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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JALEH WILKINSON, Defendant and Appellant.	B145982 c/w B154520 (Super. Ct. No. SA 035468)
In re JALEH WILKINSON on Habeas Corpus	B154520 c/w B145982 (Super. Ct. No. SA 035468)

APPEAL from a judgment of the Superior Court of Los Angeles County. Steven C. Suzukawa, Judge. Reversed in part and vacated with directions.

ORIGINAL PROCEEDING; petition for writ of habeas corpus. Granted.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part III.

Anthony J. Dain, under appointment by the Court of Appeal, for Defendant, Appellant and Petitioner.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Jaime L. Fuster and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

Jaleh Wilkinson appeals from the judgment entered after her conviction by jury of felonious battery on a custodial officer, and misdemeanor alcohol-impaired and hit and run driving. (Pen. Code, § 243.1; Veh. Code, §§ 23152, subd. (a), 20002, subd. (a); all further undesignated section references are to the Penal Code.) The court suspended imposition of sentence and placed Wilkinson on probation on condition, among others, that she serve 180 days in jail.

Wilkinson also filed a habeas corpus petition. We ordered the petition to be considered with the appeal.

In her appeal, Wilkinson contends her felony conviction violates (I) the separation of powers and (II) equal protection. Section 243, subdivisions (b) and (c), punishes the same or more serious conduct as either a misdemeanor or an alternative felony/misdemeanor, while Wilkinson was convicted of a straight felony under section 243.1. Wilkinson argues this scheme permits the prosecution to select her punishment, a judicial task, and results in her being treated more harshly than others committing the same or more culpable acts. (III) Wilkinson also contends the trial court erred in denying her motion to hold an in limine hearing (Evid. Code, § 402) to determine the admissibility of her evidence that she successfully passed a polygraph test. (*People v. Leahy* (1994) 8 Cal.4th 587; *People v. Kelly* (1976) 17 Cal.3d 24.) The court relied on

Evidence Code section 351.1's absolute prohibition against such evidence. Wilkinson argues the trial court's ruling deprived her of due process.

In her habeas petition, Wilkinson contends (IV) her trial counsel was prejudicially incompetent. Wilkinson declared her trial counsel advised her against accepting two plea bargains in which she would have pled guilty to only misdemeanor crimes and served no custody time, and rejected one such offer without telling her. Wilkinson declared her lawyer told her the worst she would do was a misdemeanor conviction with no jail time, and that she was likely to prevail at trial. Wilkinson argues her trial counsel erroneously told her inadmissible exculpatory evidence would be admitted, and admissible inculpatory evidence would be excluded. Wilkinson was a legal immigrant from Iran who had lived here since her early teens, spoke little Farsi, had no family in Iran, and was a bank vice-president. Wilkinson relied on her lawyer's erroneous advice and rejected all plea bargains despite her fear that custody time and a felony conviction would damage her work and immigration status. As a result of her felony conviction, Wilkinson was jailed, lost her job, had her citizenship application denied, and faces deportation to Iran.

In the appeal, we reject Wilkinson's first contention, but agree with her second and third claims. We vacate the judgment, reverse her section 243.1 conviction, and remand the case for the trial court to conduct a *Kelly/Leahy* hearing to determine the admissibility of Wilkinson's proffered polygraph evidence.

In the habeas petition, we issue an order to show cause returnable before the trial court. The court is to conduct an evidentiary hearing and rule on the merits of Wilkinson's allegations.

FACTS

In the early morning of February 27, 1999, a motorist saw Wilkinson driving erratically. Wilkinson made a wide turn, crossed over the center divider, hit a parked car without stopping, and continued swerving between lanes. Wilkinson made a U-turn, stopped at the curb, and laid down on the front seat. The motorist called the police. Officers arrived and tapped on the window. Wilkinson looked at an officer, put the car in gear, and drove off. The police pursued with emergency lights on for about three blocks before Wilkinson stopped. Wilkinson staggered to the curb, admitted having a few drinks, and was unable to complete even one field sobriety test. The officers ended the tests because they were concerned Wilkinson would fall and hurt herself. The officers smelled a strong alcohol odor on Wilkinson's breath and in her car. They arrested Wilkinson, who refused to take any chemical tests and who resisted being searched and put in a cell, once grabbing a jailer's arm so hard that visible welts appeared. The officers opined Wilkinson was under the influence of alcohol but not of drugs, and did not examine her for drug intoxication.

In defense, Wilkinson did not dispute her described conduct. She testified that over several hours after work the previous evening, she had about five alcoholic drinks, dinner, and some food at two restaurants, and never felt impaired. Wilkinson went to the bathroom several times throughout the evening, and believed someone secretly put the date-rape drug Rohypnol into her drink. Shortly after she left to drive home, she blacked out and remembered nothing until she awoke in jail the next morning. She filed a complaint to that effect with her local police department shortly after being released from custody. Restaurant receipts, credit card bills, and police records corroborated Wilkinson's account.

Two experts, a toxicologist and a police drug recognition expert, testified Wilkinson's actions and lack of cognition were likely caused by Rohypnol ingestion.

DISCUSSION

I

Wilkinson contends the statutes proscribing battery on a custodial officer violate the separation of powers because they permit prosecutors, executive branch representatives, to decide whether such conduct receives felony or misdemeanor punishment, usurping a judicial function. We disagree.

"A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions." (§ 17, subd. (a).) "Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a felony, or to be punishable by imprisonment in a state prison, is punishable by imprisonment in any of the state prisons for 16 months, or two or three years . . . ." (§ 18.)

Wilkinson was charged with and convicted of violating section 243.1, enacted in 1976 and last amended in 2001, which makes any battery on a custodial officer a straight felony: "When a battery is committed against the person of a custodial officer . . . , and the person committing the offense knows or reasonably should know that the victim is a custodial officer engaged in the performance of his or her duties, and the custodial officer is engaged in the performance of his or her duties, the offense shall be punished by imprisonment in the state prison."

In contrast, section 243, subdivision (b) makes the identical conduct a straight misdemeanor: "When a battery is committed against the person of a . . . custodial officer . . . engaged in the performance of his or her duties, . . . and the person

committing the offense knows or reasonably should know that the victim is a . . . custodial officer, . . . engaged in the performance of his or her duties, . . . the battery is punishable by a fine not exceeding two thousand dollars ($2,000), or by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment."

Finally, section 243, subdivision (c)(1) makes such conduct an alternative felony/misdemeanor (§ 17, subd. (b), known as a "wobbler") if the victim is injured: "When a battery is committed against a custodial officer . . . engaged in the performance of his or her duties, . . . and the person committing the offense knows or reasonably should know that the victim is a . . . custodial officer . . . engaged in the performance of his or her duties, . . . and an injury is inflicted on that victim, the battery is punishable by a fine of not more than two thousand dollars ($2,000), by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment, or by imprisonment in the state prison for 16 months, or two or three years."

"It is well settled that the prosecuting authorities, exercising executive functions, ordinarily have the sole discretion to determine whom to charge with public offenses and what charges to bring. [Citations.] This prosecutorial discretion to choose, for each particular case, the actual charges from among those potentially available arises from '"the complex considerations necessary for the effective and efficient administration of law enforcement."' [Citations.] The prosecution's authority in this regard is founded, among other things, on the principle of separation of powers, and generally is not subject to supervision by the judicial branch. [Citations.]" (*People v. Birks* (1998) 19 Cal.4th 108, 134, emphasis added [overruling *People v. Geiger* (1984) 35 Cal.3d 510, 529-530 on, among others, separation of powers grounds, and eliminating a defendant's ability to have the jury instructed on lesser related crimes].)

Recently, our Supreme Court upheld voter-enacted juvenile justice changes that allowed prosecutors to file serious charges against some juvenile offenders directly in criminal rather than juvenile court. This change eliminated the former statutory scheme in which all such charges were first filed in juvenile courts, which then decided whether it was appropriate instead to prosecute the filed charges in criminal court. The Supreme Court rejected a separation of powers challenge to the initiative. "[W]e conclude that a prosecutor's decision to file charges against a minor in criminal court . . . is well within the established charging authority of the executive branch. Our prior decisions instruct that the prosecutor's exercise of such charging discretion, before any judicial proceeding is commenced, does not usurp an exclusively judicial power, even though the prosecutor's decision effectively can preclude the court from selecting a particular sentencing alternative." (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 545-546, emphasis added.) In a lengthy analysis rejecting the separation of powers challenge to the initiative (*id.* at pp. 551-562), the court rejected a claim "that the legislative branch unconstitutionally has conferred upon the executive branch (that is, the prosecutor) an exclusively judicial function of choosing the appropriate dispositions for certain minors convicted of specified crimes. Several decisions of [the Supreme C]ourt have addressed similar claims. . . . [T]hese decisions establish that the separation of powers doctrine prohibits the legislative branch from granting prosecutors the authority, after charges have been filed, to control the legislatively specified sentencing choices available to a court. A statute conferring upon prosecutors the discretion to make certain decisions before the filing of charges, on the other hand, is not invalid simply because the prosecutor's exercise of such charging discretion necessarily affects the dispositional options available to the court. Rather, such a result generally is merely incidental to the

exercise of the executive function -- the traditional power of the prosecutor to charge crimes." (*Id.* at pp. 552-553.)

Manduley discussed all the cases Wilkinson cites in support of her separation of powers argument and rejected their applicability. We likewise reject Wilkinson's claim that those cases compel us to accept her contention, and her attempts to distinguish *Manduley*.

In choosing which section to charge for battery on a custodial officer, the prosecutor exercises an exclusively executive function. That choice limits the eventual sentencing options available to the court. However, such charging decisions do not intrude on judicial functions to choose the appropriate sentence from the limited range of choices set out by the Legislature for the particular charge chosen by the executive branch through its prosecutorial representative. The executive usurps the judicial sentencing power only when statutes attempt to permit the prosecution to limit the court's sentencing choices after the filing of charges.

Here, the prosecutor's charging decision determines only the maximum sentence which can be imposed. By charging section 243.1, the prosecutor makes the maximum sentence three years in state prison. By charging section 243, subdivision (c) if the victim is injured, the prosecutor again makes the maximum sentence three years in prison. By charging section 243, subdivision (b), the prosecutor makes the maximum sentence one year in county jail. In all three cases, the court can impose any sentence between no custody time and the maximum sentence. The court's sentencing options are set by the Legislature for whatever section is charged. These choices are a result of the prosecutor's charging decision, made before any charges are filed. As such, they do not intrude on any exclusive judicial function and do not violate the separation of powers.

II

Wilkinson contends the statutes proscribing battery on a custodial officer also violate equal protection because they permit prosecutors to arbitrarily subject violators who committed less egregious conduct to greater punishment than those committing more serious acts. The contention has merit.

Manduley rejected an equal protection challenge to the changes in juvenile justice procedures. (*Manduley v. Superior Court, supra,* 27 Cal.4th at pp. 567-573.) *Manduley* extensively reviewed the applicability of equal protection to criminal statutes that give prosecutors discretion to charge offenders who commit the same crimes under different statutes which provide different punishments. The Supreme Court concluded that, so long as prosecutorial discretion is not exercised to invidiously discriminate against members of discrete groups (*Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 293-301) or vindictively retaliate against those who exercise protected rights (*In re Bower* (1985) 38 Cal.3d 865, 873-874), such discretion does not violate equal protection. Here, Wilkinson does not claim the statutory scheme she challenges, either facially or as applied, demonstrates either discrimination or retaliation.

If the battery on custodial officer statutes included only two options, a straight felony under section 243.1 or a straight misdemeanor under section 243, subdivision (b), both of which have identical elements, prosecutorial discretion to choose different punishment between offenders engaging in similar conduct would not violate equal protection under *Manduley*. Prosecutors legitimately could choose to prosecute those who committed battery on a custodial officer as either a felony or misdemeanor, based on the prosecutor's evaluation of the crime, the defendant, the defendant's past record, and other factors, although the choice resulted in different treatment for offenders who

committed similar acts. As long as the prosecutors did not base their decision on prohibited discriminatory or vindictive motives, equal protection would not be violated.

What is troubling about our scheme, however, is its inclusion of a third charging option, the wobbler under section 243, subdivision (c)(1), which contains the additional requirement of infliction of an injury. The injury need not be serious; it is unclear whether the visible red coloration inflicted by Wilkinson's hard squeezing of the officer's arm would qualify. This third option raises the specter of complete irrationality in the scheme, because the more serious offense of battering a custodial officer with injury could be punished less seriously (an alternative felony/misdemeanor) than battering a custodial officer without injury (a straight felony under section 243.1).

This scheme, punishing more culpable conduct less seriously, is not even rationally related to a scheme which would give prosecutors the entire range of punishments, from straight misdemeanor through wobbler to straight felony, to punish different perpetrators differently depending on the seriousness of the offense, the perpetrator's criminal and other history, and other aggravating and mitigating factors. It certainly is arbitrary and irrational to punish more egregious misconduct less seriously than less egregious conduct. If the scheme made all batteries on custodial officers with any injury straight felonies, and all such batteries without injuries wobblers, it would provide the prosecutor with the entire range of possible punishments, permitting the greater punishment to be applied for, among other factors, more egregious conduct.

The current scheme encourages arbitrary, irrational charging. Here, Wilkinson may or may not have inflicted injury. However, the prosecutor would be encouraged under this scheme to charge her with the straight felony under section 243.1, under which he would not have to prove any injury, rather than under section 243, subdivision (c)(1), where he would have to prove an injury. Rather than being encouraged to prove

more egregious conduct under the statute requiring greater punishment, the prosecutor would be encouraged to ignore evidence of injury to secure a straight felony conviction. Conversely, Wilkinson might be encouraged to try and show she inflicted some injury, no matter how minor, and wedge herself into the wobbler sentencing range. These possibilities demonstrate that the current scheme is irrational under any reasonable penological theory. We conclude this scheme violates equal protection.

Our analysis of the equal protection implications of the current scheme compels us to discuss a recent case which also addressed this sentencing scheme. Although it did not address Wilkinson's constitutional challenges, *People v. Chenze* (2002) 97 Cal.App.4th 521, 525-528 rejected the claim of a defendant convicted of violating section 243.1 that recent amendments to subdivisions (b) and (c) of section 243 impliedly repealed section 243.1, leaving battery on a custodial officer proscribed only by section 243. *Chenze* reviewed the legislative history of these sections and concluded the Legislature deliberately maintained them all to give prosecutors broad charging and sentencing options to punish various types of batteries on custodial officers. *Chenze* found the statutory scheme rational and consistent, and affirmed the defendant's conviction under section 243.1.

We realize *Chenze* did not address the separation of powers or equal protection issues. Likewise, we do not quarrel with *Chenze's* legislative history discussion or its conclusion that the Legislature chose to enact and maintain all three options. However, we disagree with *Chenze's* conclusion that the current statutory scheme is rational. *Chenze* looked at the scheme's different options as graduated steps, allowing prosecutors to choose between misdemeanor, wobbler, and felony charges, for increasingly egregious conduct, but ignored the anomaly discussed above, namely, that more egregious conduct can be punished less severely.

Thus, we conclude the current scheme violates equal protection. We reverse Wilkinson's conviction under section 243.1. In the resulting new trial, Wilkinson can be tried only for violating section 243, subdivision (c)(1) (the wobbler) or section 243, subdivision (b) (the misdemeanor).

III

Wilkinson filed a written motion for a *Kelly/Leahy* hearing, supported by a declaration and points and authorities. Wilkinson also filed nearly 100 pages of supporting documents as exhibits. Wilkinson made an offer of proof that she had been examined by a qualified polygraph expert and had truthfully answered that, on the night of her arrest, she consumed no more than five alcoholic drinks, did not knowingly take any drugs, and did not intentionally attack the custodial officer. Wilkinson also proffered the testimony of experts who, she said, would testify that the polygraph was now accepted as accurate and reliable in the scientific community. However, relying on Evidence Code section 351.1's absolute exclusion of such evidence, the trial court denied Wilkinson's motion, and refused to conduct the hearing.

"Evidence Code section 351.1 states that 'the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take . . . or [the] taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding, including . . . post conviction . . . hearings, . . . unless all parties stipulate to the admission of such results.' Defendant, recognizing the facial applicability of this statute, argues that barring him from presenting favorable mitigating polygraph evidence at the penalty phase violates his federal constitutional right to have the penalty phase jury consider all 'relevant mitigating evidence.' [Citations.] In support, he cites several cases in which the United States Supreme Court held the application of state evidentiary rules governing the admissibility of evidence was inconsistent with the

federal constitutional right to due process, to compulsory process, and to testify on one's own behalf. [Citations.] [¶] Defendant, however, failed to present an offer of proof that polygraph evidence was generally accepted in the scientific community. We have previously held that such an offer of proof is necessary to preserve the issue for appeal. [Citation.] '"Absent an offer of proof that the polygraph is now accepted in the scientific community as a reliable technique, the evidence was presumptively unreliable and inadmissible." Having failed to make the proper offer of proof, defendant is in no position to assign error in the trial court's ruling.' [Citations.]" (*People v. Fudge* (1994) 7 Cal.4th 1075, 1122.)

Later, the Supreme Court applied the Fudge holding to polygraph evidence offered during trial of charged crimes. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1212-1213.)

The trial court erred in not conducting a hearing. Wilkinson made a sufficient offer of proof to entitle her to a *Kelly/Leahy* hearing. Indeed, we do not see what more such an offer would need to meet the threshold required to convene such a hearing. Wilkinson offered to prove that a reliable polygraph test demonstrated she truthfully said she had consumed no more than five drinks and no drugs, and did not intentionally attack the officer. She also offered testimony of experts in the field that polygraph examinations are now accepted in the scientific community.

Moreover, we cannot say the error was harmless. Although Wilkinson testified to the same facts, the prosecution argued she was lying and knowingly consumed more alcohol and/or drugs, thus making her volitionally impaired. If admitted, the proffered polygraph evidence would have provided support for the crucial defense evidence. Indeed, the Attorney General argues only that any error was harmless because

Wilkinson would not have been able to prove scientific acceptability, not that the evidence, if admitted, would not have affected the outcome.

After issuing our opinion in this case, we granted the Attorney General a rehearing regarding only section III. The Attorney General argued we did not consider some authority cited in his response brief, which he claims supported his argument that Evidence Code section 351.1 correctly acted as an absolute bar to admission of any polygraph-related evidence. We also permitted the Sacramento County District Attorney to support the Attorney General's position by citing a U.S. Supreme Court opinion not mentioned in the original briefing. We considered Wilkinson's written responses to both filings. Upon reconsideration, we reaffirm our earlier analysis and conclusion.

First, none of the authority referenced by the Attorney General undercuts *Fudge* or *Jackson*. Some of the cases merely follow Evidence Code section 351.1 without addressing the constitutional claim that such an absolute bar may prevent a defendant from presenting relevant exculpatory evidence. None of the cases reviews a trial court ruling that the scientific community agrees on such evidence's unreliability.

Second, all but one of those cases preceded *Jackson*, and thus do not contradict it. The only cited case which came after *Jackson*, *People v. Basuta* (2001) 94 Cal.App.4th 370, 388-391, did not involve any dispute about the reliability of the evidence and did not address that point or the constitutional issue raised here. *Basuta* assumed that mention of a witness's offer to take a polygraph test, in spite of the trial court's exclusion order, was prejudicial error on its facts. Thus, none of the cited authority contradicts our earlier analysis or conclusion.

Third, contrary to the Sacramento County District Attorney's claim, its cited case does not hold that per se exclusion of polygraph evidence is constitutional for all

purposes. In *United States v. Scheffer* (1998) 523 U.S. 303, a plurality of four justices upheld a similar exclusion in the rules governing military court martials. The case did not involve any offer of proof supporting admission of polygraph evidence or any hearing weighing the reliability of such evidence. Indeed, the plurality opinion noted a deep split among the scientific community on the reliability of polygraph evidence. Four concurring justices agreed with the result, but refused to join in any language restricting a later court from deciding whether such evidence was reliable. The concurring justices expressly reserved such a discussion to a case presenting an evidentiary record permitting such analysis. One dissenting justice argued that per se rules excluding polygraph evidence are unconstitutional. Thus, the case does not stand for the cited proposition and does not alter our analysis.

Thus, we vacate the judgment and remand for the trial court to conduct a *Kelly/Leahy* hearing regarding Wilkinson's offer of proof. Our holding should not be construed to suggest how the court should rule at such a hearing. Evidence Code section 351.1 was enacted because such evidence was deemed unreliable in the scientific community. We hold only that Wilkinson's offer of proof was sufficient to entitle her to a hearing.

IV

We conclude the totality of Wilkinson's allegations raise a prima facie case of incompetence of trial counsel. (*In re Cudjo* (1999) 20 Cal.4th 673, 687.) In his informal response, the Attorney General does not contend the petition is either procedurally barred or that, if proven, Wilkinson's allegations would not constitute prejudicial incompetence. The Attorney General argues only that Wilkinson has failed to include her trial counsel's declaration about any tactical reasons for his conduct, and failed to provide a complete record of the various offers she alleges the prosecution

made. We issue an OSC, returnable before the trial court, which is to hold an evidentiary hearing and rule on the merits of Wilkinson's allegations. (*People v. Mendoza-Tello* (1997) 15 Cal.4th 264, 266-267.)

DISPOSITION

In the appeal, we reverse Wilkinson's felony conviction under section 243.1. We vacate Wilkinson's two misdemeanor convictions and remand for the trial court to conduct a *Kelly/Leahy* hearing to determine the admissibility of Wilkinson's proffered polygraph evidence.

In the habeas petition, we issue an order to show cause returnable before the trial court. The court is to conduct an evidentiary hearing and rule on the merits of Wilkinson's incompetency of trial counsel allegations.

First, the court is to conduct the habeas petition hearing. If the court grants the petition, entitling Wilkinson to a new trial, the court then is to conduct the *Kelly/Leahy* hearing to determine if Wilkinson's polygraph evidence is admissible at the new trial, at which Wilkinson can be tried for violating section 243, subdivision (c)(1), or 243, subdivision (b), and the two misdemeanors vacated above.

Alternatively, if the court denies the habeas petition, it then is to conduct the *Kelly/Leahy* hearing. If the court concludes the evidence is inadmissible, the court is to reinstate the two misdemeanor convictions vacated above, and conduct a new trial on the section 243, subdivision (c)(1) or 243, subdivision (b) charge. If the court concludes the polygraph evidence is admissible, the court is to grant Wilkinson a new trial on the

section 243, subdivision (c)(1) or section 243, subdivision (b) charge, and the two misdemeanors vacated above, at which the polygraph evidence will be admitted.

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ORTEGA, J.

I concur:

SPENCER, P.J.

MALLANO, J., Concurring and Dissenting.

I concur in the majority opinion except for part II, in which defendant's conviction under Penal Code section 243.1 is found to violate equal protection because the statutory scheme of which it is a part "is irrational under any reasonable penological theory." (Maj. opn., *ante,* at p. 11.) Assuming that a statutory scheme is subject to equal protection analysis solely because it punishes less culpable conduct greater than more culpable conduct, I find no violation here. A defendant who commits a battery on a custodial officer without injury may be charged with either a misdemeanor (Pen. Code, § 243, subd. (b)) or a straight felony (Pen. Code, § 243.1). A defendant who commits a battery on a custodial officer with injury may be charged with a wobbler, punishable as either a misdemeanor or a felony. (Pen. Code, § 243, subd. (c)(1).) An exercise of prosecutorial discretion in filing criminal charges does not a violation of equal protection make. (See *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 567–573; *People v. Gonzales* (2001) 87 Cal.App.4th 1, 15.)

Moreover, the injury contemplated by Penal Code section 243, subdivision (c)(1), "means any physical injury which requires professional medical treatment." (Pen. Code, § 243, subd. (f)(5).) It does not appear that the victim here suffered such an injury, thereby rendering charging as a wobbler unavailable on remand. I find no basis in law to bind the prosecution to a misdemeanor charge in this case.

Finally, I am not prepared to say that a hypothetical defendant who, in the course of grabbing the arm of a correctional officer, inflicts a puncture wound with her fingernail that requires medical attention has engaged in conduct more culpable than a defendant who repeatedly hits and kicks the correctional officer, intending to cause

serious injury but does not do so through no lack of effort. Thus, although unlikely, it is possible to commit a battery with injury in a less culpable manner than a battery in which no injury is inflicted. Accordingly, with respect to part II of the majority opinion, I dissent.

MALLANO, J.