IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

REPLY 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

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

Attorney for Defendant,
MANUEL ALEX TRUJILLO

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I. THE PROSECUTION HAS NO STATUTORY RIGHT TO APPEAL THE TRIAL COURT VERDICT THAT THE ALLEGED PRIOR CONVICTION WAS NOT A STRIKE.

A. Penal Code section 1238, subdivision (a)(1)

The prosecution asserts that there is a right to appeal the trial court's finding that the alleged serious felony prior conviction was not a strike conferred by Penal Code section 1238, subdivision (a)(1). Although this subdivision refers to an "order setting aside all or any portions of the indictment, information or complaint," the prosecutor claims that the trial court's verdict "essentially set the ... allegation aside" and was "functionally an order setting aside the strike allegation as legally unauthorized . . ." (Answer Brief on Merits (hereafter ABM), at pp. 7,8.) A verdict that a prior conviction allegation is not true is not an order setting aside a portion of the

information.

The prosecution failed to address the precedent cited by defendant indicating that an "order setting aside all or a portion of the . . . information" has been defined as an order made before trial occurs. (Opening Brief on the Merits [hereafter OBM], at pp. 8-9.) Defendant cited *People v. Valenti* (1957) 49 Cal.2d 199, 204, *People v. Burke* (1956) 47 Cal.2d 45, 53 and *People v. Booker* (1994) 21 Cal.App. 4th 1517, 1520, in support of this proposition. The prosecution chose simply not to acknowledge defendant's argument or the authorities cited. Defendant's argument is thus unrebutted.

The prosecution does cite a single case in support of its position, *People v. Walker* (2001) 89 Cal.App. 4th 380, a case discussed in the Opening Brief on the Merits, at pages 10 to 12. In *Walker*, at the trial of a prior conviction allegation, the trial judge made a not true finding because the prosecution had failed to prove the validity of the waiver of *Boykin-Tahl* rights with respect to a federal bank robbery conviction. The Court of Appeal ruled that "the trial court did not really make a 'not true' determination, but instead invalidated the prior conviction on constitutional grounds." (*Id.*, at p. 385.) As the opinion went on to hold, the invalidation on constitutional grounds did not address either of the two issues in the trial of a strike prior conviction allegation, which were: (1) did the accused suffer the prior conviction and (2) did the offense committed qualify as a serious felony. (*Id.*, at p. 386.) The *Walker* opinion

held that there is no burden on the prosecution to prove the validity of the defendant's waiver of rights attendant to a guilty plea *unless* the defendant makes a constitutional challenge alleging violation of such rights and carries the burden of producing evidence of such violation. The defense had not done so in *Walker*, so the judge's not true finding was not based on a finding relating to the two issues which had to be decided at trial. (*Id.* at pp. 386-387.)

In contrast, as argued in the Opening Brief on the Merits at pages 11 and 12, the trial court in the present case did not view the prior conviction as constitutionally defective. Instead, it declined to find that the prior conviction constituted a serious felony because of dissatisfaction with the proof of the necessary element that defendant had personally used a dangerous and deadly weapon. That is a finding that must be made beyond a reasonable doubt. (*People v. Monge* (1997) 16 Cal.4th 826, 834; *People v. Tenner* (1993) 6 Cal.4th 559, 566; *In re Yurko* (1974) 10 Cal.3d 857, 962.)

In his remarks concerning his finding, the trial judge noted that there was no admission by defendant when he entered a plea of guilty to the felony violation of section 273.5 that he personally used a dangerous and deadly weapon, and that in fact the allegation of personal weapon use had been dismissed. (RT 37-38.) He mentioned that the attempt to prove the use of a knife based on admissions by the defendant made after the prosecutor dismissed the allegation deprived the defendant of the apparent benefit of his

bargain and that the defendant relied upon the dismissal of the allegation.

The trial court did not refuse to admit the prosecution evidence, defendant's admission of knife use in the probation report. It was admitted into evidence. (RT 26.) But when the court viewed the entire record of conviction, including the plea colloquy, it did not find that defendant personally used a weapon beyond a reasonable doubt. The trial court considered the prosecution's evidence, but nonetheless found it had not proved that the alleged strike prior qualified as a strike.

That the trial judge did not declare the prior conviction unconstitutional is conclusively demonstrated by his finding the same prior conviction to be true as alleged for purposes of imposing a one year "prison prior" under Penal Code section 667.5, subdivision (b). (RT 36.) But in light of the entire record of conviction put before him, he declined to find beyond a reasonable doubt that defendant had used a dangerous and deadly weapon, such that it qualified as a strike prior.

In these circumstances, *Walker* does not support the prosecution's claim that the court's action was based on an improper finding of constitutional invalidity and thus was appealable under subdivision (a)(1).

B. Penal Code section 1238, subdivision (a)(8).

The prosecution asserts that an appeal from a verdict or finding of not true is authorized by Penal Code section 1238, subdivision (a)(8), which

provides that the People may 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 when the defendant has waived jeopardy."

The prosecution contends that a verdict or finding following trial of a prior conviction allegation is "an order or judgment dismissing or otherwise terminating a portion of the action after a verdict or finding of guilty" within the meaning of subdivision (a)(8). A verdict or finding pursuant to Penal Code section 1158 is neither an order or a judgment, nor does it dismiss or otherwise terminate a portion of the action.

Under Penal Code section 1158, the judge or jury "must find whether or not [the defendant] has suffered such previous conviction. The verdict or finding upon the change of previous conviction may be: (1) We (or I) find the charge of previous conviction true' or 'We (or I) find the charge of previous conviction not true'. . . ."

Generally, a verdict or finding is not considered an order. An order is generally defined as a ruling upon a motion: "Direction of a court or judge made or entered in writing, and not included in a judgment. An application for an order is a motion." (Black's Law Dictionary (5th ed. 1979) at p. 988.)

It is also clear that a verdict or finding is distinct from a judgment.

Under California law, a criminal judgment can be imposed only upon a plea of guilty or a verdict of guilt or verdict against the defendant on a plea of former conviction or acquittal or double jeopardy. (Pen. Code, § 1191, subd. (a).).

In determining whether section 1238, subdivision (a)(8) authorizes the People's appeal, this court should keep in mind the history of California law on whether Double Jeopardy applies to the trial of prior conviction allegations. Before this court's decision in *People v. Monge*, *supra*, 16 Cal.4th 826, numerous Court of Appeal decisions stated that just as retrial on a current charge in which insufficient evidence was presented was precluded by the Double Jeopardy Clause, so too was retrial of a prior conviction allegation. (*People v. Raby* (1986) 178 Cal.App. 3d 577; *People v. Jones* (1988) 203 Cal.App.3d 456; and *People v. Brookings* (1989) 215 Cal.App.3d 1297.) While the decisions by this court and the U.S. Supreme Court in *Monge* stated that the Double Jeopardy Clause did not prevent retrial of a prior conviction allegation when the evidence was insufficient at the first attempt, it is apparent that before 1997, the Legislature did not attempt to authorize an appeal from a not true finding after trial of a prior conviction allegation, because all published state decisional law held that such an appeal would violate Double Jeopardy.

That brings us to the 1998 amendment of Penal Code section 1238,

subdivision (a)(8), as effected by Senate Bill 1850 (Stats. 1998, ch. 208.). The original version of the bill would have expanded immensely the People's right to appeal. It would have abolished all existing ten subdivisions of section 1238, subdivision (a), and replaced them by an omnibus provision recognizing a People's right to appeal any "decision, judgment, or order arresting judgment, granting a new trial or dismissing, striking or setting aside, or otherwise terminating the prosecution of all of any portion of the indictment, information or complaint, or otherwise affecting the substantial rights of the people, except that no appeal shall lie where double jeopardy prohibits further prosecution. The appeal may include the review of a ruling or order underlying the decision, judgment or order." (SB 1850, as introduced.)[1]

The bill as introduced would have reenacted or left undisturbed two existing exceptions to the broad rule of appealability and added another. Subdivision (b) of section 1238 would have excepted the choice to impose either the upper, middle, or lower term of imprisonment or to impose consecutive or concurrent terms when that choice was within the sentencing court's discretion, which would have reenacted the second paragraph of existing subdivision (a)(10). The bill also left intact subdivision (d), which excepted an order granting probation from the right of appeal, specifying that

1. The legislative history materials cited in this brief are included in defendant's motion to take judicial notice, filed concurrently with this brief.

review in such cases could take place only by means of a petition for writ of mandate or prohibition. Subdivision (e) would have added an exception for orders made during trial concerning the admissibility of evidence or the manner in which the court conducted proceedings, restricting review of such order to writ proceedings and stating that the trial court would not have to stay trial to permit the People to pursue such relief.

Under Senate Bill 1850 as introduced, perhaps a right to appeal a not true verdict could be plausibly maintained. Senate Bill 1850 as introduced would have permitted appeal from not just a judgment or order, but also any "decision," which "affect[ed] the substantial rights of the people" and would include "the review of a ruling or order underlying the decision, judgment or order."

However, it is remarkable that *none* of the legislative history of Senate Bill 1850 ever mentioned an intent to permit an appeal from a not true finding after trial of a prior conviction allegation. In the analysis of the Senate Committee of Public Safety on Senate Bill 1850 as introduced, there were only two situations described in the "Need for the Bill" section: (1) "when a case is dismissed after a unanimous verdict of guilty by the jury" and; (2) "when some, but less than all, criminal counts are dismissed prior to trial." (Sen. Com. On Public Safety, Rep. on Sen. Bill No. 1850 (1997-98 Reg. Sess.), at pp. 3-4.) The rationale for the bill as introduced was to cover these two

situations. (*Id.*, at p. 8.)

The Senate Committee on Public Safety analysis stated that the opposition to the bill believed that "the problems this bill is intended to address could be addressed in a much narrower fashion." (*Ibid*.) The opposition suggested that, "If some courts were refusing to hear an appeal when it concerns a demurrer to only a portion of an indictment accusation or information, adding the words 'or a portion thereof' following the current language would clarify this issue." (*Id.*, at p. 8.)

Likewise, as to the situation concerning a right to appeal a section 1385 dismissal following a verdict of guilt, the opposition stated: "it would be possible to draft something to take care of the sponsor's concerns." (*Id.* at p. 8-9.)

These comments in the analysis were followed by the question: "SHOULD THE BILL BE MORE NARROWLY DRAFTED TO TAKE CARE OF THE SPONSOR'S CONCERNS REGARDING THE INABILITY TO APPEAL A 1385 MOTION AFTER A VERDICT? [¶] COULD SOMETHING BE ADDED TO THE ENUMERATED LIST OF POSSIBLE APPEALS THAT WOULD CLARIFY THAT A 1385 MOTION MAY BE APPEALED AT ANY TIME WHEN IT IS NOT BARRED BY JEOPARDY? (*Id.*, at p. 9, capitalization in original.)

These questions were followed by the comment: "The concern of the

opposition was the great and apparently unintended expansion of the right to appeal sentences. . .” (*Ibid*.) Thereafter, the question was posed: “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?” (*Ibid*., capitalization in original.)

Thereafter, on April 21, 1998, Senate Bill 1850 was amended, insofar as it dealt with section 1238, to delete the proposed new omnibus version of subdivision (a), and to make only minor changes to several existing subdivisions. Subdivision (a)(1) was amended to state: “An order setting aside *all or any portion of* the indictment, accusation or information”, adding the italicized words. Subdivision (a)(2) was amended from “A judgment for the defendant on a demurrer to the indictment, accusation or information,” to read “An order sustaining a demurrer to all or any portion of the indictment, accusation or information.” Subdivision (a)(8) amended was to read: “An order or judgment dismissing or otherwise terminating *all or any portion of* the action *including an order or judgment after a verdict or finding of guilty or 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,” adding the italicized words and deleting the bracketed words. An amendment in the Senate made on May 12, 1998, added

back into subdivision (a)(8) the deleted phrase "where the defendant has."

These amendments, when compared with the statements of the sponsor and the opposition as contained in the analysis of the Senate Committee on Public Safety, make it clear that the expansive language of the bill as introduced, which would have made appealable virtually every decision affecting the substantial rights of the People, was rejected in favor of narrow amendments designed to cover the situations of concern to the bill's sponsor. With regard to the amendment to subdivision (a)(8), it is clear that the language which added "all or any part of" the action "including an order or judgment after a verdict of finding of guilty" was drafted to permit appeals of section 1385 dismissals following verdict, one of the two situations the sponsors complained about. There was no legislative intent to authorize appeals from a not true finding after trial of a prior conviction or allegation. Such findings were not discussed at all and were clearly not the target of the amendment to subdivision (a)(8).

One further note about the legislative history of Senate Bill 1850 concerns the Assembly Committee on Public Safety report quoted in *People v. Salgado* (2001) 88 Cal.App.4th 5, 14. An examination of that report demonstrates that its quotation of the author's statement regarding the bill was identical to that quoted in the Senate Committee on Public Safety on the bill *as introduced.* While accurate as to the bill as introduced, the author's

statement that the bill would "provide for a People's right to appeal in a criminal case except where the appeal would violate double jeopardy" referred to language in the bill that was amended out in the Senate. Since the author's statement referred to language in the bill that was deleted, it offers no aid to proper construction of the bill as adopted.

This point was readily apparent to the Legislative Counsel. In the Legislative Counsel's Digest of the bill as introduced, it was stated: "This bill would delete the specified limited instances set forth in existing law in which the People are authorized to appeal and would, instead, authorize the people to appeal generally from judgments and orders, except where the double jeopardy provisions of the federal and state constitutions would bar appeal." Following the Senate amendment, this paragraph was revised by striking all the language following "This bill would" and adding "revise certain of those provisions by making technical or clarifying changes."

The prosecution's reading of the legislative history in its Answer Brief of the Merits is not at all consistent with it. For example, the Answer Brief states that while the history "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." (ABM, at p. 11.) First of all, the legislative history does not suggest any

concern over making appealable discretionary sentencing choices, such as imposing the upper, middle or lower term or imposing terms concurrent or consecutive. Senate Bill 1850 as introduced continued the existing subdivision (a)(10) exclusion of such sentencing choices, simply moving it into what would have been subdivision (b). Second, there is no expressed desire to prevent the People from appealing a not true finding because nobody ever said that that was what the bill would do.

Thus, the legislative history reveals a broadly written original bill, the stated purpose of which was to expand the People's right to appeal to include two specific situations. When opponents pointed out the discrepancy between the broad language and the small targets, the bill was changed to make narrow amendments to reach the two targeted situations. Appeal from a not true finding following trial of a prison conviction allegation was not one of the two targeted situations.

Therefore, assuming for purposes of argument only that the People have shown the possibility that the language of subdivision (a)(8) could be construed to permit an appeal from a not true finding, the legislative history of that language conclusively demonstrates that such a meaning was not intended.

C. Penal Code section 1238, subdivision (a)(10).

The prosecution lastly claims that authority for their appeal is provided by subdivision (a)(10). That subdivision permits appeal from an unlawful

sentence, which is defined to mean "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."

Defendant explained in detail in the OBM why a not true finding following trial of a prior conviction allegation was neither an order striking the prior conviction nor one "modifying its effect." (OBM, at pp. 18-23.) Defendant cited relevant legislative history of subdivision (a)(10) to show that permitting an appeal from a not true finding was not mentioned in any committee analyses of the bill, and would have been contrary to opposition concerns which, as with Senate Bill 1850, significantly narrowed the reach of the bill as introduced.

The prosecution chooses not to respond to any of these points. Instead, it dwells solely on its claim that the trial court erred by making a "legal ruling precluding consideration of the evidence that defendant used a knife [which] eviscerated the People's ability to prove the prior conviction was a strike." (ABM, at p. 14.) In so doing, the prosecution ignores this court's frequent statement that: "Courts must respect the limits on review imposed by the Legislature 'although the People may therefore suffer a wrong without a remedy.'" (*People v. Williams* (2005) 35 Cal.4th 817, 823, quoting *People v. Superior Court (Howard)* (1968) 69 Cal.2d 491, 499.)

But even the attempt to show error founders on the fact that the trial court did not make the ruling or order the prosecution claims. It made a verdict or finding on one of the two elements that the prosecution had to prove beyond a reasonable doubt, that defendant had previously used a dangerous or deadly weapon. Based on the prosecution's willingness to dismiss the precise allegation necessary to establish that fact, the trial judge had a doubt as to its character as a "strike" prior conviction. There was no refusal to admit or consider the prosecutor's evidence. However, in the context of all the evidence on that issue before the trial judge, including the plea colloquy, the trial judge did not find that fact beyond a reasonable doubt.

This is not the "erroneous understanding of the law" (ABM, at p. 15) claimed by the prosecution. It is a fact finder making a decision it is legally required and authorized to make by Penal Code section 1158. While the prosecution claims that the trial judge's remarks at the later sentencing hearing that defendant did use a knife prove that he legally erred in the finding on the prior conviction, it does not. A sentencing judge is entitled to determine facts relating to the exercise of sentencing discretion under a much lower standard of proof than that applicable at the trial of a prior conviction allegation. (*People v. Black* (2005) 35 Cal.4th 1238, 1253-1255.) At the sentencing hearing, the judge was exercising discretion to choose between the three terms available, and was not limited to consideration of facts proved beyond a

reasonable doubt. (*Id.*, at p. 1255, citing *Harris v. United States* (2002) 536 U.S. 545, 558.)

In sum, a not true finding is not an order, the finding was not unlawful, and it did not strike or otherwise modify the effect of a prior conviction. Even if some plausible argument could be made that subdivision (a)(10) applied to not true verdicts, the legislative history evinces no such intent.

II. BECAUSE THIS COURT HAS A DUTY TO AVOID AN INTERPRETATION OF SECTION 1238 WHICH WOULD VIOLATE THE STATE OR FEDERAL CONSTITUTION, OR EVEN RAISE SERIOUS CONSTITUTIONAL QUESTIONS, IT MUST CONSIDER WHETHER PERMITTING AN APPEAL OF A NOT TRUE FINDING WOULD VIOLATE THE STATE AND FEDERAL DOUBLE JEOPARDY CLAUSES.

A. The constitutional issues must be considered in interpreting section 1238, and are thus fairly included in the issue to be briefed.

The prosecution claims that the issue of whether recognition of a statutory right to appeal would violate the state or federal constitution is not fairly included in the issue to be briefed. In making the argument, the prosecutor again resorts to the expedient of ignoring defendant's arguments and authorities cited in the Opening Brief on the Merits. There, defendant cited the well known principle of statutory construction that an interpretation of a statute that would render the statute unconstitutional or raise serious and doubtful constitutional questions is to be avoided. (OBM, at pp. 23-24, citing

Miller v. Municipal Court (1943) 22 Cal.2d 818, 828.) Despite this clearly applicable rule, followed many times by this court, the prosecution claims that this court should ignore the constitutional issues the prosecution's construction of section 1238 would raise. As the argument is contrary to a basic rule of statutory interpretation, which the prosecution refuses to acknowledge or attempt to distinguish, this argument must be rejected.

B. A successful appeal on the merits would require retrial in the present case.

Next, the prosecutor claims that if the People were to prevail on their appeal, no retrial would be required, and Double Jeopardy would therefore not be violated. (ABM, at pp. 16-17.) This claim is spurious.

At the outset, the prosecution argument attempts to free itself from the facts of the present case by positing a situation in which a "per se serious felony" was found not to be a strike. However, the prior conviction allegation at issue in the present case is not such a "per se serious felony," that is, one in which the conviction of the offense itself constitutes a serious felony. Defendant's alleged prior conviction was for a violation of Penal Code section 273.5, which is not listed in section 1192.7, subdivision (c) as a serious felony per se. A finding must be made by a trier of fact that defendant personally used a dangerous or deadly weapon in the commission of the section 273.5 violation before it qualifies under section 1192.7, subdivision (c)(23) as a

serious felony prior conviction.

Since the prosecution argument is predicated on a set of facts not present in this case, it must of course be rejected.

However, the argument is not meritorious even on its own terms. The argument assumes that an appellate court could simply make a "conclusive determination that the prior conviction was a strike. (See § 1260.)" (ABM, at p. 18.) After making this conclusive determination, the argument goes, the appellate court could avoid ordering another trial and simply remand for sentencing.

In other words, the prosecution claims an appellate court is authorized to make the "true" finding with respect to the prior conviction allegation which section 1158 says must be made by a jury or trial court judge. The only authority cited for the proposition is Penal Code section 1260, but this section does not grant to appellate courts the right to make "conclusive determinations" of issues which are committed by statute to the decision of a trial court judge or jury. Section 1260 limits the remedies an appellate court many provide to reversal, affirmance, modification, reduction of degree of the offense or punishment, grant of a new trial, or remand "for such further proceedings as may be just under the circumstances." However, the provision for a remand does not give the appellate court the power to make "conclusive determinations" of contested issues which under law must be decided by a trial

judge or jury.

On the facts of the present case, a successful appeal would require a remand for a new trial. This is the remedy sought by the prosecution in the Court of Appeal and the one provided by the Court of Appeal. (People's Reply Brief, at p. 13; typed opn., at p. 10.) The prosecution claim that a successful appeal would not require a retrial of the prior conviction allegation fails, for the multiple reasons set forth above.

C. Whether the Federal Double Jeopardy Clause Prohibits Retrial is an Issue of Serious Constitutional Doubt.

The prosecution understandably relies heavily on *Monge v. California* (1998) 524 US 721 to argue that retrial would not violate the federal Double Jeopardy Clause. And the prosecution is correct that the present case is not distinguishable from *Monge,* since the prior conviction allegation in that case also involved a non "per se" serious felony prior conviction, which required proof of personal use or proof of person infliction of great bodily injury to establish its serious felony character.

However, the prosecution has failed to address the later precedents from the United States Supreme Court which create doubt as to the continuing validity of *Monge.* While the prosecution is correct in its argument that this court should not determine that subsequent decisions have overruled *Monge,* absent the United States Supreme Court's acknowledgment, nonetheless the

existence of grave constitutional doubt is relevant to this court's interpretation of section 1238. Not only are clearly unconstitutional interpretations of a statute to be avoided, but also interpretations that "raise serious and doubtful constitutional questions . . ." (*Miller v. Municipal Court, supra*, 22 Cal.2d at p. 828.)

The dubious validity of *Monge* can be denied only by ignoring the United States Supreme Court's recent decision in *Shepard v. United States* (2005) ___ US ___ [161 L.Ed.2d 205] and this court's expression of related constitutional doubt in *People v. Epps* (2001) 25 Cal.4th 19. Consequently, the prosecution has declined to discuss either case in the ABM.

However, this court undoubtedly will not ignore these relevant decisions. *Shepard* is highly instructive as to the approach this court should take in the present case. In *Shepard*, the United States Supreme Court refused to construe a statute to permit proof that a prior conviction was of a building when that fact was not established by the prior judgment. It did so because of the "serious risks of unconstitutionality" which would attend such an interpretation. (*Shepard, supra*, ____ US at p. ___ [161 L.Ed.2d at p. 217.] This constitutional doubt existed because "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 finding subject to [the jury trial requirement of] *Jones* and *Apprendi* to say that

Almendariz-Torres clearly authorizes a judge to resolve the dispute." (*Ibid.*)

This court similarly recognized the same state of constitutional doubt in *People v. Epps*, *supra*, 25 Cal.4th 19. There this court recognized that its holding in *People v. Kelii* (1999) 21 Cal.4th 452, that there was no federal constitutional right to a jury trial of prior conviction allegations, was called into doubt by *Apprendi v. New Jersey* (2000) 530 U.S. 466, "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." (*Id.* at p. 28.)

Although the prosecution does not address *Sheppard* or this court's comments in *Epps*, there is a footnote in the Answer Brief which attempts to sever the constitutional cord between the right to jury trial and rights secured by the Double Jeopardy clause. In footnote 3 at page 23, the prosecution claims that even if this court were to recognize in the pending case of *People v. McGee*, S123474, that a jury trial right existed as to "additional facts" not established by the judgment which are necessary to prove a conviction is serious, there would still be no federal right under the Double Jeopardy clause to avoid repeated prosecution attempts to prove such a fact.

This is yet another major premise of the Answer Brief that is without any supporting authority. No one has questioned that if proof of a fact in a criminal action requires trial by jury, that the attendant protections of the

Double Jeopardy would also apply.

Indeed, that assumption was the basis of Justice Scalia's dissent in *Monge v. California, supra,* 524 US 721. Justice Scalia reasoned that the distinction between an "element" of a criminal offense and a fact that only goes to the sentence "provides the foundation for our entire double jeopardy jurisprudence . . . The same distinction also delimits the boundaries of other important constitutional rights, like the Sixth Amendment right to trial by jury and the right to proof beyond a reasonable doubt." (*Id.*, at p. 738.) The majority opinion took no issue with this view, but based their analysis on their view that the fact in question was not part of the "offense" but only a "sentencing factor." (*Id*., at pp. 728-729.)

The lead opinion of this court in *People v. Monge, supra,* 16 Cal.4th 826, 836, similarly relied on this court's prior decisions that statutory provision of jury trial of prior conviction allegations did not create a constitutional requirement that such that trial be by jury, and concluded: "For the same reasons, a state that provides a trial of sentencing allegations arguably need not provide double jeopardy protection." (*Id.* at p. 833.)

Therefore, the prosecution claim that there could be a federal right to jury trial on a prior conviction allegation requiring proof of a fact not established by the judgment, yet no corresponding double jeopardy protection, is one that has no apparent support in the precedent of this court, the United

States Supreme Court, or indeed any court. It must be rejected.

D. Whether State Double Jeopardy Clause Prohibits Retrial is an Issue of Serious Constitutional Doubt.

The prosecution briefly addresses the reasons set forth in the Opening Brief on the Merits for doubting the continuing validity of this court's denial of state constitutional double jeopardy protection to the trial of prior conviction allegations.

According to the prosecution, the fact that prior to *People v. Monge* "inferior courts had reached a contrary conclusion has no tendency to suggest that this court should now engraft those conclusions into the state Constitution." (ABM, at p. 26.) However, not only did the only three California appellate courts to consider the issue hold this view, their decisions required the superior courts of the state to follow that rule for the ten years between the issuance of *People v. Raby* in 1986 and this court's decision in *Monge* in 1996. Also particularly troublesome was the lead opinion's failure to acknowledge these opinions, or that they were the state of the published decisional law for ten years. While this court obviously is not bound by a hundred "inferior" court opinions on a legal issue, nonetheless this court frequently finds such decisions persuasive, and generally acknowledges contrary Court of Appeal authority on point.

The prosecution does not actually respond to the argument that there

has been a need for this court to establish its own Double Jeopardy analysis due to the United States Supreme Court's Double Jeopardy jurisprudence, which has been described as inconsistent, confusing, out moded, overly technical and too easily subject to manipulation by prosecutors and trial judges, through at least the point is acknowledged. (ABM, at p. 25.) Obviously, the prosecution has reason to be satisfied with the U.S. Supreme Court's uncertain enforcement of Double Jeopardy rights which may frustrate prosecutorial goals. Nonetheless, this court has a responsibility to provide a consistent, coherent interpretation of the state Double Jeopardy clause, and to learn from its own errors and those of the United States Supreme Court.

The prosecution acknowledges defendant's argument that the United States Supreme Court decision in *Monge v. California* has been heavily criticized by legal commentators, but makes no reasoned argument as to why these criticisms are not correct. (ABM, at p. 25.)

The best the prosecution can do is to claim that Justice Werdegar's dissent on state constitutional grounds in *Monge* was based entirely on the then uncertain state of federal law on the point, and that since such uncertainty no longer exists, there are no reasons to construe the state constitution differently. (ABM, at p. 26.)

This argument misrepresents Justice Werdegar's opinion, which was joined by Justices Mosk and Kennard. Justice Werdegar's opinion did not

rely solely on the absence of controlling federal authority. Her dissent addressed the fact that this court had recognized its authority "to continue to interpret the state Constitution more expansively than its federal counterpart," while noting that it would not be so doing in *Monge* due to the lack of a definitive federal decision on point. (*Monge, supra,* 16 Cal.4th at p. 873.)

Justice Werdegar also traced the history of the state Double Jeopardy Clause, and prior decisions by this court and the Court of Appeal which supported application of state double jeopardy protection to noncapital sentencing procedures. (*Id.*, at pp. 874-878.) She concluded by criticizing the lead opinion's sanctioning of innumerable retrials of prior conviction allegations as "disturbing" and the lead opinion's suggestions that other legal doctrines might prevent such occurrences as "legal contortions." (*Id*., at pp. 878-879.) She noted that there was "in this state an unbroken line of cases applying the double jeopardy principles to noncapital sentence enhancement allegations. The majority breaks with this history without persuasive reasons for doing so." (*Id.*, at p. 879.) The claim that Justice Werdegar's opinion that the state constitution prevented retrial of the prior conviction allegations in *Monge* was based solely on the uncertain state of federal law is inaccurate.

Finally, there is a brief defense of the merits of this court's decision in *People v. Monge.* This portion of the lead opinion is quoted: "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 primary offense, not an allegation of a prior conviction. The trial of a prior conviction allegation is relatively perfunctory, and the outcome is usually predictable." (ABM, at pp. 26-27, quoting *Monge, supra,* 16 Cal.4th at p. 845 (lead opn. of Chin, J.).)

Yet this case illustrates how wrong that reasoning is. If proof of the character of a prior conviction was limited to the adjudicated elements of the prior conviction, as under federal law, then the characterization would be at least partially correct. But where, as in the present case, a previously unadjudicated fact about a prior conviction must be proven, the trial is not perfunctory and the outcome is not predictable. Was the defendant here suckered into an unreliable admission of personal knife use by a combination of the prosecutor's agreement to dismiss that allegation and the customary advice from counsel to take full responsibility in a probation interview for the crime as reported by the victim, and not to do anything which could be characterized as minimizing his acts?

In addition to its failure to appreciate the complications caused by the need to prove facts not adjudicated during the prior conviction proceedings, the lead opinion vastly undervalued the anxiety attendant to the retrial of a prior conviction allegation. The defendant here has endured anxiety since the People filed their notice of appeal several years ago as to whether he would

serve the seven year sentence imposed by the trial judge, or the 25-year-to-life sentence he would be subject to if upon reversal and retrial the allegation of a second strike were found true. The anxiety generated by this uncertainty between a certain release date in the not too distant future, and a minimum of 25 years of actual custody and the possibility of being imprisoned until death cannot reasonably be termed "relatively minor."

It is true that permitting retrial of prior conviction allegations promotes the statutory policy of more severe punishment for recidivist offenders, as this court noted in *People v. Barragan* (2004) 32 Cal.4th 236.[2]/ However, the question is whether the promotion of these statutory policies comes at the expense of state constitutional protections. Even if this court does not believe that this case is the appropriate vehicle for overruling *People v. Monge*, it must nonetheless recognize that grave constitutional doubts exist as to whether *People v. Monge* was correctly decided, and that such doubts militate against construing section 1238 to authorize a People's appeal from a not true finding after trial of a prior conviction allegation.

CONCLUSION

For the reasons stated above, neither the language of Penal Code section

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2. Although the prosecution cites *Barragan* as supporting authority, *Barragan* simply rejected the alternate legal bases for preventing retrial of prior conviction allegations that were suggested by the lead opinion in *Monge*.

1238 or the relevant legislative history indicate that the Legislature ever intended to authorize an appeal from a not true finding. Even if such an interpretation were possible, it should be avoided because it would render the statute unconstitutional, or raise serious and doubtful constitutional questions. The judgment of the Court of Appeal should therefore be reversed, with directions to dismiss the appeal.

Dated: January ____, 2006

Respectfully submitted,

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MICHAEL A. KRESSER
Sixth District Appellate Program
Executive Director
Attorney for Defendant,
Manuel Alex Trujillo