IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	No. S219889
Plaintiff/Appellant,	DCA No. G049037 (lead)
vs.	Consolidated with
GERARDO JUAREZ et al.,	DCA Case: No. G049038
Defendants/Respondents.	

CONSOLIDATED ANSWER BRIEF ON THE MERITS

FOLLOWING THE APPEAL FROM THE
SUPERIOR COURT OF ORANGE COUNTY
THE HONORABLE GREGG L. PRICKETT, JUDGE PRESIDING

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INTRODUCTION

Defendants' position is contrary to Penal Code section 1387(a)'s plain language. That section only applies to successive prosecutions for the "same offense." Conspiracy to commit murder is not the "same offense" as attempted murder. They are different crimes that punish different acts and require different intents. Defendants' policy-based arguments misunderstand section 1387(a)'s purpose and would swallow the rule. Defendants' citation to caselaw undermines their position. The cases show that section 1387(a) precludes subsequent offenses that cannot be committed without committing the dismissed offense. Conspiracy to commit murder can be committed without committing attempted murder. Section 1387(a) is functioning precisely how the Legislature envisioned it would. The Court of Appeal correctly determined section 1387(a) does not apply to the new conspiracy charges in this case.

FACTUAL BACKGROUND

On June 3, 2011, at approximately 5:00 p.m., victims John Doe and Jane Doe drove by a Jeep Grand Cherokee driven by defendant Emmanuel Juarez ("defendant Emmanuel") in an alley near their apartment complex. (C.T. p. 40.)[1] As they passed, John Doe and defendant Emmanuel stared at each other and then stopped their respective vehicles. (C.T. p. 40.) They exited and exchanged words. (C.T. pp. 40-41.) When John Doe returned to his vehicle, Jane Doe heard him say he did not mean to disrespect defendant Emmanuel's son. (C.T. p. 41.)

John Doe and Jane Doe returned to their apartment complex, and at approximately 10:45 p.m. that evening, were preparing to leave again. (C.T. p. 43.) As they entered the same alley, they saw defendant Emmanuel together with defendant Gerardo Juarez ("defendant Gerardo"). (C.T. pp. 44, 74.) Defendant Emmanuel approached John Doe and punched him in the face. (C.T. p. 44.) John Doe said, "Let's throw down." (C.T. p. 45.) Defendant

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[1] The facts are from the preliminary hearing held in Case No. 11NF1767. The transcript is identical for both defendants. References herein are to the transcript found in the Clerk's Transcript for defendant Emmanuel Juarez.

Emmanuel removed a plastic bag from his waistband and gave it to defendant Gerardo. (C.T. p. 45.) From its shape, the bag appeared to contain a gun. (C.T. p. 45.) Defendant Emmanuel and John Doe began to fight. (C.T. pp. 44-45.) During the fight, defendant Gerardo removed a gun from the plastic bag and gave it to defendant Emmanuel. (C.T. p. 46.) Defendant Emmanuel yelled something similar to "Long Beach Psychos" or "Long Beach Cyclones" and then shot John Doe. (C.T. p. 46.)

Jane Doe ran through the alley to the entrance gate for the apartment complex. (C.T. pp. 46-47.) The gate was locked. (C.T. p. 47.) Defendant Emmanuel approached the gate driving the Jeep Grand Cherokee with defendant Gerardo walking alongside. (C.T. p. 47.) Defendant Gerardo ordered Jane Doe to open the gate. (C.T. p. 47.) Jane Doe said she could not open the gate. (C.T. p. 47.) Defendant Emmanuel exited and lifted the gate. (C.T. p. 47.) Defendant Gerardo looked at Jane Doe and Jane Doe begged him not to kill her. (C.T. pp. 47-48.) Defendant Gerardo said, "Fuck you, bitch," and fired one shot at Jane Doe. (C.T. p. 48.)

PROCEDURAL BACKGROUND

On June 7, 2011, defendants Emmanuel and Gerardo were charged by way of felony complaint in Case Number 11NF1767 with, among other things, two counts of attempted murder – one count for John Doe and the other for Jane Doe. (C.T. pp. 27-31.)[2] A preliminary hearing was held on November 17, 2011. (C.T. pp. 33-88.) The magistrate held both defendants to answer on both attempted murder charges. (C.T. p. 87.) An information alleging both attempted murder charges was filed on November 21, 2011. (C.T. pp. 90-92.) On July 16, 2012, the court dismissed Case Number 11NF1767 on the People's motion to dismiss. (C.T. p. 15.)

On the same date, July 16, 2012, the People re-filed, among other charges, both attempted murder charges against defendants by felony complaint in Case Number 12NF0057. (C.T. p. 17.) On July 26, 2012, the parties waived preliminary hearing and were held to answer. (C.T. p. 18.) On July 30, 2012, the People filed an information alleging, among other things, the two attempted murder charges against both defendants. (C.T. pp. 99-102.) After several continuances, and after the People had previously answered ready for trial, the People moved to continue the trial date because Anaheim

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[2] The relevant procedural background is identical for both defendants. For simplicity, the references herein are to the Clerk's Transcript for defendant Emmanuel Juarez.

Police Detective Darren Wyatt, the lead investigator and a necessary witness, was traveling in Africa and unavailable to testify. (C.T. pp. 104-107.) On December 10, 2012, the court dismissed the case pursuant to Penal Code section 1382. (C.T. p. 20.)

On that same date, the People filed the instant case alleging two counts of conspiracy to commit murder against each defendant. (C.T. pp. 109-112.) Defendants' Penal Code section 1387 motions to dismiss were denied by the magistrate. (C.T. p. 9.) Defendants filed petitions for writ of mandate in superior court challenging the magistrate's ruling. (C.T. p. 301.) The superior court granted defendants' petitions and dismissed this case against both defendants. (C.T. p. 306.) The People appealed to the Court of Appeal. (C.T. p. 349.) After consolidating defendants' cases on appeal, the Court of Appeal reversed the lower court's order dismissing this case and both defendants petitioned for review in this Court.

ARGUMENT

A. THE COURT OF APPEAL CORRECTLY APPLIED THE "SAME ELEMENTS" TEST TO DETERMINE PENAL CODE SECTION 1387 DOES NOT BAR THE NEW CONSPIRACY CHARGES IN THIS CASE

1. Section 1387's Plain Language Shows It Only Applies Where The Successive Charges Allege The "Same Offense"

"When interpreting statutes, [the Court] begin[s] with the plain, commonsense meaning of the language used by the Legislature. [Citation.]" (*Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 519.)

> [I]t is well-settled that [the Court] must look first to the words of the statute, "because they generally provide the most reliable indicator of legislative intent." [Citation.]

(*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103.) "'If the statutory language is clear and unambiguous [the Court's] inquiry ends.' [Citation.]" (*In re D.B.* (2014) 58 Cal.4th 941, 945-946.) In other words, "[i]f there is no ambiguity in the language, [the Court must] presume the Legislature meant what it said and the plain meaning of the statute governs. [Citations.]" (*People v. Snook* (1997) 16 Cal.4th 1210, 1215.)

Penal Code section 1387, subdivision (a) (section 1387(a)) limits the number of times a defendant may be charged with a criminal "offense." (Pen. Code, § 1387, subd. (a)[3].) It generally precludes prosecution for the "same offense" if it is a felony and it has been twice dismissed. (Pen. Code, § 1387, subd. (a).)

The Legislature meant what it said when it narrowly limited section 1387(a) to successive prosecutions for "the same offense." As this Court notes, although section 1387(a) has been amended numerous times and is "'hardly pellucid,'" one thing is clear from section 1387(a)'s language, "it applies only to successive prosecutions 'for the same offense.'" (*People v. Traylor* (2009) 46 Cal.4th 1205, 1212, citation omitted.)[4]

As we discuss below, conspiracy to commit murder is not the "same offense" as attempted murder under section 1387(a). Therefore, section 1387(a) does not apply to the conspiracy to commit murder charges in this case.

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[3] All further code references are to the Penal Code unless otherwise noted.

[4] Defendant Gerardo notes this Court's comment that section 1387(a) is "hardly pellucid," but fails to include the Court's subsequent determination that section 1387(a) is clearly limited to successive prosecutions for the "same offense." (Def. Gerardo's brief at p. 9.)

2. This Court Applies The "Same Elements" Test To Determine Whether Successive Charges Are For The "Same Offense" Under Section 1387

In *Traylor*, this Court defined when two offenses are the "same offense" under section 1387(a).

> [S]uccessive prosecutions are "for the same offense," and are thus governed by section 1387, where "the identical criminal act ... underlies" each of the prosecutions.

(*People v. Traylor, supra,* 46 Cal.4th 1205, 1212, citing *Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1016, fn. 3, omission in original.) Accordingly, "'[w]hen two crimes *have the same elements*, they are the same offense for purposes of ... section 1387.'" (*People v. Traylor, supra,* 46 Cal.4th 1205, 1212, italics and omission in original, quoting *Burris v. Superior Court, supra,* 34 Cal.4th 1012, 1016-1017, fn. 3.)

The Court then applied the "same elements" test to the situation in *Traylor*. There, the prosecutor filed a lesser included misdemeanor offense of vehicular manslaughter after a charge of felony vehicular manslaughter with gross negligence was dismissed. (*People v. Traylor, supra,* 46 Cal.4th 1205, 1208.) The Court noted the felony and misdemeanor charges, although very closely related, "did not include the identical elements." (*Ibid.*) The felony offense requires proof that a grossly negligent act caused the traffic death, while the misdemeanor offense does not require such proof. (*Id.* at p. 1213.)

Thus, they were not the "same offense" under section 1387(a). (*People v. Traylor, supra*, 46 Cal.4th 1205, 1212-1213.)

The successive charges in our case – attempted murder and conspiracy to commit murder – are less related than the charges in *Traylor*. Neither is a lesser-included or greater offense of the other. They have substantially different elements and punish substantially different criminal acts. "Criminal conspiracy is an offense distinct from the actual commission of a criminal offense that is the object of the conspiracy. [Citations.]" (*People v. Morante* (1999) 20 Cal.4th 403, 416, fn. omitted.) Conspiracy is an inchoate crime that

> "'[F]ixes the point of legal intervention at [the time of] agreement to commit a crime,' and 'thus reaches further back into the preparatory conduct than attempt[.]' [Citation.]"

(*Id.* at p. 417, second modification in original.) 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. (*Id.* at p. 416; Pen. Code, § 182, subd. (a)(1).) The overt act need not be criminal and can merely be a preparatory act. (*People v. Gilbert* (1938) 26 Cal.App.2d 1, 23.)

In contrast, 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. [Citations.]" (*People v. Lee* (2003) 31 Cal.4th 613, 623.) The direct but ineffectual act must be an act beyond mere preparation. (*People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 8.)

Conspiracy to commit murder and attempted murder are two separate and distinct offenses. The Court of Appeal correctly determined section 1387(a) does not apply to the conspiracy to commit murder offenses in this case.

B. THIS COURT SHOULD NOT REPLACE THE "SAME ELEMENTS" TEST WITH DEFENDANTS' "FACT-BASED" TEST

Defendants do not argue conspiracy to commit murder is the "same offense" as attempted murder under the "same elements" test. Instead, they attack the test. They want this Court to disapprove of the "same elements" test used in *Traylor*, and discussed in *Burris*, and adopt defendants' "fact-based" test.

Defendants, however, do not agree on their versions of their tests. Defendant Emmanuel argues "same offense" should be rewritten to mean "all related charges arising out of the same set of circumstances underlying the two dismissed cases." (Def. Emmanuel's brief at p. 14.) Defendant Gerardo argues "same offense" should mean charges that have the same "essence." (Def. Gerardo's brief at p. 7.) He does not define "essence," but states that charges should be considered the "same offense" when the "exact same facts and intent are required to prove" them. (Def. Gerardo's brief at p. 7.)

This Court should reject defendants' "fact-based" tests.

1. This Court And The Court Of Appeal Have Already Rejected "Fact-Based" Tests

As discussed above, in *Traylor*, the Court examined the "elements" of the successive charges, not the alleged facts of the case, to determine whether the charges were the "same offense" under section 1387(a). Nothing in the Court's discussion supports defendants' plea for a broader "fact-based" test. On the contrary, the Court specifically rejected the defendant's claim that "section 1387(a) should apply to all charges arising from the *same conduct or behavior* of the defendant ...." (*People v. Traylor, supra,* 46 Cal.4th 1205, 1213, fn. 6, original emphasis.) The Court found that "the statutory language belies such a necessarily broad construction." (*Ibid.*)

Instead,

> [O]ne crime is the "same offense" as another when it involves the "identical *criminal* act" as represented by the criminal *elements* necessary for a conviction. [Citation.]

(*People v. Traylor, supra,* 46 Cal.4th 1205, 1213, fn. 6.)

In *People v. Meza* (1991) 231 Cal.App.3d 362, the Court of Appeal independently came to the same conclusion. In *Meza*, the defendant stole a victim's car and collided with a police car after driving approximately one mile. (*Id.* at p. 364.) The defendant's blood alcohol level was over the legal limit. (*Ibid.*) The defendant was charged with robbery and Vehicle Code section 10851, but the charges were dismissed because the "'victim had not been personally served.'" (*Ibid.*) The People refiled the same two charges. (*Ibid.*) The second case was dismissed because the People failed to timely bring the defendant to trial under section 1381. (*Ibid.*) The People then filed a felony complaint charging two counts of driving under the influence of alcohol and causing injury. (*Ibid.*) The trial court dismissed the charges under section 1387(a) because

> [T]he driving under the influence of alcohol and causing bodily injury offenses were transactionally related to the [previously dismissed robbery and vehicle-taking offenses] ....

(*Id.* at pp. 364-365.)

The Court of Appeal reversed the trial court's decision, which was based upon the facts of the case. (*People v. Meza, supra,* 231 Cal.App.3d 362, 365-366.) The Court of Appeal instead looked to the elements of the successive charges finding that the driving under the influence charges "could have been committed without engaging in the conduct alleged in the twice dismissed robbery and 'Vehicle Code section 10851' offenses." (*People v. Meza, supra*, 231 Cal.App.3d 362, 365.) Thus,

> Neither driving under the influence charge was "the same offense" within the meaning of Penal Code section 1387 as either of the twice dismissed charges.

(*People v. Meza, supra*, 231 Cal.App.3d 362, 365.)

The same is true in our case. Conspiracy to commit murder can be committed without committing attempted murder. They are not the "same offense." This is consistent with *Traylor*. Misdemeanor vehicular manslaughter can be committed without committing felony vehicular manslaughter with gross negligence. Thus, under both *Traylor* and *Meza*, section 1387(a) does not apply to the conspiracy to commit murder charges in our case.

2. Defendants' "Fact-Based" Test Disregards Section 1387(a)'s Plain Language And Would Swallow The Rule

Defendants want this Court to rewrite section 1387(a) disregarding the Legislature's plain language. The Court should refuse.

> Where the terms of a statute are plain and not absurd, a court may not presume a drafting error and thereby substitute its judgment for the Legislature's. [Citation.] To do so would contravene [the Court's] constitutional role, tread into the domain of a coequal branch, and inject intolerable uncertainty into the drafting and lawmaking process, since neither the Legislature nor the public could rely on a court to follow plain statutory language.

(*Joshua D. v. Superior Court* (2007) 157 Cal.App.4th 549, 558.)

Defendants' "fact-based" test disregards section 1387(a)'s narrow application and would swallow the rule. For example, in our reply brief to the Court of Appeal, we asked the court to consider the hypothetical situation where both defendants in our case had methamphetamine in their pockets during the commission of the attacks and, instead of charging conspiracy to commit murder in the present prosecution, the People charged possession of a controlled substance in violation of Health and Safety Code section 11377. We asked if defendants would argue the drug-offense prosecution was barred under section 1387(a).

Defendant Emmanuel answers this question in the affirmative. He confirms that, under the "fact-based" test, the possession of methamphetamine charge would be the "same offense" under section 1387(a) as the attempted murder charges. Defendants' position makes no sense. Possession of methamphetamine is not the "same offense" as attempted murder. Defendants' "fact-based" test would rewrite the limiting language in section 1387(a).

Defendant Emmanuel cites *Kellett v. Superior Court* (1966) 63 Cal.2d 822 and claims section 1387(a) should apply to all offenses arising from the facts known to the prosecution. His citation to *Kellett* is misplaced and undermines his position. *Kellett* interpreted section 654, not section 1387(a). (*Id.* at p. 824.) The Legislature used different language in section 654. That section applies to prosecutions "for the same act or omission," while section 1387(a) applies to prosecutions "for the same offense." (Pen. Code, §§ 654, subdivision (a), 1387, subdivision (a).)

Defendants' "fact-based" test would equate section 1387(a) and section 654 even though the Legislature used significantly different language. This would contravene the settled principle that

> When the Legislature uses materially different language in statutory provisions addressing the same subject or related subjects, the normal inference is that the Legislature intended a difference in meaning. [Citation.]

(*People v. Trevino* (2001) 26 Cal.4th 237, 242.) It would also contravene *Traylor*. There, this Court concluded that the contrasting language between sections 1387(a) and 654 demonstrates the Legislature's intent to provide distinct and narrower coverage under section 1387(a). (*People v. Traylor, supra,* 46 Cal.4th 1205, 1213, fn. 6.)[5]

Defendant Emmanuel also cites section 1387(a)'s policies. He claims precluding the possession of methamphetamine charge would "serve" section 1387(a)'s policies of preventing harassment and delay. His argument proves too much. Barring every successive prosecution would "serve" to prevent harassment and delay. Yet, in contrast to section 654, the Legislature narrowly limited section 1387(a) to successive prosecutions "for the same offense." (Pen. Code, § 1387, subd. (a).) This demonstrates the flaw in defendants' policy-driven position. It is error to use the policies to define when offenses are the "same offense" under section 1387(a).[6]

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[5] We discuss the differences between sections 1387(a) and 654 more fully in Section C, below.

[6] We discuss the flaws in defendants' policy-driven claims more fully in Section C, below.

Defendants' "fact-based" test is at odds with the result in *Traylor*. The lesser-included misdemeanor vehicular manslaughter charge was a "related" charge "arising out of the same set of circumstances" as the dismissed felony vehicular manslaughter charge. Both charges were based upon the same set of facts, i.e., the defendant's collision with the nine-year-old motorcycle rider. (*People v. Traylor, supra,* 46 Cal.4th 1205, 1209-1211.) The only issue was whether the evidence showed gross negligence or ordinary negligence. (*Id.* at pp. 1209-1212.) Thus under defendants' "fact-based" test, the successive charges in *Traylor* would be the "same offense."[7]

The limiting language in *Traylor* does not help defendants in our case. In a footnote, the Court stated its holding was limited to the situation where a magistrate dismisses a felony charge indicating the evidence supports a lesser included misdemeanor and the People file that lesser included misdemeanor charge. (*People v. Traylor, supra,* 46 Cal.4th 1205, 1220, fn. 10.) The Court further indicated it was not addressing how section 1387(a) would apply where the prosecution filed a "lesser-included offense" in contravention of a magistrate's prior determination or when dismissed felonies are followed by

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[7] The same would be true under defendant Gerardo's "fact-based" test because the successive charges in *Traylor* involved the same victim, intent and action by the defendant.

lesser-included felonies or a dismissed misdemeanor is followed by a lesser-included misdemeanor. (*People v. Traylor, supra*, 46 Cal.4th 1205, 1220, fns. 9 and 10.)

None of the situations contemplated in *Traylor* is present in our case. Conspiracy to commit murder and attempted murder are neither greater nor lesser-included offenses of the other. They are separate and distinct offenses. Moreover, nothing about the new prosecution for conspiracy to commit murder in our case was done in contravention of a magistrate's prior determination. The only magistrate to hear the evidence presented in our case held both defendants to answer on both attempted murder charges and defendants waived preliminary hearing in the second case.

In any event, nothing about the Court's discussion in *Traylor* suggests the Court would abandon the "same elements" test under section 1387(a) – particularly in our case where the successive prosecutions do not involve lesser-included or greater offenses. On the contrary, as discussed above, the Court reaffirmed the "same elements" test and rejected the defendant's argument that "section 1387(a) should apply to all charges arising from the *same conduct or behavior* of the defendant[.]" (*People v. Traylor, supra,* 46 Cal.4th 1205, 1213, fn. 6, emphasis in original.)

Defendants' "fact-based" test would convert section 1387(a) from the Legislature's narrow scope to a broad prohibition that would preclude the filing of any charges following the requisite dismissals. There would be no uniformity, consistency or predictability. Whether offenses were the "same offense" would vary with the facts of each case. This is contrary to the Legislature's choice of clear, unambiguous language limiting section 1387(a) to successive prosecutions for the "same offense."

3. Defendants' Position Is Contrary To The Cases They Cite

None of the cases defendants cite supports their position. For example, defendants cite *Dunn v. Superior Court* (1984) 159 Cal.App.3d 1110. In that case, the court held two dismissals of simple kidnapping charges (section 207) barred filing a kidnapping for robbery charge (section 209). (*Dunn v. Superior Court, supra,* 159 Cal.App.3d 1110, 1118-1119.) The court also held that prior dismissals of auto theft (Vehicle Code section 10851) and robbery (section 211) charges barred a third filing charging robbery where the auto theft and robbery charges involved taking the same vehicle. (*Dunn v. Superior Court, supra,* 159 Cal.App.3d 1110, 1118-1119.)

Defendants cite the court's statement that

> 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 v. Superior Court, supra,* 159 Cal.App.3d 1110, 1117-1118.) Neither this statement, nor the analysis in *Dunn*, however, supports defendants' claim that conspiracy to commit murder is the "same offense" as attempted murder under section 1387(a).

First, as this Court noted in *Burris* and reiterated in *Traylor*, the *Dunn* court

> "[A]ppl[ied a] same elements test to determine whether [a] new charge [was the] same offense as [a] previously dismissed one for purposes of [section] 1387." (*Burris, supra,* 34 Cal.4th at p. 1017, fn. 3, 22 Cal.Rptr.3d 876, 103 P.3d 276.)

(*People v. Traylor, supra,* 46 Cal.4th 1205, 1212, first modification added.) This undermines defendants' proposed "fact-based" test.

The *Dunn* court's application of the "same elements" test in that case further undermines defendants' position. The court noted that "[k]idnaping for the purpose of robbery cannot be committed without committing the lesser offense of kidnaping." (*Dunn v. Superior Court, supra,* 159 Cal.App.3d 1110, 1118.) Thus, the court reasoned the

> [P]rosecution for kidnaping for the purpose of committing robbery [was barred] on the theory that to charge the greater would be also to charge the lesser an additional and prohibited third time.

(*Dunn v. Superior Court, supra,* 159 Cal.App.3d 1110, 1118.)

The court made the same observation with respect to the auto theft and robbery charges. (*Dunn v. Superior Court, supra,* 159 Cal.App.3d 1110, 1118.) Where the same vehicle forms the basis of the auto theft and the robbery charges, auto theft is considered a necessarily included offense of robbery. (*Ibid.*) Thus, the greater robbery charge could not have been committed without committing the lesser included auto theft charge. (*Ibid.*)[8]

Our case is different. Unlike the greater section 209 offense and the greater robbery offense in *Dunn*, which included all of the elements of the previously dismissed charges, conspiracy to commit murder does not include

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[8] Defendants suggest the *Dunn* court's analysis of the auto theft and robbery charges did not depend upon whether auto theft was a lesser included offense of robbery. They are mistaken. The court in *Dunn* cited this Court's holding in *People v. Marshall* (1957) 48 Cal.2d 394, 398, for that proposition. (*People v. Dunn, supra,* 159 Cal.App.3d 1110, 1118-1119.) Moreover, this Court understood *Dunn's* decision to involve lesser-included dismissed offenses followed by the corresponding greater offenses, stating,

> As *Dunn* suggested, 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, and perhaps additional elements as well. (*Dunn, supra,* 159 Cal.App.3d 1110, 1118 [].)

(*People v. Traylor, supra,* 46 Cal.4th 1205, 1218, original emphasis.)

all of the elements of attempted murder. Conspiracy to commit murder and attempted murder are separate and distinct offenses with different elements. Attempted murder is not a lesser included offense of conspiracy to commit murder. Defendants can conspire to commit murder without committing attempted murder. Rather than support defendants' position, *Dunn* shows the charges filed in our case are different and section 1387(a) does not apply.[9]

The same is true with *Wallace v. Municipal Court* (1983) 140 Cal.App.3d 100 – a case cited in *Dunn*. In *Wallace*, the court considered whether the failure to timely prosecute a Vehicle Code section 23152, subdivision (a) charge bars a subsequent prosecution under Vehicle Code section 23152, subdivision (b). The court stated a "general rule" distilled from cases that one action bars a subsequent action "when the essence of the offense charged in the second action is the same as the essence of the offense [charged in the previous action]." (*Wallace v. Municipal Court, supra*, 140 Cal.App.3d 100, 107.)

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[9] In *Meza,* the court distinguished *Dunn* on similar grounds, stating,

> *Dunn* is quite obviously different from the present case. One can drive under the influence of alcohol and commit bodily injury against another without committing a robbery or a violation of Vehicle Code section 10851.

(*People v. Meza, supra,* 231 Cal.App.3d 362, 365.)

Defendants cite *Wallace* and argue the "essence" of the offenses in our case is the same because, defendants claim, they "involved the same victims, the same specific intent, and the exact same actions/evidence ...." (Def. Gerardo's brief at p. 12.) Their claim is contrary to *Wallace*.

In *Wallace,* the court examined the statutory "elements" of the offenses, not the alleged facts, to determine whether they were the same offense. The court stated,

> When the statutory scheme for the punishment of violations of Vehicle Code section 23152, subdivisions (a) and (b), is considered it is clear that they do not charge essentially the same violation.

(*Wallace v. Municipal Court, supra,* 140 Cal.App.3d 100, 107.)

Moreover, as noted in *Dunn*, although the *Wallace* court did not define "essence," the court concluded the "essence" of the two Vehicle Code offenses was different because "either offense could be committed without committing the other ...." (*Dunn v. Superior Court, supra,* 159 Cal.App.3d 1110, 1118, citing *Wallace v. Municipal Court, supra,* 140 Cal.App.3d 100, 109.)

The same is true in our case. Conspiracy to commit murder can be committed without committing attempted murder. Thus, the "essence" of the two offenses is different and, under *Wallace*, conspiracy to commit murder is not the "same offense" as attempted murder.

In any event, defendant Gerardo is wrong in his claim that the successive charges in our case require the exact same specific intent and actions. Conspiracy requires an agreement to commit the crime; attempted murder does not. Attempted murder requires a direct but ineffectual act toward accomplishing the intended killing. Conspiracy does not. Conspiracy merely requires at least one overt act in furtherance of the conspiracy. It need not be a criminal act and it can be merely preparatory. The conspiracy to commit murder can be proved with actions that occurred before the evidence required to prove the attempted murders.[10]

Defendants also cite *People v. Salcido* (2008) 166 Cal.App.4th 1303. That case involved charges of section 4501 (assault by a prisoner with a deadly weapon or force likely to produce great bodily injury) and section 4501.5 (battery by a prisoner on a nonprisoner). According to the court's statement

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[10] Although his "fact-based" test should be summarily rejected, we note defendant Gerardo is inconsistent in stating his test. He first states his test applies where "the exact same facts and intent are *required* to prove" the successive charges. (Def. Gerardo's brief at p. 7, emphasis added.) Elsewhere, he changes the test to when the charges "*involve*[] the same victims, the same specific intent, and the exact same actions/evidence." (Def. Gerardo's brief at p. 12, emphasis added.) Finally, he states the test as when the charges are "*based on* the exact same conduct." (Def. Gerardo's brief at p. 20, emphasis added.)

in the procedural background, the section 4501.5 charge was filed and dismissed in the first and second cases and the section 4501 charge was filed and dismissed in the second case. (*People v. Salcido, supra*, 166 Cal.App.4th 1303, 1306-1307.) To avoid section 1387's bar, the People added great bodily injury enhancements (section 12022.7) to the section 4501 and section 4501.5 charges in the third case to come within section 1387.1's third filing provision for violent felonies. (*People v. Salcido, supra*, 166 Cal.App.4th 1303, 1307-1308.) The court held section 1387.1 did not apply to the third filing even though the added enhancements made the charges violent felonies. (*People v. Salcido, supra*, 166 Cal.App.4th 1303, 1313.)

The court based its decision on section 1387.1's plain language, but in dicta, indicated that if the People believed the defendant's conduct was appropriate for a great bodily injury enhancement, the enhancement should have been included in the prior two accusatory pleadings. (*People v. Salcido, supra,* 166 Cal.App.4th 1303, 1313-1314.) Defendants first argue *Salcido* is authority for a "waiver" rule under section 1387(a). According to defendants, the People "waive" the right to allege in a third filing any charges that arise from the facts known to the People in the previous filings. (Def. Gerardo's brief at pp. 19-20.) Defendants misread *Salcido*.

Salcido considered a different issue under a different statute. The *Salcido* court confronted what it called an issue of first impression; namely,

> [W]hether section 1387.1 permits a third filing to charge a violent felony offense when only a nonviolent felony offense was charged in two accusatory pleadings previously dismissed, ...

(*People v. Salcido, supra,* 166 Cal.App.4th 1303, 1312.) The court held section 1387.1's plain language means "the violent felony offense for which charges may be refiled must be one of the charged offenses previously dismissed." (*Ibid.*) The People could not add a great bodily injury enhancement in the third filing simply to avoid section 1387's two-dismissal rule. (*Id.* at p. 1314.)

The circumstances in *Salcido* have nothing to do with our case. Our case does not involve adding an enhancement to convert previously dismissed felonies to "violent" felonies within section 1387.1's third filing exception.[11]

Moreover, defendants' extrapolation from *Salcido* makes no sense. Under defendants' rule, the People could never file any offense following the

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[11] The *Salcido* court did not cite any case dealing with section 1387 in connection with its "waiver" comment. The court cited *People v. Mancebo* (2002) 27 Cal.4th 735, a case in which this Court considered the "narrow question" of whether the defendant's gun use could support two section 12022.5 enhancements for sentencing purposes when it had already been pled and proved to invoke One Strike sentencing. (*People v. Salcido, supra,* 166 Cal.App.4th 1303, 1314)

dismissal of two previous actions. Defendants would argue the People "waived" such filing by failing to allege the offense in the prior actions. Defendants' position would create a new requirement under section 1387(a) – that the new offense cannot be based upon facts previously known to the prosecution. Defendants' position would swallow the rule. It would bar filings such as the filing permitted by this Court in *Traylor*. Defendants misread *Salcido*. That case did not incorporate a "waiver" rule into section 1387(a).

Defendants' second claim based upon *Salcido* is also flawed. Defendant Emmanuel claims that because the court dismissed the section 4501 charge, which is a different offense than the section 4501.5 charge, *Salcido* established a new rule that section 1387(a) applies even though the offenses are not the "same offense." (Def. Emmanuel's brief at p. 17.) Not so. As mentioned above, *Salcido* considered section 1387.1, not section 1387. The court did not consider the issue of when two offenses are the "same offense" under section 1387(a). Thus, *Salcido* is not authority on this issue. (See *In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388 ["'axiomatic that cases are not authority for propositions not considered [therein].' [Citation.] [Fn. omitted.]")

In any event, nothing in *Salcido* purports to interpret section 1387(a) contrary to its plain language. Rather, the court repeatedly affirmed that section 1387(a) only applies where the "same offense" has been twice dismissed. The court quoted section 1387(a) and then stated it "operates to bar any third or subsequent prosecution *on the same charge* ...." (*People v. Salcido, supra,* 166 Cal.App.4th 1303, 1309, quoting 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 423, p. 600, citation omitted, emphasis added.) The court also quoted this Court's statement in *Burris* that, under section 1387(a), "'two previous dismissals of charges *for the same offense* will bar a new felony charge.' (*Burris,* at p. 1019, [].)" (*People v. Salcido, supra,* 166 Cal.App.4th 1303, 1309, emphasis added.)

Furthermore, regardless of the court's recitation in the procedural history, the court dismissed the section 4501 charge under section 1387(a) because the court believed both the section 4501.5 offense and the section 4501 offense had been twice dismissed. In reciting the defendant's argument, the court stated the defendant argued for dismissal "because neither of the offenses previously charged, *which charges were twice dismissed,* was a violent felony ...." (*People v. Salcido, supra,* 166 Cal.App.4th 1303, 1307, emphasis added.) Elsewhere, the court stated the People could not add the

great bodily injury enhancements "to the *felonies* originally charged in the two prior dismissed accusatory pleadings to make *their third filing* a charge of a violent felony ...." (*People v. Salcido, supra*, 166 Cal.App.4th 1303, 1313, citation omitted, emphasis added.) The court concluded,

> 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, emphasis added.) The court believed both the section 4501.5 and the section 4501 charges had been twice dismissed in the prior two cases. *Salcido* is not authority for defendants' claim that section 1387(a) applies where the successive charges are not the "same offense."

Finally, defendant Emmanuel cites an Iowa case, *State v. Abrahamson* (Iowa 2008) 746 N.W.2d 270. That case does not help defendants. Defendant Emmanuel correctly notes the successive charges in *Abrahamson* were conspiracy to manufacture methamphetamine and manufacturing methamphetamine. Defendant Emmanuel neglects to note that, in contrast to our case, both the conspiracy and the manufacturing charges were alleged under the same statutory offense – a violation of Iowa Code section 124.401. (*Id.* at pp. 275-276.) In Iowa, that code section "defines one offense, drug trafficking, and enumerates numerous alternative means of committing it,"

including conspiracy to manufacture a controlled substance and manufacturing a controlled substance. (*State v. Abrahamson, supra*, 746 N.W.2d 270, 276, fn. 6.) Thus, the court held "manufacturing and conspiracy [were] alternative means of committing a single offense under section 124.401(1). [Fn. omitted.]" (*Ibid.*)

The *Abrahamson* court distinguished its prior decision in *State v. Lies* (Iowa 1997) 566 N.W.2d 507, where the defendant was first charged with burglary and then charged with conspiracy to commit the same burglary. (*Id.* at p. 508.) In contrast to *Abrahamson*, the subsequent indictment in *Lies* alleged conspiracy to commit burglary under Iowa's separate, general conspiracy statute, not the same burglary statute alleged in the prior complaint. (*Id.* at p. 509.) The court held that "conspiracy to commit burglary is neither the same offense as the burglary for which defendant was arrested nor a lesser-included offense; ...." (*Ibid.*)

Our case is like *Lies*, not *Abrahamson*. Defendants are not charged with conspiracy to commit murder under the same statute as the previous attempted murder offenses. They are charged under California's general conspiracy statute – section 182. As with the conspiracy law in Iowa, conspiracy under section 182 is a separate and distinct offense from any crime

that may be committed pursuant to the conspiracy.[12] Defendants' citation to *Abrahamson* and Iowa law undermines their position and shows the successive offenses in our case are not the "same offense" under section 1387(a).

None of the cases defendants cite supports their position. None disregards section 1387(a)'s plain language. All of the cases examine the elements of the alleged crimes rather than the facts of the case to determine whether a subsequent offense is the "same offense" as a previous offense.

4. The Accusatory Pleading Test Has No Application Under Section 1387(a)

Defendants argue the Court should substitute the established "elements" test with the "accusatory pleading" test to determine whether successive charges are the "same offense" under section 1387(a). Defendants' suggestion is contrary to this Court's decisions.

In contrast to the elements test, the accusatory pleading test is a fact-based inquiry that examines the facts of the case alleged in the accusatory pleading. (*People v. Reed* (2006) 38 Cal.4th 1224, 1227-1228.) As mentioned

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[12] The Iowa conspiracy statute expressly provides that conspiracy is a separate and distinct offense. (*State v. Abrahamson, supra,* 746 N.W.2d 270, 276.) As discussed above, California cases reach the same conclusion.

above, in *Traylor*, this Court has already rejected a fact-based test under section 1387(a) because "the statutory language belies such a necessarily broad construction" of the phrase "same offense." (*People v. Traylor, supra,* 46 Cal.4th 1205, 1213, fn. 6.)

Moreover, this Court has refused to expand the accusatory pleading test to situations bearing no relevance to its purpose. "The accusatory pleading test arose to ensure that defendants receive notice before they can be convicted of an uncharged crime." (*People v. Reed, supra,* 38 Cal.4th 1224, 1229.) In *Reed*, the Court found the accusatory pleading test has no relevance in deciding whether a defendant may be convicted of multiple charged offenses.

> "[I]t makes no sense to look to the pleading, rather than just the legal elements, in deciding whether conviction of two charged offenses is proper. Concerns about notice are irrelevant when both offenses are separately charged...." [Citation.]

(*Id.* at pp. 1229-1230, second omission in original; see also *People v. Sanders* (2012) 55 Cal.4th 731, 738-739 [rejecting the defendant's request to consider the facts in the case and applying statutory elements test].)

In *People v. Bailey* (2012) 54 Cal.4th 740, the Court refused to apply the accusatory pleading test to determine whether one offense was a lesser-included offense of another for purposes of modifying a conviction under section 1181, subdivision 6. (*Id.* at pp. 751-752.) The Court reiterated that,

> [T]he accusatory pleading test only applies in determining whether a defendant received *notice* of the charges against him in order to have a reasonable opportunity to prepare and present his defense. [Citations.]

(*People v. Bailey, supra*, 54 Cal.4th 740, 751, emphasis in original.) Thus,

> [W]here "'concerns about notice are irrelevant,'" ... the legal elements test, rather than the accusatory pleading test, is used to determine whether an offense is necessarily included within another. [Citation.]

(*Ibid.*) Because concerns about notice were not at issue in *Bailey*, "the accusatory pleading test [was] not applicable." (*Id.* at p. 752.)

The accusatory pleading test is similarly inapplicable in our case. There is no issue concerning notice of the charges. There is no issue concerning multiple punishment. Therefore, the accusatory pleading test has no relevance to determine whether successive charges are the "same offense" under 1387(a). Defendants' reference to the accusatory pleading test is misguided and would apply the wrong standard.[13]

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[13] Defendants' reference to the accusatory pleadings test is misguided for additional reasons. It would encourage artful pleading by prosecutors to circumvent section 1387(a). In our case, for example, if the accusatory pleading merely alleged overt acts 1 and 2 for both counts, defendants would have no argument that the alleged facts supported an attempted murder offense. In addition, in contrast to the elements test, defendants' accusatory pleading test would vary with the facts alleged in any given case and provide no predictability or uniformity in deciding whether successive offenses were the "same offense" under section 1387(a).

C. THE "SAME ELEMENTS" TEST ENCOMPASSES PENAL CODE SECTION 1387'S POLICIES AND LEGISLATIVE INTENT

1. The Legislature Made A Policy Choice Narrowly Limiting Section 1387 To Successive Prosecutions Charging 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. [Citation.]" [Citation.]

(*Miller v. Superior Court* (2002) 101 Cal.App.4th 728, 740, first omission in original.) In deciding where to set the limit, the Legislature balanced two competing interests. "[S]ociety, represented by the People, has a legitimate interest in the 'fair prosecution of crimes properly alleged.' [Citation.]" (*People v. Orin* (1975) 13 Cal.3d 937, 947.) Defendants have an interest in avoiding potential harassment and delay that may result from repeated criminal prosecutions.

For over 100 years, the Legislature drew the balance wholly in favor of society's interest with respect to felonies.

> [U]ntil 1975, the interest in prosecuting felonies was considered so much greater that, while a one-dismissal rule applied to misdemeanors, felony charges could be refiled ad infinitum. [Citations.]

(*Burris v. Superior Court, supra,* 34 Cal.4th 1012, 1019.) In 1975, the Legislature implemented the "two-dismissal" limit. (See Stats. 1975, ch. 1069, § 1, p. 2615.) Generally, "two previous dismissals of charges *for the same offense* will bar a new felony charge." (*Burris v. Superior Court, supra,* 34 Cal.4th 1012, 1019, emphasis added.)

The Legislature chose to draft section 1387(a) narrowly. The Legislature did not intend for section 1387(a) to bar all offenses arising out of the same facts or circumstances. (*People v. Traylor, supra,* 46 Cal.4th 1205, 1213, fn. 6 ["the statutory language belies such a necessarily broad construction"].)

> [S]ince its adoption in 1872, section 1387(a) applies only to repetitive charges "for the same *offense*" (italics added), and then describes such an "offense" in terms of whether "it" is a "felony" or a "misdemeanor."

(*Ibid.*, emphasis in original.) Such a correlation, this Court found,

> [I]mplies that, for purposes of section 1387(a), an "offense" is defined not by conduct, but by its particular definition as such in the Penal Code. Thus, ... one crime is the "same offense" as another when it involves the "identical *criminal* act" as represented by the criminal *elements* necessary for a conviction. [Citation.]

(*People v. Traylor, supra,* 46 Cal.4th 1205, 1213, fn. 6, emphasis in original.)

As further support of the Legislature's intent, this Court noted that

> [S]ection 1387(a)'s use of the narrow phrase "the same offense" contrasts with the provisions of other statutes that provide broader protection against multiple prosecutions after the defendant has been *convicted or acquitted* of, or *placed in jeopardy* for, offenses arising from the same course of criminal conduct. [Citations.]

(*People v. Traylor, supra,* 46 Cal.4th 1205, 1213, fn. 6, emphasis in original.)

For example, the Court observed section 654 provides that the "acquittal or conviction under one statute bars further prosecution for the 'same act or omission' under another[.]" (*People v. Traylor, supra,* 46 Cal.4th 1205, 1213, fn. 6) Section 1023 provides that the "conviction, acquittal, or jeopardy under an accusatory pleading bars further prosecution for '*the offense* charged in such accusatory pleading, ... *or for an offense necessarily included therein*' (italics added)[.]" (*Ibid.*, quoting section 1023, emphasis and omission in original.) Finally, under *Kellett v. Superior Court, supra,* 63 Cal.2d 822, section "654 applies to all offenses arising from the 'same act or course of conduct'[.]" (*People v. Traylor, supra,* 46 Cal.4th 1205, 1213, fn. 6)

Defendants' "fact-based" test is contrary to the legislative intent. It would convert the meaning of "same offense" under section 1387(a) into the same meaning as "same act or omission" under section 654. This Court

concluded in *Traylor*, however, that the contrasting language between section 1387(a) and section 654 demonstrates the Legislature's intent to provide distinct and narrower coverage under section 1387(a). (*People v. Traylor, supra,* 46 Cal.4th 1205, 1213, fn. 6.)

The Legislature's use of different language in sections 1387(a) and 654 reflects the Legislature's policy distinction between filing charges before the defendant has been acquitted or convicted and filing charges after that time. Generally, securing an acquittal or conviction demands greater resources to be spent by both sides, and the potential harassment and waste of resources caused by additional trials are more significant. Hence, the Legislature provides broader protection in section 654 than in section 1387(a).

If the Legislature intended section 1387(a) to have broader coverage, it would have used broader language such as the language used in section 654. When the Legislature wants to broaden the scope of a statute, it knows how to do so. The Legislature's change in the law relating to the tolling of the statute of limitations illustrates this point. Former section 802.5 provided

> "... no time during which a criminal action is pending is a part of any limitation of the time for recommencing that criminal action in the event of a prior dismissal of that action, subject to the provisions of Section 1387." (Stats. 1981, ch. 1017, § 3, p. 3927.)

(*People v. Whitfield* (1993) 19 Cal.App.4th 1652, 1659, fn. 8, quoting former § 802.5 (1982).) In 1984, the Legislature repealed section 802.5 and added section 803, subdivision (b), which read,

> No time during which prosecution of the same person *for the same conduct* is pending in a court of this state is a part of a limitation of time prescribed in this chapter.

(Pen. Code, § 803, subd. (b), emphasis added.) In its comment to section 803, subdivision (b), the Law Revision Commission explained that former section 802.5's limitation that

> "[P]ermitted recommencing the same 'criminal action' [was] replaced by the broader standard of prosecution of the 'same conduct,' drawn from [the] Model Penal Code § 1.06(6)(b)."

(*People v. Whitfield, supra,* 19 Cal.App.4th 1652, 1659, fn. 8.) The Commission further explained that

> "The former law that provided tolling only for a subsequent prosecution *for the same offense* was too narrow, since the dismissal may have been based upon a substantial variation between the previous allegations and the proof."

(*Ibid.*, emphasis added.)

Although section 1387(a) has been amended numerous times since its inception in 1872, the Legislature has never changed the limiting phrase, "same offense."

> Where the Legislature has made a policy choice, using as here particularly clear and unambiguous language, [a court] may not second-guess its determination. [Citation.]

(*Joshua D. v. Superior Court, supra,* 157 Cal.App.4th 549, 565.)

Here, the Legislature made a policy choice narrowly limiting section 1387(a) to successive prosecutions charging the "same offense." When the new case alleges a different offense, the Legislature determined section 1387(a) does not apply. The "same elements" test stays true to section 1387(a)'s plain language and furthers the legislative intent.

2. This Case Is Consistent With Section 1387(a)'s Policies And The Legislative Intent

Defendants claim this Court must find that conspiracy to commit murder is the "same offense" as attempted murder to preserve section 1387(a)'s policies. They are mistaken.

As discussed in the previous section, none of section 1387(a)'s policies is violated in this case. Section 1387(a) is operating how the Legislature envisioned it would. It precludes the People from refiling attempted murder

charges because those offenses have been twice dismissed. It does not preclude the conspiracy to commit murder charges because they are not the "same offense" as the attempted murder charges.

While defendants cite section 1387(a)'s policies, they neglect to note that the policies assume the "offense" in the subsequent prosecution is the "same offense" as the dismissed prosecutions. Defendants' own quotation from *Traylor* makes this point:

> "'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*.'"

(Def. Gerardo's brief at p. 15, emphasis added, quoting *People v. Traylor, supra,* 46 Cal.4th 1205, 1209.) Nothing in section 1387(a)'s policies suggests the Legislature meant "same offense" to apply to all successive offenses.

Defendants' specific claim that applying section 1387(a)'s plain language will "completely eviscerate the speedy trial right protections intended in section 1387[]" suffers from the same flaw. (Def. Gerardo's brief at p. 24.) As this Court stated in *Burris*, section 1387(a) "prevents the evasion of speedy trial rights through the repeated dismissal and refiling of *the same charges*. [Citations.]" (*Burris v. Superior Court, supra*, 34 Cal.4th 1012, 1018, emphasis added.) Conspiracy to commit murder is not "the same charge" as attempted murder.

In any event, defendants are not deprived of any speedy trial rights in this case. They can challenge the instant prosecution on both statutory and constitutional speedy trial grounds. (See, e.g., *Bellizzi v. Superior Court* (1974) 12 Cal.3d 33, 38 ["the prosecution's statutory right to refile cannot infringe upon petitioner's constitutional right to a speedy trial[]"]; see also *People v. Sahagun* (1979) 89 Cal.App.3d 1, 16-17 [determinations made in prior criminal proceedings may be considered in determining whether subsequent filing demonstrates prosecutorial delay abridging accused's right to speedy trial].)

Defendants' policy-driven arguments disregard section 1387(a)'s plain language and would convert section 1387(a) from the Legislature's narrow scope to a broad prohibition that could preclude the filing of any charges following two dismissals. The defendant could simply cite the policies against delay and potential harassment and have the subsequent filing dismissed regardless of the charges. After all, dismissing the third case would always save the accused from the consequences of facing additional criminal proceedings. It would prevent potential harassment and delay from successive prosecutions.

In fact, defendants' "policy" arguments would apply equally to the prosecution in *Traylor*. Defendants could argue that disallowing the

successive prosecution in that case would curtail prosecutorial harassment, reduce prosecutors' ability to forum-shop and prevent the evasion of speedy trial rights. Defendants' policy-driven claims do not help them. They do not mandate that conspiracy to commit murder is the "same offense" as attempted murder under section 1387(a). Nor do defendants' allegations concerning the prosecutor's motives.

Defendants claim the prosecutor in *Traylor* had "clean hands" because the prosecutor followed the magistrate's recommendation to file the lesser misdemeanor offense. They contrast *Dunn*, claiming the prosecutor in that case filed the subsequent prosecution to "churn the charges to different permutations to evade section 1387[.]" (Def. Gerardo's brief at p. 23.) They argue that this Court should find conspiracy to commit murder is the "same offense" as attempted murder in this case because the prosecution is trying to evade section 1387(a)'s policies. Defendants' claim is misplaced.

As discussed above, the prosecution in this case is consistent with section 1387(a)'s plain language, legislative intent, and policies. There is no evidence of any inappropriate prosecutorial attempt to harass, delay, or "forum shop." The People did not file the conspiracy to commit murder charges in this case to forum shop after a magistrate found the evidence supporting the attempted murder charges insufficient. The only magistrate to hear the

evidence in this case held both defendants to answer for both attempted murder charges. (C.T. p. 87.) There is no evidence the People are attempting to "churn" charges a magistrate found too weak to sustain.

Nor is there any evidence of attempts to harass or evade speedy trial rights. After moving to dismiss the first case, the People refiled the same charges on the same date – July 16, 2012. (C.T. p. 17.) The parties waived preliminary hearing and after several motions to continue the trial date by defendant Emmanuel, the People and defendant Gerardo again answered ready for trial on November 7, 2012. (C.T. pp. 18-19.) Defendant Emmanuel moved to continue the trial date to November 19, 2012. (C.T. p. 19.) The People informed the court and defendants' counsel that if the trial were continued to November 19, 2012, the People would be unable to proceed because the lead investigator and a necessary witness in the case would be in Africa. (C.T. pp. 106-107.) The court continued the trial to November 19, 2012 and the People filed a motion to continue, but the case was eventually dismissed pursuant to section 1382 on December 10, 2012. (C.T. pp. 19-20.) The People filed the instant case on the same date, December 10, 2012. (C.T. pp. 109-112.)

This procedural history shows a prosecutorial motive to protect society's interest in punishing defendants for their criminal behavior. There is no evidence of prosecutorial malfeasance in this case.

In any event, defendants cite this Court's comments regarding the magistrate's determination and the prosecutor's conduct in *Traylor* out of context. The tension in *Traylor* does not exist in this case. In *Traylor*, the Court considered how section 1387(a) applies where the subsequent offense is a lesser-included offense of the dismissed offense. This Court noted that accepting the result in *Dunn* – that a lesser-included offense is the "same offense" as a subsequently filed greater offense under section 1387(a) – did not mandate the same result for the converse situation presented in *Traylor* – a dismissed greater offense followed by a misdemeanor lesser-included offense. (*People v. Traylor, supra,* 46 Cal.4th 1205, 1218.) The Court observed that a prime objective of section 1387(a)

> [I]s to limit prosecutorial forum shopping on evidence that prior magistrates *have already found insufficient*. That precise danger is presented if the People, after sustaining one or more dismissals of charge A for lack of evidence, can continue to refile the identical charge A, or go "up the ladder" to even more serious charges that *include* A, until they find a magistrate willing to hold the defendant to answer.

(*Ibid.*, emphasis in original.)

Unlike either *Dunn* or *Traylor*, our case does not involve lesser included and greater offenses. Conspiracy to commit murder and attempted murder are distinct and separate crimes. There is no danger the prosecution

will continue to file the *identical* charge or a charge that *includes* the identical charge.

Defendants' speculation concerning prosecutorial motives is misplaced for additional reasons. Whether successive offenses are the "same offense" under section 1387(a) should not vary depending upon the particular procedural history or perceived motives in any given case. That would render the phrase "same offense" meaningless and reduce the inquiry under section 1387(a) to a case-by-case review depending upon the circumstances. It would lead to inconsistent results. The same successive charges could be considered the "same offense" in one case, but not in the other.

For example, consider if in *Traylor* the prosecutor had twice filed the same felony gross vehicular manslaughter charge and, in both cases, magistrates held the defendant to answer, but both cases were eventually dismissed because the prosecution was unable to proceed due to witness unavailability. The prosecution then filed the same misdemeanor vehicular manslaughter charge filed in *Traylor*.

Defendants would make the same arguments they make in our case. They would argue the prosecution was trying to evade section 1387(a)'s policies. They would argue the misdemeanor vehicular manslaughter charge was the "same offense" under section 1387(a) as the dismissed felony charge.

Under defendants' position, the same misdemeanor vehicular manslaughter charge would be considered the "same offense" in one case but not the other simply because of the magistrate's determination.

Consider instead if the magistrates reached different conclusions. The magistrate in the first case found the evidence only supported the misdemeanor vehicular manslaughter offense, but the magistrate in the second case found the evidence supported the felony vehicular manslaughter offense. Would defendants argue the subsequent misdemeanor vehicular manslaughter charge was the "same offense" under section 1387(a)?

Similarly, consider the situation where both magistrates in successive cases hold a defendant to answer on a simple kidnapping charge, but both cases are dismissed because the prosecution is unable to proceed due to witness unavailability. The prosecutor then files aggravated kidnapping. Would the Court distinguish *Dunn* on the grounds that in *Dunn* the second magistrate did not hold the defendant to answer on the lesser-included kidnapping charge while in the hypothetical case both magistrates found sufficient evidence?

The court in *Dunn* did not base its decision on the fact that the second magistrate found insufficient evidence of the lesser offenses.[14] As this Court observed in *Burris*, the court in *Dunn* applied the "same elements" test to determine whether the successive charges were the "same offense" under section 1387(a). (*Burris v. Superior Court, supra,* 34 Cal.4th 1012, 1016, fn. 3, cited in *People v. Traylor, supra,* 46 Cal.4th 1205, 1212.) As this Court observed in *Traylor*, the court in *Dunn* determined a greater offense is the "same offense" under section 1387(a) as a dismissed lesser-included offense because – regardless of the facts or procedural circumstances – "'to charge the greater would be *also to charge the lesser* an additional and prohibited third time.' (*Dunn, supra,* 159 Cal.App.3d 1110, 1118 [], italics added.)" (*People v. Traylor, supra,* 46 Cal.4th 1205, 1217.)[15]

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[14] In this respect, in *Dunn*, the magistrate at the first preliminary hearing found sufficient evidence and held the defendant to answer on the lesser charges. (*Dunn v. Superior Court, supra,* 159 Cal.App.3d 1110, 1114.) Thus, it was not apparent in *Dunn* that the prosecutor attempted to press forward even though the evidence was insufficient.

[15] The converse situation in *Traylor* did not present the same problem under section 1387(a). Because the successive lesser-included offense does not include all of the elements of the previously dismissed greater offense, to charge the lesser-included offense is not to charge the greater offense an additional and prohibited third time. In our case, to charge conspiracy to commit murder is not to charge attempted murder an additional and prohibited third time.

A final situation involving the successive charges in our case further illustrates the wisdom of using the "same elements" test to determine when offenses are the "same offense" under section 1387(a). Consider if two magistrates refused to hold the defendants to answer on attempted murder charges in two successive cases but stated on the record that the evidence supported conspiracy to commit murder charges instead. The prosecutor then filed a new case charging conspiracy to commit murder. Would defendants concede the conspiracy to commit murder charges were not the "same offense" as the attempted murder charges in that case?

These situations and many more that could arise illustrate the flaw in defendants' position. Whether successive charges are the "same offense" under section 1387(a) does not depend upon the particular procedural variations in a case. Instead, courts wisely examine the offenses and their respective elements. The successive charges in our case are separate and distinct offenses with different elements. They are not the "same offense" under section 1387(a).

3. The Legislature's Clear Language Governs

Section 1387(a)'s pertinent language is clear. It applies only to successive prosecutions for the "same offense." It reflects the Legislature's policy decision balancing defendants' interest in avoiding harassment and

delay from repeated prosecution and society's interest in prosecuting defendants for their criminal behavior.

Defendants complain about where the Legislature drew the line. They complain that section 1387(a) does not limit the number of times prosecutors can file successive prosecutions in the same case alleging different offenses. They want section 1387(a) to bar all successive prosecutions arising out of the same facts and circumstances. They want section 1387(a) to provide the same protection as section 654 even though section 654 uses substantially different language. Defendants complain to the wrong branch of government.

In *In re D.B., supra*, 58 Cal.4th 941, this Court recently rejected a similar complaint. In that case, the Court considered language in Welfare and Institutions Code section 733, subdivision (c) that provided for a minor's commitment to the Department of Corrections juvenile facility only if "the most recent offense alleged" in the petition and sustained is a violent or serious offense. (*Id.* at p. 944, quoting Welf. & Inst. Code, § 733, subd. (c).) The lower court determined the plain language meant a juvenile commitment is available only if the juvenile's most recently committed offense is violent or serious. (*In re D.B., supra*, 58 Cal.4th 941, 944.) The People claimed the plain language could produce absurd consequences as where a juvenile commits numerous violent offenses, but the most recent alleged offense is

nonviolent. (*In re D.B., supra*, 58 Cal.4th 941, 944.) That juvenile, although quite violent, would not receive a commitment to the Department of Corrections juvenile facility. (*Ibid.*)

This Court acknowledged some potential consequences from the statute's plain language were "troubling." (*In re D.B., supra,* 58 Cal.4th 941, 948.) The Court found, however, that the language was clear and stated, "When a law is unambiguous, we must conclude the Legislature meant what it said even if the outcome strikes us as unwise or disagreeable." (*Id.* at p. 944.) The Court explained,

> To justify departing from a literal reading of a clearly worded statute, the results produced must be so unreasonable the Legislature could not have intended them. [Citation.]

(*Id.* at p. 948.)

The Court observed that

> The Legislature's primary purpose in enacting the statute [in that case] was to reduce the number of juvenile offenders housed in state facilities by shifting responsibility to the county level "'for all but the most serious youth offenders.'" [Citations.]

(*In re D.B., supra,* 58 Cal.4th 941, 948.) The Court stated,

> Although reasonable minds may debate the wisdom of the chosen approach, decisions about how to limit [juvenile offender] commitments are the Legislature's to make.

(*Ibid.*)

The same is true in our case. In clear language, the Legislature limited section 1387(a) to successive prosecutions for the "same offense." (*People v. Traylor, supra,* 46 Cal.4th 1205, 1212.) Although defendants complain about section 1387(a)'s narrow scope, decisions about how to limit when additional criminal offenses may be filed are the Legislature's to make.

The Legislature could reasonably believe the risk that prosecutors will not join all charges arising from the same set of facts in one prosecution is low. Section 954 greatly expands the scope of permissible joinder and prosecutors have little, if any, incentive to purposefully withhold charges. They have limited resources and the risks to successful prosecution increase over time as memories fade and necessary witnesses or evidence may be lost.

In addition, section 654 provides a strong disincentive against withholding charges. An acquittal or conviction bars the prosecution from filing additional charges arising out of the same act or course of conduct. (Pen. Code, § 654; *Kellett v. Superior Court, supra,* 63 Cal.2d 822, 827.) As this Court noted in *Kellett*,

> [T]o avoid these risks, it has always been necessary for prosecutors carefully to assess the seriousness of a defendant's criminal conduct before determining what charges should be prosecuted against him.

(*Kellett v. Superior Court, supra,* 63 Cal.2d 822, 828.)

Section 1385 provides a court with broad discretion to dismiss "in furtherance of justice" on its own motion or as a result of a defendant's suggestion. (*People v. Orin, supra,* 13 Cal.3d 937, 945; *People v. Konow* (2004) 32 Cal.4th 995, 1022.) Under section 1385, the court considers the

> "[C]onstitutional rights of the defendant, and *the interests of society represented by the People*, in determining whether there should be a dismissal. [Citations.]" [Citations.]

(*People v. Orin, supra,* 13 Cal.3d 937, 945, second omission and emphasis in original.) Section 1385 provides protection where defendants believe they are subjected to unwarranted harassment or delay by successive prosecutions alleging different offenses. Finally, as mentioned above, defendants retain their statutory and constitutional speedy-trial protection.

To the extent defendants argue these protections are insufficient, their complaints are misplaced. "[The Court is] not free to rewrite the law simply because a literal interpretation may produce results of arguable utility." (*In re D.B., supra,* 53 Cal.4th 941, 948.) Rather, it is for the Legislature to amend the statute "if the language it has enacted is [] understood to create unintended consequences." (*Ibid.*)

Since the statute's adoption in 1872, the Legislature has limited section 1387(a) to successive prosecutions charging the "same offense." The Court of Appeal correctly determined that if section 1387(a)'s protection "is to be broadened, it is up to the Legislature."

CONCLUSION

For the foregoing reasons, the People respectfully request this Court affirm the judgment of the Court of Appeal.

Dated this 26th day of January, 2015.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT
[California Rules of Court, Rule 8.520(c)]

The text of the Consolidated Answer Brief on the Merits consists of 10,819 words as counted by the word-processing program used to generate this brief.

Dated this 26th day of January, 2015.

Respectfully submitted,

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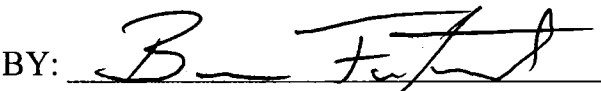
BY: 

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STATE OF CALIFORNIA)
) ss
COUNTY OF ORANGE)

RE: PEOPLE vs. GERARDO JUAREZ, et al.
NO. S219889
DCA NO. G049037 (LEAD)
CONSOLIDATED WITH DCA CASE: NO. G049038

I am a citizen of the United States; I am over the age of eighteen years and not a party to the within entitled action; my business address is: Office of the District Attorney, County of Orange, 401 Civic Center Drive West Santa Ana, California 92701.

On, January 26 2015, I served the within **CONSOLIDATED ANSWER BRIEF ON THE MERITS** on interested parties in said action by placing a true copy thereof enclosed in a sealed envelope, in the United States mail at Santa Ana, California, that same day, in the ordinary course of business, postage thereon fully prepaid, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct.
Executed on January 26, 2015, at Santa Ana, California.

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