IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Appellant,

v.

MANUEL ALEX TRUJILLO,

Defendant and Respondent.

S130080

Sixth Appellate District No. H026000
Santa Clara County Superior Court No. CC125830
The Honorable Hugh F. Mullin III, Judge

ANSWER BRIEF ON THE MERITS

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **MANUEL ALEX TRUJILLO,** Defendant and Appellant.	S130080

ISSUE

May the People appeal under Penal Code section 1238, subdivision (a) a trial court's order finding that an alleged prior conviction is "not a strike"?

INTRODUCTION

The trial court found that defendant had a prior conviction for inflicting corporal injury on his spouse (Pen. Code, § 273.5, subd. (a)).[1/] However, the court also found that the prior conviction did not qualify as a strike within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12). At issue is whether the People may appeal from the latter order. The People's appeal is authorized under three different provisions of section 1238, subdivision (a), and would not violate defendant's rights under the state and federal double jeopardy clauses.

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1. All subsequent statutory citations are to the Penal Code.

STATEMENT OF THE CASE

Prior Convictions

In 1989, defendant was convicted of assault with a deadly weapon (§ 245, subd (a)(1)). (CT 243.)

In 1991, he was convicted of inflicting corporal injury upon his spouse (§ 273.5, subd. (a)). (Augmented CT ["ACT"] 6, 19.) The conviction was the product of a plea agreement whereby defendant pleaded guilty in exchange for a two-year prison term and the dismissal of a special allegation that he personally used a deadly weapon (§ 12022, subd. (b)) and a count of assault with a deadly weapon (§ 245, subd. (a)(1)). (ACT 6, 15-16.) The resulting presentence report stated that defendant told the probation officer that he stabbed his wife with a knife. (ACT 9.)

Present Offense And Trial Court Proceedings

On October 16, 2001, defendant repeatedly punched and kicked David Smith in the head, neck, and shoulders. (RT [1/27/03] 96-97, 100.) After the assault, Smith discovered that his wallet was missing. (RT [1/27/03] 102.)

The Santa Clara County District Attorney filed an information charging defendant with robbery (§ 211) and assault with force likely to produce great bodily injury (§ 245, subd. (a)(1)). (CT 27.) The information also alleged, among other things, that defendant had two prior convictions within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12). Specifically, the information alleged that defendant was convicted of assault with a deadly weapon and inflicting corporal injury "involving the personal use of a dangerous and deadly weapon." (CT 28.)

The trial court found that the defendant had prior convictions for assault with a deadly weapon and inflicting corporal injury, and that the assault conviction qualified as a strike. (RT [2/5/03] (hereafter "RT") 35-37.)

However, the court also found that the corporal injury conviction was not a strike. (RT 37-38.) Specifically, the court stated,

> I'm going on the fact that [the previous prosecutor], in all his wisdom, 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. Now, if you disagree with me, take me up on it. That's fine. But the Court finds that that is not a strike. [¶] . . . [¶] . . . [B]ecause there was never an admission of it -- it was stricken on the motion of the district attorney -- and there was no -- after that, there was no further language in the Information that remained as to involving a deadly and dangerous weapon, to wit, a knife, the Court finds that not to be a strike.

(RT 38.)

The trial court denied defendant's motion to strike his prior conviction in furtherance of justice, noting that he "has a fairly extensive criminal history" including "the 273.5 that involved the use of a knife, although you have to go back behind the conviction to show that." (RT 45.) It sentenced him to seven years in prison, consisting of the middle term of three years, doubled due to the prior strike, plus a one-year prior prison term enhancement pursuant to section 667.5, subdivision (b).

Appeal

The District Attorney filed a notice of appeal from the trial court's order finding "the Penal Code section 245(a)(1) [*sic*] prior conviction . . . to not be a strike under the Three Strikes Law." (CT 247.) After the Court of Appeal granted defendant relief from default, he filed a notice of appeal from the judgment.

The Court of Appeal affirmed defendant's conviction and reversed the trial court's order finding that the prior corporal injury conviction was not a strike. It found that the People's appeal was authorized under section 1238, subdivision (a)(10), because the trial court imposed a sentence that was not

authorized by law. (Opn. 8.) "[T]he trial court's refusal to consider defendant's statement [in the presentence report] constituted judicial error and deprived the prosecution of a full and fair opportunity to prove that the prior offense was a 'serious' felony." (Opn. 8-9.) The Court of Appeal denied defendant's petition for rehearing, but modified its opinion to explain that "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. [Citation.] . . . Here, the court . . . 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." (Order Modifying Opinion and Denying Petition for Rehearing, December 10, 2004.)

This court granted defendant's petition for review and deferred further action pending consideration of a related issue in *People v. Samples*, S112201, or further order. On May 18, 2005, this court ordered briefing regarding "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.'"

SUMMARY OF ARGUMENT

Three separate provisions of Penal Code section 1238, subdivision (a), allow the People to appeal the trial court's order finding that the prior conviction did not qualify as a strike. First, the People may appeal under section 1238, subdivision (a)(1), because the order essentially set aside a portion of the accusatory pleading based on the court's ruling that treating the prior conviction as a strike would unlawfully deny defendant the benefit of a prior plea agreement. Second, the People may appeal under section 1238, subdivision (a)(8), because the order terminated the action to sentence defendant to a life term under the Three Strikes law. Third, the People may appeal under section 1238, subdivision (a)(10), because the order struck or otherwise modified the effect of the prior conviction based on an unlawful order that the court could not consider defendant's admission that he personally used a knife to inflict the corporal injury on his spouse.

Defendant claims that even if section 1238, subdivision (a), allows the People to appeal from an order finding that a prior conviction is not a strike, such an appeal would violate the double jeopardy clause of the state and federal Constitutions because the People would not be able to retry the strike allegation. His claim of constitutional error is not fairly included in the issue that this court specified to be briefed. In any event, his claim of constitutional doubt regarding the interpretation of section 1238, subdivision (a), is without merit because the United States Supreme Court has held that the federal double jeopardy clause does not prohibit the prosecution from retrying a strike allegation, even if the prosecution failed to offer sufficient evidence to prove the allegation at the first trial. In addition, there are not cogent reasons to give the state double jeopardy clause a different construction than the one given to the federal double jeopardy clause.

ARGUMENT

I.

SECTION 1238, SUBDIVISION (A), AUTHORIZES THE PEOPLE TO APPEAL AN ORDER FINDING THAT A PRIOR CONVICTION IS NOT A STRIKE

Defendant claims that section 1238, subdivision (a), does not allow the People to appeal from an order finding that a prior conviction is not a strike within the meaning of the Three Strikes law. We submit that the People may take such an appeal pursuant to section 1238, subdivision (a)(8) and (10), in every case, and pursuant to section 1238, subdivision (a)(1), in the present case.

A. Background

The adjudication of a strike allegation involves at least two distinct steps. (See *People v. Epps* (2001) 25 Cal.4th 19, 23-28.) First, either the jury the court following a jury waiver determines whether a defendant has a prior conviction. (*Ibid*.) Second, the court determines whether the prior conviction qualifies as a strike within the meaning of the Three Strikes law. (*People v. Kelii* (1999) 21 Cal.4th 452, 454.) "Often this determination is purely legal, with no factual content whatsoever." (*Id*. at p. 456.) "Sometimes the determination does have a factual content . . . ." (*Ibid*.) "In determining whether a prior conviction is serious, 'the trier of fact may look to the entire record of the conviction' but '*no further*.' [Citation.] Thus, no witnesses testify about the facts of the prior crimes. The trier of fact considers only court documents." (*Id*. at pp. 456-457, original italics.)

Defendant waived his statutory right to a jury trial regarding whether he had a prior conviction for inflicting corporal injury on his spouse, and the court found he had such a prior conviction. (RT 35-36.) At the second step, the court found that the prior conviction did not qualify as a strike within the

meaning of the Three Strikes law. (RT 37-38.) The court based its order on the fact that the prior conviction was the result of a plea agreement dismissing an allegation that defendant personally used a deadly weapon during the crime. (RT 37-38.) Specifically, the court found that consideration of defendant's use of a knife would deny him the benefit of the prior agreement. (RT 37-38.) At issue is whether the People may appeal the court's order finding that the proven prior conviction did not qualify as a strike.

"The prosecution in a criminal case has no right to appeal except as provided by statute. [Citation.]" (*People v. Williams* (2005) 35 Cal.4th 817, 822.) "'Appellate review at the request of the People necessarily imposes substantial burdens on an accused, and the extent to which such burdens should be imposed to review claimed errors involves a delicate balancing of the competing considerations of preventing harassment of the accused as against correcting possible errors.' [Citation.] Courts must respect the limits on review imposed by the Legislature 'although the People may thereby suffer a wrong without a remedy.' [Citation.]" (*Id.* at p. 823.)

B. Section 1238, Subdivision (a)(1)

Section 1238, subdivision (a)(1), provides that the People may take an appeal from an "order setting aside all or any portion of the indictment, information, or complaint." This provision allows the People to appeal where the court rules that the consideration of the prior conviction as a strike is unauthorized by law. In the present case, the court essentially set the strike allegation aside on the ground that absent a prior adjudication of a weapon-use allegation, a finding that the prior conviction was a strike would violate defendant's due process right to the benefit of his prior plea bargain. As a result, the People can appeal this particular ruling under section 1238, subdivision (a)(1).

"[A]n order striking or dismissing an allegation of prior conviction is appealable by the People as 'an order setting aside [part of] the indictment, information, or complaint. [Citations.]" (*People v. Jackson* (1991) 1 Cal.App.4th 697, 700-701.) In *People v. Walker* (2001) 89 Cal.App.4th 380, the trial court "determined the alleged federal prior conviction for bank robbery was not true because the prosecution failed to prove the validity of the waiver of constitutional rights at the time of the guilty plea in that case." (*Id.* at pp. 385-386.) The Court of Appeal held that the People could appeal from the trial court's order because "the trial court did not really make a 'not true' determination, but instead invalidated the prior conviction on constitutional grounds. As such its decision had the effect of either striking the prior conviction or dismissing it as an allegation in the pleadings. As such we believe the trial court's novel analysis resulted in an order that falls within the scope of both subdivision (a)(1) and (10) of section 1238." (*Id.* at p. 385.)

The trial court's order in the present case was similarly based on its belief that it would be unconstitutional or otherwise unlawful to find the prior conviction was a strike. Specifically, the trial court based its order on the fact that defendant accepted a plea agreement dismissing the weapon-use allegation. As this court has held, "When a guilty plea is entered in exchange for specified benefits . . . both parties, including the state, must abide by the terms of the agreement." (*People v. Walker* (1991) 54 Cal.3d 1013, 1024.) "'It necessarily follows that violation of the bargain by an officer of the state raises a constitutional right to some remedy. [Citations.]" (*Ibid.*)

The trial court stated that rather than consider the entire record of conviction, it was "going on the fact that [the previous prosecutor], in all his wisdom, 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." (RT 38.) Similarly, the court stated that

"a prior, to be a strike, has to be a prior conviction, and there was no conviction of the 12022(b) allegation. And the charging language of Count 1, the 273.5, mentions nothing about a weapon." (RT 37.) The court's order rests on a legal theory that because the weapon-use allegation was dismissed previously, treating the prior conviction as a strike based on defendant's use of a weapon would deny him his right to the benefit of his prior plea agreement. Since the court's order was functionally an order setting aside the strike allegation as legally unauthorized, the People may appeal the order pursuant to section 1238, subdivision (a)(1).

C. Section 1238, Subdivision (a)(8)

Section 1238, subdivision (a)(8), provides that the People may take an appeal from an "order or judgment dismissing or otherwise terminating all or any portion of the action including such an order or judgment after a verdict or finding of guilty or an order or judgment entered before the defendant has been placed in jeopardy or where the defendant has waived jeopardy." This provision authorizes an appeal from any order finding that a prior conviction does not qualify as a strike. Such an order terminates the proceedings involved in sentencing the defendant under the Three Strikes law based on the existence of the prior conviction.

Here, defendant does not dispute that an order finding that a prior conviction is not a strike is an "order . . . after a verdict or finding of guilty" on the present offense. Instead, he claims that the order does not have the effect of "dismissing or otherwise terminating . . . any portion of the action." (OBM 13-16.) We disagree. A "criminal action" is defined as the "proceeding by which a party charged with a public offense is accused and brought to trial and punishment." (§ 683.) To "terminate" means "to bring to an ending or cessation in time, sequence, or continuity," "to form the ending or conclusion of," or "to

end formally and definitely." (See Webster's 3d New Internat. Dict. (2002) p. 2359.) An order finding that a prior conviction is not a strike terminates the proceedings by which the defendant is brought to trial on the strike allegation in the sense that the order concludes the adjudication of the allegation. The order also terminates further proceedings regarding the strike. For example, the order eliminates the possibility that the court will conduct a hearing under *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 regarding its discretion to dismiss the strike in furtherance of justice. As a result, an order finding that a prior conviction does not qualify as a strike is an "order or judgment . . . terminating . . . any portion of the action including such an order or judgment after a verdict or finding of guilty" within the meaning of section 1238, subdivision (a)(8).

Defendant claims, "When paired with the word 'dismissed,' [*sic*] the phrase 'or otherwise terminates' [*sic*] means a similar act which ends proceedings short of trial." (OBM 13.) We disagree. In the phrase "an order or judgment dismissing or otherwise terminating all or any portion of the action," the word "otherwise" acts as an adverb modifying "terminating." When used as an adverb, "otherwise" means "in a different way or manner," "in different circumstances," "under other conditions," or "in other respects." (Webster's 3d New Internat. Dict., *supra*, p. 1598.) Accordingly, the phrase "an order or judgment dismissing or otherwise terminating all or any portion of the action" refers to orders or judgments that terminate a portion of the action in different ways, circumstances, or respects. The reference to "dismissing" is merely an example of one of the ways that a qualifying order may terminate an action; it is not a requirement that the order or judgment "end[] proceedings short of trial." Section 1238, subdivision (a)(8), also expressly includes "an order or judgment after a verdict or finding of guilty." (§ 1238, subd. (a)(8).) It is improbable that the Legislature intended to refer to an order that occurs

"after a verdict or finding of guilty" but still somehow "ends proceedings short of trial." As a result, defendant's construction is without merit.

People v. Salgado (2001) 88 Cal.App.4th 5, and *People v. Craney* (2002) 96 Cal.App.4th 431, read the legislative history of section 1238 as expanding the People's appellate rights. *Salgado* explained that "[a] legislative committee report states that the [1998] amendment [to section 1238, subdivision (a)(8)] was enacted to permit the prosecution to appeal in all situations 'except where the appeal would violate double jeopardy,' thereby bringing the scope of appeals by the People into conformity with federal law." (*Id*. at p. 12.) In *Craney*, the court stated, "As *Salgado* noted, the legislative history of section 1238 indicates that the Legislature intended to expand the prosecution's right to appeal to the extent that it could do so consistent with the double jeopardy provisions of the state and federal Constitutions." (*People v. Craney*, *supra*, 96 Cal.App.4th at p. 440.) Defendant, however, argues that the legislative history actually evinces a contrary intent to restrict the People's ability to appeal under section 1238, subdivision (a)(8). (OBM 13-16.)

Although the history of the 1998 amendment to section 1238 suggests a concern with eliminating the restriction on appealing discretionary sentencing choices found in section 1238, subdivision (a)(10), it does not demonstrate a desire to prevent the People from appealing an order finding that a prior conviction does not qualify as a strike. Rather, the 1998 amendment made such an order appealable under section 1238, subdivision (a)(8), by expanding the People's ability to take an appeal. Prior to the 1998 amendment, section 1238, subdivision (a)(8), allowed the People to appeal only an order or judgment affecting "the action before the defendant has been placed in jeopardy or where the defendant has waived jeopardy." The 1998 amendment allowed the People to appeal an order finding that a prior conviction was not a strike by expanding section 1238, subdivision (a)(8), to include orders and judgments affecting "any

portion of the action including such an order or judgment after a verdict or finding of guilty." (Stats. 1998, ch. 208, § 1.) Neither the 1998 amendment nor the maintenance of certain restrictions on the People's ability to appeal suggests a legislative desire to prevent the People from appealing under section 1238, subdivision (a)(8), an order finding that a prior conviction was not a strike. Accordingly, defendant's reliance on the history of the 1998 amendment is unavailing.

We note that in *People v. Williams*, *supra*, 35 Cal.4th 817, this court held that a magistrate's pretrial determination under section 17, subdivision (b)(5), that a wobbler offense was a misdemeanor did not dismiss or otherwise terminate any portion of the action. "The magistrate's order under section 17(b)(5) did not preclude the People from prosecuting the wobbler offenses charged against defendant; it simply determined that these offenses were misdemeanors rather than felonies." (*Id*. at p. 830.) "Our conclusion is consistent with our holding in *People v. Drake* (1977) 19 Cal.3d 749 . . . that the order modifying the verdict to a lesser offense was not an action 'otherwise terminating the action' within the meaning of subdivision (a)(8) of section 1238: '[T]he order from which the People seek to appeal did not terminate the action at all; following that order the action simply proceeded into the sentencing phase. The People attempt to circumvent this fact by the conceptual device of characterizing the modification by the judge as having "terminated the action on the portion of the information charging first degree robbery." None of the cases cited by the People invokes such a diluted concept of "termination" [citations] . . . . We decline to . . . manipulate the accepted concept of "terminating the action" . . . .' [Citation.]" (*People v. Williams*, *supra*, 35 Cal.4th at pp. 832-833.) This court observed that the People may be able to seek an extraordinary writ, but "a pretrial appeal by the People while the guilt of the defendant remained at issue would significantly delay the proceedings

and impact the defendant's right to a speedy trial." (*Id*. at pp. 833-834.)

An order finding that a prior conviction is not a strike is distinguishable from the orders at issue in *Drake* and *Williams*. The prior conviction allegation is separate from the current offense, and each prior conviction allegation must be separately pleaded and proved. An order finding that a prior conviction is not a strike categorically bars consideration of the prior conviction as a ground for imposing the otherwise prescribed punishment under the Three Strikes law. Accordingly, a prior conviction allegation is not akin to issues regarding the nature of the current offense, such as the determination of whether the current offense is only a lesser included offense as in *Drake* or a misdemeanor as in *Williams*. In addition, an appeal from an order finding that a prior conviction is not a strike would not impact the defendant's right to a speedy trial because it would not occur "while the guilt of the defendant remained at issue" as in *Williams*. (See *United States v. Loud Hawk* (1986) 474 U.S. 302, 315 ["Given the important public interest in appellate review [citation], it hardly need be said that an interlocutory appeal by the Government ordinarily is a valid reason that justifies delay"].) As a result, an order finding that a prior conviction is not a strike is an "order . . . dismissing or otherwise terminating . . . any portion of the action including such an order or judgment after a verdict or finding of guilty" within the meaning of section 1238, subdivision (a)(8).

D. Section 1238, Subdivision (a)(10)

The People's ability to appeal from an order regarding a prior conviction is most directly addressed by section 1238, subdivision (a)(10). That provision provides in pertinent part that the People may take an appeal from ""[t]he imposition of an unlawful sentence . . . . 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." (§ 1238, subd. (a)(10).) Unless the trial court exercises its discretion to dismiss the prior conviction pursuant to section 1385, it is unlawful for the court not to sentence a defendant to the term prescribed by the Three Strikes law. If a trial court fails to apply the Three Strikes law based on a legal error regarding the prior conviction, then the failure to correctly sentence the defendant constitutes an "unlawful order of the court which strikes or otherwise modifies the effect of . . . [the] prior conviction" within the meaning of section 1238, subdivision (a)(10).

For example, if a court failed to recognize that the crime was a serious or violent felony per se, then the resulting sentence would be unlawful. "The Three Strikes law defines a strike as, among other things, 'any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state.' [Citations.] Section 1192.7, subdivision (c), lists some felonies that are per se serious felonies, such as murder, mayhem, rape, arson, robbery, kidnapping, and carjacking." (*People v. Kelii*, *supra*, 21 Cal.4th at p. 456.) If a trial court finds that a prior conviction for such a per se serious felony is not a strike, then the court's order is contrary to the statutory definition of a strike. Since the order is contrary to the statute definition of a strike, it is an unlawful order.

Similarly, if a court were to erroneously believe that there was some legal impediment to the use of what would otherwise be a qualifying strike, that error would yield an unlawful sentence. In the present case, for example, the court felt legally precluded from considering defendant's use of a weapon because the prior plea agreement dismissed the weapon-use allegation. The order's dependance on the court's legal ruling was further demonstrated by the court's subsequent statement that defendant did use knife. (RT 45.) The court's legal ruling precluding consideration of the evidence that defendant used a knife eviscerated the People's ability to prove the prior conviction was a strike.

Accordingly, the People are authorized to appeal the order on the ground that it was based an erroneous understanding of the law.[2/]

An unlawful order finding that a prior conviction is not a strike "modifies the effect" of the prior conviction. (§ 1238, subd. (a)(10).) If the defendant has only a single prior conviction that qualifies as a strike, the Three Strikes law provides that "the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction." (§ 1170.12, subd. (c)(1).) If the defendant has more than one prior conviction that qualifies as a strike, the Three Strikes law provides that "the term for the current felony conviction shall be an indeterminate term" of at least 25 years to life in prison. (§ 1170.12, subd. (c)(2).) An unlawful order finding that a prior conviction is not a strike "modifies the effect" of the prior conviction by eliminating it as a basis to impose and calculate the sentence under the Three Strikes law. As a result, section 1238, subdivision (a)(10) authorizes the People to appeal an order finding that a prior conviction is not a strike because it results in 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." (§ 1238, subd. (a)(10).)

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2. The trial court's understanding of the law was, indeed, erroneous. In *People v. Blackburn* (1999) 72 Cal.App.4th 1520, the court held, "Jackson's main contention is that the prior cannot qualify as a 'strike' because, in the prior proceeding, a personal firearm use enhancement was alleged but stricken, and never either found true or admitted. Jackson can cite no case so holding, nor does he convince us there is any reason why this should be the rule." (*Id*. at p. 1527.)

II.

THE STATE AND FEDERAL DOUBLE JEOPARDY CLAUSES DO NOT PROHIBIT THE PEOPLE FROM APPEALING AN ORDER FINDING THAT A PRIOR CONVICTION IS NOT A STRIKE

Defendant claims that the double jeopardy clause of the state and federal Constitutions prohibit the People from appealing an order finding that a prior conviction is not a strike. (OBM 24-40.) He alternatively claims that this court should construe section 1238 as prohibiting such appeals in order to avoid constitutional doubt. (OBM 23-24.) He essentially argues that an order finding that a prior conviction is not a strike acts as an acquittal that bars retrial. In the absence of an affirmative order to reimpose following reversal, and with retrial barred, an appeal would be pointless. (See *United States v. Wilson* (1975) 420 U.S. 332, 352-353; *People v. Webb* (1869) 38 Cal. 467, 480.) His claim of constitutional error is not fairly included in the issue that this court specified to be briefed. In addition, his claim of "constitutional doubt" is without merit because a successful appeal on the merits does not necessarily require a retrial; this court and the Supreme Court of the United States have held that the state and federal double jeopardy clauses do not prohibit retrial of a strike allegation (*People v. Monge* (1997) 16 Cal.4th 826 ("*Monge I*"); *Monge v. California* (1998) 524 U.S. 721 ("*Monge II*")); and there are not cogent reasons to construe the state double jeopardy clause differently than the federal double jeopardy clause.

A. The Claim Of Constitutional Error Is Not Fairly Included In The Issue To Be Briefed

"On or after ordering review, the Supreme Court may specify the issues to be briefed and argued. Unless the court orders otherwise, the parties must limit their briefs and arguments to those issues and any issues fairly included in

them." (Cal. Rules of Court, rule 29(a)(1).) After ordering review, this court specified the issue to be briefed as being "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.'" This issue of statutory interpretation does not fairly include defendant's claim that permitting an appeal would lead to constitutional error. (See *People v. Guzman* (2005) 35 Cal.4th 577, 593, fn. 5 [equal protection claim did not fairly include due process claim]; *People v. Toledo* (2001) 26 Cal.4th 221, 235, fn. 9 [claim that there is no crime of attempted criminal threats did not fairly include claim that trial court inadequately instructed the jury]; see also *People v. Randle* (2005) 35 Cal.4th 987, 1001 [claim that California has not recognized the doctrine of imperfect defense of others fairly included the claim that the defendant may not invoke the doctrine because the latter issue "was squarely raised in the Attorney General's petition for review, which we granted"].) Relying on *People v. Birks* (1998) 19 Cal.4th 108, defendant claims he may raise the issue because the issue "could not have been decided below" in light of *Monge I* and *Monge II*. (OBM 24-25.) His reliance on *Birks* is unavailing, however, because *Birks* addressed an assertion that the People had waived a claim by not presenting it in the Court of Appeal, not whether a claim was fairly included in the issues specified to be briefed. (*People v. Birks*, *supra*, 19 Cal.4th at p. 116, fn. 6.) As a result, this court should decline to consider defendant's claim that permitting an appeal under section 1238, subdivision (a), would lead to constitutional error.

B. A Successful Appeal On The Merits Will Not Necessarily Require Retrial

Defendant's claims of constitutional error and constitutional doubt are premised on the assumption that if the People succeed on the merits of an appeal from an order finding that a prior conviction is not a strike, then the

appropriate remedy must be a retrial of the strike allegation. The premise is unsound because the determination of whether a prior conviction qualifies as a strike is often a purely legal question. As such, it will often be inappropriate for a reviewing court to remand the matter for a redetermination of a strike allegation following the reviewing court's conclusive resolution of the issue.

As this court has recognized, the determination of whether a prior conviction qualifies as a strike is often exclusively a question of law. "The Three Strikes law defines a strike as, among other things, 'any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state.' [Citations.] Section 1192.7, subdivision (c), lists some felonies that are per se serious felonies, such as murder, mayhem, rape, arson, robbery, kidnapping, and carjacking. If a defendant's prior conviction falls into this group, and the elements of the offense have not changed since the time of that conviction, then the question whether that conviction qualifies as a serious felony is entirely legal." (*People v. Kelii*, *supra*, 21 Cal.4th at p. 456.)

If a trial court were to find that a proven prior conviction for a per se serious felony, such as murder, did not qualify as a strike, then the reviewing court could correct the error without remanding the matter for a retrial on the strike allegation. The reviewing court's determination that an offense was a per se serious felony would necessarily yield a determination that the offense was a strike. Since the prior conviction would already have been proven below, there would be no need to remand the matter for a redetermination of whether the prior conviction was a strike. The reviewing court's resolution of that issue would bind the lower court under the law of the case doctrine. (See *People v. Stanley* (1995) 10 Cal.4th 764, 786-787.) The proper remedy would not be to order a pointless redetermination of whether the prior conviction was a strike, but rather to remand the matter for resentencing in light of the reviewing court's conclusive determination that the prior conviction was a strike. (See § 1260.)

As a result, a successful appeal by the People will not necessarily result in a retrial of the strike allegation. Similarly, if the trial court were to incorrectly apply the law to deprive a prior conviction of its effect as a strike, the reviewing court's correction of that legal error would not require a remand for the determination of a factual question related to the prior conviction allegation if the factual question had already been determined below.

C. The Federal Double Jeopardy Clause Does Not Prohibit Retrial

Even if a successful appeal would require a retrial on the issue of whether the prior conviction qualifies as a strike, such a retrial would not violate the defendant's rights under the federal double jeopardy clause. Specifically, the high court held in *Monge II*, *supra*, 524 U.S. 721 that the federal double jeopardy clause does not prohibit the retrial of a strike allegation even if the People failed to prove the allegation at the first trial. *Monge II* is controlling and indistinguishable from defendant's case.

The Fifth Amendment provides, "Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." (U.S. Const., 5th Amend.) The clause "protects against successive prosecutions for the same offense after acquittal or conviction and against multiple criminal punishments for the same offense." (*Monge II*, *supra*, 524 U.S. at p. 728.)

In *Monge I*, a majority of this court, formed by the lead opinion of Justice Chin and the concurring opinion of Justice Brown, held that the federal double jeopardy clause does not prohibit retrial of a strike allegation that is reversed based on insufficient evidence. The prosecutor alleged that the defendant's prior conviction for assault under section 245, subdivision (a)(1), qualified as a serious felony strike. (*Monge I*, *supra*, 16 Cal.4th at p. 830 (lead opn. of Chin, J.).) However, the conviction qualified as a strike only if the defendant *personally* inflicted great bodily injury or *personally* used a weapon. (*Id*. at p.

831.) The Court of Appeal "reversed the trial court's true finding on the prior serious felony allegation, holding the evidence insufficient to establish that defendant had acted personally." (*Ibid*.)

Justice Chin's lead opinion concluded that "the federal double jeopardy clause does not apply to the trial of the prior conviction allegation in this case." (*Monge I*, *supra*, 16 Cal.4th at p. 843 (lead opn. of Chin, J.).) Justice Brown concurred in the result, but "favor[ed] a more cautious approach." (*Id*. at p. 845 (conc. opn. of Brown, J.).) Justice Werdegar's dissenting opinion stated that the federal double jeopardy clause precluded retrial because the double jeopardy analysis articulated in *Bullington v. Missouri* (1981) 451 U.S. 430 for use in capital sentencing proceedings was indistinguishable. (*Monge I*, *supra*, 16 Cal.4th at pp. 851-863, 869-870 (dis. opn. of Werdegar, J.).)

In *Monge II*, the United States Supreme Court held that "the Double Jeopardy Clause does not preclude retrial on a prior conviction allegation in the noncapital sentencing context." (*Monge II*, *supra*, 524 U.S. at p. 734.) "An enhanced sentence imposed on a persistent offender . . . 'is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes' but as 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.' [Citations.]" (*Id*. at p. 728.) "Sentencing decisions favorable to the defendant, moreover, cannot generally be analogized to an acquittal. We have held that where an appeals court overturns a conviction on the ground that the prosecution proffered insufficient evidence of guilt, that finding is comparable to an acquittal, and Double Jeopardy Clause precludes a second trial. [Citation.] Where a similar failure of proof occurs in a sentencing proceeding, however, the analogy is inapt. The pronouncement of sentence simply does not 'have the qualities of constitutional finality that attend an acquittal.' [Citations.]" (*Id*. at p. 729.)

In *People v. Barragan* (2004) 32 Cal.4th 236, this court unanimously held

that retrial of a strike allegation is permissible when an appellate court reverses a true finding based on insufficient evidence. (*Id*. at p. 239.) The prosecution alleged that the defendant had a prior strike based on a juvenile adjudication. (*Id*. at p. 239.) The Court of Appeal found that the evidence was insufficient because it did not show that the adjudication resulted in a declaration of wardship. (*Id*. at p. 240.) This court observed that the defendant "cannot, after *Monge I* and *Monge II*, invoke the protection of the double jeopardy clause to bar retrial." (*Id*. at p. 244.) This court further found that retrial of the strike allegation was not prohibited by due process (*id*. at pp. 243-245), the law of the case doctrine (*id*. at pp. 245-252), res judicata (*id*. at pp. 252-258), or legislative intent (*id*. at pp. 258-259). In rejecting the defendant's due process claim, this court held that the claim "essentially asks us to do what the high court in *Dowling* [*v. United States* (1990) 493 U.S. 342] said we could not do: 'use the Due Process Clause as a device for extending the double jeopardy protection to cases where it otherwise would not extend.' [Citation.]" (*People v. Barragan*, *supra*, 32 Cal.4th at p. 244.)

In *People v. Laino* (2004) 32 Cal.4th 878, this court noted that the People's appeal from the trial court's order finding that "the prior conviction allegation had not been proved" was not barred by the due process clause or collateral estoppel. (*Id*. at pp. 885-886 & fn. 7.) The prosecution alleged that the defendant had a prior strike based on his Arizona conviction for assaulting his wife with a handgun. (*Id*. at pp. 882-883.) However, the defendant had "successfully completed a domestic violence 'diversion' program in Arizona, which resulted in a judgment of dismissal." (*Id*. at p. 882.) The trial court found that Arizona's diversion program was akin to a dismissal under California's deferred entry of judgment program for drug offenders. (*Id*. at p. 885.) The trial court also "found that the prior conviction allegation had not been proved because a guilty plea under the drug-offender deferred entry of

judgment program cannot be used as a prior conviction if the defendant has successfully completed the program." (*Id*. at pp. 885-886.)

The Court of Appeal reversed. (*People v. Laino*, *supra*, 32 Cal.4th at p. 886.) In affirming the reversal, this court rejected the defendant's argument that the People were precluded from appealing the trial court's order finding that "the prior conviction allegation had not been proved." "Defendant argues that the People's appeal of a judgment of 'acquittal' after the court trial on the prior conviction allegation is 'barred under the principles of procedural due process and collateral estoppel set out in *People v. Mitchell* (2000) 81 Cal.App.4th 132.' Not so. We recently held to the contrary in [*Barragan*]." (*Id*. at p. 886, fn. 7.)

A categorical ban on appealing an order finding that a prior conviction is not a strike is inappropriate because *Monge II* is the controlling authority regarding the interpretation of the federal double jeopardy clause. In addition, the high court has held on a related issue that a defendant does not have the right to a jury trial on the fact of a prior conviction. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; see *Almendarez-Torres v. United States* (1998) 523 U.S. 224.) Defendant nonetheless claims "it is clear that a majority of the U.S. Supreme Court has express the view that *Almendarez-Torres*, and thus, necessarily *Monge v. California*, was wrongly decided." (OBM 34.) As he acknowledges, however, no case from the United States Supreme Court has overruled either *Almendarez-Torres* or *Monge II*. Those authorities "remain binding precedent until [the high court] see[s] fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." (*Hohn v. United States* (1998) 524 U.S. 236, 252-253.) Accordingly, *Monge II* still states the controlling rule: "[T]he Double Jeopardy Clause does not preclude retrial on a prior conviction allegation in the noncapital sentencing

context." (*Monge II*, *supra*, 524 U.S. at p. 734.)[3/]

Nor is an appeal from an order finding that a prior conviction is not a strike unconstitutional as applied in defendant's particular case. Defendant claims the federal double jeopardy clause precludes retrial following the order in his case because he "contested the truth of the prior [conviction] allegation, and because proof of the allegation required proof about the defendant[']s conduct that were not adjudicated with procedural protection in the prior proceeding." (OBM 35.) His case is indistinguishable from *Monge II*. The defendant in *Monge II* similarly disputed the truth of the prior conviction allegation. (*Monge II*, *supra*, 524 U.S. at p. 725; see *Monge I*, *supra*, 16 Cal.4th at p. 830 (lead opn. of Chin, J.).) In addition, the prosecution in *Monge II* similarly had to prove that the defendant acted personally. Nor was there any suggestion in *Monge II* that the prosecution intended to prove that the defendant acted personally based on evidence that had been "adjudicated with procedural protection in the prior proceeding." Moreover, defendant enjoyed procedural protections regarding his admission in the prior proceeding's presentence report because he had the right "to dispute facts in the record or the probation officer's report, or to present additional facts" with the assistance of counsel. (§ 1170, subd. (b); see *Mempa v. Rhay* (1967) 389 U.S. 128, 134.) As a result, *Monge II* is indistinguishable. It is controlling. It unequivocally provides that the federal double jeopardy clause does not preclude retrial of a strike allegation. (*Monge II*, *supra*, 524 U.S. at p. 734.)

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3. The issue of whether additional factfinding in the adjudication of a strike allegation falls within the *Almendarez-Torres* prior conviction exception is pending in *People v. McGee*, review granted April 28, 2004, S123474. However, the resolution of *McGee* on the Sixth Amendment issue will not affect whether a strike allegation may be retried under the federal constitution because *Monge II* is controlling. *McGee* will instead affect whether the additional factfinding on retrial is conducted by the court or a jury.

D. The State Double Jeopardy Clause Does Not Prohibit Retrial

Even if a successful appeal would require a retrial on the issue of whether a prior conviction qualifies as a strike, such a retrial would not violate the defendant's rights under the state double jeopardy clause. Specifically, the lead opinion in *Monge I*, *supra*, 16 Cal.4th 826 held that the state double jeopardy clause does not prohibit the retrial of a strike allegation even if the People failed to prove the allegation at the first trial. There are not cogent reasons for this court to overturn *Monge I* and construe the state double jeopardy clause differently than the federal double jeopardy clause.

Article I, section 15 of the California Constitution provides, "Persons may not twice be put in jeopardy for the same offense." (Cal. Const., art. I, § 15.) "The purpose behind the state and federal double jeopardy provisions is the same." (*Monge I*, *supra*, 16 Cal.4th at p. 844 (lead opn. of Chin, J.).) "As early as 1938, [this court] stated that 'cogent reasons must exist before a state court in construing a provision of the state Constitution will depart from the construction placed by the Supreme Court of the United States on a similar provision in the federal Constitution.' [Citations.]" (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 353.)

In *Monge I*, the lead opinion concluded that there were not cogent reasons for interpreting the state double jeopardy clause differently than the federal double jeopardy clause and that "the double jeopardy provision of the state Constitution does not apply to the trial of the prior conviction allegation." (*Monge I*, *supra*, 16 Cal.4th at pp. 844-845 (lead opn. of Chin, J.).) "[T]hough the effect on a defendant's sentence may be significant, the embarrassment, expense, and anxiety of trying a prior conviction allegation are relatively minor, and the risk of an erroneous result is slight. The primary source of embarrassment is the defendant's present offense, not an allegation of a prior conviction. The trial of a prior conviction allegation is relatively perfunctory,

and the outcome is usually predictable. We see no reason, in the present context, to interpret the state Constitution differently from the federal. [Citation.]" (*Id*. at pp. 844-845.)

In *Barragan*, this court unanimously observed that the defendant "cannot, after *Monge I* . . . invoke the protection of the double jeopardy clause to bar retrial." (*People v. Barragan*, *supra*, 32 Cal.4th at p. 244.) In addition, this court rejected the defendant's claim of fundamental unfairness because "it essentially asks us to do what the high court in *Dowling* said we could not do: 'use the Due Process Clause as a device for extending the double jeopardy protection to cases where it otherwise would not extend.' [Citation.]" (*Ibid*.)

Defendant advances several reasons why this court should now interpret the state double jeopardy clause differently than the federal double jeopardy clause. He relies on the fact that, prior to *Monge I*, the Courts of Appeal had held that retrial was barred by double jeopardy. (OBM 36-37.) He claims that *Monge I* was "inconsistent with this court's prior Double Jeopardy jurisprudence" because this court "has a history of providing greater Double Jeopardy protection under the California Constitution than that recognized under the federal charter. [Citations.]" (OBM 37-38.) He further claims that the United States Supreme Court's double jeopardy jurisprudence is inconsistent, confusing, outmoded, overly technical, and subject to manipulation. (OBM 38.) He observes that the high court's cases "have been closely divided, and at times overruled within several years of their issuance." (OBM 38-39.) He further claims that the United States Supreme Court's interpretation of the federal Constitution in *Monge II* "has been subjected to virtually unanimous condemnation by legal commentators." (OBM 39-40.)

None of defendant's claims constitute "cogent reasons" for this court to not only overturn *Monge I* and *Barragan*, but to also depart from the construction of the federal double jeopardy clause. The fact that, prior to

Monge I, inferior courts had reached a contrary conclusion has no tendency to suggest that this court should now engraft those contrary conclusions into the state Constitution. In addition, the fact that the state double jeopardy clause affords greater rights than the federal constitution in some circumstances does not mean that it affords greater rights in every circumstance. Treating prior departures as a "cogent reason" for additional departures fails to "remain cognizant [that] the electorate expressed displeasure with state constitutional interpretations that granted criminal defendants greater procedural rights than are required under the federal Constitution." (See *Monge I*, *supra*, 16 Cal.4th at p. 873 (dis. opn. of Werdegar, J.).)

Moreover, the "cogent reasons" for departure identified in the dissenting opinion in *Monge I* no longer apply. Justice Werdegar opined that cogent reasons were not required because the high court "has never ruled on the question whether the federal double jeopardy clause applies to noncapital sentence enhancements. There is thus no federal construction from which to depart." (*Monge I*, *supra*, 16 Cal.4th at pp. 871, 873 (dis. opn. of Werdegar, J.).) "Not only . . . are we left with no definitive holding from the high court, we cannot anticipate that court will soon resolve the question. This uncertain state of affairs provides '"cogent reasons"' [citation], were they needed, for us to rely on our state Constitution." (*Id*. at p. 874.) After *Monge I*, however, the high court definitively ruled on the question in *Monge II*. Accordingly, there is no longer an uncertain state of affairs warranting a departure from the federal construction. (See *People v. Barragan*, *supra*, 32 Cal.4th at p. 244.)

In contrast, the arguments against departure identified in the lead opinion in *Monge I* still apply. "[T]he embarrassment, expense, and anxiety of trying a prior conviction allegation are relatively minor, and the risk of an erroneous result is slight. The primary source of embarrassment is the defendant's present offense, not an allegation of a prior conviction. The trial of a prior conviction

allegation is relatively perfunctory, and the outcome is usually predictable." (*Monge I*, *supra*, 16 Cal.4th at p. 845 (lead opn. of Chin, J.).) As this court subsequently and unanimously held, "retrial of a prior conviction allegation 'carries out the policy of the statutes imposing "more severe punishment, proportionate to their persistence in crime, of those who have proved immune to lesser punishment" [citation], and prevents defendants from escaping the penalties imposed by those statutes through technical defects in . . . proof.' [Citation.] California 'has a strong interest in protecting its citizenry from individuals who, by their repeated criminal conduct, demonstrate an incapacity to reform.' [Citation.]" (*People v. Barragan*, *supra*, 32 Cal.4th at p. 252.) As a result, there are not cogent reasons for this court's construction of the state double jeopardy clause to depart from the United States Supreme Court's construction of the federal double jeopardy clause.

CONCLUSION

The People respectfully request that the judgment of the Court of Appeal be affirmed.

Dated: September 14, 2006

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 9,123 words.

Dated: September 14, 2006

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