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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

FREDRICK WILLIAM HOWARD,

Petitioner,

v.

THE SUPERIOR COURT OF CONTRA  
COSTA COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

A147609

(Contra Costa County  
Super. Ct. No. 5-151925-5)

FRANKLIN THOMAS HOWARD,

Petitioner,

v.

THE SUPERIOR COURT OF CONTRA  
COSTA COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

A147678

The above-captioned writ matters are hereby consolidated for purposes of disposition. Both petitioners seek a writ of prohibition commanding respondent court to dismiss count 1 of the indictment filed against them in Contra Costa County Superior Court case No. 5-151925-5, which alleged they committed a felony violation of Penal

Code<sup>1</sup> section 69 on or about April 25, 2015. We stayed trial proceedings, requested briefing, and placed the parties on notice that we may choose to act by issuing a peremptory writ in the first instance, pursuant to *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171. For reasons stated below, we now grant the relief requested.

### **BACKGROUND**

On April 28, 2015, the Contra Costa County District Attorney (DA) filed a felony complaint against Fredrick and Franklin Howard (the Howards) alleging two counts of willfully and by means of threats and violence resisting an executive officer in the performance of his duty, in violation of Penal Code section 69, count one occurring on April 25, 2015, and count two occurring on April 10, 2015. At the preliminary hearing, the magistrate reduced the section 69 felony charge in count one to a misdemeanor section 148 charge pursuant to section 17, subdivision (b)(5). On June 5, 2015, the DA filed a three-count information in case No. 5-150926-4, and as relevant here, charged the Howards in count three with misdemeanor obstruction of a peace officer on or about April 25, 2015, in violation of section 148, subdivision (a)(1). The Howards were arraigned on the information on June 8, 2015, and the matter was set for trial on September 21, 2015.

On October 2, 2015, the trial court dismissed all charges in case No. 5-150926-4 after the prosecution indicated it was not prepared to proceed to trial. Less than a month later, the DA filed a two-count indictment in case No. 5-151925-5, realleging in count 1 a violation of section 69, resisting or deterring an officer on or about April 25, 2015, and alleging in count 2 a violation of section 71, threatening a public officer on or about September 6, 2015. The Howards were later arraigned on the indictment. Subsequently, the Howards filed separate motions under section 995 to set aside count 1 of the indictment. The trial court held a hearing on the section 995 motions, and denied them as to count 1 of the indictment. These writ petitions followed.

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<sup>1</sup> All statutory references are to the Penal Code.

## DISCUSSION

“After the magistrate, with or without the prosecutor’s concurrence, has acted under [section 17, subdivision (b)](5) to fix the offense as a misdemeanor, the prosecutor’s ex parte dismissal of the action and initiation of a new felony proceeding would effectively frustrate the magistrate’s judicial act. Were it permissible, that conduct would unconstitutionally invade the magistrate’s judicial authority. It is not permissible.” (*Malone v. Superior Court* (1975) 47 Cal.App.3d 313, 318 (*Malone*); see *Esteybar v. Municipal Court* (1971) 5 Cal.3d 119, 127 (*Esteybar*) [“magistrate’s act of holding a defendant to answer is a judicial act . . . . [and] requiring the district attorney’s consent in determining the charge on which a defendant shall be held to answer violates the doctrine of separation of powers”].)

Relying on *Malone* and *Esteybar*, petitioners contend that after the magistrate reduced the section 69 “wobbler” offense from a felony to a misdemeanor, the prosecution cannot dismiss the misdemeanor and refile the charge as a felony. The Attorney General, on the other hand, noting *Malone* and *Esteybar* were decided prior to 1975 amendments to section 1387 (governing exceptions to dismissal as a bar to prosecution), asserts the refile of the felony charge in this case is permitted under section 1387’s refile rules, as discussed in *Burris v. Superior Court* (2005) 34 Cal.4th 1012 (*Burris*).

In *Burris*, the California Supreme Court stated section 1387 “curtails prosecutorial harassment by placing limits on the number of times charges may be refiled” and “reduces the possibility that prosecutors might use the power to dismiss and refile to forum shop.” (*Burris, supra*, 34 Cal.4th at p. 1018.) Pursuant to section 1387, the court concluded: “Misdemeanor prosecutions are subject to a one-dismissal rule; one previous dismissal of a charge for the same offense will bar a new misdemeanor charge. Felony prosecutions, in contrast, are subject to a two-dismissal rule; two previous dismissals of charges for the same offense will bar a new felony charge. [¶] We note that because what matters is the nature of the current charge, the nature of any prior charges is immaterial to application of these dismissal rules. Thus, either a misdemeanor or a felony dismissal

will bar a subsequent misdemeanor charge, while either two felony dismissals or one misdemeanor and one felony dismissal will bar a subsequent felony charge.” (*Burris*, at pp. 1019–1020, fn. omitted.)

As pertinent here, the court noted, “The consequences of this interpretation are consistent with the Legislature’s purposes” because when new evidence comes to light suggesting a crime originally charged as a misdemeanor is graver than originally believed and should be charged as a felony, section 1387 allows the People to do so. (*Burris*, *supra*, 34 Cal.4th at p. 1020.) According to *Burris*, “To hold . . . a single misdemeanor filing and dismissal could preclude subsequent felony prosecution, even when new evidence demonstrates that the crime committed was a felony, would be inconsistent with the Legislature’s intent to permit more dismissals for serious crimes.” (*Ibid.*) Relying on this language from *Burris*, the Attorney General contends the People properly refiled the section 69 felony charge based on new evidence.

The “new evidence” proffered by the Attorney General is a subsequent incident that occurred on September 6, 2015 (September 2015 incident) between the Howards and a different peace officer, in which the Howards allegedly taunted and threatened the police officer and his family while the family was dining at a restaurant.<sup>2</sup> On the basis of this “new evidence,” the Attorney General asserts this case presents the situation contemplated in *Burris* of new evidence demonstrating an offense treated as a misdemeanor should be prosecuted as a felony.<sup>3</sup>

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<sup>2</sup> As noted, count 2 of the indictment in case No. 5-151925-5 alleged a violation of section 71 based on the September 2015 incident. Ironically, this charge was dismissed because the trial court granted petitioners’ section 995 motion as to count 2.

<sup>3</sup> *Burris* is not squarely on point. In *Burris*, the Supreme Court interpreted section 1387 to mean its dismissal rules depended on the character of the *later* charge, not the character of the *earlier dismissal*. (*Burris*, *supra*, 34 Cal.4th at p. 1020.) Therefore, the court concluded that section 1387 did not bar *Burris*’s later DUI (driving under the influence) prosecution because charges against him for the same offense had been dismissed only once before and felony charges are subject to a two-dismissal rule. (*Burris*, at p. 1023.) *Burris* did not address our situation, where a magistrate reduced a “wobbler” offense from a felony to a misdemeanor based on evidence presented at the

We disagree. In *Burris*, the defendant was charged with misdemeanor DUI and driving with a blood-alcohol level of at least 0.08 percent, and the complaint alleged two prior DUI convictions. However, before trial, the prosecutor discovered Burris had a third DUI making him eligible for a felony DUI prosecution. Based on this newly discovered evidence, the prosecutor moved to dismiss the misdemeanor complaint, and after the motion was granted the prosecutor refiled a felony complaint. (*Burris, supra*, 34 Cal.4th at pp. 1015–1016.) The Supreme Court held the felony complaint was not barred under section 1387’s refiling rules. But as pertinent to the issue of “new evidence,” the discovery of a third prior DUI is relevant and material to the seriousness of the current offense because it demonstrates the “crime originally charged as a misdemeanor is in fact graver and should be charged as a felony.” (*Burris*, at p. 1020.) That is not so in this case. Here, the so-called “new evidence”—the Howards’ conduct at the September 2015 incident—is neither relevant nor material to whether they obstructed a different officer with “any threat or violence” (§ 69) on April 25, 2015, and therefore should be charged with a felony as opposed to a misdemeanor for the offense they committed that day. In short, the Attorney General has identified no “new evidence” showing the dismissed misdemeanor section 148 charge was “in fact graver and should be charged as a felony.” (*Burris*, at p. 1020.)

#### **DISPOSITION**

We have previously notified the parties we might issue a peremptory writ in the first instance. (*Palma v. U.S. Industrial Fasteners, Inc., supra*, 36 Cal.3d 171, 177–180.) No useful purpose would be served by further briefing and oral argument. Accordingly, let a peremptory writ of mandate issue commanding respondent Contra Costa County Superior Court, in its case No. 5-151925-5, to vacate its orders denying petitioners’ motions under section 995 to dismiss count 1 of the indictment and enter new and different orders granting the motions as to count 1 of the indictment. The temporary

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preliminary hearing, and the prosecutor then refiled the same offense as a felony. Nevertheless, we shall put aside this distinction for purposes of addressing the Attorney General’s “new evidence” argument under *Burris*.

stays imposed by this court in these matters shall dissolve upon issuance of the remittitur. This decision is final in this court upon filing. (Cal. Rules of Court, rules 8.490(b)(2)(A), 8.272.)

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Margulies, J.

We concur:

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Humes, P. J.

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Dondero, J.