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. S195600

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

RESPONDENT'S OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

ISSUE PRESENTED

Was retrial on sentencing allegations under the One Strike Law (Pen. Code, § 667.61) barred by double jeopardy although the first jury never reached or resolved the issue?

STATEMENT OF THE CASE

The jury at appellant's first trial was unable to reach a decision regarding the ten sex offense counts pertaining to one victim (Zelene C.), but found appellant guilty of the three sex offense 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 appellant was 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 it returned guilty verdicts pertaining to qualifying offenses *for two or more victims* as required by the special allegation. (2CT 313.)

The trial court noted the inconsistency between the guilt determinations and the special allegation, and specifically asked 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. (3RT 2107-2109.)

What happened next in the proceedings is contested. According to the Court of Appeal majority, the jury actually returned with another finding,

and Penal Code section 1161[1] then "prohibited the court from sending the jury back for reconsideration in either case." (Opn. at p. 9.)

According to the Court of Appeal dissent, however, there was no evidence that the jury returned with any finding.[2] In this regard, the record shows that the jury was never asked whether it had reached a new verdict, and no juror volunteered that he or she had returned and reached a new verdict. The trial court explained to the jurors that the special allegation was inapplicable unless the jury returned with guilt findings as to two different victims or unless the jury unanimously concluded there was only a single victim, and again directed the jury to reconvene and clarify its decision. (Dissenting Opn. at pp. 2-3; 3RT 2110-2113.)

Shortly thereafter, the first jury returned and submitted a blank special allegation verdict. (3RT 2113-2114.) On retrial, another jury found appellant guilty of the deadlocked counts and found true the Penal Code section 667.61 allegation.

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[1] Penal Code section 1161 provides as follows: "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. If the jury render a verdict which is neither general nor special, the Court may direct them to reconsider it, and it cannot be recorded until it is rendered in some form from which it can be clearly understood that the intent of the jury is either to render a general verdict or to find the facts specially and to leave the judgment to the Court."

[2] Respondent in the Court of Appeal initially assumed that the first jury actually returned with a "not true" finding. (RB 15.) However, respondent subsequently noted for the Court of Appeal in an unsuccessful petition for rehearing that a closer and more accurate reading of the entire record, as set forth herein and in the dissenting opinion of Acting Justice Sanjay Kumar, reveals that this assumption was mistaken and that the jury in fact never actually returned with a finding.

SUMMARY OF ARGUMENT

The Court of Appeal erred when it held that retrial was barred by double jeopardy principles both because appellant's jury never in fact returned 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 specifically reach or resolve the issue of the special allegations on the counts on which it was deadlocked.

The double jeopardy clause of "[t]he Fifth Amendment to the United States Constitution, which applies to the states through the Fourteenth Amendment (*Benton v. Maryland* (1969) 395 U.S. 784, 793–796 [89 S.Ct. 2056, 2061–2064, 23 L.Ed.2d 707]), protects defendants from repeated prosecution for the same offense [citations], by providing that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb . . . .'" (*People v. Batts* (2003) 30 Cal.4th 660, 678.)

"It has been established for 160 years, since the opinion of Justice Story in *United States v. Perez* (1824) 9 Wheat. 579, 6 L.Ed. 165, 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, 93 L.Ed. 974], the United States Court held that double jeopardy clause does not prohibit retrial after a first jury is unable to reach a unanimous final judgment:

> 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)[3]

Likewise, pursuant to the double jeopardy clause in the United States Constitution and article I, section 15, of the California Constitution, this

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[3] See also *Renico v. Lett* (2010) __ U.S. __, __ [130 S.Ct. 1855, 1862-1864, 176 L.Ed.2d 678]; *Yeager v. United States* (2009) __ U.S. __, __ [129 S.Ct. 2360, 2366, 174 L.Ed.2d 78]; *United States v. DiFrancesco* (1980) 449 U.S. 117, 130 [101 S.Ct. 426, 66 L.Ed.2d 328]; *Illinois v. Somerville* (1973) 410 U.S. 458, 468-471 [93 S.Ct. 1066, 35 L.Ed.2d 425]; *Keerl v. State of Montana* (1909) 213 U.S. 135, 137-138 [29 S.Ct. 469, 53 L.Ed. 734]; *Dreyer v. People of Illinois* (1902) 187 U.S. 71, 85-86 [23 S.Ct. 28, 47 L.Ed. 79]; *Logan v. United States* (1892) 144 U.S. 263, 297-298 [12 S.Ct. 617, 36 L.Ed. 429]; *United States v. Perez, supra,* 9 Wheat. at p. 580.

Court has long adhered to the settled principle 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, quoting *Arizona v. Washington, supra,* 434 U.S. at p. 503.)

As this Court has noted, this principle has also been statutorily codified:

> This principle is codified in [Penal Code] section 1140,[4] which prohibits discharge of the jury after the case is submitted to it until it has rendered a verdict, unless by consent of both parties or it appears there is no reasonable probability the jury can agree, and [Penal Code] section 1141,[5] which permits retrial under such circumstances. (See *People v. Fields* (1996) 13 Cal.4th 289, 300, 52 Cal.Rptr.2d 282, 914 P.2d 832; see also § 1160 [permitting the jury, in a trial of multiple charges, to return a verdict on the charge or charges on which they agree and permitting retrial of the charges on which they do not agree].)

(*People v. Halvorsen* (2007) 42 Cal.4th 379, 425-426)[6]

More specifically, this Court has held that "a defendant's conviction of the underlying substantive offense does not (on double jeopardy grounds) bar further proceedings, such as retrial, on a penalty allegation.

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[4] Penal Code section 1140 provides as follows: "Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree."

[5] Penal Code section 1141 provides as follows: "In all cases where a jury is discharged or prevented from giving a verdict by reason of an accident or other cause, except where the defendant is discharged during the progress of the trial, or after the cause is submitted to them, the cause may be again tried."

[6] See also *People v. Gurule* (2002) 28 Cal.4th 557, 646; *People v. Fields* (1996) 13 Cal.4th 289, 300.)

[Citation.] Thus, the circumstance that the jury has returned a verdict on the underlying offense, but is unable to make a finding on the penalty allegation, does not constitute an 'acquittal' of (or otherwise bar retrial of) the penalty allegation on the ground of double jeopardy. [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.)

However, there is no authority that supports the application of double jeopardy principles in the manner articulated by the Court of Appeal. Indeed, as noted in the dissenting opinion below, this is the first case that, contrary to well-settled authority, 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 Court of Appeal has done, provides fodder for an inconsistent application of double jeopardy principles. The Court of Appeal's misapplication of double jeopardy principles should be corrected.

ARGUMENT

I. THE COURT OF APPEAL INCORRECTLY DETERMINED THAT RETRIAL AS TO A SPECIAL ALLEGATION WAS 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 the court's erroneous premise that "following a brief period of reconsideration, the [first] jury again returned a finding." (Opn. at 9.) Because of this reading of the record, the Court of

Appeal held that the trial court violated Penal Code section 1161 because it did not "give effect to the jury's finding." (Opn. at 10.)

However, the record does not establish that the first jury ever returned a "not true" finding as to the special allegation. But even assuming, contrary to the record, that it did return such a finding, the jury did not (and could 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 Returned a Not True Finding on the Special Allegation

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, all the record shows is that 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. (3RT 2113-2114.)

The record thus 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 *id.* 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 reversal of the decision below. The Court of Appeal merely surmised that the first jury returned with a finding and then reached a corresponding 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.)[7] In other words, it was only from pure conjecture that the Court of Appeal applied the doctrine of double jeopardy to preclude retrial of a special allegation.

The record here does not 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.[8] The Court of Appeal's invocation of Double Jeopardy in such a circumstance should not be permitted.

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[7] In an unsuccessful petition for rehearing, respondent suggested that if the Court of Appeal found the record unclear as to whether the first jury returned with a verdict or finding as to the special allegation, then the better remedy than reversal was a limited remand for a hearing to determine whether the jury actually returned with a signed "not true" finding.

[8] Were the Court of Appeal's approach the law, an appellate court could find any fact in the record merely from the trial court's prediction of that fact.

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

As stated above, the Court of Appeal wrongly held that retrial violated the double jeopardy clauses because the former jury never in fact returned with a finding on the Penal Code section 667.61 penalty allegation. But irrespective of whether the first jury returned a finding, the Court of Appeal also wrongly determined that retrial was barred by double jeopardy principles because the first jury did not (and could not) resolve the question of the special allegation as it applied to the counts on which the jury was deadlocked 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, supra,* 12 Cal.4th at pp. 660-661.) These principles of double jeopardy have been extended to penalty allegations. (*People v. Anderson, supra,* 47 Cal.4th at pp. 105-108.)

Here, appellant'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 deadlocked on the charges related to victim Z.C., but found appellant guilty of the charges corresponding to victim J.R. Thus, the predicate necessary to trigger the jury's consideration of a multiple-victim allegation under Penal Code section 667.61 allegation for those offenses on which the jury deadlocked (counts 1 through 9 and 13) was absent from that trial.[9]

Significantly, if the first jury had convicted appellant of the Z.C. offenses, and had announced it was deadlocked on the Penal Code section 667.61 allegation, the prosecutor would have been able to retry the allegation. Further, 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.)

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[9] There was only one Penal Code section 667.61 multiple-victim allegation charged in the information. However, once the initial jury was deadlocked on counts 1 through 9 and 13, this penalty allegation applied and could be considered by the jury (if at all) only to those counts upon which the jury actually reached and returned a verdict (counts 10 through 12) since that allegation attaches to each separate count. (See *People v. Wutzke* (2002) 28 Cal.4th 923, 930-931; *People v. Valdez* (2011) 193 Cal.App.4th 1515, 1521-1524; *People v. Murphy* (1998) 65 Cal.App.4th 35, 38-40; *People v. DeSimone* (1998) 62 Cal.App.4th 693, 698-699.)

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 below has done, "provides fodder for the inconsistent application of double jeopardy principles." (Dissenting Opn. at 3.)

Additionally, as the dissenting opinion in the Court of Appeal correctly noted, the majority's view, when read in tandem with this Court's decision in *Anderson*, would create 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 Court of Appeal's 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. Since the section 667.61 penalty allegation attaches to a particular offense, and may be resolved only after the jury convicts on the offense, it cannot be reached if the jury has deadlocked on that offense.

Nor would anything in this Court's opinion in *People v. Fields*, *supra*, 13 Cal.4th 289, afford appellant relief. In *Fields*, this Court decided that Penal Code section 1023[10] prohibited a retrial of a greater offense after a

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[10] Penal Code section 1023 provides as follows: "When the defendant is convicted or acquitted or has been once placed in jeopardy upon an accusatory pleading, the conviction, acquittal, or jeopardy is a bar to another prosecution for the offense charged in such accusatory pleading, or for an attempt to commit the same, or for an offense necessarily included (continued...)

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." (*Porter v. Superior Court* (2009) 47 Cal.4th 125, 135-136, citing *Fields*, *supra*, 13 Cal.4th at pp. 310-311.) This 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." (*Ibid.*) "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." (*Id.* 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.) Consequently, *Fields* does not impact this case involving a penalty allegation under section 667.61.

In sum, nothing in the record indicates that the first jury actually reached and returned a verdict or finding resolving the issue of the Penal Code section 667.61 allegation. Further, and more specifically, the first jury here could not reach or resolve the special allegation as to the counts on which the jury remained hung (and which formed the basis for the second trial) because "the jury does not address [it] until after it has reached

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(...continued)
therein, of which he might have been convicted under that accusatory pleading."

a verdict on the underlying offense." (*Porter*, *supra*, 47 Cal.4th at p. 136.)

As the dissent in the Court of Appeal aptly noted:

> 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, the decision of the Court of Appeal should be reversed.

Dated: November 4, 2011

Respectfully submitted,

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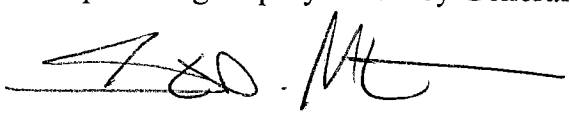

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S OPENING BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 3,979 words.

Dated: November 4, 2011

KAMALA D. HARRIS
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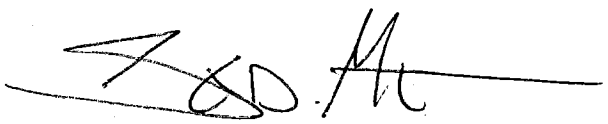

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DECLARATION OF SERVICE

Case Name: *People v. Valentin Carbajal*
No.: S195600

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 November 7, 2011, I served the attached **Respondent's Opening Brief on the Merits** 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:

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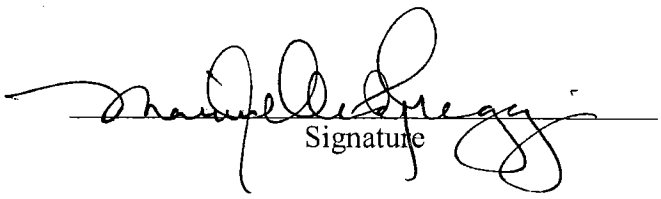
On November 7, 2011, I caused 13 copies of the **Respondent's Opening Brief on the Merits** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102 by regular mail.

On November 7, 2011, I hand-delivered a copy of the **Respondent's Opening Brief on the Merits** 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 November 7, 2011, at Los Angeles, California.

M. O. Legaspi
Declarant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