

**“JABS” AND “UPPER” CUTS:  
HOW *JONES*, *APPRENDI*, *BLAKELY* AND *SHEPARD*  
EXPAND THE APPLICABILITY OF DOUBLE-JEOPARDY PRINCIPLES  
TO PRIOR CONVICTIONS, “RECIDIVISM” AND OTHER FACTS  
USED TO INCREASE A DEFENDANT’S SENTENCE**

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This article is a follow-up to two prior articles (both of which are also available on CCAP’s website)<sup>1</sup> regarding the impact of the United States Supreme Court’s recent opinions *Jones*,<sup>2</sup> *Apprendi*,<sup>3</sup> *Blakely*<sup>4</sup> and *Shepard*<sup>5</sup> (collectively, “JABS”) on sentencing determinations in California. The prior articles provided a historical overview of these cases and suggestions for how they might provide a basis for challenging the constitutionality of sentencing determinations made in state criminal courts in California. In this article, the aim is to remind criminal defense counsel of the close relationship between the Sixth Amendment right to a jury trial and the Fifth Amendment right not to be placed twice in jeopardy for the same offense, and to explain how the reasoning and holdings in “JABS” breathe new life into claims that the Double Jeopardy Clause may limit or preclude the use of prior convictions, “recidivism” and other allegations to increase a defendant’s sentence.

Specifically, the article will explain how *JABS* have limited the “fact of a prior conviction” exception to the rule of *Apprendi/Blakely* to just that – the fact of a prior conviction (i.e., rather than a broader “recidivism” exception). Although none of the

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<sup>1</sup> “An Approach to Understanding and Applying *Blakely v. Washington* to Sentencing Determinations in California” (© CCAP 2004) (“*An Approach to Blakely*”); and “*Shepard v. United States*: New Supreme Court Opinion with Negative Implications for *Almendarez-Torres & Guerrero*” (CCAP © 2005).

<sup>2</sup> *Jones v. U.S.* (1999) 526 U.S. 227.

<sup>3</sup> *Apprendi v. New Jersey* (2000) 530 U.S. 466.

<sup>4</sup> *Blakely v. Washington* (2004) 542 U.S. \_\_\_\_ [124 S.Ct. 2531, 159 L.Ed.2d 403].

<sup>5</sup> *Shepard v. United States* (2005) \_\_\_\_ U.S. \_\_\_\_ [125 S.Ct. 1254; 161 L.Ed.2d 205].

*JABS* cases expressly overrules *Almendarez-Torres*,<sup>6</sup> the writing is on the wall that the holding in *Almendarez-Torres* is not long for this world, since five Supreme Court Justices have opined that it was wrongly decided. And, even if *Almendarez-Torres* is not overruled, it is quite clear from the High Court’s subsequent opinions in *JABS* that *Almendarez-Torres* is to be narrowly applied, so as to provide at most for a narrow “fact of a prior conviction” exception to the *Apprendi/Blakely* rule.

This article will also explain how *JABS* increase the protections of the Double Jeopardy Clause to the same extent that they increase the number of facts that are subject to our right to a jury trial. It will also illustrate how double-jeopardy’s *Blockburger* test<sup>7</sup> and *JABS* delimit the types of evidence that may be used to determine what the precise “facts of a prior conviction” are, and why the California Supreme Court’s opinion in *People v. Guerrero*,<sup>8</sup> in which the court held that prior convictions may be redefined with facts other than those actually encompassed within the judgment of the prior conviction, must be revisited in light of *JABS*. Finally, this article will provide some suggestions on how *JABS* might strengthen claims that double-jeopardy principles preclude retrial of facts used to enhance a defendant’s sentence and preclude multiple convictions based on the same criminal conduct.

## I. Double-Jeopardy Overview.

### A. The *Blockburger* Test.

Both the United States and California Constitutions prohibit placing a person twice in jeopardy for the same offense.<sup>9</sup> This protection applies both to successive punishments

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<sup>6</sup> *Almendarez-Torres v. U.S.* (1998) 523 U.S. 224.

<sup>7</sup> *Blockburger v. United States* (1932) 284 U.S. 299.

<sup>8</sup> (1988) 44 Cal.3d 343.

<sup>9</sup> U.S. Const., Amdt. 5. [“nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.”]; *Benton v. Maryland* (1969) 395 U.S. 784, 794 [the federal Double Jeopardy Clause applies to the states through the Due Process Clause of the Fourteenth Amendment]; *Oregon v. Kennedy* (1982) 456 U.S. 667, 671; and see Cal. Const., art. I, § 15; *Curry v. Superior Court* (1970) 2 Cal.3d 707, 712-713. Several provisions in the California Penal Code also bar double jeopardy. (See Pen. Code §§ 687,

and to successive prosecutions for the same criminal offense.<sup>10</sup> “The purpose behind the state and federal double jeopardy provisions is the same[: they both serve] ‘the defendant's interest in avoiding both the stress of repeated prosecutions and the enhanced risk of erroneous conviction.’”<sup>11</sup>

Under the federal and state constitutions, greater-including and lesser-included

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794 and 1023.) These provisions are related to, but differ in significant ways from, the multiple-punishment and -prosecution bars set forth in Penal Code section 654. (See footnote 16, *post*.)

<sup>10</sup> See *North Carolina v. Pearce* (1969) 395 U.S. 711, 717 [the federal double jeopardy clause “protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.”]; *United States v. Dixon* (1993) 509 U.S. 688, 696. However, the Double Jeopardy Clause does not prohibit the imposition of multiple punishment for the same offense where the legislature has clearly authorized multiple punishment. (*Missouri v. Hunter* (1983) 459 U.S. 359, 366-367.) The extent to which Double Jeopardy precludes multiple convictions for the same offense (i.e., as opposed to multiple punishments or prosecutions) is discussed in section VI, *post*.

<sup>11</sup> *People v. Monge* (1997) 16 Cal.4th 826, 844 (“*Monge I*”), quoting *People v. Fields* (1996) 13 Cal.4th 289, 298; and see *Green v. United States* (1957) 355 U.S. 184-187-188. However, as the California Supreme Court noted in *Monge I, supra*, “the California Constitution is a document of independent force and effect that may be interpreted in a manner more protective of defendants' rights than that extended by the federal Constitution[; thus, in] certain contexts ..., the state double jeopardy clause provides greater protection than its federal counterpart.” (*Id.*, 16 Cal.4th at p. 844, quoting *People v. Fields, supra*, 13 Cal.4th at p. 298.) For example, the state double jeopardy clause protects defendants from receiving a greater sentence if reconvicted after a successful appeal (see *People v. Henderson* (1963) 60 Cal.2d 482, 495-497; but see *People v. Serrato* (1973) 9 Cal.3d 753, 764-765 [holding that this rule does not apply to unauthorized sentences]), while the federal double jeopardy clause does not (i.e., although due process might). (See *North Carolina v. Pearce, supra*, 395 U.S. at pp. 719-724.)

offenses are considered the “same offense” for purposes of double jeopardy.<sup>12</sup> This is the longstanding “*Blockburger*” test.<sup>13</sup> In other words, regardless of which offense has been prosecuted first, if one of the offenses wholly subsumes all the elements of the other, Double Jeopardy applies and precludes further prosecution or punishment following a prior prosecution as to which jeopardy has attached<sup>14</sup> and been terminated.<sup>15</sup>

Although the *Blockburger* test has been around for a long time, there has also been considerable debate in the High Court about whether the *Blockburger* test is too narrow in the multiple-prosecution context. In 1990, the Court held that Double Jeopardy’s multiple-prosecution bar should be broader and include a “same conduct” test.<sup>16</sup> But a broader test

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<sup>12</sup> See *Brown v. Ohio* (1977) 432 U.S. 161, 164, 168-169; *People v. Bright* (1996) 12 Cal.4<sup>th</sup> 652, 660; and Pen. Code § 1023.

<sup>13</sup> *Blockburger v. United States* (1932) 284 U.S. 299, 304 [“the test to be applied to determine whether there are two offenses or only one [for purposes of double jeopardy], is whether each provision requires proof of a fact which the other does not.”].

<sup>14</sup> In jury trial cases, jeopardy attaches when the jury is impaneled and sworn. (*Crist v. Bretz* (1978) 437 U.S. 28, 38; *Jackson v. Superior Court* (1937) 10 Cal.2d 350, 352.) In cases in which the defendant is tried by a court, jeopardy attaches when the trial is “entered upon” – usually when the first witness is sworn. (*People v. Upshaw* (1974) 13 Cal.3d 29, 32.)

<sup>15</sup> The protection of the Double Jeopardy Clause by its terms applies only if there has been an event, such as an acquittal, which terminates the original jeopardy. (*Richardson v. United States* (1984) 468 U.S. 317, 325.) However, as discussed in section I.B, *post*, termination of jeopardy can be by means other than acquittal or conviction.

<sup>16</sup> *Grady v. Corbin* (1990) 495 U.S. 508, 510 [“the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted.”]. This “same conduct” test is somewhat analogous to the “same course of conduct” test applicable to Penal Code section 654, which also is broader than the *Blockburger* test for Double Jeopardy, and which precludes multiple punishments or prosecutions for an indivisible course of criminal conduct committed with a single intent or objective. (See *Neal v. State of California* (1960) 55

for double jeopardy's multiple-prosecution bar was later rejected in *United States v. Dixon, supra*; and (at present) *Blockburger* remains the sole test for what constitutes "the same offense" for purposes of the federal Double Jeopardy Clause.<sup>17</sup> However, it is important to remember that the federal Double Jeopardy Clause includes the doctrine of collateral estoppel.<sup>18</sup> Therefore, even where the *Blockburger* test cannot be satisfied, Double Jeopardy can preclude a subsequent prosecution where the second offense of prosecution has as an "ultimate issue" a fact that was resolved adversely to the government in a prior prosecution.<sup>19</sup>

B. Double Jeopardy Applies When Jeopardy Has Previously Attached and Been Terminated.

The federal Double Jeopardy Clause applies to a new trial following either conviction or acquittal.<sup>20</sup> However, jeopardy that has attached can be terminated by means other than acquittal or conviction. For example, Double Jeopardy bars retrial if a court discharges the jury (after it has been sworn) without a verdict and without the defendant's consent and/or "legal" or "manifest necessity" (e.g., a hung jury).<sup>21</sup> Double jeopardy also

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Cal.2d 11, 19; *Kellett v. Superior Court* (1966) 63 Cal.2d 822, 824-825.)

<sup>17</sup> *United States v. Dixon, supra*, 509 U.S. 688, 703-712, overruling *Grady v. Corbin, supra*.

<sup>18</sup> *Ashe v. Swenson* (1970) 397 U.S. 436, 443 [collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."].

<sup>19</sup> *Id.*, 397 U.S. at pp. 445-446 ["For whatever else [the Double Jeopardy Clause] may embrace [citation], it surely protects a man who has been acquitted from having to 'run the gantlet' a second time."]; and see *People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 78, fn. 22 ["The jury's rejection [of a firearm-use allegation] constituted an express acquittal on the enhancement and forecloses any retrial [of that allegation]."].

<sup>20</sup> *North Carolina v. Pearce, supra*, 395 U.S. 711, 717.

<sup>21</sup> *Arizona v. Washington* (1978) 434 U.S. 497, 509; *Oregon v. Kennedy, supra*, 456 U.S. at p. 672; *Gori v. United States* (1961) 367 U.S. 364, 369; *Curry v. Superior Court, supra*, 2 Cal.3d at p. 712.

bars a retrial when the first jury had an opportunity to return a verdict on a greater charge, but instead reached a verdict on the lesser charge,<sup>22</sup> and where the prosecutor's or court's intentional misconduct "goads" the defense into requesting a mistrial.<sup>23</sup>

The Double Jeopardy Clause usually does not prohibit the retrial of charges after a successful appeal.<sup>24</sup> However, a big exception to this rule is when the conviction is reversed for insufficient evidence, in which case the reversal is tantamount to a determination that the defendant was legally entitled to an acquittal, so retrial is prohibited.<sup>25</sup>

### C. Double Jeopardy and Prior Convictions.

#### 1. Double jeopardy's multiple-punishment bar's application to prior convictions used to increase a defendant's sentence.

When applying Double Jeopardy to prior convictions, it is important to keep in mind the Clause's two distinct types of protection, i.e., against multiple punishment and against multiple prosecutions. Double Jeopardy's multiple-punishment protection has been (at least to date) of limited benefit to defendants contesting the propriety of punishment that has been increased as a result of a prior conviction (e.g., as a result of the application of an "anti-recidivism" statute). The Double Jeopardy Clause does not bar the use of a prior conviction as a basis for increasing punishment for a subsequent offense, because, in such cases, the defendant is viewed as being punished for the latter offense, the commission of which may constitutionally be viewed as more culpable and punishable as a

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<sup>22</sup> See *Price v. Georgia* (1970) 398 U.S. 323, 329 [this is considered an "implied acquittal"].

<sup>23</sup> *Oregon v. Kennedy, supra*, 456 U.S. 667, 676.

<sup>24</sup> See *United States v. DiFrancesco* (1980) 449 U.S. 117, 131; *North Carolina v. Pearce, supra*, 395 U.S. at pp. 720-721; *People v. Mattson* (1990) 50 Cal.3d 826, 849.

<sup>25</sup> *Burks v. United States* (1978) 437 U.S. 1, 16-18; *Greene v. Massey* (1978) 437 U.S. 19, 24; *People v. Superior Court (Marks), supra*, 1 Cal.4th 56, 72.

result of the defendant's prior crimes.<sup>26</sup>

However, there could be an important exception to this rule. As the Supreme Court explained in *Witte v. United States* (1995) 515 U.S. 389, double-jeopardy concerns may be implicated if the “enhancing role played by the [prior conviction is] so significant that consideration of that conduct in sentencing has become ‘a tail which wags the dog of the substantive offense.’”<sup>27</sup> This “tail-wagging-the-dog” concern<sup>28</sup> is related to the analysis

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<sup>26</sup> See *Moore v. Missouri* (1895) 159 U.S. 673, 677 [“Recidivist statutes do not impose a second punishment for the first offense in violation of the Double Jeopardy Clause.”]; *Gryger v. Burke* (1948) 334 U.S. 728, 732 [“The sentence as a fourth offender or habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.”].

<sup>27</sup> *Witte v. United States*, *supra*, 515 U.S. at p. 403, citing *McMillan v. Pennsylvania* (1986) 477 U.S. 79, 88; and *Mullaney v. Wilbur* (1975) 421 U.S. 684, 700. In *Witte*, the Court held that the Double Jeopardy Clause did not bar the defendant's prosecution for a cocaine-trafficking offense whose underlying facts had already been used in calculating his sentence (under the federal Sentencing Guidelines) for a prior narcotics conviction, because the cocaine-trafficking conduct's use in determining the defendant's sentence for the prior conviction did not increase that sentence beyond its legislatively-authorized range. (*Id.* at pp. 403-404.) Relying on *Witte*, the Court, in *United States v. Watts* (1997) 519 U.S. 148, 155, held that the Double Jeopardy Clause permitted a court to consider acquitted conduct in sentencing a defendant under the Sentencing Guidelines. The continuing validity of *Witte* and *Watt* is unclear in the wake of *United States v. Booker* (2005) 543 U.S. \_\_\_\_ [125 S.Ct. 738, 160 L.Ed.2d 621], in which the Court held that *Blakely v. Washington*, *supra*, applies to the Sentencing Guidelines and requires that the provisions that make the Guidelines mandatory be invalidated. (*Booker*, *supra*, 125 S.Ct. at p. 746.) In *Booker*, the Court did not disapprove *Witte* or *Watts*, but simply distinguished them as not having presented a “*Blakely*” question. (*Booker*, *supra*, 125 S. Ct. at pp. 754-755.)

<sup>28</sup> In *Blakely* and *Apprendi*, the Court criticized the “not letting the tail wag the dog” approach as an inadequate and unworkable standard with which to protect our core constitutional rights from legislative erosion. (See *Blakely*, *supra*, 124 S.Ct. at pp. 2540-2541 [“The subjectivity of the standard is obvious. ... With *too far* as the yardstick, it is always possible to disagree with such judgments and never refute them.”] italics in

used to determine whether a defendant's sentence violates the Eighth Amendment's proscription of cruel and unusual punishment, because the latter analysis includes the concern that the defendant's sentence be proportionate to his current offense, and not reflect the aim to simply re-punish the defendant for prior offenses.<sup>29</sup> Thus, in cases where the bulk of a defendant's sentence is caused by the impact of prior convictions, and when those priors are also used either as elements of the current offense of conviction (e.g., violations of Penal Code section 290 or 12021) or as a basis for elevating the offense from a misdemeanor to a felony (e.g., Pen. Code § 666), defense counsel would be well-advised to argue that the sentence is not only cruel and unusual, but that it also violates the prohibition against double jeopardy.

The viability of multiple-punishment-based, double-jeopardy challenges to the application of anti-recidivism statutes is perhaps most promising in sex-registration-violation cases. Double-jeopardy arguments can be compelling in such cases, especially where the defendant's duty to register under Penal Code section 290 arises from the same prior convictions used to increase his sentence under the Three Strikes law (Pen. Code § 1170.12). This is so, because the court's rejection of a claim that the sentence is cruel and

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original; *id.* at p. 2542, fn. 13; and *Apprendi, supra*, 530 U.S. at p. 495 [noting that such a standard should have been met in that case].) Although the "tail-dog" approach has been rejected as an alternative to the *Jones-Apprendi-Blakely* rule for determining the facts that must be proven to a jury beyond a reasonable doubt, the author believes that it remains relevant to the interplay between the Double Jeopardy Clause and the Eighth Amendment's proscription of cruel and unusual punishment. (See footnote 29, *post.*)

<sup>29</sup> See *Solem v. Helm* (1983) 463 U.S. 277, 297, fn. 21 ["we must focus on the principal felony – the felony that triggers the life sentence – since Helm has already paid the penalty for each of his prior offenses."]; *People v. Carmony* (2005) 127 Cal.App.4th 1066, 1072 ["The state and federal prohibitions against cruel and/or unusual punishment require that the sentence be proportionate to the crime. Accordingly, the current offense must bear the weight of the recidivist penalty imposed."]; *Riggs v. California* (1999) 525 U.S. 1114 (opn. of Stevens, J., dissenting from the denial of cert.) [noting double-jeopardy and proportionality concerns applicable where a life sentence is imposed under the Three Strikes Law, "especially when the State 'double counts' the defendant's recidivism in the course of imposing that punishment."]; *Ramirez v. Castro* (2004) 365 F.3d 755, 761 [noting significance of the "double-whammy" effect of using prior convictions to both elevate the current offense to a felony and to subject the defendant to a Three Strikes sentence].

unusual will often require an unfair characterization of the seriousness of the defendant's current offense. Since the failure to register consists of "wholly passive" conduct that would be *legal* without the defendant's prior conviction(s), it is clearly among the most minor offenses punishable as a felony in California.<sup>30</sup> Thus, treating a registration-law violation as serious (or as anything more than "de minimis") for purposes of assessing the proportionality of the defendant's sentence will very likely require the court to rely (at least implicitly) on an assessment of how dangerous the defendant is – viz., on the seriousness of his *prior* crimes.<sup>31</sup> In such a case, the defendant's sentence could well rest on a *triple-counting* of his prior convictions (i.e., once in order to render his failure to register illegal under section 290; once to increase his sentence under the Three Strikes law; and once in order to classify the current offense as serious for purposes of analyzing the proportionality of the defendant's sentence). It is in these cases, where the defendant's current offense is minor, and his sentence rests on a multiple re-counting of the prior conviction(s), that a claim that the priors are "a tail that wags the dog" in violation of the Double Jeopardy Clause (and the Eighth Amendment's proscription of cruel and unusual punishment) are most likely to resonate with the courts.<sup>32</sup>

## 2. Double jeopardy's multiple-prosecution bar's application

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<sup>30</sup> See *Lambert v. California* (1957) 355 U.S. 225, 228-229 [noting the significant distinction between punishable "acts" and the "wholly passive" conduct involved in a "mere failure to register," and comparing registration laws to business licensing statutes]; *United States v. Bajakajian* (1998) 524 U.S. 321, 336-339 [holding a forfeiture of currency to be an excessive fine for a "crime [that] was solely a reporting offense"]; and see *People v. Carmony, supra*, 127 Cal.App.4th 1066, 1072 ["If the constitutional prohibition [against cruel and/or unusual punishment] is to have a meaningful application it must prohibit the imposition of a recidivist penalty based on an offense that is no more than a harmless technical violation of a regulatory law."]; and see *id.* at p. 1078.

<sup>31</sup> See, e.g., *People v. Meeks* (2004) 123 Cal.App.4th 695, 709-710.

<sup>32</sup> See footnote 29, *ante*. And see *People v. Carmony, supra*, 127 Cal.App.4th at p. 1080 ["The policy of the [Double Jeopardy] Clause therefore circumscribes the relevance of recidivism. [Citation.] To the extent the 'punishment greatly exceeds that warranted by the aggravated offense, it begins to look very much as if the offender is actually being punished again for his prior offenses.'"], quoting *Duran v. Castro* (E.D. Cal. 2002) 277 F.Supp.2d 1121, 1130. *Carmony*, which was decided on March 25, 2005, is not yet final.

to prior convictions used to increase a defendant's sentence.

At least two issues arise when attempting to determine whether the multiple-prosecution bar of the Double Jeopardy Clause is implicated in a case in which the state seeks to increase the defendant's sentence on the basis of a prior conviction. First, there is a basic question as to whether litigating the truth of a prior conviction alleged as a basis for increasing the defendant's sentence is a process to which the Double Jeopardy Clause's multiple-prosecution bar applies. Second, there is the question of how the prior conviction is defined, viz., whether it actually is the sort of conviction the prosecutor has alleged it to be, and whether it qualifies as a basis for increasing the defendant's sentence under the particular "anti-recidivism" sentencing law at hand. This second question, which is distinct from but closely-related to the first, involves an inquiry into the type of evidence that may be used to prove the prior conviction.

The two main cases confronting California defense counsel as to the first question are *People v. Monge, supra* ("Monge I"), and *Monge v. California* (1998) 524 U.S. 721 ("Monge II"), in which the state and federal Supreme Courts held that the trial of a prior conviction alleged under the Three Strikes law is a mere "sentencing proceeding" to which Double Jeopardy's multiple-prosecution bar does not apply. Thus, when an appellate court holds that a "strike prior" allegation found true in the trial court was not supported by sufficient evidence, the prior may be remanded for retrial, without violating double jeopardy principles or the Supreme Court's holding in *Burks, supra*, because "the Double Jeopardy Clause does not preclude retrial on a prior conviction allegation in the noncapital sentencing context."<sup>33</sup>

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<sup>33</sup> *Monge v. California*, 524 U.S. at p. 734; and see *People v. Monge*, 16 Cal.4th at p. 845. In *People v. Monge, supra*, at p. 845, the California Supreme Court left open a number of "secondary questions" that the court recently resolved adversely to criminal defendants. In *People v. Barragan* (2004) 32 Cal.4th 236, the court rejected contentions that re-trying a prior-conviction allegation following reversal for insufficient evidence on appeal violates fundamental fairness, principles of res judicata, collateral estoppel or law of the case, or the legislative intent of Penal Code sections 667, subdivision (f)(1), 1025, subdivision (b), or 1158. However, *Barragan* did not resolve whether retrial of a prior-conviction allegation following a "not true" finding would be contrary to the legislative intent of Penal Code sections 667, 1025 and/or 1158 (*id.* at p. 258); and a closely-related issue is now pending in the California Supreme Court in *People v. Samples* (S112201), review granted Feb. 25, 2003, and *People v. Trujillo* (S130080), review granted Feb. 16,

As to the second question, on the evidence that may be used to prove a prior-conviction allegation, the controlling case in California is *People v. Guerrero* (1988) 44 Cal.3d 343, in which the California Supreme Court held that the trier of fact may consider “the entire record of conviction” (if otherwise admissible under the rules of evidence) in order to determine “the substance of a prior conviction,” i.e., “the facts of the offense actually committed.”<sup>34</sup>

The Supreme Court’s opinions in *JABS* substantially impact and call into question the continuing validity of *Guerrero*, *Monge I* and *II*, and their progeny. There are two basic reasons for this. First, by clarifying what a “conviction” is, *JABS* have also clarified what a “*prior* conviction” is, for purposes of the United States Constitution. Second, by extending the right to a jury trial to the facts legally essential to a defendant’s sentence, *JABS* have also extended our double-jeopardy rights as to such facts. These reasons, and the ways in which they should impact Double Jeopardy’s application to the litigation (and re-litigation) of facts (including prior convictions) used to increase a defendant’s sentence, are explained in greater detail in the sections that follow.

## II. *JABS* Increase the Protections Provided by the Constitution As to Prior-Conviction Allegations by Delimiting the Facts That Constitutionally Compose a “Conviction.”

Considering the significance of the term to our constitutional rights to notice of the charges against us, trial by jury, acquittal in the absence of proof and findings of guilt beyond a reasonable doubt, and not to be placed twice in jeopardy for the same offense, it is obviously crucial for criminal defense attorneys to know precisely what the United States Supreme Court means by the term, “fact of a prior conviction.” Exactly what does this term mean? Doesn’t the answer necessarily rest on how we define a “conviction”? What *is* a “conviction”? Perhaps the most underappreciated aspect of *Jones*, *Apprendi*, *Blakely* and *Shepard* is how they answer this question. Collectively, *JABS* provide a pretty clear definition of what a “conviction” is for purposes of the federal Constitution. Under *JABS*, only the facts essential to the defendant’s sentence that are actually found by the jury or admitted by the defendant as part of a guilty plea constitute the “facts of conviction” for purposes of the federal Constitution. A brief recap of the holdings and

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<sup>34</sup> *Id.* at p. 352; and see *People v. Reed* (1996) 13 Cal.4th 217; *People v. Myers* (1993) 5 Cal.4th 1193 [applying *Guerrero*'s principles to proof of foreign convictions].

reasoning of *JABS* illustrates this.

In *Jones v. U.S.*, *supra*, and *Apprendi v. New Jersey*, *supra*, the United States Supreme Court held that whether a fact constitutes an element of a crime as to which the defendant's "*Winship*"<sup>35</sup> and jury-trial rights attach depends, not on the label legislatively attached to the fact (e.g., "sentencing factor"), but on the substantive, liberty-depriving *impact* the fact has on the defendant's sentence.<sup>36</sup> In a historic turn of the tide,<sup>37</sup> the Court held that the elements of a crime – the facts that must be submitted to a jury and proved beyond a reasonable doubt – include any fact, other than a prior conviction, that increases the maximum penalty for the crime, viz.: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."<sup>38</sup>

In *Blakely*, *supra*, the Court carried the *Jones/Apprendi* rule a step further, by explaining what the Court meant in *Apprendi* by the phrase "prescribed statutory maximum." *Blakely* explained that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings."<sup>39</sup> By "additional facts," the Court meant facts other than those found by the jury or admitted by the defendant:

Our precedents make clear, however, that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or*

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<sup>35</sup> *In re Winship* (1970) 397 U.S. 358.

<sup>36</sup> "[T]he relevant inquiry is not one of form, but of effect – does the required finding expose the defendant to a greater punishment than is authorized by the jury's guilty verdict?" (*Apprendi*, *supra*, 530 U.S. at p. 494.)

<sup>37</sup> As explained at pages 4-7 of *An Approach to Blakely* (see footnote 1, *ante*), the High Court's opinions in *Jones* and *Apprendi* represented an about-face from its recent, prior opinions in *Monge* and *Almendarez-Torres*.

<sup>38</sup> *Apprendi*, *supra*, 530 U.S. at p. 490; and see *Jones v. U.S.*, *supra*, 526 U.S. 242-243, fn. 6.

<sup>39</sup> *Blakely*, *supra*, 124 S.Ct. at pp. 2536-2537, emphasis in original.

*admitted by the defendant.* See *Ring, supra*, at 602, 153 L. Ed. 2d 556, 122 S. Ct. 2428 ("the maximum he would receive if punished according to the facts reflected in the jury verdict alone" (quoting *Apprendi, supra*, at 483, 147 L. Ed. 2d 435, 120 S. Ct. 2348)); *Harris v. United States*, 536 U.S. 545, 563, 153 L. Ed. 2d 524, 122 S. Ct. 2406 (2002) (plurality opinion) (same); cf. *Apprendi, supra*, at 488, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (facts admitted by the defendant). In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," [1 J.] Bishop, [Criminal Procedure] § 87, [p.] 55 [(2d ed. 1872)], and the judge exceeds his proper authority.<sup>40</sup>

*Blakely's* clarification of *Apprendi* provides extremely helpful insight into the constitutional definition of a "conviction." By clarifying what the "elements" of crime are, *Blakely* also delimited what a "conviction" is; it confirms our commonsense understanding of the term, viz., that a conviction is a *decision*. In guilty-plea cases that make up the majority of convictions, a "conviction" is the court's acceptance of the defendant's knowing, intelligent and voluntary decision to admit to having committed the specific conduct required to violate the particular statute that is the subject of his plea.<sup>41</sup> In cases where the conviction is the product of a trial, a "conviction" is the decision of the trier of fact (judge or jury) that the defendant has committed the elements of the crime(s) charged in a complaint, information or indictment. In other words, in the absence of a special verdict reflecting a judge's or jury's findings on additional facts, or in the absence of a defendant's admission to additional facts as part of a guilty plea, *a conviction is limited to the least adjudicated elements of the offense*. A conviction cannot be deemed to include additional facts that are not reflected in the "guilty" verdict or plea, because such "additional findings" (if legally essential to the defendant's sentence) are not

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<sup>40</sup> *Blakely, supra*, 124 S.Ct. at p. 2537, emphasis in original; see also *Apprendi, supra*, 530 U.S. at p. 483 [importing that a conviction for which a defendant may constitutionally punished is limited to "the facts reflected in the jury verdict alone."].

<sup>41</sup> Cf. *People v. Chadd* (1981) 28 Cal.3d 739, 748 [a guilty plea is "a judicial admission of every element of the offense charged"].

allowed.<sup>42</sup>

This clarification of the meaning of the term “conviction” is important, not only because it delimits the facts of the defendant’s *current* conviction that may constitutionally be punished, but also because it should delimit what constitutes “the fact of a *prior* conviction” within the meaning of *Apprendi*. As explained in *An Approach to Blakely*, there is no principled basis for defining “conviction” more broadly in the context of “prior convictions” used to increase a defendant’s sentence than the *Apprendi/Blakely* definition applicable to current convictions; therefore, the facts that compose “convictions” and “prior convictions” should be the same for constitutional purposes.<sup>43</sup>

Support for this extrapolation from *Blakely* was recently provided in the Supreme Court’s subsequent opinion in *Shepard v. U.S.*, *supra*. In *Shepard*, the Court held that a sentencing judge may not use the entire record of a prior conviction (e.g., including things like police reports) to determine whether a prior conviction that resulted from a guilty plea is one that can be considered in assessing whether the defendant must receive an increased sentence under the Armed Career Criminal Act (18 U.S.C. § 924(e); “ACCA”). Instead, the inquiry into whether a prior conviction that resulted from a guilty plea includes the facts necessary to render it an ACCA prior “is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant *in which the factual basis for the plea was confirmed by the defendant*, or to some comparable judicial record of this information.”<sup>44</sup>

This holding, the Court explained, is consistent with its prior holding in *Taylor v. United States* (1990) 495 U.S. 575, in which the Court held (as a matter of Congressional intent) that, in determining whether a prior conviction qualifies as a prior under the ACCA, a sentencing judge is limited to the prior’s statutory elements, charging documents, and jury instructions.<sup>45</sup>

Although *Shepard*, like *Taylor*, is based on the Court’s assessment of

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<sup>42</sup> See footnotes 39 and 40, *ante*.

<sup>43</sup> *An Approach to Blakely*, pp. 28-31.

<sup>44</sup> *Shepard, supra*, 125 S.Ct. at pp. 1262-1263, emphasis added.

<sup>45</sup> *Shepard, supra*, 125 S.Ct. at p. 1257, citing *Taylor v. U.S., supra*.

Congressional intent, a plurality of the Court in *Shepard* expressed the view that the Court's holding is also required by constitutional concerns regarding due process and the right to trial by jury. In part III of his plurality opinion, Justice Souter explained that allowing the sentencing court to use additional facts (i.e., evidence reflecting facts in addition to those necessarily found by the jury or admitted by the defendant) to determine the nature of a prior conviction would "raise[] the concern underlying *Jones* and *Apprendi*: the Sixth and Fourteenth Amendments guarantee a jury standing between a defendant and the power of the state, and they guarantee a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence."<sup>46</sup> The Court reasoned that its holding was necessary to protect the defendant's constitutional rights notwithstanding the Court's prior holding in *Almendarez-Torres*:

While the disputed fact here can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute. The rule of reading statutes to avoid serious risks of unconstitutionality [citation] therefore counsels us to limit the scope of factfinding on the disputed generic character of a prior plea, just as *Taylor* constrained judicial findings about the generic implication of a jury's verdict.<sup>47</sup>

Justice Souter's opinion in *Shepard* is joined by Justices Stevens, Scalia and Ginsburg.<sup>48</sup> Justice Thomas concurred in the result and in all parts of the opinion except part III. However, the reason Justice Thomas did not join in part III of the opinion is that, in his view, it does not go far enough in explaining the constitutional infirmity of the ACCA and of *Almendarez-Torres* in the wake of *Jones* and *Apprendi*.<sup>49</sup>

The combined impact of the plurality opinion of Justice Souter and the concurring

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<sup>46</sup> 125 S.Ct. at p. 1262.

<sup>47</sup> *Shepard, supra*, 125 S.Ct. at pp. 1262-1263.

<sup>48</sup> Justice O'Connor, joined by Justices Kennedy and Breyer, dissented. Chief Justice Rehnquist did not participate in the case.

<sup>49</sup> *Shepard v. U.S.*, 125 S.Ct. at p. 1264, Thomas, J., concurring.

opinion of Justice Thomas in *Shepard* is that it is now apparent that prior convictions should be defined no differently than current convictions for federal constitutional purposes. Both should be limited to the facts actually found by the jury (or court) in rendering its verdict or admitted by the defendant in pleading guilty.

And this should be no surprise. For why should the Constitution protect a defendant from judicial over-reaching at sentencing as to current convictions, but provide no protection when the conviction has drifted into the past and become a “prior”? Under *JABS*, a defendant whose jury has convicted him only of theft may not be sentenced for robbery. So, why should a court be able to treat that theft as a robbery when the defendant is later sentenced for a subsequent offense, and the theft is alleged as a robbery prior? Exactly how did the jury’s “theft” verdict change into one for “robbery” over time? Again, a conviction is simply a decision. It is not a bottle of wine. And it should not change with the mere passage of time.

As explained in the sections that follow, *Shepard*, like its “*JAB*” precedents, has significant negative implications for the continuing validity of *Almendarez-Torres*, *Monge (I and II)*, and *Guerrero*. *JABS* strongly infer that these cases are no longer good law and, at the very least, should be read and applied very narrowly.

### III. *JABS* Make Clear That *Almendarez-Torres* and “The Fact of a Prior Conviction” Exception to the *Apprendi/Blakely* Rule Should Both Be Construed Narrowly.

#### A. *Almendarez-Torres* Is Hanging by a Thread.

As previously noted, *JABS* represent a 180-degree shift by the Supreme Court from the view it had espoused just a year or two earlier in *Almendarez-Torres*. In *Almendarez-Torres*, the Court held (in a 5-4 decision) that a prior conviction that increases the defendant’s sentence may constitutionally be treated as a sentencing factor that may be decided by a judge and need not be set forth in an indictment. The court reasoned that, since recidivism has traditionally been treated as a sentencing factor rather than an element of an offense (i.e., except in cases where the conduct proscribed is not independently unlawful in the absence of a prior conviction), prior convictions may constitutionally be deemed sentencing factors rather than elements even if they have a substantial impact on a defendant’s sentence.<sup>50</sup>

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<sup>50</sup> *Id.*, 523 U.S. at pp. 238-247.

None of the Court's subsequent opinions in *JABS* expressly overrules *Almendarez-Torres*. However, as Justice Thomas reiterated in his concurring opinion in *Shepard*,

*Almendarez-Torres* ... has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided. See 523 U.S., at 248-249, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (Scalia, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting); *Apprendi*, *supra*, at 520-521, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (Thomas, J., concurring). The parties do not request it here, but in an appropriate case, this Court should consider *Almendarez-Torres*' continuing viability. Innumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of *Almendarez-Torres*, despite the fundamental "imperative that the Court maintain absolute fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond-a-reasonable-doubt requirements."<sup>51</sup>

In *Apprendi*, Justice Thomas provided a lengthy concurring opinion explaining why he had changed his mind and joined the four other Justices (Stevens, Scalia, Souter and Ginsburg) who dissented from *Almendarez-Torres*.<sup>52</sup> This concurring opinion, along with Justice Thomas's concurring opinion in *Shepard* and portions of the Court's majority opinion in *Apprendi*,<sup>53</sup> provide plenty of fodder for an argument that *Almendarez-Torres* was wrongly decided, is inconsistent with the reasoning of the Court's subsequent opinions in *JABS*, and should not be followed. Criminal defense attorneys should not be shy about making this argument, which (if ultimately successful) will render Penal Code section 1025, subdivision (c),<sup>54</sup> and the California Supreme Court's opinion in *People v.*

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<sup>51</sup> *Shepard v. U.S.*, 125 S.Ct. at p. 1264, Thomas, J., concurring, quoting *Harris v. United States* (2002) 536 U.S. 545, 581-582 (Thomas, J., dissenting).

<sup>52</sup> *Apprendi, supra*, 530 U.S. at pp. 498-518, Thomas, J., concurring.

<sup>53</sup> See *Apprendi*, 530 U.S. at pp. 488-490, 496; and see discussion at pp. 19-21, *post*.

<sup>54</sup> Penal Code section 1025, subdivision (c), provides that "the question of whether the defendant is the person who has suffered [an alleged] prior conviction shall be tried by the court without a jury." The problem with this provision is that the issue of

*Epps* unconstitutional.<sup>55</sup>

Of course, until the federal courts hold otherwise, California's appellate courts will continue to reject this argument and maintain that *Almendarez-Torres* is still good law, as reflected by the fact that it has not yet been overruled by the Supreme Court, and by the fact that the Supreme Court in *JABS* has retained a "prior conviction" exception the *Apprendi/Blakely* rule.<sup>56</sup> But the issue will never make it to federal court if we don't raise it in the state's courts first. And the writing is on the wall: *Almendarez-Torres* is hanging by a thread and could soon be overturned. So, whenever the defendant demands a jury trial on a prior-conviction allegation, his trial counsel should raise a "*JABS*" objection to

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identity – whether the defendant is the same person who incurred the prior conviction and is the person whose name, date of birth, photograph and/or fingerprints are contained in Penal Code section 969b packet for the prior – is clearly an issue of fact that is not part of the prior conviction itself (i.e., it was not resolved by the jury whose verdict is the basis of the prior conviction, nor (if the prior conviction resulted from a guilty plea) was it a fact admitted by the defendant's alleged plea to the prior)). Hence, the issue of identity does not satisfy the stated rationale for *Apprendi*'s "fact of a prior conviction exception," viz., that such facts need not be retried to a jury beyond a reasonable doubt, because they have resulted from "a proceeding in which the defendant [already] had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt ...." (*Apprendi*, 530 U.S. at p. 496.)

<sup>55</sup> In *People v. Epps* (2001) 25 Cal.4th 19, the California Supreme Court held that, even in the wake of the United States Supreme Court's decision in *Apprendi*, the right to a jury trial on the fact of a prior conviction derives solely from statute (viz., Pen. Code §§ 1025 and 1158) and not from the state or federal Constitutions, and that the *Watson* standard of reversibility therefore applies to a trial court's erroneous denial of a defendant's limited right to a jury trial under Penal Code section 1025. (*Epps, supra*, 25 Cal.4th at pp. 28-30.) However, it is worth noting that, in *Epps*, the alleged prior conviction (kidnaping) was a serious felony by definition under Penal Code section 1192.7, and the court expressly noted that it was not deciding how *Apprendi* would apply in a situation where some additional fact other than the bare fact of the prior conviction needed to be proved, such as whether a prior burglary was residential. (*Id.*, 25 Cal.4th at p. 28.)

<sup>56</sup> See *People v. Epps, supra*, at pp. 28-29; *People v. Thomas* (2001) 91 Cal.App.4th 212.

the court's removal from the jury any factual issue(s) necessary to a true finding on the alleged prior (including, for example, whether the defendant is the person who suffered the prior conviction), and his appellate counsel should raise an argument on appeal that *Almendarez-Torres* and *Epps* were wrongly decided, and that Penal Code section 1025, subdivision (c), is unconstitutional.

B. *Even If Almendarez-Torres Is Still Good Law, JABS Make Clear That Almendarez-Torres and the "Fact of a Prior Conviction" Exception to Apprendi Should Both Be Narrowly Interpreted.*

In addition to (and probably more important than) arguing that *Almendarez-Torres* was wrongly decided, defense counsel should vigorously dispute any contention that *Almendarez-Torres* creates a broad "recidivism" exception, rather than a narrow "fact of a prior conviction" exception, to the *Apprendi/Blakely* rule. The author has read numerous unpublished Court of Appeal opinions rejecting "*Blakely*" arguments on the basis of this contention. These opinions rely primarily on the Second District Court of Appeal's 2001 opinion in *People v. Thomas, supra*.

In *Thomas*, the court considered whether there is a federal constitutional right to a jury trial on an allegation that the defendant has served a prior prison term within the meaning of Penal Code section 667.5. The Court of Appeal held that there is no such right, because "prison prior" allegations fall within the "fact of a prior conviction" exception to the rule of *Apprendi*. The defendant in *Thomas* argued that there is a federal constitutional right to a jury trial on prison priors under *Apprendi*, because prison priors include an element that does not constitute a "fact of a prior conviction," viz.: whether the defendant served a prison term for the prior conviction. The Court of Appeal rejected this argument, holding that *Apprendi*'s "fact of a prior conviction" exception should be read more broadly, as encompassing the more general concept "recidivism," as expressed in the Supreme Court's earlier opinion in *Almendarez-Torres*.<sup>57</sup>

There are several problems with the reasoning and holding in *People v. Thomas*, not the least of which is the liberty with which that court revises the clear and express holding of the United States Supreme Court on an issue of federal constitutional law.<sup>58</sup>

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<sup>57</sup> *People v. Thomas, supra*, 91 Cal.App.4th at pp. 216-223.

<sup>58</sup> See *People v. Bradley* (1969) 1 Cal.3d 80, 86 (California courts "are bound by decisions of the United States Supreme Court interpreting the federal Constitution").

Nowhere in *Apprendi* does the Court intimate that the “fact of a prior conviction exception” should be interpreted as including facts that a court might fairly categorize as examples of “recidivism” (whatever that means), even though they are not facts specifically encompassed within a “prior conviction.” The language of the Court’s holding in *Apprendi* is quite clear: “Other than *the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”<sup>59</sup>

And *Apprendi*’s reasoning and discussion of *Almendarez-Torres* make it equally clear that the Supreme Court in *Apprendi* did not view *Almendarez-Torres* as a basis for interpreting “the fact of a prior conviction” exception as being an open-ended and indefinite “recidivism” exception that includes facts *other* than “the fact of a prior conviction.” While not overruling *Almendarez-Torres* (apparently because it was not asked to), the Court did little to hide its disagreement with that opinion, and made it very clear that it was narrowly limiting the remaining precedential value of that case to “its unique facts.”<sup>60</sup> The Court explained that “the specific question decided [in *Almendarez-Torres*] concerned the sufficiency of the indictment.”<sup>61</sup> And, while noting the importance of “recidivism” to the holding of *Almendarez-Torres*, the Court also explained that, by “recidivism,” it meant “the fact of a prior conviction”:

More important, as *Jones* made crystal clear, 526 U.S. at 248-249, our conclusion in *Almendarez-Torres* turned heavily upon the fact

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<sup>59</sup> *Apprendi*, *supra*, 530 U.S. at p. 490, emphasis added; and see *Jones v. U.S.*, *supra*, 526 U.S. 242-243, fn. 6.

<sup>60</sup> See *Apprendi*, 530 U.S. at pp. 489-490: “Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, *Apprendi* does not contest the decision’s validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset. Given its unique facts, it surely does not warrant rejection of the otherwise uniform course of decision during the entire history of our jurisprudence.” (Footnote omitted.)

<sup>61</sup> *Apprendi*, 530 U.S. at p. 488; see also *Jones*, *supra*, 526 U.S. at pp. 248-249 [explaining that *Almendarez-Torres* was “not dispositive” of the question in *Jones*, in part, because *Jones* was “concerned with the Sixth Amendment right to jury trial and not alone the rights to indictment and notice as claimed by *Almendarez-Torres* ...”].

that the additional sentence to which the defendant was subject was "the prior commission of a serious crime." Both the certainty that procedural safeguards attached to *any "fact" of prior conviction*, and the reality that Almendarez-Torres did not challenge the accuracy of that "fact" in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a "fact" increasing punishment beyond the maximum of the statutory range.<sup>62</sup>

This explanation echoes the Court's reasoning in *Jones, supra*, in distinguishing and limiting the import of *Almendarez-Torres*.<sup>63</sup> And it provides a cogent and consistent reason for a very narrow "fact of a prior conviction" exception to the *Jones/Apprendi* rule, viz.: the defendant has already had his right to a jury trial and to acquittal in the absence of a finding beyond a reasonable doubt as to "any 'fact' of prior conviction;" so these constitutional requirements have already been satisfied as to such facts. This cannot be said for facts *other* than the facts of a prior conviction, however they might be labeled (e.g., "recidivism").<sup>64</sup>

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<sup>62</sup> *Apprendi*, 530 U.S. at p. 488 (emphasis added; citations and footnote omitted); and see *id.* at p. 496 ["Moreover, there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof."].

<sup>63</sup> See *Jones*, 526 U.S. at p. 249: "unlike virtually any other consideration used to enlarge the possible penalty for an offense, and certainly unlike the factor before us in this case, a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees. *Almendarez-Torres* cannot, then, be read to resolve the due process and Sixth Amendment questions implicated by reading the carjacking statute as the Government urges."

<sup>64</sup> The idea that "the fact of a prior conviction" exception to *Apprendi* could be replaced by a label as indefinite as "recidivism" is also contrary to *Apprendi's* teaching that the requirements of the Constitution cannot be evaded by resort to labels. (See *id.*, 530 U.S. at pp. 476, 494; *Blakely v. Washington, supra*, 124 S.Ct. at p. 2539; and see *Monge v. California, supra*, 524 U.S. at pp. 738-739, Scalia, J., dissenting.)

*Thomas* begs the question: precisely what *does* “recidivism” mean, if it is not limited (as it was by the Supreme Court in *Jones* and *Apprendi*) to “the fact of a prior conviction”?<sup>65</sup> If a fact legally essential to the defendant’s sentence could be removed from the ambit of the *Jones-Apprendi-Blakely* rule simply by fitting it within the open-ended and undefined label “recidivism” used by the Court of Appeal in *Thomas*, the *Jones-Apprendi-Blakely* rule could be sidestepped so easily as to be rendered largely meaningless. Broadly read, “recidivism” means simply a tendency to commit crime.<sup>66</sup> This would arguably include the entire range of aggravating facts “relating to the defendant” (see Cal. Rules of Court, rule 4.421(b)) and any prior conduct whether it constituted a crime for which the defendant had previously been tried and convicted or not. Had the Supreme Court intended such a vastly broader exception to the *Jones-Apprendi-Blakely* rule than “the fact of a prior conviction,” it seems highly unlikely that it

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<sup>65</sup> It is important to note that *Almendarez-Torres* itself actually involved only “the fact of a prior conviction,” i.e., an allegation that the defendant had previously been convicted of an aggravated felony. (See *id.*, 523 U.S. at p. 228.) And even though there is language in *Almendarez-Torres* that notes that “recidivism” has traditionally been a factor considered at sentencing, the decision does not explain what it means by the term “recidivism,” or intimate that, in the context of that case, it meant anything other than a prior conviction. (See *id.*, 523 U.S. at pp. 230, 241.) Therefore, contrary to the court’s analysis in *Thomas*, *supra*, 91 Cal.App.4th at p. 223, the specific holding in *Almendarez-Torres* cannot be said to define “recidivism” as something broader than “the fact of a prior conviction.” Although *Thomas* posits that the process of determining whether a particular prior conviction is enumerated in the statutory list of aggravated felonies (viz., 8 U.S.C. § 1101(a)(43)) is analogous to the process of determining whether a defendant has served a prior prison sentence (*id.*, 91 Cal.App.4th at p. 223), this analogy is highly questionable, since the former process is very probably a question of law, while the latter is clearly a question of fact. (Cf. *People v. Kelii* (1999) 21 Cal.4th 452, 456 [“the question whether [a] conviction [of an offense listed in Penal Code section 1192.7] qualifies as a serious felony is entirely legal”].) And it must be remembered that there was no issue in *Almendarez-Torres* as to whether the facts of his prior conviction constituted an “aggravated felony” because *Almendarez-Torres* did not dispute that point. (See *Apprendi*, 530 U.S. at p. 488 [“*Almendarez-Torres* did not challenge the accuracy of th[e] ‘fact’ [of a prior conviction] in his case.”].)

<sup>66</sup> See The American Heritage Dictionary, 2d College Edition (1983), which defines “recidivism” as a “tendency to relapse into a former pattern of behavior, esp. a tendency to return to criminal habits.”

would have used that far narrower and more precise term to describe it.<sup>67</sup>

This is the main problem with the open-ended “recidivism” label *Thomas* substitutes for *JABS*’ “fact of a prior conviction” exception: its lack of definition. The constitutional concerns that underpin the need for a rule delimiting the facts for which a defendant may be punished would be defeated by an exception to the rule as open-ended and indefinite as the “recidivism” exception adopted by the court in *Thomas*. In order to meaningfully serve the concerns that underpin the rule adopted by *Jones*, *Apprendi* and *Blakely*, the “fact of a prior conviction” exception to that rule must be delimited and defined in the same way as the rule itself. Just as the rule of *Jones*, *Apprendi* and *Blakely* does not allow a defendant to be punished for more facts than those of which he has

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<sup>67</sup> On remand from *Ring v. Arizona* (2002) 536 U.S. 584, the Arizona Supreme Court took a much narrower and more literal view of *Apprendi*’s “fact of a prior conviction exception” than did the California Court of Appeal in *Thomas, supra*. In *State v. Ring* (2003) 204 Ariz. 534 [65 P.3d 915], the court held that, where litigating a prior conviction’s characteristics brings proof of underlying conduct into play, “‘factual questions could arise as to exactly what conduct the defendant engaged in. Typically, such factual questions are within the province of a jury, and this Court doubts that the Supreme Court would construe *Almendarez-Torres* as applying to such situations.’” (*State v. Ring, supra*, 63 P.3d at p. 939, quoting *United States v. Brietweiser* (N.D. Ga. 2002) 220 F.Supp.2d 1374, 1379.) Hence, the Arizona Supreme Court held that “when an additional finding must be made beyond the bare fact that a prior conviction exists, the Sixth Amendment demands that a jury perform this task.” (*State v. Ring, supra*, 63 P.3d at p. 939.) A similar question is currently pending in the California Supreme Court in *People v. McGee* (2004) 115 Cal.App.4th 819, rev. granted Apr. 28, 2004 (S123474), viz.: “Under *Apprendi v. New Jersey* (2000) 530 U.S. 466, was defendant entitled to a jury trial on the question whether his prior conviction for robbery in Nevada constituted a serious felony for purposes of sentencing under the three strikes law when the elements of the Nevada offense differed from the elements of robbery under California law and the sentencing issue thus depended upon whether the record of the prior conviction established that defendant’s prior conduct amounted to robbery under California law?” Although the author agrees with the Arizona Supreme Court’s literal and logical view (in *State v. Ring, supra*) of the “fact of a prior conviction” exception to *Apprendi*, he believes that allowing the state to relitigate before a new jury the conduct the defendant committed in a prior offense of conviction would violate the Double Jeopardy Clause and be contrary to the Supreme Court’s opinion in *Shepard*. (See discussion in section V, *post*.)

actually been convicted, the “fact of a prior conviction” exception to that rule should not include facts that were never the subject of a “conviction” that would itself pass constitutional muster under *Jones*, *Apprendi* and *Blakely*. For the same reasons that it would flout the Constitution to sentence a defendant for robbery when he has been convicted only of theft, it would also be unconstitutional to increase the defendant’s sentence on the basis of a prior “robbery” conviction, when that prior conviction was actually only a conviction for theft. The same basic problem would apply to both sentences: they would both be based on facts as to which the defendant has not been afforded his constitutional rights to a trial by jury and to acquittal in the absence of a jury’s adjudication of guilt beyond a reasonable doubt.<sup>68</sup>

As the above discussion illustrates, it is certainly arguable that, in the wake of *JABS*, *Almendarez-Torres* should be narrowly construed to apply only to “the fact of a prior conviction,” and that it should not be read as allowing a defendant’s jury-trial and due-process rights to be legislatively subverted as to a broader range of “recidivism” factors that include facts that have never been found true by a jury or admitted by the defendant as part of a guilty plea.

So what does this mean for criminal defendants? It means that they should contest many if not most of the facts “legally essential” to their sentences that are not subsumed within their current “conviction(s)” (i.e., within the facts admitted as part of a current guilty plea or the facts actually found by the jury (beyond a reasonable doubt) in convicting the defendant of his current offense). These facts include many types of fact that courts have labeled “recidivism,” e.g., the numerosity and increasing seriousness of the defendant’s prior offenses, whether the defendant served a prior prison term, whether the defendant was on probation or parole at the time of the current offense, and the adequacy of the defendant’s performance on probation or parole.<sup>69</sup> Since all of these sentencing factors involve questions of fact that were not resolved by a prior jury, they do not fall within *Apprendi*’s narrow “fact of a prior conviction” exception.

Defendants should also challenge juvenile adjudications alleged as strikes or “recidivist” priors on the ground that juveniles have no right to a jury trial, so prior juvenile adjudications should not fall within “the fact of a prior conviction” exception to

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<sup>68</sup> See *Apprendi*, 530 U.S. at pp. 488, 496; *Jones*, *supra*, 526 U.S. at p. 249; and *Shepard*, *supra*, 125 S.Ct. at pp. 1262-1263.

<sup>69</sup> See Cal.Rules of Court, rule 4.421(b).

*Apprendi*.<sup>70</sup> And they should challenge the continuing validity of *People v. Wiley* (1995) 9 Cal.4th 580, 583-585, which held that there is no right to a jury trial on whether prior serious felonies were brought and tried separately within the meaning of Penal Code section 667, subdivision (a), and *People v. Kelii, supra*, 21 Cal.4th 452, 455-459, which held that there is no right to a jury trial on facts necessary to render a prior felony conviction “serious” (e.g., whether a burglary prior involved the burglary of a residence). *Wiley* and *Kelii* are both based on the premise – since invalidated by *JABS* – that “defendants have ‘no constitutional right to have a jury determine factual issues relating to prior convictions alleged for purposes of sentence enhancement.’”<sup>71</sup> As explained above, this premise is incorrect under *JABS*, because the “fact of a prior conviction” exception to *JABS* is limited to facts that were found by a jury or admitted by the defendant in the prior case; it does not include facts (such as those at issue in *Wiley* and *Kelii*) that were not adjudicated in a prior case.<sup>72</sup>

IV. If a Court Commits *Blakely* Error by Using a Fact (Other than the Fact of a Prior Conviction) That Was Not Found by the Jury, to Increase the Defendant’s Sentence, Double Jeopardy Should Preclude Remand for Retrial of That Fact If it Was Not Supported by Substantial Evidence.

In *An Approach to Blakely, supra*, the author urged defense attorneys to use *Blakely* to “challenge *Monge v. California, supra* [, because] [i]f *Almendarez-Torres* ever falls, so should *Monge*.”<sup>73</sup> That article also noted the need to “see the ‘good’ in *Monge* [because], as that opinion illustrates, our double-jeopardy rights and jury-trial rights are joined at the hip. So *Monge* increases our right to double-jeopardy protection to the same

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<sup>70</sup> *United States v. Tighe* (9<sup>th</sup> Cir. 2001) 266 F.3d 1187. And double jeopardy principles should bar retrial of the “truth” of a prior juvenile adjudication in the current case, even if that trial is conducted before a jury under the beyond-a-reasonable-doubt standard, because “[c]learly, the Fifth Amendment ban against double jeopardy applies to juvenile delinquency proceedings.” (*In re Johnny R.* (1995) 33 Cal.App.4th 1579, 1581, citing *Richard M. v. Superior Court* (1971) 4 Cal.3d 370, 375; and see discussion at pp. 30-31, *post.*)

<sup>71</sup> *Wiley, supra*, 9 Cal.4th at p. 589; *Kelii, supra*, 21 Cal.4th at p. 455.

<sup>72</sup> See footnote 68, *ante*.

<sup>73</sup> *An Approach to Blakely*, p. 34.

extent that *Apprendi* and *Blakely* have increased the number of facts that are subject to our right to a jury trial.”<sup>74</sup> What the author was trying to say with these suggestions is that our view of *Monge I* and *II*, like our view of *Almendarez-Torres*, must be reconsidered in light of *Jones*, *Apprendi* and *Blakely*. This section of this article will explain in greater detail how *JABS* have expanded our double-jeopardy rights, by narrowing the scope of facts to which *Monge I* and *II* apply.

It is pretty easy to see why *Monge v. California* will have to be revisited, if *Almendarez-Torres* ever “falls.” *Monge II* simply holds that Double Jeopardy does not apply to noncapital sentencing proceedings.<sup>75</sup> It was unnecessary for the Court to address whether the fact at issue in that case (i.e., a “strike prior” allegation) should be considered an element of the current offense for which Monge had been convicted, rather than a “sentencing proceeding,” because: (1) Monge did not make this argument; and (2) such an argument would have been at odds with *Almendarez-Torres*, which the Court had just recently decided.<sup>76</sup> Of course, if *Almendarez-Torres* is overturned in the wake of *JABS*, and the “fact of a prior conviction” exception to *JABS* is eliminated, the strike prior at issue in *Monge* would be an element of the offense for which Monge had been convicted (i.e., because it would increase the maximum sentence that could otherwise be imposed for that offense). If this ever occurred, the assumption in *Monge v. California* that the proceeding constitutionally required to establish the truth of the alleged strike prior is merely a “sentencing proceeding” would obviously be incorrect. Rather, under *JABS*, a jury trial would be required to find this fact true beyond a reasonable doubt. And, as Justice Scalia explained in his dissenting opinion in *Monge*,<sup>77</sup> and as the Supreme Court

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<sup>74</sup> *Ibid.*

<sup>75</sup> See *Monge v. California*, 524 U.S. at p. 724.

<sup>76</sup> *Monge v. California*, 524 U.S. at p. 728; and see *id.* at pp. 737-741 (dis. opn. of Scalia, J.).

<sup>77</sup> *Monge v. California, supra*, 524 U.S. at p. 738 (dis. opn. of Scalia, J.): “The fundamental distinction between facts that are *elements* of a criminal offense and facts that go only to the *sentence* provides the foundation for our entire Double Jeopardy jurisprudence – including the ‘same elements’ test for determining whether two ‘offences’ are ‘the same,’ see *Blockburger v. United States*[, *supra*], and the rule (at issue here) that the Clause protects an expectation of finality with respect to offences but not sentences. That same distinction also delimits the boundaries of other important

has reiterated since *Apprendi* was decided,<sup>78</sup> the Double Jeopardy Clause applies to the elements of crime to which the jury-trial right attaches.

This is what *An Approach to Blakely* meant by “seeing the good in *Monge*.” If anything, *Monge v. California* supports a claim that *JABS* increase the number of facts subject to the Double Jeopardy Clause to the same extent that *JABS* have increased the number of facts that are subject to our right to a jury trial.<sup>79</sup>

Unfortunately, this logical and necessary extension of *JABS* to the double-jeopardy context seems to have been overlooked by many California appellate justices and criminal defense attorneys. The author has read few “*Blakely*” arguments in which counsel has contended that retrial would be barred by Double Jeopardy. He has also read recent unpublished Court of Appeal opinions in which the court granted relief on a “*Blakely*” issue, remanded the case for “retrial” of the “*Blakely*-violating” aggravating fact(s), and cited *Monge v. California* as support for why this remedy does not violate Double Jeopardy.

Of course, in many cases in which reversible *Blakely* error has occurred, it may well *not* be a violation of Double Jeopardy to remand the case for “retrial” of the aggravating facts that violate *Blakely*. However, even in cases in which such a retrial would not be barred by Double Jeopardy, *Monge* is not the reason *why* Double Jeopardy would not be implicated. Rather, *Monge* would be inapposite to the question of whether Double Jeopardy applies to such a retrial, because such a retrial would not be happening in the first place if the Court of Appeal had not found the aggravating fact to be one as to which the defendant is entitled to a jury trial under *Blakely*. To say that *Blakely* applies to a fact used to increase a defendant’s sentence is to say that *Monge* does not. Since *JABS* apply to all facts “other than the fact of a prior conviction” that are legally essential to the

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constitutional rights, like the Sixth Amendment right to a jury trial and the right to proof beyond a reasonable doubt.” (Emphasis in original.)

<sup>78</sup> See *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 111, plurality opn. of Scalia, J. [“We can think of no principled reason to distinguish, in this context, between what constitutes an offense for purposes of the Sixth Amendment’s jury-trial guarantee and what constitutes an ‘offence’ for purposes of the Fifth Amendment’s Double Jeopardy Clause”].

<sup>79</sup> *An Approach to Blakely*, p. 34.

defendant's sentence, and render such facts "elements" rather than "sentencing factors,"<sup>80</sup> the reach of *Monge* in the wake of *JABS* (like that of *Almendarez-Torres*) is limited to "the fact of a prior conviction." Thus, whether Double Jeopardy precludes retrial of a fact as to which the defendant has the right to a jury trial under *JABS* will depend on the applicability, not of *Monge*, but of *Burks*.

Remember, *Burks* holds that Double Jeopardy precludes retrial of an offense of conviction reversed on appeal for insufficient evidence (i.e., because a determination that the evidence is legally insufficient to support conviction is tantamount to a holding that the defendant was legally entitled to an acquittal).<sup>81</sup> Although *Monge II* held that *Burks* does not apply to sentencing proceedings,<sup>82</sup> this holding (as previously explained) does not apply to facts that violate *Apprendi/Blakely* (i.e., because such facts are, by definition, *not* mere "sentencing" factors, but more analogous to elements of a greater offense than that for which the defendant has been convicted.)<sup>83</sup> Thus, the question remains: does *Burks* preclude retrial of a fact that violates *Apprendi/Blakely*? For the answer to this question, we must look to *Burks* itself and ask: was there sufficient evidence adduced at trial to support the fact? If not, the defendant is legally entitled to a judgment of acquittal as to the fact, and retrial should be barred by Double Jeopardy.<sup>84</sup> On the other hand, if the problem with the aggravating fact is only that it was not resolved by the jury (or admitted by the defendant) – and does not involve a want of evidence, then the error would be more analogous to instructional error as to which reversal would not be tantamount to a finding of "not guilty" and therefore would not implicate Double Jeopardy.<sup>85</sup>

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<sup>80</sup> *Apprendi, supra*, 530 U.S. at pp. 476-477, 483, fn. 10 [treating a sentence enhancement as the functional equivalent of a crime]; *id.* at pp. 490-495 & fn. 19 [treating enhanced crime as the functional equivalent of a greater crime]; *Blakely, supra*, 124 S.Ct. at pp. 2536-2537; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.)

<sup>81</sup> *Id.*, 437 U.S. at pp. 16-18.

<sup>82</sup> *Monge v. California, supra*, 524 U.S. 721, 729.

<sup>83</sup> See footnote 80, *ante*.

<sup>84</sup> See *Burks, supra*, 437 U.S. at pp. 16-18; *Ashe v. Swenson, supra*, 396 U.S. 436, 443 [Double Jeopardy includes the doctrine of collateral estoppel].

<sup>85</sup> See footnote 24, *ante*.

Although many attorneys and appellate Justices apparently haven't grasped this double-jeopardy-expanding byproduct of *Jones*, *Apprendi* and *Blakely*, the California Supreme Court has. In *People v. Seel* (2004) 34 Cal.4th 535, the court held that federal Double Jeopardy protection precludes retrial of a premeditation allegation attached to an attempted murder conviction (Pen. Code § 664, subd. (a)) when an appellate court finds that there was insufficient evidence to support the allegation. Distinguishing *People v. Bright*, *supra*, 12 Cal.4th 652,<sup>86</sup> and disapproving both *Bright* and *People v. Hernandez* (1998) 19 Cal.4th 835<sup>87</sup> in so far as those cases conflict with intervening high court decisions,<sup>88</sup> the court in *Seel* held that *Monge I* and *II* both had to be limited to prior-conviction allegations in light of the United States Supreme Court's subsequent opinion in *Apprendi*.<sup>89</sup> Therefore, the question of whether a fact as to which *Apprendi* entitled the defendant to a jury trial could be retried following a reversal on appeal based on insufficiency of the evidence was controlled by *Burks* rather than *Monge*; and *Burks* compelled the conclusion that Double Jeopardy bars retrial.<sup>90</sup>

*Seel* does not disclose how broadly the California Supreme Court would interpret *Apprendi*'s "fact of a prior conviction" exception. But the court's opinion in *Seel* suggests that that exception (and therefore *Monge*) would apply to "prior conviction

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<sup>86</sup> In *People v. Bright*, *supra*, the court had held that double jeopardy did not bar retrial of an attempted-murder-premeditation allegation as to which a mistrial had been declared, because attempted-murder-premeditation provisions of Penal Code section 664 constitute a penalty provision, rather than creating a greater degree of attempted murder. (*Id.*, 12 Cal.4th at pp. 656-657.)

<sup>87</sup> In *People v. Hernandez*, *supra*, the court held that a trial court's decision to impose an enhancement under Penal Code section 667, subdivision (a), after previously finding that there was insufficient evidence to find that the current offense was a serious felony, did not violate the federal prohibition of double jeopardy because the determination of whether the conduct underlying a current offense of conviction renders it a serious felony is a noncapital sentencing determination to which the state and federal prohibitions against double jeopardy did not apply. (*Id.*, 19 Cal.4th at pp. 837-838.)

<sup>88</sup> See *People v. Seel*, *supra*, 34 Cal.4th at p. 550 and fn. 6.

<sup>89</sup> *People v. Seel*, *supra*, 34 Cal.4th at pp. 540-548.

<sup>90</sup> *Seel*, 34 Cal.4th at pp. 548-550.

allegations.”<sup>91</sup> This suggestion is not very revealing, however, because, as discussed previously and elaborated upon further in the next section, the breadth of a “prior-conviction” exception to *JABS* is a function of how broadly you define “prior conviction,” and this, in turn, depends on the type of evidence that may be considered in order to define a prior conviction.

But *Seel* confirms the contention in *An Approach to Blakely* that *Apprendi* and *Blakely* have increased our right to double-jeopardy protection to the same extent that they have increased the number of facts that are subject to our right to a jury trial. So, it is important in scrutinizing a sentence for *Apprendi-Blakely* error to also assess the sufficiency of the evidence introduced at trial to support any fact used to increase the defendant’s sentence. If there is both “*Blakely*” error and insufficient evidence to support a *Blakely*-violating fact, then remand for retrial of the fact should be barred by the Double Jeopardy Clause, and the required remedy for the error should be modification of the defendant’s sentence to one unenhanced by the insufficiently-proven fact.

V. *Guerrero* Must Be Revisited: *JABS* Make Clear That the Only Evidence That May Be Used to Prove Whether a Prior Conviction Is a “Strike” or Other “Qualifying” Prior Are Those Parts of the Record of the Prior That Reflect the Jury’s Actual Findings or (If the Prior Resulted from a Guilty Plea) the Facts Actually Admitted by the Defendant When He Entered His Plea.

Summarizing the last three sections of this article, *JABS*: (1) increase the constitutional protections applicable to prior-conviction allegations by delimiting the facts that constitutionally compose a “conviction;” (2) require a very narrow and literal interpretation of *Apprendi*’s “fact of a prior conviction” exception (i.e., because a more indefinite “recidivism” exception would ill-serve the policy underlying the *Apprendi* rule, if not effectively swallow the rule); and (3) increase the protection of the Double Jeopardy Clause to the same extent that they increase the number of facts that are subject to our right to a jury trial. Building on these prior sections, this section will show how *JABS* and double-jeopardy’s *Blockburger* test delimit the types of evidence that may be used to determine what the precise “facts of a prior conviction” are, and require that the California Supreme Court’s opinion in *People v. Guerrero, supra*, be revisited.<sup>92</sup>

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<sup>91</sup> *Seel*, 34 Cal.4th at p. 549.

<sup>92</sup> The author previously posited that *Guerrero* could be challenged on the basis of *JABS* in the two prior CCAP articles on which this article is following up. (See footnote

*People v. Guerrero* has, since 1988, been the lead case in California on the scope of evidence that may be considered to ascertain the facts that make up a prior conviction, and to determine whether that prior conviction is for an offense that qualifies as a prior conviction for which the defendant's sentence may (or must) be enhanced under a particular "anti-recidivism" statute (e.g., the Three Strikes Law). In *Guerrero*, the defendant was charged with residential burglary, and the information further alleged that he had suffered two prior residential-burglary convictions, both of which were serious felonies under Penal Code section 1192.7. The prior judgments of conviction alone did not disclose whether the two prior convictions were "serious" within the meaning of section 1192.7 (and thus could be used to increase the defendant's sentence under Penal Code section 667), because the nature of the building (i.e., whether it was a residence) was not an element of the crime when Guerrero committed the prior offenses. Therefore, the trial court had to consider evidence beyond the necessarily adjudicated elements in order to sustain the "serious felony" allegations.<sup>93</sup>

On appeal, the Supreme Court ratified this procedure, saying that, "in determining the truth of a prior-conviction allegation, the trier of fact may look to the entire record of the conviction."<sup>94</sup> The court explained that this rule furthered the intent of the electorate when it enacted Proposition 8 in 1982 and established an enhancement for "burglary of a residence" - a term that referred to conduct, not a specific crime.<sup>95</sup> The court rejected Guerrero's argument that this rule was unfair because it would allow enhancements to be predicated on facts that had no particular significance at the time of the prior conviction.<sup>96</sup> The court also rejected the previous rule that had recently been articulated by the same court (but with a considerably different make-up of Justices) in *People v. Alfaro* (1986) 42 Cal.3d 627,<sup>97</sup> holding that that rule did not follow from relevant precedent.<sup>98</sup> Thus, the

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1, *ante.*) This section will explain in greater detail why *Guerrero* violates Double Jeopardy and the reasoning underpinning *JABS*.

<sup>93</sup> *Id.*, 44 Cal.3d at pp. 345-346.

<sup>94</sup> *Id.* at pp. 345, 352, 355.

<sup>95</sup> *Id.* at pp. 346-348, 355.

<sup>96</sup> *Id.* at pp. 355-356.

<sup>97</sup> In *Alfaro, supra*, the court had adhered to dictum in its previous opinion in *People v. Jackson* (1985) 37 Cal.3d 826, and held that the record of conviction that could

trial court could properly determine from the records of conviction, each of which included an accusatory pleading charging residential burglary and the defendant's no-contest plea, that the defendant's prior convictions were for serious felonies.<sup>99</sup>

There are many problems with the reasoning of *Guerrero*, a number of which are identified in Justice Broussard's very persuasive dissent.<sup>100</sup> But the basic problem with *Guerrero*, especially in light of *JABS*, is that it blurs the nature of the issue being litigated – the object of the fact-finding process for which the “entire record of conviction” is to be consulted. Exactly what *is* being litigated when the state seeks to enhance a defendant's sentence with a prior-conviction allegation? Remember, *Guerrero* was not being tried for, nor was his sentence being increased as a result of, his prior “crime” or “conduct.” He was being tried for a prior, serious-felony “conviction” alleged under Penal Code section 667, subdivision (a).<sup>101</sup> Penal Code section 1025, subdivision (b), defines the question raised by such an allegation as “whether the defendant has *suffered* the prior conviction.”<sup>102</sup> And Penal Code section 1158 defines the subject of such a trial as “*the*

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be used to prove a prior-conviction allegation was limited to the “judgment and matters necessarily adjudicated therein.” (*Alfaro, supra*, 42 Cal.3d at pp. 629, 634-636.)

<sup>98</sup> *Guerrero, supra*, at pp. 348-355.

<sup>99</sup> *Id.* at pp. 345, 356.

<sup>100</sup> *Id.* at pp. 357-361, Broussard, J., dissenting.

<sup>101</sup> See *id.*: “[A]ny person convicted of a serious felony who *previously has been convicted* of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such *prior conviction* on charges brought and tried separately.” (Emphasis added.)

<sup>102</sup> *Id.*, emphasis added. It would seem to go without saying that a “conviction” (and consequent sentence) is something a defendant “suffers,” while criminal “conduct” is what a crime's victim “suffers.”

*fact of a previous conviction.*”<sup>103</sup> Sound familiar?<sup>104</sup>

However we define a “conviction,” it clearly is not, as *Guerrero* and its progeny<sup>105</sup> suggest, “conduct.” Rather, it is a *decision* – a group of *findings* (or admissions) – *about* alleged conduct. This is clear not only from our common understanding of the term,<sup>106</sup> but also from established legal precedent in the prior-conviction-enhancement context.<sup>107</sup>

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<sup>103</sup> *Id.*, emphasis added.

<sup>104</sup> In *Guerrero*, the court did not address, or try to square its holding with, the “conviction” language of Penal Code sections 667, 1025 and 1158. But one might well question whether *Guerrero*’s rule allowing courts to substitute the “substance of a prior conviction” for the “fact of a previous conviction” violates the express language and legislative intent of Penal Code sections 667, 1025 and 1158. The court’s subsequent opinion in *Kelii*, *supra*, suggests that a legislative-intent-based attack on *Guerrero* would not have been well received (at least not by the Justices who ascribed to the majority opinion in *Kelii*).

<sup>105</sup> See, e.g., *People v. Myers*, *supra*, 5 Cal.4th at p. 1195 [“the trier of fact may consider the entire record of the proceedings leading to the imposition of judgment on the prior conviction to determine whether the offense of which the defendant has been convicted *involved conduct* which satisfies all of the elements of the comparable California serious felony offense.”] (Emphasis added).

<sup>106</sup> See discussion in section II, *ante*; and see *An Approach to Blakely*, pp. 12-13, 26-33.

<sup>107</sup> See *People v. Williams* (1996) 49 Cal.App.4th 1632, 1637 [“Generally ..., where the existence of a prior conviction triggers increased punishments, courts interpret ‘conviction’ to mean the factual ascertainment of guilt by verdict or plea.”]; and see *People v. Rosbury* (1997) 15 Cal.4th 206, 210 [“when guilt is established, either by plea or verdict, the defendant stands convicted and thereafter has a prior conviction”], quoting *Williams*, *supra*, at p. 1638. Coincidentally, this is also when jeopardy terminates for “an offense.” (See *North Carolina v. Pearce*, *supra*, 395 U.S. 711, 717 [Double Jeopardy “protects against a second prosecution for the same offense after conviction”]; and see *People v. Scott* (1997) 15 Cal.4th 1188, 1201 [“The court’s acceptance of a guilty plea is the equivalent of a conviction and bars a later prosecution for the same offense.”].)

And, as previously explained, *JABS* instruct that a “conviction” consists of the facts for which the defendant may constitutionally be punished, and these are limited to the facts actually *adjudicated*, viz., the facts found true by the jury or admitted by the defendant.<sup>108</sup> *Guerrero* is inconsistent with this teaching, because it suggests that the entire record of conviction may be consulted in order to determine – not the mere “fact” of a prior conviction (i.e., the facts actually adjudicated in the prior judgment of conviction) – but the conduct underlying it, viz., “the substance of a prior conviction,” viz., “the facts of the offense actually committed.”<sup>109</sup> In this way, *Guerrero* (and the cases that follow it) allow a new court – the court in which the prior-conviction allegation is being litigated under Penal Code section 1158 – to find the prior offense to be something different from, and *greater than*, that which it was actually found to be in the original prosecution.<sup>110</sup> That this violates the constitutional rationale underpinning of *JABS* was recently made clear by the United States Supreme Court’s opinion in *Shepard*, *supra*.<sup>111</sup>

Of course, *Guerrero* is somewhat distinguishable from *Shepard*. And, because the record of conviction used to prove the prior convictions in *Guerrero* consisted only of the charging document and the defendant’s no-contest plea, it could be argued that the specific holding in *Guerrero* does not violate the policy of *JABS*, because it involved evidence that in many cases can fairly be said to encompass the judgment of conviction,<sup>112</sup>

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<sup>108</sup> See *Blakely, supra*, 124 S.Ct. at p. 2537; and discussion in section II, *ante*.

<sup>109</sup> *Id.*, 44 Cal.3d at p. 352; and see *People v. Myers, supra*, 5 Cal.4th at p. 1195.

<sup>110</sup> See *Guerrero, supra*, 44 Cal.3d at pp. 357-360 (dis. opn. of Broussard, J.): “This is precisely the holding in *Alfaro* -- that proof is limited to those matters which were *adjudicated* in the prior proceeding. The purpose of the majority opinion [in *Guerrero*] is to permit the People to go behind the adjudicated elements and use the prior record to prove factual issues which were not adjudicated in that proceeding.” (Emphasis in original.)

<sup>111</sup> See *Shepard, supra*, 125 S.Ct. at pp. 1262-1263; and see discussion at pp. 13-15, *ante*; “*Shepard v. United States: New Supreme Court Opinion with Negative Implications for Almendarez-Torres & Guerrero*” (CCAP © 2005).

<sup>112</sup> See *People v. Chadd, supra*, 28 Cal.3d at p. 748 [a guilty plea is “a judicial admission of every element of the offense charged”].

and evidence that the United States Supreme Court in *Shepard* held to be admissible to prove a prior conviction.<sup>113</sup> However, this assertion would be incorrect: *Guerrero* violates *JABS*, not simply because of the *type* of evidence *Guerrero* allows to be considered to prove a prior conviction, but because of the *scope* of facts it allows to be relitigated to prove the *conduct* underlying a prior conviction. *Guerrero* violates *JABS*, because it allows the trial court to increase the defendant's sentence based on facts not subsumed within the specific facts *actually adjudicated* in the prior "conviction." *Shepard* makes clear that this sort of relitigation of disputed facts is not allowed.<sup>114</sup> Thus, *Shepard*, like *Alfaro*, seems to hold that "proof of the prior conviction [should be] limited to matters which fall within the doctrine of collateral estoppel and thus cannot be controverted."<sup>115</sup>

And the impropriety of the holding in *Guerrero* in light of *JABS* is even clearer when considering the way the California Supreme Court has, in subsequent cases, extended the "record of conviction" to include far more troubling types of evidence – evidence that was never even before the original trier of fact or the court that accepted the defendant's guilty plea in the prior case.<sup>116</sup> The use of this evidence to prove "the fact of a prior conviction" unquestionably is not encompassed within the evidence that *Shepard* says may be used to prove such a fact, viz.: the prior conviction's statutory elements, charging document, and jury instructions (where the prior conviction is the product of a

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<sup>113</sup> *Shepard*, 125 S.Ct. at p. 1263

<sup>114</sup> See *Shepard, supra*, at pp. 1262-1263 [rejecting the idea that the sentencing judge could "make a disputed finding of fact about what the defendant and state judge must have understood as the factual basis of the prior plea ..."]; *id.* at p. 1263 [suggesting that the nature of the inquiry should be to ascertain "the factual basis for the plea [that] was confirmed by the defendant"] (emphasis added).

<sup>115</sup> *Alfaro, supra*, 42 Cal.3d at pp. 632-636; and see *Shepard, supra*, 125 S.Ct. at p. 1262 [noting "the *conclusive significance* of a prior judicial record"] (emphasis added).

<sup>116</sup> See, e.g., *People v. Reed, supra*, 13 Cal.4th 217 [allowing preliminary hearing transcripts to be used to prove the facts underlying a prior conviction]; and *People v. Woodell* (1998) 17 Cal.4th 448 [allowing an appellate opinion regarding a prior conviction to establish its underlying facts].

jury verdict),<sup>117</sup> or “the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information” (where the prior conviction is the product of a guilty plea).<sup>118</sup>

Although *Shepard* strongly supports a claim that *Alfaro* is correct and *Guerrero* is wrong about the evidence that constitutionally may be used to define “the fact of a prior conviction,” *Shepard* does not clearly explain *why* a rule as broad as that established in *Guerrero* rule would necessarily be unconstitutional. After all, *Guerrero* does not say who the trier of fact, or what the standard of proof, must be when litigating a prior-conviction allegation. It simply defines the type of evidence and scope of facts that can be considered in determining the truth of a prior-conviction allegation. Why would the *Guerrero* rule be unconstitutional under *JABS* if, for example, the *current* trier of fact on the prior-conviction allegation is a jury, and the standard of proof for establishing each fact essential to the prior-conviction allegation is the “beyond a reasonable doubt” standard? The answer, as explained below (and as noted in *People v. Alfaro, supra*, and *People v. Jackson, supra*),<sup>119</sup> is that it would violate the Double Jeopardy Clause.

The reason the evidence used to prove a prior-conviction allegation must be limited to the facts actually included in the prior judgment of conviction (usually the least adjudicated elements of the offense of the prior conviction) is that to relitigate “the substance” of these facts (i.e., the conduct underlying the prior conviction) would constitute a second trial for the “same offense” under the *Blockburger* test. In light of *JABS*’ clarification of what constitutes a “conviction” for which a defendant may constitutionally be punished (i.e., the facts actually found true by the jury or admitted by the defendant),<sup>120</sup> it is now clear that *Guerrero* runs afoul of the *Blockburger* test, because it allows the state to re-characterize an offense that is the subject of a prior conviction as

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<sup>117</sup> *Shepard, supra*, at p. 1257, citing *Taylor v. U.S., supra*, 495 U.S. 575.

<sup>118</sup> *Shepard, supra*, 125 S.Ct. at pp. 1263.

<sup>119</sup> See *Alfaro, supra*, 42 Cal.3d at pp. 632-636; *Jackson, supra*, 37 Cal.3d at p. 836 [“A contrary holding, permitting the People to litigate the circumstances of a crime committed years in the past, would raise serious problems akin to double jeopardy and denial of speedy trial.”].

<sup>120</sup> See footnote 108, *ante*.

something greater than it was actually found (or admitted by the defendant) to be when it was originally prosecuted to conviction.<sup>121</sup>

As *JABS* make clear (and as the California Supreme Court has grudgingly recognized), facts legally essential to a defendant's sentence, but not encompassed within the elements of the offense for which the defendant has been convicted, are analogous to elements of a greater offense than that for which the defendant has been convicted.<sup>122</sup> Also, as explained previously, there is no principled basis for treating the elements of prior convictions any differently from those of current convictions for purposes of *JABS*.<sup>123</sup> Thus, just as application of the *Blockburger* test implicates Double Jeopardy and prevents the state from prosecuting or punishing a defendant for a greater offense that includes all elements of an offense for which he has already been prosecuted and punished, it should also preclude the state from re-trying a prior conviction for the purpose of expanding on its elements so as to allow the state to punish the defendant more harshly on the basis of the prior conviction. In the latter case, the defendant is not truly having his sentence increased solely on the basis of a *prior* "conviction." Instead, where the anti-recidivism statute at issue requires facts additional to those actually encompassed within the prior judgment of "conviction," the process of litigating the prior in order to obtain the *JABS*-required additional findings is no longer a mere "sentencing proceeding," but amounts to prosecuting the prior anew, i.e., as a greater offense that wholly includes the elements of the prior. This clearly violates *Blockburger* and the Double Jeopardy Clause.

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<sup>121</sup> To date, the California Supreme Court has not decided the extent (if any) to which *Guerrero* must be limited so as to address the double-jeopardy concerns that have arisen in the wake of *JABS*. However, the court apparently will have to address that question in *People v. Warner* (S126233), a pending case in which the issue on review is: "Does defendant's prior conviction of sexual assault of a child under Nebraska Revised Statutes, section 28-320.01 qualify as a serious felony for sentencing purposes in California although the Nebraska statute does not include all of the elements of any felony under California law amounting to a 'lewd and lascivious act on a child under the age of 14 years' within the meaning of Penal Code section 1192.7, subdivision (c)(6)?" And it is possible the court will have to address *Guerrero*'s continuing viability in the wake of *JABS* in *People v. McGee*, *supra*, as well. (See footnote 67, *ante*.)

<sup>122</sup> See footnote 80, *ante*.

<sup>123</sup> See pp. 13-15, *ante*.

Remember, as discussed in section IV, *ante*, *Monge* must be read in light of *JABS*. While *Monge I* and *II* hold that Double Jeopardy does not apply to “sentencing proceedings,” it is now clear that, when *JABS* requires that a fact be tried to a jury under the “beyond a reasonable doubt” standard, that trial cannot, for double jeopardy purposes, be considered a mere “sentencing proceeding.” Rather, it is a new *trial*, and a new *prosecution*. And it is a trial whose purpose is to increase the punishability of an offense that, according to the *Blockburger* test, is the same one for which the defendant has already been prosecuted and punished. Thus, it is precluded by both the multiple-prosecution and multiple-punishment protections of the Double Jeopardy Clause. Since *Guerrero* allows the trial of a prior-conviction allegation to include facts beyond the narrow range of elements encompassed within the “fact of a prior conviction,” it violates *JABS* and Double Jeopardy.<sup>124</sup>

The court in *Guerrero* posited that the rule it announced would not violate double jeopardy principles: “To allow the trier to look to the record of the conviction – but no further – is ... fair: it effectively bars the prosecution from relitigating the circumstances of a crime committed years ago thereby threatening the defendant with harm akin to double jeopardy and denial of a speedy trial.”<sup>125</sup> However, this statement is self-serving and conclusionary. It does not discuss or apply the *Blockburger* test. And it has been proven untrue: “relitigating the circumstances of a crime committed years ago” is precisely what *Guerrero* and its progeny allow prosecutors to do. Although the decision places additional evidentiary limits on prosecutors trying to prove that a prior felony conviction is “serious” or “violent,” it clearly allows prosecutors to argue to a new trier of fact that the defendant committed conduct that constitutes a greater crime than the one of which he was previously adjudicated guilty. This is a classic example of double jeopardy

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<sup>124</sup> An argument along these lines drafted by the author at roughly the same time he wrote this article is available on the SearchLight page of CCAP’s website. CCAP panel attorney Jerry Wallingford has also developed an argument along these lines. His argument (which is also available on the SearchLight page of CCAP’s website) explains: (1) that a prior conviction that enhances the sentence for a current crime under an anti-recidivism statute is analogous to an element of a greater offense that includes as an additional element the defendant’s status as a particular type of felon; and (2) that *Guerrero*’s rule that allows this status to be changed to something greater than it was actually determined to be in the prior case violates the Double Jeopardy Clause. Ironic support for this argument can be found in *Monge I, supra*, 16 Cal.4th at pp. 838-839.

<sup>125</sup> *Id.*, 44 Cal.3d at p. 355.

and (as previously explained) it clearly violates the *Blockburger* test.<sup>126</sup>

In sum, defense counsel should challenge the continuing validity of *Guerrero* and its progeny in the wake of *JABS*. And, on behalf of their clients, defense counsel should enter pleas of “once in jeopardy” to prior-conviction allegations, when those allegations will have to be proven with evidence that goes beyond the actual facts of conviction (i.e., the least adjudicated elements of the offense and any other facts that were actually or necessarily encompassed within the jury’s verdict or the defendant’s guilty plea in the prior case). And defense counsel should object to any evidence other than that allowed by *Shepard*<sup>127</sup> that the prosecution proposes to introduce to prove a prior-conviction

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<sup>126</sup> See pp. 2-5, 34-36, *ante*. It is also important to note that the *Guerrero*’s court’s promise that the evidentiary rule it was creating would be “fair” to defendants has proven equally difficult to keep. The *Guerrero* rule certainly did not seem to protect the rights of the defendant in *People v. Reed, supra*, where the court used the rule to reject the defendant’s hearsay and confrontation-clause objections to the use of preliminary-hearing testimony of a witness whose unavailability at trial of the prior-conviction allegation had not been established. (*Reed, supra*, 13 Cal.4th at pp. 224-229 [holding that *Guerrero* made the witness unavailable as a matter of law].) In *Reed*, the court’s only answer to the unfairness caused by this application of *Guerrero* was to leave it for another day, in a case where the defendant (unlike *Reed*) seeks to go outside the record of conviction and present live testimony in defending against a prior-conviction allegation. (*Reed, supra*, at p. 229.) By leaving this issue for another day, the court in *Reed* tacitly acknowledged the big problem with the *Guerrero* rule that Justice Broussard foresaw in his dissent in that case, viz.: how do you square the *Guerrero* rule with both double jeopardy principles and the defendant’s right to present a defense to a disputed prior-conviction allegation? (See *id.*, 44 Cal.3d at pp. 357-360 (dis. opn. of Broussard, J).) This question is answered the same fair and logical way by both *Alfaro* and *Shepard*: litigation of the prior-conviction allegation must be limited to matters necessarily adjudicated in the prior case – “to matters which fall within the doctrine of collateral estoppel and thus cannot be controverted.” (*Alfaro, supra*, 42 Cal.3d at pp. 632-636; and see *Shepard, supra*, 125 S.Ct. at pp. 1262-1263.)

<sup>127</sup> Again, the evidence that *Shepard* allows the government to use to prove a prior-conviction allegation that is legally essential to the defendant’s sentence is limited to those portions of the record of the prior conviction that establish the facts that the jury in the prior case actually or necessarily found in convicting the defendant (viz., the prior’s statutory elements, charging documents, and jury instructions) or the facts that the

allegation, on the ground that reliance on such evidence would redefine the prior as an offense greater than it was originally adjudged to be, in violation of Double Jeopardy and the policy underlying *JABS*.<sup>128</sup>

#### VI. *JABS*' Implications Vis-A-Vis Double Jeopardy's Preclusion of Multiple Convictions for the Same Offense.

The last issue that this article will discuss concerns what the author refers to as the “*Pearson-Ortega*” rule, viz., the rule that a defendant may not be convicted of two offenses when all the elements of one offense are included in the other.<sup>129</sup> The author posits that *JABS* has had a beneficial impact on this rule as well, because this rule is based on (and, in some cases, may be compelled by) principles of double jeopardy, and (as previously explained) *JABS* increase our right to double-jeopardy protection to the same extent that they have increased the number of facts that are subject to our right to a jury trial.

It is important to remember that the *Pearson-Ortega* rule precludes not just multiple punishment or multiple prosecutions, but multiple *convictions*, so staying the sentence for one of the convictions under Penal Code section 654 (or running the

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defendant actually or necessarily admitted in pleading guilty in the prior case (viz., “the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or ... some comparable judicial record of this information”). (*Shepard, supra*, 125 S.Ct. at pp. 1262-1263.)

<sup>128</sup> Of course, if trial counsel has not preserved these double-jeopardy issues, appellate counsel should argue that they should be addressed on the grounds of ineffective assistance of counsel. (See *People v. Belcher* (1974) 11 Cal.3d 91, 96 [the failure to raise a meritorious defense of double jeopardy is ineffective assistance of counsel]; *People v. Scott* (1997) 15 Cal.4th 1188, 1201 [appellate court must address the merits of a double jeopardy claim, even if not raised below, to assess the effectiveness of counsel]; *People v. Marshall* (1995) 13 Cal.4th 799, 824, fn. 1.)

<sup>129</sup> *People v. Pearson* (1986) 42 Cal.3d 351, 355 [“Although the reason for the rule is unclear, this court has long held that multiple convictions may *not* be based on necessarily included offenses.”] emphasis in original; *People v. Ortega* (1998) 19 Cal.4th 686, 692.

sentences concurrently) is not sufficient. Rather, when the defendant has more than one conviction based on the same offense (i.e., when the elements of one of the two offenses of conviction wholly include the elements of the other),<sup>130</sup> the remedy is to reverse the lesser conviction.<sup>131</sup>

In *People v. Pearson, supra*, the court stated that the reason for the rule against multiple convictions for the same offense was “unclear.”<sup>132</sup> However, subsequent cases explain that the rule is closely-related to, and can required by, double jeopardy principles, application of which hinges on the same test as the *Pearson-Ortega* test for what constitutes “the same offense” – viz., the *Blockburger* test.<sup>133</sup> In *Rutledge v. United States* (1996) 517 U.S. 292, the United States Supreme Court relied on double-jeopardy principles to hold that two convictions could not be imposed for “the same offense” within the meaning of the *Blockburger* test, even when the defendant had received concurrent sentences for the two overlapping convictions.<sup>134</sup> The Court reasoned that, when there is a chance that the multiple convictions will result in multiple punishment in the future (e.g., when the convictions might be used more than once to increase the sentence for a later conviction), double-jeopardy concerns are implicated.<sup>135</sup>

“The second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence. The separate conviction, apart from the concurrent sentence, has potential adverse collateral consequences that may not

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<sup>130</sup> “The test in this state of a necessarily included offense is simply where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense.” (*People v. Pearson, supra*, 42 Cal.3d at p. 355.) “The determination of whether an offense cannot be committed without necessarily committing the included offense must be based ... upon the statutory definitions of both offenses and the language of the accusatory pleading.” (*People v. Ortega, supra*, 19 Cal.4th at p. 698.)

<sup>131</sup> *People v. Cole* (1982) 31 Cal.3d 568, 582.

<sup>132</sup> *Id.*, 42 Cal.3d at p. 355.

<sup>133</sup> See discussion in section I.A, pp. 2-5, *ante*.

<sup>134</sup> *Id.*, 517 U.S. at pp. 296-302.

<sup>135</sup> *Id.*

be ignored. For example, the presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction. [Citations.] Thus, the second conviction, even if it results in no greater sentence, is an impermissible punishment.”<sup>136</sup>

Relying on *Rutledge*, the Third District Court of Appeal recently held (in a case that may no longer be cited because the California Supreme Court has just granted review)<sup>137</sup> that a defendant’s multiple, overlapping convictions for the same act of breaking his wife’s leg violated the Double Jeopardy Clause’s multiple-punishment bar, because the three convictions all constitute “strikes” under the Three Strikes Law (Pen. Code § 1170.12) for future purposes.<sup>138</sup> The three convictions were for (1) inflicting great bodily injury (“GBI”) on a spouse (Pen. Code §§ 273.5, subd. (a), and 12022.7, subd. (e)); (2) aggravated assault causing GBI (Pen. Code §§ 245, subd. (a)(1), and 12022.7, subd. (e)); and (3) battery causing serious bodily injury (Pen. Code § 243, subd. (d)).<sup>139</sup> Finding that they were for offenses wholly included within the first count of conviction, the court reversed the second and third convictions as being precluded by

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<sup>136</sup> *Id.* at p. 302, quoting *Ball v. United States* (1985) 470 U.S. 856, 864-865.

<sup>137</sup> *People v. Sloan*, S132605 (C042448; 126 Cal.App.4th 1148), review granted June 8, 2005. (See Cal. Rules of Ct., rules 976(d), 977.) The same day the Supreme Court granted review in *Sloan*, it also granted review (on the same and related issues) in *People v. Izaguirre*, S132980, an unpublished opinion of the Second District Court of Appeal (B169352). *Sloan* is discussed in this article solely for illustrative purposes. Although the opinion may not be cited in a brief (i.e., except to note that the issue is pending in the California Supreme Court), its reasoning should be useful to attorneys attempting to craft an argument that enhancement allegations should be included in the *Pearson-Ortega* test for necessarily included offenses.

<sup>138</sup> *People v. Sloan, supra*, 126 Cal.App.4th at pp. 1150-1151, 1156-1159.

<sup>139</sup> *Id.*, 126 Cal.App.4th at pp. 1150-1151.

## Double Jeopardy and the *Pearson-Ortega* rule.<sup>140</sup>

In order to reach this conclusion, the court had to (and did) hold that enhancements should be included in the *Pearson-Ortega* test for whether multiple convictions are for the same offense, because, without the GBI enhancements, none of the offenses were wholly included within another, as required by the *Pearson-Ortega* test. In doing so, the court declined to follow *In re Jose H.* (2000) 77 Cal.App.4th 1090, the only previous published case on the issue. In the *Jose H.* case, the Sixth District Court of Appeal had held that the California Supreme Court's opinion in *People v. Wolcott* (1983) 34 Cal.3d 92 compelled the conclusion that enhancements are not included in the *Pearson-Ortega* "same offense" test.<sup>141</sup> The court in *Sloan* disagreed with this reasoning, finding that *Wolcott* was distinguishable because its holding concerned a trial court's sua sponte duty to instruct on lesser-included offenses rather than the question of how many times a defendant could be convicted and punished for the same offense.<sup>142</sup>

We respectfully decline to follow *In re Jose H.*, *supra*, 77 Cal.App.4th 1090 because we find its reasoning unpersuasive. First, by assaulting and personally inflicting great bodily injury upon his spouse, defendant necessarily committed both aggravated assault and battery with serious bodily injury. The decision in *Wolcott*, *supra*, 34 Cal.3d 92 that enhancements are not considered in determining lesser included offenses for purposes of sua sponte jury instructions is distinguishable because, as the *Jose H.* court noted, different considerations are at issue. The *Pearson[-Ortega]* rule is more than an exception to Penal Code section 954, *it embodies an aspect of double jeopardy protection*. As Justice Chin noted, "There is no reason to permit two convictions for the lesser offense." (*People v. Ortega*, *supra*, 19 Cal.4th 686, 705 (conc. & dis. opn. of Chin, J.)) [¶] Here, the result, if not the reason, of convicting defendant three

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<sup>140</sup> *Sloan*, *supra*, 126 Cal.App.4th at pp. 1150-1151, 1156-1159.

<sup>141</sup> *In re Jose H.*, *supra*, 77 Cal.App.4th at pp. 1093-1096. In *Wolcott*, the California Supreme Court held that enhancements should not be included in determining whether a trial court has a sua sponte duty to instruct on lesser-included offenses. (See *id.*, 34 Cal.3d at pp. 96-101.)

<sup>142</sup> *Sloan*, *supra*, 126 Cal.App.4th at pp. 1158-1159.

times for the same act is to give him three strikes rather than one strike and thus make him eligible for a life sentence upon the future conviction of any felony. The "unambiguous purpose" of the "Three Strikes" law "is to provide greater punishment for recidivists. [Citations.] This purpose is not served by treating a single act as separate offenses. Nor should this result rest solely upon the charging discretion of the prosecutor. We conclude enhancements should be considered in determining whether there are necessarily included offenses and multiple convictions are improper."<sup>143</sup>

In the author's view, the holding and reasoning of *Sloan* are supported by *JABS*. As *JABS* make clear, the question of whether a fact should be viewed as an element or as merely a sentencing factor depends not on the label legislatively attached to the fact, but on the fact's liberty-depriving impact on the defendant's sentence.<sup>144</sup> In the wake of *JABS*, it is now clear that sentence "enhancements" that are legally essential to the defendant's sentence (such as Penal Code section 12022.7) are analogous to elements of a greater offense than that for which the defendant has been convicted.<sup>145</sup> And since federal double-jeopardy concerns are involved when the defendant is convicted more than one time for the "same offense" within the meaning of the *Pearson-Ortega* and *Blockburger* tests, the rule of *JABS* that enhancements are indistinguishable from elements should also apply.

## VII. Conclusion.

With apologies to those whose sensibilities are offended by acronyms, sports analogies and bad puns (especially when they involve boxing), this article's title's reference to "*JABS*" and "upper cuts" is an appropriate double entendre. For our job as criminal defense attorneys is to fight for our clients. And *JABS* have given our clients the best fighting chance they have had in years to challenge prior convictions, "recidivism" and other facts used to dramatically increase their sentences.

As hard as it may seem to believe, *JABS* show that a majority of the Justices of the

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<sup>143</sup> *Sloan, supra*, 126 Cal.App.4th at p. 1159, emphasis added.

<sup>144</sup> See footnote 64, *ante*.

<sup>145</sup> See footnote 80, *ante*.

United States Supreme Court is in our clients' corner. *JABS* also make clear that, no matter how badly prosecutors and lower courts may want to believe otherwise, the "fact of a prior conviction" exception to *JABS* is a very narrow one that should be read literally and that may not even be around much longer. The same reasoning that limits a current "conviction" to the facts actually encompassed within the jury's findings or the defendant's guilty-plea admissions should apply to delimit *JABS*' "fact of a prior conviction" exception. And *JABS* increase the protections of the Double Jeopardy Clause to the same extent they increase the number of facts to which our jury-trial and "*Winship*" rights attach.

Our clients have been on the ropes a long time, taking multiple hits and often receiving huge sentences as a result of "the same" prior conduct. The above-summarized points give us a great arsenal of punches with which to fight for our clients and to challenge their prior-conviction-enhanced sentences on double-jeopardy grounds. In short, "*JABS*" provide us with the means to fight and *win* "upper" cuts for our clients. So let's put up our dukes and do it.