

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,]	S130080
]	
Plaintiff and Appellant,]	H026000
]	
vs.]	(SANTA CLARA CO.
]	SUPERIOR COURT
MANUEL ALEX TRUJILLO,]	NO. CC125830)
]	
Defendant and Respondent.]	
]	

REPLY SUPPLEMENTAL BRIEF

AN APPEAL BY THE PEOPLE FROM A FINDING
BY THE SANTA CLARA SUPERIOR COURT THAT A
PRIOR CONVICTION ALLEGATION WAS NOT TRUE
THE HONORABLE HUGH F. MULLIN III, JUDGE

SIXTH DISTRICT APPELLATE PROGRAM

MICHAEL A. KRESSER
Executive Director
State Bar #66483
100 N. Winchester Blvd., Suite 310
Santa Clara, CA 95050
(408) 241-6171

Attorneys for Respondent,
MANUEL ALEX TRUJILLO

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I. IF THE COURT REVERSES THE TRIAL COURT'S FINDING, IT MUST DO SO WITH DIRECTIONS TO PROVIDE RESPONDENT WITH A TRIAL BY JURY WHICH WOULD DETERMINE FACTS BEYOND THE LEAST ADJUDICATED ELEMENTS OF HIS PRIOR CONVICTION.

Many of defendant's arguments concerning his right to jury trial were decided by this court recently in *People v. McGee* (2006) 38 Cal.4th 682. Defendant will state why he believes the majority erred in *McGee*, and why the analysis of the dissent was correct.

The determinative point is the difference between the majority and dissenting opinions' treatment of *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *United States v. Booker* (2005) 543 U.S. 220. The majority and dissenting opinions both recite the language in *Apprendi* in which the court declined to

overrule its prior decision in *Almendarez-Torres v. United States* (1998) 523 U.S. 224, while acknowledging that it was "arguable" that it was "incorrectly decided." (*Apprendi, supra*, 530 U.S. at p. 489.) The reasons given in *Apprendi* for not overruling *Almendarez-Torres* were: (1) *Almendarez-Torres* had admitted, not contested, the existence of the prior convictions; (2) those convictions "had been entered pursuant to proceedings with substantial procedural protections of their own" (*id.*, at p. 488); and (3) because *Almendarez-Torres* "turned heavily upon the fact that the additional sentence to which the defendant was subject was 'the prior commission of a serious crime.'" (*Ibid.*)

The *Apprendi* court then summarized its distinction: "Both the certainty that procedural safeguards attached to any 'fact' of a prior conviction, and the reality that *Almendarez-Torres* did not challenge the accuracy of that 'fact' in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range." (*Ibid.*)

While *Apprendi* did not overrule *Almendarez-Torres*, it certainly limited it to its "unique facts." (*Apprendi, supra*, 530 U.S. at p. 490.) The *McGee* majority opinion did not recognize or implement these limitations, while the dissenting opinion did. As the dissent states in *McGee*, in that case, as in this one, the defendant had not admitted but contested the prior conviction

allegation. Regarding factual allegations beyond the facts admitted by the plea, the trial court that accepted McGee's pleas in the prior convictions "never determined the truth of those factual allegations and they did not provide defendant with any procedural protections pertaining to those allegations . . ." (*McGee, supra*, 38 Cal.4th at p. 714 (dis. opn. of Kennard, J.)).

As the *McGee* dissent also points out, the third reason *Apprendi* gave for distinguishing *Almendarez-Torres*, the traditional judicial use of recidivism to increase an offender's sentence (*Apprendi, supra*, 530 U.S. at p. 488), has since been questioned by the U.S. Supreme Court in *United States v. Booker* (2005) 543 U.S. 220, 236. (*McGee, supra*, 38 Cal.4th at pp. 713-714 (dis. opn. of Kennard, J.)). As persuasively set forth in *Booker*, the proliferation of the states' use of sentencing "facts" which vastly increase penalties has changed criminal sentencing in a very significant way in the last twenty years. While the *Booker* court was addressing "facts" relating to the offense for which the defendant is currently being sentenced, its rationale applies with equal force to sentencing schemes, such as the Three Strikes law, which vastly increase sentences based on the existence of prior convictions. "The new sentencing practice forced the court to address the question how the right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime." (*United States v. Booker, supra*, 543 U.S. at p. 237). The

ed. 1961) (A. Hamilton)." (*Booker, supra*, 543 U.S. at p. 229).

The jury trial right was adopted "To guard against a spirit of oppression and tyranny on the part of rulers . . ." (2 J. Story, Commentaries on the Constitution of the United States (4th ed. 1873) at pp. 540-541.) The jury is knowingly empowered to render verdicts which reduce punishment to something the jury believes is reasonable in contrast to harsh mandatory legal penalties. "As we suggested in *Jones v. United States*, 526 U.S. 227 (1999), juries devised extralegal ways of avoiding a guilty verdict, at least of the more severe form of the offense alleged, if the punishment associated with the offense seemed disproportionate to the seriousness of the conduct of the particular defendant. *Id.* at 245." (*Apprendi, supra*, 530 U.S. at p. 479, fn. 5.)

This court has decried jury nullification and recognized judicial power to remove individuals from a jury who state they are engaging in it during deliberations. (*People v. Williams* (2001) 25 Cal.4th 441, 447-461.) Nonetheless, *Williams* recognized that, "The jury's power to nullify the law is the consequence of a number of specific procedural protections granted criminal defendants." (*Id.*, at p. 450.) It is a weakening of the historic jury trial right to remove the jury, "the great bulwark of [our] civil and political liberties" (2 J. Story, *op. cit. supra*, at pp. 540-541), from the decision of whether the state will imprison a person for a relatively short determinate term, or for a minimum sentence of 25 years to a maximum of life.

It is true that recognition of this proper role of the jury would require the overruling of a series of this court's decisions which has placed the trial of prior conviction allegations outside the scope of the constitutional right to jury trial (*People v. Wiley* (1995) 9 Cal.4th 580, 585; *People v. Kelii* (1999) 21 Cal.4th 452, 456-457; *People v. Epps* (2001) 25 Cal.4th 19, 21; *People v. McGee, supra*, 38 Cal.4th 682) and the right against being twice placed in jeopardy (*People v. Monge* (1997) 16 Cal.4th 826). However, each of these decisions generated strong dissents from multiple members of the court. The fundamental basis of this series of decisions, that “ ‘ "this is the type of inquiry traditionally performed by judges as part of the sentencing function" ’ ” (*McGee, supra*, 38 Cal.4th at p. 707, quoting *Kelii, supra*, 21 Cal.4th at p. 457, quoting *Wiley, supra*, 9 Cal.4th at p. 590) has been adjudged by the U.S. Supreme Court in *Booker* not to be "a sound guide to enforcement of the Sixth Amendment's guarantee of a jury trial in today's world." (*Booker, supra*, 543 U.S. at p. 226.)

The fundamental rationale of this court's prior decisions in this area is not persuasive. The right to jury trial should be recognized as a limitation on the power of the judiciary to oppress through unbending enforcement of laws so harsh they may not be enforced by a jury of a defendant's peers. While recognition of the limits of one's own power may be difficult, and in this setting runs against the judiciary's natural assumption of its expertise in

criminal sentencing, this court should recognize that the Framers wished to limit these powers and adopted the right to trial by jury to do it. This court should enforce that right.¹

II. IT IS FUNDAMENTALLY UNFAIR FOR THE GOVERNMENT TO BARGAIN WITH A DEFENDANT FOR A PARTICULAR JUDGMENT OF CONVICTION, AND LATER TO TREAT THE CONVICTION AS INCLUDING AN ELEMENT THAT WAS DISMISSED.

The government charged defendant in the proceedings leading to this prior conviction with several charges and allegations. He was charged with assault with a deadly weapon and with infliction of injury on a cohabitant with personal use of a weapon. The parties settled the lawsuit for a judgment that established only that defendant had inflicted corporal injury on his cohabitant. The charge of assault with a deadly weapon and the allegation of personal weapon use in the commission of the cohabitant abuse were dismissed.

Years later, the government says the conviction was actually for cohabitant abuse with personal weapon use. According to the majority in *McGee*, the trial on the government's allegation of personal weapon use does not consist of an inquiry into what conduct defendant engaged in while

¹While this court has limited its request for supplemental briefing to whether the court's not true finding was error, there is an obvious connection between recognition of a right to jury trial and the attendant Double Jeopardy protection which would deny the prosecution a right to maintain the present appeal at all. (*People v. Seel* (2004) 34 Cal.4th 535, 547-548.)

inflicting corporal injury on his spouse. "The need for such an inquiry does not contemplate that the court will make an independent determination regarding a disputed issue of fact relating to the defendant's prior conduct [citation], but instead that the court will examine the record of the prior proceeding to determine whether that record is sufficient to demonstrate that the *conviction* is of the type that subjects defendant to increased punishment under California law." (*McGee, supra*, 38 Cal.4th at p. 706.)

If that is the case, defendant's conviction is not of the type that subjects defendant to increased punishment. Cohabitant abuse is not a listed felony under either Penal Code section 667.5, subdivision (c), nor section 1192.7, subdivision (c), the lists of offenses cross-referenced by the Three Strikes law. The record of conviction demonstrates that the factual allegation that would have brought defendant's conviction on to that list was dismissed.

Despite its ability to fix the conviction as a serious felony by actually convicting defendant of cohabitant abuse with personal weapon use, the government agreed to dismiss that allegation in exchange for defendant's plea of guilty to cohabitant abuse and waiver of his constitutional rights to jury trial, confrontation and self-incrimination. Years later, the government wants another court to say the conviction included the element alleged but dismissed. This is a form of governmental conduct which offends fundamental notions of fairness. The government enticed the surrender of defendant's fundamental

right to trial by jury with assistance of counsel by agreeing to a conviction which established facts constituting a nonserious offense, then later asserts the right to treat the conviction as the more serious offense originally charged.

The government tries to analyze the issue as one which depends on a demonstrated agreement at the time of the plea agreement that the government will not treat the conviction as a more serious one in the future. It argues that the plea agreement did not prohibit the later treatment of the offense as one that involved personal weapon use. (People's Supplemental Brief [PSB], at pp. 10-18.)

This issue is a red herring. The failure of a defendant to get an express agreement from the government that it will not in the future disregard the agreement as embodied in the judgment does not render the government's later disregard fair. Why should such a burden be placed on the defendant? As the government points out, "plea agreements rarely involve the collateral consequences of the plea . . ." (PSB, at p. 12.) Why this state of affairs gives the government the right in the future to disregard the limits of the judgment they agreed to is left totally unexplained. If a defendant is not suspicious enough to realize the government may try to disregard the limits of the conviction in the future, and get an agreement that it not do so, the government claims it is free to treat the conviction as the more serious one originally charged, rather than the less serious one agreed to by both parties. The

government asserts a position inconsistent with honesty and fair dealing. It does not want to be bound by its prior agreement to a conviction of a certain type, but asserts no persuasive reason that justifies a departure from the moral, legal and social norm that a party is bound by its prior agreements, even when later it becomes advantageous for the party to disregard it.

The government dances around the issue by saying that the United States Supreme Court in *Taylor v. United States* (1990) 495 U.S. 575 only said that it “would seem unfair” to treat a plea bargained conviction to a lesser offense as a conviction of a greater offense to purposes of sentence enhancement. “[I]t did not rule that the scenario actually was unfair.” (PSB, at p. 20.) The short answer to this is that *Taylor* involved a prior conviction that had been the result of a jury trial, so that the facts of that case did not permit an explicit ruling on the issue. Nonetheless, a unanimous U.S. Supreme Court indicated that it seemed unfair to permit the government to do what it is trying to do in the present case: agree to a plea to a lesser offense, then later treat it as a more serious offense for purpose of increasing the sentence for a subsequent offense.

There is further quibbling in the government’s brief about what the *Taylor* court meant by a plea to a lesser offense. The government posits that the court meant an offense whose elements are factually inconsistent with the greater offense, and claims their dismissal of the personal weapon use

allegation is not inconsistent with later treatment of the conviction as one that did involve personal weapon use. (PSB, at pp. 20-21.)

Utilizing criteria developed in Justice O'Connor's dissent in *Shepard*, the government also claims that consistent assertions in the police report, as summarized by the probation report, demonstrate the corporal injury could only have been inflicted by defendant's use of a knife. (PSB, at p. 22, citing augmented CT 8-9 and *United States v. Shepard* (2005) 544 U.S. 13, 35 (dis. opn. of O'Connor, J.) However, the material referenced provides a basis for the offense other than personal use of a knife. In the summary of the police report, the victim described injury inflicted by punches and kicks. (Augmented CT at p. 8.) In the victim's statement to the probation officer, she mentioned only being thrown to the ground by defendant, and did not claim that he used a knife. (*Id.*, at p. 9.) Likewise, defendant's statement indicates that pushing and shoving took place between him and his cohabitant, as well as his use of a knife. (*Ibid.*)

Under Justice O'Connor's test for defining what the prior conviction was for, which was whether the defendant "*understood* himself to be admitting the crime" defined in the enhancement statute (*Shepard, supra*, 544 U.S. at p. 31), the record of conviction demonstrates that defendant did not understand he was pleading guilty to personal use of a weapon because that allegation was being dismissed.

The government also suggests that dismissal of the personal weapon use allegation was necessary to keep the sentence within the agreed upon sentence of two years, the mitigated term for cohabitant abuse. (PSB at p. 13.) However, the prosecution was free to insist on an admission to the allegation, with an understanding that the additional one year punishment for the enhancement would not be imposed. (*People v. Shirley* (1993) 18 Cal.App.4th 40, 45-47.) “[T]he admission of an enhancement made with full knowledge of the consequences also serves to determine the nature of the offense it modifies and in cases like this one constitutes the conviction of a serious felony. [¶] The striking of the enhancement for sentencing purposes in the earlier case does not negate the conviction or enhancement nor change the nature of the original offense and its accompanying enhancement.” (*Id.*, at p. 47.)

The parties bargained for a conviction of a certain type. Here, the factual element which would render the conviction a "strike" prior was dismissed. Therefore the "nature" of the *conviction* is one that does not include the factual element that would render the conviction a strike prior. Any other approach would constitute the “independent determination regarding a disputed issue of fact relating to the defendant’s prior conduct” that *McGee* says is *not* permitted in the trial of a prior conviction allegation. (*McGee, supra*, 38 Cal.4th at p. 707.)

III. THE PROBATION REPORT IS NOT A PART OF THE RECORD OF CONVICTION WHICH CAN BE EXAMINED BY THE TRIER OF A PRIOR CONVICTION ALLEGATION.

Defendant pointed out in his supplemental brief the limitations on the "record of conviction" which may be considered by federal courts in determining whether a prior conviction triggers increased punishment. (Supp. brief, at p. 15-16, citing *United States v. Shepard*, *supra*, 544 U.S. 13.) The government recognizes these limitations, but states they were the result of "statutory interpretation." (PSB at p. 21.) While this statement is true as far as it goes, the government does not acknowledge that the *Shepard* court's statutory interpretation was based in part on the policy of avoiding serious constitutional issues that would arise if a broader definition were allowed. While acknowledging that the fact in dispute in *Shepard*, whether the defendant had burglarized a building rather than another object included in the statute he had been prosecuted under, could be viewed as a "fact about a prior conviction," the *Shepard* court said that adjudication of such a fact did not clearly come within the *Armendarez-Torres* rule. (*Shepard*, *supra*, 544 U.S. at p. 25.) "The rule of reading statutes to avoid serious risks of unconstitutionality [citation], therefore counsels us to limit the scope of judicial fact finding . . ." (*Ibid.*)²

²This portion of Justice Souter's opinion represented the view of four justices. A fifth, Justice Thomas, expressed the view that a broader definition

The government never explains why the same rule of avoiding serious constitutional issues should not also apply to this court's definition of the record of conviction which may be examined to establish the "nature or basis" of the conviction. Apparently the government's position is that this court should ignore the risks of unconstitutionality and adopt as expansive a definition as possible, contrary to this court's well established policy. (*Miller v. Municipal Court* (1943) 22 Cal.2d 818, 828.)

Rather than run the risks of unconstitutionality the U.S. Supreme Court prudently avoided in *Shepard*, this court should make the definition of the record of conviction which may be considered the trial of prior conviction allegation congruent with the limits set in *Shepard*. A probation report is not within the record of conviction recognized in *Shepard*. Therefore, this court should not include it. If the report is excluded, there is no evidence to support a finding that the prior conviction was a serious felony, and the trial court made no error in its not true finding.

CONCLUSION:

For the foregoing reasons, the trial court did not err in ruling that defendant's alleged prior conviction for inflicting corporal injury was not a

would violate the jury trial right and that even the limited fact finding permitted by the plurality violated Shepard's right to jury trial. (*Shepard, supra*, 544 U.S. at p. 28 (conc. opn. of Thomas, J.).)

strike.

Dated: July ____, 2006

Respectfully submitted,

MICHAEL KRESSER
Executive Director
Sixth District Appellate Program
Attorneys for Respondent
Manuel Alex Trujillo