of the preliminary examination associated with case 11NF1767.

When Jane Doe reached the gate the Jeep Cherokee approached the gate and Gerardo told her to open the gate. When she told him that she was not able to, Emmanuel Juarez got out of the Jeep and lifted the gate open. (1 CT 46-47; RT 14-15.) After that, Gerardo fired one shot in Jane Doe's direction. (1 CT 48; RT 16.) Jane Doe did not receive any wounds or injuries. (1 CT 58; RT 26.)

ARGUMENT

PENAL CODE SECTION 1387'S PROHIBITION ON A THIRD FELONY PROSECUTION FOR THE "SAME OFFENSE" BARS A THIRD PROSECUTION OF A DEFENDANT FOR PRECISELY THE SAME CONDUCT AT ISSUE IN THE TWO PREVIOUSLY DISMISSED CASES, WHERE NO STATUTORY EXCEPTION APPLIES, BUT WHERE THE PROSECUTOR HAS ELECTED TO CHARGE THE SAME CONDUCT UNDER A DIFFERENT PENAL CODE SECTION.

I.

PENAL CODE SECTION 1387(a)

Penal Code section 1387, subdivision (a), known as California's "Two Dismissal" Rule, 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 Rule was first codified in section 1387 when the California Penal Code was adopted in 1872, and read:

> An order for the dismissal of the action, as provided in this chapter, is a bar to any other prosecution for the same offense, if it is a misdemeanor; but it is not a bar if the offense is a felony. (Stats. 1872, ch. 278, sec. 1387, p. 382.)

Section 1387 was first made applicable to felonies in 1975, when the statute was amended to read:

> An order for the dismissal of 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 dismissed pursuant to this chapter, or if it is a misdemeanor; except in those felony cases where subsequent to the dismissal of the felony the court finds that substantial new evidence has been discovered by the prosecution which would not have been known through the exercise of due diligence at or prior to the time of dismissal. (Stats. 1975, ch. 1069, sec. 1.)

The present case calls upon this Court to give guidance in the situation where the same felony ***code sections*** are charged and dismissed twice, and then, in the third filing regarding the same factual scenario, different code sections are selected by the prosecutor, specifically because the original code sections are no longer available to the prosecution. The

Court is asked to determine the meaning of the two words, "same offense" in this particular situation.

Based on this Court's opinion in *People v. Traylor*, (2009) 46 Cal.4th 1205, which involved a completely different situation and was expressly limited to its particular procedural history, the prosecution herein asks the Court to announce a severely limiting rule. The prosecution erroneously suggests that "same offense" only applies to the re-filing of identical code sections, or code sections with identical elements. As this case makes obvious, and as the Court of Appeal below recognized, such a rule is counterintuitive, and violates the strong public policies that section 1387 was intended to protect.

In contrast, defendant Gerardo Juarez urges the Court to give meaning to the policies that section 1387 is intended to represent and hold that the words "same offense" bar the filing of a third felony complaint where the "essence" of the charges in the third complaint is the same as the essence of the charges that were dismissed in two previous felony complaints. Gerardo Juarez asks the Court to hold that, where the exact same facts and intent are required to prove the charges contained in the third filing document as were required to prove the charges in the first two complaints, the prosecution my not purposely avoid section 1387's bar by simply charging a different code section.

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

Division One of the Second Appellate District Court of Appeal probably summed the statute up best by holding that "Read together, these statutes [sections 1382, 1384, 1387 and 1387.2] mean that a felony case once dismissed for delay can be refiled, but (subject to certain exceptions) a felony case ***twice dismissed for delay cannot. In short, a third or subsequent prosecution is barred.***" (*Paredes v. Superior Court* (1999) 77 Cal.App.4th 24, 28, emphasis added.)

II.

DETERMINING THE APPLICATION OF SECTION 1387(a)

A court's primary task in construing a statute is to determine the legislature's intent. (*Brown v. Kelly Broadcasting* Company (1989) 49 Cal.3d 711, 724.) To determine the application of the language in section 1387(a) the Court must start with the statutory language, giving the words their plain, commonsense meaning. When the statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it. (*People v. Overstreet* (1986) 42 Cal.3d 891, 895.) Where the

plain language of a statute is not ambiguous, the plain meaning controls and resort to extrinsic sources to determine the Legislature's intent is unnecessary. (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 919.)

However, this Court has already stated that section 1387 is "hardly pellucid". (*Traylor*, supra, at p. 1212, citing *Burris v. Superior Court* (2005) 34 Cal.4th 1012) In determining the Legislature's intent in enacting section 1387 this Court stated, in *Burris*, supra, that Section 1387 implements a series of related public policies including the curtailing of prosecutorial harassment by placing limits on the number of times charges may be refiled. (*Burris*, supra, at p. 1018) *Burris* also found that the statute "prevents the evasion of speedy trial rights through the repeated dismissal and refiling of the same charges." (*Id.*)

The basic purpose of this section (1387) is to limit improper successive prosecutions which harass a defendant. (*People v. Superior Court (Martinez)* (1993) 19 Cal.App.4th 738, 744; *People v. Cossio* (1977) 76 Cal.App.3d 369, 372.) The basic policy behind Penal Code section 1387 is to prevent the prosecution from harassing defendants or forum shopping for a judge who would rule in favor of the prosecution. (*Lee v. Superior Court* (1983) 142 Cal.App.3d 637, 640.) Section 1387 is also intended to

help protect the speedy trial limits in section 1382. (*Alex T. v. Superior Court* (1977) 72 Cal.App.3d 24, 30.)

It is with these well-accepted recognitions of the Legislature's intent in enacting section 1387 that this Court must analyze the words "same offense".

III.

COURTS HAVE REPEATEDLY AFFIRMED THAT SECTION 1387 MUST BE INTERPRETED IN A MANNER THAT SUPPORTS THE INTENT THAT UNDERLIES THE STATUTE

Regardless of the outcome in each particular case, virtually all courts that have attempted to divine the meaning of section 1387 have found that the statute was always intended to prevent the prosecution from harassing defendants with successive prosecutions and to protect the defendant from a denial of speedy trial rights. Even the *Traylor* opinion acknowledged that:

> Thus, the central aim of section 1387 is to prevent unlimited dismissals and refilings of complaints charging the same offense. (*Traylor,* supra, at p. 1214.)

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.

In discussing the question of what "offenses" were twice terminated within the meaning of section 1387, *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

The prosecution's reliance on the *Traylor* opinion 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". (*People v. Juarez* (2014) 227 Cal.App.4th 1138, 1142, 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.

IV.

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 IN THE PRESENT CASE, AND THOSE POLICIES WOULD BE DISSERVED AND UNDERMINED IF THIS COMPLAINT WAS ALLOWED TO BE RE-INSTATED.

As has been discussed above, 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". (*Juarez*, supra, at p. 1143.)

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].)

The *Traylor* Court explained the circumstances of that case's procedural history and the appropriate and non-manipulative charging decisions that had been made by the prosecution, 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 suffered two dismissals of attempted murder charges as a result of being unable proceed, then recast the same crimes under an alternative code section *only* because he already twice dismissed the afore-mentioned attempted murder charges). 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.

This Court should also consider the consequences that will flow from its determination of the meaning of the term "same offense". "Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation." (*Dyna-Med, Inc. v. Fair Employment and Housing Com.* (1987) 43 Cal.3d 1379, 1387; *Alford v. Pierno* (1972) 27 Cal.App.3d 682, 688; *Ivens v. Simon* (1963) 212 Cal.App.2d 177, 181.) Adopting the violently narrow interpretation suggested by the prosecution would completely eviscerate the speedy trial right protections intended in section 1387. As this case illustrates, if the Court holds that "same offense" only bars the third filing of the same code section, the prosecution will simply move on to a new code section that might also describe the conduct at hand. Instead of getting two bites at the apple, prosecutors will be entitled to two bites at every different kind of

apple they can creatively imagine. Just as an example, every multiple defendant attempted murder case, like the present one, could be filed and dismissed twice as an attempted murder, then filed and dismissed twice as a conspiracy to commit murder, then twice as an aggravated assault, then twice as a conspiracy to commit an aggravated assault, etc. Such a consequence would render section 1387's bar meaningless.

V.

DISMISSAL OF THE THIRD FILING 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[4], 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.[5] (*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 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.

[4] The "elements test".

[5] The "accusatory pleadings test".

> 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*, supra, 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)

CONCLUSION

The prosecution's filing of a third complaint against Gerardo Juarez that includes conspiracy to commit murder charges instead of the twice-dismissed attempted murder charges is a blatant attempt to subvert section 1387's two dismissal rule. In fact, the prosecution's filing of what they creatively call a "new filing" specifically violates one of the key public policy rationales underlying the section. The filing of the third complaint in this case was an attempt to violate Gerardo Juarez' Constitutionally guaranteed rights to a speedy trial. Reversal of the Court of Appeal's opinion is required. This Court must fashion an interpretation of the term "same offense" which includes an "essence test" that gives meaning to the Legislature's intent in enacting section 1387.

Dated: 1/13/14

Respectfully Submitted,

FRANK DAVIS
Alternate Defender
Orange County

ANTONY C. UFLAND
Senior Deputy Alternate Defender
Attorneys for Defendant/Respondent
Gerardo Juarez

CERTIFICATE OF WORD COUNT

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

I certify that the text of Defendant/Respondent Gerardo Juarez' Opening Brief on the Merits consists of 6,532 words as counted by "Word", the word-processing program used to generate it.

Dated this 13th day of November, 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 November, 2014, I served a copy of Defendant/Respondent Gerardo Juarez' Opening Brief on the Merits 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

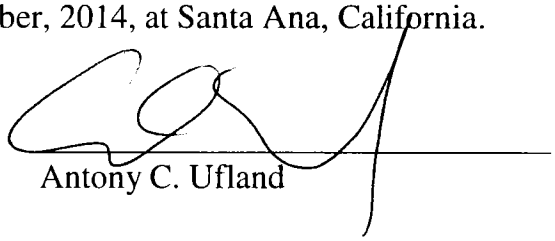
DEPUTY COUNTY CLERK
Attn: Hon. Gregg L. Prickett
Orange County Superior Court
Dept. C42
700 Civic Center Drive West
Santa Ana, CA 92701

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 November, 2014, at Santa Ana, California.



Antony C. Ufland