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.	]	
	]	

OPENING BRIEF ON THE MERITS

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

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STATEMENT OF ISSUE

On May 18, 2005, this court directed defendant to serve and file a Brief on the Merits "addressing whether the People can appeal under Penal Code section 1238, subdivision (a) the trial court's order finding the alleged prior conviction is 'not a strike.'"

STATEMENT OF THE CASE

Defendant[1] Manuel Alex Trujillo was charged by information filed on March 7, 2002, with robbery and assault with force likely to produce great

1. Although Mr. Trujillo was respondent and cross-appellant in the Court of Appeal, and is petitioner in this court, he will be referred to as defendant for ease of reference.

bodily injury. (Pen. Code §§ 211 and 245, subd. (a)(1).)[2] (CT 26-29.) Great bodily injury enhancements were alleged as to each count. (§§ 12022.7, subd. (a) and 1203, subd. (e)(3).) Prior conviction allegations included two "strike" priors (§§ 667, subds. (b)-(i) and 1170.12), two prior prison term allegations (§ 667.5, subd. (b)), and a serious felony prior (§ 667, subd. (a).) (*Ibid*.)

On February 5, 2003, a jury acquitted defendant of the robbery charge but convicted him of the felony assault, while finding the great bodily injury allegation not true. (CT 201-202.)

The jury verdicts were rendered on the morning of February 5, 2003. That afternoon, a court trial on the prior conviction allegations began. (CT 205.) After presentation of evidence by the prosecution, the truth of the prior convictions was argued. (CT 206.) The court rendered findings that one strike prior allegation was true, and the second allegation was not true. The court also found one of the prison prior term allegations true and one not true. (*Ibid*.)

On March 7, 2003, defendant was sentenced to the mid term of three years for the felony assault, doubled to six years by virtue of the strike prior which was found true, and enhanced by one year for service of a prior prison term. Total term imposed was seven years. (CT 246.) The court also ordered

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2. All further statutory references are to the Penal Code unless otherwise indicated.

reimbursement of $1,000 to the county for attorney fees.

On April 30, 2003, the People filed a timely notice of appeal, purporting to appeal "the sentencing of defendant, having [sic] previously granted the motion to find the Penal Code section 245(a)(1) [sic] prior conviction alleged pursuant to Penal Code sections 667.5(c)/1192.7(c) to not be a strike under the Three Strikes Law . . . ." (CT 247-248.)

Defendant was permitted by the Court of Appeal to file a late notice of appeal and did so on August 8, 2003. On November 1, 2004, the Court of Appeal issued its opinion affirming defendant's conviction, but reversing the "not true" finding on the prior conviction allegation and the order requiring reimbursement of attorney fees. The Court of Appeal remanded for a retrial of the strike prior allegation and for a new hearing concerning defendant's ability to pay attorney fees.

On February 16, 2005, this court granted review, and deferred further action and briefing pending decision of a related issue in *People v. Samples,* S112201, or further order of this court.

On May 18, 2005, this court directed defendant to serve and file this a Brief on the Merits.

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STATEMENT OF FACTS CONCERNING THE TRIAL OF THE PRIOR CONVICTION ALLEGATIONS.

Following the jury's verdict on the robbery and assault charges, on the morning of February 5, the court stated that the court trial on the prior convictions would begin that afternoon. (RT 10.)[3] At 1:43 p.m. the court reconvened "for the court trial on the priors." (RT 11.)

The prosecutor had a number of documentary exhibits marked for identification as People's Exhibits 7 through 15. (RT 11-14.) A latent fingerprint analyst for the San Jose Police Department was called to testify that the fingerprints in Exhibits 8, 9, 10, 11 and 12 were made by the same person. (RT 21.) The prosecutor moved his exhibits into evidence without objection, and rested. (RT 27.) The defense rested without presenting evidence. (RT 27.)

The court then entertained argument. The prosecutor argued that the documents produced proved that defendant had suffered two prior strike convictions. One was for infliction of corporal injury on a spouse, evidenced by an exhibit consisting of an abstract of judgment, minutes of the plea, probation report, and transcript of plea. (People's Exhibit 13, AUG CT 1-21.)

The prosecutor argued that the section 273.5 conviction qualified as a prior strike because of evidence that defendant used a dangerous or deadly

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3. There are two Volume I's of Reporter's Transcript in the record on appeal. The RT references used refer to the Reporter's Transcript of proceedings on February 5 and March 7, 2003.

weapon in the commission of the offense. (RT 28.) Reference was made to an admission by defendant in the probation report that he had stuck the victim with a knife. (*Ibid*.; AUG CT 9.)

Defense counsel conceded that the section 245, subdivision(a)(1) prior conviction alleged as a strike was a strike prior, but argued that the section 273.5 conviction was not. (RT 31-32.) Counsel argued that reference to court records for factual detail was warranted only if there was an ambiguity in the record. Counsel pointed out that an allegation that defendant had used a dangerous or deadly weapon in the commission of the section 273.5 violation had been stricken as part of the plea bargain in that case. (RT 33.)

The prosecutor gave rebuttal argument, reiterating that the court could rely on defendant's admissions in the probation report to find he used a dangerous and deadly weapon, and that the strike prior was true. (RT 34-35.)

The court stated it would not find the prior to be a strike because the prosecutor had "settled the case with the understanding the knife allegation would not be used. It went away. The defendant relied on that. . .And I think this goes to the benefit of his bargain . . . Because there was never an admission of it . . . the court finds that not to be a strike." (RT 38.) The court minutes stated: "PC 273.5 (case #149886) found NOT TRUE AS A STRIKE." (CT 206.)

ARGUMENTS OF LAW

I. THE PEOPLE'S APPEAL IS NOT AUTHORIZED BY STATUTE AND MUST BE DISMISSED.

A. Introduction.

"An appeal may be taken by the People from a finding that a prior conviction allegation is not true." In these eighteen words, a law could be written which would give the prosecution the statutory right to appeal a finding after trial that a prior conviction allegation is not true. However, no such law has ever been written in this state. Consequently, no published case has ever held that the People are statutorily authorized to appeal from such a finding.[4]

The People asserted in the Court of Appeal that they are statutorily authorized by section 1238, subdivisions (a)(1), (a)(8) and (a)(10) to appeal from a not true finding following trial of a prior conviction allegation. The Court of Appeal found the People's appeal authorized by section 1238, subdivision (a)(10), without discussing the two other subdivisions. However,

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4. While this court in *People v. Laino* (2004) 32 Cal.4th 878 affirmed the Court of Appeal's reversal of a trial court finding that an alleged prior conviction was not a strike, the defendant apparently did not raise the issue of whether the People were statutorily authorized to appeal such a finding. This court did note the defendant's argument that the appeal was "barred under the principles of procedural due process and collateral estoppel set out in *People v. Mitchell* (2000) 81 Cal.App. 4th 132." This court rejected that argument based on its recent disapproval of *Mitchell* in *People v. Barragan* (2003) 32 Cal.4th 236. (*Laino, supra,* 32 Cal.4th at p. 886, fn. 7.) In *Barragan*, this court stated that the "issue of whether the People have a statutory right to appeal a not true finding is unsettled and currently pending before this court." (32 Cal.4th at p. 258.)

none of these subdivisions mention a not true finding following trial of a prior conviction allegation. The subdivisions relied upon by the People address either judicial actions which deprive the People of a trial on the merits of charges and allegations, or actions taken to nullify the effect of a true finding on charges or allegations. None of the three subdivisions give even a hint that an appeal by the People from a not true finding is permitted. Only by arguments which stretch statutory language well beyond its apparent meaning can the People support their position.

The fundamental rule of law applied by this court in *People v. Valenti* (1957) 49 Cal.2d 199, 204 is unchanged: "[T]he right of appeal is statutory and a judgment or order is not appealable unless it is expressly made so by statute." (*Ibid.*) An examination of the three subdivisions of section 1238 relied upon by the People will establish that the right of the People to appeal from a not true finding after trial of a prior conviction allegation is nowhere expressed.

B. Section 1238, subdivision (a)(1) Does Not Authorize the People's Appeal.

Section 1238, subdivision (a)(1) authorizes an appeal by the People from "an order setting aside all or any portion of the indictment, information, or complaint." No such order was made by the superior court in this case. Instead, the court rendered a finding of not true as to the strike prior conviction

allegation, as it was authorized to do by Penal Code section 1158. That finding is quite different from an order setting aside all or any portion of an indictment or information.

In *People v. Valenti, supra*, 49 Cal.2d 199, this court considered what was then subdivision (1) of section 1238, which was identical to the present subdivision (a)(1), except that it did not contain the language "all or any portion of" before "indictment, information, or complaint." This court said: "Subdivision 1 of section 1238 has been primarily understood to refer to an order setting aside the indictment or information on the grounds stated in section 995 of the Penal Code, i.e., in the case of an information on the ground '1. That before the filing thereof the defendant had not been legally committed by a magistrate' or '2. That the defendant had been committed without reasonable or probable cause.' (Citation.)" (*Id.*, at p. 204).

Valenti also discussed the suggestion in *People v. Burke* (1956) 47 Cal.2d 45 that an order dismissing a prior conviction allegation was appealable under paragraphs 1 of section 1238. In *Burke*, the trial court dismissed a prior conviction allegation after a defendant's admission of it. The *Burke* court stated that "the trial court's action was in substance 'an order setting aside [a part of] the . . . information'; having set aside that part of the information charging a prior conviction the court properly made no finding." (*Id.*, at p. 53.) Thus, the dismissal of a prior conviction allegation *before a finding was made*

was deemed an appealable order within subdivision 1 of section 1238 by *Burke*.

Subdivision (a)(1) has always been understood to authorize an appeal from 'an order dismissing an information or terminating part of a criminal action *before trial* . . .' (*People v. Booker* (1994) 21 Cal.App.4th 1517 (emphasis added).) Such pretrial dismissals avoid the procedure for the trial of the truth of a prior conviction allegation, as set forth in Penal Code section 1158:

> Whenever the fact of a previous conviction of another offense is charged in an accusatory pleading, and the defendant is found guilty of the offense with which he is charged, the jury, or the judge if a jury trial is waived, must unless the answer of the defendant admits such previous conviction, find whether or not he has suffered such previous conviction. The verdict or finding upon the charge of previous conviction may be: "We (or I) find the charge of a previous conviction true," or, "We (or I) find the charge of previous conviction not true," according as the jury or the judge find that the defendant has or has not suffered such conviction. If more than one previous conviction is charged a separate finding must be made as to each.

Following this procedure, the trial judge made a finding as to the allegation in question that it was not a strike, after receiving and considering evidence presented by the prosecutor, and hearing argument from counsel. There simply was no order "setting aside" any portion of the information.

The distinction between a finding after trial of a prior conviction allegation and a pretrial order "setting aside" such an allegation was made in *People v. Walker* (2001) 89 Cal.App.4th 380. In *Walker*, the trial court found

an alleged prior conviction not to be a strike prior because the prosecution had failed to meet its burden of proving the validity of the waiver of *Boykin-Tahl* rights at the time of the entry of plea. (*Id*., at p. 387.) The Court of Appeal found that the prosecution had a right to appeal, because "the trial court's decision was not a determination of the issues before it on a trial on the truth of the prior conviction under section 1025, but was instead an order invalidating a prior conviction on constitutional grounds without following the procedure set out in [*People v.*] *Sumstine* [1984] 36 Cal.3d 909." (*Id*., at pp. 383-384.)

The *Walker* court determined that at a trial of the truth of prior conviction allegations, the issues on which the prosecution bears the burden of proof are whether the accused suffered the prior felony conviction alleged and, if the conviction is alleged as a serious felony, whether the offense qualified as a serious felony. (*Id*., at p. 386.) The *Walker* court observed that proof of the constitutional validity of the prior conviction by the prosecutor is not required unless and until a defendant produces evidence to show a violation of *Boykin-Tahl* rights.

In *Walker*, at the trial of the truth of the prior convictions, the defendant made no allegation of the violation of his *Boykin-Tahl* rights at the entry of his plea of guilty to the prior conviction, and produced no evidence of any such violation. Because the trial court's subsequent "not true" finding was not based on the failure to prove either the fact or the serious felony character of

the alleged prior conviction, the appellate court determined that the trial court had actually invalidated it on constitutional grounds. (*Walker*, *supra*, 89 Cal.App.4th at p. 385.) The court held that such an invalidation amounted to dismissing it as an allegation, thus making it appealable under subdivision (a)(1).

The reasoning of *Walker* demonstrates that the not true finding in the present case was a nonappealable finding that the allegation was not true. It was not based on any ground of constitutional invalidity in the taking of the plea. It was based on the factfinder's determination that the prosecution had not carried its burden to show that the prior conviction qualified as a strike prior. While the finding that the conviction was "not a strike" appears to have been caused by the fact that the use allegation was not previously adjudicated due to the prosecutor's dismissal of the use enhancement as part of a plea bargain, it was a finding on that disputed issue after trial, not an order setting aside a portion of the information without trial.

In the Court of Appeal, the People also cited *People v. Espinoza* (1979) 99 Cal.App.3d 59 to support their position. However, in *Espinoza*, the trial court in pretrial proceedings ordered a section 667.5, subdivision (b) prior conviction allegation stricken. (*Id.*, at p. 64.) Although the trial court was at one point indicating an intent to make a not true finding and thus decide the merits of the allegation, the prosecutor successfully objected that such a

determination was improper because the People had never waived their right to a jury trial of the allegation, and that the appropriate remedy would be an order striking the allegation. (*Ibid*.) The court then ordered the allegation stricken. In the present case, both the People and defendant had waived their right to a jury trial on the prior conviction allegations and appeared "for the court trial on the priors." (RT 11.) Thus, the present case is totally distinguishable from *Espinoza*.

In sum, a finding after trial that a prior conviction allegation is not true is not an order dismissing all or any a portion of the information and is therefore not appealable pursuant to section 1238, subdivision (a)(1).

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C. Section 1238, Subdivision (a)(8) Does not Authorize the People's Appeal.

Section 1238, subdivision (a)(8) provides that an appeal may be taken by the People from "an order or judgment dismissing or otherwise terminating all or any portion of the action, including such an order or judgment entered before the defendant has been placed in jeopardy or when the defendant has waived jeopardy."

For the reasons set forth in section B, *supra,* the court's verdict that the prior strike conviction allegation was not true did not constitute a dismissal. The court reached the merits of the prior conviction allegation and made a not

true finding.

Nor can the phrase "otherwise terminated" be reasonably applied to a not true finding. While such a finding does conclude the proceedings on that portion of the action, it does not "terminate" the proceedings in the sense that word is used in the statute. When paired with the word "dismissed," the phrase "or otherwise terminates" means a similar act which ends proceedings short of trial.

There has been some suggestion in the caselaw that the 1998 amendment to this subdivision was enacted to permit the prosecutor to appeal "in all situations 'except when the appeal would violate double jeopardy.'" (*People v. Salgado* (2001) 88 Cal.App. 4th 5, 12.) The *Salgado* court based its conclusion on its "review of the legislative history of the 1998 amendment to section 1238, subdivision (a)(8)." (*Id.*, at p. 12.) However, a review of the legislative history of the amendment refutes this conclusion.

The 1998 amendment of subdivision (a)(8) began with the introduction of Senate Bill 1850 by Senator Schiff on February 19, 1998.[5] At that time, the bill would have amended section 1238 to read as follows: "(a) An appeal may be taken by the people from any decision, judgment, or order arresting judgment, granting a new trial or dismissing, striking, setting aside, or

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5. This and other legislative history documents referenced in the brief will be the subject of a motion for judicial notice.

otherwise terminating the prosecution of all or any portion of the indictment, information, or complaint, or otherwise affecting the substantial rights of the people, except that no appeal shall lie when double jeopardy prohibits further prosecution. The appeal may include the review of a ruling or order underlying the decision, judgment or order." The original SB 1850 would thus have eliminated all ten subdivisions of subdivision (a) and replaced them with truly expansive language that would have expanded the appellate rights of the People to the constitutional limits of the Double Jeopardy Clause.

This original version of the bill received opposition that was summarized in a Senate Committee of Public Safety report prepared for an April 14, 1998 hearing. This report began by quoting the author's opinion that "SB 1810 [sic] would provide for a People's right to appeal, except where the appeal would violate double jeopardy." However, this report then related that opposition to the bill "believes that the problems the bill is intended to address could be addressed in a much narrower fashion." The opposition was reported to have expressed concern over "the great and apparently unintended expansion of the right to appeal sentences. This bill would let the prosecutor appeal a sentence when he or she did not agree with the court's failure to impose or sentence for enhancements. 'Under current law, the prosecutor can appeal unlawful sentences, this measure would allow the prosecution to appeal a sentence s/he felt was not harsh enough.'" (Sen. Comm. on Public Safety,

Rep. on Sen. Bill No. 1850 (1997-1998 Reg. Sess.).)

The report then stated: "Should this bill be amended to clarify existing law to take care of the sponsor's concerns without expanding the right of the People to appeal sentences?"

Subsequently, on May 12, 1998, SB1850 was amended to the version ultimately adopted, which made minor changes to subdivisions (a)(1), (a)(2), and (a)(8).

The Assembly Committee on Public Safety report quoted by the *Salgado* opinion was actually the report quoting the bill's author. "According to the author, 'SB 1850 would provide for a People's right to appeal in a criminal case except when the appeal would violate double jeopardy." (The internal quote was never closed in the report.) However, this quote is identical to that in the earlier Senate Committee report, and appears to be the author's description of the language in the original bill, not the bill as amended.

The deletion of the expansive rewrite of subdivision(a) in favor of the minor changes to subdivisions (a)(1), (a)(2) and (a)(8) indicate there was no legislative intent in the 1998 amendment to subdivision (a)(8) to expand the limits of the People's right to appeal sentences. In fact, the Assembly report referenced by the *Salgado* case said the reach of the bill as amended was limited to: (a) dismissals after a unanimous jury verdict of guilty; (b) where some, but not all, criminal counts are dismissed prior to trial; (c) post-verdict

dismissals and (d) dismissals after demurrers.

Obviously, the 1998 amendment to subdivision (a)(8) was minor in nature and repudiated SB 1850's original approach of vastly expanding the People's right to appeal. In particular, the legislative history materials evidence a concern that the People's right to appeal sentences and enhancements *not* be expanded.

Thus, no right to appeal a not true finding on a prior conviction allegation can be found in subdivision (a)(8).

D. Section 1238 Subdivision (a)(10) Does Not Authorize the People's Appeal.

The Court of Appeal found that subdivision (a)(10) authorized the People's appeal from a not true finding. However, its conclusion cannot withstand analysis.

The Court of Appeal's reasoning on this issue, added only upon modification of the opinion, was as follows:

> We find that the sentence was unauthorized by law because, as we shall explain below, the court mistakenly refused to allow the People to prove the prior conviction was a serious or violent felony. The court's mistake was a mistake of law which resulted in an unauthorized sentence, that is, a sentence that is unauthorized by the Penal Code. (*People v. Massengale* (1970) 10 Cal.App.3d 689, 693.) In a case involving prior felony convictions, unless the court strikes a prior conviction in the furtherance of justice pursuant to section 1385, the court must sentence defendant pursuant to section 667, subdivisions

> (b) through (i). Here, the court did not strike the prior conviction pursuant to section 1385, but made a mistaken evidentiary ruling that eviscerated the prosecution's proof. The subsequent sentence violated section 667, subdivisions (b) through (i). The People may appeal the sentence as not authorized by law.

Subdivision (a)(10) provides that an appeal may be taken by the People from:

> The imposition of an unlawful sentence, whether or not the court suspends the execution of the sentence, except that portion of a sentence imposing a prison term which is based upon a court's choice that a term of imprisonment (A) be the upper, middle, or lower term, unless the term selected is not set forth in an applicable statute, or (B) be consecutive or concurrent to another term of imprisonment, unless an applicable statute requires that the term be consecutive. As used in this paragraph, "unlawful sentence" means the imposition of a sentence not authorized by law or the imposition of a sentence based upon an unlawful order of the court which strikes or otherwise modifies the effect of an enhancement or prior conviction.

The Court of Appeal stated that defendant's seven year sentence was "not authorized by law" because the court "made a mistaken evidentiary ruling that eviscerated the prosecutor's proof."[6] However, the seven year sentence imposed on defendant was authorized by law. It was the sentence authorized as the three year midterm for felony assault, doubled by the one strike prior found true, and enhanced by a year for a prison prior. (§§ 245, subd. (a)(1); 667, subd. (e)(1)/1170.12, subd. (c)(1); 667.5, subd. (b).)

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3. In fact, the trial court did not make a mistaken evidentiary ruling. All of the prosecution's proffered evidence was admitted. (RT 26.)

The Court of Appeal equated the existence of evidentiary error in that the trial of a prior conviction allegation with an "unauthorized sentence." However, the term "unlawful sentence" in subdivision (a)(10) has a specific statutory definition: "The imposition of a sentence not authorized by law or the imposition of a sentence based upon an unlawful order of the court which strikes or otherwise modifies the effect of an enhancement of prior conviction." The superior court's sentence was not unauthorized within either of these statutory definitions.

The Court of Appeal's reasoning was that if a serious felony prior conviction allegation is found not true, when in the view of the appellate court the allegation was adequately proved, that a sentence subsequently imposed based on that finding is not authorized. This rationale is incorrect.

The Three Strikes Law requires that serious felony prior convictions must be "pled and proved" before triggering steeper penalties. (§ 667, subds. (e)(1) and (e)(2); 1170.12, subds. (c)(1) and (c)(2)(A).)

Under the statute governing the trial of prior conviction allegations, the determination of whether a prior conviction allegation is proven is left to the jury, or if a jury is waived, to the trial judge. (§ 1158.) Here, the trial judge found only one of the two charged strike priors true, and then proceeded to sentence the defendant to the doubled term required by that finding. The sentence imposed was a lawful and authorized sentence given the findings of

the jury and judge.

Had the trial court failed to double the base term despite its true finding on one strike prior, the sentence would be unauthorized. If it imposed a 25-year-to-life sentence, having found only one strike prior allegation to be true, the sentence would be unauthorized. However, the court doubled the base term as required by its finding, and the sentence was thus authorized.

Nor is the sentence imposed unauthorized under the second statutory definition of an unlawful sentence: "the imposition of a sentence based upon an unlawful order of the court which strikes or otherwise modifies the effect of an enhancement or prior conviction."

The finding of not true on the second strike prior allegation did not "strike" the allegation, for reasons explained above in the discussion of the inapplicability of subdivisions (a)(1) and (a)(8). That term refers to judicial action to dismiss a prior conviction allegation before trial (*People v. Sumstine, supra,* 36 Cal.3d 904), or after a trial or admission has resulted in a true finding. (*People v. Superior Court (Romero)* 13 Cal.4th 447.)

The term "otherwise modifies the effect of an enhancement or prior conviction" must refer to judicial action to avoid the penalty enhancing effect of an enhancement or prior conviction which has been proven. No mere allegation of an enhancement or prior conviction has any effect on a sentence. It is only enhancements and prior conviction allegations which are proven

which have an effect.

The language used in subdivision (a)(10) was carefully selected and meant to confine the People's right to appeal a sentence. A review of the legislative history of Chapter 59 of the Statutes of 1986, which added subdivision (a)(10) in its present form, indicates that none of its proponents ever identified findings after the trial of a prior conviction allegation as a target of the bill. Rather, as explained in the Assembly Committee on Public Safety analysis prepared for a hearing on AB 2287 on June 10, 1985, the goal of the bill as originally proposed was to permit the People to appeal probation grants even if imposition of sentence was suspended, to remove the judicial limitation that such appeals were permissible only when execution of sentence was suspended, and to appeal sentences in which the trial court abused its discretion in selecting a particular sentence, or imposed a sentence choice or term not authorized by law.

However, AB 2287 underwent extensive amendment from its original version, which would have added subdivisions (a)(10) and (a)(11) to section 1238, as follows: "(10) An unlawful grant of probation, whether or not the court imposes sentence. (11) The imposition of an unlawful sentence, whether or not the court imposes sentence." Opponents of the bill raised the specter of unnecessary appellate litigation manipulated for political purposes against judges perceived by prosecutors as too lenient. Opponents also mentioned

Double Jeopardy concerns, noting that “Double Jeopardy litigation would be encouraged." (Ass. Comm. On Public Safety, April 10, 1985 hearing at p. 5.) Opponents questioned the fairness of upping a criminal sentence by an appellate decision issued a year or two after sentence was imposed in the trial court.

In response to the opposition, AB 2287 was amended in the Assembly Committee on June 13, 1985. The amendment changed proposed subdivision (a)(10) to language similar but not identical to that later enacted, dropped proposed subdivision (a)(11), and added subdivision (d), which clarified that no appeals from probation grants would be permitted, though relief by way of petition for writ of mandate or prohibition could be sought.

Thus, it is clear that the expansive right to appeal sentences proposed in the original version of AB 2287 was pared down as the bill went through the Legislature. Language which limited the scope of the prosecution’s right to appeal a sentence was substituted in response to opponents’ concerns regarding excessive appellate litigation and double jeopardy. The bill as amended did not allow appeals based upon a sentencing judge’s choice between upper, middle or lower term, or choice to run multiple sentences consecutive or concurrent, unless a consecutive term was required by law. The “unlawful sentence” which could be appealed was very narrowly defined, in terms of a sentence not authorized by law or based on unlawful action striking

or modifying the effect of an enhancement or prior conviction.

There is no hint in the language selected that the prosecution would be allowed to appeal a finding of not true following the trial of a prior conviction allegation. Such a provision would have run directly into the Double Jeopardy concerns of the opposition to the bill. Indeed, the very notion of a People's appeal from a not true finding after trial of a prior conviction allegation was contemporaneously described in *People v. Raby* (1986) 179 Cal.App.3d 577, 591, as a "spurious notion." In *Raby*, the Attorney-General sought a remand and retrial of a Nevada prior conviction allegation which the trial judge had found had not been proven. The Court of Appeal rejected the request, expressing "surprise[] that a firm with a substantial speciality in criminal law could hold such a spurious notion. The court expressly *acquitted* Raby on that allegation. He has been once in jeopardy; another attempt is not permissible." (*Ibid*.)

Thus, the legislative history confirms what is apparent on the face of subdivision (a)(10): that its definition of "unlawful sentence" does not apply to a not true finding after trial of a prior conviction allegation.

E. Even If The Court Found Ambiguity In These Subdivisions, It Should Construe The Statute Not To Apply To Not True Findings After Trial To Avoid Serious Constitutional Questions.

As this court has long recognized, when interpreting statutes, a court

should avoid a construction which raises a serious doubt as to the constitutionally of the statute. The classic statement of this principle was made in *Miller v. Municipal Court* (1943) 22 Cal.2d 818, 828:

> If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable. [Citations.] The basis of this rule is the presumption that the Legislature intended, not to violate the Constitution, but to enact a valid statute within the scope of its constitutional powers.

For the reasons stated in Argument II, *post*, construing any subdivision of section 1238 to permit a prosecution appeal from a not true finding after trial of a prior conviction allegation would raise serious constitutional doubts under the state and federal Double Jeopardy Clauses. (Cal. Const., art. I, sec. 15; U.S. Const., Amends V and XIV.)

II. THE STATE AND FEDERAL DOUBLE JEOPARDY CLAUSES APPLY TO A PROCEEDING TO DETERMINE THE TRUTH OF A PRIOR SERIOUS FELONY ALLEGATION WHERE, AS HERE, A FACT FINDER MUST MAKE FINDINGS ABOUT THE NATURE OF THE DEFENDANT'S CONDUCT BEYOND THE LEAST ADJUDICATED ELEMENTS. AN APPEAL OF THE NOT TRUE FINDING IS THEREFORE BARRED.

A. Federal Double Jeopardy principles.

Defendant acknowledges at the outset that this issue was not briefed in

the Court of Appeal. However, this court's contrary decision in *People v. Monge* (1997) 16 Cal.4th 826, and the U.S. Supreme Court is contrary decision in *Monge v. California* (1998) 524 U.S. 721 were binding on the Court of Appeal. As this court recognized in *People v. Birks* (1998) 19 Cal.4th 108, 116, footnote 6, in such a situation, "Because the issue now presented could not have been decided below, it is properly before us in the first instance."

Defendant would also note that the court has pending before it an issue that is closely related to the Double Jeopardy issue in this case: Is a criminal defendant entitled to a jury trial on the issue of whether a foreign prior conviction qualifies as a "strike" prior? (*People v. McGee*, S123474, rev. gtd. April 28, 2004.) In that case, it had to be determined whether the defendant's conduct underlying a Nevada robbery conviction came within the California definition of robbery, because the Nevada statute was broader and included conduct that would not qualify in California as a robbery. The Court of Appeal in *McGee* referred to these issues as "ancillary factual issues relating to the circumstances and conduct giving rise to McGee's prior convictions." (115 Cal.App.4th 819, 831.)

The trial of the prior conviction allegation at issue in the present case also posed such an ancillary factual issue relating to the circumstances and conduct giving rise to the prior conviction. The offense defendant was convicted of, a violation of section 273.5, is not listed as an offense that itself

qualifies as a serious felony. (§ 1192.7, subd. (c).) The prosecutor's theory was that it qualified because defendant personally used a knife in the commission of the offense, bringing it with the scope of section 1192.7, subdivision (c)(23), "any felony in which the defendant personally used a dangerous or deadly weapon."

This theory required proof of facts beyond the least adjudicated elements of a section 273.5 violation. The least adjudicated elements of that offense are: willful infliction of corporal injury resulting in a traumatic condition upon a current or former spouse or cohabitant or mother or father of the person's child. (*People v. Thurston* (1999) 71 Cal.App.4th 1050, 1052-1056.)

This court in *People v. Guerrero* (1988) 44 Cal.3d 343 overruled its prior decision in *People v. Alfaro* (1986) 42 Cal.3d 627, to permit a fact finder to go beyond the least adjudicated elements of a prior conviction and to "look to the entire record of conviction" (*id.*, at p. 345) in determining the truth of a prior conviction allegation. However, in doing so, this court made the decision maker in the trial of some prior conviction allegations do more than the traditional tasks of determining identity and the facts adjudicated by the judgement of prior conviction. It made the decision maker determine facts which had not been adjudicated in the course of the proceedings leading to the prior conviction.

This course of action took the trial of at least some prior conviction allegations outside the scope of the "narrow exception" to the jury trial right recognized in *Almendariz-Torres v. United States* (1998) 523 U.S. 224. In *Almendariz-Torres,* a federal statute increased the maximum sentence from ten to twenty years for the offense of entry by an alien who had previously been deported, if the entry was subsequent to a conviction for commission of an aggravated felony. A closely divided U.S. Supreme Court ruled that the facts of such prior conviction did not have to be charged in the indictment or proved to a jury.

Two years later, in *Apprendi v. New Jersey* (2000) 530 U.S. 466, the U.S. Supreme Court ruled there was a jury trial right to trial of an enhancement that required fact finding about a defendant's conduct beyond the elements of the offense charged. The court in *Apprendi* questioned whether *Almendariz-Torres* had been correctly decided, but stopped short of overruling it. However, it did limit *Almendariz-Torres* by pointing out: (1) in *Almendariz-Torres,* the defendant admitted and did not challenge the "fact" of the prior conviction, and (2) there were procedural safeguards involved in the process resulting in the prior conviction. (*Id.*, at p. 488.) The court saw no need to examine the continued validity of *Almendariz-Torres* given its "unique facts" which made it a "narrow exception" to the general rule expressed in *Apprendi*.

The present case is not within the "unique facts" and "narrow

exception" of *Almendariz-Torres*. First, the defendant here contested the truth of the fact that he had suffered a prior conviction as defined in the Three Strikes law, and demanded and received a trial at which he received a favorable finding.

Second, the prior conviction allegation made in this case required more than proof that defendant had suffered a conviction of a specific offense with certain elements. There were procedural safeguards in the prior proceeding that ensured the accuracy of the findings that defendant was guilty of inflicting corporal injury resulting in a traumatic condition upon a current or former spouse or cohabitant or mother of his child. Either a jury had to find such elements had been proved beyond a reasonable doubt, or, as occurred, the defendant had to enter a plea of guilty which admitted such elements. However, there were no comparable safeguards ensuring accuracy in the determination of whether the defendant used a knife in the commission of the offense. The prosecution surrendered its opportunity to prove that fact or have it admitted when it dismissed the allegation that defendant used a dangerous and deadly weapon.

That leaves the task of adjudicating whether defendant used a dangerous or deadly weapon in the commission of the prior offense to the fact finder deciding the truth of the prior convictions allegation made in a later case. This requires adjudication of facts not adjudicated in a procedurally

safeguarded way at the earlier proceeding that resulted in the prior conviction. The additional fact that would convert the section 273.5 conviction into a serious felony must be established at the trial of the prior conviction. This is an "ancillary fact" not determined in the prior proceeding. No reliance can be placed on procedural safeguards in the prior proceedings, because the ancillary feet was not adjudicated in the prior proceeding.

Thus, more must be proved than the facts established by the judgment of conviction in the prior case. Inquiry into additional facts about the conduct underlying the conviction is necessary. This type of inquiry exceeds the scope of *Almendariz-Torres*, and falls within the general rule expressed in *Apprendi*: "any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi, supra,* 530 U.S. at p. 490.)

This court has already acknowledged that its decision in *People v. Kelii* (1999) 21 Cal.4th 452, that a defendant has neither a constitutional nor statutory right to a trial by jury on the issue of whether a prior conviction qualifies as a strike, has been called into question by *Apprendi.* In *People v. Epps* (2001) 25 Cal.4th 19, the court reaffirmed its holding in *Kelii* in situations where "only the bare fact of the prior conviction was at issue." (*Id.*, at p. 28.) In *Epps*, the alleged strike prior conviction was kidnapping, which on its minimum elements qualifies as a strike. (§ 1192.7, subd. (c)(20).)

However, this court stated: "We do not now decide how *Apprendi* would apply were we faced with a situation like the one at issue in *Kelli*, where some fact needed to be proved regarding the circumstances of the prior conviction--such as whether a prior burglary was residential--in order to establish that the conviction is a serious felony." (25 Cal.4th at p. 28.)

Since *Epps*, the United States Supreme Court very recently revisited the issue of determination of facts about prior convictions beyond those established by the elements of the offense in *Shepard v. United States* (2005) ___ U.S. ___ [161 L Ed 2d 205]. In *Shepard*, the court considered what information a court could consider in determining whether a state court burglary conviction qualified as a violent felony for purposes of the federal Armed Career Criminal Act. The determinative fact was whether the state conviction, elements of which included entries into motor vehicles, boats buildings, was for entry into a building. (*Id.*, at p. ___ [161 L Ed 2d at p. 211].) The federal appellate court had considered police reports submitted for issuance of the criminal complaints. The complaints to which the defendant had pled guilty alleged all the variations of burglary: motor vehicle, boat or building. (*Id.*, at p. ___ [161 L Ed 2d at p. 212].)

The U.S. Supreme Court held that the police reports could not be considered. It adhered to its prior holding in *Taylor v. United States* (1990) 495 U.S. 575, "any sentence under the ACCA must rest on a showing that a

prior conviction 'necessarily' involved (and a prior plea necessarily admitted) facts equating to a generic burglary." (*Id.*, at p. ___ [161 L Ed 2d at p. 216].) One of the reasons, cited by a plurality of four justices, was that to permit consideration of facts outside those established by the judgment would raise a significant question as to whether a jury must then find such facts. "While the disputed fact here can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi*, to say that *Almendariz-Torres* clearly authorizes a judge to resolve the dispute. The rule of reading statutes to avoid serious risks of unconstitutionality [citation] therefore counsels us to limit the scope of judicial fact finding on the disputed generic character of a prior plea . . ." (*Id.*, at p. ___ [161 L Ed 2d at p. 217].) Concurring in the result, Justice Thomas said that permitting any judicial fact finding on facts not established by the prior judgment was a violation of the right to jury trial, and called on the court to reconsider and overrule *Almendariz-Torres.* (*Id.*, at p. ___ [161 L.Ed 2d at pp. 218-219].)

Thus, a federal constitutional right to jury trial on facts concerning a prior conviction that are not established by the judgment should be recognized. An understanding that all prior conviction allegations are not the same has been reached. While a "bare fact of the prior conviction" exception to the jury trial right may survive, it cannot rationally be extended to situations in which

new facts, not established by the prior judgment, must be found.

Once the federal constitutional rights to jury trial and proof beyond a reasonable doubt are recognized with respect to proof of ancillary facts about conduct underlying a prior conviction, the Double Jeopardy protections are clear. If an ancillary fact of the alleged prior conviction is treated as an element of the crime for purpose of right to jury trial and proof beyond a reasonable doubt, then the finality interests protected by the Double Jeopardy Clause must give the state only one chance to prove that element and must bar any attempt to retry the defendant after a finding in his favor has been made.

This was the argument of the four dissenting justices in *Monge v. California*, *supra*, 524 U.S. 721. In *Monge*, the defendant had had his sentence doubled under the Three Strikes law upon a finding that an assault with a deadly weapon conviction qualified as a strike. The California Court of Appeal found the evidence of the prior conviction insufficient to prove Monge had personally used a dangerous or deadly weapon, which was necessary to establish it qualified as a strike prior, and held that retrial of the strike prior allegation would violate the federal and states double jeopardy clauses. This court, in a 3-1-3 decision, held that retrial was not barred by the state or federal double jeopardy clauses. The U.S. Superior Court affirmed in a 5-4 decision. As stated in the dissent of Justice Scalia, joined by Justices Souter and Ginsberg (*id.*, at pp. 740-741, fn. omitted):

> Petitioner Monge was convicted of the crime of using a minor to sell marijuana, which carries a *maximum* possible sentence of seven years in prison under California law. See California Health & Safety Code Ann. § 11361(a) (West 1991). He was later sentenced to *eleven* years in prison, however, on the basis of several additional facts that California and the Court have chosen to label "sentence enhancement allegations." However California chooses to divide and label its criminal code, I believe that for federal constitutional purposes those extra four years are attributable to conviction of a new crime. Monge was functionally acquitted of that crime when the California Court of Appeal held that the evidence adduced at trial was insufficient to sustain the trial court's "enhancement" findings, see *Burks v. United States,* 437 U.S. 1, 18, 57 L Ed 2d 1, 98 S Ct 2141 (1978). Giving the State a second chance to prove him guilty of that same crime would violate the very core of the double jeopardy prohibition.

Justice Stevens was also clear that the Double Jeopardy Clause prevented retrial of a strike prior allegation (524 U.S. at p. 735, fns. omitted): "In this case, the prosecution attempted to prove that petitioner had previously been convicted of a qualifying felony. If the prosecution proved this fact, petitioner would have automatically been sentenced to an additional five years in prison. The prosecution, however, failed to prove its case. Consequently, the Double Jeopardy Clause prohibits a ' "second bite at the apple."'" Justice Stevens made it clear in footnote 3 of his opinion that retrial would be barred whether, as in *Monge*, the determination of evidentiary insufficiency was made by the appellate court, or by a trial judge or jury, as in the present case.

The same points were made with respect to the application of both the state and federal double jeopardy clauses by the three justices of this court who

dissented in *People v. Monge*, supra, 16 Cal.4th at pp. 847-879 (dis. opn. of Werdegar, J., with Mosk, J. and Kennard, J. concurring.)

While reliance on dissenting opinions usually is unpersuasive, in the present situation, it is clear that a majority of the U.S. Supreme Court has expressed the view that *Almendarez-Torres*, and thus, necessarily *Monge v. California*, was wrongly decided. Justice Thomas, a necessary member of the five justice majority in both *Monge* and *Almendarez-Torres*, recognized his error in his concurring opinion in *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, 220-221:

> [O]ne of the chief errors of *Almendarez-Torres*--an error to which I succumbed--was to attempt to discern whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender's sentence. 523 U.S., at 243-244, see *id.*, at p 230, 241. For the reasons I have given, it should be clear that this approach just defines away the real issue. What matters is the way by which a fact enters into the sentence. If a fact is by law the basis for imposing or increasing punishment--for establishing or increasing the prosecution's entitlement--it is an element.

Thus, a majority of the U.S. Supreme Court has expressed the view that a fact necessary to increase the range of punishment for an offense, even if that fact involves proof of a prior conviction, is an element of the offense for purposes of the right to jury trial, proof beyond a reasonable doubt, and double jeopardy protections.

However, this court need not anticipate the overruling of *Almendarez-*

Torres or *Monge* in order to hold that an appeal of the not true finding in this case violates the federal constitutional protections against Double Jeopardy. It need only limit *Almendarez-Torres* to its facts, as *Apprendi* did. Because defendant contested the truth of the prior allegation, and because proof of the allegation required proof about the defendants conduct that were not adjudicated with procedural protection in the prior proceeding, defendant's case does not fit within the scope of *Almendarez-Torres*, as that decision was construed in *Apprendi.*

B. State Double Jeopardy principles.

A more fruitful approach than trying to reconcile inconsistent and closely divided U.S. Supereme Court precedents in this area is available to this court. This court is free to construe the California Constitution Double Jeopardy Clause (Cal. Const. Art. 1, sec. 15) to provide the constitutional protection appropriate in defendant's case, independent of any resolution (or nonresolution) of the issue by the U.S. Supreme Court. It is free to reconsider and overrule its decision on state constitutional grounds in *People v. Monge, supra,* 16 Cal.4th 826, and should do so.

The reasons for doing so were persuasively set forth in Justice Werdegar's dissent in *Monge.* As she pointed out, this court invalidated an amendment to the state Constitution which would have limited this court's right to interpret the Double Jeopardy Clause and other state constitutional

provisions protecting the rights of criminal defendants to whatever protections were recognized by the U.S. Supreme Court. (*Raven v. Deukmejian* (1990) 52 Cal.3d 336.) However, *Raven* recognized that there should be "cogent reasons" (*id.,* at p. 353) for construing a state constitution provision more expansively than its federal counterpart has been construed.

Such cogent reasons exist. First, as demonstrated by Justice Werdegar's dissent, pre-*Monge* California decisional law recognized that Double Jeopardy precluded retrial of a prior conviction allegation after a favorable finding or if insufficient evidence was presented. *People v. Raby, supra,* 178 Cal.App.3d 577 stated the principle with great certainty, and all but mocked the contrary argument. Two years later, in *People v. Jones* (1988) 203 Cal.App.3d 456, the Court of Appeal held retrial on a prior conviction allegation under section 667.5, subdivision (b) was barred where evidence presented at trial was insufficient to prove the allegation. In *People v. Brookins* (1989) 215 Cal.App.3d 1297, 1309, the Court of Appeal found that a finding that the defendant was a habitual offender under Penal Code section 667.7 was not supported by sufficient evidence. The allegation required proof not only of a conviction for robbery, but that the robbery involved use of force or a deadly weapon. The court held that there was insufficient evidence of use of force or a deadly weapon, and held that "since we are reversing for insufficiency of the evidence to support the habitual criminal allegation, this

precludes the People from attempting to prove it a second time in this proceeding."

Thus, three published decisions issued between 1986 and 1989 held that prior conviction allegations were subject to Double Jeopardy principles. No contrary decisions existed, nor did any court question or criticize these holdings. The *Monge* decision was thus a change in California law, and a change made without acknowledgment by either the plurality or concurring opinions in *People v. Monge*, as neither cited or discussed *Raby, Jones*, or *Brookins.*

Monge was also a decision that was inconsistent with this court's prior Double Jeopardy jurisprudence. As noted by Justice Werdegar, this court has a history of providing greater Double Jeopardy protection under the California Constitution than that recognized under the federal charter. (*Monge, supra*, 16 Cal.4th at pp. 874-876.) In a line of cases beginning with *Cardenas v. Superior Court* (1961) 56 Cal.2d 273, reaffirmed in *Curry v. Superior Court* (1970) 2 Cal.2d 707, and continuing with *People v. Henderson* (1963) 60 Cal.2d 482, reaffirmed in *People v. Hanson* (2000) 23 Cal.4th 355, and *People v. Comingore* (1977) 20 Cal.3d 142, this court has enforced the double jeopardy bar in situations in which the United States Supreme Court has refused to do so. Although these decisions have been reexamined by the court, their wisdom has stood the test of time.

On the other hand, the United States Supreme Court has admitted that its decisional law concerning the Double Jeopardy Clause has been "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator." (*Albernaz v. United States* (1981) 450 U.S. 333, 343.) That court has produced a body of double jeopardy doctrine that "various commentators have criticized as inconsistent, confusing, outmoded in a modern day procedural system, unduly technical, and too readily subject to manipulation by prosecutor and trial judge." (5 LaFave, et al., Criminal Procedure (2d ed. 1999) § 25.1 (b), at p. 634.) Double Jeopardy cases in that court have been closely divided, and at times overruled within several years of their issuance. (E.g., *United States v. Dixon* (1993) 509 U.S. 688, overruling *Grady v. Corbin* (1990) 495 U.S. 508; *United States v. Scott* (1978) 432 U.S. 82, overruling *United States v. Jenkins* (1975) 420 U.S. 358; *Hudson v. United States* (1997) 522 U.S. 93, overruling *United States v. Halper* (1989) 490 U.S. 435.)

Also, the *Monge* decision has been subjected to virtually unanimous condemnation by legal commentators. "In allowing California to increase drastically an individual sentence while offering only statutory procedural protections, the Supreme Court accepts the reorganization of the criminal justice system. 'Offense' and 'sentencing' become mere labels and constitutional protections for defendants become empty rhetoric . . . . In failing

to ensure constitutional safeguards to defendants facing the Three Strikes law, the Court missed an opportunity to reaffirm a criminal defendant's right to protection under the Double Jeopardy Clause and shield against legislative degradation of that right." (Heller, *Three Strikes, Two Bites at the Apple, and One Offense*? (1999) 77 N.C.L. Rev. 2007, 2045, 2048.) "Justice Scalia's hypothetical scenario of a jurisdiction permitting a single offense accompanied by multiple sentence enhancements paints a dim picture of the protections afforded non-capital defendants by Justice O'Connor and the majority. The current state of the law has made it so that when buzz words such as "three-strikes," "recidivism," and "sentence enhancement" are introduced, the structure of constitutional law is thrown off base." (Kline, *Wading in the Sargasso Sea: The Double Jeopardy Clause, Non-Capital Sentencing Procedure and California's "Three Strikes" Law Collide in Monge v. California* (2000) 27 Pepp. L. Rev. 861, 886.) "[T]he *Monge* court should have found that the sentence enhancement phase was in essence, a trial on this issue of punishment. Therefore, the Double Jeopardy Clause should have prevented the prosecution from getting a second chance to prove its case, whether the nature of the sentencing trial was capital or non-capital. The line the courts must draw is between trial-like and non-trial like sentencing procedures. Instead, the *Monge* court improperly drew the line between life and death." (Floyd, *Note: Criminal Procedure: Allowing the Prosecution a*

"Second Bite at the Apple" in Non-Capital Sentencing: Monge v. California (2000) 53 Okla. L.Rev 299, 306.)

In light of its inconsistency with prior California law, its failure to protect criminal defendant's from repeated trials of allegations which vastly increase punishment, and its failure to distinguish between facts established by the prior convictions and ancillary facts which must be proved for the first time, this court should reexamine its holding in *People v. Monge*, and overrule it as an erroneous interpretation of the state Double Jeopardy Clause.

CONCLUSION:

There is no right under Penal Code section 1238 for the People to appeal a not true finding following trial of a prior conviction allegation. Additionally, permitting the appeal would violate the Double Jeopardy Clause of both the state and federal constitution. For all of these reasons, the People's appeal should be dismissed.

Dated: August ____, 2005

Respectfully submitted,

_____

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