

Opening brief by staff attorney Carmela Simoncini in *People v. Steven Gonzales* (E035293). This sample brief does not raise a typical *Blakely* sentencing issue, but rather it questions *Monge* and *Barragan* in light of *Apprendi* and *Blakely* and asserts retrial of the truth of the prior strike allegation, which was reversed due to insufficient evidence, is barred by double jeopardy principles.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA,)
)
Plaintiff and Respondent,	) Court of Appeal
	) No. E035293
v.)
	) Superior Court
STEVEN MICHAEL GONZALES,	) Nos. FWV012454
	) FWV016181
Defendant and Appellant.)
_____)

Appeal from the Superior Court of San Bernardino County

Honorable Ingrid A. Uhler, Judge

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This appeal is from final judgments in two cases following a court trial

on an allegation that appellant had suffered a prior serious felony conviction within the meaning of the Three Strikes Law. The true finding after the court trial applied to both the guilty plea judgments and doubled appellant's sentences. The appeal is authorized by Penal Code section 1237, and Rule 31(d).

INTRODUCTION

This appeal is from a retrial of Strikes allegation which was reversed by the United States District Court in habeas corpus proceedings, following state appellate court affirmance of the true finding. This appeal explores the issue of whether retrial of a Strikes allegation is barred by double jeopardy principles, despite the holding of *Monge*,¹ as a result of the United States Supreme Court holding in *Apprendi*.² No prior cases have addressed the effects the *Apprendi* holding may have on the reasoning of *Monge*, although even the United States Supreme Court has questioned the continued validity of its prior holding of *Almendarez-Torres*,³ which dictated the result in

1. *Monge v. California* (1998) 524 U.S. 721 [118 S.Ct. 2246, 141 L.Ed.2d 615].

2. *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435].

3. *Almendarez-Torres v. United States* (1997) 523 U.S. 224, 226 [118 S.Ct 1219, 140 L.Ed.2d 350].

Monge.

As appellant will demonstrate, under current precedent the fact that a prior conviction qualifies as a strike is an *element* of a greater offense; pursuant to *Apprendi*, proof that a prior conviction constitutes a strike is a *fact* requiring proof beyond a reasonable doubt; and as a fact which is an element of a greater offense, a finding that there is insufficient evidence to prove that

element bars retrial under the Double Jeopardy Clauses of the State and Federal Constitutions.

STATEMENT OF THE CASE

Procedural History

FWV012454

The information filed on August 8, 1997, charged two criminal law violations: count 1, a violation of Penal Code section 245, subdivision (a)(2), and count 2, a violation of Penal Code section 12021, subdivision (a)(1). It was further alleged, with respect to count 1, that appellant personally used a firearm, within the meaning of Penal Code sections 12022.5, subdivision (a) and 1203.06, subdivision (a)(1). The information also alleged that appellant had suffered three prior prison terms within the meaning of Penal Code section 667.5, subdivision (b), and one strike prior within the meaning of Penal Code section 667, subdivisions (b) through (i). (CT 45-48.)

On December 28, 1998, appellant pled guilty pursuant to plea bargain which did not include the Strikes allegation. The agreement provided that appellant would plead guilty to count 2, the violation of Penal Code section 12021, subdivision (a)(1) and that count 1 would be dismissed. Following court trial on the prior conviction, the court found that the 1992 prior conviction for violating Penal Code section 246.3 constituted a serious felony. Appellant was therefore sentenced pursuant to Penal Code sections 667, subdivision (e)(1) and 1170.12, subdivision (c)(1). The prison priors

were stricken, and he was sentenced to the upper term of three years, doubled for a total term of six years, on count 2, with credit for 802 days (535 days actual custody, plus 267 days pursuant to Penal Code section 4019) served in local custody. The court ordered the sentence to run consecutive to the term in Case No. FWV 16181. (CT 132-133.)

FWV16181

An eight-count information was filed in FWV16181, charging appellant with various offenses arising out of a domestic violence incident. As relevant here, the information was amended to add count 9, robbery, in violation of Penal Code section 211, along with three prison priors pursuant to Penal Code section 667.5, subdivision (b), and one strike prior within the meaning of Penal Code section 1170.12, subdivisions (a) through (d). (CT 124-131, 134, 136.) Pursuant to a plea bargain, appellant pled guilty on December 28, 1998, to count 9, pursuant to an agreement that reserved the issue of the strike for a court trial, and contemplated dismissal of the remaining counts and allegations. After a court trial, the court found the strike allegation was true. Appellant was sentenced to the low term of 2 years, doubled, for a total of 4 years for count 9, and dismissed the balance of the information. (CT 134-135.)

Both Cases

Following his appeal in Case Numbers E024154 and E024158, this court affirmed the judgment finding that the prior conviction for violating Penal Code section 246.3 constituted a serious or violent felony within the meaning of Penal Code section 1192.7, subdivision (c)(8) on May 9, 2000.⁴ A motion to recall the remittitur was granted, and a modified opinion was filed on November 29, 2000. On February 28, 2001, review was denied by the California Supreme. Appellant filed a petition for writ of habeas corpus in the United States District Court for the Central District of California, Case No. EDCV-02-117. (See Exhibits attached to first judicial notice request.) The United States District Court reversed the true finding for insufficient evidence to prove the allegation qualified as a strike.

The matter was remanded to the trial court for retrial on the issue of the truth of the strike allegation. Following a retrial, the court found the prior conviction for violation of Penal Code section 246.3 to be a strike, and reimposed sentence as before. (CT 146-147.) On February 4, 2004, Mr. Gonzales timely appealed. (CT 150.)

4. Appellant requests that this court take judicial notice of the previous appeals, which were consolidated under the Case Number E024154, by a request submitted concurrently with this brief. The original opinion was modified on November 29, 2000, following a court order recalling the remittitur, and review was denied on February 28, 2001 [three votes to grant].

Facts of the Offenses

The facts of the offenses are not germane to the issue presented in this appeal, which is from a retrial on the issue of whether a violation of Penal Code section 246.3 constitutes a serious or violent felony within the meaning of Penal Code section 1192.7, subdivision (c)(8).

ARGUMENT

I

RETRIAL OF THE STRIKES ALLEGATION VIOLATED DOUBLE JEOPARDY PRINCIPLES WHERE THE TRUTH OF THE ALLEGATION DEPENDS ON THE PROOF OF FACTS WHICH CONSTITUTE AN ELEMENT OF THE SEPARATE SENTENCING SCHEME AND WHERE A REVERSAL BASED ON INSUFFICIENT EVIDENCE TO PROVE THE ELEMENT BARS RETRIAL.

Background

After exhausting state remedies in a prior consolidated appeal, Case No. E024154, the United States District Court reversed the true finding on the Strikes allegation. Specifically, the federal court determined that the factor which makes a prior conviction a serious felony within the meaning of Penal Code section 1192.7, subdivision (c), is an element of the charge, requiring proof beyond a reasonable doubt. Further, it found insufficient evidence to support that element and reversed the Strike allegation finding. (See Exhs. B and C to first Req. for Jud. Ntc.)

Retrial of the Strikes allegation took place over the defendant's double jeopardy objection. As appellant will show, the trial court erred in proceeding with retrial and entering a new judgment finding the strike allegation to be true, and appellant will demonstrate that recent California

Supreme Court decisions are not dispositive have not considered the issue in the proper context.

A. The Holding that “Personal Use of a Firearm” Is An Element, Subject to *Apprendi*, Is *Res Judicata*.

The United States District Court has ruled that the fact relating to personal use of a firearm is an element of the offense (see first Request for Judicial Notice, Exhs. A through C). The government did not appeal the judgment to the Ninth Circuit Court of Appeals. Therefore, that determination is *res judicata*.

It is well settled that a decision granting habeas corpus relief is *res judicata*. (*In re Fain* (1983) 139 Cal.App.3d 295, 301.) The doctrine of *res judicata* precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction. (*Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 810.) Particularly if an order is appealable, and no timely appeal is taken, the issues determined by the order are *res judicata*. (*In re Matthew C.* (1993) 6 Cal.4th 386, 393, citing *Reeves v. Hutson* (1956) 144 Cal.App.2d 445, 451.)

This case was remanded to the state court following a determination by the United States District Court that personal use of a firearm is an element of the offense, a determination which reversed the state court adjudication and appellate findings based on the Ninth Circuit holding of

Dillard v. Roe (2001) 244 F.3d 758. Respondent is estopped to challenge that holding due to its failure to timely appeal, and further litigation on that point is therefore barred. As appellant will next demonstrate, where *Apprendi* applies, so do principles of double jeopardy.

B. An Allegation Pursuant to the Strikes Law is an Element to Which *Apprendi* is Applicable.

There are two bases for determining that *Apprendi* applies. First, the United States District Court reversed the state court judgments following the initial trial, and held that the allegation regarding “personal use of a firearm” was an element which was subject to *Apprendi*. This reasoning was correct and is not subject to review here because respondent failed to timely appeal that determination as explained more fully in the previous section.

Second, under the doctrine of *Apprendi*, a fact which increases a defendant’s prison sentence beyond the maximum for a particular offense must be proven beyond a reasonable doubt by the jury. *Apprendi* reaffirmed that if the allegation is merely a sentencing factor, this rule does not apply. So the question here is whether an allegation that a prior conviction qualifies as a serious felony constitutes a sentencing factor or an element. Here, the factor has been deemed an element.

The California Supreme Court has held that the strike allegation law is not an enhancement, it is a *separate sentencing scheme* which may be

invoked only when it is proven that the defendant has suffered a prior conviction for a serious felony as defined by Penal Code section 1192.7, subdivision (c). (*People v. Murphy* (2001) 25 Cal.4th 136, 155; *People v. Martin* (1995) 32 Cal.App.4th 656, 667 [strikes law does not establish an enhancement, but rather “defines the term for the crime itself] [disapproved on another ground in *People v. DeLoza* (1998) 18 Cal.4th 585, 600, fn.10].)

There is a difference between an enhancement and a statute establishing an alternate penalty for the underlying felony. A sentence enhancement is “an additional term of imprisonment added to the base term.” (Cal. Rules of Court, rule 4.405(c).) Penal Code section 667, subdivision (b) through (i), the Strikes law, does not fall within Rule 4.405(c)’s definition of an enhancement because it is not an “additional term of imprisonment,” and it is not added to a “base term.” (*People v. Jefferson* (1999) 21 Cal.4th 86, 101.) Instead, when an underlying crime comes together with an allegation which gives rise to an alternative sentence, it becomes the “functional equivalent” of a single “greater” crime. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325-326, applying *Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 490-495; see fn. 19.)

In *Sengpadychith*, the California Supreme Court analyzed the criminal street gang enhancements alleged pursuant to Penal Code section 186.22,

which held that for felonies not punishable by an indeterminate term of imprisonment for life, the gang enhancement finding constituted a fact which increases the penalty for the charged crime, which fact must be proven beyond a reasonable doubt, in light of *Apprendi*. (*People v. Sengpadychith, supra*, 26 Cal.4th at p. 320.) It held that the underlying crime, together with the gang enhancement allegation, became the functional equivalent of a single greater crime. (*Id.* at pp. 325-326.)

Under the Strikes law, the alternative sentencing scheme may not be applied to a criminal sentence unless certain predicate facts are proved, namely, that the defendant has suffered a prior conviction and that the prior conviction in question qualifies as a serious or violent felony as defined by Penal Code sections 667.5, subdivision (c), or 1192.7, subdivision (c). (*People v. Murphy, supra*, 25 Cal.4th at p. 155; see also *People v. Martin, supra*, 32 Cal.App.4th at p. 667 [“Strikes law” does not establish an enhancement, but “defines the term for the crime itself”].) The various subparagraphs of Penal Code section 1192.7, subdivision (c), are factual allegations, or elements, which, if proven beyond a reasonable doubt, render the crime a serious felony. Once the elements of section 1192.7, subdivision (c) are proven, the crime is deemed to be a serious felony, and the provisions

of Penal Code sections 667, subdivisions (b) through (i), and 1170.12 come into play.

The Strikes law thus provides for an *alternate* sentence – not a sentence enhancement – which may be imposed for crimes where the trier of fact finds true, beyond a reasonable doubt, that a defendant has previously been convicted of a prior violent or serious felony within the meaning of Penal Code sections 667.5, subdivision (c), or 1192.7, subdivision (c). Even under federal law, a determination that a crime constitutes a “serious felony” has been deemed to be an element of the offense which must be submitted to a jury and proved beyond a reasonable doubt. (*Dillard v. Roe* (2001) 244 F.3d 758, 773 [cert. denied, 534 U.S. 905 {122 S.Ct. 238, 151 L.Ed.2d 172}].)

Federal law is in accord in holding that allegations pursuant to Penal Code section 1192.7, subdivision (c), are elements, subject to the requirement of proof beyond a reasonable doubt. (*Dillard v. Roe, supra*, 244 F.3d 758, 773.) .

The alternate Strikes sentence in the present case, based on the proof of the “element” that makes the prior conviction a serious or violent felony, is greater than the maximum term provided by law for the underlying crime. Thus, under the doctrine of *Apprendi*, the fact that appellant had suffered a

prior serious felony conviction within the meaning of Penal Code sections 667, subdivisions (b) through (i), or 1192.7, subdivision (c), was an *element* of the crime which the prosecution was required to prove beyond a reasonable doubt in the initial trial proceedings.

The federal district court's decision that there was insufficient evidence to prove that element barred retrial under double jeopardy and collateral estoppel principles. As appellant will next show, the rulings holding double jeopardy principles are inapplicable to cases such as this one were based on pre-*Apprendi* precedent holding that in non-capital cases, enhancements may be retried. However, as will be explained, the current validity of these precedents is questionable.

C. *Monge* Does Not Govern Strikes Allegations Which Are Deemed to Be Elements After *Apprendi* and Thus Does Not Permit Retrial of Strikes Allegations Following a Reversal For Insufficient Evidence to Support the Finding.

Having shown that the Strikes allegation was not merely a sentence enhancement, the next question is whether double jeopardy principles barred retrial after the federal district court made a judicial determination that there was insufficient evidence to prove the "element" which permitted the imposition of the alternative sentencing scheme of the Strikes law. The general rule is that double jeopardy bars retrial of a cause after a reversal has been ordered based on insufficiency of the evidence. (*Burks v. United States*

(1978) 1978) 437 U.S. 1, 18 [98 S.Ct. 2141, 2150, 57 L.Ed.2d 1]; *United States v. DiFrancesca* (1980) 449 U.S. 117, 131 [101 S.Ct. 426, 66 L.Ed.2d 328]; *People v. Hatch* (2000) 22 Cal.4th 260, 270-271; *People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 72.)

However, this rule has been subjected to the exception, prior to *Apprendi*, that retrial of an enhancement which has been reversed for insufficient evidence is not been subject to double jeopardy. (*Monge v. California, supra*, 524 U.S. at pp. 724,734 [see also *People v. Monge* (1997) 16 Cal.4th 826].)

Prior to *Monge*, in *Almendarez-Torres v. United States, supra*, 523 U.S. 224, 226 [118 S.Ct 1219, 140 L.Ed.2d 350], the United States Supreme Court held that where a statute simply authorizes an increased sentence for a recidivist, it does not define a separate crime and therefore need not be charged in the indictment, nor must it be proven beyond a reasonable doubt. The following year, the United States Supreme Court held in *Monge v. California, supra*, that the Double Jeopardy Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment, did not bar retrial of sentence enhancements in noncapital sentencing proceedings because the determination at issue does not place a defendant in jeopardy for an “offense.” (*Id.*, 524 U.S. at p. 728.)

Monge was based on the view that the policies of *Bullington v. Missouri* (1981) 451 U.S. 430 [101 S.Ct. 1852, 68 L.Ed.2d 270] could not be rationally extended to retrial of prior conviction allegations in the noncapital context. It noted that the penalty phase of a capital trial is “undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder.” (*Monge v. California, supra*, 524 U.S. at pp. 731-732.)

In *Monge*, Justice Scalia dissented, noting that a criminal offense is composed of “elements” which are factual components that must be proved by the state beyond a reasonable doubt and submitted to a jury. “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’ [*sic*] are ‘the same,’ see *Blockburger v. United States*, 284 U.S. 299, 76 L.Ed.306, 52 S.Ct. 180 (1932), and the rule (at issue here) that the Clause protects an expectation of finality with respect to offences but not sentences.” (*Monge v. California, supra*, 524 U.S. at pp. 737 [Dis.opn. of Scalia, J.].) Justice Scalia would have extended double jeopardy to enhancements that involve “elements.”

Recent California decisions have followed the majority in *Monge* without addressing the impact of the intervening decision in *Apprendi* or the impact of a determination that an enhancement allegation has been determined to be an element. (See *People v. Barragan* (2004) 32 Cal.4th 236; *People v. Sotello* (2002) 94 Cal.App.4th 1349.) In *Barragan*, the Supreme Court relied extensively on the reasoning of *Monge*, and did not address the issue as it is presented here. The courts having had the opportunity to determine whether double jeopardy principles apply to enhancements did not have before them a situation where the enhancement was determined to be *an element* of a greater offense.

The trial court's view was that retrial was not barred under the doctrine of *Monge v. California, supra*, 524 U.S. 721, or *People v. Barragon, supra*. However, as appellant will show, that decision is of questionable validity in the wake of *Apprendi* where the prior conviction is alleged as an element of the alternative Strikes sentencing scheme, rather than as a mere enhancement based solely on the fact of the prior conviction.

To understand the issue, it is instructive to review Justice Scalia's dissent from the majority's analysis in *Monge*. He emphasized the ground that the recidivism enhancement at issue there in fact constituted an element of the defendant's offense. (*Monge v. California, supra*, 524 U.S. at p. 737-741.) He

acknowledged, however, the effect of the court's precedent in *Almendarez-Torres v. United States*, *supra*, 523 U.S. 224, but questioned its correctness in light of the fact that proof of the enhancement exposed the defendant to a term in excess of the statutory maximum. (*Monge*, *supra*, 524 U.S. at p. 740 [dis. opn. of Scalia, J.].) His reasoning was eventually adopted by the majority when *Almendarez-Torres* was questioned in *Apprendi*. There, the *Monge* dissenters now formed part of the majority in holding that where a factual finding results in a sentence in excess of the maximum term for the underlying offense, it is an element, requiring proof beyond a reasonable doubt. (See *Apprendi*, *supra*, 530 U.S. 466 [120 S.Ct. at 2362-2363].)

The majority in *Apprendi* made exceptions only for cases where the enhancement allegation related solely to the fact of the prior conviction, without proof of additional elements. Thus, *Almendarez-Torres* and *Monge* are only applicable where enhancements are based solely on proof that the defendant suffered a prior conviction, and does not apply where the allegation involves proof of facts which constitutes an element of an alternate sentence. As discussed in the previous section, where the fact of a prior conviction subjects an accused to a separate sentencing scheme, the substantive crime coupled with the prior conviction is the functional equivalent of a single

greater crime. (See *Apprendi, supra*, 530 U.S. at pp. 476-477, 483, fn. 10 [120 S.Ct. 2348]; *People v. Sengpadychith, supra*, 26 Cal.4th at pp. 325-326.)

Because “personal use of a firearm” was an element of the offense presented to the trier of fact in the original trial, this case did not involve merely a question of whether the defendant had suffered a prior conviction. Personal use of a gun is an element of a strike allegation pursuant to Penal Code section 1192.7, subdivision (c)(8). (*Dillard v. Roe, supra*; see also *Gill v. Ayers* (9th Cir. 2003) 342 F.3d 911, 915, 919.) As such, the fact of personal use of a firearm is an element which must be proven beyond a reasonable doubt. It is not merely a sentencing factor, and is thus not subject to the analysis of *Monge* and *Almendarez-Torres*.

The District Court’s ruling of legal insufficiency means that the evidence was therefore the functional equivalent of an acquittal and precludes retrial. (*People v. Hatch, supra*, 22 Cal.4th at pp. 271-272.) The "successive prosecution" aspect of the Double Jeopardy Clause protects an accused from again being forced to defend himself against repeated attempts to exact one or more punishments for the same offense. (*United States v. \$405,089.23* (1994) 33 F.3d 1210, 1215.)

The purpose of the double jeopardy defense is that "the State with all its resources and power should not be allowed to make repeated attempts to

convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." [citations] (*Bryan v. Superior Court* (1972) 7 Cal.3d 575, 581.) The double jeopardy clause also addresses a further concern as well, "that the government not be given the opportunity to rehearse its prosecution, "honing its trial strategies and perfecting its evidence through successive attempts at conviction," [Citations]" (*United States v. Dixon* (1993) 509 U.S. 688, 696 [113 S.Ct. 2849, 125 L.Ed.2d 556](conc. & dis. opn. of Souter, J.).)

Justice Scalia echoed this concern in his dissent in *Monge* case: "Giving the State a second chance to prove him guilty of that same crime would violate the very core of the Double Jeopardy prohibition." (*Monge v. California, supra*, 524 U.S. at p. 741 [dis. opn. of Scalia, J.]) Because the United States District Court found insufficient evidence in the record to support that element, retrial, at which the government could "perfect its evidence through successive attempts at conviction," is barred.

All of the recent state decisions which have held that double jeopardy principles do not prohibit retrial of a Strikes allegation have applied the conclusion of *Monge* without considering how that result would be impacted

by *Apprendi*, or the more recent holding of *Blakely v. Washington* (2004) ___U.S.____ [2004 U.S. LEXIS 4573, 72 U.S.L.W. 4546], both of which emphasize the elemental nature of facts alleged in sentencing enhancements to increase punishment above the statutory maximum for the underlying crime. Thus, the holdings of *Barragon* (32 Cal.4th 236) and *Sotello* (94 Cal.App.4th 1349), which have not considered the double jeopardy issue in this context, are inapposite and do not compel affirmance.

Because personal use of a firearm was an element of the Strike allegation, an integral element of a single greater offense, which was reversed on the ground of insufficient evidence by the United States District Court, retrial of the allegation was barred by double jeopardy principles. Reversal is therefore required.

CONCLUSION

Because double jeopardy principles apply to retrial of Strikes allegations which have been reversed for insufficiency of the evidence, it was error to permit the State to prosecute the allegation on remand. The policy prohibiting the government from “perfecting its evidence through successive attempts at conviction” apply with equal force to allegations under the Strikes law where a strike allegation is an element of what is the functional equivalent of a separate offense. Because current published authorities have not considered this question in light of the effect *Apprendi* must have on the applicability of the *Monge* rule, this court is not bound by those precedents.

For the foregoing reasons, the true finding that the prior conviction qualified as a Strike must be reversed and the allegation must be dismissed.

Respectfully submitted,

Dated:

APPELLATE DEFENDERS, INC.

Carmela F. Simoncini
Attorney at Law, SBN 86472
Attorney for Appellant Steven
Gonzales

CERTIFICATION OF WORD COUNT

I, Carmela F. Simoncini, hereby certify that, according to the computer program used to prepare this document, defendant's Appellant's Opening Brief contains 4,245 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this day of July, 2004, in San Diego, California.

Carmela F. Simoncini, SBN 86472
Staff Attorney

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA,)
)
Plaintiff and Respondent,	) Court of Appeal
	) No. E035293
v.)
	) Superior Court
STEVEN MICHAEL GONZALES,	) Nos. FWV012454
	) FWV016181
Defendant and Appellant.)
_____)

Appeal from the Superior Court of San Bernardino County

Honorable Ingrid A. Uhler, Judge

APPELLANT'S OPENING BRIEF

APPELLATE DEFENDERS, INC.

Carmela F. Simoncini
Staff Attorney
State Bar No. 086472

555 West Beech Street
Suite 300
San Diego, CA 92101
619.696.0282
Attorneys for Appellant
and Defendant

TOPICAL INDEX

	PAGE
STATEMENT OF APPEALABILITY	1
INTRODUCTION	2
STATEMENT OF THE CASE	4
Procedural History	4
FWV012454	4
FWV16181	5
Both Cases	6
Facts of the Offenses	7
ARGUMENT	
RETRIAL OF THE STRIKES ALLEGATION VIOLATED DOUBLE JEOPARDY PRINCIPLES WHERE THE TRUTH OF THE ALLEGATION DEPENDS ON THE PROOF OF FACTS WHICH CONSTITUTE AN ELEMENT OF THE SEPARATE SENTENCING SCHEME AND WHERE A REVERSAL BASED ON INSUFFICIENT EVIDENCE TO PROVE THE ELEMENT BARS RETRIAL.....	8
Background	8
A. The Holding that “Personal Use of a Firearm” Is An Element, Subject to <i>Apprendi</i> , Is <i>Res Judicata</i>	9
B. An Allegation Pursuant to the Strikes Law is an Element to Which <i>Apprendi</i> is Applicable.	10

C.	<i>Monge</i> Does Not Govern Strikes Allegations Which Are Deemed to Be Elements After <i>Apprendi</i> and Thus Does Not Permit Retrial of Strikes Allegations Following a Reversal For Insufficient Evidence to Support the Finding.	14
	CONCLUSION	22
	CERTIFICATION OF WORD COUNT	23

TABLE OF AUTHORITIES

PAGE(S)

CASES

<i>Almendarez-Torres v. United States</i> (1997) 523 U.S. 224 [118 S.Ct. 1219, 140 L.Ed.2d 350]	2, 15, 18, 19
<i>Apprendi v. New Jersey</i> (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435]	2, 9-15, 17-19, 21, 22
<i>Bernhard v. Bank of America</i> (1942) 19 Cal.2d 807	9
<i>Blockburger v. United States</i> (1932) 284 U.S. 299 [52 S.Ct. 180, 76 L.Ed.306]	16
<i>Bullington v. Missouri</i> (1981) 451 U.S. 430 [101 S.Ct. 1852, 68 L.Ed.2d 270]	16
<i>Burks v. United States</i> (1978) 1978) 437 U.S. 1 [98 S.Ct. 2141, 57 L.Ed.2d 1]	14
<i>Dillard v. Roe</i> (2001) 244 F.3d 758	10, 13, 19
<i>Gill v. Ayers</i> (9 th Cir. 2003) 342 F.3d 911	19
<i>In re Fain</i> (1983) 139 Cal.App.3d 295	9
<i>In re Matthew C.</i> (1993) 6 Cal.4th 386	9
<i>Monge v. California</i> (1998) 524 U.S. 721 [118 S.Ct. 2246, 141 L.Ed.2d 615]	2, 14-19, 22
<i>People v. Barragan</i> (2004) 32 Cal.4th 236	17
<i>People v. DeLoza</i> (1998) 18 Cal.4th 585	11

<i>People v. Hatch</i> (2000) 22 Cal.4th 260	15, 19
<i>People v. Jefferson</i> (1999) 21 Cal.4th 86	11
<i>People v. Martin</i> (1995) 32 Cal.App.4th 656	11, 12
<i>People v. Murphy</i> (2001) 25 Cal.4th 136	11, 12
<i>People v. Sengpadychith</i> (2001) 26 Cal.4th 316	11, 12
<i>People v. Sotello</i> (2002) 94 Cal.App.4th 1349	17, 21
<i>People v. Superior Court (Marks)</i> (1991) 1 Cal.4th 56	15
<i>Reeves v. Hutson</i> (1956) 144 Cal.App.2d 445	9
<i>United States v. DiFrancesca</i> (1980) 449 U.S. 117 [101 S.Ct. 426, 66 L.Ed.2d 328]	15
<i>United States v. Dixon</i> (1993) 509 U.S. 688 [113 S.Ct. 2849, 125 L.Ed.2d 556]	20

CONSTITUTIONS

United States Constitution	
Fifth Amendment	15
Fourteenth Amendment	15

STATUTES

Penal Code	
section 186.22	11
section 211	5
section 245, subdivision (a)(2)	4
section 246.3	4, 6, 7
section 667, subdivision (b)	11
section 667, subdivision (e)(1)	4
section 667, subdivisions (b) through (i)	4, 13, 14

section 667.5, subdivision (b)	4, 5
section 667.5, subdivision (c)	12, 13
section 1170.12	13
section 1170.12, subdivisions (a) through (d)	5
section 1170.12, subdivision (c)(1)	4
section 1192.7, subdivision (c),	8, 11-14
section 1192.7, subdivision (c)(8)	6, 7, 19
section 1203.06, subdivision (a)(1)	4
section 1237	1
section 4019	5
section 12021, subdivision (a)(1)	4
section 12022.5, subdivision (a)	4

RULES

California Rules of Court

rule 4.405(c)	11
rule 31(d)	1

DECLARATION OF SERVICE

Case Name: STEVEN MICHAEL GONZALES

No. E035293

I declare:

I am employed in the County of San Diego, California. I am over 18 years of age and not a party to the within entitled cause; my business address is 555 West Beech Street, Suite 300, San Diego, California 92101-2939.

On July 27, 2004, I served the attached

APPELLANT'S OPENING BRIEF

of which a true and correct copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Attorney General
110 W. "A" St., Ste. 1100
P.O. Box 85266
San Diego, CA 92186-5266

Clerk, San Bernardino County
Superior Court
Attn: Appeals Division
401 N. Arrowhead Ave.
San Bernardino, CA 92415

San Bernardino County District Attorney
Attn: Appeals Division
412 Hospitality Ln, 1st Fl.
San Bernardino, CA 92415

Steven Michael Gonzales, #H50189
480 Alta Road
San Diego, CA 92179

Office of the Public Defender
Herbert E. Williamson, III, Deputy
8303 N. Haven
Rancho Cucamonga, CA 91730

Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at San Diego, California on July 27, 2004.

I declare under penalty of perjury that the foregoing is true and correct, and this declaration was executed at San Diego, California, on July 27, 2004.

DOROTHY JIMENEZ
(Typed Name)

(Signature)

