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 REPLY 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

LAW OFFICES OF JOHN F. SCHUCK
John F. Schuck, #96111
885 N. San Antonio Road, Suite A
Los Altos, CA 94022
(650) 383-5325
schuckappeal@hotmail.com
Attorney for Respondent
EMMANUEL JUAREZ
By appointment of the Supreme Court

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Los Altos, CA 94022
(650) 383-5325
schuckappeal@hotmail.com
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I. INTRODUCTION

In the opening brief, respondent Emmanuel Juarez demonstrated that the term "same offense" in Penal Code section 1387 means all offenses arising out of the same set of underlying or operative facts. (OB 7-24.) The prosecution concedes that "same offense" does not mean literally the same, exact statutory offense. The prosecution claims that "same offense" means offenses that have the same elements. Under this proposed test, as long as the newly charged offense has different elements, the prosecutor is not limited by section 1387's two-dismissal rule, but can refile charges against a defendant innumerable times, limited only by the prosecutor's creativity in selecting the new charge. This cannot be what the Legislature intended in enacting and amending section 1387. The prosecution's claims are not well-taken and should be rejected.[1]

II. ARGUMENT

THE TERM "SAME OFFENSE" AS USED IN PENAL CODE SECTION 1387 REFERS TO ALL OFFENSES ARISING FROM THE SAME SET OF UNDERLYING FACTS.

1. The policies underlying section 1387 are best served by adopting respondent's "underlying case" construction of the term "same offense."

In *Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1018, this court discussed the purpose of the two-dismissal rule of Penal Code section 1387:

> Section 1387 implements a series of related public

[1] "AB" refers to the prosecution's Consolidated Answer Brief on the Merits.

> policies. It curtails prosecutorial harassment by placing limits on 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. (Citations omitted.)

(Accord, *People v. Traylor* (2009) 46 Cal.4th 1205, 1213; *People v. Salcido* (2008) 166 Cal.App.4th 1303, 1309.)

But, the language of section 1387 "'is hardly pellucid.'" (*People v. Traylor, supra,* 46 Cal.4th 1205, 1212.) And, as this court acknowledged in *Burris* regarding section 1387, the usual rules of statutory construction "do not reveal a clear legislative intent....Nor does the legislative history behind the statute and its subsequent revisions contain evidence the legislature chose a particular construction in order to implement one rule or another." (34 Cal.4th at 1018.) Therefore, when interpreting the term "same offense," 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.)

The human problems and evils with which section 1387 is concerned are the harassment, repeated refiling, and speedy trial issues mentioned in Burris, supra. Section 1387 "exist[s] to protect a defendant's right to a speedy trial and must be construed to serve that overriding purpose." (*Paredes v. Superior Court* (1999) 77 Cal.App.4th 24, 28-29.) Balanced against these interests of a defendant is the prosecution's interest in

bringing defendants to trial. These disparate interests are all served by construing the term "same offense" to mean all charges arising out of the underlying facts. Such a construction allows the prosecution two opportunities to bring the defendant to trial (and three opportunities where excusable neglect has been shown (sec.1387.1)), while at the same time preventing harassment and preserving a defendant's constitutional speedy trial rights.

Given this court's acknowledgment that the language of section 1387 is not clear and that the legislative history does not shed any light on the legislature's intent, the prosecution's claims that the statute is "clear" (AB 48-53), "'clear and unambiguous'" (AB 6, 39) and that its "'terms...are plain'" (AB 14) are flat wrong. Further, as the prosecution concedes (AB 39), the term "same offense" does not mean literally the same statutory offense. In *Traylor*, to resolve the limited issue before it, the court recognized that section 1387, subdivision (a) was not clear. It therefore *did* "'depart from a literal reading'" (AB 50) of "same offense" and held that it meant an offense with the same elements. (46 Cal.4th at 1212-1213.) Given the issue here, and the indisputable fact that section 1387 "plac[es] limits on the number of times charges may be refiled" (*Burris, supra,* 34 Cal.4th at 1018) a departure from this definition is necessary.

Respondent acknowledges that the reported authorities have generally construed "same offense" as used in section 1387 to mean "the 'identical criminal act' as represented by the criminal *elements* necessary for conviction." (*Traylor, supra,* 46

Cal.4th at 1217, fn.6.) But, none of those authorities considered the definition of the term in the context of whether unlimited refilings – the proposition argued for by the prosecution in this case -- were permissible. Given the "predominant purpose" of "establish[ing] some limit" to the number of refilings (*Miller v. Superior Court* (2002) 101Cal.App. 4th 728, 740), it is obvious that the Legislature never would have intended to adopt the prosecution's definition of the term "same offense."

Indeed, the prosecution agrees (AB 34) that the "[t]he predominant purpose of section 1387 is to establish some limit to a defendant's period of potential liability..." (*Miller v. Superior Court, supra,* 101 Cal.App.4th at 740.) The prosecution also recognizes that "[d]efendants have an interest in avoiding potential harassment and delay that may result from repeated criminal prosecutions." (AB 34.) Despite these necessary concessions, the prosecution inimically argues that section 1387 permits it a virtually unlimited number of repeated prosecutions. (AB 34-53.)

Contrary to the public policies stated in *Burris,* the prosecution in this matter argues that it can refile charges against a defendant an unlimited number of times as long as the new charge does not contain the same elements as a twice-dismissed charge. But, such repeated refiling constitutes harassment, thus thwarting one of the purposes of section 1387. Further, this construction of "same offense" does nothing to "balance the defendant's interest in avoiding harassment and delay from repeated filings and society's interest in prosecuting defendants for their criminal behavior," as the prosecution claims.

(AB 48-49.) The prosecution's idea of "same offense" has the exact opposite effect and tips the scale completely against the defendant.

The prosecution's unlimited refiling argument also eviscerates a defendant's constitutional and statutory rights to a speedy trial. "The purpose of the right to a speedy trial is to protect the accused from having criminal charges pending against him an undue length of time caused either by willful oppression, or the neglect of the state or its officers." (*People v. Luu* (1989) 209 Cal.App.3d 1399, 1404.) Under the prosecution's theory, repeated refilings can continue unabated for years, which is clearly an undue length of time.

Respondent recognizes that the *Traylor* court, in the context of the issues of that case, rejected the interpretation of section 1387, subdivision (a) that it "should apply to all charges arising from the same conduct or behavior of the defendant" and that "the statutory language belies such a necessarily broad construction." (*Traylor, supra,* 46 Cal.4th at 1213, fn.6.) But, *Traylor* was not dealing with the issue before the court in this instant case, i.e., whether unlimited dismissals and refilings of felony charges are proper where the new offense does not include all the elements of the twice-dismissed charges. The prosecution recognizes that "[n]one of the situations contemplated in *Traylor* are present in our case." (AB 18.) Thus, to that extent, *Traylor* is inapposite. And, the holding in *Traylor* was "carefully limited" to the circumstances then before the court. (46 Cal.4th at 1220, fn.10.)

After reciting the salutary public policies underlying section 1387 and the prosecution's interest in the prosecution of serious offenses (46 Cal.4th at 1213-1214), the *Traylor* court stated that, "the central aim of section 1387 is to prevent unlimited dismissals and refilings of complaints charging the same offense." (46 Cal.4th at 1214.) The public policies against unlimited refilings where the elements-based "same offense" test is used are equally at play using in a "fact-based" test where the new charges arise out of the underlying incident. This is so even if the elements of the new charge are different from the twice-dismissed charge. The policy objectives of section 1387 are fully accomplished by applying the two-dismissal "same offense" rule as argued for by respondent. Under this rule, section 1387 bars a subsequent refiling after two dismissals where the charges arise out of the same underlying facts or incident.

The prosecution claims that respondent's "'fact-based' test disregards section 1387(a)'s narrow application." (AB 14.) Not so. Respondent acknowledges that the *Traylor* court has given section 1387 an arguably "narrow" interpretation. However, respondent has demonstrated that this narrow interpretation should be reconsidered because it thwarts the policies behind the statute and unfairly and unconstitutionally permits unlimited dismissals and refilings as long as the new charge does not contain all of the elements of the twice-dismissed charges.

The prosecution's claim that application of respondent's "'fact-based' test...would swallow the rule," (AB 14, 27) is not well-taken. Respondent's "test" would simply

broaden the rule to include all charges arising out of the underlying incident. The term "same offense" would be so defined. Such a definition would preclude unlimited dismissals and refilings, which is the construction sought by the prosecution.

The prosecution argues that respondent's construction of section 1387, subdivision (a) would lead to "a broad prohibition that would preclude the filing of any charges following the requisite [two] dismissals. There would be no uniformity, consistency, or predictability." (AB 19.) But, a prosecutor is entitled to refile a third time where there has been excusable neglect. (Penal Code sec.1387.1.) A prosecutor who twice having been inexcusably unprepared should not receive a third, fourth, fifth, etc. bite of the apple. And, uniformity and consistency would be furthered because all parties would definitively know that the prosecutor would have only two chances to bring the defendant to trial, not unlimited opportunities to charge different offenses as the prosecution in this case proposes.

Respondent cited *Kellet v. Superior Court* (1966) 63 Cal.2d 822, 825-826 for the proposition that "trials seriatim" "constitute wholly unreasonable harassment." The prosecution does not dispute this reasonable proposition. And, while trials seriatim are not at issue here, "refilings seriatim" certainly are, which also constitutes harassment, as *Traylor* recognizes. Unlimited seriatim refilings, however, is the procedure argued-for by the prosecution in this case. This cannot be the intent behind section 1387.

To accomplish the purpose of setting a limit to a defendant's period of potential

liability, the Legislature provided for a two-dismissal rule, with an escape hatch third refiling in cases of excusable neglect. The only way for this period of liability to be limited is to adopt respondent's definition that section 1387, subdivision (a) should apply to all charges arising from the same conduct or behavior of the defendant. Although this definition was rejected in *Traylor* (46 Cal.4th at 1213, fn.6), it is the only definition that provides a limit to a defendant's period of potential liability. Neither the prosecution's definition of "same offense" nor the court's definition in *Traylor* provides the necessary limitation.

The prosecution claims that "[s]ection 1387(a) is operating how the Legislature envisioned it would." (AB 39.) However, the words of the statute establish beyond cavil that the Legislature envisioned a two-dismissal rule, not an unlimited dismissal rule. While the Legislature used the term "same offense," it is doubtful it envisioned that the term would permit virtually unlimited dismissals and refilings. Nor did *Traylor* state that such was permissible.

The prosecution claims it is not "trying to evade section 1387's policies" (AB 42) because it did not inappropriately harass or forum shop. (AB 42-43.) The prosecution is wrong; the statutory policy against repeated filings is precisely what the prosecution seeks to evade. It suffered two dismissals as a result of its inexcusable lack of diligence and unpreparedness and now wants to try again. Such a tactic should not be condoned. (*Parades v. Superior Court, supra,* 77 Cal.App.4th at 28 ["a felony case once dismissed

for delay can be refiled, but...a felony case twice dismissed for delay cannot."]) To permit unlimited refilings after such conduct would reward careless, slipshod work and provide no incentive to prosecute the case in a timely manner. Repeated unpreparedness certainly constitutes an inappropriate form of harassment which can violate a defendant's right to a speedy trial.

2. Conclusion

The human problems and evils with which section 1387 are concerned are the curtailment of prosecutorial harassment, the limitation of repeated dismissals and refilings, and protection of the defendant's fundamental right to a speedy trial. (*Burris v. Superior Court, supra,* 34 Cal.4th at 1018.) These salutary policies can only be satisfied by construing "same offense" to mean all offenses relating to the underlying conduct of the defendant. Any other definition thwarts these policies.

III. CONCLUSION

For the reasons stated above, and in the brief on the merits, reversal of the Court of Appeal's opinion is required.

Dated: February 11, 2015

LAW OFFICES OF JOHN F. SCHUCK
John F. Schuck, #96111
885 N. San Antonio Road, Suite A
Los Altos, CA 94022
(650) 383-5325
By _____
JOHN F. SCHUCK
Attorney for Respondent
EMMANUEL JUAREZ
(Appointed by the Court)

CERTIFICATE OF WORD COUNT

In reliance on the word count of the computer program used to generate this brief, I, John F. Schuck, hereby certify that this Reply Brief contains 2,132 words.

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

Dated: February 11, 2015

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.

On February 11, 2015, I served the within:

APPELLANT'S REPLY BRIEF ON THE MERITS

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

Emmanuel Juarez
1915 Line Avenue, Apartment 6
Long Beach, CA 90806

Orange County Superior Court
Central Justice Center - Criminal
700 Civic Center Drive West
Santa Ana, CA 92701

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

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

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

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PROOF OF SERVICE CONT'D.

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

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

Executed at Los Altos, California on February 11, 2015.

John F. Schuck

Patricia Schuck

Patricia Schuck