SUPREME COURT, STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Appellant, v. EMMANUEL JUAREZ, et al., Defendants/Respondents.	No: S219889 RESPONDENT EMMANUEL JUAREZ'S BRIEF ON THE MERITS

AFTER OPINION OF THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION THREE
CASE NOS. G049037, G049038

THE HONORABLE GREGG L. PRICKETT, JUDGE

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I. STATEMENT OF ISSUES

The issues for review stated in respondent Emmanuel Juarez's petition for review were:

> 1. Under Penal Code sec. 1387, based on the same set of underlying facts, may the prosecution, after two dismissals, continue to file charges against a defendant an unlimited number of times, as long as the subsequent filings are not for the same, exact statutory offense?
> 2. Should the term "same offense" as used in Penal Code section 1387 be given a narrow interpretation or a broad interpretation?
>
> Co-respondent Gerardo Juarez stated these issues in a similar fashion:
>
> Does Penal Code 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?

II. INTRODUCTION

On two occasions, the People filed attempted murder charges against respondents. On two occasions those cases were terminated because the prosecution was not prepared. Penal Code[1] section 1387 provides that two terminations such as occurred here constitutes a bar to any other prosecution for the "same offense." Thus, the trial court in this matter properly dismissed the third case filed against respondent, charging conspiracy to commit murder, which was based on the same conduct and incident as the first two cases.

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[1] All further statutory references are to the Penal Code unless otherwise noted.

The Court of Appeal in this case apparently agreed with the trial court's dismissal of the third case. However, based on this court's conclusion in *People v. Traylor* (2009) 46 Cal.4th 1205, 1213, footnote 6 that "...an 'offense' is defined not by conduct, but by its particular definition as such in the Penal Code," the Court of Appeal felt constrained to reverse. It nevertheless stated that its decision was "...not in keeping with the policies section 1387 is supposed to represent." (Opn. p.10.)

In *Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1018, this court stated that section 1387 "is hardly pellucid." This understated observation was repeated in *People v. Traylor, supra,* 46 Cal.4th at 1212. It now devolves upon this court to provide a clear, definitive definition of "same offense" for purposes of section 1387. This court's construction of that term should be guided by the salutary policies underlying section 1387 rather than a rigid, statute-bound definition of the term "same offense."

Typically, a court's "...role in interpreting or construing a statute is to ascertain and effectuate the legislative purpose." (*Laurel Hgts. Imp. Assn. v. Regent of Univ. of Calif.* (1993) 6 Cal.4th 1112, 1127.) Regarding the word "it" in section 1387, this court, in *Burris, supra,* stated that "...the legislative history behind the statute and its substantive provisions [do not] contain evidence the Legislature chose a particular construction in order to implement one rule or the other." (34 Cal.4th at 1018.) The same can readily be said for the term "same offense" as used in section 1387. As the Court of Appeal in the instant matter stated, "...this statutory formulation leaves much to be desired." (Opn. p.4.)

Thus, in construing this term, this court "...must consider the human problems the Legislature sought to address in adopting section 1387 -- '"the ostensible objects to be achieved [and] the evils to be remedied."'" (*Burris, supra,* 34 Cal.4th at 1018.)

Section 1387 promotes a policy of basic fairness and the observation of fundamental constitutional rights. These are the "human problems" and "objects" with which section 1387 is concerned. As explained in *People v. Salcido* (2008) 166 Cal. App.4th 1303, 1309:

> "Section 1387 implements a series of related public policies. It curtails prosecutorial harassment by placing limits in the number of times charges may be refiled. The statute also reduces the possibility that prosecutors might use the power to dismiss and refile to forum shop. Finally, the statute prevents the evasion of speedy trial rights through the repeated dismissal and refiling of the same charges." "The purpose of section 1387 is to prevent improper successive attempts to prosecute a defendant." (Citations omitted.)

Every case that has considered section 1387 has described it in much the same way.

The prosecution in this case contends that it can suffer repeated dismissals as a result of its failure to be prepared yet still refile against a defendant an unlimited number of times, as long as the new charge is not the same statutory offense pled in a twice-dismissed case. This argument wholly undermines the constitution-based public policy underlying section 1387. This contention sweeps aside the human problems and objects that section 1387 seeks to address. Indeed, the prosecution's argument effectively abrogates section 1387.

The trial court, in conformity with section 1387 and its salutary public policy, properly dismissed the third case the prosecution filed against respondent. But for this court's decision in *People v. Traylor, supra,* 46 Cal.4th 1205, the Court of Appeal would have affirmed the dismissal. *Traylor* therefore must be reconsidered in light of the purposes underlying section 1387. When this is done, it is clear that the prosecution's argument must be rejected.

III. STATEMENT OF THE CASE

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

On July 16, 2012, in case no. 12NF0057, the People filed a felony complaint against respondents once again charging them with, *inter alia,* attempted murder. These charges arose out of the same alleged June 3, 2011 incident that formed the basis of the information in case no. 11NF1767. (1CT 94-98.) An information alleging the same attempted murders was filed on July 30, 2012. (1CT 99-102.) On December 10, 2012,

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

this case was dismissed because the prosecution was not prepared. (1CT 104-103; 2CT 133.)

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

On February 7, 2013, respondent filed a petition for writ of mandate in the superior court seeking review of the denial of the section 1387 dismissal motion. (2CT 122-306.) On March 25, 2013, the prosecution filed an informal response. (2CT 307-311.) On April 3, 2013, respondent filed a reply. (2CT 312-315.) On June 6, 2013, the prosecution filed a return to the petition. (2CT 316-333.) On July 1, 2013, respondent filed a traverse. (2CT 334-348.) On July 19, 2013, a hearing was held on that petition. (2CT 304-305; RT 23-33.) On July 25, 2013, the petition was granted and case no. 12CF3538 was dismissed. (2CT 305-306; RT 34-36.)

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

On June 30, 2014, the Court of Appeal reversed the judgment dismissing the case. On September 10, 2014, review was granted.

IV. STATEMENT OF THE FACTS[3]

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

John Doe and Jane Doe returned to their apartment and parked in the alley. At about 10:45 p.m., they exited the complex and walked into the alley where they saw respondent and Gerardo Juarez. Respondent supposedly punched John Doe in the face. When Doe said, "let's throw down," respondent gave a black plastic bag to Gerardo and the two men started fighting. Jane Doe thought there was a gun in the bag. Gerardo, who looked uncomfortable while holding the bag, said to respondent, "you'd better fucking get

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

him." (2CT 185-186, 190-191, 195-196.)

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

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

V. ARGUMENT

A. THE TERM "SAME OFFENSE" AS USED IN PENAL CODE SECTION 1387 MEANS ALL OFFENSES ARISING FROM THE SAME SET OF FACTS; THEREFORE, PURSUANT TO PENAL CODE SECTION 1387, THE SUPERIOR COURT PROPERLY DISMISSED THE THIRD FILING OF CHARGES AGAINST RESPONDENT. THE COURT OF APPEAL'S CONTRARY OPINION MUST BE REVERSED.

1. Introduction

Section 1387 provides that a second termination of an action bars a third prosecution for the same offense. "[S]ection 1387 is generally intended to protect against successive dismissals and refilings of accusatory pleadings....[S]ection 1387 'prevents the evasion of speedy trial rights through the repeated dismissal and refiling of the same

charges.'" (*Berardi v. Superior Court* (2008) 160 Cal.App.4th 210, 225.) "The purpose of section 1387 is to prevent the prosecution from harassing defendants with successive prosecutions." (*Dunn v. Superior Court* (1984) 159 Cal.App.3d 1110, 1119.) But, as noted, section 1387 is "hardly pellucid."

"[A] statute must be given a reasonable and practical construction" (*Fortenberry v. Weber* (1971) 18 Cal.App.3d 213, 222) and "'should be interpreted to avoid an absurd result.'" (*Giorgianni v. Crowley* (2011) 197 Cal.App.4th 1462, 1475.) "[L]egislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." (*Addison v. Holly Hill Fruit Products, Inc.* (1944) 322 U.S. 607, 618 [64 S.Ct. 1215, 88 L.Ed.1488].) Where, as here, the legislative history fails to "reveal a clear meaning, [courts] 'apply reason, practicality, and common sense to the language at hand,' seeking to make the [statute] 'workable and reasonable..., in accord with common sense and justice, and to avoid an absurd result.'" (*Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 338-339.) Where, as here, "...uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation." (*Dyna-Med, Inc. v. Fair Emp & Housing Com'n.* (1987) 43 Cal.3d 1397, 1387.)

The only common sense, reasonable, and practical construction of section 1387, one that avoids the absurd result the prosecution seeks -- the prospect of virtually never-

ending refilings -- is that unless there has been excusable neglect (sec.1387.1), the prosecution may only twice file charges against a defendant based on the same underlying set of circumstances. Further, the prosecution's unlimited filing interpretation encourages slovenly practices and provides no incentive to the prosecution to prepare for trial a timely manner.

The Court of Appeal stated that "[t]he policy goals of section 1387...militate in favor of application of section 1387" in the instant case (Opn. p.6.) Thus, even if, arguendo, past authorities can be said to have considered "same offense" to be the same statutory offense, a reasonable and practical construction of the term, one that avoids the absurd result of unlimited refilings, is that "same offense" includes all related offenses arising out of the same incident.

2. "Same offense" must be construed to mean all related offenses and charges arising out of the same incident or set of circumstances.

The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy...trial..." (Accord, *Doggett v. United States* (1992) 505 U.S. 647, 649, [112 S.Ct. 2686, 120 L.Ed.2d 520]; *Barker v. Wingo* (1972) 407 U.S. 514, 515, [92 S.Ct. 2182, 33 L.Ed.2d 101] ["...a speedy trial is guaranteed the accused by the Sixth Amendment to the Constitution...is 'fundamental' and is imposed by the Due Process Clause of the Fourteenth Amendment on the States."]; *Klopfer v. North Carolina* (1967) 386 U.S. 213, 223 [87 S.Ct. 988, 18 L.Ed.2d 1].) The California Constitution,

article 1, section 15 provides the same fundamental right: "The defendant in a criminal cause has the right to a speedy... trial." (Accord, *People v. Roybal* (1998) 19 Cal.4th 481, 512-513.) "The speedy trial clause is designed to minimize interference with personal liberty prior to trial[,]...preserves the presumption of innocence, minimizes oppressive pre-trial incarceration, and limits the possibility that the defense is impaired." (*Cain v. Smith* (7th Cir.1982) 686 F.2d 374, 384; accord, *United States v. Loud Hawk* (1986) 474 U.S. 302, 312 [106 S.Ct. 648, 88 L.Ed.2d 640].)

Section 1387 provides that two terminations of "an action...is a bar to any other prosecution for the same offense." "'The predominant purpose of section 1387 is to establish some limit to a defendant's period of potential criminal liability, thereby avoiding harassment and discouraging prosecutorial forum-shopping.'" (*Miller v. Superior Court* (2002) 101 Cal.App.4th 728, 740.) Courts have recognized that there is a limit to the number of times the prosecution can refile charges against a defendant. At first blush, section 1387 could be literally construed to mean that the prosecution, after suffering two terminations, could refile as many times as it liked as long as the new charge was not the same statutory offense. But, even the prosecution in this matter concedes that "same offense" has its limitations. The prosecution concedes that, even if the new charge is not the same statutory offense, it nevertheless cannot be refiled where it contains the same elements as the charge in the terminated action. As the prosecution stated, "...section 1387(a) precludes subsequent offenses that cannot be committed

without committing a previously dismissed offense." (Reply B., p.1.) Thus, all parties agree that "same offense" is not limited to only the same statutory offense.

The American Bar Association, through its standards for speedy trial (Standard 12-2.2(a), has addressed the issue of repeated refilings. The standards are "...intended to prevent the prosecution from rendering the defendant's right to a speedy trial meaningless by dismissing the case and refiling *charges that relate to essentially the same conduct...*" (*A.B.A., Standards for Crim. Justice* (3rd Ed. 2006), Speedy Trial and Timely Resolution of Criminal Cases, sec.12-22, p.47; italics added.) To allow the prosecution to suffer two dismissals yet continue to file an unlimited amount of cases against the defendant based on essentially the same conduct certainly would render meaningless the right to a speedy trial.[4]

In *People v. Woods* (1993) 12 Cal.App.4th 1139, 1148, the Court stated that the "general rule" of section 1387 is "that a twice-dismissed *action* cannot be refiled." (Italics added.) Several authorities have discussed section 1387 in terms of the dismissal of a felony action or felony charges rather than offenses. (See, e.g., *Miller v. Superior Court, supra*, 101 Cal.App.4th at 739, 747 [Section 1387 "sets forth what is sometimes referred to as the 'two-dismissal rule': Two dismissals of a felony action bars further

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[4] Although the rules and standards promulgated by the American Bar Association are not binding, this Court has said that referral thereto "may be 'helpful and persuasive in situations where the coverage of our Rules is unclear or inadequate.'" (*Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23, 52, 4n.12.)

prosecution, except in certain specified circumstances," and, "Section 1387 states two dismissals...bars retrial on felony charges."] ; *People v. Superior Court (Quinteros)* (1993) 13 Cal.App.4th 12, 17 ["Section 1387 does provide that a prosecution is barred if a felony charge has previously been twice dismissed."]; *Paredes v. Superior Court* (1999) 77 Cal. App.4th 24, 28 ["these statutes [secs.1382, 1384, 1387, 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."]; C.E.B., Calif. Crim. Law, Proc. and Prac. (2014) "Motion to Set Aside Information or Indictment," sec.13.31, p.325 ["When a felony...has been dismissed twice..., those dismissals are a bar to any other prosecution...Pen.C. sec.1387."])

In *State v. Abrahamson* (Iowa 2008) 746 N.W.2d 270, conspiracy to manufacture methamphetamine charges were filed against the defendant. The charge was subsequently dismissed on speedy trial grounds which, under Iowa decisional law, was a bar to "'...refiling of an 'information or indictment charging the same offense.'" (746 N.W.2d at 273.) Based on the same set of facts as the dismissed conspiracy charge, the prosecution refiled an information charging the defendant with manufacturing methamphetamine. The *Abrahamson* court rejected the "same elements" test proposed by the prosecution in the instant matter. It held that the refiling was improper because:

> It would permit, if not encourage, the piecemeal prosecution of drug trafficking charges as a means of avoidance of the time-honored constraints of our speedy trial rule. For example, under the State's interpretation, the dismissal of the

> conspiracy charge as a penalty for violation of Abrahamson's right to a speedy trial would be of insubstantial consequence to the State because the manufacturing charge would stand in ready reserve to be charged as a separate offense. Such an interpretation would undermine the salutary purposes of the speedy trial rule. *See [State v.] Johnson,* [1974] 217 N.W.3d [609] at 612 (noting the remedy afforded by a dismissal with prejudice for violation of the speedy trial rule assures that the rule will not be rendered meaningless).

Under the logic of *Abrahamson*, permitting the prosecution to refile non-lesser included offense charges against a defendant an unlimited number of times -- or limited only by the prosecutor's creativity in finding arguably applicable statutes --would eviscerate and render meaningless the speedy trial-based provisions of section 1387.

In the Court of Appeal, the prosecution argued that, because attempted murder and conspiracy to commit murder are "not the 'same offense,'" the third case filed against respondent should not have been dismissed. (AOB 2-6.) Implicit in the prosecution's argument is the claim that it can refile charges against a defendant innumerable times after two dismissals as long as the same statutory offense or an offense with the same elements is not charged. But, such "ad infinitum" filing is prohibited by section 1387. (*Burris v. Superior Court, supra,* 34 Cal. 4th at 1019[Recognizing that felony charges cannot "be refiled ad infinitum."]; accord, *People v. Salcido, supra,* 166 Cal.App. 4th at 1309.) Further, this theory of unlimited refiling defeats and frustrates the "purpose" of section 1387 which "is to prevent successive attempts to prosecute a defendant." (*People v. Cossio* (1977) 76 Cal. App.3d 369, 372; accord, *People v. Superior Court (Martinez)*

(1993) 19 Cal.App.4th 738, 744 ["The basic purpose of this section [1387] is to limit improper successive prosecutions which harass a defendant."]) Thus, contrary to the prosecution's argument, there is a limit to the number of permissible refilings, i.e., two, as provided for in section 1387.

For section 1387 purposes, the term "same offense" should be interpreted to mean all related charges arising out of the same set of circumstances underlying the two dismissed cases. Here, the fundamental basis or essence of all three cases, whether charged as attempted murder or conspiracy to commit murder or whatever other charge the prosecutor can come up with, is the claim that respondents tried to murder John Doe and Jane Doe. Neither attempted murder nor conspiracy to commit murder could have been committed without engaging in the conduct alleged in the third filing. In such a situation, the filing of charges a third time is barred by section 1387. As stated in *Wallace v. Muncipal Court* (1983) 140 Cal.App.3d 100, 107, "The general rule...is that when the essence of the offense charged in a [third] action is the same as the essence of the offense in a previously dismissed action the [third] action will be barred."[5] This "essence" analysis was favorably cited in *Dunn v. Superior Court, supra,* 159 Cal. App.3d at 1118 and *People v. Traylor, supra*, 46 Cal.4th at 1216-1217. Here, the essence of the attempted murder and conspiracy to commit murder charges is the same -- respondents'

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

supposed effort or undertaking to murder the Does. Thus, under the above authorities, the third prosecution is barred by section 1387.

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

The prosecution in *Dunn* filed a second complaint charging appellant with violation of section 209, kidnapping for robbery, section 211, robbery, section 496, possession of stolen property, and section 32, accessory to kidnapping, robbery, and auto taking. At the preliminary examination, all charges except accessory to auto taking were dismissed. This constituted the second termination of the case. The prosecutor, however, included all charges a third time in the information. The defendant filed a section 1387 dismissal motion as to the kidnapping, robbery, and receiving counts. The motion was denied. The Court of Appeal recognized that "[t]he purpose of section 1387 is to prevent the prosecution from harassing defendants with successive prosecutions... and, in part, to pressure the prosecution to bring the case to trial within the time limits of section 1382." (159 Cal.App.3d at 1119.) The court reversed, holding that the kidnapping and robbery charges must be dismissed because they were of the essence of the previously dismissed charges and section 1387 bars prosecution of an action that has been twice dismissed. Regarding the term "same offense" in section 1387, the court stated, "it is clear that this

phrase does not simply mean that the district attorney is not permitted to charge violation of the same statute." (159 Cal.App.3d at 1117-1118.) The court further explained:

> In seeking a meaning of the term "the same offense" in section 1387, attention has been directed by petitioner to the case of *Wallace v. Municipal Court* [*supra*]....The court likened this bar [of section 853.6] to the bar of section 1387 and, after reviewing several cases, stated: "The general rule which can be distilled from these examples is that when the essence of the offense charged in a second action is the same as the essence of the offense in a previously dismissed action the second action will be barred." ...
>
> ...Kidnapping for the purpose of robbery cannot be committed without committing the lesser offense of kidnapping. Two dismissals of kidnapping should bar a prosecution for kidnapping for the purpose of committing robbery on the theory that to charge the greater would be also to charge the lesser an additional and prohibited third time.
>
> So too with the offenses of auto theft and robbery. Although every robbery does not include an auto theft, the concept of necessarily included offenses permits reference to the facts in the accusatory pleading....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. (159 Cal.App.3d at 1118-1119.)

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

The prosecution argued below that, merely because the charge in the third complaint is not the same statutory offense, the refiling was proper. The argument is refuted in *Dunn, supra,* and in *People v. Salcido, supra,* 166 Cal.App.4th 1303. In

Salcido, the first and second charging documents charged the defendant with a violation of Penal Code section 4501.5, battery by a prisoner on a nonconfined person. These two cases were dismissed. A third complaint, based on the same conduct as the previous two cases, charged the defendant with violations of section 4501.5 and section 4501, assault by a prisoner with a deadly weapon or by means of force likely to cause great bodily injury. The prosecution subsequently alleged a section 12022.7, great bodily injury enhancement. The defendant's section 1387 dismissal motion was denied. The Court of Appeal reversed and ordered the case dismissed *with prejudice*, even though section 4501 was not the same statutory offense as section 4501.5. The court stated, "the section 1387 two-dismissal rule barred the People from filing a third complaint against Salcido based on the June 15, 2000 incident." (166 Cal.App.4th at 1312.) Regarding the great bodily injury enhancement, the court stated:

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

(*Id.* at p.1314.) Thus, under *Salcido*, the two-dismissal rule applies even where the third complaint does not allege the same statutory offense.

The prosecution's interpretation of "same offense" is based on *People v. Traylor, supra,* 46 Cal.4th 1205. But, that case must be read in light of the disparate facts at issue

there and the extremely narrow issue before the court, an issue which is *not* before this court. As this court stated in limiting its holding:

> We therefore hold that when the People initially file a felony complaint, which is then dismissed by a magistrate on grounds there is sufficient evidence only to support a lesser included misdemeanor offense, the subsequent filing of a second complaint containing such a reduced misdemeanor charge, comprising fewer than all the elements of the previously dismissed offense, is not barred by section 1387(a). Here, the dismissing magistrate specifically indicated his belief that while the evidence of felony vehicular manslaughter with gross negligence was insufficient, the evidence would support a different and lesser charge of misdemeanor manslaughter that did not require proof of a grossly negligent act or omission. Under those circumstances, the People properly could, following the first felony dismissal, file a second complaint alleging the lesser included misdemeanor.[10]
>
> [10]As the reader will notice, we have carefully limited our holding to the situation in which an initial *felony* charge, having been dismissed by a magistrate on grounds that the evidence supports only a lesser included misdemeanor, is followed by the filing of a second complaint charging that *misdemeanor* offense. We do not here confront, and expressly do not decide, how section 1387(a) should apply when dismissed felony charges are followed by one or more new complaints charging lesser included *felonies*, or when a dismissed *misdemeanor* charge is followed by a new complaint charging a lesser included *misdemeanor*. (46 Cal.4th at 1219-1220; footnote 9 omitted.)[6]

Thus, *Traylor* is not authority for the proposition argued for by the prosecution, i.e., t that

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[6] In discussing footnote 10 of *Traylor*, the Court in *People v. Hernandez* (2010) 181 Cal.App.4th 404, 410 recognized that "...the court's holding is narrow...."

a different felony, conspiracy to commit murder, can be charged in a third prosecution based on the same conduct underlying two previously dismissed felony propositions.

Further, the one-time refiling in *Traylor* "actually promote[d]" and did "not abuse" the salutary purposes of section 1387. (*Traylor, supra,* 46 Cal.4th at 1209.) The refiling of a misdemeanor charge in *Traylor* "represent[ed] an ameliorative effort to charge a different offense that conforms to the actual evidence." (46 Cal.4th at 1214-1215.) Here, the prosecution's third refiling is not ameliorative of anything. By stark contrast to *Traylor,* it constitutes an abusive attempt to evade the protections of section 1387. Indeed, allowing a third refiling promotes laziness and unpreparedness by the prosecution. *Traylor* does not stand for the proposition that the prosecution can repeatedly refile different charges after suffering successive dismissals for which it was solely and inexcusably responsible. In *Traylor*, the prosecution did nothing wrong. Here, on two occasions, the prosecution was not prepared. Its inexcusable neglect should not be rewarded with a third prosecution.

Citing *Traylor,* the prosecution claimed offenses are the "same offense" for purposes of section 1387 when they have the same elements. (AOB p.3.) But, this Court did not state that such an analysis was applicable where two felony informations have been dismissed and third has been filed based on the same underlying acts. *Traylor* involved the dismissal of a felony complaint based on insufficient evidence, after which a misdemeanor charge was filed which lacked an element necessary for the felony charge.

The *Traylor* Court stated that "[u]nder these circumstances," the felony and misdemeanor were not the same offense. (46 Cal.4th at 1209.) These circumstances are not present in the instant case.

Although *Traylor* stated that section 1387, subdivision (a) "applies only to successive prosecutions 'for the same offense'" (46 Cal.4th at 1212), such statement must be read in light of the different facts and narrow and expressly limited issue before the court in that case. (*Chevron U.S.A., Inc. v. W.C.A.B.* (1999) 19 Cal.4th 1182, 1195["It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered."]) The dismissal in *Traylor* was not due to any failings of the prosecution. And the prosecution's refiling in that case "actually promote[d]" the purpose of section 1387"...to protect a defendant against harassment, and the denial of speedy trial rights that result from the repeated dismissal and refiling of identical charges." (46 Cal.4th at 1209, 96 Cal.Rptr.3d at 280.) Such cannot be said of the unlimited refiling rule sought by the prosecution in the instant case.

Further, the *Traylor* court (46 Cal.4th at 1216-1217) did not reject the "essence of the offense" test of section 1387. (*Dunn, supra,* 159 Cal.App.3d at 1118 ["'...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'"]; C.E.B., Calif. Crim. Law, Proc. and Prac. (2013) sec.25.47, p.750 [Charge may not be "...filed that is of the

same essence as the twice-dismissed charges," citing *Dunn.*]) Nor did the *Traylor* court reject the statement in *Burris, supra,* "...that successive prosecutions are 'for the same offense,' and are thus governed by section 1387, where 'the identical criminal act...underlies' each of the prosecutions." (*Traylor,* 46 Cal.4th at 1212.) Rather, the *Traylor* Court considered and applied those logical, common sense concepts in analyzing the "same offense" issue. If this Court had felt those cases and their analyses of the issue were wrongly decided, or had intended to overrule them, it would have expressly said so. (See, e.g., *People v. Carpenter* (1997) 15 Cal.4th 312, 381-382 [We certainly did not clearly overrule what we so recently said was settled law."]) Given the narrow issues before the Court in *Traylor*, its favorable view of the "essence" and "identical criminal act" concepts, its decision not to overrule *Dunn* and *Burris*, and the purposes underlying section 1387, the *Traylor* decision does not stand for a cut-and-dried, unlimited refiling rule.

Under *Traylor* (and *Dunn* , *Burris*, and other cases construing section 1387), in determining the applicability of section 1387, a court can properly consider the essence of the charges and the underlying criminal conduct, as well as whether the third refiling involves the same statutory offense. A consideration of all the circumstances furthers "the human intent that underlies the statute.'" (*Traylor, supra,* 46 Cal.4th at 1213.) Section 1387 is not limited to situations where the same statutory offense is alleged in the third pleading, nor did *Traylor* so hold.

In its reply brief in the Court of Appeal, the prosecution posited a situation where "defendants had methamphetamine in their pockets during commission of the attacks," and rhetorically asked, "Would defendants argue that the prosecution was barred under section 1387(a)?" (Reply B., 5.) The answer is a resounding, yes. The harassment prevention and speedy trial purposes of section 1387 would be served by precluding prosecution of the posited drug offense. Such "trials seriatim" "constitute wholly unreasonable harassment." (*Kellett v. Superior Court* (1966) 63 Cal.2d 822, 825-826.) And, here the prosecution from the outset is aware of the facts supporting the methamphetamine charge, such a charge should be alleged in the original complaint and/or information. It should not be held in reserve to sandbag the defendant after the prosecution suffers two inexcusable dismissals. (See, e.g., *United States v. Goodwin* (1982) 457 U.S. 368, 382, fn.14, [102 S.Ct. 2485, 73 L.Ed.2d 74] [Court "recognize[d] that prosecutors may be trained to bring all legitimate charges against an individual at the outset"].)

In the Court of Appeal, the prosecution argued that respondents' construction of section 1387 amounts "to a broad prohibition that would preclude the filing of any charges following two dismissals." (Reply B.6.) Not so. Where the charges involve a violent felony and there has been excusable neglect by the prosecutor, the prosecution may refile charges a third time. (Penal Code section 1387.1; *People v. Mason* (2006) 140 Cal.App.4th 1190, 1196 ["Section 1387.1 is an exception to the so-called two-dismissal

rule."])

The prosecution argued below that, because "[t]here is no indication of any prosecutorial attempt to delay, harass or forum shop" (Reply B., p.6), section 1387's salutary speedy trial-based provision do not apply. Implicit in this argument is the proposition that, where such bad faith conduct is absent, the prosecutor can have the action dismissed innumerable times because he or she is unprepared, yet still be able to refile and proceed against the defendant an unlimited amount of times. But, such a construction of section 1387 would render its provisions meaningless.

The prosecution had its two chances to prosecute respondents for the conduct they engaged in on June 3, 2011. Respondents therefore have the due process right under the Fifth and Fourteenth Amendments to have the State follow its statutory procedures, here, to have the cases against them dismissed pursuant to section 1387. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, [100 S.Ct. 2227, 66 L.Ed.2d 175]; *Fetterly v. Paskett* (9th Cir.1993) 997 F.2d 1295, 1300 ["the failure of a state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state"].)

3. Conclusion

The term "same offense" as used in Penal Code section 1387 must be construed to refer to all related offenses arising out of the same set of circumstances. Barring excusable neglect, which is not present here, section 1387 gives the People two bites of

the prosecutorial apple. The prosecution has had its two bites in this matter; it is not entitled to any more. The trial court properly applied the salutary speedy trial purposes of section 1387 and dismissed the third case. Its decision should be reinstated.

B. RESPONDENT JOINS IN AND ADOPTS THE ARGUMENTS RAISED BY CO-RESPONDENT.

Respondent hereby joins in and adopts by reference all arguments raised by his co-respondent. (*People v. Stone* (1981) 117 Cal.App.3d 15, 19, fn.5; *People v. Smith* (1970) 4 Cal.App.3d 41, 44; Calif. Rules of court, rule 8.200(a)(5).)[7]

VI. CONCLUSION

For the reasons stated above, reversal of the Court of Appeal's opinion is required.

Dated: December 3, 2014

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[7] Respondent is aware of this court's recent pronouncement in *People v. Bryant* (2014) 60 Cal.4th 335, 363-364, that "[a]ppellate counsel for the party purporting to join some or all of the claims raised by another are obligated to thoughtfully assess whether such joinder is proper as to the specific claims and, if necessary, to provide particularized argument in support of his or her client's ability to seek relief on that ground." Here, both respondents are in exactly the same position vis-a-vis all of the issues raised in the briefs. Without further elaboration, the arguments co-respondent has raised are equally applicable in all aspects to respondent. In this case, "joinder *is* proper" as to all arguments made by co-respondent.

CERTIFICATE OF WORD COUNT

In reliance on the word count of the computer program used to generate this brief, I, John F. Schuck, hereby certify that this Brief on the Merits contains 6,274 words.

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

Dated: December 3, 2014

John F. Schuck

PROOF OF SERVICE

I, John Schuck, declare:

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

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BRIEF ON THE MERITS

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Executed at Los Altos, California on December 3, 2014.

John F. Schuek