Filed 3/10/16 Ahmed v. Superior Court CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

KAREEM AHMED et al., Petitioners, v. THE SUPERIOR COURT OF ORANGE COUNTY, Respondent; THE PEOPLE, Real Party in Interest.	G051473 (Super. Ct. Nos. 14ZF0334, 14ZF0335) O P I N I O N

Original proceedings; petition for a writ of mandate or other appropriate relief to challenge an order of the Superior Court of Orange County, Thomas M. Goethals, Judge. Petition granted.

Bird Marella Boxer Wolpert, Nessim, Drooks, Lincenberg & Rhow, Benjamin N. Gluck, Thomas R. Freeman, and Nicole R. Van Dyk for Petitioner Kareem Ahmed.

Law Offices of Mani Dabiri and Mani Dabiri for Petitioner Andrew R. Jarminski.

Law Offices of Mark J. Werksman, Mark Werksman and Mark M. Hathaway for Petitioner Arsalan Pourteymour, M.D.

Nasatir, Hirsch, Podberesky & Khero, Michael Nasatir and Vicki I. Podberesky for Petitioner Michael Rudolph.

Law Offices of Harland Braun and Harland W. Braun for Petitioner Randy Rosen.

The Blue Law Group, Michael K. Blue, Eleanor Ung; Pohlson & Moorhead and Gary M. Pohlson for Petitioner Eduardo Anguizola, M.D.

Law Office of David W. Wiechert, David W. Wiechert, Jahnavi Goldstein and Jessica C. Munk for Petitioner Michael Barri.

Isaacs Friedberg & Labaton, Jeffrey B. Isaacs, Jerome H. Friedberg and Amanda R. Touchton for Petitioner David Evans.

Spertus, Landes & Umhofer, James W. Spertus and Dolly K. Hansen for Petitioner Curtis Hague.

Scheper Kim & Harris, Jean M. Nelson and Angela Machala for Petitioner Evette Charbonnet.

Caldwell Leslie & Proctor, David K. Willingham, Andrew A. Esbenshade and Julia J. Bredrup for Petitioner Bruce Curnick.

Ismael Bautista Arent Fox, Terree Bowers and Malcolm S. McNeil for Petitioner Craig M. Chanin, M.D.

Chambers Law Firm, Dan E. Chambers; Frank P. Barbaro & Associates, Frank P. Barbaro and Jason Flores for Petitioner Rahil Khan, M.D.

Sidley Austin and Douglas A. Axel for Petitioner Daniel Alexander Capen, M.D.

Law Office of Kirt J. Hopson and Kirt J. Hopson for Petitioner Robert J. Villapania, D.C.

No appearance for Respondent.

Tony Rackauckas, District Attorney and Yvette Patko, Deputy District Attorney, for Real Party in Interest.

* * *

A grand jury returned indictments in two related cases on counts of insurance fraud, each of which aggregated numerous victims into a single count. The grand jury was instructed that it had to unanimously find a defendant committed only a single act encompassed within the count to return a true bill on that count. After the grand jury found the indictments to be true, defendants demurred in the trial court, resulting in the People amending the indictments to add hundreds of new counts — a separate count for each victim — and adding an additional allegation in a single count of involuntary manslaughter. The defendants moved to set aside the amended indictments on the ground the grand jury had not made separate findings as to each victim, but instead had been instructed to find only one act. Defendants posited that the amendments thus impermissibly changed the offenses charged by the grand jury in violation of Penal Code section 1009.[1] As to the involuntary manslaughter count, the defendants contended the new allegation, embedded in the single charge of involuntary manslaughter, also impermissibly changed the offense charged by the grand jury. The court denied the motion. We grant defendants' petition for a writ of mandate directing the court to vacate its order denying the motion to set aside and enter a new order granting the motion.

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

PROCEDURAL HISTORY

This writ proceeding arises from two criminal cases, *People v. Charbonnet* (Super. Ct. Orange County, 2014, No. 14ZF0334) (*Charbonnet*) and *People v. Ahmed* (Super. Ct. Orange County, 2014, No. 14ZF0335 (*Ahmed*). Both cases involve allegations of fact based on a kickback scheme involving medical insurance fraud in connection with workers' compensation patients. In both cases, the district attorney proceeded by way of obtaining an indictment from a grand jury. In *Charbonnet*, the grand jury returned an indictment with 35 counts against 12 defendants, including multiple violations of sections 549 (fraudulent insurance claim); 550, subdivisions (a)(5) (use of a writing in support of a fraudulent claim) and (a)(6) (fraudulent claim for payment of a health care benefit); and Business & Professions Code section 650 (rebates for patient referrals). In *Ahmed*, the grand jury returned an indictment with nine counts against three defendants, alleging violations of the same code sections, except that the *Ahmed* indictment also included a count of involuntary manslaughter by lawful act against the three defendants named in the indictment. (§ 192, subd. (b).)

The defendants in both cases filed a single joint demurrer, motion to set aside, and motion to dismiss the indictments. As to the insurance fraud allegations, defendants raised two issues.

First, defendants argued many of the counts were "fatally duplicitous"; i.e. they improperly aggregated multiple offenses into a single count. This argument was based on two characteristics of the counts in the indictments. First, several of the counts aggregated multiple victims into a single count. Typical of the indictments is count 3 in the *Ahmed* indictment, which stated: "On or about and between June 15, 2010, to December 31, 2012, in violation of Section 550(a)(5) of the Penal Code (INSURANCE FRAUD — WRITTEN CLAIM), a FELONY, ANDREW JARMINSKI, M.D., and KAREEM AHMED, with the intent to defraud, did knowingly and unlawfully prepare,

make, and subscribe a material writing, with the intent to present and use it, and to allow it to be presented to Aims, Employers, Ins., Hartfort Ins., Gallagher Bassett, Zurich Ins., American Claims Management, Liberty Mutual Ins., Sedgwick, Travelers Ins., Sedgwick [*sic*], C.N.A. Ins., Fireman's Fund Ins., Tristar, Berkshire Hathaway Homestate Companies, State Compensation Insurance Fund, Republic Indemnity Ins., Sentry Ins., AIG/Chartis, York, Crum & Forster, Farmers Ins., First Comp Ins., ICW, Zenith Ins., Seabright Ins., State Farm, Employers Ins. in support of a false and fraudulent claim, and did aid and abet, solicit, and conspire with another to do the same." The second feature rendering these counts duplicitous, according to the defendants, was that, apart from the multiple victims, the scope of the count involved thousands of discrete offenses. This was based on a statement by the prosecutor in summation to the grand jury that the prosecutor could have charged 5,000 counts in lieu of the actual counts charged.

Second, defendants argued the indictments alleged conduct outside the statute of limitations. In particular, defendants argued the statute of limitations for violations of section 549 and Business and Professions Code section 650 is three years (§ 801), and the statute of limitations for a violation of section 550 is four years (§§ 801.5, 803, subd. (c)(6)). With the indictments being filed on June 17, 2014, defendants argued they cannot be tried for conduct prior to June 17, 2011 and June 17, 2010, respectively. The indictments, however, provided a date range for most of the charges of June 15, 2010, through December 31, 2012.

The People made two concessions. First, the inclusion of multiple victims in each fraud count was error. Second, it was error to include conduct occurring outside the limitations period. On both fronts, the People sought leave to amend. The People also sought to amend the count of involuntary manslaughter in the *Ahmed* indictment. The manslaughter count had been alleged as involuntary manslaughter by a lawful act done in an unlawful manner, and the People sought leave to add a theory of involuntary

manslaughter by an unlawful act. The court sustained the demurrer with leave to amend and did not require the People to return to the grand jury.

The present writ proceeding concerns the amended indictments. The amended indictments differ from the originals: The original indictments had aggregated multiple victims in a single count; the amended indictments alleged a separate count for each victim. As a result, the *Charbonnet* indictment went from 35 counts to 349 counts, and the *Ahmed* indictment went from nine counts to 90 counts. The People also attempted to cure the statute of limitations issue by amending each of the counts that previously had included a date range prior to June 17, 2011. Due to a "miscommunication between counsels for the People," however, the amendment changed the earliest date from June 15, 2010, to June 17, *2010* for all of the problematic charges, which was adequate for the section 550 charges, but not the section 549 charges, nor the Business and Professions Code section 650 charges. Finally, the involuntary manslaughter charge in the *Ahmed* indictment was amended to add a theory of involuntary manslaughter by unlawful act.

Defendants filed a demurrer, motion to dismiss, and motion to set aside the amended indictments. They argued the law prohibits adding counts to an indictment by way of amendment without returning to the grand jury. They also argued that, in light of how the grand jury was instructed, it did not find probable cause as to every victim. In particular, the grand jury was instructed as follows: "In some counts, the People have presented evidence of more than one act to prove that the defendant committed an offense. You must not indict the defendant unless you all agree that the People have proved that the defendant committed *at least one* of these acts and you all agree on which act he/she committed." (Italics added.) The result, defendants argued, was that "whichever particular act or acts the People choose to present at trial, it will be impossible to claim that they were 'found' by the Grand Jury. Put another way, the People are making an end-run around the Defendants' right to a finding of probable cause

on any acts presented at trial." Defendants made a similar argument regarding the statute of limitations. Even assuming the People had properly amended the indictments to track the actual statute of limitations, given how the jury was instructed, there could be no assurance that the grand jury found defendants committed the offenses within the statutory period.

The court overruled the demurrer and denied the motions. The court reasoned that defendants' arguments were about "form and, unfortunately for the defendants, in California the law . . . is forgiving with respect to form mistakes. There certainly have been some form mistakes here. The People have tried to correct them. I think they're allowed to try." To the extent defendants lacked notice of what they were being charged with, the court reasoned, "I believe that wrong can best be addressed . . . by different motions dealing with substance rather than form."

Defendants petitioned this court for a writ of mandate. We initially summarily denied the petition. Defendants then petitioned for review by the California Supreme Court. The high court granted review and transferred the matter back to our court with directions to vacate our order denying the writ petition and to issue an alternative writ to be heard in this court. Accordingly, we issued an alternative writ ordering the trial court to vacate its ruling denying the motions to vacate and set aside, or, in the alternative, to show cause why a peremptory writ of mandate should not issue. The trial court elected not to comply. After the parties filed additional briefing, we entertained oral argument.

DISCUSSION

Before being prosecuted for a felony, a criminal defendant is entitled to a prior finding of probable cause, either by a grand jury or by a magistrate. (Cal. Const., art. I, § 14; *Stark v. Superior Court* (2011) 52 Cal.4th 368, 406.) Once the People have

met that burden, and filed an indictment or information, section 1009 sets forth the circumstances in which the charging document may be amended: "The court in which an action is pending may order or permit an amendment of an indictment, accusation or information, or the filing of an amended complaint, for any defect or insufficiency, at any stage of the proceedings, or if the defect in an indictment or information be one that cannot be remedied by amendment, may order the case submitted to the same or another grand jury, or a new information to be filed. . . . An indictment or accusation cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination." Section 1009 draws a notable distinction between an indictment and an information: An amended indictment may not change the offense charged; an amended information may, so long as the evidence presented at the preliminary hearing supports the new offense. With respect to the insurance fraud counts, the narrow issue before this court is whether the amended indictment "change[d] the offense charged . . . ." (*Ibid.*) We conclude it did.

The Amendments of the Insurance Fraud Counts Changed the Offense Charged

The Grand Jury was presented with counts that included multiple victims — as many as 27 — and was instructed to agree unanimously on one act to constitute a single offense. One cannot interpret the grand jury's finding as applying to *every* victim; it was not instructed to make findings as to every victim. The People's amendments changed the offense, therefore, in that what was once a single offense ballooned into dozens of offenses which, because of the unanimity instruction, the grand jury was not asked to consider.

The only cases we have located that address the issue before us have concluded that adding offenses to an indictment changes the offense in violation of section 1009.

The first is *Owen v. Superior Court* (1976) 54 Cal.App.3d 928 (*Owen*), where a grand jury indicted the defendant on three counts arising out of furnishing alcohol and marijuana to three different minors over a four month period. (*Id.* at p. 932.) The trial court sustained a demurrer to the indictment. (*Ibid.*) Without returning to the grand jury, the People expanded the indictment from three charges to 34 charges. (*Id.* at p. 933.) This time, rather than generally alleging the crimes occurred over a four month period, the prosecutor included 17 specific dates and charged a violation of Business and Professions Code section 25658 (providing alcoholic beverages to a minor) and section 272 (contributing to the delinquency of a minor) for each date. (*Ibid.*) The court denied the defendant's motion to set aside the amended indictment pursuant to section 995. (*Ibid.*) The Court of Appeal reversed, stating, "Although the district attorney may upon leave of court therefor, himself amend an indictment for any 'defect or insufficiency, at any stage of the proceedings,' he may not by such amendment 'change the offense charged.' [Citations.] Here, contrary to law, by the second amended indictment [the district attorney] *added* 32 charges against [the defendant]. To that extent the indictment was amended by the district attorney to 'change the offenses charged." (*Id.* at p. 934 [citing § 1009].)

The People's attempt to distinguish *Owen* is difficult to follow, perhaps because *Owen* is essentially indistinguishable from the instant case. As best we can discern the thrust of the People's argument, they posit the *Owen* court based its holding on the state of the evidence in that case, instead of holding that adding offenses to the indictment changes the offense charged in violation of section 1009. We disagree. The *Owen* court expressly relied on section 1009 as the basis for its decision. As the *Owen* court succinctly put it: "[C]ontrary to law, by the second amended indictment [the district attorney] *added* 32 charges against" the defendant.

The second case is *People v. McKinney* (1979) 95 Cal.App.3d 712 (*McKinney*). There, a grand jury indicted the defendant on several charges, including a

charge of kidnapping for robbery and robbery. The People dismissed the indictment and filed a second indictment, omitting those charges. The People later claimed this was a clerical error and moved to amend the second indictment, without returning to the grand jury to reinstate those charges, arguing the same grand jury had endorsed both indictments. (*Id.* at pp. 742-743.) The trial court granted the motion (*ibid.*) and the jury ultimately convicted defendant on those charges (*id.* at p. 723). Relying on *Owen* and section 1009, the Court of Appeal reversed the conviction on both counts. "[T]he addition of two new counts to [the second indictment] was obviously a 'change' in the offense charged. Indeed, if adding two counts, one of which carried a penalty of life imprisonment, did not 'change' the offense charged against [defendant], we cannot conceive of *any* amendment to *any* indictment that would." (*McKinney*, at p. 742.)

The People make little effort to distinguish *McKinney*, simply describing the case and stating, "Nothing remotely resembling this scenario occurred here." The People have thus taken the head-in-the-sand approach and elected not to address the obvious similarity. In both *McKinney* and here, the People added charges to an indictment by amendment without returning to the grand jury, and in *McKinney* doing so was deemed to violate section 1009. (*McKinney*, *supra*, 95 Cal.App.3d at p. 742.)

Here, we need not address whether the addition of charges without returning to the grand jury would *ever* satisfy section 1009, as the present case is even more starkly a violation of section 1009 than either *Owen* or *McKinney*. Neither of those cases included a unanimity instruction pursuant to which the grand jury was required to make a finding on only a single act out of, potentially, thousands, in order to return a true bill as to each count. Given this instruction, there is no logical basis upon which we can conclude that the grand jury made a finding as to each of the new counts in the amended indictment. The additional counts are new offenses, not shown to be found by the grand jury, and thus changed the offenses charged in violation of section 1009. Accordingly,

the indictment was "not found, endorsed, and presented as prescribed in" the Penal Code.[2] (§ 995, subd. (a)(1)(A).)

The trial court reasoned that differences between the charges found by the grand jury and those alleged in the amended indictment were merely technical, and that the proper approach was to file section 995 motions on the merits to determine whether the charges in the amended indictment were supported by the evidence presented in the grand jury proceeding. While that approach has some facial appeal, it is contrary to both the letter and spirit of our grand jury system. The court's approach is suited to a preliminary hearing and information, where the prosecutor is entitled to add new offenses, provided they are "shown by the evidence taken at the preliminary examination." (§ 1009.) Not so with an indictment, where the prosecutor may not "change the offense charged." (*Ibid*.)

Long ago, our Supreme Court explained the rationale for this distinction. (*People v. Foster* (1926) 198 Cal. 112.) "There exist substantial reasons for placing a different limitation upon the power to amend an indictment than should be placed upon the power to amend an information. A grand jury is a distinctive, inquisitorial body which exists for a limited time and no one may act for it after it has completed its service. Its sessions are secretly conducted and the person whose acts are under investigation by it may have no official knowledge that he is the subject of investigation nor does he know who his accusers were or what they have testified to until after the indictment has been returned against him. In short, the accused has not had his day in court so far as the preliminary proceedings are concerned. The right of the accused to be informed of the evidence taken before the grand jury, even after indictment found, is a modern statutory

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[2] In a county of Orange County's size, section 940 requires that an indictment "cannot be found without concurrence of at least . . . 12 [out of 19] grand jurors." Here, we have assurance that the grand jury made the requisite finding as to only one act in each of 35 (out of 349) counts in the *Charbonnet* indictment and one act in each of nine (out of 90) counts in the *Ahmed* indictment.

innovation of the ancient rule. In no case is the accused privileged to be confronted by his accusers. Indeed, he may not appear before the grand jury or produce witnesses in his own behalf as a matter of right. The procedure by information is quite different. The accused, before any proceedings are had against him in the magistrate's court, must be fully informed of his right to be represented by counsel at every stage of the proceeding and he is entitled to compel the attendance of witnesses and he is also privileged to appear as a witness in his own behalf. All proceedings must be had in his presence. The evidence, which must be sufficient to support the information, is adduced in the presence and hearing of the accused and furnishes the authority for the commitment and the filing of the information. The procedure by indictment and information are so vastly different as to justify the distinction observed by [former] *section 1008 of the Penal Code*, which prohibits the amendment of an indictment in such form as to change the offense charged therein and permits the amendment of an information so long as the crime stated by the amendment is supported by the evidence which was taken at the preliminary examination. By pursuing this course the due process clauses of the federal and state constitutions are not violated by such an amendment for the reason that the defendant was present and was given an opportunity to defend himself throughout the entire proceedings. [Citations.] [¶] Under our system of criminal procedure the committing magistrate is not limited in making his order of commitment to the allegations of the complaint or the crimes named therein. It is his duty to commit the accused for trial for the offense disclosed by the evidence, even though it be a different offense than the one laid in the complaint." (*Id*. at pp. 120-121.)

Based on our conclusion that adding multiple counts of insurance fraud changed the offense charged in violation of section 1009, we will grant the petition for writ of mandate setting aside most of the charges in the two indictments. For the benefit of the parties, we address defendants' remaining contentions.

Under the Facts of This Case, the Indictments May Not Be Amended to Change the Date Range on Each Charge Without Returning to the Grand Jury

Because of the unanimity instruction given to the grand jury, as discussed above, we also conclude the prosecutor may not amend the indictment to change the date range on each charge without returning to the grand jury.

Section 15 defines an offense as an *act*: "A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed" certain punishments, including imprisonment. In the original indictment, the People set forth a wide date range in which defendants committed many acts that may constitute the offense charged. As a general matter, this was an acceptable way of proceeding. "The precise time at which the offense was committed need not be stated in the accusatory pleading, but it may be alleged to have been committed at any time before the finding or filing thereof, except where the time is a material ingredient in the offense." (§ 955.) Nor is it problematic that the range may include multiple acts that could constitute the offense. A prosecutor is entitled to present evidence of multiple acts that satisfy a single offense charged. In such cases, the prosecutor must either elect which act constituted the charged offense, or the jury must be instructed to unanimously agree on a single act to return a guilty verdict. (*People v. Hoye* (2010) 188 Cal.App.4th Supp. 1, 4-5 ["When a defendant is charged with a single criminal act, but the evidence reveals more than one instance of the charged crime, either the prosecution must select the particular act upon which it relies to prove the charge, or the jury must be instructed that it must unanimously agree beyond a reasonable doubt that defendant committed the same specific criminal act"].)

But here, a significant portion of the date range was outside the statute of limitations, and the jury was instructed that it needed to agree on only one act to return a true bill as to that charge. The amended charges target a different subset of acts, which

may or may not be the acts the grand jury actually considered. Since an offense is defined as an act, changing the acts changed the offense.

In contending otherwise, the People rely principally on *People v. Crosby* (1962) 58 Cal.2d 713 (*Crosby*), which we find distinguishable. The defendants in *Crosby* were accused of defrauding investors. (*Id.* at p. 717.) In December 1957, the Commissioner of Corporations formally took possession of the company the defendants had been operating. (*Ibid.*) The defendants were indicted, and the last paragraph of the indictment alleged that the defendants were absent from California from February 1957 to the date of the indictment, an allegation intended to toll the statute of limitations. (*Id.* at p 721-722.) That time period, however, was insufficient to bring certain counts within the statute of limitations, so the prosecutor sought leave to amend the indictment, without returning to the grand jury, to enlarge that timeframe. (*Id.* at p. 722.) Our high court held the prosecutor was entitled to do so, stating, "an amendment merely adding or extending allegations tolling the statute of limitations would not change the offense charged, for 'although the right to maintain the action is an essential element in the final power to pronounce judgment, that element constitutes no part of the crime itself.'" (*Id.* at p. 723.) The court went on to hold that, although the grand jury need not make a finding regarding the tolling of the statute of limitations, there must at least have been evidence to support the tolling argument before the grand jury. (*Id.* at p. 724.)

Crosby is distinguishable. In *Crosby* the *acts* constituting the offense were not changed. Here, if the prosecutor was permitted to reduce the time frame for the charged offense, the prosecutor would be alleging a different set of acts, which may or may not be the act or acts the grand jury actually relied upon. Put another way, whereas in *Crosby* the prosecutor could add an allegation that the acts found by the grand jury occurred within the relevant limitations period, the prosecutor here cannot. The prosecutor here concedes that much of what was presented to the grand jury fell outside

the applicable limitations period and now seeks to focus the indictment on a different subset of acts. This changes the offense and thus violates section 1009.

The Amendment of the Involuntary Manslaughter Count

Finally, we address whether the prosecutor may add a theory of involuntary manslaughter by unlawful act in the *Ahmed* indictment without returning to the grand jury. As noted above, the original indictment contained a count of involuntary manslaughter by lawful act done in an unlawful manner. The amended indictment added a second theory in the same count — manslaughter by unlawful act. The People cited violations of section 550, subdivision (a)(6) (fraudulent claim for payment of health care benefit), Business and Professions Code sections 650 (rebates for patient referrals) and 4170 (restrictions on pharmacists prescribing dangerous substances), and Health and Safety Code 111615 (license required to manufacture drugs) as the unlawful acts supporting this theory of involuntary manslaughter.

Section 192, the statute defining the offense of manslaughter, states, "Manslaughter is the unlawful killing of a human being without malice. It is of three kinds: [¶] (a) Voluntary — upon a sudden quarrel or heat of passion. [¶] (b) Involuntary — in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. This subdivision shall not apply to acts committed in the driving of a vehicle." On appeal, the parties debate whether adding the allegation of involuntary manslaughter by unlawful act changed the offense charged in violation of section 1009.

Defendants argue that section 192, subdivision (b) defines two different offenses; the prosecutor argues subdivision (b) merely states two different ways in which the single offense of involuntary manslaughter may be committed. Both parties marshal cogent reasons for their respective positions. But neither party has found authority, nor

have we, that answers the question whether section 192, subdivision (b) defines a single offense committed in two different ways or two separate offenses. We conclude, however, it is not necessary to join this metaphysical debate, for it threatens to miss the forest for the trees.

The fundamental task of a criminal grand jury is to decide whether probable cause exists to charge a defendant with a criminal offense. "California law provides that a defendant has a due process right not to be indicted in the absence of a determination of probable cause *by a grand jury* acting independently and impartially in its protective role." (*People v. Superior Court* (*Mouchaourab*) (2000) 78 Cal.App.4th 403, 424, italics added.) The amended indictment alleges that defendants unlawfully and without malice killed a human being "as a proximate result" of the commission by defendants of non-felonious unlawful acts namely, a violation of section 550, subdivision (a)(6), Business and Professions Code section 650, and Health and Safety Code section 111615. It is plain the grand jury *never* returned an indictment finding probable cause to believe that defendants violated section 550, subdivision (a)(6), Business and Professions Code section 650, or Health and Safety Code section 111615 proximately causing death to a victim. Those allegations were missing in the indictment returned by the grand jury. The *prosecutor* made those allegations, not the grand jury. The new allegations are not merely a clarification of the offense originally charged. The prosecutor charged the violation of three separate statutes to have been the proximate cause of the victim's death. The original grand jury indictment did not charge a violation of *any* predicate statute. Instead, it charged a lawful act done in an unlawful manner. This necessarily implies different acts, as the same act cannot be both lawful and unlawful. Thus, this amendment was not the mere correction of a "defect or insufficiency." (§ 1009.) Instead, this defect is "one that cannot be remedied by amendment" and the court "may order the case submitted to the same or another grand jury." (*Ibid.*)

Although the grand jury found probable cause to believe defendants committed a lawful act in an unlawful manner, the alternate allegation of an unlawful act causing death cannot stand without the requisite finding by the grand jury. Whether involuntary manslaughter is divisible into two separate offenses or not, defendants are entitled to a grand jury determination of the added allegations of unlawful acts before being required to stand trial on those allegations. If section 192, subdivision (b) defines two separate offenses as contended by defendants, they should be set out in separate counts considered separately by the grand jury. If section 192, subdivision (b) defines only one single offense with two different theories of liability as contended by the People, the two theories should still be set out in separate counts as "different statements of the same offense," as permitted by section 954. Either way, defendant is entitled to a grand jury finding of probable cause as to each.

DISPOSITION

The petition for a writ of mandate is granted. Let a peremptory writ of mandate issue directing the respondent court to vacate its order of January 16, 2015, denying defendants' motion to set aside the indictment, and to issue a new order granting the motion with respect to all counts in the *Charbonnet* indictment except counts 1, 298, and 323,[3] and all counts in the *Ahmed* indictment except count 1.[4] The court is further directed to, at the prosecutor's election, order the case resubmitted to a grand jury pursuant to sections 997, 998, and 1009. (See *Owen*, *supra*, 54 Cal.App.3d at p. 934

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[3] Count 1 is a conspiracy charge not addressed in this writ petition. Counts 298 and 323 repeated counts 30 and 33 from the original indictment, which alleged violations with respect to a single victim during a timeframe entirely within the statute of limitations.

[4] Count 1 is a conspiracy charge not addressed in this writ petition.

["The peremptory writ of prohibition will issue with the provision, however, that the prosecution may in its discretion elect to have the case submitted to the same or another grand jury for further proceedings; in the event of such election the superior court will so order"].) Having served its purpose, the order to show cause is discharged.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.