I. THE HUGE UNRESOLVED QUESTION ABOUT PRIOR CONVICTIONS, OR WHY DO *ALMENDAREZ-TORRES* AND *MONGE* SURVIVE WHEN FIVE JUSTICES OF THE U.S. SUPREME COURT HAVE SAID THEY WERE WRONGLY DECIDED?

Jurisprudentially speaking, the issues of whether there is a jury trial right and double jeopardy protection accorded in the trial of prior conviction allegations have made the U.S. Supreme Court look very bad. The story is familiar to you criminal procedure buffs. First, in August, 1997, in *People v. Monge* (1997) 16 Cal.4th 826, the California Supreme Court in a 4-3 decision overruled *sub silentio* lower court precedent and decided that the retrial of a prior conviction allegation, after the prosecution produced insufficient evidence at the first trial, was not prohibited by either the state or federal double jeopardy clauses.

Then, in March, 1998, the United States Supreme Court decided *Almendariz-Torres v. United States* (1998) 523 U.S. 224. The court said that an allegation that a person had been convicted of an aggravated felony, which upped the maximum term for entry by an alien who has been previously deported, did not have to be proved to a jury. That was a 5-4 decision, based on statutory grounds. Justice Scalia wrote the dissent, saying he would not so construe the statute because to do so would raise grave constitutional doubts, which he would avoid resolving, about whether the prior conviction was an "element"of the offense and therefore had to be proved to a jury.

Then, just a few months later in June, 1998, the U.S. Supreme Court affirmed *People v. Monge* in another 5-4 decision, with the same line up as *Almendariz-Torres.* (*Monge v. California* (1998) 524 U.S. 721.) This time, Justice Scalia dissented on the basis that the

strike prior allegation which doubled Monge's term was an element of the offense, and that consequently a federal constitutional right to both a jury trial and double jeopardy protection existed. Justice Scalia crossed the Rubicon of constitutional interpretation he had contemplated in his *Almendariz-Torres* dissent. Still, 5-4, the defendant lost.

In 1999, the court confronted a similar issue in *Jones v. United States* (1999) 526 U.S. 227. The question there was whether a federal statute with three different sentencing ranges, depending on whether serious bodily injury or death resulted from a carjacking, defined three different offenses, or one offense in which the judge could determine whether the aggravating facts existed. This time, the defendant won 5-4. The difference? Justice Clarence Thomas moved to the defendant's side. The statute was construed to establish three separate offenses, such that a jury would have to find whether serious bodily injury or death had resulted before the steeper sentence for either could be imposed. Although the basis for the majority's opinion was to avoid the serious constitutional questions that would attend the contrary interpretation, it appeared that Justice Scalia's views had gained a crucial adherent

That proved to be the case the following year in *Apprendi v. New Jersey* (2000) 530 U.S. 466. New Jersey permitted a judge to increase the sentence for any offense if the judge found that the crime was committed with the purpose to intimidate on the basis of race. The majority in *Apprendi* embraced the constitutional principle that "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." (*Id*., at p. 489.)

Apprendi clearly eroded the foundations of *Almendariz-Torres.* The majority allowed that "it is arguable that *Almendariz-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested . . . ." (530 U.S. at pp. 489-490.) But the *Apprendi* majority refused to overrule *Almendariz-Torres* because "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." (*Id*., at p. 490.) *Apprendi* did limit the scope of *Almendariz-Torres* by saying: "Both the certainty that procedural safeguards attached to any 'fact' of prior convictions, and the reality that Almendariz-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." (*Id*., at p. 488.)

Also, Justice Thomas wrote an extensive concurrence in *Apprendi* tracing the American history of the use of aggravating facts and prior convictions to increase punishment, and concluded that all such facts had been treated as elements of the offense until the U.S. Supreme Court's decision in *McMillan v. Pennsylvania* (1980) 477 U.S. 79. Justice Thomas indicated that both *McMillan* and *Almendariz-Torres* were inconsistent with his constitutional analysis.

Thus, it seemed as though the *Almendariz-Torres* "recidivism" exception, allowing increased punishment based on prior convictions allegations which could be proved by a mere preponderance to a judge, was headed for speedy oblivion. Five justices of the U.S. Supreme Court had said *Almendariz-Torres* was wrongly decided, and the majority in *Apprendi* limited it strictly to its facts, one of which was that the defendant had *admitted* and not contested the truth of the alleged prior convictions. Surely, many thought, a case would be decided in the next term of the U.S. Supreme Court that would clarify the definition of "element" of a crime to include a prior conviction allegation which increased punishment. The four dissenters in *Almendariz-Torres* and Justice Thomas, it was thought, would accord constitutional protections to the trial of prior conviction allegations and overrule *Almendariz-Torres* and, inexorably, *Monge.*

Almost six years later, we are still waiting for those five members of the court to halt what they clearly believe is the unconstitutional practice of having judges decide prior conviction allegations based on a preponderance standard, with no double jeopardy protection in cases in which the prosecution presented insufficient evidence or in which the defendant obtained a favorable verdict in the trial court. What has been holding them up? Was it the vehemence of the dissents in *Jones* and *Apprendi*, which claimed the majority view "threaten[ed] the workability of every criminal justice system" (530 U.S. at p. 565 (Breyer, J., dissenting)) and created doubt about the constitutionality of the confinement of many prisoners?

Whatever the reason, the lengthy tolerance of widespread practices concerning the trial of prior conviction allegations which a majority of the court regard as unconstitutional is a blot on the court's record as guardian of constitutional rights.

With the U.S. Supreme Court in such a rationally indefensible position, what have our California courts done in response? The answer is, as little as possible. The California Supreme Court in *People v. Epps* (2001) 25 Cal.4th 19, reaffirmed its holding in *People v. Kelii* (1999) 21 Cal.4th 452, that a defendant had neither a constitutional nor a statutory right to trial by jury on the issue of whether a prior conviction suffered by the defendant was or was not a strike, at least where "only the bare fact of the prior conviction was at issue." (25 Cal.4th at p. 28.) However, it did concede that "we do not now decide how *Apprendi* would apply were we faced with a situation like the one at issue in *Kelii*, where some fact needed to be proved regarding the circumstances of the prior conviction - - such as whether a prior burglary was residential - - in order to establish that the conviction is a serious felony." (*Ibid*.) In *Epps,* the alleged strike prior was kidnapping, a "per se" serious felony.

In February, 2004, the First District Court of Appeal decided this precise issue in *People v. McGee,* formerly published at 115 Cal.App.4th 814, review granted. There two Nevada robbery convictions were alleged as strike priors. However, the Nevada robbery statute permitted the force or fear element to be satisfied by fear of future harm to a companion of the person being robbed, while California law limits such fear to immediate harm. Also, robbery in California requires an intent to permanently deprive the victim of

property, while Nevada required only a taking of the property. Since the elements of the two robbery statutes did not match, there had to be a determination of whether appellant's conduct would constitute robbery under California law. (*People v. Myers* (1993) 5 Cal.4th 1193.)[1]

The First District held that the determination of whether defendant's conduct constituted robbery as defined in California had to be made by a jury, not a judge as occurred in *McGee.* "We cannot reconcile with *Apprendi* the notion that a judge may, in the first instance, make a factual determination about a criminal defendant's intent, and then use that factual determination to increase substantially the maximum term to which the defendant will be subjected." (115 Cal.App.4th at p. 834.) However, *McGee* found that *Apprendi* error of this type was not structural by a far fetched analogy to cases in which a jury had not been instructed on all elements of an offense. It then reviewed the evidence from the plea transcript in one prior conviction, and the preliminary examination transcript in the other, and found the error was harmless.

Nonetheless, the California Superior Court granted review, and the case was orally

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1. It is noteworthy that *Myers* did not overrule *People v. Crowson* (1983) 33 Cal.3d 623. *Crowson* construed Penal Code section 667.5, subdivisions (b) and (f), and determined that the elements of a foreign conviction must match the elements of a California felony before a one year prison prior enhancement could be imposed. However, *Crowson* was overruled in *People v. Riel* (2000) 22 Cal.4th 1153, 1205. To have the court overrule its 17-year-old interpretation of section 667.5, which had never been questioned by the Legislature, was unusual to say the least. Plus, *Myers* determined that it did not have to follow *Crowson* as to section 667, subdivision (a) priors because the statutory schemes were distinguishable. In *Riel*, it overruled *Crowson* because it said the schemes were not distinguishable.

argued on March 7. Published reports indicate that a majority of the court seemed inclined toward the view that *Apprendi* said prior convictions are an exception, and that's good enough for us.

Currently, the California Supreme Court also has before it the case of *People v. Trujillo*, S130080. In this case, in which I am appellate counsel, the defendant had two prior strike convictions alleged. Following conviction by jury, Trujillo waived jury for the trial of the prior conviction allegations. The trial judge found that one of the alleged prior convictions was not a strike. That prior conviction was for infliction of corporal injury on a spouse/cohabitant, not a "per se" serious felony under the Three Strikes law. However, the prosecutor alleged it qualified because defendant had personally used a dangerous or deadly weapon. To back up this allegation, the prosecutor introduced defendant's admission in the probation report that he had stuck his cohabitant with a knife. However, the plea colloquy was also introduced, which showed that the prosecution had originally alleged personal use of a dangerous or deadly weapon, but had dismissed the allegation in exchange for the plea of guilty to the offense. Trial counsel argued that the court should not go beyond the elements of the offense pled to, and the judge said finding personal use would deny the defendant the benefit of his prior bargain. He found that the conviction qualified as a prison prior, but not a strike.

The DA filed a notice of appeal from the sentence imposed. At the time the case was briefed in the Court of Appeal, the Supreme Court had pending the issue of whether there

was a statutory right under Penal Code section 1238 to appeal a not true finding following trial of a prior conviction allegation. The Sixth District Court of Appeal decided in an unpublished opinion that the People had such a right. We petitioned for review, and were granted and held in February, 2005, for the lead case, which had been fully briefed for a year and a half at that point. In May, 2005, the court ordered me to file a brief on the merits, and made *Trujillo* the lead case. I then did something I should have done a long time before, which is read the briefing in the former lead case. In so doing, I discovered that the attorney in the lead case had, in arguing that appeal was not permitted under two subdivisions of section 1238, tried to buttress his argument by improvidently asserting that it was permitted under a third subdivision that had not been relied upon by the People.

I will not belabor you with the somewhat byzantine legislative history and statutory construction arguments about whether subdivisions (a)(1), (a)(8) or (a)(10) authorize a People's appeal of a not true finding. The California Supreme Court will finally resolve these issues in *Trujillo* at some point. However, I did want to alert you that there are arguments to be made, at least in situations like *McGee* and *Trujillo,* that there is a federal constitutional right both to jury trial and to double jeopardy protection as to factual issues about a prior conviction that were not resolved in the prior conviction proceedings. I made those arguments in an attempt to persuade the court that it should not construe section 1238 to permit a People's appeal, for to do so would raise serious and doubtful constitutional questions. I argued that such questions would arise under both the federal and state

constitutional double jeopardy clauses. As to the federal clause, I point to the inconsistency between *Almendariz-Torres* and *Apprendi,* the limited reading *Almendariz-Torres* was given in *Apprendi*, and the fact that five members of the court have stated that *Almendariz-Torres* was wrongly decided.

I also discussed the recent case of *Shepard v. United States* (March 7, 2005) 544 U.S. 13. In that case, the U.S. Supreme Court rejected an attempt to prove that a state conviction qualified as a violent prior felony conviction under the federal Armed Career Criminal Act. Under this federal law, a prior conviction for burglary of a building is a violent felony, and a person with three violent priors who possesses a firearm faces a 15 year mandatory minimum sentence. Shepard had four prior convictions under a state burglary statute that included buildings, boats and motor vehicles. The complaints to which Shepard had pled guilty alleged all the statutory variations as to the object of the burglary. Thus, the complaints did not establish that the convictions were necessarily for burglary of a building. The prosecution introduced police reports which had been submitted to obtain the complaints, which indicated that Shepard had burglarized buildings.

The majority in *Shepard* stated that it was adhering to its prior decision in *Taylor v. United States* (1990) 495 U.S. 575, which limited a judge sentencing under the ACCA to looking at the statutory elements, charging documents and jury instructions to determine if a prior conviction qualified as violent. "[A] later court determining the character of an admitted burglary is generally limited to examining the statutory definition, charging

document, written plea agreement, transcript or plea colloquy, and any explicit factual finding of the judge to which the defendant assented." (544 U.S. at p. ____ [161 Led 2d at p. 211].)

One of the reasons the court gave for its ruling was that to permit fact finding outside such sources would create constitutional issues as to whether such fact finding would trigger the *Apprendi* right to jury trial. "While the disputed fact here can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi,* to say that *Almendariz-Torres* clearly authorizes a judge to resolve the dispute." (*Id.* at p. ____ [161 Led 2d at p. 217].)

On the state constitutional side, I urged the California Supreme Court to recognize the dubious validity of the *Monge* plurality opinion, how it ignored contrary California Court of Appeal precedent, and rested on the erroneous assumptions that trials of prior conviction were "perfunctory," their outcomes "predictable," the risk of an erroneous result "slight," and that the "embarrassment, expense and anxiety of trying a prior conviction allegation are relatively minor." (*Monge, supra*, 16 Cal.4th at p. 845 (plur. opn. of Chin, J.). I include my briefing of these points from both my brief on the merits and reply brief on the merits in *Trujillo.*

II. WHAT ARE THE LIMITS OF THE "RECORD OF CONVICTION" WHICH A COURT MAY CONSIDER AND WHAT ARE THE EVIDENTIARY LIMITATIONS ON THE USE OF SUCH DOCUMENTS?

In *People v. Guerrero* (1988) 44 Cal.3d 343, the California Supreme Court overruled *People v. Alfaro* (1986) 42 Cal.3d 627 and held that proof that a prior conviction qualified as a serious felony was not limited to the elements necessarily adjudicated in the prior proceeding. *Alfaro* had held that a conviction of burglary in which a defendant was charged with burglary of a residence and plead guilty "as set forth in the information," did not qualify, because under the burglary statute as it read at the time of the offense, proof that the burglary was of a residence was not an element of the offense.

The *Guerrero* court knew it wanted to overrule *Alfaro*, and cover the situation in which a non-element fact which made the prior conviction serious was pled in the charging document and the defendant pled guilty as charged. However, it was very vague about the contours of its new rule that "a trier of fact may look to the entire record of the conviction." (44 Cal.3d at p. 355.) The *Guerrero* majority justified its new rule as reasonable, because it promoted the "efficient administration of justice" and the intent of the people in defining the enhancement in terms of conduct, not a specific crime. It also said that not allowing the trier to go further than the record "bars the prosecution from relitigating the circumstances of a crime committed years ago . . ." (*Ibid*.) The majority added what I would call a "fuzzy footnote." "In this case we are not called on to resolve such questions as what items in the record of conviction are admissible and for what purpose or whether on the peculiar facts of an individual case the application of the rule set forth herein might violate the constitutional rights of a criminal defendant." (*Id*., at p. 356, fn. 1.)

The California Supreme Court revisited *Guerrero* in *People v. Reed* (1996) 13 Cal.4th 217. *Reed* established that a preliminary examination transcript was part of the "record of conviction" which could be examined by the trier of a prior conviction allegation, "because the procedural protections afforded the defendant, and the accuracy of a reporter's transcript, make such evidence relatively reliable." (*Id*. at p. 230.) It said that the preliminary examination transcript came within the official records hearsay exception. It also said that the testimony came within the hearsay exception for prior recorded testimony (Ev. Code, § 1291), because of the defendant's prior opportunity and incentive to cross-examine the witnesses, and because the witnesses were "unavailable" due to the *Guerrero* rule that the prosecution could not go beyond the record of conviction to prove the truth of the prior conviction allegation. (*Id.* at p. 229.)

However, *Reed* declined to resolve whether a probation report was included in the "record of conviction." (13 Cal.4th at p. 230.) It did, however, hold that a fragment of a report which contains statements of people other than the defendant was inadmissible hearsay. (*Ibid*.)

The next step by the state supreme court to define "record of conviction" was taken in *People v. Woodell* (1998) 17 Cal.4th 448. In that case, the court determined that an appellate court opinion was part of the record of conviction which could be considered. While that conclusion was unanimous, the court split 5-2 over the proper use of such an opinion. The majority authorized its use for the "nonhearsay" purpose of "determining the

basis of the conviction." (17 Cal.4th at p. 459.) According to the majority, the trier of fact is to determine "the nature of the *conviction*." The court stated that one way to do that is to look to the record to show the nature of the defendant's conduct, citing *Reed*, and that evidence used for this purpose must comply with the hearsay rule. (*Ibid*.)

However, the majority said another way to decide what crime the defendant was convicted of is to look to a court ruling "for the nonhearsay purpose of determining the basis of the conviction." (17 Cal.4th at p. 459.) "The appellate court's discussion of the evidence is relevant and admissible, not to show exactly what the defendant did, but to show whether the trial court found, at least impliedly, that the conviction was based on personal use rather than vicarious liability." (*Id.* at p. 460.)

The two dissenters argued that the appellate opinion "proves his crime and the basis of his liability only by proving his conduct." (*Id.*, at p. 467 (conc. and dis. opn. of Mosk, J.).) It further noted that the proof in the opinion of that conduct (personal use of a dangerous weapon in a prison assault) consisted of an unidentified inmate's statement to a deputy sheriff, who made an unsworn statement to that effect at the defendant's sentencing hearing.

Justice Mosk also suggested that an appellate court opinion would be vulnerable to a "best evidence" objection, pursuant to Evidence Code section 1500. (17 Cal.4th at p. 465.) Since no such objection was made, neither the majority nor the dissenters resolved this issue.

The *Woodell* opinion is interesting because it intersects somewhat with the limitations

placed on information that could be considered in federal courts in *Taylor* and *Shepard.* The *Taylor* and *Shepard* decisions permit consideration of a judge's rulings in the case to determine if the conviction necessarily rested on the factual basis required by federal law to trigger steeper penalties. However, in *Woodell*, the defendant had been charged in North Carolina with assault with a deadly weapon and pled guilty. His plea did not admit whether he personally either used a deadly weapon or great bodily injury, because he could have been liable either as a perpetrator or as an aider and abettor. The majority permitted use the appellate opinion to determine whether he personally used the weapon on the theory that in arguing in the appellate court that the offense should have been mitigated, "surely, if the conviction had been based on vicarious liability for someone else's actual weapon use, defendant would have argued that circumstance. The appellate court recited the evidence of personal weapon use as a reason for the trial court not to find the mitigating factor that the defendant had acted under premeditation. The opinion contained no hint a third party was even involved in the crime, much less actually used the weapon." (17 Cal.4th at p. 461.)

It is clear that in fact the trial judge made no ruling on whether or not the defendant had personally used a weapon. He had merely "fail[ed] to find as a statutory mitigating factor that defendant acted under strong provocation." (17 Cal.4th at p. 451.) Such a failure to find mitigation by way of strong provocation did not reasonably constitute an implied finding of personal use. Nor could defendant's failure to argue in his North Carolina appeal in support of his claim of strong provocation that he did not personally use a weapon be

reasonably construed as an admission or shed any light on whether the trial court necessarily found personal use. Nor could the North Carolina appellate court's reference to the evidence presented at sentencing as a circumstance supporting the trial court's failure to find mitigation amount to a trial court ruling that the defendant personally used a weapon. It is clear that under the federal rule, the appellate court opinion would be insufficient to establish that Woodell's North Carolina offense was for commission of a felony with personal use of a weapon.

I will at this point refer to the motions in limine and supplemental motions in limine prepared by George Schraer which I include in these materials. I want to thank George for sending me these, and for giving me permission to use them. I could attempt to rewrite the material, but it would only detract from their clarity of presentation, so I will try to quickly summarize them.

In the motions in limine, George begins with a summary of law concerning the proof of prior conviction allegations. (Motion in limine, at pp. 2-4.) Then he challenges the prosecution's attempt to establish necessary facts for one prior conviction allegation through the defendant's stipulation on a guilty plea form that the police report provided a factual basis for his plea, and a later admission to the probation office that the police reports were accurate. (Motion in limine, pp. 4-11.) He argues that the stipulation would only apply to facts necessary to support the plea and not to all facts contained in the police report. He also argues that the police reports are not part of the record of conviction under *Guerrero*. He

discusses in detail the Court of Appeal authority on what constitutes the "record of conviction." Finally he argues the police reports are inadmissible hearsay, and that their admission would violate the Confrontation Clause.

He attacks the evidence presented to prove a second prior conviction allegation, a preliminary examination transcript and his client's admission to a probation officer that he hit the victim in the face, on record of conviction, hearsay, confrontation clause and self-incrimination grounds. (Motion in limine, at pp. 12-13.) This is probably a good "mantra" for trial attorneys to memorize and trot out in response to the introduction of all the prosecution's evidence at a prior conviction allegation trial. As is ethically required, George cited the trial court to adverse controlling authority on these issues.

George also reiterates the defense double jeopardy objection to any retrial at all, since the prosecution had presentenced insufficient evidence at the first trial. (Motions in limine, at pp. 13-14.)

Another issue that is briefly discussed but not raised in the motion in limine is the issue of whether a defendant may present live testimony to dispute the circumstances of the offense. There is a negative Court of Appeal decision on point, though it is arguably dictum. (*People v. Bartow* (1996) 46 Cal.App. 4th 1573, 1581.) The California Supreme Court declined to resolve that issue in *Reed*, but the Ninth Circuit has ruled in *Gill v. Ayers* (9th Cir. 2003) 342 F.3d 911, 914-922, that the due process clause requires an opportunity for the defendant to testify to offer a defense and to refute or explain the evidence presented by the

prosecution. For this issue to be raised effectively on appeal, there would have to be an attempt by the trial counsel to introduce testimony and an offer of proof as occurred in *Gill*. The offer of proof in *Gill* was that he would testify as to his reasons for telling a probation officer he had personally used a weapon during commission of several assaults and to testify that he did not actually do so.

However, if no such proffer was made, it might be fruitful for appellate counsel to ask the client about his version of the facts underlying a strike prior in which proof of a fact such as personal use or personal infliction of GBI was necessary to establish it was a serious felony prior. Particularly in cases in which proof of that fact rests solely on a purported admission to a probation officer, if the client denies making the admission or claims that it was not truthful, there may be an ineffective assistance habeas claim for not seeking admission of the client's testimony.

In his supplemental motion filed in the same case, George argues that the limitations on proof of the nature of a prior conviction set forth in *Taylor* and *Shepard* are constitutionally based, and that the trial court must follow those rules under the Supremacy Clause and not the rule of *Guerrero*. (Supplemental Motion in limine, at pp. 2-8.) He also adds to his jury trial and double jeopardy claims, acknowledging authority to the contrary, but anticipating the demise of *Almendariz-Torres* and *Monge.* (Supplemental Motion in limine, at pp. 9-11.)

CONCLUSION:

When prior conviction findings have such profound effects on a clients sentence, as

is now frequently the case in California, we must attack these findings as vigorously and effectively as we can. This presentation has dealt with just a few of the potential issues, but I hope it conveys that the rules applicable to the trial of prior convictions differ in many ways from those which govern the "guilt phase" of a criminal trial. Also, that many of these rules are still very much unresolved or in flux, which makes it important that we insure that our clients get the benefit of any favorable resolution of these issues.