S195600

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

VALENTIN CARBAJAL,

Defendant and Appellant.

Case No. S_______

Second Appellate District, Division Five, Case No. B222615
Los Angeles County Superior Court, Case No. BA316526
The Honorable Larry P. Fidler, Judge

SUPREME COURT
FILED

AUG 15 2011

Frederick K. Ohlrich Clerk

Deputy

PETITION FOR REVIEW

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
LAWRENCE M. DANIELS
Supervising Deputy Attorney General
STEVEN D. MATTHEWS
Supervising Deputy Attorney General
State Bar No. 137375
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2367
Fax: (213) 897-6496
Email: DocketingLAAWT@doj.ca.gov
Attorneys for Respondent

TABLE OF CONTENTS

Page

Issue Presented 1

Statement of the Case 1

Reasons for Granting the Petition 5

The court should grant review to determine whether retrial as to a special allegation is barred by double jeopardy where the first jury never reached or resolved the allegation 5

A. Retrial was not barred by double jeopardy because the first jury never reached or resolved the special allegation 5

B. Retrial was not barred by double jeopardy because the first jury could not resolve the special allegation as to the deadlocked counts 9

Conclusion 13

TABLE OF AUTHORITIES

Page

CASES

Arizona v. Washington
(1978) 434 U.S. 497 .... 3, 4

Illinois v. Somerville
(1973) 410 U.S. 458 4

Logan v. United States
(1892) 144 U.S. 263 4

People v. Anderson
(2009) 47 Cal.4th 92 .... 4, 10, 11

People v. Bright
(1996) 12 Cal.4th 652 10

People v. Fields
(1996) 13 Cal.4th 289 12

People v. Seel
(2004) 34 Cal.4th 535 10

Porter v. Superior Court
(2009) 47 Cal.4th 125 .... 12, 13

Richardson v. United States
(1984) 468 U.S. 317 3

United States v. Perez
(1824) 9 Wheat. 579 4

Wade v. Hunter
(1949) 336 U.S. 684 3

STATUTES

Pen. Code,
§ 667.61 .... passim
§ 667.61, subd. (b) 10
§ 1023 12
§ 1161 .... 2, 5, 8

COURT RULES

Cal. Rules of Court,
rule 8.500 1
rule 8.500(b)(1) 4, 9
rule 8.504 1

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

The People of the State of California, plaintiff and respondent in the above-entitled action, hereby petition this Honorable Court to grant review in this case, pursuant to California Rules of Court, rules 8.500 and 8.504, following a published decision by the California Court of Appeal, Second Appellate District, Division Five, case number B222615, filed on July 5, 2011, reversing the judgment of conviction. (Exh. A.)

ISSUE PRESENTED

Whether double jeopardy bars retrial as to a multiple-victim enhancement that the first jury never reached because no verdict was received, and was never resolved because the jury deadlocked on the underlying offenses?

STATEMENT OF THE CASE

This is a case about whether a retrial is barred by double jeopardy as to an enhancement that the first jury never reached and moreover, could not have resolved. The jury at the defendant's first trial was unable to reach a decision regarding the counts pertaining to one victim (Zelene C.), but found the defendant guilty of the three counts pertaining to another victim (Jessica R.), and found true the multiple victim special circumstance pursuant to Penal Code section 667.61. Although the instructions specifically asked the jury to decide the Penal Code section 667.61 allegation only if the defendant were found guilty of two or more qualifying sex *offenses*, the instructions given did not specify that the special allegation was only to be considered by the jury in the event they returned guilty verdicts pertaining to qualifying offenses *for two or more victims*.

The trial court noted the inconsistency between the guilt determinations and the special allegation, and specifically inquired of the foreperson at the first trial whether the special allegation verdict was correct. The foreperson noted the original "true finding" was incorrect. The trial court then asked the jury to reconvene and ascertain its true verdict regarding the special allegation.

At this point, the majority opinion adopts the position that the jury actually returned with another finding, and that Penal Code section 1161 "prohibited the court from sending the jury back for reconsideration in either case." (Opn. at p. 9.)

However, the record instead clearly shows that *before* the jury was asked whether it reached a new verdict, and without any juror volunteering that he or she had returned and reached a new verdict, the trial court called the jurors back and explained that the special allegation was inapplicable unless the jury returned with guilt findings as to two different victims or if the jury unanimously concluded there was only a single victim, and again directed the jury to reconvene and clarify its decision. (3RT 2110-2113.)

Shortly thereafter, the first jury returned and submitted a blank special allegation verdict. The jury on retrial found the defendant guilty of the deadlocked counts and found true the Penal Code section 667.61 allegation.

As the dissenting opinion found, the majority opinion of the Court of Appeal erred on the question of whether retrial was barred by the double jeopardy clause both because the jury never returned with a "not true" finding on the special allegation, and because even if (contrary to the record) the jury had returned with a finding, it nevertheless did not reach or resolve the issue of the special allegations on the counts on which they were deadlocked.

The Court of Appeal's published opinion now declares as a matter of law that double jeopardy bars retrial as to a special allegation even if a jury

never reached or resolved, and could not legally reach and resolve, the question.

"It has been established for 160 years, since the opinion of Justice Story in *United States v. Perez*, 9 Wheat. 579, 6 L.Ed. 165 (1824), that a failure of the jury to agree on a verdict was an instance of 'manifest necessity' which permitted a trial judge to terminate the first trial and retry the defendant, because 'the ends of public justice would otherwise be defeated.' *Id.*, at 580, 6 L.Ed. 165." (*Richardson v. United States* (1984) 468 U.S. 317, 323-324 [104 S.Ct. 3081, 82 L.Ed.2d 242].) The United States Supreme Court has "constantly adhered to the rule that a retrial following a 'hung jury' does not violate the Double Jeopardy Clause" (*Id.* at p. 324), and explained the reasons for this conclusion in *Arizona v. Washington* (1978) 434 U.S. 497 [98 S.Ct. 824, 54 L.Ed.2d 717]:

> [W]ithout exception, the courts have held that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial. This rule accords recognition to society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws.

(*Id.* at p. 509.)

Similarly, in *Wade v. Hunter* (1949) 336 U.S. 684 [69 S.Ct. 834, 836, 93 L.Ed. 974], the Court held:

> The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. There may be unforeseeable circumstances that arise during a trial making its completion impossible, such as the failure of a jury to agree on a verdict. In such event the purpose of law to protect society from those guilty of crimes frequently would be

> frustrated by denying courts power to put the defendant to trial again. . . . What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.

(*Id.* at pp. 688-689; see also *Illinois v. Somerville* (1973) 410 U.S. 458, 468-471 [93 S.Ct. 1066, 35 L.Ed.2d 425]; *Logan v. United States* (1892) 144 U.S. 263, 297-298 [12 S.Ct. 617, 36 L.Ed. 429]; *United States v. Perez* (1824) 9 Wheat. 579, 580 [6 L.Ed. 165].)

Likewise, this Court has held that "when a trial produces neither an acquittal nor a conviction retrial may be permitted if the trial ended 'without finally resolving the merits of the charges against the accused.'" (*People v. Anderson* (2009) 47 Cal.4th 92, 104 ("*Anderson*"), quoting *Arizona v. Washington, supra,* 434 U.S. at p. 503.)

There is no authority whatsoever supporting the application of double jeopardy principles in the manner articulated by the majority in a published opinion. Indeed, as noted in the dissenting opinion, this the first case that, contrary to this Court's and the United States Supreme Court's well-settled principles, has applied the doctrine of double jeopardy to preclude a retrial of a special allegation despite the fact that the allegation was not reached and was never decided by a fact-finder in a prior proceeding.

Respondent submits the record must instead affirmatively demonstrate that the jury actually reached and decided the special allegation in order to trigger a double jeopardy bar to retrial of the same allegation. To conclude otherwise, as the majority has done in this published opinion, now provides fodder for the inconsistent application of double jeopardy principles. As a result, review is necessary to settle important questions of law and secure uniformity of decision. (Cal. Rules of Court, rule 8.500(b)(1).)

REASONS FOR GRANTING THE PETITION

THE COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER RETRIAL AS TO A SPECIAL ALLEGATION IS BARRED BY DOUBLE JEOPARDY WHERE THE FIRST JURY NEVER REACHED OR RESOLVED THE ALLEGATION

The Court of Appeal's decision that retrial as to the special allegation was barred by the Double Jeopardy Clause, and reversing and remanding for resentencing, was based upon that court's determination that "following a brief period of reconsideration, the [first] jury again returned a finding" (Opn. at 9), and, as such, the trial court below violated Penal Code section 1161 because it thereafter "did not give effect to the jury's finding" (Opn. at 10).

Review is necessary because the record does not establish that the first jury returned with a "not true" finding as to the special allegation, and even assuming, contrary to the record, that it did return with such a finding, the jury did not reach or resolve the special allegation as to the counts on which the jury remained deadlocked.

A. Retrial Was Not Barred by Double Jeopardy Because the First Jury Never Reached Or Resolved the Special Allegation

Respondent first submits that, contrary to the Court of Appeal's determination, the record below does not establish that the first jury, after being sent back to reconsider, ever in fact returned with any finding, let alone a "not true" finding. Indeed, the record establishes precisely to the contrary. Here the trial court, before recalling the jury, recognized that based upon its incomplete directives, the jury was *likely* to return with what the court *guessed* would be a "not true" finding, as indicated in the following colloquy:

THE COURT: I think I can guess what they have done. They have gone in; they signed it "not true" finding. The problem is that's not what they should have done.

MS. WISE [the DDA]: They should have just not made --

THE COURT: It will be double jeopardy. Otherwise, the truth is if they are hung, the court should not take any verdict on that count because it's inappropriate.

MS. WISE: That's correct.

THE COURT: So --

MR. HERRIFORD [defense atty]: Do you want to look and see what they did first?

THE COURT: I think what it is, since they are hung, we probably should not enter a finding on that at this point.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT IN THE PRESENCE OF THE JURY:)

THE COURT: Okay. Ladies and gentlemen, I have given this some thought. Since you are unable to arrive at a decision on some of the counts, it is my belief that you should not be making a finding on that allegation unless two different victims were named. [¶] Now, we know what the verdicts are. You signed them, and I have read them, and counsel is aware of it. It appears to me the appropriate thing to do is -- as with the other charges, is not to enter a finding. Since you are unable to arrive at a verdict, you can't find that to be true unless your belief is unanimously -- if unanimously you believe not just as to the counts that you return but the entire case that there is not more than one victim.

I mean, technically, you could come to that finding without arriving at the other counts. I think legally they could, but you would have to make a finding unanimously that there is only one victim. If you are not able to do that -- if you are not able to do that, then what you should do is simply not fill in the form.

That's correct, if you believe unanimously that that finding is not true, it is based on the three verdicts that you

returned, it's based on the entire case because you are unable to arrive at a verdict on many of the counts. You understand what I am saying?

That enhancement -- I am not going to explain anymore.

Let's assume for a moment you had arrived at verdicts, and the verdicts named more than one victim, that's all I could say, you then would have to make a determination whether this allegation was true or not true. The problem is by signing that verdict form, you still have counts where you have been unable to arrive at a verdict and those verdict forms do name more than one victim.

So I sort of, I don't want to tell you what to do. I am sort of giving you what I believe the law require -- you have three options: you could find it to be true, which at this point you originally signed, but you have agreed it was a mistake based upon a misunderstanding. I think I may have misled you when I sent you back out as to what -- what your options were.

Do you understand now what your options are? I see a lot of jurors nodding their heads you don't. There is a lot of counts that are still outstanding.

JUROR 9: Correct.

THE COURT: I think legally there may be some problem, but I don't want to tell you that's the law because I am not sure you are making a finding that there is not more than one victim in this case; yet you haven't decided all the counts.

That finding does not apply just to the three counts that you decided; it applies to the entire case. If you are unable -- I don't want to say anything more on that finding. I think you have to go in and discuss that.

A lot of jurors are nodding their heads, and I think I know -- Juror Number 8, you seem somewhat confused. That finding applies when the entire case has been decided, if you can, but what I am saying is there are a lot of counts you did not decide.

JUROR NO. 8: Correct. Okay.

> THE COURT: I want you to go back. I don't want to say anymore. When you're done -- go in, take as much time as you need. Let us know. I am going to send the alternates back out in the hallway. You retire and continue your deliberations. I am not comfortable saying anything more about it. I think I have explained it to the satisfaction where enough jurors could perhaps guide the discussion. Then we will see where you stand.

(3RT 2110-2113.) The jury thereafter returned with a blank verdict form as to the Penal Code section 667.61 allegations.

The record quoted in full above demonstrates that the first jury was not asked whether it reached a verdict or finding, that no juror volunteered that he or she had reached a new verdict or finding, and that no new verdict or finding was ever taken or recorded. Indeed, the record instead establishes -- contrary to the majority opinion that "the jury returned a finding" (Opn. at 9) -- that, as recognized in the dissenting opinion, "no verdict in the first trial was ever taken or recorded on the allegation" and "the former jury never reached, much less resolved the issues[.]" (Dissenting Opn. at 2; see also *id.* at p. 1 ["the majority appears to assume the former jury found the allegation to be not true"]; and at p. 4 ["the record is devoid of any indication that the former jury reached a verdict resolving the issue"].)

This was a significant and material error, warranting a review of this published opinion, as it is from pure conjecture that the first jury returned with a finding that the majority opinion then reached the similarly erroneous legal conclusion that the trial court violated Penal Code section 1161 because it thereafter "did not give effect to the jury's finding." (Opn. at 10.)[1] In other words, it is only from this erroneous finding that the Court

---

[1] In an unsuccessful petition for rehearing, respondent alternatively suggested that if the record was unclear to the Court of Appeal as to

(continued...)

of Appeal, in a published case and contrary to this Court's settled principles, has applied the doctrine of double jeopardy to preclude retrial of a special allegation despite the fact that the allegation was not reached and decided by a fact-finder in a prior proceeding.

Respondent submits the record must affirmatively demonstrate that the first jury actually reached and decided the allegation in order to trigger a double jeopardy bar to retrial of the same allegation.[2] As a result, review is necessary to settle important questions of law and secure uniformity of decision. (Cal. Rules of Court, rule 8.500(b)(1).)

B. Retrial Was Not Barred by Double Jeopardy Because the First Jury Could Not Resolve the Special Allegation as to the Deadlocked Counts

As stated above, the Court of Appeal erred when it held that retrial was barred under double jeopardy principles because the former jury never *in fact* returned with a finding on the Penal Code section 667.61 penalty allegation. Nevertheless, irrespective of whether the first jury returned with a finding, the Court of Appeal further erred in determining that retrial was barred by the double jeopardy clause because the first jury did not (and could not) resolve the question of the special allegation *as it applied to the counts on which they were deadlocked.* In other words, retrial was not barred by double jeopardy principles because the record is devoid of any indication that the former jury resolved the issue of the Penal Code section

---

(...continued)
whether or if the first jury returned with verdict or finding as to the special allegation, then the appropriate remedy was a limited remand for the purposes of holding a hearing to determine whether the jury actually returned with a signed "not true" finding.

[2] In fact, the majority opinion could be relied on in any case for the proposition that a Court of Appeal may find any fact in the record merely from the trial court's prediction of that fact.

667.61 allegation as it applied to the counts on which the jury was hung and which formed the basis for the second trial.

Penal Code section 667.61, subdivision (b), provides, in pertinent part, that "any person who is convicted of an offense specified in subdivision (c) under one or more circumstances specified in subdivision (e) . . . shall be punished by imprisonment in the state prison for 15 years to life." This statute is an alternative sentencing scheme applicable to only certain felonies. (*People v. Anderson*, *supra*, 47 Cal.4th at p. 102.) "[T]he jury must first decide whether all the elements of the underlying substantive crime have been proven. If not, it returns an acquittal and the case is over. If the jury convicts on the substantive crime, it then independently determines whether the factual allegations that would bring the defendant under the One Strike sentencing scheme [set forth in section 667.61] have also been proven." (*Ibid.*)

"The double jeopardy clauses of the Fifth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, and article I, section 15, of the California Constitution, guarantee that a person shall not be placed twice 'in jeopardy' for the 'same offense.' The double jeopardy bar protects against a second prosecution for the same offense following an acquittal or conviction, and also protects against multiple punishment for the same offense. [Citations.]" (*People v. Bright* (1996) 12 Cal.4th 652, 660-661, overruled on other grounds in *People v. Seel* (2004) 34 Cal.4th 535, 550, fn. 6.) These principles of double jeopardy have been extended to penalty allegations. (*People v. Anderson, supra,* 47 Cal.4th at pp. 105-108.)

Here, as stated above, the defendant's first trial concerned two sets of sex offenses -- counts 1 through 9 and 13, committed against victim Z.C., and counts 10 through 12 committed against victim J.R. -- as well as a Penal Code section 667.61 penalty allegation. The jury was declared

deadlocked on the charges related to victim Z.C., but found the defendant guilty of the charges corresponding to victim J.R. Thus, because the defendant was not convicted of the Z.C. offenses (counts 10 through 12) in the former trial, the predicate necessary to trigger the jury's consideration of the Penal Code section 667.61 allegation *for those offenses* was absent from that trial.

In sum, if the first jury had convicted the defendant of the Z.C. offenses in counts 10 through 12, and had announced they were deadlocked on the Penal Code section 667.61 allegation, the prosecutor would have been able to retry the allegation. However, as noted in the dissenting opinion, "the reality of the instant case evinces even stronger support for allowing retrial of the allegation -- i.e., the jury deadlocked on the attached substantive crimes (i.e., the [Z.C.] offenses) and, therefore, never reached the penalty allegation." (Dissenting Opn. at 3.)

Furthermore, if the doctrine of double jeopardy does not preclude retrial of a sentencing allegation where a former jury deadlocked on that sentencing allegation, then it should not preclude retrial of that allegation if, because the former jury deadlocked on the attendant substantive offense, it never even considered the allegation. To conclude otherwise, as the majority has done in this published opinion, "now provides fodder for the inconsistent application of double jeopardy principles." (Dissenting Opn. at 3.)

As the dissenting opinion correctly notes, the majority's holding, when read in tandem with this Court's decision in *Anderson*, now creates an anomaly in the law. This Court held in *Anderson* that "if a defendant is convicted of the substantive crime but the jury deadlocks on the attached [Penal Code section 667.61] sentencing allegations, neither federal nor state double jeopardy principles bar a retrial on those sentencing allegations." (*Anderson*, *supra*, 47 Cal.4th at p. 105.) The majority opinion turns

Anderson on its face by deeming double jeopardy to apply where the jury deadlocks on the crime but (supposedly) has made a finding on a Penal Code section 667.61 allegation.

Nothing in *People v. Fields* (1996) 13 Cal.4th 289 ("*Fields*") permits this result. In *Fields*, this Court decided that Penal Code section 1023 prohibited a retrial of a greater offense after a defendant's conviction of a lesser included offense, even when there has been no express or implied acquittal of the greater offense. (*Id.* at p. 307.) The decision in *Fields* "was grounded on the 'acquittal first' rule, which requires that a jury be instructed it must acquit the defendant of a greater offense before it returns a verdict on any lesser included offense," and the Court "reasoned that a jury's verdict on a lesser included offense alone is 'mistaken in law,' and section 1023 requires that the consequences of this mistake must be borne by the People, not the defendant." (*Porter v. Superior Court* (2009) 47 Cal.4th 125, 135-136 ("*Porter*"), citing *Fields, supra*, 13 Cal.4th at pp. 310–311.) "Accordingly, a conviction of the lesser offense alone will bar the People from retrying the greater offense notwithstanding the jury's deadlock on that charge." (*Porter, supra*, at p. 136.) Critically, however, this Court in *Porter, supra*, 47 Cal.4th 125, specifically noted that the "holding in *Fields* is limited to greater and lesser included offenses and does not apply to sentencing enhancements or penalty allegations, *which the jury does not address until after it has reached a verdict on the underlying offense*." (*Porter, supra*, 47 Cal.4th at p. 136, emphasis added.)

In sum, there is nothing in the record to indicate that the first jury actually reached a verdict or finding resolving the issue of the Penal Code section 667.61 allegation. Further, and more specifically, the first jury here never reached and resolved the special allegation *as to the counts on which the jury remained hung* (which formed the basis for the second trial)

because "the jury does not address [it] until after it has reached a verdict on the underlying offense." (*Porter*, at p. 136.) As the dissent aptly notes:

> If the prosecution were barred from proving a charge-specific penalty allegation simply because a prior jury was declared deadlocked on the charge, the defendant would be provided with an unjustified windfall. There is no authority supporting the application of double jeopardy principles in this manner. This case should not be the first.

(Dissenting Opn. at 4.)

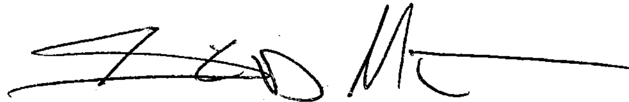
CONCLUSION

For the foregoing reasons, respondent respectfully requests that review be granted.

Dated: August 12, 2011

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
LAWRENCE M. DANIELS
Supervising Deputy Attorney General



STEVEN D. MATTHEWS
Supervising Deputy Attorney General
Attorneys for Respondent

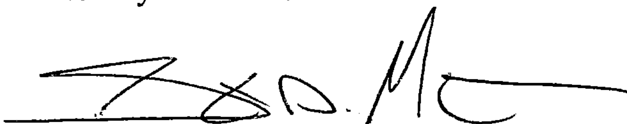
SDM:mol
LA2011503695
50953224.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 3,850 words.

Dated: August 12, 2011

KAMALA D. HARRIS
Attorney General of California



STEVEN D. MATTHEWS
Supervising Deputy Attorney General
Attorneys for Respondent

EXHIBIT A

TRACEY LETTEAU
LA2010501735

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

COURT OF APPEAL - SECOND DIST.
FILED
JUL 05 2011
Clerk
Deputy Clerk

THE PEOPLE,

Plaintiff and Respondent,

v.

VALENTIN CARBAJAL,

Defendant and Appellant.

B222615

(Los Angeles County
Super. Ct. No. BA316526)

APPEAL from a judgment of the Superior Court of Los Angeles County. Larry Paul Fidler, Judge. Affirmed in part; reversed and remanded in part.

Nancy J. King, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews and G. Tracey Letteau, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Valentin Carbajal was convicted, following a jury trial, of three counts of lewd acts on a child in violation of Penal Code[1] section 288, subdivision (a). The jury was unable to reach verdicts on 10 other counts, and the trial court declared a mistrial. A retrial followed, and appellant was convicted of one count of lewd acts, one count of forcible rape in violation of section 261, subdivision (a)(2), three counts of attempted forcible rape in violation of sections 664 and 261, subdivision (a)(2), and four counts of forcible oral copulation in violation of section 288a, subdivision (c)(2). The jury found true the allegation that appellant committed an offense specified in section 667.61 against more than one victim. The trial court sentenced appellant to a total of 83 years to life in state prison, which included two consecutive terms of 15 years to life imposed pursuant to section 667.61.

Appellant appeals from the judgment of conviction, contending that the true finding on the section 667.61 allegation must be reversed. We agree. We reverse the finding and remand for resentencing.

Facts

The underling facts can be briefly summarized, as they are not relevant to the issue on appeal. The victims in this case were Zelene C. and Jessica R. The two girls are stepsisters. Appellant is Zelene's biological father. Appellant was married to Jessica's biological mother, Ruth. At the time of the offenses in this case appellant, Zelene, Jessica, and Ruth all lived together.

Procedural facts

In the third amended information in this case, appellant was charged with 13 counts of sexual offenses against Zelene and Jessica. Counts 10, 11 and 12 alleged that appellant committed lewd acts upon a child in violation of section 288, subdivision (a). The victim of those counts was Jessica. The victim in the other counts was Zelene. The

---

[1] All further statutory references are to the Penal Code unless otherwise indicated.

information contained the following allegation: "It is further alleged, within the meaning of Penal Code sections 667.61(a), (b) and (e), as to defendant, VALENTIN CARBAJAL, as to counts(s) 1, 2, 6, 7, 8, 9, 10, 11, 12, and 13 that the following circumstances apply: The defendant in the present case committed an offense specified in Penal Code section 667.61, subdivision (c), against more than one victim."

The trial court instructed the jury about this allegation as follows: "If you find the defendant guilty of two or more sex offenses, as charged in Counts 1, 2, 6, 7, 8, 9, 10, 11, 12 & 13, you must then decide whether the People have proved the additional allegation that those crimes were committed against more than one victim. [¶] The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that this allegation has not been proved."

After deliberating, the jury reached a guilty verdict on counts 10, 11 and 12, all involving Jessica as the victim. The jury could not reach verdicts on the other 10 counts, which involved Zelene as the victim. The foreperson told the court that he/she did not believe that further deliberations would be of assistance. The court polled the jury and all the jurors agreed with the foreperson.

After a brief discussion with counsel, the trial court stated: "I will take the verdict and then I will declare a mistrial on the remaining counts." The court then directed the jury foreperson to hand "the verdict forms where you have been able to arrive at a verdict" to the bailiff.

After reading the verdict forms, the court stated: "This is certainly interesting. The jury has arrived at guilty verdicts on Counts 10 [alleging Jessica R. as the victim], 11 [alleging Jessica R. as the victim], and 12 [alleging Jessica R. as the victim]. The named victim is Jessica R. in each count. They have also found a true finding on the special allegation against more than one victim. I don't know if they can do that without a conviction. I would like to think about that. I don't know the answer to that."

After a brief consultation with counsel, the court spoke to the jury foreperson: "Juror Number 8, I have a question. Based upon your verdicts that I've taken a look at, as to counts 10, 11, and 12, you also signed a true finding on the special allegation, which

calls for the offenses to be committed against more than one victim. Is that what you wanted to do?" Juror No. 8 replied: "No, sir. I thought it was one or more counts." The court stated: "No. It has to be against one or more victims. With that in mind, what I am going to do, I am going to hand this form back to you. I'm going to ask the jury to go back in, and if you did not mean to find that as true, because I've just explained it to you, to make sure that that reflects your verdict. Once you're done, you are done with that, come back out."

The jury returned to the jury room and, in less than five minutes, returned to the courtroom. The court, apparently surprised by the jury's quick return, made the following statement: "I think I can guess what they have done. They have gone in; they signed it 'not true finding.' The problem is that's not what they should have done." The court continued: "It will be double jeopardy. Otherwise, the truth is if they are hung, the court should not take any verdict on that count because it's inappropriate." The court concluded: "I think what it is, since they are hung, we probably should not enter a finding on that at this point."

The court then addressed the jury:

"Okay. Ladies and gentlemen, I have given this some thought. Since you are unable to arrive at a decision on some of the counts, it is my belief that you should not be making a finding on that allegation unless two different victims were named.

"Now, we know what the verdicts are. You signed them, and I have read them, and counsel is aware of it. It appears to me the appropriate thing to do is – as with the other charges, is to not enter a finding. Since you are unable to arrive at a verdict, you can't find that to be true unless your belief is unanimously – if unanimously you believe not just as to the counts that you return but the entire case that there is not more than one victim.

"I mean, technically, you could come to that finding without arriving at the other counts. I think legally they could, but you would have to make a finding unanimously that there is only one victim. If you are not able to do that – if you are not able to do that, then what you should do is simply not fill in that form.

"That's correct, if you believe unanimously that that finding is not true, it's not based on the three verdicts that you returned, it's based on the entire case because you are unable to arrive at a verdict on many of the counts. You understand what I am saying?

"That enhancement – I am not going to explain anymore.

"Let's assume for a moment you had arrived at verdicts, and the verdicts named more than one victim, that's all I could say, you then would have to make a determination whether this allegation was true or not true. The problem is by signing that verdict form, you still have counts where you have been unable to arrive at a verdict, and those verdict forms do name more than one victim.

"So I sort of, I don't want to tell you what to do. I am sort of giving you what I believe the law require – you have three options: You could find it to be true, which at this point you originally signed, but you have agreed it was a mistake based upon a misunderstanding. I think I may have misled you when I sent you back out as to what – what your options were.

"Do you understand now what your options are? I see a lot of jurors nodding their heads you don't. There is a lot of counts that are still outstanding.

"Juror No. 9: Correct.

"The court: I think legally there may be some problem, but I don't want to tell you that's the law because I am not sure you are making a finding that there is not more than one victim in this case; yet you haven't decided all the counts.

"That finding does not apply just to the three counts that you decided; it applies to the entire case. If you are unable – I don't want to say anything more on that finding. I think you have to go in and discuss that.

"A lot of jurors are nodding their heads, and I think I know – Juror Number 8, you seem somewhat confused. That finding applies when the entire case has been decided, if you can, but what I am saying is there is a lot of counts you did not decide.

"Juror No. 8: Correct. Okay.

"The court: I want you to go back. I don't want to say anymore. When you're done – go in, take as much time as you need. You let us know. I am going to send the

alternates back out into the hallway. You retire and continue your deliberations. I am not comfortable saying anything more about it. I think I have explained it to the satisfaction where enough jurors could perhaps guide the discussion. Then we will just see where you stand."

The jury deliberated briefly, then returned to the courtroom. The court stated: "For the record, the jurors questioned the clerk as to whether they could leave a form blank and could they have a fresh form which was sent in to them? [¶] Juror Number 8, is that what the jury wishes to do, is to leave that form blank?" Juror No. 8 agreed that it was. The court polled the jury and all jurors agreed. The clerk then read the verdicts for counts 10, 11 and 12.

Following the reading of the verdict, the court stated: "Ladies and gentlemen, based upon my conversations with you, on the remaining counts that you were unable to arrive at a verdict on, I will find that further deliberations would not be of use. You have indicated that you have taken several ballots and no juror believes that any further deliberations will help on those counts. [¶] As to those counts, I will declare a mistrial, and the jury will now – as soon as I read the final instruction to you – will be discharged with the thanks of the court."

A second trial followed, involving the retrial of the charges against appellant in which Zelene was the victim. The section 667.61 multiple victim allegation was also retried. The jury convicted appellant of 9 of the 10 counts alleging Zelene as the victim and found the section 667.61 allegation true.

Discussion

1. Single trial

As discussed, *ante*, in the second trial of this matter, the jury considered only the charges involving Zelene. Evidence of appellant's conviction in the first trial was introduced, and the jury was instructed that if it found appellant guilty of one of the section 288(a) charges involving Zelene in the present case, and found that the

prosecution had proved that appellant had been convicted of the crimes in the first trial involving Jessica, the jury could find the section 667.61 multiple victim allegation true.

Appellant contends that there was only one victim in the second trial, and there was no statutory authority for the jury in that trial to determine the truth of a multiple victim allegation pursuant to section 677.61. We do not agree.

The multiple victim enhancement of section 667.61 reads as follows: "The defendant has been convicted in the present case or cases of committing an offense specified in subdivision (c) against more than one victim." (§ 667.61, subd. (e)(5).)

The charges involving both Jessica and Zelene were charged in the same information and were initially all tried together, before one jury. The charges were closely related. The retrial of the hung counts involving Zelene was still the same case.

There is no absolute requirement under California law that "the same jury that finds a defendant guilty of an offense must always decide the truth of an attached penalty allegation. On the contrary, 'prior decisions have held that a trial court may receive a guilty verdict from a jury that is unable to agree on a penalty provision, declare a mistrial on the penalty provision alone, and empanel another jury to consider the issue of penalty. [Citations.]' [Citation.]" (*People v. Anderson* (2009) 47 Cal.4th 92, 119-120 [involving retrial of penalty allegation under section 667.61 without retrial of previous lewd act conviction].) "Defendant has not identified, nor have we found, a single decision holding that aggravating factors must be retried together with all the elements of the underlying offenses to which they attach. If *Apprendi* [*v. New Jersey* (2000) 530 U.S. 466] truly required such a dramatic change in resentencing proceedings, one would expect to find case law reaching this conclusion, as well as clear guidance from the United States Supreme Court about how the change should be implemented. There is none, and we decline to create it." (*Id.* at p. 123.)

2. Double jeopardy

Appellant contends that retrial of the section 667.61 multiple victim allegation was barred by double jeopardy principles.

Appellant did not raise a claim of double jeopardy in the trial court. "If, however, a plea of former jeopardy had merit and trial counsel's failure to raise the plea resulted in the withdrawal of a crucial defense, then defendant would have been denied the effective assistance of counsel to which he was entitled. (*People v. Belcher* (1974) 11 Cal.3d 91, 96 . . . [acknowledging general rule of waiver, but addressing double jeopardy argument on direct appeal and concluding trial counsel's failure to timely raise plea of former jeopardy constituted a denial of effective assistance of counsel]; see *Strickland v. Washington* (1984) 466 U.S. 688 [80 L.Ed.2d 674, 104 S.Ct. 2052].) Consequently, although the Attorney General is technically correct in arguing the issue was waived, as in *Belcher* we nevertheless must determine whether such a plea would have had merit." (*People v. Marshall* (1996) 13 Cal.4th 799, 824, fn. 1.)

Both parties agree that if the jury in the first trial found the section 667.61 allegation not true, retrial of the allegation would be barred under *People v. Seel* (2004) 34 Cal.4th 535. (*People v. Anderson, supra*, 47 Cal.4th 92, 119 ["Under *Apprendi*, the One Strike allegation had to be tried to a jury, and under *Seel* an acquittal on the allegation would have barred retrial"].)

Although the parties do not consider the alternate scenario, retrial would also be barred if the jury in the first trial had again found the section 667.61 allegation true after reconsideration, because such a finding would not be supported by the evidence as a matter of law. The jury convicted appellant only of the charges against one victim and the section 667.61 requires two or more victims. Thus, the true finding would inevitably be reversed on appeal for insufficiency of the evidence, and double jeopardy would bar retrial. (*People v. Seel, supra*, 34 Cal.4th at pp. 548-550 [double jeopardy bars retrial of penalty allegation after reversal for insufficient evidence].)

The handling of the jury finding in this matter was governed by section 1161 which provides in pertinent part: "When there is a verdict of conviction, in which it appears to the Court that the jury have mistaken the law, the Court may explain the reason for that opinion and direct the jury to reconsider their verdict, and if, after the

reconsideration, they return the same verdict, it must be entered; but when there is a verdict of acquittal, the Court cannot require the jury to reconsider it."

Here, the jury initially returned a true finding on the section 667.61 allegation. The court believed that the jury had mistaken the law and believed that it could find the allegation true if it had convicted appellant of multiple *counts*. The allegation involved multiple *victims*. The court's discussion with the jury foreperson supported the court's belief. Thus, the court properly directed the jury to reconsider its true finding.

It is undisputed that, following a brief period of reconsideration, the jury again returned a finding. The trial court and both parties believed that the jury finding was "not true" and both parties on appeal still share that belief. As the trial court said, apparently surprised by the jury's quick return: "I think I can guess what they have done. They have gone in; they signed it 'not true finding.' The problem is that's not what they should have done." The court added: "It will be double jeopardy." For purposes of double jeopardy, it does not matter whether that finding was "true" or "not true" because section 1161 prohibited the court from sending the jury back for further reconsideration in either case.[2]

Section 1161 specifies that when there is a verdict of conviction, the trial court may direct the jury to reconsider but "if, after the reconsideration, they return the same

---

[2] The jury foreperson's exchange with the court clearly shows that the jury intended to return a verdict, albeit one based on a mistake in the jury's understanding of the substantive law. The jury had correctly informed the trial court that it was hung on substantive counts, so this is not a case where the jury was confused about how to inform the court that it could not reach a verdict or mistakenly believed that it had to fill out all the forms. Thus, the circumstances of this case are not like the circumstances before the Court in *People v. Caird* (1998) 63 Cal.App.4th 578. *Caird*, and the cases considered therein, involved instances where the jury made technical or clerical errors in filling out verdict forms. The jury in *Caird*, for example, returned a guilty finding on the greater offense and a not guilty finding on a lesser included offense. The trial court, suspecting a "technical" error, polled the jury and determined that the jury "never reached a decision on the lesser included offense." (*Id.* at p. 586.) Thus, the verdict form did not reflect the jury's intent. The jury in *Caird*, like the jury in other similar cases, may well "have mistakenly believed that it was supposed to complete all the forms it had been given." (*Id.* at p. 589.)

verdict, it must be entered." Thus, if the jury had again returned a "true" finding, the court was required to enter that finding.

Section 1161 also specifies that "when there is a verdict of acquittal, the Court cannot require the jury to reconsider it." Thus, if the jury had returned a "not true" finding, the court was required to enter that finding.

"[O]nce the jury submits a verdict of acquittal to the trial court, the court may not order reconsideration of that verdict but rather must order that judgment be entered on the verdict. (§§ 1161, 1165; *People v. Blair* (1987) 191 Cal.App.3d 832, 839 [236 Cal.Rptr. 675].) Second, a trial court may not coerce a jury by rejecting its verdict and requesting it to continue deliberating. (*Ibid.*; see also *People v. Gainer* (1977) 19 Cal.3d 835, 842-843.)" (*People v. Bigelow* (1989) 208 Cal.App.3d 1127, 1134.)

"Once the jury has manifested its intention to acquit, then the court must receive and record the verdict. (§§ 1164, 1165.) The court may not thereafter declare a mistrial without giving effect to that verdict. Nor may the court, by refusing to poll the jury or otherwise impeding recordation of the verdict, deny the defendant his right to have his guilt or innocence determined by the first tribunal to hear the matter. [Citations.]" (*Bigelow v. Superior Court, supra,* 208 Cal.App.3d at p. 1135.)

Here, the court did not give effect to the jury's finding after reconsideration. Rather, the court impermissibly sent the jury back to deliberate again, after making it clear to the jury that the court expected the jury to indicate that it was hung. The jury asked if they could leave the form blank and requested a fresh form. The jury foreperson then told the court that the jury wanted to leave the form blank. This indicated that the jury was hung on the section 667.61 allegation.

Respondent contends that the court properly found that the jury's true and not true findings were inconsistent with the jury's inability to reach a verdict on the counts involving the second victim Zelene. Respondent further contends that the jury's findings appeared to be based on a mistake or confusion and the trial court had authority under section 1161 to clarify or reconcile their verdict, which respondent characterizes as "ambiguous." Respondent concludes that the trial court acted properly in directing the

jury to reconsider their finding, and so no "not true" finding was actually returned at the first trial.

As we discuss, *ante*, section 1161 permits the trial court to direct the jury to reconsider a guilty verdict (or true finding) if it appears that the verdict is based on a mistake of law. If, however, the jury again returns a guilty verdict (or true finding), the court must accept that verdict. This second verdict presumably would be no less mistaken than the first verdict, but the law limits the number of times a jury may be asked to reconsider a guilty verdict.

The law does not permit reconsideration of a verdict of acquittal (or not true finding), even if it is inconsistent. "A jury's verdict of acquittal or not true may not be questioned by anyone else or in any other forum, and a trial court may not probe further into the jury's deliberations. 'As a general rule, inherently inconsistent verdicts are allowed to stand. [Citations.] For example, "if an acquittal of one count is factually irreconcilable with a conviction on another, *or if a not true finding of an enhancement allegation is inconsistent with a conviction of the substantive offense,* effect is given to both." [Citation.]" (*People v. Avila* (2006) 38 Cal.4th 491, 600 [43 Cal. Rptr.3d 1 133 P.2d 1076], italics added.) The system accepts the possibility that 'the jury arrived at an inconsistent conclusion through "mistake, compromise, or lenity." [Citation.]' (*Ibid.*)" (*People v. Guerra* (2009) 176 Cal.App.4th 933, 943 [jury convicted defendant of sex crimes against two victims but found section 667.61 multiple victim enhancement not true].)

In general, "the state has no remedy when a jury acquits 'in the teeth of both law and facts.' (*Horning v. District of Columbia* (1920) 254 U.S. 135, 138 [65 L.Ed. 185, 41 S.Ct. 53], disapproved on other grounds in *United States v. Gaudin* (1995) 515 U.S. 506, 520 [132 L.Ed.2d 444, 115 S.Ct. 2310].)" (*People v. Guerra, supra,* 176 Cal.App.4th at p. 943.)

Respondent contends that the trial court's action was permissible under *Bigelow v. Superior Court, supra,* 208 Cal.App.3d 1127 because the court in that case stated that the trial court could have "informed the jury that the acquittal was not consistent with

findings of special circumstances and asked it to clarify its verdict to show its true intent." (*Id.* at p. 1136.) The Court in *Guerra* rejected an identical claim, pointing out that in the very next sentence of *Bigelow*, the Court of Appeal "disapproved of what the trial court there actually did: 'the court sent the jury back to deliberate.'" (*People v. Guerra*, *supra*, 176 Cal.App.4th at p. 944.) To be precise, the opinion in *Bigelow* reads: "The court could have . . . informed the jury that the acquittal was not consistent with findings of special circumstances and asked it to clarify its verdict to show its true intent. *But instead*, the court sent the jury back to deliberate." (*Bigelow v. Superior Court*, *supra*, 208 Cal.App.3d at p. 1136, italics added.)

Respondent's reliance on *Bigelow* is misplaced. Respondent cites no other authority to support its position. We are not aware of any authority which permits a trial court to send the jury back for further deliberations on a punishment allegation because it is inconsistent with the jury's verdicts on the charges. As we have just discussed, statutory and case law are to the contrary. The trial court acted improperly in refusing to accept the jury's finding. Accordingly, the true finding on the section 667.61 allegation must be reversed and a not true finding entered in the minutes.

Disposition

The jury's true finding on the section 667.61 multiple victim allegation is reversed. This matter is remanded for resentencing and for correction of the minutes. The judgment of conviction is affirmed in all other respects.

CERTIFIED FOR PUBLICATION

ARMSTRONG, Acting P. J.

I concur:

MOSK, J.

"[W]hen a trial produces neither an acquittal nor a conviction retrial may be permitted if the trial ended 'without finally resolving the merits of the charges against the accused.'" (*People v. Anderson* (2009) 47 Cal.4th 92, 104 ("*Anderson*"), quoting *Arizona v. Washington* (1978) 434 U.S. 497, 503.) This is the first case that, contrary to this principle, has applied the doctrine of double jeopardy to preclude retrial of a special allegation despite the fact that the allegation was not reached and decided by a fact-finder in a prior proceeding. Because I believe that, under these circumstances, the record must demonstrate the former fact-finder (e.g., a jury) reached and decided the allegation in order to trigger a double jeopardy bar to retrial of the same allegation, I respectfully dissent.

"The double jeopardy clauses of the Fifth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, and article I, section 15, of the California Constitution, guarantee that a person shall not be placed twice 'in jeopardy' for the 'same offense.' The double jeopardy bar protects against a second prosecution for the same offense following an acquittal or conviction, and also protects against multiple punishment for the same offense. [Citations.]" (*People v. Bright* (1996) 12 Cal.4th 652, 660-661, overruled on other grounds in *People v. Seel* (2004) 34 Cal.4th 535, 550, fn. 6.) Principles of double jeopardy have been extended to penalty allegations. (*People v. Anderson, supra,* 47 Cal.4th at pp. 105-108.)

The majority concludes that, not only did the former jury reach a decision with respect to the multiple–victim penalty allegation (§ 667.61, subds. (b) & (e)(4)) but, in some instances, the majority appears to assume the former jury found the allegation to be not true. Thus, the majority holds the doctrine of double jeopardy precluded retrial of the allegation. There are three problems with this approach.

The first stems from the nature of a section 667.61 allegation. Section 667.61, subdivision (b) provides, in pertinent part, that "any person who is convicted of an offense specified in subdivision (c) under one or more circumstances specified in subdivision (e) . . . shall be punished by imprisonment in the state prison for 15 years to life." This statute is considered to be an alternative sentencing scheme applicable to only certain felonies. (*People v. Anderson, supra,* 47 Cal.4th at p. 102.) "[T]he jury must first decide whether all the elements of the underlying substantive crime have been proven. If not, it returns an acquittal and the case is over. *If the jury convicts on the substantive crime*, it then independently determines whether the factual allegations that would bring the defendant under the One Strike sentencing scheme [set forth in section 667.61] have also been proven." (*Ibid.*, italics added.)

The first trial concerned two sets of sex offenses – some committed against Zelene and others committed against Jessica – as well as a section 667.61 penalty allegation. The jury was declared deadlocked on the charges related to Zelene but found appellant guilty of the charges corresponding to Jessica. Because appellant was not *convicted of* the Zelene offenses in the former trial, the predicate necessary to trigger consideration of the section 667.61 allegation for those offenses was absent from that trial. Thus, it cannot be said that double jeopardy principles precluded retrial of the penalty allegation *as it applied to the Zelene offenses* because the former jury never reached, much less resolved, the issue of whether the allegation was applicable to the Zelene offenses.

The second relates to the absence of a section 667.61 verdict in the former proceeding. In this regard, no verdict at the first trial was ever taken or recorded on the allegation and, in fact, the only indication in the record of the nature of that verdict is a reference in the reporter's transcript to the trial court's "guess" that it was "not true." The record does not demonstrate the jury was asked whether it reached a verdict and no juror volunteered that it reached a "not true" verdict. Ultimately, the court asked each individual juror whether he or she wanted to leave the verdict form blank and each juror indicated that was his or her desire. I respectfully disagree with the inference in the

majority opinion that double jeopardy precludes retrial of a penalty allegation or offense as long a court is able to "guess" a former fact-finder resolved the corresponding issue in the defendant's favor. [1]

The third problem with the majority's holding is that, when it is read in tandem with the California Supreme Court's decision in *Anderson*, it creates an anomaly in the law. *Anderson* holds that "if a defendant is convicted of the substantive crime but the jury deadlocks on the attached [section 667.61] sentencing allegations, neither federal nor state double jeopardy principles bar a retrial on those sentencing allegations." (*People v. Anderson, supra,* 47 Cal.4th at p. 105.) Thus, if the first jury had convicted appellant of the Zelene offenses and had deadlocked on the section 667.61 allegation, the prosecutor would have been able to retry the allegation. However, the reality of the instant case evinces even stronger support for allowing retrial of the allegation – i.e., the jury deadlocked on the attached substantive crimes (i.e., the Zelene offenses) and, therefore, never reached the penalty allegation. If the doctrine of double jeopardy does not preclude retrial of a sentencing allegation where a former jury deadlocked on that sentencing allegation then, certainly, it should not preclude retrial of that allegation if, because the former jury deadlocked on the attendant substantive offense, it never even considered the allegation. To conclude otherwise, as the majority has done, provides fodder for the inconsistent application of double jeopardy principles.

---

[1] The majority also appears to suggest the finding on the section 667.61 allegation must be reversed because, by declining to take the jury's verdict when it returned to the courtroom for the second time, the trial court failed to comply with section 1161. However, "[r]eversal of a conviction for a violation of section 1161 requires a showing of actual prejudice." (*People v. Caird* (1998) 63 Cal.App.4th 578, 587.) As explained above, any section 667.61 verdict at the first trial corresponded only to the offenses for which appellant was convicted. Thus, any error the trial court may have committed by declining to accept the jury's verdict when it returned to the courtroom a second time was harmless because, even if the trial court accepted a "not true" verdict, double jeopardy principles would not have precluded the prosecution from proving the section 667.61 allegation in the subsequent trial on the deadlocked counts.

In sum, the record is devoid of any indication that the former jury reached a verdict resolving the issue of whether the section 667.61 allegation was applicable to the counts on which the jury hung and formed the basis for the second trial. If the prosecution were barred from proving a charge-specific penalty allegation simply because a prior jury was declared deadlocked on the charge, the defendant would be provided with an unjustified windfall. There is no authority supporting the application of double jeopardy principles in this manner. This case should not be the first.[2]

KUMAR, J.*

---

[2] I would direct the abstract of judgment be corrected. In pertinent part, the prosecution alleged section 667.61 applied to counts 1, 2, 6, 7, 8, 9, 10, 11, and 12. The first trial resulted in guilty verdicts on counts 10, 11, and 12. Following the second trial, the jury found appellant guilty as charged in counts 1, 2, 6, 7, 8, and 9; and the section 667.61 allegation was found true. The trial court sentenced appellant pursuant to section 667.61 only on counts 1 and 10. However, appellant should have been sentenced to consecutive 15 years-to-life terms, pursuant to section 667.61, on counts 2, 6, 7, 8, and 9 because: (1) a trial court may not strike a section 667.61 allegation (§ 667.61, subd. (i)); and (2) the crimes were committed on separate occasions (§ 667.67, subd. (i); § 667.6, subd. (d)). In addition, due to the fact that neither jury found the section 667.61 allegation applicable to count 10, the trial court incorrectly imposed a 15-years-to-life sentence for that offense. But, because the court expressed a desire to impose the maximum term, remand is not necessary. The abstract of judgment should be corrected to reflect the maximum term of eight years (§§ 288, subd. (a), 667.6, subds. (d) & (e)(5)) in state prison on count 10 as well as consecutive 15 years-to-life terms on counts 2, 6, 7, 8, and 9.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

LOS ANGELES
ATTORNEY GENERAL
RECEIVING
DOCKETING

DECLARATION OF SERVICE

Case Name: ***People v. Valentin Carbajal***
No.: **S________; B222615**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 300 South Spring Street, Suite 1702, Los Angeles, CA 90013. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On August 12, 2011, I served the attached **Petition for Review** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail system of the Office of the Attorney General, addressed as follows:

Nancy J. King
Attorney at Law
1901 First Avenue, Suite 138
San Diego, CA 92101
(Counsel for Appellant Carbajal)

Anne Marie Wise
Deputy District Attorney
Los Angeles District Attorney's Office
210 West Temple Street, 17th Floor
Los Angeles, CA 90012

John A. Clarke
Clerk of the Court
Los Angeles County Superior Court
111 N. Hill Street
Los Angeles, CA 90012
To be delivered to
Hon. Larry P. Fidler, Judge

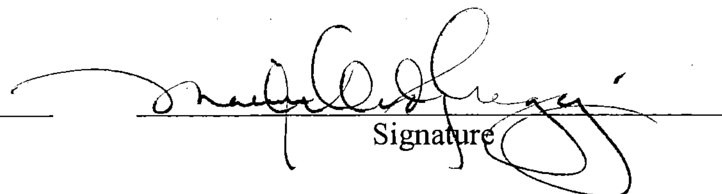
CAP- LA
California Appellate Project (LA)
520 S. Grand Ave., 4th Floor
Los Angeles, CA 90071-2600

On August 12, 2011, I caused 13 copies of the **Petition for Review** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102 by FedEx Priority Overnight Service, tracking number 8744 4308 7168.

On August 12, 2011, I hand delivered a copy of the **Petition for Review** to the Clerk of the Court of Appeal, Second Appellate District, Division Five, 300 South Spring Street, Los Angeles, CA 90013.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 12, 2011, at Los Angeles, California.

M. O. Legaspi
Declarant



Signature

SDM:mol
LA2011503695
50955026.doc