Criminal Procedure: Allowing the Prosecution a "Second Bite at the Apple" in Non-Capital Sentencing: *Monge v. California*

Eva Maria Floyd

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Criminal Procedure: Allowing the Prosecution a "Second Bite at the Apple"\textsuperscript{1} in Non-Capital Sentencing: \textit{Monge v. California}

\textbf{I. Introduction}

Rarely do drug dealers like Angel Jaime Monge arouse much sympathy. However, Monge's case is not about sympathy; his case concerns the fundamental right to receive a fair trial. The United States Constitution guarantees every criminal defendant a fair trial.\textsuperscript{2} The Constitution guarantees that the government will jeopardize no person's life or liberty more than once for the same offense.\textsuperscript{3} In \textit{Benton v. Maryland},\textsuperscript{4} the United States Supreme Court made the Double Jeopardy Clause of the Fifth Amendment applicable to the states through the Fourteenth Amendment.\textsuperscript{5} \textit{Monge v. California}\textsuperscript{6} clarified the application of the Double Jeopardy Clause by answering: Can the State place a convicted defendant in jeopardy of losing his liberty multiple times by allowing the prosecution multiple chances to try its "repeat offender" (recidivist) allegations?\textsuperscript{7} The \textit{Monge} Court held that our Constitution fails to protect a defendant from double jeopardy in such circumstances.\textsuperscript{8} The State may repeatedly attempt to use alleged prior offenses to enhance sentencing for the same offense. Unlike cases where a defendant's life is on the line, the Court affords a person's \textit{mere liberty} less constitutional protection. Therefore, as in \textit{Monge}, where the prosecution conceded to the California Court of Appeals that it failed to prove the sentencing allegations beyond a reasonable doubt, the Double Jeopardy Clause does not prevent a retrial of non-capital sentencing. The prosecution may repeatedly attempt to prove recidivist allegations until it eventually musters enough evidence to deprive the defendant of his liberty. Will Oklahoma state courts follow the \textit{Monge} decision by treating its criminal defendants' liberty with such callous disregard?

This note seeks to answer this question. First, Part I gives a brief overview of federal and Oklahoma law with respect to sentence enhancement. Part II of this note reviews the history of the Double Jeopardy Clause. Next, Part III provides

\begin{itemize}
  \item \textsuperscript{1} Burks \textit{v. United States}, 437 U.S. 1, 17 (1978).
  \item \textsuperscript{2} \textit{See U.S. CONST. amend. V} ("nor shall any person be . . . deprived of life, liberty, or property, without the due process of law"); \textit{U.S. CONST. amend. XIV, § 1} ("nor shall any State deprive any person of life, liberty, or property, without due process of law").
  \item \textsuperscript{3} 
  \item \textsuperscript{4} 395 U.S. 784, 794 (1969).
  \item \textsuperscript{5} \textit{See id. at 796.}
  \item \textsuperscript{6} 524 U.S. 721 (1998).
  \item \textsuperscript{7} Recidivism allegations refer to the prosecution's charge that the defendant is a repeat or habitual felon. \textit{BLACK'S LAW DICTIONARY} 1276 (7th ed. 1999).
  \item \textsuperscript{8} \textit{See Monge}, 524 U.S. at 734.
\end{itemize}

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an overview of the Monge decision. Part IV shows how the Court could have easily ruled in favor of extending double jeopardy protection to sentencing proceedings and discusses Oklahoma's options after Monge.

A. Enhanced Punishment for Recidivists

The growing popularity of "Three Strikes" laws has created sentencing procedures under which the prosecution must prove recidivism allegations in order to enhance a sentence. Under these types of statutes, a court can double or even triple a defendant's sentence if the State shows that the defendant has prior convictions. During the sentencing phase of a bifurcated trial, the prosecution must prove beyond a reasonable doubt whether the defendant was actually convicted of the alleged prior convictions. Therefore, with sentencing procedures becoming complex and more trial-like, courts must decide whether trial protections, such as the protection against double jeopardy, should extend to these trial-like sentencing proceedings. The opinions in Monge presented three distinct views regarding whether the Double Jeopardy Clause should apply to non-capital sentencing. First, the majority held that the Double Jeopardy Clause does not protect a defendant from a retrial of a non-capital sentencing phase, even when the prosecution fails to produce evidence to support the recidivism charges at the first sentencing trial. The second view, articulated by Justice Stevens' dissent, drew a distinction between insufficient evidence and legal error. Justice Stevens proposed that the Constitution protects the former from double jeopardy, but not the latter. The third view set forth in a dissent by three Justices claimed that sentence enhancements are separate elements of the offense and, therefore, should receive double jeopardy protection.

B. Oklahoma's Enhancement Statutes

Like most states, Oklahoma has sentence enhancements for recidivist defendants. Recently, the Oklahoma legislature constructed sentencing matrices that

9. Basically, "Three Strikes" laws refer to laws that allow for increased or enhanced sentences based upon a defendant's habitually criminal nature. In order to enhance a defendant's sentence, the prosecution must prove that the defendant has prior felony convictions. BLACK'S LAW DICTIONARY, supra note 7, at 1490.


11. The distinction between capital and non-capital sentencing began in 1981 when the Court carved out a narrow exception to the rule that the Double Jeopardy Clause does not apply to the sentencing phase of a bifurcated trial. See Bullington v. Missouri, 451 U.S. 430, 446 (1981). In Bullington, the Court found double jeopardy protection for capital sentencing based upon its trial-like proceedings. Id.

12. See Monge, 524 U.S. at 734.

13. See id. at 736 (Stevens, J., dissenting).

14. See id. at 738 (Scalia, J., dissenting).

15. See generally 21 OKLA. STAT. § 17 (Supp. 1998); 21 OKLA. STAT. § 51 (1991) (repealed by
specify the criteria for determining the length of an enhancement. To determine a sentence, Oklahoma allows for bifurcated proceedings in which the prosecution must prove the recidivism allegations beyond a reasonable doubt. Often, Oklahoma courts must review the validity of enhancing a defendant's sentence. However, as Justice Stevens suggested, Oklahoma courts distinguish between insufficient evidence and legal error with respect to a retrial of recidivism allegations. Specifically, in Cooper v. State, the Oklahoma Court of Criminal Appeals did not allow the prosecution a second chance to prove recidivism allegations. The Cooper court remanded the case for the trial court to set the sentence without enhancement. Additionally, in Robertson v. State, the Oklahoma Court of Criminal Appeals found that the State can retry sentencing phases only in cases involving legal error once jeopardy has attached. Clearly, Oklahoma courts can retry the sentencing phase in cases of legal error. However, where the prosecution fails to provide sufficient recidivism evidence, the Oklahoma Court of Criminal Appeals refuses to allow the prosecution a second chance once jeopardy has attached. With the United States Supreme Court's ruling in Monge, Oklahoma courts no longer have to make this distinction.

II. The History of Double Jeopardy

A. The Evolution of Double Jeopardy Protection

The rule forbidding a judiciary from trying and punishing a person more than once for the same offense is as old as law itself.

It is impossible to trace the doctrine [of double jeopardy] to any distinct origin. It seems to have been always embedded in the common law of England, as well as in the Roman law, and doubtless in every other system of jurisprudence, and, instead of having a specific origin, it simply always existed.

The United States adopted the Fifth Amendment to the Constitution, which includes the Double Jeopardy Clause, in 1791. While the words of the Amendment seem straightforward, its application is as complex as criminal procedure itself. Confusion stems from the supposition that "[t]he drafters . . . were so steeped in common law that they tended to perpetuate its inadequacies
rather than declare a precise protection for a criminal defendant."\textsuperscript{25} The drafters included the Double Jeopardy Clause to embody two common law defenses of the era.\textsuperscript{26} The first common law defense prevented a retrial once a defendant was "already acquitted."\textsuperscript{27} The second common law defense prevented a retrial once a defendant was "already convicted."\textsuperscript{28} This second defense effectively prevented defendants from appealing a conviction.\textsuperscript{29} Later interpretations of the Double Jeopardy Clause allowed defendants the opportunity to appeal a conviction.\textsuperscript{30} The reasoning behind these current interpretations is that jeopardy should not attach until a defendant has had one trial free of error.\textsuperscript{31}

In 1969, the United States Supreme Court "incorporated" the Double Jeopardy Clause,\textsuperscript{32} applying the Clause not only to the federal government but also to the states as well.\textsuperscript{33} The Court found that the principle behind the Double Jeopardy Clause is "a fundamental ideal in our Constitutional heritage, and that it should apply to the States through the Fourteenth Amendment."\textsuperscript{34} Interestingly, at the time of incorporation, every state had adopted some form of double jeopardy ban through its state constitution or common law.\textsuperscript{35} The language setting forth the Court's rationale behind incorporating the Double Jeopardy Clause comes from \textit{Green v. United States}:\textsuperscript{36}

\begin{quote}
The 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
\end{quote}

\begin{itemize}
\item \textsuperscript{26} See id. at 33.
\item \textsuperscript{27} See id.
\item \textsuperscript{28} See id.
\item \textsuperscript{29} See id. at 36 & n.148.
\item \textsuperscript{30} See generally id. at 1-37 (discussing the evolution of double jeopardy protection in the United States).
\item \textsuperscript{31} See Burks v. United States, 437 U.S. 1, 15 (1978).
\item \textsuperscript{32} See Benton v. Maryland, 395 U.S. 784, 794 (1969).
\item \textsuperscript{33} Courts developed the application of the Bill of Rights, but [o]riginally, the Bill of Rights was only applicable to the federal government. However, using the Fourteenth Amendment, the United States Supreme Court has found most of the clauses contained in the Bill of Rights so fundamental that they must apply against the states as well. When the Court finds a right so fundamental, it is referred to as "incorporated" in the Due Process Clause of the Fourteenth Amendment. Instead of incorporating the entire Bill of Rights at once, the Court has selectively incorporated these rights over the years. Accordingly, the Court has not yet incorporated every right guaranteed in the Bill of Rights.
\item \textsuperscript{34} Benton, 395 U.S. at 794.
\item \textsuperscript{35} See id. at 795.
\item \textsuperscript{36} 355 U.S. 184 (1957).
\end{itemize}
a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.\textsuperscript{37}

B. Federal Interpretation of the Double Jeopardy Clause

1. Interpretation Regarding Trial Phase

For over a century, the United States Supreme Court has relied on \textit{Ball v. United States}\textsuperscript{38} as an interpretational guide to the Double Jeopardy Clause. However, many courts have misinterpreted the \textit{Ball} rule over the years.\textsuperscript{39} In \textit{Burks v. United States},\textsuperscript{40} the United States Supreme Court interpreted \textit{Ball} to hold that a defendant can be re-prosecuted for an offense when the court sets aside his conviction based on legal error.\textsuperscript{41} In \textit{Burks}, the Court clarified the distinction between a retrial due to legal error and a retrial due to insufficient evidence. The \textit{Burks} Court held that "the Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."\textsuperscript{42} Therefore, at the beginning of a trial, double jeopardy protection attaches barring a retrial due to insufficient evidence; however, it does not bar a retrial when a legal error occurs, such as wrongly admitting evidence or improperly instructing the jury. The fundamental rule from \textit{Ball}, further clarified in \textit{Burks}, forms the heart of the Double Jeopardy Clause.

2. Interpretation Regarding Sentencing Phase

In \textit{Bullington v. Missouri},\textsuperscript{43} the United States Supreme Court carved out an exception to the long-standing rule that double jeopardy protection does not apply to sentencing.\textsuperscript{44} When life is at stake, the Court held that a defendant deserves double jeopardy protection in capital sentencing because this type of sentencing phase bears the "hallmarks of a trial."\textsuperscript{45} Using the standard language quoted \textit{supra}

\begin{thebibliography}
38. 163 U.S. 662, 672 (1896) ("[A] defendant who procures a judgment against him upon an indictment to be set aside may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he has been convicted.").
39. \textit{See Burks v. United States}, 437 U.S. 1, 14-15 (1978) (stating that failure to make a distinction "between reversals due to trial error and those resulting from evidentiary insufficiency . . . has contributed substantially to the . . . confusion existing in this area of law."). Part II of the \textit{Burks} opinion gives a comprehensive look at the case law misinterpreting \textit{Ball}. \textit{See id.} at 5-10; Yates v. United States, 354 U.S. 298, 328 (1957) (granting a new trial as a remedy where the prosecution failed to prove its case).
41. \textit{See Ball}, 163 U.S. at 672. The \textit{Burks} Court clarified this interpretation. \textit{See Burks}, 437 U.S. at 14.
42. \textit{Burks}, 437 U.S. at 11.
45. \textit{See Bullington}, 451 U.S. at 438-39. The Court lists some of the procedures that constitute
from *Green*, the Court applied the Clause as a heightened procedural protection for the defendant. Basically, the Court wanted to provide finality to capital sentencing. Following *Green*, the Court reasoned that a defendant should not fear that the State will retry capital sentencing once a court imposes a non-capital sentence.

In *Lockhart v. Nelson*, the Court, as it did in *Burks*, made an important distinction between retrial of a sentence based upon insufficient evidence and retrial of a sentence based upon legal error. The *Lockhart* Court held that, where evidence is admitted erroneously, the Double Jeopardy Clause does not preclude the retrial of a sentence enhancement allegation. Because the issue was not before the Court, however, it could not address whether the Double Jeopardy Clause precludes the retrial of a sentence where evidence was insufficient to prove recidivism. In dicta, the Court suggested that it would bar a retrial in cases where the prosecution failed to provide sufficient evidence of recidivism. Six years later in *Schiro v. Farley*, the Court stated that "[t]he state is entitled to 'one fair opportunity' to prosecute a defendant . . . and that opportunity extends not only to prosecution at the guilt phase, but also to present evidence at an ensuing sentencing proceeding."  

C. Oklahoma Interpretation of Double Jeopardy Before *Monge v. California*

The Oklahoma Constitution contains a Double Jeopardy Clause substantially similar to the one in the United States Constitution. In fact, Oklahoma courts

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46. See supra text accompanying notes 32-33.
47. See *Bullington*, 451 U.S. at 444-46.
48. See id. at 445.
50. See id.
51. See id. at 34.
52. See id. at 40-42.
54. Id. at 231-32 (citation omitted). Interestingly, the *Monge* Court did not overrule *Schiro*, but relied on it as precedent. See *Monge v. California*, 524 U.S. 721, 730 (1998). However, the *Monge* Court misinterpreted *Schiro*. In *Schiro*, the defendant claimed that the bifurcated sentencing phase violated the Double Jeopardy Clause as a successive prosecution. See *Schiro*, 510 U.S. at 229. The Court held that a separate sentencing proceeding following conviction at trial is not a re-prosecution of guilt, but a trial to determine punishment. See *Schiro* at 231. The *Schiro* Court reinforced that the reason behind the *Bullington* exception was the trial-like proceedings in that case. See id. "Because the capital sentencing proceeding 'was itself a trial on the issue of punishment,' requiring a defendant to submit to a second, identical proceeding was tantamount to permitting a second prosecution of an acquitted defendant." Id. (quoting *Bullington v. Missouri*, 451 U.S. 430, 446 (1981)). The *Monge* Court incorrectly stated that *Schiro* stands for the proposition that "double jeopardy principles have no application in the sentencing context." *Monge*, 524 U.S. at 730.
55. "[N]or shall any person, after having been once acquitted by a jury, be again put in jeopardy of life or liberty for that of which he has been acquitted. Nor shall any person be twice put in jeopardy of life or liberty for the same offense." OKLA. CONST. art. 2, § 21.
treat the state and federal clauses as one in the same.\textsuperscript{56} Furthermore, as in \textit{Burks}, Oklahoma courts commonly distinguish between a retrial based upon trial error and a retrial based upon insufficient evidence. With the former, Oklahoma courts follow the "clean slate" rule.\textsuperscript{57} Once a defendant succeeds in overturning a conviction based upon trial error, the Double Jeopardy Clause does not prohibit the state from retrying the defendant.\textsuperscript{58} Oklahoma courts reason that because the overturning court nullifies the conviction, the slate is effectively wiped clean.\textsuperscript{59} More importantly, the courts seem willing to extend the clean slate rule to the retrial of sentencing procedures. For example, in \textit{Robertson v. State},\textsuperscript{60} the Oklahoma Court of Criminal Appeals stated "[o]nly judgments or sentences void on their face may be set aside after jeopardy has attached."\textsuperscript{61} In \textit{Robertson}, the defendant received a sentence that was below the statutorily prescribed range and, therefore, void on its face. Essentially using the clean slate rule, the Oklahoma Court of Criminal Appeals found that the Double Jeopardy Clause does not bar a trial court from re-sentencing a defendant in this situation.\textsuperscript{62}

An Oklahoma case analogous to \textit{Monge} is \textit{Cooper v. State}.\textsuperscript{63} In \textit{Cooper}, a jury found the defendant guilty on two counts of drug charges and sentenced him to two consecutive prison terms, each lasting fifty years and one day. At the enhancement proceedings, the prosecution alleged that the defendant had prior rape convictions in California and Illinois. The prosecution admitted certified copies of court records from those convictions.\textsuperscript{64} However, the California judgment listed its defendant as "Cecil Cooper, Jr." and the Illinois judgment listed its defendant as "Cecil Cooper."\textsuperscript{65} On appeal, the defendant argued that the differentiation in names raised a reasonable doubt as to whether the defendant was the same person listed in the California and Illinois judgments. The Oklahoma Court of Criminal Appeals found that because the defendant had a common name, the prosecution had the burden of providing corroborative evidence to show that the documents referenced the defendant. Absent this evidence, the Oklahoma Court of Criminal

\textsuperscript{56} In \textit{Kane v. State}, 915 P.2d 932 (Okla. Crim. App. 1996), the court stated that the Double Jeopardy Clauses in the Oklahoma Constitution and the United States Constitution provide the same protection and require the same analysis. See id. at 934 n.5. Therefore, throughout this note, the term "Double Jeopardy Clause" refers to both the Oklahoma and United States Constitution, unless otherwise noted.


\textsuperscript{58} See id.

\textsuperscript{59} See id.

\textsuperscript{60} 888 P.2d 1023 (Okla. Crim. App. 1995).

\textsuperscript{61} See id. at 1025.

\textsuperscript{62} See id. (stating that re-sentencing was proper and mandatory under Oklahoma case law); see also \textit{Stafford v. State}, 800 P.2d 738, 740 (Okla. Crim. App. 1990) (applying the clean slate rule for a void sentence).


\textsuperscript{64} See id. at 1305.

\textsuperscript{65} See id. at 1305-06.
Appeals found that the prosecution failed to prove the recidivism allegations beyond a reasonable doubt.66

Without directly addressing double jeopardy issues, the Oklahoma Court of Criminal Appeals did not allow the prosecution a second chance to prove its allegations.67 The court remanded for re-sentencing so that the lower court could deduct the enhancement from the defendant's sentence.68 The Oklahoma Court of Criminal Appeals did not allow the prosecution to provide any corroborating evidence. This ruling suggests that Oklahoma courts will not allow a retrial of enhancement allegations when the prosecution provides insufficient evidence to support enhancement. In essence, the Oklahoma Court of Criminal Appeals provided double jeopardy protection against a retrial when the prosecution failed to support recidivist allegations with sufficient evidence.

III. Monge v. California

A. Facts and History of the Case

On the afternoon of January 25, 1995, Angel Monge employed a thirteen-year-old boy to complete a marijuana sale to undercover officers of the Pomona Police Department.69 The charges against Monge consisted of three violations of the California Health and Safety Code:70 (1) use of a minor to sell marijuana;71 (2) sale or transportation of marijuana;72 and (3) possession of marijuana for sale.73 Additionally, the California Penal Code provided sentence enhancement for defendants with previous convictions of "serious felonies"74 and for previous prison time served.75 The State sought sentence enhancement for both.76 The district attorney alleged that Monge had a prior conviction for assault with a deadly weapon in 199277 and that Monge served time for the conviction.78 Monge pleaded not guilty to all counts and denied the prior conviction and prior prison term allegations.79

67. See Cooper, 810 P.2d at 1306.
68. See id.
71. See id. (citing CAL. HEALTH & SAFETY CODE § 11361(a) (West 1991)).
72. See id. (citing CAL. HEALTH & SAFETY CODE § 11360(a)).
73. See id. (citing CAL. HEALTH & SAFETY CODE § 11359).
74. See CAL. PENAL CODE §§ 667(b)-(l), 1170.12(a)-(d) (1991). Under sections 667(d)(1) and 667(e)(1), a defendant's sentence may be doubled if the defendant has committed one prior serious felony.
75. See id. § 667.5(b).
77. See CAL. PENAL CODE § 245(a).
78. See Monge, 941 P.2d 1121, 1124 (Cal. 1997).
79. See id.
In bifurcated proceedings, the jury convicted Monge on all counts. As requested by Monge, the court determined his sentence. To trigger sentence enhancement, California law requires that the prosecution prove beyond a reasonable doubt that the defendant was previously convicted of a serious felony. Therefore, the prosecution had to prove that Monge either personally used a dangerous or deadly weapon during the 1992 assault, or personally inflicted great bodily injury. During an informal conversation between judge and counsel, the prosecutor claimed that Monge had used a stick in committing the 1992 incident. The State provided evidence of the seriousness of the 1992 felony by using an abstract of judgment and a prison record showing that Monge served time for assault with a deadly weapon. However, the case does not indicate that the prosecutor produced definitive evidence that Monge used a stick. Nevertheless, the judge inferred that the assault actually occurred with a deadly weapon merely because Monge pleaded guilty to the charge in 1992. In actuality, the State never produced direct evidence that Monge personally used a dangerous or deadly weapon during the assault, or that Monge personally inflicted great bodily injury. Based upon a circumstantial inference, the trial court found that the prosecution proved the prior serious felony and prior prison term allegations. Applying the sentence enhancement for prior convictions, the court sentenced Monge to eleven years in prison.

Monge appealed the enhancement decision. After reviewing both parties' briefs, the California Court of Appeals determined that the State failed to produce sufficient evidence to support the enhanced sentence. Moreover, the State

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80. See Monge, 524 U.S. at 725.
81. See CAL. PENAL CODE § 1192.7 (outlining convictions that constitute serious felonies). The section qualifies a serious felony as "any felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice," id. § 1192.7(c)(8), and as "any felony in which the defendant personally used a dangerous or deadly weapon," id. § 1192.7(c)(23).
82. See id. §§ 1192.7(c)(8), 1192.7(c)(23).
84. An abstract of judgment, also known as an abstract of record, is an abbreviated but accurate history of trial proceedings. BLACK'S LAW DICTIONARY 9 (7th ed. 1999).
85. The state presented the evidence of the prison term in the form of a "prison packet" that characterized Monge's conviction as "PC 245(a)(1) ADW GBI" and "ASLT W/DW (245(a)(1)PC)." People v. Monge, 941 P.2d 1121, 1124 (Cal. 1997). Presumably, "PC 245(a)(1) and "(245(a)(1)PC)" is an abbreviation of CAL. PENAL CODE § 245(a)(1) (1991); and, "ADW GBI" and "ASLT W/DW" is an abbreviation for assault with a deadly weapon and great bodily injury.
86. See Monge, 941 P.2d at 1124.
87. See id.
88. See id.
90. The court sentenced Monge to five years for using a minor to sell marijuana, and the sentence doubled under sections 667(e)(1) and 1170.12(c)(1). See Monge, 941 P.2d at 1124. Monge received a one-year enhancement for his prior prison term, a two-year concurrent sentence for possession of marijuana for sale, and a three-year stayed sentence for selling marijuana. See Monge, 524 U.S. at 725.
91. See Monge, 941 P.2d at 1124.
92. See Monge, 524 U.S. at 725-26.
blatantly admitted that it failed to prove the charges beyond a reasonable doubt. Nevertheless, the State boldly asked for a second chance.93 The California Court of Appeals denied this request, reasoning that a retrial of the sentencing phase would violate the federal Double Jeopardy Clause where the State failed to produce sufficient evidence on its first try.94 The State appealed the decision and received a reversal by the California Supreme Court.95 In a 4-3 decision, the California Supreme Court held that retrying non-capital sentencing does not violate the Double Jeopardy Clause.96 The United States Supreme Court granted Monge's petition for certiorari.97

B. United States Supreme Court's Holding

The United States Supreme Court refused to extend its holding in Bullington to provide double jeopardy protection to all sentencing proceedings. In a 5-4 decision, the Court held that the Double Jeopardy Clause of the Fifth Amendment applies only to capital sentencing.98 Effectively, the Court allowed the prosecution another chance to prove its recidivism case, thereby placing Monge's liberty in jeopardy indefinitely. Moreover, the Court stated that "trial-like protections" in a sentencing phase are "a matter of legislative grace, not Constitutional command."99 Finally, the Court reiterated a long-standing rule that a State may provide more protection for its criminal defendants than the United States Constitution, but is not required to do so.100

C. Majority Opinion by Justice O'Connor

Writing for the majority, Justice O'Connor focused on the distinction between capital and non-capital sentencing. Citing precedent,101 the Court stated that double jeopardy protection historically has never applied to sentencing.102 Because Bullington created an exception for capital sentencing, Justice O'Connor's opinion focused on justifying an exception only when death is at stake.103 Also, the opinion centered on the idea that sentencing is not a separate offense and is not an additional punishment, and therefore, is not entitled to double jeopardy protection.104 Specifically, the Court stated that sentence enhancement for recidivism is not "new jeopardy or additional penalty for the earlier crimes" but is "a stiffened

93. See id. at 725.
94. See id. at 726.
95. See id.
96. See Monge, 941 P.2d at 1134.
98. See Monge, 524 U.S. at 734.
99. Id.
100. See id.
102. See Monge, 524 U.S. at 728.
103. See id. at 730-34.
104. See id. at 728.
penalty for the latest crime."105 The majority rejected the dissent's argument that sentencing is an element of the offense that deserves double jeopardy protection.106 Citing Almendarez-Torres v. United States,107 Justice O'Connor "rejected an absolute rule that an enhancement constitutes an element of the offense any time that it increases the maximum sentence to which a defendant is exposed."108

The Court also reasoned that non-capital sentencing does not require constitutional finality.109 After the sentencing phase is complete, nothing prevents a court from adjusting a defendant's non-capital sentence, thereby possibly depriving any person of his liberty whenever the prosecution digs up more evidence.110 However, unlike mere liberty, a defendant's life does receive protection from double jeopardy. In an effort to distinguish life from liberty, the Court rationalized the Bullington exception to this rule using four arguments. First, the sentencing "jury's deliberations bore the hallmarks of the trial on guilt or innocence"111 because it had to decide between imprisonment and death. Second, like a trial, the prosecution must prove aggravating circumstances beyond a reasonable doubt.112 The Bullington Court distinguished non-capital sentencing by stating that, in capital sentencing, when the jury decides to sentence a defendant to life in prison, it necessarily follows that the prosecution failed to prove those aggravating circumstances required for a death sentence.113 Third, the prosecution formally presents evidence much like it would at a trial.114 Finally, the Court recognized that the need for finality of a capital sentencing phase goes with the finality of imposing a death sentence.115 It reasoned that limiting a defendant's embarrassment, expense, ordeal, anxiety, and insecurity is more crucial in capital sentencing proceedings.116

In conclusion, the Court affirmed the California Supreme Court decision to bar double jeopardy protection in non-capital sentencing.117 Justice O'Connor summarized the majority's reasoning by stating that "[m]any States have chosen to implement procedural safeguards to protect defendants who may face dramatic increases in their sentences as a result of recidivism enhancements. . . . [W]ere we to apply double jeopardy here, we might create disincentives that would diminish these important procedural protections."118

105. Id. (citing Gryger v. Burke, 334 U.S. 728, 732 (1948)).
106. See id. at 729.
108. Monge, 524 U.S. at 729.
109. See id.
110. See id. at 730.
111. Id.
112. See id.
113. See id.
114. See id.
115. See id. at 732.
116. See id.
117. See id. at 734.
118. Id.
D. Justice Stevens' Dissent

Following the reasoning of Burks, Justice Stevens argued that the prosecution should not get a second chance to prove its allegations. Instead of drawing a line between capital and non-capital sentencing, Justice Stevens based his dissent on the distinction between a retrial after legal error and a retrial after insufficient evidence. He argued that a court may retry after legal error because a defendant deserves one trial free of error. However, Justice Stevens contended that under Burks the Double Jeopardy Clause forbids a retrial when the state fails to produce sufficient evidence. Justice Stevens believed that by drawing this line, courts would avoid the conceptual confusion encountered when applying the Double Jeopardy Clause.

E. Dissent by Justices Scalia, Souter and Ginsburg

Justices Scalia, Souter, and Ginsburg agreed that the Double Jeopardy Clause should not apply to ordinary, non-capital sentencing. However, Justice Scalia, writing for the dissenters, believed that the majority missed the real issue in the case. Using the "same elements" test from Blockburger v. United States, Justice Scalia concluded that enhanced sentencing is an element of the offense. Following this reasoning, sentence enhancement deserves constitutional protection. Additionally, Justice Scalia stated that California law conveniently discards constitutional rights by treating sentence enhancements as separate crimes. Justice Scalia predicted that this method would lead courts down a slippery slope resulting in a state discarding all constitutional rights when such rights become inconvenient.

IV. The Analysis and Implications of Monge

A. Analysis of the United States Supreme Court's Decision

1. The Bullington Analysis

While the United States Supreme Court obviously is not bound to the Bullington precedent, the Monge Court flagrantly disregarded the true rationale behind the decision to provide double jeopardy protection in sentencing. The purpose behind
Bullington and the Double Jeopardy Clause is to prevent the government from placing someone's life or liberty at stake more than once for an offense. The Clause protects a defendant by giving the prosecution one chance to prove its case in a trial proceeding. The Bullington Court clearly set forth the trial-like proceedings that trigger double jeopardy protection. However, in an effort to limit Bullington, the Court erroneously focused on the capital versus non-capital distinction when deciding Monge. Thus, the Monge Court manipulated Bullington to fit its goal. Relying on a capital/non-capital distinction is erroneous because it demeans the value of a person's liberty. For example, when the government placed Monge's liberty in jeopardy at the first sentencing trial, the trial court should have sentenced Monge to only five years in prison because the prosecution failed to prove its enhancement case. By allowing the prosecution another chance, the State placed Monge's liberty in jeopardy again. Thus, the State had the opportunity to subject Monge to more than double his original sentence, provided the prosecution could produce sufficient evidence in the second sentencing phase.

In Bullington, the Court recognized that placing a defendant in this "continuing state of anxiety and insecurity" is unconstitutional. Therefore, the primary focus of Bullington was not on the capital versus non-capital distinction, but on the trial-like procedure of the sentencing phase. The Court specifically stated that the Double Jeopardy Clause should protect a defendant when the sentencing phase bears "the hallmarks of the trial on guilt or innocence." The Court found three hallmarks most important. First, the Missouri law required a separate pre-sentence hearing empaneling a jury to determine the sentence. Second, at this hearing, the prosecution had to prove elements of an aggravating circumstance beyond a reasonable doubt — a higher standard than the usual preponderance of the evidence. Third, the Missouri law did not allow the jury unfettered discretion regarding the sentence it could impose. Because the jury could choose between the death penalty or life in prison, the Court found that the jury had standards to guide its exercise of discretion. For these reasons, the Bullington Court found that the pre-sentence hearing was in essence a trial on the issue of punishment. Specifically, the Court noted the procedural similarities between a trial and the pre-sentence hearing as including opening statements, testimony and evidence, jury instructions, closing arguments, and jury deliberating and returning a verdict.

131. See supra notes 33, 50 and accompanying text.
133. Id. at 445 (quoting Green v. United States, 355 U.S. 184, 187 (1957)).
134. Id. at 439.
135. See id. at 438.
136. See id.
137. See id.
138. See id. at 440.
139. See id. at 438.
140. See id.
141. See id. at 438 n.10.
If the Monge Court had focused on the procedural similarities as did the Bullington Court, it would arguably have reached a different conclusion. The distinct, trial-like procedure of a bifurcated sentencing phase involving enhancement should trigger constitutional protection against double jeopardy. Under California law, Monge's sentence enhancement hearing included many of the hallmarks of a trial on guilt or innocence. First, California law allowed for a separate trial with a judge or jury to determine whether to impose an enhanced sentence. Second, at this hearing, the prosecution had to prove beyond a reasonable doubt that the defendant was previously convicted of a serious felony. Third, California law did not give the judge or jury unfettered discretion regarding the sentence it could impose. The trier of fact had sentencing guidelines to follow. If the state proved the recidivist allegations, then the primary sentence would double. In essence, a decision to enhance the sentence meant that the prosecution had proven its case. A decision not to enhance the sentence meant that the prosecution had failed to provide sufficient evidence to prove recidivism. For these reasons, the Monge Court should have found that the sentence enhancement phase was, in essence, a trial on the issue of punishment. Therefore, the Double Jeopardy Clause should have prevented the prosecution from getting a second chance to prove its case, whether the nature of the sentencing trial was capital or non-capital. The line the courts must draw is between trial-like and non-trial-like sentencing procedures. Instead, the Monge Court improperly drew the line between life and death.

2. The Burks/Lockhart Analysis

The Court in both Burks v. United States and Lockhart v. Nelson made the necessary distinction between a retrial based on insufficient evidence and a retrial based on legal error. In fact, Burks stated that such a distinction is critical in alleviating some "conceptual confusion" encountered when analyzing double jeopardy issues. Based on this distinction, the United States Supreme Court in Burks held that when the evidence is insufficient to support a conviction, "the only 'just' remedy available for [the reviewing] court is the direction of a judgment of acquittal." Applying this distinction to Lockhart, the United States Supreme Court addressed the issue of retrial of a sentence enhancement hearing where legal error occurred. In Lockhart, the defendant pleaded guilty to burglary charges. In a separate sentencing hearing, the State alleged recidivism and had the burden of

142. See Cal. Penal Code §§ 667(b)-(l), 1170.12(a)-(d), 1192.7(c)(8), 1192.7(c)(23) (West 1991).
144. See People v. Tenner, 862 P.2d 840, 845 (Cal. 1993).
146. See id. §§ 667(b)-(l), 1170.12(a)-(d).
147. See id.
150. See Burks, 437 U.S. at 15.
151. Id. at 18.
proving the allegations beyond a reasonable doubt. As required by Arkansas enhancement statutes, the State presented evidence of four prior convictions at the hearing. The defendant contended at trial that the governor had pardoned one of those convictions. Believing the defendant was mistaken, the court ultimately disregarded his contention. Seeking a writ of habeas corpus, the defendant again maintained that the governor had pardoned the conviction. After investigation, the district court found that the governor had pardoned the conviction and declared the enhanced sentence invalid. When the State requested a second chance to provide evidence of another conviction in place of the pardoned conviction, the court denied the request based on the Double Jeopardy Clause. Affirming, the Eighth Circuit held that the Double Jeopardy Clause did prevent a retrial. It found that a pardoned conviction was inadmissible to prove enhancement allegations. Finally, the Eighth Circuit Court reasoned that without that conviction the State failed to provide sufficient evidence to prove the enhancement allegations.

In Lockhart, the United States Supreme Court held that, whether erroneously admitted or not, the totality of evidence would have been sufficient to sustain the sentencing enhancement. Again, the United States Supreme Court relied upon the distinction between legal error and insufficient evidence to determine whether the Double Jeopardy Clause precluded retrial. The Lockhart Court relied on the following language from Burks:

[R]eversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that the defendant has been convicted through a judicial process which is defective in some fundamental respect . . . . When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error . . . .

The Court concluded that the basis for retrial of the sentencing allegations was legal error, not insufficient evidence. It reasoned that if the defendant had offered proof of the pardon at trial, then the judge would have allowed the prosecution a chance to offer another conviction to prove the charges. Because

152. See Lockhart, 488 U.S. at 34-35.
153. See id. at 35.
154. See id. at 36.
155. See id. at 37.
156. See id.
157. See id. at 34.
158. See id. at 40.
160. See Lockhart, 488 U.S. at 40.
161. See id. at 42.
the admission was a legal error, the Court found that the Double Jeopardy Clause did not preclude a retrial.\footnote{162}

\textit{Lockhart} is significant because the Court used the \textit{Burks} distinction to decide whether the Double Jeopardy Clause precluded a retrial of a \textit{sentencing} hearing. Thus, in dicta, the Court showed that it was willing to provide double jeopardy protection if the basis for retrial solely had been insufficient evidence rather than erroneous admission of a null conviction.\footnote{163} Furthermore, the Court stated that the prosecution would have had an opportunity \textit{at the sentencing hearing} to provide additional evidence. Therefore, the Court's decision "merely recreate[d] the situation that would have been obtained if the trial court had excluded"\footnote{164} the pardoned conviction.

Using the \textit{Burks} and \textit{Lockhart} rationale, the \textit{Monge} Court should have held that the Double Jeopardy Clause barred a retrial of the sentencing allegations because the prosecution failed to produce sufficient evidence at trial. Applying \textit{Lockhart}, the Court should have gone through three steps to reach this conclusion. First, the United States Supreme Court should have applied the Double Jeopardy Clause to Monge's sentencing phase. The Court had no problem doing so in either \textit{Lockhart} or \textit{Bullington}. Monge's liberty was at stake. Allowing the prosecution as many chances as it needs to deprive Monge's liberty, even in a \textit{sentencing trial}, undermines the very purpose behind the Double Jeopardy Clause. Second, the Court should have distinguished between a retrial based on legal error and a retrial based on insufficient evidence, applying double jeopardy protection for the latter. As stated in \textit{Burks}, this distinction avoids any conceptual confusion encountered when analyzing double jeopardy issues. Because the sentencing trial contained no legal errors, the Court lacked a reason to allow readjudication of Monge's sentencing enhancement. Moreover, the prosecution conceded that its evidence failed to support the recidivism allegation.\footnote{165} Finally, with the prosecution's conceding insufficient evidence, the Court should have treated the prosecution's failure to prove its case as an acquittal regarding the recidivism allegations.\footnote{166}

The trial court allowed the prosecution to present all its evidence regarding the "serious felony" allegations. If the trial court had properly found that the evidence did not prove the allegations beyond a reasonable doubt, then it would not have

\begin{itemize}
\item \footnote{162} See Lockhart, 488 U.S. at 42.
\item \footnote{163} Interestingly, in a footnote, the \textit{Lockhart} Court expressed no aversion to extending double jeopardy protection to non-capital sentencing. See \textit{id.} at 37 n.6. The Court stated that usually it would answer whether the Double Jeopardy Clause prohibits successive non-capital sentencing proceedings. See \textit{id.} The courts below found that the Double Jeopardy Clause did bar a successive sentencing. See \textit{id.} Therefore, the Court "assume[d], without deciding, that [the issue] present[ed] no barrier to reaching the double jeopardy claim raised." \textit{id.} So, the lower courts provided double jeopardy protection to non-capital sentencing, assuming that to be constitutionally sound. Furthermore, the United States Supreme Court \textit{assumed}, albeit without deciding, that the lower courts acted constitutionally. See \textit{id.} Hence, allowing double jeopardy protection for \textit{mere liberty} apparently was not as repugnant to the Court in 1988.
\item \footnote{164} \textit{id.} at 42.
\item \footnote{165} See Monge v. California, 524 U.S. 721, 725 (1998).
\item \footnote{166} See Lockhart, 488 U.S. at 41.
\end{itemize}
enhanced Monge's sentence and would not have deprived his liberty. Therefore, as in Lockhart, the Court should have "recreated" the just conclusion that the trial court should have obtained.\footnote{167} Applying this type of analysis, the Double Jeopardy Clause should have barred the enhancement of Monge's sentence.

In summary, although the United States Supreme Court has expressed no aversion to applying the Double Jeopardy Clause to non-capital sentencing in the past,\footnote{168} in Monge the Court denied Double Jeopardy protection in non-capital sentencing. However, the Monge Court expressed no justifiable reason for making the capital versus non-capital distinction, other than a strained application of the Bullington reasoning. Had the Court accurately applied Bullington, it would have barred Monge's sentencing retrial for two reasons. First, the enhancement proceedings bore the hallmarks of a trial. Second, because of the trial-like aspects, the sentencing phase required finality. No person, not even Monge, deserves to live in constant fear of the State lengthening a sentence whenever it finally gathers enough evidence. Preventing this type of suspense is at the heart of the Double Jeopardy Clause. Essentially, the only situation in which the Court should have allowed a retrial is if a legal error had occurred requiring readjudication.

B. The Effect of Monge on Oklahoma

1. Where Oklahoma Stands

At this time, Oklahoma provides more protection for its defendants than the United States Constitution demands. No Oklahoma case has specifically addressed the issue of whether double jeopardy protection applies to non-capital sentencing. However, precedent indicates the courts will bar a retrial of sentencing allegations when no legal errors occur.\footnote{169} Applying the "clean slate" rule, Oklahoma courts do not apply double jeopardy protection when a defendant's sentence is void for legal error.\footnote{170} Furthermore, Oklahoma courts have stated that a void sentence is the only justification for retrying sentencing issues.\footnote{171} This rationale follows the

\footnotesize{167. The Lockhart Court stated: "Our holding today thus merely recreates the situation that would have been obtained if the trial court had excluded the evidence of the conviction ... " Id. at 43. Hence, the Court merely wanted to rule in a way that created an outcome that would have existed if the trial court done its job correctly.

168. See, e.g., id.

169. See Cooper v. State, 810 P.2d 1303 (Okla. Crim. App. 1991) (barring the retrial of recidivism allegations where the prosecution failed to provide sufficient evidence at non-capital sentencing). It is important to note that a careful reading of Burks and Bullington, before Monge, would have indicated that the Court was willing to extend double jeopardy protection to trial-like proceedings where no legal errors had occurred. Therefore, the Oklahoma courts may choose to limit double jeopardy protection to only capital sentencing in the future as well.


171. See Robertson v. State, 888 P.2d 1023, 1025 (Okla. Crim. App. 1995) (applying the clean slate rule to a non-capital sentencing case where original sentence was void). The Robertson court gives several examples of sentences "void on their face" including sentences outside the statutory limit, sentences modified by a trial court after a jury has imposed it, and sentences modified after the defendant began serving the sentence. See id. at 1025 n.7 & n.10. Therefore, a void sentence appears to be one.
rule that a defendant is entitled to one trial free from legal error. Moreover, the Oklahoma approach alleviates the conceptual confusion encountered when dealing with double jeopardy issues.

Additionally, Oklahoma's sentencing procedures for enhancements also bear the hallmarks of a trial. First, the courts allow bifurcated sentencing proceedings to prove enhancement allegations. Second, the prosecution must prove the recidivism allegations beyond a reasonable doubt. Third, the judge or jury does not have unfettered discretion when determining a sentence. For these reasons, an enhancement sentencing proceeding is essentially a trial on the issue of punishment. Therefore, if the prosecution fails to provide sufficient evidence to prove recidivism, that failure is the equivalent of an acquittal of those charges.

2. Oklahoma's Options

Since Monge specifically stated that nothing requires courts to provide double jeopardy protection in non-capital sentencing, Oklahoma now has the option of lowering its standard. However, to preserve the fundamental ideal so deeply ingrained in our nation's history, Oklahoma must continue to protect its defendants from an unjust retrial when the prosecution fails to prove its case. Except where legal error occurs, the United States Constitution demands that sentencing procedures have finality to prevent a defendant from living in constant fear of deprivation of liberty. This is true despite the contrary interpretation of the Constitution found in the Monge decision.

Since the Court lowered the constitutional standard, Oklahoma courts should choose to provide more protection than the United States Constitution now requires. When a sentencing procedure contains the hallmarks of a trial, Oklahoma courts should afford the defendant the same constitutional protections of a trial, including protection against double jeopardy. Accordingly, the prosecution should not get multiple chances to prove its case. Allowing the prosecution a chance to gather more evidence in anticipation of a defendant's appeal is a clear abuse of our constitutional principles.

The Monge Court stated that double jeopardy protection in non-capital sentencing is a matter best left to "legislative grace, not constitutional command." Indisputably, a person's liberty should not be left to anyone's grace or charity, especially when the United States Constitution commands the protection of both life and liberty with equal fervor. In order to maintain these fundamen-

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172. Although not required in every trial, Oklahoma courts do allow bifurcated proceedings where prior convictions are inadmissible in the guilt phase but necessary to the sentencing phase. See Reed v. State, 657 P.2d 662, 665 (Okla. Crim. App. 1983) (discussing when the law requires bifurcated trials).


175. Monge, 524 U.S. at 734.

176. U.S. CONST. amend. V ("nor shall any person be . . . deprived of life, liberty or property, without the due process of law"); see also U.S. CONST. amend. XIV, § 1 (applying the same command
tial principles, Oklahoma must retain double jeopardy protection for its defendants in cases of noncapital sentencing despite the Monge Court's opinion that the Constitution requires less.

V. Conclusion

After Monge, the Double Jeopardy Clause does not protect a defendant from a retrial of non-capital sentencing allegations. As it stands, the prosecution can provide more evidence to support its allegations if evidentiary insufficiency is an issue on appeal. Also, the Monge Court rejected the contention that an appellate court's finding of insufficient evidence was analogous to acquittal of the recidivist allegations. Abandoning previous benchmarks, the Court drew a sharp distinction between capital and non-capital sentencing, focusing on the severity of punishment at stake instead of the trial-like nature of the proceeding. Finally, the Court reasoned that an extension of double jeopardy protection to non-capital sentencing would diminish incentives for the individual states to keep important procedural safeguards.

Considering this decision, Oklahoma courts now must decide whether to retain procedural safeguards providing double jeopardy protection in non-capital sentencing. Currently, Oklahoma courts distinguish between a retrial for legal error and a retrial for insufficient evidence, with the latter protected from double jeopardy. Recognizing every person's inalienable, constitutional right to liberty, Oklahoma should retain this important safeguard and continue to protect life and liberty with equal fervor. Oklahoma should provide strenuous and unwavering constitutional protection under the Double Jeopardy Clause instead of the callous indifference shown by the United States Supreme Court in Monge.

Eva Maria Floyd

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178. See id. at 732.
179. See id. at 731.
180. See id. at 733-34.