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I. INTRODUCTION

The Fifth Amendment to the United States Constitution reads, in part, "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."1 This passage, known commonly as the Double Jeopardy Clause, has become infamous in legal circles, not merely for its ideals, but for the questions it creates concerning those ideals.2

The principles of the Double Jeopardy Clause are woven into the fabric of the Constitution via the Bill of Rights and corresponding case law, yet this case law has become troublesome.3 While issues concerning the Clause and a trial on guilt or innocence are well resolved, many others remain hazy. As one scholar put it, "[T]he decisional law in the [double jeopardy] area is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator."4

In particular, sentencing proceedings have been a recent sore spot for judicial clarity in the double jeopardy realm. Until 1980, many thought this matter had been resolved by the Supreme Court in United States v. DiFrancesco,5 which held that the Double Jeopardy Clause does not pertain to sentencing proceedings.6 However, one year later the Court opened Pandora’s Box by creating an exception and applying the Double Jeopardy Clause to capital sentencing proceedings.7

While creating such an exception furthered the ideals of the Court, some questions

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1. U.S. CONST. amend. V.
6. See id. at 13-14 (holding that subsequent to remand, a stricter sentence may be imposed in criminal proceedings).
loomed large. For example, if capital sentencing proceedings were indeed a context in which an exception to DiFrancesco should apply, where would such exceptions stop?

Such legal questions are not confined solely to the issues surrounding the Double Jeopardy Clause. Recidivism statutes have proved equally troublesome to the Supreme Court. Of course, double jeopardy concerns are intrinsic to such maxims as “three-strikes” laws. In particular, courts were concerned that three-strikes laws would, in effect, punish a defendant twice for the same offense. Remarkably, the Court did not lay this concern to rest until 1997 in United States v. Watts, ruling that enhancement statutes punish the defendant for his present crime based on his previous actions, thereby making any double jeopardy concerns moot.

To keep double jeopardy pitfalls at bay, states such as California have developed safeguards for sentencing proceedings involving three-strikes laws. These protections include the right to a jury trial, the right to confront witnesses and evidence, and the “beyond a reasonable doubt” standard of proof. While such safeguards are not mandated by the Constitution per se, they do afford the utmost protection in an area otherwise littered with legal land mines. Despite the best efforts of legislators and the courts to clarify the law on sentencing for both capital and non-capital offenses, conflicts arose that came to a head in Monge v. California. In this case, the Court decided to resolve an issue it had passed on several times before: whether the Double Jeopardy Clause pertains to non-capital sentencing proceedings. In deciding that the Clause did not apply, the Court provided some resolution to the questions raised by Bullington v. Missouri. In doing so, the Court overruled the Bullington rationale that the Double Jeopardy Clause applies to capital sentencing proceedings because such bear “the hallmarks of a trial on guilt or innocence.” The Court said in Monge that because such

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10. See id. at 151.
11. See infra notes 195-201 and accompanying text.
13. But see infra notes 195-204 and accompanying text (discussing the problems of applying such safeguards to non-capital sentencing proceedings).
17. See id. at 439.
sentencing proceedings do not have the constitutionally mandated protections that capital sentencings do, the Double Jeopardy Clause does not apply. The Court noted that proceedings involving capital punishment are so unlike any other type of proceeding that the exception created for capital sentencing proceedings in Bullington can be successfully attenuated from all other sentencing proceedings. Yet, recidivism statutes, and California's three-strikes law in particular, are unique in and of themselves. By identifying an issue as broad as the application of the Double Jeopardy Clause to non-capital sentencing proceedings, the Court has left one very important question unanswered: where sentencing and recidivism statutes meet, is there any room left for the Double Jeopardy Clause?

This Note is divided into six parts. Part II will analyze the historical background of the Double Jeopardy Clause and three-strikes statutes. Part III will examine the factual and procedural background of Monge. Part IV will discuss the majority and dissenting opinions of the Court. Part V will include an analysis of the Monge decision and a discussion of its future impact. Finally, Part VI will contain a brief conclusion.

II. HISTORY

A. The Double Jeopardy Clause

The common law of the United States provides most of the legal protections against double jeopardy. These protections are so vast that the details of the law's component parts have been described as "numbingly complex." Despite such decisions as State v. Felch, which trace the history of double jeopardy back to English statutes prior to 1791, the legislative history of double jeopardy is quite recent. However, even though the legislative history is comparatively brief, the idea of double jeopardy is much older.

"The early development of [double jeopardy] can be traced through a variety of sources ranging from legal maxims to casual references in contemporary commentary." There is evidence of prohibitions against different forms of double

18. See id.
19. See Monge, 118 S. Ct. at 2251-52.
20. See McAninch, supra note 4, at 413-14.
21. See id.
22. 105 A. 23, 26 (Vt. 1918).
23. See McAninch, supra note 4, at 413-14.
24. See infra notes 42-48 and accompanying text.
26. Id.
jeopardy in such places as early Roman and canon law. In addition, a very early form of double jeopardy protection emerged as early as the Fourteenth Century. By the 1600's, double jeopardy protections, then crystallized to some extent, were enumerated in four distinct pleas: autrefois acquit, autrefois convict, autrefois attaint, and former pardon. These common-law rules were disseminated, as evidence of them has been found in two popular publications of the time: Blackstone's Commentaries and Coke's Institutes.

The first evidence of rules prohibiting double jeopardy appeared in America for the first time in the Massachusetts Body of Liberties of 1641. This piece of colonial legislation not only served as a model for other colonies, but also expanded the scope of protection afforded by English common law. Yet the culmination of double jeopardy law in America would not come until its incorporation into the Bill of Rights.

The Double Jeopardy Clause was originally proposed by James Madison in 1789. It was later augmented with language incorporated from Blackstone, and was unanimously passed by Congress. At the time, only two states had similar protections in their respective state constitutions. Interestingly, the Double Jeopardy Clause was not deemed applicable to the states until the 1969 Supreme Court decision of Benton v. Maryland, in which the Court held the Clause to be "fundamental to the American scheme of justice."

The three original protections afforded by English common law were only recently Americanized. Both North Carolina v. Pearce and United States v. DiFrancesco acknowledged three separate protections afforded by the Double Jeopardy Clause: protection from a second prosecution after acquittal, protection

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27. See McAninch, supra note 4, at 414.
28. See id.; see also Wilson, 420 U.S. at 339-40 n.6 (referencing early forms of double jeopardy protections in the time of the Year Books and Fifteenth century English courts).
29. See McAninch, supra note 4, at 414.
30. See McAninch, supra note 4, at 414 (citing William Blackstone, Commentaries on the Laws of England 335-37 (13th ed. 1880)).
32. See id.
33. See id.
34. See id. at 415-18.
35. See United States v. Wilson, 420 U.S. 332, 341 (1975). Madison's proposed incorporation of double jeopardy protection into the Bill of Rights read, "[n]o person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense." See id.
36. See id. at 341-42.
37. See McAninch, supra note 4, at 415. New Hampshire's constitution provided limited protection for prior acquittals. See id. Pennsylvania used language similar to the language incorporated into the Fifth Amendment. See id.
39. See id. at 794-95 (quoting Duncan v. Louisiana, 391 U.S. 145, 149 (1968)).
from a second prosecution after conviction, and protection from multiple punishments for the same offense.\textsuperscript{42} In this sense, the modern Double Jeopardy Clause provides much broader protections than in England or the colonies, as it is not limited to capital felonies, previous convictions, or prior acquittals. The rationale for this broad approach is simple,

[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.\textsuperscript{43}

This broad approach has been significantly narrowed in recent years.\textsuperscript{44} Even so, exceptions to the rule have only been grudgingly allowed.\textsuperscript{45} These exceptions are quite numerous, however, and they cover a wide range of time, cases, and issues involving the Double Jeopardy Clause and the protections it affords citizens of the United States.\textsuperscript{46}

\textbf{B. Sentencing Procedures in the Double Jeopardy Context}

Cases determining the range of the Double Jeopardy Clause when applied to sentencing restrictions answer the unresolved issues that culminated in the \textit{Monge} decision.\textsuperscript{47} \textit{North Carolina v. Pearce}\textsuperscript{48} established that the Double Jeopardy Clause does not prevent a defendant convicted on retrial following the reversal of his original conviction to have a more severe sentence imposed on him than his original sentence.\textsuperscript{49} This notion was further expanded by the landmark case of

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\item \textsuperscript{42} See id. at 129 (quoting North Carolina v. Pearce, 395 U.S. 711, 717 (1969)).
\item \textsuperscript{43} Green v. United States, 355 U.S. 184, 187-88 (1957).
\item \textsuperscript{44} See id.
\item \textsuperscript{46} See id.
\item \textsuperscript{47} See id.
\item \textsuperscript{48} 395 U.S. 711 (1969).
\item \textsuperscript{49} See id. at 718-19; see also Pennsylvania v. Goldhammer, 474 U.S. 28, 30 (1985) (holding that the Double Jeopardy Clause does not bar re-sentencing on counts for which sentence is suspended); Poland v. Arizona, 476 U.S. 147, 155-56 (1986) (Double Jeopardy Clause does not bar reimposition of the death penalty at a second sentencing proceeding, even though the second sentence was particularly based on an aggravating circumstance not found at the original sentencing); Hitchcock v. Dugger, 481 U.S. 393 (1987) (holding that the Double Jeopardy Clause's bar to imposition of the death penalty applies only to cases in which there is an implied acquittal); Witte v. United States, 115 S. Ct. 2199 (1995) (holding that consideration of uncharged relevant conduct in determining a defendant's sentence under the Federal Sentencing Guidelines does not constitute punishment for that conduct).
\end{itemize}
United States v. DiFrancesco,\textsuperscript{50} which firmly established the legal maxim that the Double Jeopardy Clause does not prevent the government from appealing a sentence, nor does it prevent the appellate court from increasing the sentence.\textsuperscript{51} Although the law seemed clear on this issue, problems arose in capital punishment cases. In Bullington v. Missouri,\textsuperscript{52} the Court determined that capital punishment was such an extreme penalty that exceptions would have to be made to the rule established in DiFrancesco. In particular, the Bullington Court ruled that the government cannot seek the death penalty after reconviction of a capital offense where the defendant was not given the death penalty in his first sentencing proceeding.\textsuperscript{54}

C. Three Strikes Laws

The history of three-strikes laws, while a separate and unique topic, has extreme relevance to the case at bar. Habitual offender laws have been in existence since Sixteenth Century England and colonial America.\textsuperscript{55} These laws had two separate thrusts. The first was to target offenders who specialized in a particular type of crime;\textsuperscript{56} the second was to punish offenders who committed such crimes a specific number of times.\textsuperscript{57} By the Eighteenth Century, these laws encompassed a wider variety of offenses as the specialization of crimes was slowly phased out.\textsuperscript{58} By 1797, New York became the first state government in the United States to enact this broader type of statute.\textsuperscript{59}

Although this new type of legislation was quickly developing a foothold in the United States, habitual offender legislation did not completely avail itself to this country until the 1920's.\textsuperscript{60} One typical example of the legislation of this period was Baume's Law, a New York statute enacted in 1926.\textsuperscript{61} Baume's Law was the predecessor of modern three-strikes legislation, as it provided life in prison for third-time felony offenders.\textsuperscript{62} Many states followed New York's lead in enacting this type of statute, and by 1968, twenty-three states had laws mandating life imprisonment after a specified number of offenses were committed by a single

\textsuperscript{50} 449 U.S. 117 (1980).
\textsuperscript{51} See id. at 134-35.
\textsuperscript{52} 451 U.S. 430 (1981).
\textsuperscript{53} See McAninch, supra note 4, at 415.
\textsuperscript{56} See id.
\textsuperscript{57} See id.
\textsuperscript{58} See id.
\textsuperscript{59} See id.
\textsuperscript{60} See id.
\textsuperscript{61} See id.
\textsuperscript{62} See id.
The 1970's were an important decade for recidivism laws, as legislators were engaged in the political battle to try to “out-tough” one another. Accordingly, lawmakers took several steps toward this end. The first of these was the return of capital punishment as a constitutionally viable form legal reprimand. In addition, legislators across the country promulgated the enactment of not only habitual offender laws, but mandatory sentencing restrictions as well. One prime example of the trends of this time was in Texas, where third-time felons automatically received twenty-five years to life in prison. The trends developed in the 1970's continued into the 1980's, and by 1982, a vast majority of states had criminal statutes on the books that singled out repeat offenders for “particularly harsh punishment.”

1993 proved to be a watershed year for three-strikes legislation, as it then came to be known. These types of laws were promulgated by media events of the year including the Polly Klaas killing and the murder of James Jordan, father of basketball star Michael Jordan. In both instances, these crimes were committed by people with prior felony convictions. By November of that year, both state and federal legislators took decisive action in response to the election victories of many candidates that ran on “get-tough-on-crime” platforms. Accordingly, the State of Washington adopted the United States’ first official three-strikes proposal. This trend was picked up by a majority of states, and California quickly followed suit in early 1994.

The three-strikes legislation proposed in California proved to be stricter than the Washington model. In particular, it limited time off given to repeat offenders for good behavior. It also required convicts to serve at least eighty percent of their sentence in jail, as opposed to the fifty percent requirement mandated in

63. See id.
64. See id. at 16.
65. See id.
66. See id.
69. See Applegate, supra note 55, at 16.
70. See id.
71. See Marc Mauer, Politics, Crime Control ... and Baseball?, 9 CRIM. JUST., Fall 1994, at 30.
72. See id.
73. See id.
75. See McClain, supra note 67, at 104.
Washington. Although some viewed these changes as a harsh stance by the state, the bill passed in March 1994. An identical initiative was passed by voters at the ballot box eight months later, thereby quashing any opposition the legislation might have had. The intent of the laws was “to ensure longer prison sentences . . . for those who commit a felony and have been previously convicted of serious and/or violent felony offenses.” Shortly after the California bill became law, a federal three-strikes bill was signed into law by President Clinton, and the remaining holdout states stepped in line shortly thereafter. As of today, all fifty states have enacted some form of recidivism statute.

III. PROCEDURAL AND FACTUAL HISTORY

The facts of *Monge v. California* are straightforward. On January 25, 1995, two undercover officers were investigating marijuana distribution in Pomona, California. At one point during the day, after their inquiries to a thirteen-year-old boy, the officers observed the boy approach the defendant, Angel James Monge, and have a short conversation with him. The officers then observed Monge hand the boy several plastic baggies. Shortly thereafter, the boy approached the officers and offered to sell them two dime bags of marijuana. Monge and the boy were subsequently arrested.

Monge was charged with several offenses, including using a minor to sell marijuana, the sale or transportation of marijuana, and the possession of marijuana for sale. The district attorney also alleged that Monge had a prior serious felony conviction under California’s three strikes law; namely Monge’s July 1992 conviction for assault with a deadly weapon. In the present case, Monge pled not guilty to all accusations and motioned to bifurcate the trial on the guilt and sentencing phases, which was granted by the court. A jury subsequently found Monge guilty of the substantive charges against him.

76. See id.
78. See id.
79. See id. at 34.
81. See id.
84. See id.
85. See id.
86. See id.
87. See id.
88. See id.; see also CAL. HEALTH & SAFETY CODE §§ 11359-61 (West 1991).
89. See People v. Monge, 941 P.2d at 1124.
90. See id.
91. See id.
In the sentencing phase of the trial, the government asserted that Monge's prior conviction was a "serious felony" under California's three-strikes law. However, the only evidence presented by the prosecutor was that Monge pled guilty and served time for assault with a deadly weapon. These events, the government asserted, proved an admission that the defendant personally used a deadly weapon in his prior offense. The personal use of a deadly weapon is enumerated in California law as being one of the aforementioned dangerous felonies. In spite of these arguments, the judge sentenced Monge to eleven years in prison—the five year sentence for the substantive offense was doubled to ten under the three-strikes law, and an additional one year enhancement for his prior prison term was added.

On appeal to the California Court of Appeals, the court found that the evidence presented by the government was insufficient to establish beyond a reasonable doubt that the defendant had acted personally. The court also ruled constitutional protections against double jeopardy bar the retrial of prior serious felony allegations, and the case was remanded for sentencing. Accordingly, this decision was appealed by the government to the California Supreme Court.

In reversing the decision of the Court of Appeals, the California Supreme Court emphasized its well-established hesitation to apply the Double Jeopardy Clause to sentencing proceedings. The court ruled that the rationale employed by the Supreme Court in Bullington v. Missouri did not apply to the case at bar. The court noted Bullington was confined to the specifics of capital cases. The court further ruled that while capital sentencing procedures such as the right to confront witnesses and the beyond a reasonable doubt standard were mandated by the Court's interpretation of the Constitution, such procedural protections in California's sentence enhancement proceedings rest on statutory grounds and are therefore immune to the Double Jeopardy restrictions imposed in capital cases. The court also distinguished the sentencing proceedings at bar from capital proceedings by emphasizing the "breadth and subjectivity of factual determinations at issue in the capital sentencing context, as well as the financial and emotional burden of the

92. See id.; see also CAL. PENAL CODE § 1192.7(c)(1) (West 1982 & Supp. 1999).
94. See id.
95. See CAL. PENAL CODE § 1192.7(c)(1).
96. See Monge, 118 S. Ct. at 2249.
98. See id.
99. See Monge, 118 S. Ct. at 2249.
101. See Monge, 118 S. Ct. at 2249.
102. See id.
capital sentencing phase. Finally, the majority pointed out that while a qualifying strike under California’s three-strikes law involves the finding of a particular status that may be made from the defendant’s criminal record, capital sentencing “depends on specific facts of the defendant’s present crime, as well as an overall assessment of the defendant’s character.”

The dissent analyzed the Bullington decision in a much broader context. While acknowledging the legitimacy of the differences pointed out by the majority, the dissent interpreted the Bullington rationale as applying to successive efforts to prove prior conviction allegations due to evidentiary insufficiency in any sentencing context, not just capital proceedings. This discrepancy, which had been reinforced by a number of state and federal court decisions, provided a basis of appeal for Monge. On January 16, 1998, the Supreme Court granted a writ of certiorari. The issue to be decided was limited to the following question, “Does the Double Jeopardy Clause apply to noncapital sentencing proceedings that have the hallmarks of a trial on guilt or innocence?”

IV. MAJORITY AND DISSENTING OPINIONS

A. Majority Opinion

In her majority opinion, Justice O’Connor first outlined California’s three-strikes law and emphasized certain distinct aspects of the statute. First, she noted the portion of the law applicable to the case at bar: when an instant conviction is proceeded by one serious felony offense, the court is required to double the defendant’s term of imprisonment. Next, Justice O’Connor summarized the law’s definition of a “serious felony” as it applied to Monge. She noted that “[a]n assault conviction qualifies as a serious felony if the defendant either inflicts great bodily injury on another or personally used a dangerous or deadly weapon during the assault.” Finally, Justice O’Connor emphasized the procedural safeguards for three strikes sentencing proceedings as mandated by California law. These include the defendant’s right to a jury trial, right to confront witnesses, and privilege against self-incrimination. The government has restrictions imposed

103. Id.
104. Id. (quoting People v. Monge, 941 P.2d at 1130).
105. See Monge, 118 S. Ct. at 2249-50.
106. See supra note 15.
107. See Monge, 118 S. Ct. at 751.
108. See id.
109. See Monge, 118 S. Ct. at 2246 (Justice O’Connor was joined in her opinion by Chief Justice Rehnquist and Justices Kennedy, Thomas and Breyer).
110. See id.
111. See id.; see also CAL. PENAL CODE § 1192.7(c)(8) & (23) (West 1982 & Supp. 1999).
112. See Monge, 118 S. Ct. at 2248.
on it as well. According to California law, the State must prove the allegations beyond a reasonable doubt and it must obey all the ordinary rules of evidence.\textsuperscript{113} Next, Justice O'Connor quickly delved into the procedural history of \textit{Monge v. California}. She stated that when the case was brought before the California Court of Appeal, prosecutors conceded that the sentencing allegations against Monge were not proven beyond a reasonable doubt.\textsuperscript{114} When the State asked for an opportunity to prove the allegations on remand, the Court of Appeal ruled that doing so would violate double jeopardy principles.\textsuperscript{115}

In examining the California Supreme Court reversal of the Court of Appeal, Justice O'Connor noted the United States Supreme Court's "traditional reluctance" to apply double jeopardy concerns to sentencing proceedings, and concluded that the exception to this rule, created in \textit{Bullington v. Missouri},\textsuperscript{116} would not apply in this case.\textsuperscript{117} Justice O'Connor pointed out five reasons for the majority's holding.\textsuperscript{118} First, the Court's statements in cases such as \textit{Caspari v. Bohlen}\textsuperscript{119} and \textit{Pennsylvania v. Goldhammer}\textsuperscript{120} specifically confine \textit{Bullington} to capital cases.\textsuperscript{121} The second reason was the different foundations for sentencing procedures in capital and non-capital cases; "capital sentencing procedures are mandated by the Supreme Court's interpretation of the Federal Constitution, whereas the procedural safeguards accorded in California's sentence enhancement proceedings rest on statutory grounds."\textsuperscript{122} Third, the factual determinations in capital sentencing proceedings are different in terms of breadth and subjectivity.\textsuperscript{123} The Court's fourth basis for its decision was the greater financial and emotional burden placed on defendants in a capital sentencing that in a non-capital proceeding.\textsuperscript{124} Finally, a qualifying strike under a three-strikes statute involves the finding of a particular status that must be made from the record of the defendant's prior convictions.\textsuperscript{125} However, a capital sentencing determination must be broader.\textsuperscript{126} Federal law mandates that such a proceeding take into account "the specific facts of the

\begin{thebibliography}{99}
\item\textsuperscript{113} See id.
\item\textsuperscript{114} See id. at 2249.
\item\textsuperscript{115} See id.
\item\textsuperscript{116} 451 U.S. 430 (1981).
\item\textsuperscript{117} See id.
\item\textsuperscript{118} See id.
\item\textsuperscript{119} 510 U.S. 383 (1994).
\item\textsuperscript{120} 474 U.S. 28 (1985).
\item\textsuperscript{121} See Monge v. California, 118 S. Ct. at 2249.
\item\textsuperscript{122} See id.
\item\textsuperscript{123} See id.
\item\textsuperscript{124} See id.
\item\textsuperscript{125} See id.
\item\textsuperscript{126} See id.
\end{thebibliography}
defendant’s present crime, as well as an overall assessment of the defendant’s character.”127 Justice O’Connor ended this discussion by briefly summarizing the Court’s three-judge dissent, which reasoned that under the Bullington rationale that “the Double Jeopardy Clause precludes successive efforts to prove prior conviction allegations.”128

Next, Justice O’Connor examined the related three-strikes and double jeopardy case law. In North Carolina v. Pearce,129 the Court ruled that the Double Jeopardy Clause “protects against successive prosecutions for the same offense after acquittal or conviction, as well as multiple prosecutions for the same offense.”130 This was followed by Bullington v. Missouri,131 which held the Double Jeopardy Clause to be “inapplicable to sentencing proceedings.”132 Justice O’Connor also noted Nichols v. United States,133 which held that the determinations at issue in sentencing proceedings do not place the defendant in double jeopardy for an “offense.”134 This was followed in 1997 by the Court’s decision in United States v. Watts,135 which held that sentence enhancements are not construed as additional punishment for the previous offense.136 To clarify this holding, Justice O’Connor referred to Gryger v. Burke.137 Gryger held that an enhanced sentence is only “a stiffened penalty for the latest crime, which is considered to be an aggravated offense because [sic] a repetitive one.”138

Although the case law on recidivism statutes and the Double Jeopardy Clause seem fairly straightforward, Justice O’Connor addressed the argument that a prior-felony enhancement could be interpreted as an element of the present offense, thereby precluding such legal pitfalls as a double jeopardy violation.139 Justice O’Connor stated that this issue was resolved in Almendarez-Torres v. United States,140 where the Court rejected “an absolute rule that an enhancement constitutes an element of the offense any time it increases the maximum sentence to which a defendant is exposed.”141 However, Justice O’Connor conceded that some cases may exist in which fundamental ideals of fairness would require the definition of a fact of the substantive case as a sentencing factor.142 For example,
a defendant would not want to plead innocent to drug charges and dispute the amount of drugs allegedly involved, should a certain amount trigger such sentencing enhancements as the ones that have been previously defined.143

Justice O'Connor further bolstered the majority's holding by eliminating the notion that a sentencing decision favorable to the defendant constitutes an implied acquittal. Justice O'Connor first pointed out Burks v. United States,144 in which the Court did, in fact, rule that an appellate court's overturning of a conviction due to insufficient evidence, was equivalent to an acquittal and that the Double Jeopardy Clause would prevent the case from being retried.145 However, in terms of sentencing, Justice O'Connor dismissed and referred to United States v. DiFrancesco.146 In that case, the Court held that when a failure of proof occurs at the sentencing stage, such a finding does not constitute an acquittal because it does not have "the qualities of constitutional finality that attend an acquittal."147

The majority's next step in its decision was to further distinguish the Bullington exception from the case at bar. First, O'Connor wrote that Bullington created a narrow exception to the general rule that the Double Jeopardy Clause does not apply to sentencing proceedings.148 Key to this finding was the reasoning used by the Court in the Bullington case. First, and perhaps most important, the Court noted that a jury's deliberations in a capital sentencing proceeding bear the "hallmarks of the trial on guilt or innocence."149 Tantamount to this statement is the fact that such a jury has only two options: death or life in prison. In addition, all evidence is required to be introduced in a separate proceeding that formally resembles a trial.150 The jury in such a trial is given standards to guide their decision, and the prosecution is required to establish certain facts beyond a reasonable doubt.151

For all these reasons, capital sentencings are different than traditional sentencing proceedings because it is impossible to conclude in a traditional context that the imposition of a less severe sentence indicates that the government failed to prove its case.152 Justice O'Connor went on to note that capital sentencing
proceedings are unique in terms of embarrassment, expense, and ordeal. The Supreme Court on several occasions has explained that not only is there more anxiety and insecurity involved for defendants in such proceedings, but there is also an unacceptably high risk that failure to apply the Double Jeopardy Clause to capital sentencing proceedings would incur an extremely high risk of error in imposing the death penalty.

The next part of the majority opinion concentrated on the petitioner's arguments. In particular, Justice O'Connor focused in on Monge's argument that California's sentencing scheme bears the hallmarks of a trial on guilt or innocence. This was part of the Court's rationale in Bullington and was the main basis for Monge's contention that the same exception should be applied to the case at bar. To illustrate, the petitioner noted that in three-strike sentencing proceedings in California, the sentencer makes an objective finding as to whether or not the government has proven certain historical facts beyond a reasonable doubt, much in the same way capital sentence proceedings are handled. However, Justice O'Connor provided several distinguishing characteristics in her opinion.

First, Justice O'Connor stated that the penalty phase of a capital trial is not a separate and distinct part of capital proceedings, but is actually a continuation of the trial on guilt or innocence and therefore subject to double jeopardy preclusions. In addition, the death penalty is unique in its "'severity and finality." As such, there is an extremely important desire for reliability in capital sentencing proceedings which simply does not exist in other types of sentencings. As Justice O'Connor noted, "'[w]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding.' All of these lines of reasoning reinforced the majority's belief that capital sentencing proceedings, and the double jeopardy protections afforded them, be attenuated from all other types of sentencings, including those involved in California's three-strikes legislation. In summary, Justice O'Connor distinguished the Court's decision in Bullington in three ways: 1) it is confined to capital cases; 2) it is an example of the heightened procedural protections accorded capital defendants; and 3) its holding turns on the trial-like proceedings at issue and the severity of the penalty at stake.

In conclusion, Justice O'Connor underlined the foundation for the majority's opinion; constitutional restrictions and the death penalty. Justice O'Connor noted that in capital cases the fundamental respect for humanity underlying the Eighth

153. See id.
154. See id. at 2251-52.
155. See id. at 2252-53.
156. See id. at 2252.
157. See id.
158. See id. (quoting Gardner v. Florida, 430 U.S. 349, 357 (1977)).
159. See id.
160. Id. (quoting Strickland v. Washington, 466 U.S. 668, 704 (1984)).
161. See Monge, 118 S. Ct. at 2252.
Amendment has several requirements. Among these are the "consideration of the character and record of the individual offender and the circumstances of the particular offense [involved]." However, the trial-like protections in non-capital sentencing proceedings, such as is the case with California's three-strikes law, are matter of "legislative grace, not constitutional command." Therefore, Justice O'Connor and the majority ruled that there is no requirement for the Court to extend the double jeopardy bar to non-capital sentencing proceedings.

B. Dissenting Opinions

Justice Stevens' dissent took an expected departure from the line of focus taken by Justice O'Connor. Justice Stevens viewed the Double Jeopardy Clause in terms of evidentiary insufficiency at any point of a legal proceeding. As such, he cited Burks v. United States in holding that the Double Jeopardy Clause prohibits a second bite at the apple. In doing so, Stevens made a distinction between legal errors, for which the Double Jeopardy Clause would not apply, and a lack of evidence. He noted that by doing so, he was correcting a problem long overlooked by the Supreme Court in previous rulings and again in the case at bar. One important aspect of Justice Stevens' dissent was his handling of the issue of procedural safeguards. Although such safeguards are not constitutionally mandated as a part of California's three strikes law, as the majority pointed out, Justice Stevens argued that such prophylactic measures were created in response to a "traditional understanding of fundamental fairness." It is this idea of fairness, that provides the basis for the Double Jeopardy Clause itself. Justice Stevens argued that it is this commonality in foundations that provides a link between the two and calls for the application of the Double Jeopardy Clause to such laws.

Justice Scalia took quite a different approach in his dissent. Although he
agreed with Justice Stevens’ interpretation of double jeopardy law, he argued that
the main issue at question was whether or not the proceeding in question in Monge
was part of the sentencing procedures as they have been described, or if it was
tantamount to a ruling on a portion of the substantive offense. In his opinion, he
noted, “[t]he fundamental distinction between facts that are elements of a criminal
offense and facts that go only to the sentence provides the foundation for our entire
Double Jeopardy jurisprudence.”

As Justice Scalia explained, the protections afforded by the Double Jeopardy
Clause have been held applicable to proceedings involving substantive offenses,
not sentences. That being established, Justice Scalia noted that such labels,
while helpful in some aspects, are merely categorizations affixed by legislatures
and should not be used to determine constitutional jurisprudence. In a
hypothetical addressing the deficiency, Justice Scalia created a jurisdiction that
contains only one criminal offense: “knowingly caus[ing] injury to another.”
This offense is subject to a number of sentencing enhancements based on
additional factors such as use of a deadly weapon or the intent to kill. The
Double Jeopardy Clause jurisprudence forwarded by the majority creates a serious
problem. With these enhancements labeled as a part of the sentencing phase, a
prosecutor has unlimited opportunities to convict someone of any crime with a
wide variety of sentencing consequences. In short, Monge has created vast problems
with double jeopardy law that are completely contrary to the legislative
intent of the rule.

While this hypothetical situation has not yet arisen, Justice Scalia argued that
Monge has done nothing but facilitate such a process. The enhancements
described in the text of the three-strikes statute are the legal equivalent of separate
crimes that expose a defendant to additional punishment. At worst, Justice
Scalia argued, the Court has developed a loophole through which rights guaranteed
by the Constitution can be conveniently circumvented. Furthermore, such a
ruling removes the incentive for maintaining the sentencing protections mentioned
above. To conclude, Justice Scalia labeled the Court’s decision making “a grave
constitutional error affecting the most fundamental of rights.”

174. See id. at 2255 (Scalia, J. dissenting) (Justice Scalia was joined in his dissent by Justices Souter
and Ginsburg).
175. Id. (Scalia, J. dissenting).
176. See id. (Scalia, J. dissenting).
177. See id. (Scalia, J. dissenting).
178. See id. (Scalia, J. dissenting).
179. See id. (Scalia, J. dissenting).
180. See id. (Scalia, J. dissenting).
181. See id. (Scalia, J. dissenting).
182. See id. at 2256 (Scalia, J. dissenting).
183. See id. (Scalia, J. dissenting).
184. See id. (Scalia, J. dissenting).
185. See id. (Scalia, J. dissenting).
186. Id. at 2257.
V. ANALYSIS AND IMPACT

A. The Courts and the Creation of a New Exception?

In Monge, Justice O’Connor “narrowed” the scope of her opinion to the application of the Double Jeopardy Clause to non-capital sentencing proceedings.\textsuperscript{187} However, Justice O’Connor’s scope was too broad. While many of the Justices’ distinctions between capital and non-capital sentencing proceedings are solid in their foundations, the three-strikes law in Monge sets itself apart from standard methods of sentencing and therefore creates a litany of legal land mines that must be separated in a further dissection of double jeopardy law.\textsuperscript{188} Failing to distinguish between subsets of non-capital sentencing proceedings creates a standard that may thwart the Fifth and Fourteenth Amendment rights of many repeat offenders until the Court follows its own lead in Bullington and carves out another exception in double jeopardy case law.\textsuperscript{189}

At the heart of Justice O’Connor’s opinion is the adoption of the “like-a-trial” rationale proposed by the court in Bullington.\textsuperscript{190} In essence, the majority enabled that rationale to evolve into a multiple-part test.\textsuperscript{191} The Court used a certain set of criteria to determine whether a proceeding is sufficiently like a trial to invoke the

\textsuperscript{187.} See id. at 2248.

\textsuperscript{188.} These sentencing standards were formed in response to the disparity among sentences received by offenders who had committed the same crime. As such, the Sentence Reform Act of 1984 was passed and resulted in the Federal Sentencing Guidelines. See Daniel J. Lyons, Federal Sentencing Guidelines: Retaining the Preponderance Standard of Proof, 67 St. John’s L. Rev. 639, 639-40 (1993). Differences abound in the standards created in the Federal Sentencing Guidelines and California’s three strikes law. Compare 18 U.S.C. § 3553(b) (West 1994) (allowing for departure from the sentencing guidelines if a case presents aggravating or mitigating circumstances), with CAL. PENAL CODE § 667 (West 1999) (mandating specific action of the court for the sentencing of prior serious felons).

\textsuperscript{189.} See Bullington v. Missouri, 451 U.S. 430, 438 (1981) (holding that cases involving the death penalty are a separate and distinct subset of sentencing proceedings in the double jeopardy context). This Note advocates the creation of a similar subset for three strike proceedings. Doing so would protect the Fifth and Fourteenth Amendment rights of repeat offenders much in the same way the Bullington exception has done for capital defendants. See, e.g., Arizona v. Rumsey, 467 U.S. 203 (1984); People v. Cole, 63 Cal. Rptr. 2d 221 (Ct. App. 1997) superceded by 942 P.2d 413 (Cal. 1997).

\textsuperscript{190.} See Bullington, 451 U.S. at 439.

\textsuperscript{191.} This “like-a-trial” test has been summarized before. See, e.g., People v. Levin, 157 Ill. 2d 138, 147-48 (1993); Carpenter v. Chapleau, 72 F.3d 1269, 1273-74 (6th Cir. 1996).
protections of the Double Jeopardy Clause. Thus, in the majority’s view, if attributes such as a limited set of options as to a final decision, delineated standards to guide the making of that decision, and the beyond a reasonable doubt proof standard are present, and there are enough of them, there will be no repeat attempts by the state to relitigate the sentencing phase of a three-strikes proceeding.

The individualized nature of non-capital sentence proceedings makes it virtually impossible to maintain any type of consistency in the results of such a test. Some sentences are imposed by a judge, others by a jury. Some sentences are imposed at the discretion of a judge with statutory restrictions, others specifically mandated, and yet others constrained by such formulas as those adopted by the Federal Sentencing Guidelines. Of course, the application of such a “like-a-trial” test on a case-by-case basis would prove to be impractical at best. Not only would judicial economy be severely impeded by the number of litigants who would choose to appeal their cases based on double jeopardy law, but establishing such a rigid test would undoubtedly spawn yet another cacophony of inconsistent double jeopardy law among the varying jurisdictions, thus creating even more problems than those the Court has seemingly dispensed with in Monge v. California.

The ramifications of these implications are not lost on Justice O’Connor, who

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192. While the test may be at the heart of the Court’s decision, Justice O’Connor’s trump card in refusing to apply the distinction to Monge is the unique nature and severity of the death penalty. See Monge, 118 S. Ct. at 2251-53.
193. See People v. Monge, 941 P.2d at 1127-29, (illustrating an application of these factors to capital and non-capital cases).
195. See Robert A. Weninger, Jury Sentencing in Noncapital Cases: A Case Study of El Paso County, Texas, 45 WASH. U. J. URB. & CONTEMP. L. 3, 3-4 (1994) (“In the archetypical Anglo-American criminal justice system, the judge determines the sentence, even in a jury trial. Yet there are important exceptions.”).
197. The right to appeal is the most important right a convicted criminal possesses. See Susan R. Monkmeyer, The Decision to Appeal a Criminal Conviction: Bridging the Gap Between the Obligations of Trial and Appellate Counsel, 1986 WIS. L. REV. 399, 399-400 (1986). The importance of the appellate process has not been lost on state legislatures either. See Gregory M. Dyer and Brendan Judge, Criminal Defendants' Waiver of the Right to Appeal-an Unacceptable Condition of a Negotiated Sentence or Plea Bargain, 65 NOTRE DAME L. REV. 649, 655 (1990).
established Monge's bright-line rule. 199 By refusing to delve into such hypothetical anomalies in non-capital sentencing, the Court clarified what it could of the Sargasso Sea of double jeopardy law. 200 Yet with this clarification comes the loss of some flexibility that may be vital to a proper interpretation of any constitutional issue. 201 Indeed, an application of the implied test of Bullington to the case at bar provides interesting results.

The test itself, while not specifically spelled out by Justice O'Connor, has been used on the state and federal levels. 202 In a number of cases, both state and federal courts have acknowledged that while a basis exists for holding the Double Jeopardy Clause inapplicable to sentencing proceedings in general, there are three steps that any proceeding may overcome in order to be classified as a Bullington exception. 203

(1) [T]he discretion of the jury [must be] restricted to only two options... (2) the jury [must make] its decision guided by substantive standards and based on evidence introduced in a formal, separate proceeding that resembles a trial; and (3) the [government must have] had to prove certain statutorily defined facts beyond a reasonable doubt... 204

It is in the application of this test that the uniqueness of the structure of California's three strikes law becomes so readily apparent. 205

In Williams v. New York, 206 the Supreme Court established that a bifurcated

199. See Monge v. California, 118 S. Ct. at 2253 (1998) ("[T]he Double Jeopardy Clause does not preclude retrial on a prior conviction allegation in the noncapital sentencing context.").
200. See id. at 2250 (citing contrary results in the application of the Court's decision to hypothetical situations proposed in response to those forwarded by Justice Scalia in dissent).
201. See Alan Ides, The Curious Case of the Virginia Military Institute: An Essay on the Judicial Function, 50 WASH. & LEE L. REV. 35, 39 (1993) ("Much of the language of the Constitution is stated in generalities, and the ideas animating that language bespeak fluidity and invite accommodation. All branches and levels of government interpret and give meaning to that language and those ideas. Interpretation necessarily means change.").
202. See supra note 191.
203. See id.
204. Carpenter v. Chapleau, 72 F.3d 1269, 1273 (6th Cir. 1996).
205. The proceeding in Monge passes this test with flying colors. The Court is limited to two options: the original sentence or the enhanced one. Determination of the prior felony is held in a separate hearing, and such a prior felony must be proven beyond a reasonable doubt. See People v. Monge, 941 P.2d at 1125-27 (1997), cert. granted in part by Monge v. California., 118 S. Ct. 751 (1998), and aff'd [supp.] by Monge, 118 S. Ct. at 2246 (1998). See also, CAL. PENAL CODE § 1025 (West 1996) ("[T]he question of whether or not the defendant has suffered the prior conviction shall be tried by the jury... "). This reinforces the idea that California's three strikes law is a subset of non-capital sentence proceedings worthy of the Bullington exception. See People v. Monge, 941 P.2d at 1125-27.
sentencing proceeding, as the one afforded to Monge under California law, is not required by the Due Process Clause of the Fourteenth Amendment in non-capital cases. Therefore, since such a proceeding is not constitutionally mandated, any state that voluntarily elects to provide such a trial of the sentencing allegations can do so with only a minimal amount of due process protections and without any double jeopardy protections. However, a state may choose to invoke whatever additional safeguards it deems necessary. In three-strikes cases, California has elected to provide several protections in its now mandatory jury trials of prior conviction allegations. It is these protections that set California's three-strikes law apart, for only then does it rise to the level of a Bullington exception.

The Supreme Court has been extremely reluctant in applying the Double Jeopardy Clause to any type of sentencing proceeding. Yet, thanks to the Bullington exception, such an application is not without precedent. In her opinion, Justice O'Connor endorsed several distinguishing features the California Supreme Court used to differentiate between capital punishment and three strikes

207. See People v. Monge, 941 P.2d at 1125. The Court in Williams held that lesser procedural protections were needed to allow judges to exercise discretion in sentencing. However, with the current rigid guidelines restricting such judicial discretion, such a lessening is not relevant to the modern state of the law. See The Supreme Court, 1997 Term Leading-Cases, 112 HARV. L. REV. 162, 170-71 (1998).


209. See id.

210. California has done so both through the legislature and case law. See CAL. PENAL CODE § 1025 (West 1985 & Supp. 1999) ("[T]he question whether or not [a defendant] has suffered [a] prior conviction shall be tried by the jury that tries the issue upon the plea of not guilty, or in the case of a plea of guilty or nolo contendere, by a jury impaneled for that purpose . . . .") There are many California court rulings. First, the prosecution must prove a prior conviction allegation beyond a reasonable doubt. See People v. Tenner, 862 P.2d 840, 845 (1993); see also In re Yurko, 519 P.2d 561, 564 (1974). Second, the accused enjoys the privilege against self-incrimination. See id. at 564. Third, the rules of evidence apply in such sentencing proceedings. See People v. Reed, 914 P.2d 184, 188 (1996); see also People v. Myers, 858 P.2d 301, 306 (1993). Fourth, a defendant in such a proceeding has the right to cross-examine witnesses. See Reed, 914 P.2d at 184 (quoting Specht v. Patterson, 386 U.S. at 610).


212. See Monge v. California, 118 S. Ct. 2246, 2247 (1998) (citing Bullington v. Missouri, 451 U.S. 430 (1981)). By creating procedural protections for prior conviction sentencings, California's legislature and courts have carved a path for its three-strikes law to be a second exception. See The Supreme Court, 1997 Term-Leading Cases, supra note 207. But see People v. Monge, 941 P.2d at 1126 (stating that "[s]o long as the state affords minimal due process of law, it need not provide all the procedural guaranties that characterize a trial on guilt or innocence. Thus, a state that provides a trial of sentencing allegations need not provide a jury trial. For the same reason, a state that provides a trial of sentencing allegations arguably need not provide double jeopardy protection."). (citations omitted).
sentencings that go above and beyond the "like a trial" test. Undoubtedly, the protections under California law give the proceedings in question "the hallmarks of the trial on guilt or innocence." But are these traits sufficient to support the adoption of a new exception?

B. The Constitution and California's Procedural Safeguards

In California, defendants accused of a prior conviction have a statutory right to a jury trial. The California Supreme Court has identified four additional protections in the sentencing scheme in People v. Monge: the beyond a reasonable doubt standard of proof of previous convictions, the privilege against self-incrimination, the applicability of the rules of evidence, and the right to call and confront witnesses. For each protection, the courts have made it expressly clear that these safeguards are not matters of mere discretion, but are required by the Constitution.

In spite of the overwhelming evidence in support of a solid backbone of constitutional law for prior-conviction sentencing proceedings protections, the majority opinion stated the following:

Where noncapital sentencing proceedings contain trial-like protections, that is a matter of legislative grace, not constitutional command. Many states have chosen to implement procedural safeguards to protect defendants who may face dramatic increases in their sentences as a result of recidivism enhancements. We do not believe that because the States have done so, we are compelled to extend the double jeopardy bar. Indeed, were we to apply double jeopardy here, we might create

213. See Monge, 118 S. Ct. at 2249 (1998). Be it the great financial and emotional burden placed on capital defendants, or the limitations of three-strike defendants' prior conviction proceedings to the record of their prior conviction, there will always be differences between the two procedures. See People v. Monge, 941 P.2d at 1121, 1129-30.
214. See 1997 Term-Leading Cases, supra note 207, at 164 n.29.
217. See id. at 834 (citing Yurko, 519 P.2d at 565, n.5).
218. See id. at 1176 (citing Reed, 914 P.2d at 188; Meyers, 858 P.2d at 306).
219. See id. at 1124 (citing Reed, 914 P.2d at 191 n.6 (quoting Patterson, 386 U.S. at 610)).
220. See, e.g., Tenner, 862 P.2d at 845 ("Due process requires the prosecution to shoulder the burden of proving each element of a sentence enhancement beyond a reasonable doubt."). Perhaps an even greater endorsement of the constitutional foundations of California's prior conviction allegation sentencing restrictions is Yurko, which stands for the proposition that several important rights guaranteed in the Constitution are also to be guaranteed in such proceedings. See Yurko, 519 P.2d at 564 ("Those procedures by which the imposition of such added penalties is to be fixed are thus protected by specific constitutional provisions ... ").
disincentives that would diminish the important procedural protections.  

Should the Court create the exception advocated by this note, there is no support for the contention that any type of safeguard purge would be held by the courts. Previous Court decisions have separated these proceedings in such a way that necessarily demands the protection of the Constitution.

The Double Jeopardy Clause has been held inapplicable to sentencing proceedings because the defendant is not in jeopardy for an “offense.” Yet when proceedings rise to a certain level, the Double Jeopardy Clause will apply. Of course, a proceeding must jump through certain hoops if it is to receive double jeopardy protection. A mandate from the Constitution is just one. There are others.

Justice O’Connor followed the lead of the California Supreme Court in reinforcing the notion that Bullington created an exception to a general rule. In doing so, she distinguished the proceedings in Monge on a number of levels in order to attenuate the relationship between the sentencing proceedings and double jeopardy protections. It is the nature of the proceedings that is at the heart of the Bullington exception and the underlying Constitutional concerns. However, the application of the Double Jeopardy Clause to the consequences of capital, non-capital, and three-strikes sentencing proceedings may provide a bit more trouble for the judicial navigator.


[T]he Court long ago concluded that the Double Jeopardy Clause applies to all criminal offenses without regard to the particular form of punishment imposed. Moreover, . . . [the Court held] that a government may not escape the dictates of the Fifth Amendment merely by classifying a proceeding as civil in nature. A sanction imposed in what is nominally a civil proceeding may constitute criminal punishment if it appears to be advancing the punitive goals of retribution and deterrence.

Id. (footnotes omitted).
224. See Monge, 118 S. Ct. at 2247.
225. See id. at 2253 (comparing two distinct aspects of the proceedings that are in question—their nature and their consequences).
226. See id. While the Court held the two aspects to be intertwined in capital proceedings, it did not refute petitioner’s contention that whether or not a proceeding is sufficiently like a trial is a matter of nature and not consequence. The Court’s analysis of Stroud focused not on the specific nature or consequence of those proceedings, but on the fact that the capital sentencing procedures at that time were significantly different than they are today. See id.
C. The Consequences of the Court's Decision and its Impact on the Future

It is the unique nature of the death penalty that fuels Justice O'Connor's refusal to apply the Double Jeopardy Clause to the case at bar.\textsuperscript{227} The majority emphasized this uniqueness in a number of ways and based their view on a variety of previous Supreme Court holdings including \textit{Bullington}.\textsuperscript{228} The Court summarized the unique nature of capital proceedings in that case by stating that:

\textit{[t]he underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and in security} \ldots \textsuperscript{229}

Accordingly, the Court recognized the need for the utmost certainty and reliability in proceedings involved with the death penalty.\textsuperscript{230} In doing so, the majority referenced \textit{Strickland v. Washington},\textsuperscript{231} \textit{Gardner v. Florida},\textsuperscript{232} and \textit{Lockett v. Ohio}\textsuperscript{233} for the general proposition that the penalty of death is qualitatively different from any other sentence because it calls for a greater degree of reliability when the death sentence is imposed.\textsuperscript{234}

In addition, Justice O'Connor referred to the landmark capital penalty case of \textit{Gregg v. Georgia}\textsuperscript{235} for the following holding: \textit{"Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so

\ \textsuperscript{227} See, e.g., id. at 2252 ("Because the death penalty is unique 'in both its severity and its finality,' we have recognized an acute need for reliability in capital sentencing proceedings.") (citation omitted).
\textsuperscript{228} See id. at 2252-53.
\textsuperscript{231} 466 U.S. 668 (1984).
\textsuperscript{232} 430 U.S. 349 (1977).
\textsuperscript{233} 438 U.S. 586 (1978).
\textsuperscript{235} 428 U.S. 153 (1976).
as to minimize the risk of wholly arbitrary and capricious action."²³⁶ In summary, Justice O'Connor took the position that the death penalty, being the most extreme of consequences, deserves the most extreme protections, and with such protections, the Double Jeopardy Clause must attach.²³⁷

However, an argument could be made that the sentencing restrictions on proceedings involving previous convictions in California are even more strict than those in death penalty cases.²³⁸ Capital sentence proceedings provide an opportunity for the weighing of aggravating and mitigating factors, and even then the trier of fact is given the opportunity to disregard any factual findings in refusing to impose a stricter sentence.²³⁹ In contrast, in a proceeding like the one in Monge, the sentencing jury is limited to evidence taken from the record of the prior conviction, and can only impose a sentence enhancement if the allegations are proven beyond a reasonable doubt.²⁴⁰ By establishing such leeway in capital sentencing proceedings, the Court has added to the intangibles of emotional distress for a defendant, producing a significant difference between the two types of cases.²⁴¹ In contrast, California’s three-strikes proceedings have eliminated many of these concerns.

The defendant, and any member of the public, can review [their] record before the prior conviction trial and accurately forecast the trial’s outcome. When a trial . . . is short and readily predictable in this way, the defendant suffers correspondingly less embarrassment, expense, and anxiety. Significantly, the defendant does not

²³⁶. See Gregg, 428 U.S. at 189.
²³⁷. See supra notes 162-63 and accompanying text.
²³⁸. See generally People v. Monge, 941 P.2d at 1121, (highlighting the differences between sentencing proceedings in cases involving the death penalty and California’s three strikes law).
²³⁹. See id. at 1128. Often times such factors are improperly considered by a jury. See Joshua N. Sondheimer, Note, A Continuing Source of Aggravation: The Improper Consideration of Mitigating Factors in Death Penalty Sentencing, 41 HASTINGS LJ. 409 (1989). Even if such a factor is improperly considered, often times it is not enough to overturn the imposition of a capital sentence. See Geraldine A. McCafferty, et al., Eighteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1987-1988, 77 GEO. L.J. 1151, 1181-82 (1989).
²⁴⁰. See People v. Monge, 941 P.2d at 1129-30. An argument has been made that “the conservatives on the Court are prepared to abandon the strict guidelines on capital sentencing proceedings described above.” See Steven G. Gey, Justice Scalia’s Death Penalty, 20 FLA. ST. U.L. REV. 67, 80 (1992).
²⁴¹. See People v. Monge, 941 P.2d at 1129. For example, in capital cases, the sentence is in doubt until the moment it is rendered. See supra notes 153-155. In comparison, a sentence enhancement usually comes as no surprise to the defendant, as the only relevant information in such a proceeding is his record of prior convictions. See People v. Monge, 941 P.2d at 1129. The unique nature of capital sentencing and its attendant consequences on the defendant has been attributed to “the severity and finality of the sentence of death.” See George Wesley Sherrell, IV, Note, Successive Chances for Life: Kuhlmann V. Wilson, Federal Habeas Corpus, and the Capital Petitioner, 64 N.Y.U.L. REV. 455, 490 (1989). “This unique nature demands special procedural rules to ensure that each conviction and sentence is meted out with a heightened degree of reliability.” Id. at 490-91. Yet, the procedural safeguards created to ensure reliability in capital sentencing may themselves cause additional hardships on the defendant. See Alice McGill, Comment, Murray v. Giarratano: Right to Counsel in Postconviction Proceedings in Death Penalty Cases, 18 HASTINGS CONST. L.Q. 211, 216-18 (1990) (outlining the protections required to ensure reliability in a capital sentence proceeding).
need to sit for weeks or months while witnesses describe in detail to a jury and the public the specifics of his alleged unlawful activities.\textsuperscript{242}

Judicial economy is well-served as a result of the \textit{Monge} decision, which is normally the case when bright line rules such as this one are developed.\textsuperscript{243} Additionally, the legislative purpose attendant to the rash of recidivism statutes enacted during the Clinton administration is well-served, because sentencing proceedings are now heavily favored by the government.\textsuperscript{244} However, the service of these interests comes at a price. Justice O'Connor's holding is a far cry from the sentiments of a nation that has rallied around the anthem, "Give me liberty or give me death!" In essence, the majority has quantified certain freedoms. The Court's decision implies that the anguish suffered by the capital defendant is inherently greater than that of a man or woman who is looking down the barrel of a legal shotgun that is capable of taking his or her freedom away for double the amount of time, or even for his or her lifetime.

The most troubling legal ramifications of the \textit{Monge} decision come in the realm of evidentiary insufficiency. Double jeopardy strictly prohibits any type of retrial when a prosecutor fails to meet his or her burden of proof.\textsuperscript{245} Justice Stevens trumpeted this warning of negative impact in his dissent.\textsuperscript{246} He noted that the Supreme Court has been quite clear in this area of the law and has gone so far as to distinguish cases of evidentiary insufficiency from "legal errors that infect the first proceeding."\textsuperscript{247} Most striking is the Court's holding in \textit{Schiro v. Farley},\textsuperscript{248} which specifically extends the Double Jeopardy Clause's protections to cases of evidentiary insufficiency in a sentencing proceeding.\textsuperscript{249} Therefore, Justice O'Connor's decision has a significant impact. It not only dismisses the notion that a lack of evidence will not bar a prosecutor from a "second bite at the apple," but it also overturns Supreme Court precedent from only four years prior.

In moving from the legal arena to the political arena, Justices Souter and
Scalia's dissents posit very real threats to the Court's decision in Monge. Although the Court makes determinations of previous convictions in separate proceedings, it is the belief of Justices Scalia, Souter, and Ginsburg that such determinations are portions of the substantive offense. Justice Scalia warned that the Court's opinion in Monge provides legislatures a loophole which may eradicate the Double Jeopardy Clause completely. Justice Scalia's hypothetical scenario of a jurisdiction permitting a single offense accompanied by multiple sentence enhancements paints a dim picture of the protections afforded non-capital defendants by Justice O'Connor and the majority. The current state of the law has made it so that when buzzwords such as "three-strikes," "recidivism," and "sentence enhancement" are introduced, the structure of constitutional case law is thrown off base. The dissent gave an implied warning; the Court must take it upon itself to ensure that legislative labeling is not the only thing standing in the way of the nullification of the Double Jeopardy Clause. If it is, the rights of defendants may already be lost.

VI. CONCLUSION

Fortunately for the due process rights of repeat offenders, the conclusion to this issue still may come sometime in the future. As the Supreme Court demonstrated in Bullington v. Missouri, courts may adopt exceptions to steadfast rules if the law requires such extension of the law. Initially, the Court held that the Double Jeopardy Clause was inapplicable to any sentencing proceeding. Under the Bullington exception, the Court created an exception for capital sentencing procedures. In Monge v. California, the Court held that the Double Jeopardy Clause does not apply to non-capital sentencing proceedings. The Court reasoned that a delineation was necessary to resolve outstanding issues in double jeopardy case law. Yet, the unresolved issues do not stop there. The strict

250. See Monge, 118 S. Ct. at 2255 (Stevens, J. dissenting) ("The fundamental distinction between facts that are elements of a criminal offense and facts that go only to the sentence provides the foundation for our entire Double Jeopardy jurisprudence . . . . I do not believe that distinction is . . . simply a matter of the label affixed to each fact by the legislature.") (emphasis added).

251. See id. at 2255-57 (Scalia, J., dissenting). Justice Scalia created a completely different Double Jeopardy issue, arguing that the proceeding in question should not be considered sentencing at all, but rather a separate portion of the proceedings concerning the substantive offense. See id. at 2255 (Scalia, J., dissenting).

252. See id. at 2255-56 (Scalia, J., dissenting) (arguing that other Constitutional rights could be dispensed with as well by simply making such protections a matter of the label affixed to the proceeding by the legislature).

253. See id. (Scalia, J., dissenting).


255. See supra notes 212.

256. See supra notes 49-50 and accompanying text.

257. See supra notes 52-54 and accompanying text.

258. See Monge v. California, 118 S. Ct. at 2253.

259. See id. at 2250.
guidelines of three-strikes laws pose new problems and even more double jeopardy concerns. Hopefully, the Court will one day renew its efforts to traverse the Sargasso Sea of double jeopardy law and create an additional exception for three-strike proceedings.

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