IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent,	)	No. S195600
v.	)	Court of Appeal No. B222615
VALENTIN CARBAJAL, Defendant and Appellant.	)	

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SUPREME COURT
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Second Appellate District, Division Five
Los Angeles County Case No. BA316526
The Honorable Larry P. Fidler, Judge

APPELLANT'S ANSWER BRIEF ON THE MERITS

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By Appointment of the Supreme
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

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THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent,	)	No. S195600
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APPELLANT'S ANSWER BRIEF ON THE MERITS

INTRODUCTION

There were two trials in this case. The jury in the first trial convicted appellant of three counts of lewd conduct as to victim Jessica R., but was unable to reach verdicts on any charges involving Zelene C. When the jury returned its verdicts as to Jessica R., it found the multiple-victim allegation charged pursuant to Penal

Code section 667.61 to be true. After establishing with the jury foreman that the jury had been mistaken in its understanding of the allegation, the judge sent the jury back to reconsider its finding. The jury quickly returned with what the judge assumed was a finding of "not true" on the allegation.

Outside the jury's presence, the judge commented, "that's not what they should have done," and said he could not take any verdict because it would be "inappropriate." (3 R.T. 2110.) The judge then discussed the matter with the jury, broadly hinting the verdict form should have been left blank, and sent the jury back again for further deliberations. After retiring for a third time, the jury quickly asked for a blank verdict form, and returned that form unsigned. In a retrial of the charges related to Zelene C., the jury found the section 667.61 allegation to be true.

A majority of the Court of Appeal agreed with appellant that resubmitting the section 667.61 allegation to the jury in the second trial violated principles of double jeopardy, and reversed the allegation. (Slip Op., pp. 7-12.) One justice dissented, arguing the

jury did not actually return a finding on the allegation, and there was no double jeopardy bar to retrial. (Slip Op., dissent pp 1-4 (Kumar, J. dissenting).)

This court granted respondent's Petition for Review, which argued the first jury never reached or resolved the question of whether there were multiple victims, and therefore principles of double jeopardy did not bar retrial on the allegation. Respondent's argument ignores the record, which shows that the jury did return a verdict on the allegation. As appellant demonstrates below, regardless of whether the jury acquitted appellant on the allegation or again returned with a true finding, double jeopardy principles barred retrial, requiring reversal of the sentence imposed pursuant to section 667.61.

STATEMENT OF THE CASE

Valentin Carbajal was charged by amended information with nine felony offenses alleged to have been committed against one victim, Zelene C., and four offenses against a second victim, Jessica R., as follows:

> Count 1: Lewd act on a child, in violation of Penal Code section 288, subdivision (a) (Zelene C.);
>
> Counts 2: Forcible rape, in violation of Penal Code section 261, subdivision (a)(2) (Zelene C.);
>
> Counts 3-5: Attempted forcible rape, in violation of Penal Code sections 664/261, subdivision (a)(2) (Zelene C.);
>
> Counts 6-9: Forcible oral copulation, in violation of Penal Code section 288a, subdivision (c)(2) (Zelene C.); and
>
> Counts 10-13: Lewd act on a child, in violation of Penal Code section 288, subdivision (a) (Jessica R.).

(1 C.T. 144-157.)

It was further alleged as to counts 1, 2, and 6 through 13, that appellant committed an offence specified in Penal Code section 667.61, subdivision (c) against more than one victim, within the meaning of Penal Code section 667.61, subdivisions (a), (b), and (c). (1 C.T. 157.)

On December 11, 2007, a jury found appellant to be guilty in three counts involving Jessica R., but deadlocked on all counts

involving Zelene C. (1 C.T. 161-165, 166-168.) A single verdict form contained the multiple-victim allegation, stating it pertained to counts 1, 2, and 6 through 13, and the jury returned the verdict form with a "true" finding. (3 R.T. 2108.)

Upon questioning, the foreman said that the jury misunderstood the section 667.61 allegation, thinking that it applied to multiple counts, and the trial court sent the jury back to reconsider its finding on the allegation. (3 R.T. 2109) Five minutes later, the jury and parties were back in the courtroom. At a sidebar conference, the judge presumed the jury signed the verdict form with a "not true" finding, determined that was also incorrect, and decided not to enter the jury's finding. (3 R.T. 2110.) Without looking at the jury's verdict on the allegation, the judge gave the jury additional instructions, and sent it back a third time for further deliberations. (3 R.T. 2111-2113.) Within minutes, the jury returned again, and the court put on the record that the jurors had questioned the clerk on whether they were allowed to leave a form blank, and if so, requested a fresh verdict form. The court asked the foreman if it was the jury's wish to leave the form blank, and the foreman responded affirmatively. The jurors were polled, and all agreed. (3 R.T. 2113-2114.)

A mistrial was declared for Counts 1 through 9 and 13. (1 C.T. 165.) Appellant was retried on counts 1 through 9, the charges

alleged as to complaining witness Zelene C, and on October 2, 2009, a second jury returned verdicts of guilty on each of counts 1 through 9, and found the multiple-victim (§ 667.61) allegation to be true. (2 C.T. 268-270, 324-333.)

Appellant was sentenced to consecutive terms of 15-years-to-life for Counts 1 and 10, pursuant to section 667.61, subdivision (b). Full, upper consecutive terms of 8 years were imposed as to Counts 2, 6 through 9, and 11 pursuant to Penal Code section 667.6. One-year consecutive terms were imposed for Counts 3 through 5, and a consecutive term of two years was imposed for Count 12, each of which reflected one-third the midterm. Appellant's aggregate term of imprisonment is 83 years to life. (2 C.T. 375-381; 3 C.T. 604-608.)

On appeal, appellant argued the trial court erred when it required the jury to reconsider a "verdict of acquittal," on the allegation, and that retrial on the allegation violated appellant's right not to be subjected to double jeopardy. (A.O.B. pp. 25-32.) Respondent agreed the jury reached a "not true" finding after deliberating on the issue the second time (R.B. pp. 15, 20), but argued that the trial court acted correctly pursuant to Penal Code section 1161 in sending the jury back for a third time to return a blank verdict form. (R.B. pp. 19-22.) The Court of Appeal agreed with both parties that the jury had manifested intent to acquit, and held the trial judge had no discretion to refuse the verdict when the

jury came back with its second finding. As such, retrial on the allegation was barred. (Slip Op. at pp. 7-12.)

This court granted respondent's petition for review on October 12, 2011.

STATEMENT OF FACTS

The facts are not relevant to the issue being reviewed, and appellant adopts the statement of facts as briefly summarized by the Court of Appeal. (Slip Op. at p. 2.)

ARGUMENT

BECAUSE THE JURY RETURNED A FINDING ON A SENTENCING ALLEGATION, THE COURT OF APPEAL CORRECTLY DETERMINED THAT RETRIAL ON THE ALLEGATION WAS BARRED BY THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSITUTION

A. Procedural Background

The pleadings did not include separate Penal Code[1] section 667.61 allegations. Rather, at the end of the pleadings, the information alleged:

> It is further alleged, within the meaning of Penal Code sections 667.61 (a), (b) and (e), as to defendant, VALENTIN CARBAJAL, as to count(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.

(1 C.T. 157.)

Before deliberations, the jury was instructed to make a single finding on a single 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,

---

[1] Unless otherwise noted, additional code citations will be to the California Penal Code.

> and 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.

(1 C.T. 209; CALCRIM No. 3181.)

When the jury in the first trial returned with verdicts on Counts 10-12 pertaining to Jessica, it also returned a "true" finding on the verdict form for the section 667.61 multiple victim allegation, which pertained to counts 1, 2, and 6 through 13. (3 R.T. 2108.) The court discussed the verdicts with the parties, questioned the jury foreman, then sent the jury back for further deliberations, as follows:

> THE COURT: This is certainly interesting. The jury has arrived at guilty verdicts on counts 10, 11, and 12. 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 have to think about that. I don't know the answer to that.
>
> MR. HERRIFORD: I don't think they can.
>
> THE COURT: Without finding guilt as to more than one victim, I don't know that the allegation applies.

MS. WISE: I'm aware of one case where a jury did that on the Paulette case. I don't know how they resolved it.

THE COURT: Here is what I am going to do. I am going to ask the jurors about that, and right – right now, assuming that they feel that that's an appropriate finding, I'll take it without making – if I if that is what they want to do, without making any indication or telling anyone that I think that's legally sufficient and they have to be dismissed at a later time, if, indeed, this is what they want to do.

I think I can make a logical finding that's possible. I want to see.

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

THE COURT: 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: No, sir. I thought it was one or more counts.

THE COURT: 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. If it does, that's fine. You have to go back in the jury room. You

have to read – deliberate briefly, or at length, if you wish. Why don't you go ahead back in at this point. I think there may have been a misunderstanding. If that's – that's fine.

JUROR NO. 8: I am sorry, your honor.

THE COURT: You don't have to apologize. It's okay. That's why I read these things. If the alternates can go sit in the hallway for just a moment. As soon as the jury is back, we'll call you back in. We will be in a brief recess or a recess for however long.

(3 R.T. 2107-2109.)

The jury then resumed their deliberations at 2:00 p.m. (3 R.T. 2109.) Five minutes later, at 2:05 p.m., all jurors and alternates were back in the courtroom. (3 R.T. 2110.) The court had the parties approach the bench, and the context of the following conversation indicates the jury had notified the court of another finding on the allegation:

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: 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: 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.

(3 R.T. 2110.)

The court then informed the jury that because it was hung on some of the counts, a finding of "not true" on the allegation was also not acceptable, and sent the jury back for a third attempt to reach what the court would consider the correct outcome:

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 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 finding is not true, it's not based on the three verdicts 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 any more.

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 requires – 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 No. 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.

Okay. Thank you.

(3 R.T. 2111-2113.)

The jury returned to deliberations. At 2:13, everyone was back in the courtroom. And the judge made the following record:

> THE COURT: Thank you. Back on the record. All parties jurors and alternates are present as heretofore. 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: Yes, sir.

(3 R.T. 2113-2114.)

The jury was polled, and the judge at last had the clerk read the verdicts. (3 R.T. 2114-2116.) The judge declared a mistrial on the counts for which there was no verdict. (3 R.T. 2118.)

B. The Court Of Appeal Correctly Found The Underlying Procedural Facts Showed The Jury Resolved And Reached A Finding On The Section 667.61 Allegation

In the Court of Appeal decision, the court notes:

> 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.

(Slip Op. at p. 9.)

The court's comment is supported by the record (3 R.T. 2109-2110), and by respondent's description of the underlying proceedings in the Respondent's Brief:

> The jury retired and returned five minutes later. [] At that point, the verdict form indicated a 'not true' finding for the multiple victim allegation.

(Resp. Br. at p. 15.)

Respondent does an about face in its briefing for this court, claiming instead that its earlier reading of the record was mistaken, and "that the jury in fact never returned with a finding." (R.O.B.M. at p. 2, fn 2.) Respondent does not repeat in its Brief on the Merits the erroneous claim from the Petition for Review that before the jury actually returned with a second finding on the allegation, "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." (Resp.P.F.R. at p. 2, citing 3 R.T. 2110-2113.) Respondent, however, makes no attempt to reconcile its argument

with the actual record, in which it is clear from the discussion by the court and parties that the jury had indicated it had a second finding, but that the trial court refused to accept the finding because to do so would place appellant once in jeopardy, preventing retrial. (3 R.T. 2110.)

Respondent asserts repeatedly that double jeopardy cannot apply when "the allegation was not reached and never decided by a fact-finder in a prior proceeding." (R.O.B.M. at pp. 6, 7, 10; see also Dissenting Opn. at pp. 2-3.) The premise is only applicable to the present case, however, if a trial judge can properly refuse to accept a jury's finding, thereby creating a legal fiction that pretends there was no finding. Respondent offers no authority for such a proposition.

According to respondent, "The Court of Appeal merely surmised that the first jury returned with a finding and then reached a corresponding legal conclusion . . . . 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."

(R.O.B.M. at p. 10.) In a footnote, respondent then states, "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." (R.O.B.M. at p. 10, fn 8.) A more disturbing scenario would be adoption of respondent's approach, which would enable any trial court to avoid the attachment of jeopardy by refusing to accept a verdict based on the court's prediction of a fact. Such a result, as occurred in this case, conflicts with the constitutional requirements of the Double Jeopardy Clause as well as the statutory requirements of Penal Code section 1161.

C. The Finding On The Section 667.61 Allegation Applied To All Eligible Counts

Similarly unavailing is respondent's argument that the jury did not return a verdict on the special allegation because "the 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." (R.O.B.M. at p. 11.)

Respondent acknowledges only in a footnote that a single section 667.61 allegation applied to all eligible counts. (R.B.O.M. at p.

12, fn 9.) The cases cited in the footnote, however, do not support or even address respondent's assertion that the "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." (*Ibid.*) *People v. Wutzke* (2002) 28 Cal.4th 923, 930-931, for example, deals with the question of whether a defendant who is related to the victims may be subject to the one-strike law, and the portion of the opinion cited by respondent simply states that the prosecution must plead and prove the allegation; conviction of an enumerated offense alone is not sufficient to trigger one-strike sentencing. The other cases cited by respondent are equally unhelpful. (See, *People v. Valdez* (2011) 193 Cal.App.4th 1515, 1521-1524 [Multiple one-strike terms may be imposed for counts involving the same victim on separate occasions]; *People v. Murphy* (1998) 65 Cal.App.4th 35, 38-40 [one-strike law requires multiple terms for multiple victims]; *People v. DeSimone* (1998) 62 Cal.App.4th

693, 698-699 [multiple-victim allegation can be the basis for multiple life terms under the one-strike law].)

There is nothing in the record to support respondent's conclusion that the jury made a finding on the allegation as to one set of charges and not as to the other. Nor does respondent provide any legal authority for dividing up a single charged allegation in such a way. Indeed, according to the instruction given the jury, it was *required* to make a finding on the multiple-victim allegation if it found appellant guilty of two or more sex offenses.[2] It found appellant guilty of three offenses, so it should be no surprise that it returned with a finding as required by the instructions.

The jury did reach and return with a verdict on the allegation – twice – and the trial court's refusal to accept the verdict does not change the analysis either on double jeopardy or statutory principles. (*Bigelow v. Superior Court* (1989) 208 Cal.App.3d 1127,

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[2] The jury was instructed: "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, and 13, you *must* then decide whether the People have proved the additional allegation that those crimes were committed against more than one victim." (1 C.T. 209; CALCRIM No. 3181, emphasis added.)

1136; *People v. Guerra* (2009) 176 Cal. App. 4th 933, 944; Pen. Code, §§ 1161, 1164, 1165.)

To the extent the jury may have been erroneously instructed to make a finding if it found appellant guilty of two or more offenses, without being told it must have verdicts against more than one victim, the jury's verdict was "'mistaken in law,' . . . and the consequences of the mistake must be borne by the People, not the defendant." (*People v. Fields* (1996) 13 Cal.4th 289, 310.)

D. The Majority Applied Well-Settled Legal Principles To Conclude Double Jeopardy Barred Retrial On The Allegation Regardless Of The Jury's Finding

"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.] Under both federal and California law, greater and lesser included offenses constitute

the 'same offense' for purposes of double jeopardy." (*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.)

In *Seel*, this court considered whether a premeditation allegation pursuant to section 664, subdivision (a) could be retried after an appellate court reversed the finding for lack of substantial evidence. Because a true finding on the allegation would expose the defendant to greater punishment then authorized by the jury's verdict on attempted murder alone, the allegation was "the functional equivalent" of an element of a greater offense than the one covered by the jury's guilty verdict. (*People v. Seel, supra,* 34 Cal.4th 535, 548-550, relying on *Burks v. United States* (1978) 437 U.S. 1 [98 S.Ct. 2141, 57 L.Ed.2d 1]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 494, fn 19; [120 S.Ct. 2348, 147 L.Ed.2d 435].) Retrial of the allegation following a finding of insufficiency, therefore, was barred by the federal double jeopardy clause. (*Ibid.*)

The jury's true finding on a section 667.61 allegation plainly exposes a defendant to greater punishment than authorized by a

verdict on the underlying substantive offense alone. In this case, for example, appellant received terms of 15 years to life on counts 1 and 10, when the maximum term for each offense without the allegation would be 8 years. (§ 288, subd. (a).) Pursuant to this court's holding in *Seel*, double jeopardy principles certainly apply to a jury's acquittal or conviction on section 667.61 allegations.

The Court of Appeal in this case properly read the record as indicating that the jury did, in fact, return with a finding on the allegation after being sent back for further deliberations. It recognized that "'once 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.) 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.)'" (Slip Op. at p. 10, quoting *Bigelow v. Superior Court, supra,* 208 Cal.App.3d at p. 1134.)

It is of no consequence that the disputed verdict in this case involves a sentencing enhancement rather than a substantive offense. In *People v. Guerra* (2009) 176 Cal.App.4th 933, the jury returned guilty verdicts on several counts related to one victim, and a single guilty verdict as to a separate victim. The jury also returned not true findings on several 667.61 multiple victim allegations. The trial court did not enter a judgment of acquittal as to the allegations, but instead reread the instruction stating that if there were more than one victim, the answer to the allegation should be true. The court then asked if the jury would like to go back to the jury room to discuss the instruction. The foreperson responded, "Yes, sir. We misunderstood." (*Id.* at pp. 939-940.) After a brief recess, the jury returned with new verdicts, finding the section 667.61 allegations to be true. (*Id.* at p. 940.)

The *Guerra* court reversed the true findings on the allegations. The fact that the verdicts appeared to be inconsistent did not give the trial court leave to ask for further 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, 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, supra,* 176 Cal.App.4th at p. 943.)

The trial court in *Guerra* thus "impermissibly invited the jury to 'reconsider' its not true findings and allowed the jurors to deliberate anew. This was in excess of its authority; after the jury returned not true findings as to the five enhancement allegations, 'the trial court could not resubmit [those] matter[s] to the jury for further deliberation.'" (*People v. Guerra, supra,* 176 Cal.App.4th at p. 944, quoting *Bigelow v. Superior Court, supra,* 208 Cal.App.3d at p. 1136.)

The record in this case provides no basis for disputing the trial court's assumption that the jury had "manifested its intention to acquit." The Court of Appeal, therefore, correctly found the trial

court had no authority to "declare a mistrial without giving effect to that verdict." (Slip Op. at p. 10, quoting *Bigelow v. Superior Court, supra,* 208 Cal.App.3d at p. 1135.) The appellate court rejected respondent's argument the verdict was inconsistent with the failure to reach verdicts on some counts because generally, "inherently inconsistent verdicts are allowed to stand." (Slip Op. at p. 11, quoting *People v. Avila* (2006) 38 Cal.4th 491, 600.)

The Court of Appeal commented on the parties' agreement 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,* 34 Cal.4th 535." (Slip Op. at 8, *People v. Anderson* (2009) 47 Cal.4th 92, 119.) Respondent backs away from this agreement, arguing instead the lower court's decision in this case would create "an anomaly in the law" when read in tandem with this court's decision in *Anderson.* (R.O.B.M.) at p. 13; Slip Op. Dissent at p. 3.) There is no anomaly. In *Anderson,* this court held that if there is a conviction on the substantive offense but the jury deadlocks on a sentencing allegation, there is no double jeopardy bar to retrial on the

sentencing allegation. (*People v. Anderson, supra,* 47 Cal.4th at p. 105.) In this case, there were no double jeopardy issues to prevent retrial on the underlying substantive offenses, but the jury's two findings on the allegation in the first trial barred retrial on that allegation – the outcome is consistent with, and indeed required by, this court's decision in *Anderson*.

The record supports no conclusion other than that the jury had a verdict on the allegation when it returned from deliberations the second time. The assumption of the trial court was that the finding was an acquittal. Even if the jury returned with a true finding, however, the Court of Appeal recognized retrial would still be barred because "such a finding would not be supported by the evidence as a matter of law." (Slip Op. at p. 8, citing *People v. Seel, supra,* 34 Cal.4th at pp. 548-550.) The trial court would have been required, pursuant to section 1161[3], to enter the second true finding,

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[3] Penal Code section 1161 provides, in 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;

so regardless of what the jury's finding was, there can be no retrial of the allegation.

The Court of Appeal concluded in this case that it was 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." (Slip Op. at p. 12.) There does not appear to be any such authority, and the opinion of the Court of Appeal should be affirmed.

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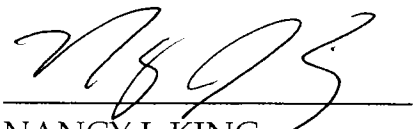
but when there is a verdict of acquittal, the court cannot require the jury to reconsider it."

CONCLUSION

The record here supports the conclusion of the Court of Appeal that the jury did actually make a finding on the section 667.61 allegation. The record also supports the appellate court's conclusion that the trial court erred by sending the jury back the third time for further deliberations and implicitly directing it to return with no finding. Retrial on the allegation, therefore, was barred by the double jeopardy clause of the United States Constitution. The opinion of the Court of Appeal should be affirmed.

Dated: January 31, 2012

Respectfully submitted,



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Nancy J. King

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