Three Strikes Two Bites at the Apple and One Offense: An Examination of Monge v. California and the Double Jeopardy Clause's Inapplicability to Three Strikes Law

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Three Strikes, Two Bites at the Apple, and One Offense?: An Examination of *Monge v. California* and the Double Jeopardy Clause’s Inapplicability to Three Strikes Law

As the United States Supreme Court has noted, the evolution of the Double Jeopardy Clause from its common-law origins was driven by the desire to eradicate the threat of multiple prosecutions. At its most basic level, double jeopardy precludes review of an acquittal, regardless of the reason behind that acquittal. Two obvious, but essential issues in determining whether the Double Jeopardy Clause precludes the review of a case are what constitutes an acquittal and what constitutes an offense.

The line between a criminal offense and a factor to be considered in sentencing has been blurred due to recent federal and state sentencing statutes promulgated to assuage public disillusionment with a criminal justice system perceived as too lenient on criminals. The Supreme Court historically has categorized sentencing determinations separately from resolutions of the factual elements of a case, holding that sentencing proceedings are unprotected by the Double Jeopardy Clause. The increased complexity of sentencing statutes, however, has introduced the issue of whether both

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1. See U.S. CONST. amend. V ("No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . ."). *See also* United States v. Wilson, 420 U.S. 332, 336-43 (1975) (tracing the course of statutory authority allowing Government appeals in light of the Double Jeopardy Clause); United States v. Jorn, 400 U.S. 470, 479 (1971) ("[S]ociety's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws."); Green v. United States, 355 U.S. 184, 190 (1957) (determining that the Double Jeopardy Clause precluded a second trial for first-degree murder after the defendant was convicted of second-degree murder).

2. See Fong Foo v. United States, 369 U.S. 141, 143 (1962) (holding that, even when an acquittal was based on an "erroneous foundation," the acquittal was final and unreviewable); United States v. Ball, 163 U.S. 662, 671 (1896) ("[A] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution.").


5. See *infra* notes 253-70 and accompanying text (describing statutory sentencing movements).

sentencing and resentencing proceedings can violate constitutional protections against double jeopardy.\(^7\) In *Monge v. California*,\(^8\) the Court held that a Three Strikes law\(^9\) does not trigger double jeopardy protections, regardless of how blurred the distinction between an element of the offense and a fact for sentencing purposes.\(^10\)

This Note discusses the facts of *Monge*, its lower court history, and the reasoning behind the Court's decision.\(^11\) The Note reviews the history of California's Three Strikes law,\(^12\) placing the law in the context of other statutory sentencing enhancements at both the state and federal level.\(^13\) Next, the Note examines case law addressing the Double Jeopardy Clause, focusing on the Court's reluctance to apply the Clause to most sentencing procedures.\(^14\) The Note also analyzes the Court's failure to apply other constitutional protections to sentencing statutes.\(^15\) The Note then considers the reasoning behind the Court's refusal to extend double jeopardy protections to non-capital sentencing proceedings.\(^16\) Finally, the Note examines the constitutional implications of allowing the states to legislate complex sentencing guidelines that elude constitutional protections.\(^17\)

On January 25, 1995, undercover officers from the Pomona Police Department were riding in an unmarked car on West Ninth Street in Pomona, California.\(^18\) A thirteen-year-old boy standing by the curb gestured for the car to pull over; instead, the officers pulled into an alley in front of an apartment complex where they had observed narcotics activity.\(^19\) Defendant Angel Monge approached the car, at which time the officers rolled down their window and

\(^7\) See *People v. Monge*, 941 P.2d 1121, 1123 (Cal. 1997), *aff'd sub nom.* *Monge v. California*, 118 S. Ct. 2246 (1998); *see also* Paul M. Winters et al., *Sentencing Guidelines*, 83 GEo. L.J. 1229, 1262 (1995) ("Resentencing is required when the sentencing judge fails to make explicit findings or to disclaim reliance on controverted matters."); *id.* at 1265-67 nn.2233-34 (listing cases in which resentencing was required).

\(^8\) 118 S. Ct. 2246 (1998).


\(^10\) *See Monge*, 118 S. Ct. at 2252-53.

\(^11\) *See infra* notes 18-103 and accompanying text.

\(^12\) *See infra* notes 104-17 and accompanying text.

\(^13\) *See infra* notes 104-05 and accompanying text.

\(^14\) *See infra* notes 118-89 and accompanying text.

\(^15\) *See infra* notes 204-12 and accompanying text.

\(^16\) *See infra* notes 213-63 and accompanying text.

\(^17\) *See infra* notes 264-89 and accompanying text.


\(^19\) *See id.*
asked Monge where they could buy marijuana. Monge failed to answer and walked over to a carport. The officers started to pull out of the alley when they saw the thirteen-year-old boy behind their car. Monge handed the boy some plastic bags, and the boy walked towards the officer's car and asked the officers how much they wanted to buy. The officers paid twenty dollars for two "dime bags" and left the alley. The undercover officers informed other uniformed officers who then arrested both Monge and the boy. At the time of his arrest, Monge had the same twenty dollars from the undercover officers in his possession.

The District Attorney charged Monge with using a minor to sell marijuana, possession of marijuana for sale, and sale or transportation of marijuana. Based on Monge's prior conviction for felony assault with a deadly weapon, the District Attorney claimed that Monge should be subject to two sentence enhancement provisions under California's Three Strikes law. First, the District Attorney argued that the prior conviction was a "serious felony." Under the California statute, a defendant with two prior "serious" felony convictions may receive a maximum sentence of twenty-five years to life upon conviction of a third felony, while a defendant

20. See id.
21. See id.
22. See id.
23. See id.
24. See id.
25. See id.
26. See id.

27. See id. Monge was charged with violating California Health and Safety Code § 11361(a), which prohibits the use of a minor to sell marijuana; § 11359, which prohibits possession of marijuana for sale; and § 11360(a), which prohibits transportation or sale of marijuana. See CAL. HEALTH & SAFETY CODE §§ 11359, 11360(a), 11361(a) (West 1991).


29. See Monge, 941 P.2d at 1123-24; see also infra notes 45-50 and accompanying text (discussing whether Monge had been convicted of a prior felony for purposes of the Three Strikes law). Under California's Three Strikes law, the defendant's prior conviction resulted in a five-year enhancement that doubled part of his sentence from five years to ten years for using a minor to sell marijuana. See CAL. PENAL CODE §§ 667(e)(1), 1170.12(c)(1) (West Supp. 1999).

30. See CAL. PENAL CODE §§ 667(e)(2), 1170.12(c)(2)(A). When a defendant has two or more felony convictions, the statute provides that the term for the instant felony conviction is "an indeterminate term of life imprisonment ... or twenty-five years." Id. § 1170.12(c)(2)(A)(i)-(ii). A "serious felony" in California has been defined as similar to a "violent felony," including:
murder or voluntary manslaughter, mayhem, rape, sodomy by force, oral copulation by force, child molestation, any felony that carries a life sentence, any felony where the accused causes great bodily injury on anyone other than an accomplice or if the defendant uses a firearm, robbery in a dwelling house or
with one prior serious felony conviction receives a doubled sentence.\textsuperscript{31} Second, because Monge had served prison time for the previous conviction, he was subject to a one-year enhancement for prior prison time served.\textsuperscript{32} Monge pleaded not guilty and contested the applicability of the Three Strikes law to his sentence.\textsuperscript{33}

California Penal Code Section 1192.7 recognizes assault as a serious felony if the defendant "personally inflicts great bodily injury on any person,"\textsuperscript{34} or if the defendant "personally used a dangerous or deadly weapon" in the assault. The California legislature has protected against the incorrect labeling of prior convictions as serious felonies by implementing procedural protections for prior conviction assessments.\textsuperscript{35} Not only does the defendant have the right to a jury trial, in which the prosecution is burdened with a reasonable doubt standard of proof,\textsuperscript{36} but the defendant also retains the right against self-incrimination.\textsuperscript{37} Furthermore, the rules of evidence apply and the defendant has the right to cross-examine witnesses.\textsuperscript{38}

\begin{itemize}
\item vessel in which the defendant used a firearm, arson, attempted murder, kidnapping, and carjacking.
\item assault with intent to commit rape or robbery; assault with a deadly weapon or instrument on a peace officer; assault by a life prisoner on a non inmate; assault with a deadly weapon by an inmate; ... attempt to commit a felony punishable by death or imprisonment in the state prison for life; any felony in which the defendant personally used a dangerous or deadly weapon; selling, furnishing, administering, giving or offering to sell, furnish, administer, or give to a minor any heroin, cocaine, phencyclidine (PCP), or any methamphetamine-related drug ... grand theft involving a firearm.
\end{itemize}

\textit{Id.;} Meredith McClain, Note, "Three Strikes and You're Out": The Solution to the Repeat Offender Problem?, 20 SETON HALL LEGIS. J. 97, 107 n.40 (1996). The category of serious felony also includes:

\textcolor{red}{\begin{itemize}
\item assault with intent to commit rape or robbery; assault with a deadly weapon or instrument on a peace officer; assault by a life prisoner on a non inmate; assault with a deadly weapon by an inmate; ... attempt to commit a felony punishable by death or imprisonment in the state prison for life; any felony in which the defendant personally used a dangerous or deadly weapon; selling, furnishing, administering, giving or offering to sell, furnish, administer, or give to a minor any heroin, cocaine, phencyclidine (PCP), or any methamphetamine-related drug ... grand theft involving a firearm.
\end{itemize}}
Upon his arrest, Monge waived his right to a jury trial on the issues of his prior conviction and prior prison term. The court granted his request and bifurcated the proceedings—one trial to determine guilt and another to determine sentencing, based on the defendant’s status as a recidivist. One week after a jury convicted Monge on the substantive issues surrounding the drug charges, sentencing proceedings against him reconvened. Monge again agreed to admit that his prior conviction was a serious felony, but after an off-the-record discussion, he articulated his wish to deny his admission of his prior conviction. He did not, however, change his waiver of a jury trial and requested that the judge try the issue of his prior conviction without a jury.

Due to section 1192.7’s requirement that a defendant convicted of assault with a deadly weapon have personally inflicted great bodily injury or have personally used the dangerous or deadly weapon, an issue arose as to whether Monge personally used a deadly weapon in his prior conviction. While the prosecution claimed that Monge had personally used a stick during the assault, the defense argued that the stick could not be classified as a deadly weapon. After stating that

admissible).

40. See Monge, 941 P.2d at 1124.
41. See id.
42. See id.
43. See id.
44. See id.
45. See id. The prior conviction at issue involved the use of a stick in an assault. See infra notes 46, 49 (discussing whether Monge personally used the stick in an assault).
46. See Monge, 941 P.2d at 1124. The defendant’s argument that his prior conviction could not be classified as assault with a deadly weapon under § 1192.7 is confusing. During oral argument, the U.S. Supreme Court attempted to clarify how the stick’s status as a deadly weapon could be a contested issue in light of the defendant’s earlier guilty plea and asked the petitioner to clarify the issue:

"Question: ... I never understood why, given that circumstance [defendant’s prior conviction being labeled ‘assault with a deadly weapon’], the California intermediate court could have held there wasn’t enough evidence. Mr. Gardner: ... [A]n assault finding ... even if it’s assault with a deadly weapon doesn’t mean personal use, because there’s always the factor of aiding and abetting."

United States Supreme Court Official Transcript at 25-29, Monge (No. 97-6146), available in 1998 WL 222955 at *27. Thus, Monge argued that because “in and of itself, California law ... does not provide sufficient evidence” that a conviction for assault with a deadly weapon implicates a defendant for personal use of that weapon, the court had insufficient evidence to convict him under section 1192.7. Id. The ultimate argument as to Monge’s prior conviction revolved around the uncertainty as to his personal use of the stick. See id. Defense counsel’s initial argument that the stick could not be labeled a deadly weapon was less compelling (and eventually discarded) because Monge’s pleading guilty to the assault charge contradicted his argument. See id. at 26 (“The only question was whether he personally used a weapon.”); see also infra note 45 and accompanying text (describing the
Monge had already pleaded guilty to the charge of assault with a deadly weapon, thereby acknowledging that the stick could be classified as a deadly weapon, the court asked if either party wished to submit more evidence on the matter. The prosecution introduced into evidence a “prison packet” and an abstract of judgment, both of which characterized the previous conviction as an assault with a deadly weapon, but neither of which implicated Monge as personally having used the weapon. The court concluded that Monge had been convicted of and served time for a prior serious felony involving his personal use of a deadly weapon. Consequently, the Three Strikes law doubled Monge’s sentence to ten years and added a one year enhancement for the prior prison term.

Monge appealed the sentence, claiming that the Three Strikes law was unconstitutional because it violated his due process rights. The California Court of Appeal went further and questioned whether application of a sentence enhancement violated double jeopardy protections by demanding a review of insufficient evidence from his prior conviction. The court of appeal affirmed the conviction on the substantive charges but remanded the case for resentencing, holding that there was insufficient evidence to establish that the defendant had a prior serious felony conviction for assault with a deadly weapon for purposes of section 1192.7 and that the Double Jeopardy Clause of the Fifth Amendment barred retrial of the issue.

language of California Penal Code section 245 under which Monge was convicted).

47. See United States Supreme Court Official Transcript at 26, Monge (No. 97-6146).
49. See id. The prison packet and abstract of judgment described Monge’s prior conviction as “PC 245(a)(1) ADW GBI” and “ASLT W/DW 245(a)(1)(PC)” and evidenced his conviction for assault in violation of California Penal Code § 245. Id. However, section 245 does not charge the defendant with personal use of a deadly weapon; its language is more general and criminalizes the commission of “an assault upon the person of another with a deadly weapon or instrument ... likely to produce great bodily injury.” CAL. PENAL CODE § 245(a)(1) (West Supp. 1999). At oral argument, defense counsel characterized the prison packet as providing insufficient evidence to classify Monge’s prior conviction under section 1192.7, stating: “The prosecutor slipped here because what the prosecutor introduced was a four-page document that did, indeed, show that the defendant was convicted of assault in 1992 ... but not that the defendant personally used a weapon.” United States Supreme Court Official Transcript at 24-25, Monge (No. 97-6146). The prison packet contained fingerprints, a picture, and information regarding the nature of the conviction. See id. at 30.
50. See Monge, 941 P.2d at 1124.
51. See id.
52. See id.
53. See id.
54. See id.
The California Supreme Court granted review to decide whether a proceeding that determines the "truth of a prior serious felony allegation" in a non-capital case is protected by state and federal prohibitions against double jeopardy. Reversing the lower court's holding, the court concluded that double jeopardy protections are triggered by sentencing proceedings only in capital cases. The court compared the sentencing proceedings at issue in Monge with those in *Bullington v. Missouri.* In *Bullington,* the U.S. Supreme Court held that the Double Jeopardy Clause bars a court from changing the defendant's sentence from life imprisonment to death in a bifurcated sentencing proceeding when the jury's sentence had been one of life imprisonment.

In distinguishing *Monge* from *Bullington,* the California Supreme Court relied exclusively on *Monge*'s status as a non-capital case. The court first reasoned that capital proceedings financially and emotionally burden the defendant more than non-capital cases, thereby triggering additional constitutional protections. In addition, the court noted that a state is not constitutionally required to provide a trial on non-capital sentencing issues, and thus, California need not provide a non-capital defendant with all of the procedural guarantees that would attend a trial on guilt or innocence. Finally, the court held that a qualifying "strike" in *Monge*'s case required the finding of a specific "status," while a sentencing decision in a capital case required consideration of facts arising from the crime for which the defendant is being tried as well as a general character assessment.

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55. *Id.* at 1125.
56. *See id.* at 1129.
57. *See id.*
59. *See id.* at 445.
60. *See Monge,* 941 P.2d at 1127-30.
61. *See id.* at 1129.
62. *See id.* at 1129-30. The Court's rationale was not clearly based on legal analysis—it cited "common-sense" as suggesting that "when a state legislature has elected at its option to provide a trial-like proceeding to resolve a factual issue ... the legislature need not provide all the procedural protections that apply in a constitutionally mandated trial." *Id.* at 1128.
63. *Id.* at 1129 (using "status" to refer to a fact about the defendant easily garnered from the public record, such as age or gender).
64. *See id.* The majority opinion reasoned that a defendant's status as a repeat offender would not trigger the stigma of a criminal charge because it was merely a determination of punishment. *See id.* The court regarded factual determinations surrounding prior convictions as "divorced from the facts of the present offense" and held that they should be viewed "irrespective of the present offense." *Id.* at 1130. However, a capital sentence proceeding relies on "specific facts of the defendant's present crime" and "an overall assessment of the defendant's character," which results in evidentiary overlap.
California Supreme Court Justice Brown concurred, reasoning that a retrial on the existence of prior conviction was not an examination of evidence surrounding the substantive offense and consequently would not put the defendant in double jeopardy. Three justices dissented on the grounds that *Bullington* applied to non-capital sentencing cases, thus precluding repeat attempts at proving that Monge had personally committed the assault in his prior conviction in accordance with the classification of "serious felonies" under section 1192.7.

The U.S. Supreme Court granted certiorari because the state court decision intensified a conflict over *Bullington's* applicability to non-death penalty cases. In an opinion written by Justice O'Connor, the Court affirmed the state court decision that *Bullington* does not extend to non-capital cases.

In analyzing the case, the Court first provided a historical overview of the application of the Double Jeopardy Clause, noting that prior decisions have not applied double jeopardy protections to sentencing proceedings because such proceedings "do not place a defendant in jeopardy for an 'offense.'" In addition, sentence enhancements have traditionally not been classified as repeat punishments for prior offenses because instead of focusing on an element of the prior offense, a sentence enhancement increases a sentence based on the "manner" in which a defendant "committed the crime of conviction." The Court further distinguished...

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65. *See id.* at 1134-35 (Brown, J., concurring).
67. *See Monge*, 118 S. Ct. at 2250. Prior to the Court's granting of certiorari, both state supreme courts and federal appellate courts had reached different conclusions on the issue of whether double jeopardy protections applied to non-capital sentencing proceedings. *Compare* Carpenter v. Chapleau, 72 F.3d 1269, 1274 (6th Cir. 1996) (holding that the defendant was not put in double jeopardy when the State used the same convictions in two trials for purposes of enhancing his sentence), and Briggs v. Procunier, 764 F.2d 368, 371-72 (5th Cir. 1985) (concluding that the State's retrial of the petitioner based on the original primary offense violated the Double Jeopardy Clause), with People v. Levin, 623 N.E.2d 317, 325 (Ill. 1993) (holding that the Double Jeopardy Clause does not prohibit a second attempt at enhanced sentencing under the Habitual Criminal Act), and State v. Hennings, 670 P.2d 256, 262 (Wash. 1983) (concluding that the Double Jeopardy Clause bars a second habitual-criminal proceeding when the prosecution failed to prove prior convictions beyond a reasonable doubt); *see also infra* note 189 (discussing the application of the Double Jeopardy Clause to non-capital sentencing proceedings in lower courts).
68. *See Monge*, 118 S. Ct. at 2248.
69. *Id.* at 2250 (emphasizing the use of the terminology in the Double Jeopardy Clause barring successive prosecution for the same offense).
70. *Id.* (quoting United States v. Watts, 519 U.S. 148, 154 (1997)); *see also* Witte v.
sentencing enhancements from acquittals, noting that the Court has held that lack of evidence prohibits retrial of an overturned conviction, but that lack of proof in a sentencing trial "does not 'have the qualities of constitutional finality that attend an acquittal.'" The Court also reasoned that the Double Jeopardy Clause does not exist to protect a defendant against excessive sentencing and that the Clause has never prevented prosecutors from requesting a lengthened sentence after a defendant's successful appeal.

The crux of the Court's reasoning was that *Bullington*, in which a capital sentencing proceeding violated double jeopardy protections, was a "narrow exception" to the general rule that the Double Jeopardy Clause does not protect a defendant during sentencing proceedings. In the majority opinion, Justice O'Connor wrote that while the Court's reasoning in *Bullington* rested in part on the sentence proceeding's similarity to a trial of guilt or innocence and the consequent triggering of procedural protections, the *Bullington* holding rested in greater part on the unique nature of a capital proceeding.

The Court recognized *Bullington* as a response to "the acute need for reliability in capital sentencing proceedings." The Court

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1. United States, 515 U.S. 389, 398-99 (1995) (clarifying that the "use of evidence of related criminal conduct to enhance a defendant's sentence for a separate crime" within the statutory guidelines does not trigger the Double Jeopardy Clause); Gryger v. Burke, 334 U.S. 728, 732 (1948) (holding that a persistent offender's enhanced sentence "is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes" but a "stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one."). The majority in *Monge* also addressed Justice Scalia's dissent, in which he claimed the sentence enhancement at issue was part of the offense but argued that under *United States v. Almendarez-Torres*, 118 S. Ct. 1219 (1998), the enhancement was "constitutionally permissible." *Monge*, 118 S. Ct. at 2250-51; id. at 2256 (Scalia, J., dissenting); see also infra notes 242-48 and accompanying text (discussing the *Monge* majority's discussion of *Almendarez-Torres*).


5. See id. at 2251-52.

6. Id. at 2252 ("Because the death penalty is unique in 'both its severity and finality,' we have recognized an acute need for reliability in capital sentencing proceedings.") (quoting Gardner v. Florida, 430 U.S. 349, 357 (1977))); see also Strickland v. Washington, 466 U.S. 668, 704 (1984) ("[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."); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (stating that the qualitative difference between the death penalty and other penalties calls for a greater degree of reliability when the death sentence is imposed). Although the *Bullington* Court pointed to both the bifurcated trial and the capital nature of the sentence as factors in its
rejected Monge's argument that by bifurcating Three Strikes hearings, the California legislature had automatically guaranteed defendants constitutional protection against double jeopardy. The Court further reasoned that only capital sentencing proceedings force the defendant 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." The Court claimed its decision was consistent with prior decisions that either applied constitutional protections to capital sentencing proceedings or declined the opportunity to imbue a non-capital defendant with constitutional protections.

Finally, the Court concluded that capital sentencing proceedings trigger constitutional protection because of the inseparability of the "nature and consequence" of the proceedings. That is, the basic respect for humanity that gave birth to the Eighth Amendment demands examination of a capital defendant's record and character as a "constitutionally indispensable" part of capital sentencing procedure. In a capital case, the Constitution compels the court to regard mitigating and aggravating circumstances as determined by factors drawn from events in the defendant's life prior to the commission of the crime. The Court refused to apply these constitutional protections to non-capital sentencing proceedings, however, holding that any examination of a non-capital defendant's prior convictions for purposes of sentence enhancement is governed by whatever particular protections state legislation grants the defendant.

Justice Stevens and Justice Scalia each dissented separately. Justice Stevens's dissent claimed that the Double Jeopardy Clause bars a second trial any time the prosecution has failed to present

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See Monge, 118 S. Ct. at 2251-52.

76. See Monge, 118 S. Ct. at 2252.

77. Id. (quoting Green v. United States, 355 U.S. 184, 187-88 (1957)).

78. See id.; see also Caspari v. Bohlen, 510 U.S. 383, 397 (1994) (holding that the nonretroactivity rule bars the extension of Bullington to non-capital sentencing proceedings); Pennsylvania v. Goldhammer, 474 U.S. 28, 30 (1985) (per curiam) (holding that sentencing in a non-capital case does not have the same constitutional finality that an acquittal does); Strickland, 466 U.S. at 686-87 (holding that "a capital sentencing proceeding . . . is sufficiently like a trial in its adversarial format and in the existence of standards for decision" to trigger constitutional protection).

79. Monge, 118 S. Ct. at 2253.

80. Id. (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976)).

81. See id.

82. See id. (labeling trial-like protections in non-capital sentencing proceedings "a matter of legislative grace, not constitutional command").

83. See id. at 2253-55 (Stevens, J., dissenting); id. at 2255-57 (Scalia, J., dissenting).
sufficient evidence in the first proceeding. Moreover, Justice Stevens argued that double jeopardy applicability is based on whether the need for a retrial was due to insufficient evidence or trial error rather than the nature of the proceeding in question. Justice Stevens also argued that "traditional understanding" of fundamental fairness dictated that California accord recidivist defendants protection from double jeopardy.

Justice Scalia, joined by Justices Souter and Ginsburg, conceded that the Bullington exception should not be applied to non-capital cases but argued that California's Three Strikes law indicates a trend towards the false labeling of criminal trials as sentence enhancements, thereby violating the Double Jeopardy Clause and other constitutional protections. Justice Scalia referred to the Court's recent decision in Almendarez-Torres v. United States to highlight the similarity between a fact used for sentence enhancement and a fact used as an element of an offense. Urging examination of the Double Jeopardy Clause in the context of Anglo-American legal principles, Justice Scalia pointed out that criminal "offenses" are made up of "elements," which must be proved for conviction.

84. See id. at 2253 (Stevens, J., dissenting) (citing Burks v. United States, 437 U.S. 1, 11 (1978)).
85. See id. at 2254 (Stevens, J., dissenting).
86. Id. at 2254-55 (Stevens, J., dissenting). Justice Stevens noted that a state's decision to provide some protections to recidivist defendants does not automatically trigger constitutional duties "that would not otherwise exist." Id. at 2254 (Stevens, J., dissenting). Therefore, California's inception of other procedural safeguards for sentence enhancements was alone insufficient to implicate double jeopardy protections. See id. (Stevens, J., dissenting). Justice Stevens noted that other states' tendencies to incorporate constitutional obligations into sentence enhancement decisions should be interpreted as "powerful evidence that [the states] were responding to the traditional understanding of fundamental fairness." Id. (Stevens, J., dissenting). Thus, Justice Stevens argued that fundamental fairness requires double jeopardy protections be attached to California's Three Strikes law. See id. at 2255 (Stevens, J., dissenting).
87. See id. at 2255-56 (Scalia, J., dissenting).
89. See Monge, 118 S. Ct. at 2256 (Scalia, J., dissenting); Almendarez-Torres, 118 S. Ct. at 1239 (Scalia, J., dissenting). In Almendarez-Torres, the defendant was convicted of illegal reentry into the United States after deportation. See Almendarez-Torres, 118 S. Ct. at 1222. The Court held that a statute adding 20 years to the sentence of any illegal returnee was a mere "penalty" provision and the illegal reentry should be treated as a sentencing factor rather than an element of the offense. See id. at 1230. In so holding, the Court allowed the "enhancement" of a sentence 24 months to 85 months. See id. at 1223.
90. See Monge, 118 S. Ct. at 2255 (Scalia, 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—including the 'same elements' test for determining whether two 'offence[s]' are 'the same.' " (emphasis added) (quoting Blockburger v. United States, 284 U.S. 299, 304 (1932))).
Justice Scalia noted that the difference between elements of the offense and sentencing factors creates the "foundation for our entire double jeopardy jurisprudence."91 Because the Double Jeopardy Clause protects against the readmission of facts that are elements of the offense but not facts that are sentencing factors, the Clause assumes elements of the offense differ from sentencing factors.92 Justice Scalia concluded that the facts at issue in Monge were technically elements of the offense, not mere sentencing factors.93

Justice Scalia's dissent questioned whether state legislatures generally distinguish between facts that constitute elements of the offense and those that constitute sentencing factors.94 Further, he argued that in delineating between offense elements and sentencing factors, the Court has relied solely on legislative labels.95 As a result, Justice Scalia asserted that a state could theoretically substitute all of the crimes in its penal code with the single offense, " 'knowingly causing injury to another,' bearing a penalty of 30 days in prison, but subject to a series of 'sentencing enhancements' authorizing additional punishments up to life imprisonment or death on the basis of various levels of mens rea, severity of injury, and other surrounding circumstances."96 With this illustration, Justice Scalia suggested re-examination of these labels, stressing that the majority's acceptance of legislative determinants of what constitutes an offense potentially circumvents a defendant's constitutional protections.97 Although Justice Scalia did not specifically accuse California's Three Strikes laws of such beguilement, he described its sentencing enhancements as indistinguishable from separate crimes and thus a first step in dispensing with constitutional rights.98

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91. Id. (Scalia, J., dissenting) (citing Blockburger, 284 U.S. at 304).
92. See id. (Scalia, J., dissenting).
93. See id. (Scalia, J., dissenting).
94. See id. at 2255-57 (Scalia, J., dissenting).
95. See id. at 2255 (Scalia, J., dissenting).
96. Id. (Scalia, J., dissenting) (quoting Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872)).
97. See id. (Scalia, J., dissenting).
98. See id. at 2256 (Scalia, J., dissenting). Justice Scalia cited the enhancement in CAL. PENAL CODE § 12022.5(a) (West 1982): "'[A]ny person who personally uses a firearm in the commission or attempted commission of a felony shall . . . be punished by an additional term of imprisonment in the state prison for three, four, or five years,' " comparing the California Code's language to the federal provision set out in 18 U.S.C.A. § 924(c)(1) (West Supp. 1999). Justice Scalia noted that Congress treats the same "enhancement elements" as a separate crime: "'[w]hoever, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years.'" Monge, 118 S. Ct. at 2256 (Scalia, J.,
Justice Scalia also expressed his dissatisfaction with the holding in *Almendarez-Torres* that a sentence increase from two to eighteen years was not a separate offense conviction that demanded constitutional procedural protections.\(^9\) Acknowledging that his dissent in *Monge* would contradict the majority in *Almendarez-Torres*, Justice Scalia argued that *Almendarez-Torres* was a "grave constitutional error affecting the most fundamental of rights."\(^9\) His dissent pointed out that the *Almendarez-Torres* Court had not decided whether sentence-increasing enhancements that do not involve a defendant's prior history are valid.\(^10\) In applying his broader assertion that elements of an offense are too often being masked as sentencing elements, Justice Scalia argued that the increase of Monge's sentence based on prior facts equaled the conviction of a new crime.\(^10\) Therefore, Monge's conviction under the Three Strikes law was unconstitutional because the holding of the California Court of Appeal—that insufficient evidence existed to convict Monge—triggered double jeopardy protections.\(^10\)

In examining *Monge* and whether the Double Jeopardy Clause should apply to California's Three Strikes law, it is important to examine the history and nature of the legislation. Over the past twenty years, there has been a movement to "get tough" on crime across the country.\(^10\) In California, legislators responded to their constituents' desires to increase punishment for criminals by passing a Three Strikes law.\(^10\) Section 667 of the California Penal Code was enacted in 1994, in response to two high-profile murders committed by different recidivists.\(^10\) The two tiers of section 667 aim to increase

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\(^9\) See *Monge*, 118 S. Ct. at 2256 (Scalia, J., dissenting) ("I... concluded that it was a grave and doubtful question whether the Constitution permits a fact that increases the maximum sentence to which defendant is exposed to be treated as sentencing enhancement rather than an element of a criminal offense."); *Almendarez-Torres* v. United States, 118 S. Ct. 1219, 1233 (1998) (Scalia, J., dissenting).

\(^10\) *Monge*, 118 S. Ct. at 2257 (Scalia, J., dissenting).

\(^10\) See id. (Scalia, J., dissenting).

\(^10\) See id. at 2256 (Scalia, J., dissenting).

\(^10\) See id. at 2257 (Scalia, J., dissenting).

\(^10\) See id. at 2258 (Scalia, J., dissenting).


\(^10\) See McClain, *supra* note 30, at 104. California's Three Strikes law was modeled in part on Washington State statutes. See id. at 103-10; see also WASH. REV. CODE ANN. § 9.92.090 (West 1994) (requiring minimum ten years incarceration upon conviction of second felony, third misdemeanor, or third petit larcency).

impetus for the law. See id. Both victims' fathers were heavily involved in the lobbying process, with Mike Reynolds as the figurehead. See Michael Vitiello, “Three Strikes” and the Romero Case: The Supreme Court Restores Democracy, 30 LOY. L.A. L. REV. 1643, 1653-60 (1997) (describing the lobbying efforts of Mike Reynolds); Cowart, supra, at 626 (discussing the Three Strikes law as a reaction to senseless murders and the public pressures that resulted in the California Penal Code additions); see also infra notes 288-89 and accompanying text (detailing the public pressure and lobbying efforts behind Three Strikes legislation).

The impetus behind California’s Three Strikes law buttresses the argument that section 667 is the unconstitutional result of populist fear and passion, See Turner et al., supra note 103, at 16; Cowart, supra note 104, at 626-27; McClain, supra note 30, at 101-08, aimed to take sentencing power from a criminal justice system perceived as soft and ineffective. See Cowart, supra, at 626. Cowart describes how the Three Strikes movement emerged at a time of general fear when people felt out of control due to gun violence, drug dealers, and gangs. See id. In response to a fearful public, legislative and presidential campaigns focused on various Three Strikes proposals. See id. at 627. President Clinton signed the Violent Crime Control and Law Enforcement Act of 1994, the federal version of Three Strikes legislation, inspiring many states, including California, to follow suit. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 42 U.S.C.); Cowart, supra, at 627. President Clinton has since rescinded his support of the Act and has voiced his desire to narrow its scope. See Cowart, supra, at 627.

Movement for this legislative change to the system occurred after the murder of seventeen-year-old Kimber Reynolds by a recidivist named Joe Davis. See Vitiello, supra, at 1653. The victim's father, Mike Reynolds, informed California Governor Pete Wilson that he was “going after these guys in a big way, the kind of people who would murder little girls in this way.” Id. (quoting the victim's father). Soon after, Reynolds lobbied California state legislators to sponsor the original Three Strikes legislation, organized four buses of supporters for the first hearing of the bill, and spoke at the hearing in favor of the bill. See id. at 1654. To draft the original Three Strikes legislation, “Reynolds solicited the assistance of James Ardaiz, the presiding justice for California's Fifth District Court of Appeal.” Id. Later, “Reynolds prevailed on Bill Jones, then a Republican assemblyman from Fresno, to sponsor Assembly Bill 971 (A.B. 971). Jones enlisted Democratic Assemblyman Jim Costa for support in the then Democratically controlled legislature.” Id. Although the first version of the bill did not pass, Reynolds, with money from the National Rifle Association and public sympathy aroused by Polly Klaas's murder-kidnapping by a repeat offender, started the voter initiation process. See id. at 1655-56. Twelve-year-old Polly Klaas was murdered by a recidivist named Richard Allen Davis. See id. The public realized that a Three Strikes law would have saved Polly, in part because her family “humanized” her by publicly playing a videotape of her and by forming the Polly Klaas Foundation to “keep her in the public eye.” Id.

According to the California Constitution, voter initiation of a bill requires five percent of the votes cast in the last gubernatorial election—in this case, almost 385,000 signatures. See CAL. CONST. art. II, § 8(b); Vitiello, supra note 106, at 1655. Reynolds garnered 50,000 signatures for the bill's petition, which, while not enough to get the bill on the ballot, were sufficient to catch the attention of the legislature. See Vitiello, supra note 106, at 1656. The legislature listened to the message from its constituents and passed the bill, despite obvious flaws. See id. at 1657-58. Critics mentioned the following as flaws with the proposed legislation: it did not include the option for life without parole and it would be cruel and unusual punishment for defendants. See id. at 1658 n.79. Reynolds commanded the attention of the legislature by stressing that it was an election year. See id. at 1659. Legislators were sufficiently afraid of voter wrath to want to avoid “being denounced as trying to subvert [Reynold's] initiative.” Id. (quoting Senator Quentin
sentences for convicted criminals with prior arrests by automatically sentencing repeat felons to life upon their third felony conviction.107

The first tier of section 667 directly affects those convicted felons who have one prior felony conviction on their record, regardless of the jurisdiction in which they committed the previous felony.108 For second-time felony offenders, section 667 mandates that a five-year enhancement penalty be added to each sentence imposed for the instant crime, with the sentence and the enhancement running consecutively.109 If the conviction at issue encompasses more than one crime, consecutive sentences and enhancements are imposed for each conviction.110 For example, if an offender is convicted of both armed robbery and murder as part of the same offense, she would be sentenced consecutively for these crimes, and a ten-year enhancement penalty would be added to the sentence.111

The second tier of section 667 applies to convicted felons with two or more prior serious or violent felony convictions.112 This provision differs, however, from the first tier in the severity of the sentence imposed for a third felony conviction.113 For the thrice

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109. See id.
110. See id. § 667(a)(1).
111. See id.
112. See id. § 667.5(c) (West Supp. 1999) (describing “violent” felonies).
convicted felon, an indeterminate life sentence is imposed. The minimum term of the indeterminate sentence is the greatest of the following three possibilities: (1) three times the sentence for the current felony conviction; (2) state imprisonment for twenty-five years; or (3) the sentence as determined by the court for the instant conviction, plus any applicable enhancements pursuant to section 1170 of the California Penal Code. At a minimum, the thrice convicted felon can be assured of a sentence of twenty-five years to life. Because the statute calls for the greatest penalty, the third-time sentence often results in life imprisonment.

To assess the Supreme Court's determination of whether the Three Strikes law triggers double jeopardy protections, it is necessary to consider the situations in which the Court has applied the Clause. Based on the English common law notion that a defendant should be protected from experiencing "jeopardy of life" more than once, the Double Jeopardy Clause historically protected individuals against being tried numerous times for the same offense. The rule is grounded in the belief that the State should not be able to repeatedly seek the criminal conviction of an individual and consequently subject that individual to embarrassment, anxiety, and a greater chance of conviction despite innocence. In theory, the Double Jeopardy Clause makes the following three situations unconstitutional: (1) "a second prosecution for the same offense after an acquittal;" (2) "a second prosecution for the same offense after a conviction;" and (3) "multiple punishments for the same offense." The Court, however, has wavered in determining the scope of double jeopardy applications. In addition, uncertainty as to what comprises acquittal, conviction, and offenses has complicated the application of the Double Jeopardy Clause.

The Court initially limited double jeopardy from applying to cases in which the appellant moves for a new trial, even when the

114. See id.
115. See id. § 667(e)(2)(A)(i)-(iii).
117. See Cowart, supra note 106, at 623-24 nn.22-34.
118. See infra notes 119-89 and accompanying text (providing discussion of case law involving Double Jeopardy Clause application).
120. See id. at 187-88; see also United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977) (tracing the history and background of the Double Jeopardy Clause).
122. See Trono v. United States, 199 U.S. 521, 533 (1905) (holding that when the
defendant was subject to capital punishment, as in Stroud v. United States. Eventually, in Burks v. United States, the Court held that the Double Jeopardy Clause protects reversals based on insufficient evidence but does not protect reversals due to trial error.

With the advent of sentencing statutes, however, courts have

appellant invokes the writ of error that requires a new trial, the plaintiff “waives ... his right to avail himself of the former acquittal of the greater offense”).

123. 251 U.S. 15, 18 (1919). In Stroud, a unanimous Court extended Trono to capital cases by holding that when a conviction of first-degree murder with capital punishment was reversed due to error, vacated, and then reinstated after retrial, the defendant was not protected against the latter conviction because he was the party requesting the new trial. See id. The petitioner in Monge pointed to Stroud as evidence that a capital sentence does not automatically trigger double jeopardy protections. See Monge, 118 S. Ct. at 2253.


125. With its decision in Burks, the Court acknowledged the policy behind the Double Jeopardy Clause by highlighting the Clause’s objective of protecting against “successive trials” and noting that its past decisions did not necessarily further that goal. Burks, 437 U.S. at 11; see also Green v. United States, 355 U.S. 184, 187 (1957) (holding that the Double Jeopardy Clause does not permit “the State ... to make repeated attempts to convict an individual for an alleged offense [because] [t]he constitutional prohibition against ‘double jeopardy’ was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense”); Yates v. United States, 354 U.S. 298, 328 (1957) (implying that new trials are the answers to insufficient evidence regardless of whether the defendant was the movant for the new trial); Bryan v. United States, 338 U.S. 552, 560 (1950) (holding that “where the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial” regardless of what prompted reversal). The Burks Court pointed to United States v. Ball, 163 U.S. 662 (1896), as the “logical starting point for unraveling the conceptual confusion” of Double Jeopardy application. Burks, 437 U.S. at 13. The Court noted that in Ball, reversal was based on trial error and not a lack of evidence. See id. at 14. The Court stressed the need for future clarification and consistency between its decisions and the policy behind the Double Jeopardy Clause, but noted that the failure of proof must result in the impossibility of a guilty verdict as a matter of law. See id. at 12-15 (holding that society could not handle every accused being immune from punishment after any trial error); see also United States v. Wilson, 420 U.S. 332, 341 (1975) (“It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.”). Burks secured the application of double jeopardy protections to reversals because of insufficient evidence but not reversals due to trial error. See Burks, 437 U.S. at 12-15.


Some states have also incepted statutes to extend the sentences of repeat offenders. See Nkechi Taifa, “Three Strikes-and-You’re Out”—Mandatory Life Imprisonment for Third Time Felons, 20 U. DAYTON L. REV. 717, 718 (1995); McClain, supra note 30, at
been forced to assess the application of the Double Jeopardy Clause to sentencing proceedings.\textsuperscript{127} Initially, the Supreme Court was reluctant to extend double jeopardy protections to sentence enhancements.

In \textit{North Carolina v. Pearce},\textsuperscript{128} the Court examined whether the Constitution prohibited the granting of more severe punishment after resentencing when the original conviction is overturned.\textsuperscript{129} The Court held that more severe punishment was not unconstitutional so long as the judge clarified the reasons for the sentence extension.\textsuperscript{130} The Court's opinion addressed two specific cases.\textsuperscript{131} In the first case, Pearce's initial conviction of assault with attempt to rape was reversed.\textsuperscript{132} Upon retrial, Pearce was reconvicted and sentenced to eight years longer than his original sentence.\textsuperscript{133} The federal district court reversed Pearce's resentencing,\textsuperscript{134} and both the Fourth Circuit and the Supreme Court affirmed his release, agreeing that the state court failed to justify its decision to increase the sentence.\textsuperscript{135} In the second case, Rice's conviction for second-degree burglary was overturned because he had not received his constitutional right to counsel.\textsuperscript{136} After being convicted in a retrial, Rice was sentenced to twenty-five years, a term substantially longer than his original sentence.\textsuperscript{137} The Supreme Court affirmed the Fifth Circuit decision to credit Rice with prison time already served, holding that the state of Alabama did not sufficiently explain the change in sentence.

\textsuperscript{100-03}. In addition to California, three other states—Washington, Texas, and Illinois—passed Three Strikes statutes during the late 1970s to the early 1990s. See McClain, \textit{supra} note 30, at 103-07.


\textsuperscript{129}. \textit{See id.} at 713.

\textsuperscript{130}. \textit{See id.} at 726.

\textsuperscript{131}. The Court combined these two cases on the basis of their "related but analytically separate issues." \textit{Id.} at 715. One case involved the "constitutional limitations upon the imposition of a more severe punishment after conviction for the same offense upon retrial," while the other case involved "the more limited question whether, in computing the new sentence, the Constitution requires that credit must be given for that part of the original sentence already served." \textit{Id.} at 715-16. The Court noted that \textit{Pearce} only addressed the first question. \textit{See id.}

\textsuperscript{132}. \textit{See id.} at 713-14.

\textsuperscript{133}. \textit{See id.}

\textsuperscript{134}. \textit{See id.}

\textsuperscript{135}. \textit{See Pearce}, 395 U.S. at 726; Pearce v. North Carolina, 397 F.2d 253, 253 (4th Cir. 1968) (per curiam).

\textsuperscript{136}. \textit{See id.} at 714.

\textsuperscript{137}. \textit{See id.}
duration. The Court ultimately held that the resentencings of Pearce and Rice were unconstitutional because of this lack of explanation. The Court failed to hold that the Double Jeopardy clause barred Pearce's resentencing, and thus its decision had implications beyond its holding. The majority opinion in Pearce reasoned that reconviction was not a violation of double jeopardy because the "slate [is] wiped clean" after a defendant's conviction is put aside. The Court relied on precedent that double jeopardy does not protect a defendant whose first conviction has been set aside. The Court cited Stroud for the proposition that any "legally

138. See id. at 726.
139. See id.
140. See, e.g., United States v. DiFrancesco, 449 U.S. 117, 143 (1980) (examining resentencing); Akhil Reed Amar, Double Jeopardy Law Made Simple, 106 YALE L.J. 1807, 1835 (1997) (noting that the Pearce Court refused to apply double jeopardy analysis and instead chose to apply a due process vindictiveness approach); James A. Shellenberger & James A. Strazella, The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies, 79 MARQ. L. REV. 1, 120 (1995) (providing Pearce as an example of the Court's attempts to "distill the meaning and application of the Double Jeopardy Clause"); Stephen G. Murphy, Jr., Comment, Limits on Enhanced Sentences Following Appeal and Retrial: Has Pearce Been Pierced?, 19 CONN. L. REV. 973, 975 (1987) (noting that the Court's analysis held that the Double Jeopardy Clause did not restrict a sentence's length when the sentence was handed down on reconviction).

In its decision, the Pearce majority acknowledged that its reasoning was based in part on the public policy argument that a safe society requires the possibility of reconviction. See Pearce, 395 U.S. at 721 n.18 (citing United States v. Tateo, 377 U.S. 463, 466 (1964)).

Justice Harlan concurred in part and dissented in part, arguing that the majority's reasoning was flawed because Pearce was indistinguishable from Green, in which the Court held that a defendant convicted of a lesser offense that is eventually reversed cannot be retried for a greater offense. See id. at 745 (Harlan, J., concurring in part and dissenting in part) (citing Green v. United States, 355 U.S. 184, 185 (1957)). Based on Green, Justice Harlan stated that a defendant who has been convicted and sentenced should not be placed in jeopardy of receiving a greater punishment. See id. (Harlan, J., concurring in part and dissenting in part). Justice Harlan wrote that disabling the second judge from handing down a longer sentence on retrial compromised a "societal interest." Id. at 750 (Harlan, J., concurring in part and dissenting in part). He noted, however, that the aim of the compromise is "protect other societal interests, and it is, after Green, a compromise compelled by the Double Jeopardy Clause." Id. (Harlan, J., concurring in part and dissenting in part). Justice White concurred, stating that an increased sentence should be based on new information given to a trial judge since the time of the first sentencing. See id. at 751 (White, J., concurring in part).

The same day the Court decided Pearce, it held in Benton v. Maryland, 395 U.S. 784 (1969), that the Fifth Amendment applied to states through the Fourteenth Amendment. See id. at 787. The Benton Court also held that the Fifth Amendment requires that good time credits be applied from the first sentencing to the second sentencing based on the Fifth Amendment's protection against multiple punishments for the same offense. See id.

141. Pearce, 395 U.S. at 721.
142. See id. at 719-20.
authorized” sentence may be applied in the event of a reconviction.143 In *DiFrancesco v. United States*,144 another case limiting the application of the Double Jeopardy Clause to sentence enhancements, the Court upheld *Pearce* and held that the Organized Crime Control Act (“OCCA”)145 provision allowing the government to appeal a “dangerous special offender’s” sentence does not violate the Double Jeopardy Clause.146 The OCCA provides a definition of “dangerous special offender” and both authorizes courts to increase the sentence of anyone falling within the definition and permits the government to appeal the sentence for a higher court to review.147 In *DiFrancesco*, the defendant was convicted of racketeering and sentenced to nine years in prison.148 One month after his initial sentencing, the government labeled the defendant a “dangerous special offender” under OCCA, and consequently, the court increased his term to two ten-year concurrent terms.149 *DiFrancesco* appealed, and the Second Circuit overturned the government’s resentencing on the grounds that it violated double jeopardy.150 The Supreme Court granted certiorari because of the case’s constitutional significance.151 *DiFrancesco* posed the question of whether a criminal sentence has the same finality as an acquittal.152 After taking into account the evolution of sentencing practices, previous Supreme

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143. *Id.* at 720 (citing *Stroud v. United States*, 251 U.S. 15, 16 (1919)).
144. 449 U.S. 117 (1980).
149. *See id.*
150. *See id.* at 126 (holding that subjecting “a defendant to the risk of substitution of a greater sentence” upon an appeal by the government, is to place him a second time “in jeopardy of life or limb.” (quoting *United States v. DiFrancesco*, 604 F.2d 769, 783 (2d Cir. 1979), rev’d, 449 U.S. 117 (1980))).
151. *See id.* at 122-23.
152. *See id.* at 120-21. In discussing the importance and finality of acquittal, the Court noted that when the trial does not result in acquittal, has been terminated prior to a verdict on grounds other than conviction, or has yielded a conviction that has been set aside, the government may prosecute again. *See id.* at 130-31 (citing *Arizona v. Washington*, 434 U.S. 497, 514-16 (1978); *United States v. Dinitz*, 424 U.S. 600, 606-11 (1976); *Illinois v. Somerville*, 410 U.S. 458, 459 (1973)). The only clear exception to retrial, according to the Court, occurs when a conviction has been set aside because of a lack of evidence to convict the defendant. *See DiFrancesco*, 449 U.S. at 131.
Court rulings, and double jeopardy policy, the Court held that criminal sentencing does not trigger double jeopardy protections.\(^\text{153}\)

The Supreme Court consistently resisted application of the Double Jeopardy Clause to sentencing enhancements until *Bullington v. Missouri*.\(^\text{154}\) In *Bullington*, the Court held that a Missouri statute implementing a capital sentencing hearing structured as a trial of guilt or innocence triggered double jeopardy restrictions.\(^\text{155}\) The Missouri statute at issue in *Bullington* aimed to provide procedural protections to the defendant, including separate guilt and sentencing trials.\(^\text{156}\)

153. *See DiFrancesco*, 449 U.S. at 132-38. First, the Court distinguished between acquittals and sentences. *See id.* at 137-38. After drawing a parallel to the holding in *Pearce* that the imposition of a new longer sentence after a retrial does not violate double jeopardy, the Court stated that the difference between a new trial and an appeal of the sentence is no more than a "‘conceptual nicety.’" *Id.* at 135-36 (quoting North Carolina v. *Pearce*, 395 U.S. 711, 722 (1969), overruled by *Alabama v. Smith*, 490 U.S. 794 (1989)); *see also supra* notes 128-43 and accompanying text (describing the holding and reasoning in *Pearce*). The Court also discounted any ill effects of an appealed sentence, reasoning that after a guilty finding, an increase in sentence will not cause anxiety, harassment, or any of the other effects against which the Double Jeopardy Clause aims to protect. *See DiFrancesco*, 449 U.S. at 136-37. Justice Brennan, in his dissent, attacked this reasoning, claiming that the Court could not believe that the sentencing phase was “merely incidental and that defendants do not suffer acute anxiety. To the convicted defendant, the sentencing phase is certainly as critical as the guilt-innocence phase. To pretend otherwise as a reason for holding 18 U.S.C § 3576 valid is to ignore reality.” *Id.* at 150 (Brennan, J., dissenting). The Court also stated that the Double Jeopardy Clause does not entitle a defendant to know the exact limit of his punishment. *See id.* at 137.

Next, the Court examined whether the statute violated double jeopardy protections against multiple punishment. *See id.* at 138. The Court disagreed with the appeals court, holding that there can be no “expectation of finality” in the sentence because Congress created a statute that clearly and pointedly enables the lengthening of a sentence. *Id.* at 139. Finally, the Court held that a sentence enhancement could not be analogized to a second trial because the statute states that an appeals court may only increase the sentence upon a trial court’s legal error. *See id.* at 141. The statute is therefore constitutional because of the limited review it allows. *See id.*

The four dissenting Justices reasoned that the majority erred in judgment by miscalculating “the appropriate degree of finality to be accorded the imposition of sentence by the trial judge.” *Id.* at 144 (Brennan, J., dissenting). The dissent articulated the similarities between acquittals and sentences in an attempt to show that the majority’s reasoning was unpersuasive. *See id.* at 146-47 (Brennan, J., dissenting). Also, the dissent found fault with the majority’s logic that the policy behind the Double Jeopardy Clause, eradicating embarrassment and anxiety, *see supra* note 153 and accompanying text, did not apply to enhancing sentences, *see DiFrancesco*, 449 U.S. at 149-50 (Brennan, J., dissenting). The dissent claimed that the statute yields unconstitutional multiple punishments. *See DiFrancesco*, 449 U.S. at 152 (Brennan, J., dissenting) (noting Justice Harlan’s dissent in *Pearce*, in which he argued that the Double Jeopardy Clause should apply equally to sentencing provisions as they are indistinguishable from “offenses”).

155. *See id.* at 446-47.
156. *See MO. REV. STAT.* § 565.006.2 (1978); *Bullington*, 451 U.S. at 433; *see also* MO. REV. STAT. § 565.001 (stating that “[a]ny person who unlawfully, willfully, knowingly,
Under the statute, the same jury was required for both proceedings and was responsible for considering mitigating and aggravating factors in its decision. \(^{157}\) While the evidence allowed at the sentencing proceeding could be "additional," it had to have been known to the defendant before the trial began. \(^{158}\) In *Bullington*, the State had informed the defendant before trial that it would seek the death penalty and that there were two aggravating factors it intended to present to the jury. \(^{159}\) After a guilty verdict, however, the jury sentenced the defendant to life imprisonment. \(^{160}\) The trial court denied the defendant's motion for an acquittal but granted him a new trial on other grounds. \(^{161}\) The prosecution then served a "Notice of Evidence in Aggravation," stating that the prosecution still intended to seek capital punishment using the same aggravating factors it had introduced to the defense prior to the first trial. \(^{162}\) The defense argued that the Double Jeopardy Clause made a second attempt at a death sentence impossible. \(^{163}\) The Missouri Supreme Court held that the death penalty issue could be retried, \(^{164}\) and the U.S. Supreme Court granted certiorari. \(^{165}\) The Court also noted that previous decisions recognized various due process protections for defendants at sentencing hearings resembling trials of guilt or innocence. \(^{166}\) Concluding that the sentencing proceeding in the defendant's first trial "was like the trial on the question of guilt or innocence," the Court held that constitutional double jeopardy protections should be applied to his second trial. \(^{167}\)

\(^{157}\) See MO. REV. STAT. § 565.006.2; *Bullington*, 451 U.S. at 433-34.

\(^{158}\) See MO. REV. STAT. § 565.006.

\(^{159}\) See *Bullington*, 451 U.S. at 435. The two aggravating factors that the prosecution intended to prove were: "'[t]he offense was committed by a person ... who has a substantial history of serious assaultive criminal convictions' ... and ... '[t]he offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind.'" *Id.* (quoting MO. REV. STAT. § 565.012.2(1), (7)).

\(^{160}\) See *id.* at 435-36.

\(^{161}\) See *id.* at 436. *Bullington* was one of 80 Missouri cases granting a new trial as a result of *Duren v. Missouri*, 439 U.S. 357 (1979), in which the Court struck down a Missouri law exempting female jurors from service, see *id.* at 370. For further discussion of *Bullington*, see John A. Chatzky, Comment, *Extending Double Jeopardy Protections to Sentencing: Bullington v. Missouri*, 451 U.S. 430 (1981), 20 AM. CRIM. L. REV. 127, 129 (1982).

\(^{162}\) See *Bullington*, 451 U.S. at 436.

\(^{163}\) See *id.*

\(^{164}\) See *Bullington v. Missouri*, 459 S.W.2d 334, 341 (Mo. 1970).

\(^{165}\) See *Bullington*, 451 U.S. at 437.

\(^{166}\) See *Bullington*, 451 U.S. at 446.

\(^{167}\) *Id.* Although the retrial in *Bullington* was necessary because of trial error, the
The Court concluded that the Missouri statute did not allow the trial court to determine whether there were additional facts warranting the death penalty after the jury had previously sentenced the defendant to life without possibility of parole. The Court held that the State had already "received 'one fair opportunity to offer whatever proof it could assemble'" and could not ask for another. Prior to Bullington, the Court had held that the granting of a less-than-maximum sentence was not an "acquittal" and did not preclude the imposition of a greater sentence. The Court distinguished Bullington from these prior decisions on two grounds. First, Bullington involved a separate sentencing procedure in which the sentencer had complete discretion. Second, the nature of the

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168. See Bullington, 451 U.S. at 433-34, 446.
169. Id. at 446 (quoting Burks v. United States, 437 U.S. 1, 16 (1978)).
171. See Bullington, 451 U.S. at 433. According to the Court, "highly pertinent differences" existed between the Missouri procedures controlling in Bullington and the ones recognized as constitutional in DiFrancesco. Id. at 440. The Court noted that in DiFrancesco, the federal procedures "include[d] appellate review of a sentence 'on the record of the sentencing court,'... not a de novo proceeding that gives the Government the opportunity to convince a second factfinder of its view of the facts. Id. (quoting 18 U.S.C. § 3576 (1970)). The Court further stated that "the choice presented to the federal judge under § 3575 is far broader than that faced by the state jury at the present
capital proceeding at issue in Bullington required double jeopardy protections.172

Writing for the Court, Justice Blackmun held that double jeopardy bars retrial of an acquitted defendant but not resentencing for a harsher term.173 According to the majority, Bullington’s capital sentencing procedure could be distinguished from a mere resentencing because the jury was given two choices—life imprisonment or death—and the prosecution had the burden of establishing facts beyond a reasonable doubt.174 In short, the sentencing proceeding was structurally identical to the trial on guilt or innocence that had immediately preceded it: “It was itself a trial on the issue of punishment so precisely defined by the Missouri statutes.”175

Justice Blackmun distinguished Bullington from Stroud v. United States,176 North Carolina v. Pearce,177 and Chaffin v. Stynchcombe,178 three cases in which the Court had held that resentencing did not violate the Double Jeopardy Clause.179 The Bullington Court also differentiated Bullington from DiFrancesco, which, like Bullington, had involved a bifurcated jury trial.180 Thus, the Court held that the

petitioner’s trial.” Id.

172. See id. at 446. In addressing the capital sentencing issue, the Court re-examined Stroud, in which it had allowed a new trial and death conviction—changed from a life sentence—for a prisoner after the Solicitor General admitted trial error. See id. at 431-32; Stroud, 251 U.S. at 18; see also Strickland v. Washington, 466 U.S. 668, 704 (1984) (Brennan, J., concurring in part and dissenting in part) (noting that heightened procedural protections are required for capital defendants).


174. See Bullington, 451 U.S. at 438.

175. Id.; see also id. at 438 n.10 (explaining the extent to which a pre-sentence hearing resembles a trial).


179. The majority opinion in Bullington stressed two differences: first, in those three cases, the sentencing procedures were not like trials, with standards of reasonable doubt and mitigating or aggravating factors allowed into evidence; and second, there were no statutory standards of guidance. See Bullington, 451 U.S. at 438-39. In the three prior cases, the factfinder was given broad discretion and provided with no standards or guidelines for sentencing. See Chaffin, 412 U.S. at 23-24; Pearce, 395 U.S. at 723; Stroud, 251 U.S. at 18.

180. See Bullington, 451 U.S. at 439. The Court relied on three factors. First, the statute in DiFrancesco gave a second factfinder the chance to review the sentence “on the record of the sentencing court,” not a de novo proceeding that allows the government to
Missouri statute triggered double jeopardy protections. The majority further reasoned that the nature of the death penalty requires double jeopardy protections in capital sentencing proceedings because of the risk of subjecting a defendant to grave stress and insecurity.

In Arizona v. Rumsey, the Court reinforced its Bullington holding in yet another examination of the application of the Double Jeopardy Clause to a resentencing proceeding involving capital punishment. Rumsey raised the issue of whether the Double Jeopardy Clause protects a defendant from a death sentence after a life sentence is set aside on appeal. Justice O'Connor, writing for
the Court, noted that Arizona’s death penalty sentencing proceeding resembled Missouri’s proceeding in its similarity to a trial. The Court held that the trial court’s initial decision of a non-capital sentence should have been treated as an “acquittal on the merits” that barred retrial on the capital punishment issue. In addition, the Court held that even though the trial court’s original decision was based on an erroneous interpretation of the statute, “reliance on an error of law ... does not change the double jeopardy effects of a judgment that amounts to an acquittal on the merits” because while the error “affects the accuracy of the determination [],... it does not alter its essential character.”

In dissent, Justice Rehnquist, joined by Justice White, claimed that Rumsey could be distinguished from Bullington because the trial judge’s decision in Rumsey targeted a specific issue—whether “certain specified aggravating factors” existed—and was not based on a full trial.

It appears sentencing has begun to overwhelm the actual criminal offense. Decisions concerning sentencing statutes point to the possibility that courts may disguise additional convictions as aggravating circumstances to determine the defendant’s sentence. See id. The trial court misinterpreted the aggravating circumstances under Arizona’s capital sentencing scheme and erroneously held that statutory requirements prohibited it from imposing capital punishment. See id. at 206-07; see also ARIZ. REV. STAT. ANN. § 13-703(E) (West Supp. 1983-84) (barring the death penalty when no aggravating factors are present). The defendant appealed his sentence of consecutive 21 and 25 year terms, claiming the sentences violated federal and state law. See Rumsey, 467 U.S. at 206. On remand, the trial court handed down a death sentence in accordance with the correct interpretation of the Arizona statute. See id. at 208 (“The court also found that none of the five statutory mitigating circumstances was present and that the fact that the murder conviction was for felony murder, if a mitigating circumstance at all, was not sufficiently substantial to call for leniency.”). Upon the defendant’s appeal of the death penalty, the Arizona Supreme Court held that under Bullington the trial court’s decision violated the Double Jeopardy Clause. See id. The U.S. Supreme Court affirmed this decision, drawing a parallel between Bullington and Rumsey. See id. at 212-13.

186. See Rumsey, 467 U.S. at 209-10. For example, “[t]he sentencer—the trial judge in Arizona—is required to choose between two options: death, and life imprisonment without possibility of parole for 25 years.” Id. Additional similarities include the sentencer’s adherence to “statutory standards” that “define aggravating and mitigating circumstances,” the “usual rules of evidence” that dictate whether aggravating and mitigating factors may be introduced into the hearing, and the standard of proof of reasonable doubt. Id. at 210. The usual rules of evidence require that the state prove the existence of aggravating circumstances beyond a reasonable doubt. See ARIZ. REV. STAT. ANN. § 13-703(E).

187. Rumsey, 467 U. S. at 211.

188. Id.

189. Id. at 213 (Rehnquist, J., dissenting). The dissent also concluded that if the Court had reversed the verdict and had given the defendant the death penalty regardless of the resentencing statute, it would not have been a violation of double jeopardy. See id. at 214 (Rehnquist, J., dissenting).
sentence enhancements; in addition to endangering a criminal defendant's right to double jeopardy protections, sentencing statutes also threaten circumvention of other constitutional protections. Although the Court's holdings offer little precedent for incorporating constitutional protections into sentencing statutes, various opinions have noted that the rationale behind protecting criminal defendants has been obscured by the replacement of "charge offense sentencing"—punishing based on the convicted offense with "real offense sentencing"—the label given to the adjustment of a defendant's punishment based on his "conduct in a particular case."

Two cases have discussed whether statutes violated other clauses of the Constitution by substituting offense elements with sentencing factors. In *McMillan v. Pennsylvania*, the Court acknowledged that a sentencing statute enacted for the purpose of being "a tail which wags the dog of the substantive offense" would trigger due process protections and require a reasonable doubt burden of proof rather

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190. See, e.g., *Almendarez-Torres v. United States*, 118 S. Ct. 1219, 1237 (1998) (Scalia, J., dissenting). In his dissent, Justice Scalia noted: "No one can read *McMillan* without learning that the Court was open to the argument that the Constitution requires a fact which does increase the available sentence to be treated as an element of the crime." *Id.* (Scalia, J., dissenting). He also stated that "[i]f all that were not enough, there must be added the fact that many State Supreme Courts have concluded that a prior conviction which increases maximum punishment must be treated as an element of the offense under either their state constitutions, ... or as a matter of common law." *Id.* (Scalia, J., dissenting); see also *McMillan v. Pennsylvania*, 477 U.S. 79, 96 (1986) (Stevens, J., dissenting) (arguing that a state legislature may not "dispense" with procedural protections for proving conduct resulting in "severe criminal penalties"). Justice Stevens cautioned that after *McMillan*, state legislation may define the criminal offenses with which a defendant can be charged, as well as "authoritatively determine that the conduct so described, i.e., the prohibited activity which subjects the defendant to criminal sanctions—is not an element of the crime which the Due Process Clause requires to be proved by the prosecution beyond a reasonable doubt." *Id.*

191. See *Almendarez-Torres*, 118 S. Ct. at 1233 (Scalia, J., dissenting) (arguing that the Court is addressing the challenging question "whether the Constitution requires a fact which substantially increases the maximum permissible punishment for a crime to be treated as an element of the crime" and concluding that "on the basis of our prior law, in fact, the answer was considerably doubtful"); see also U.S. CONST. amend. V (guaranteeing that no person "shall be subject for the same offense to be twice put in jeopardy of life or limb"); *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975) (noting the potential for a state to redefine "the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment" and in doing so undermine societal interest in constitutional protections afforded to a criminal defendant); *United States v. Kikumura*, 918 F.2d 1084, 1099 (3d Cir. 1990) (noting that "every factual consideration deemed relevant for sentencing purposes must be established through a collateral, post-verdict adjudication at which the applicable procedural protections are significantly lower than those applicable at the trial itself").


than whatever burden the statute required.\textsuperscript{194} Although the McMillan Court declined to define what would constitute a "tail wagging the dog," in \textit{United States v. Kikumura},\textsuperscript{195} the Third Circuit held that a sentence departure\textsuperscript{196} from the prescribed range of twenty-seven to thirty-three months to a maximum of thirty years imprisonment under the Federal Sentencing Guidelines offended reasonableness and required greater procedural protections.\textsuperscript{197} The court held that the statutorily prescribed preponderance standard for determining sentence departures was "generally" constitutional, but it applied McMillan's language to hold that the enormity of the sentence enhancement required the burden of proof to be raised to clear and convincing evidence.\textsuperscript{198} The \textit{Kikumura} court recognized a requirement that sentence departures be reasonable implicit in statutory demands for justification for the departure\textsuperscript{199} and stopped short of proclaiming that the requirement for changing the standard of proof in light of unreasonableness also was implicit in the Due Process Clause.\textsuperscript{200}

The \textit{Kikumura} court noted, however, that there were inherent

\begin{itemize}
\item \textsuperscript{194} \textit{Id.} at 88.
\item \textsuperscript{195} \textit{918 F.2d 1084} (3d Cir. 1990).
\item \textsuperscript{196} A judge's decision to adjust the presumptive guideline sentence because it does not sufficiently respect the four purposes of the Federal Sentencing Guidelines is referred to as a "sentence departure." See \textit{18 U.S.C.A. § 3553(b)} (West Supp. 1999). Under § 3553(b), a judge may depart from the guidelines based on "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission." \textit{Id.; see also Miller, supra note 126, at 474-77} (discussing whether judicial assessment of purpose is a sufficient reason for departure).
\item \textsuperscript{197} \textit{See Kikumura, 918 F.2d at 1089.} This departure purportedly was the "largest departure from an applicable guideline range, in absolute or percentage terms, since the sentencing guidelines became effective." \textit{Id.} The defendant in \textit{Kikumura} was traveling on the New Jersey Turnpike with bombs, bomb paraphernalia, and a map of New York City with three locations marked on it. \textit{See id.} at 1095. Although the defendant was convicted of passport and explosives offenses, \textit{see id.} at 1089, the judge based his departure from the sentencing guidelines on evidence of the defendant's previous terrorist activities, \textit{see id.} at 1096, inferring that the defendant's past evidenced an intent to cause "multiple deaths and serious injuries," \textit{id.} at 1097.
\item \textsuperscript{198} \textit{See id.} at 1101. The court explained, however, that it did not consider a standard of proof higher than clear and convincing evidence because the defendant failed to request a higher standard. \textit{See id.} In addition, the court cited \textit{United States v. McDowell}, \textit{888 F.2d 285, 291} (3d Cir. 1989), in which the court held that a preponderance standard is sufficient to warrant adjustments to the Federal Sentencing Guidelines. \textit{See Kikumura, 918 F.2d at 1101.}
\item \textsuperscript{199} \textit{See Kikumura, 918 F.2d at 1101; see also 18 U.S.C.A. § 3553(b)} (stating that sentencing court may not depart from guidelines if circumstances relied upon to justify departure were adequately considered by Sentencing Commission in formulating guidelines).
\item \textsuperscript{200} \textit{See Kikumura, 918 F.2d at 1102.}
\end{itemize}
constitutional problems in any real offense sentencing system because of the potential for "significant unfairness" whenever proceedings determining "factual considerations deemed relevant for sentencing purposes" contain fewer procedural protections than those given at trial. Judge Rosenn's concurrence specifically named the Due Process Clause as the source prohibiting such unfairness. While the Third Circuit provided a concrete illustration of when a sentence enhancement strips a defendant of his constitutional protections, other courts have not held that a specific sentencing statute triggers greater procedural protections, despite recognition of potential unfairness.

A few months prior to hearing Monge, the Court heard Almendarez-Torres v. United States, in which it debated whether an eighteen year sentence increase was grave enough to be treated as a separate offense conviction that demanded procedural protections under the Constitution. The Court held that the increase should be treated as a mere sentence enhancement and thus continued its refusal to attach constitutional protections to a statutory sentencing scheme. The Court reasoned that a section of the Immigration and Nationality Act did not define a "separate crime" but was merely an enhancement based in part on its statute's language.

201. Id. at 1099.
202. See id. at 1119 (Rosenn, J., concurring). Judge Rosenn stated that, by increasing the defendant's sentence, the Government "may have violated [his] right to due process" because of the unconstitutionality of allowing a defendant's intent to be tried and proven with less than full procedural protection. Id. at 1121 (Rosenn, J., concurring).
203. See, e.g., United States v. Miner, 127 F.3d 610, 614 (7th Cir. 1997) (narrowing the scope of Kikumura by holding that it could never apply to drug quantity determinations); United States v. Ruggiero, 100 F.3d 284, 290 (2d Cir. 1996) (declining to adopt Kikumura's holding and to apply a clear and convincing standard of proof to an increase from the 25 to 33 month range to 135 to 168 months); United States v. Rodriguez, 67 F.3d 1312, 1323 (7th Cir. 1995) (declining to apply Kikumura in one specific case but reserving opinion about whether Kikumura will ever apply); United States v. Contreras-Matos, Nos. 92-10161, 92-10200, 92-10241, 1993 WL 330754, at *3 (9th Cir. Aug. 30, 1993) (deciding against the application of Kikumura because the sentence was not increased enough to be considered the tail wagging the dog); United States v. Sanchez, 967 F.2d 1383, 1385-87 (9th Cir. 1992) (distinguishing Kikumura because the sentence enhancement at issue was not so extreme and limiting Kikumura's application to sentence departures only).
205. See id. at 1222.
206. See id.
207. 8 U.S.C. § 1326(a), (b)(2) (1994) (authorizing a 20 year maximum sentence for "any alien described" who was previously deported "subsequent to a conviction for commission of aggravated felony").
208. Almendarez-Torres, 118 S. Ct. at 1222.
209. Id. at 1225 ("Linguistically speaking, it seems more likely that Congress simply meant to ‘describe’ an alien who... was guilty of a felony. . . .").
Court also reasoned that the statute's use of the term "offense" did not prove that the section should not be interpreted as a "sentence enhancement" because the statute also used the term "aggravated felony" to refer to the increase. The Court further noted that a sentence increase of such magnitude was "well within" limits of other statutes held to be merely sentence enhancements by lower courts. Finally, the Court noted that the statute's "broad permissive sentencing range" was not unfair because statutes providing sentencing ranges have always required judicial discretion.

Monge also examined whether the statute labeled offense elements as sentencing factors. In asking whether California's Three Strikes Law denied a defendant's constitutional protections, the Court addressed three main issues. As noted by the Court, the primary issue in Monge was whether the Bullington exception granting double jeopardy protections to sentencing proceedings applies to non-capital sentencing. Although the Court had addressed application of double jeopardy to capital sentencing proceedings, it had not definitively held whether the Double Jeopardy Clause applies to non-capital cases until Monge. In

210. Id. at 1227.

211. See id. The Court cited a statute allowing a range of 5 to 40 years imprisonment for distributing 100 kilograms of marijuana, but a maximum of 5 years for distributing 50 kilograms, see 21 U.S.C.A. § 841(b)(1)(B), (D) (West Supp. 1999), and a statute mandating 20 years imprisonment for distributing 100 grams of heroin, but life imprisonment for distributing 1 kilogram or more, see 21 U.S.C. § 841(b)(1)(A), (C).

212. Almendarez-Torres, 118 S. Ct. at 1232-33.

213. See infra notes 249-50 and accompanying text (discussing Justice Scalia's claim that sentencing statutes threaten Anglo-American jurisprudence principles).

214. See Monge, 118 S. Ct. at 2250; see also supra notes 154-83 and accompanying text (discussing the facts and holding of Bullington).


216. Prior to Monge, the Court had avoided the issue of whether double jeopardy protections apply to non-capital sentencing proceedings. In Caspari v. Bohlen, 510 U.S. 383 (1994), the majority avoided the question of whether double jeopardy applied to a non-capital sentencing proceeding that had trial-like need of evidence and burden of proof by applying the Teague principle, which nullifies a habeas corpus suit. See id. at 395. Justice Stevens dissented, claiming that Teague meant nothing and the offender statute in question required due process protections, including the Double Jeopardy Clause. See id. at 397-98 (Stevens, J., dissenting). A lower court, however, addressed the issue. See Bell v. Indiana, 622 N.E.2d 450, 451-52 (Ind. 1993).

In Bell, the Supreme Court of Indiana examined the Double Jeopardy Clause's applicability after a conviction had been overturned due to trial error, as opposed to insufficient evidence. See id. at 456. The issue in Bell was analogous to that in Rumsey: both dealt with erroneous original verdicts. See Rumsey, 467 U.S. at 207; Bell, 622 N.E.2d at 456. The Supreme Court of Indiana, however, arrived at a different conclusion in Bell,
deciding Monge, the Court moved away from the analytical approach it had taken in Bullington, which looked to the existence of particular protections as triggering the Double Jeopardy Clause.\footnote{217}

The Monge Court acknowledged that the procedural protections of California Penal Code section 667 mirror those of the Missouri statute in Bullington in that they both resemble a trial of guilt or innocence.\footnote{218} The Court, however, downplayed the importance of procedural structure, holding that despite procedure possessing the “hallmarks” of a trial of guilt or innocence, the case did not sufficiently resemble Bullington because that case was decided primarily on the basis of its status as a capital punishment sentencing supposedly because the sentence involved was not a capital one. See Bell, 622 N.E.2d at 456. The court held that trial error resulted in the reversal of Bell’s conviction and habitual offender status and that “a defendant may be subjected to retrial in a habitual offender proceeding in which the result in the first trial is vacated due to trial error rather than evidence insufficiency.” Id. In Bell, the defendant had been sentenced to concurrent terms for robbery and battery that were enhanced by his habitual offender status under the Indiana code. See id. at 451; see also IND. CODE ANN. §§ 35-42-5-1, 35-42-2-1(3) (West 1998) (providing the statutory guidelines for robbery and battery). Two of the issues before the Supreme Court of Indiana were whether enough evidence existed to support Bell’s classification as a habitual offender and whether the error of admitting Bell’s confession made during discussion of a plea agreement triggered the requirement of a new trial. See Bell, 622 N.E.2d at 451-52. The court held that there was sufficient evidence to maintain Bell’s enhanced status, and thus, double jeopardy did not preclude retrial of the habitual offender issue. See id. at 452 (citing Perkins v. State, 542 N.E.2d 549 (Ind. 1989); Phillips v. State, 541 N.E.2d 925 (Ind. 1989)). Consequently, the court vacated the previous conviction and habitual offender classification because of trial error and not insufficient evidence, and allowed a new sentencing hearing determining Bell’s classification as a habitual offender. See id. at 456.

\footnote{217. See Bullington, 451 U.S. at 440 (holding that statutory procedural protections triggered double jeopardy protections). The Bullington Court factored the existence of the following procedural protections into its decision: (1) a second fact-finder’s reviewing of the first court’s finding; (2) narrow sentencing choices; and (3) a reasonable doubt standard of proof. See id. at 440-41. The Bullington Court distinguished these procedural protections as greater than those in DiFrancesco. See United States v. DiFrancesco, 448 U.S. 117, 140-42 (1980); see also supra notes 154-83 and accompanying text (discussing Bullington’s holding and reasoning).}

\footnote{218. See Monge, 118 S. Ct. at 2252; see also Petitioner’s Brief at 37-38, Monge (No. 97-6146) (claiming that the procedures attending a sentence enhancement under the California statute are identical to those of a trial on guilt or innocence because the formal rules of evidence apply, defendants are entitled to a special verdict on each prior conviction or prison term alleged, and the jury has only two choices—to acquit the defendant or to find that the defendant has a prior conviction); Respondent’s Brief at 14, Monge (No. 97-6146) (claiming that the procedures for California’s sentence enhancement differ from those of a trial on guilt or innocence because “[t]he lack of sentencing discretion, a rationale for the Court’s application of the Double Jeopardy Clause to capital sentencing proceedings, is not present in this non-capital case”). The Court concluded that, structurally, the statute’s procedure is more like that in Bullington. See Monge, 118 S. Ct. at 2252.}
proceeding. In so holding, the *Monge* majority stressed the portion of *Bullington* that addressed the underlying rationale of double jeopardy application and discarded the portion of the opinion that highlighted procedural protections, thereby emphasizing factors not stressed in *Bullington* or pre-*Bullington* precedent. Thus, the *Monge* decision highlighted the capital nature of the sentencing as crucial to its holding. In *Bullington*, however, the Court had cited both the capital nature of the sentencing and its procedural structure as rationales for application of the Double Jeopardy Clause without explicitly granting one factor more weight than the other. In fact, the majority's reasoning in *Bullington* concentrated on structural procedures, examining capital sentencing only at the very end of the opinion when comparing the finality of a death sentence to the finality of guilt or innocence in a trial. Before even noting that the finality of a capital sentence influenced its decision, the Court in *Bullington* stated its agreement with the lower court decision that the Missouri sentencing standards triggered the use of double jeopardy protections.

In its discussion of capital sentencing, the majority in *Monge* discounted the *Stroud* Court's holding that capital sentencing proceedings alone do not trigger the Double Jeopardy Clause. The majority reasoned that the decision in *Stroud* occurred prior to the Court's recognition that capital sentencing triggered more extensive constitutional requirements than other sentences. The majority also reasoned that the anxiety and finality in a capital sentencing procedure are analogous to that of a trial as to guilt or innocence and that anxiety and finality are the thrust behind the constitutional protections. California Supreme Court Justice Werdegar's dissent in *Monge*, however, noted that "[w]hat is missing from this discussion is a persuasive rationale supporting the bald assertion that a criminal defendant's 'anxiety and insecurity' when facing a possible life

219. See *Monge*, 118 S. Ct. at 2252.
220. See *Bullington*, 451 U.S. at 430-37 (failing to acknowledge that the rationale behind the Double Jeopardy Clause factored into the majority opinion to a greater extent than the structure of procedural protections).
221. See *Monge*, 118 S. Ct. at 2252.
222. See *Bullington*, 451 U.S. at 445-46.
223. See id.
224. See id. at 444 ("Missouri explicitly requires the jury to determine whether the prosecution has 'proved its case.' ")
226. See id.
227. See id.
sentence as a result of past crimes is [sic] not equivalent to that experienced by a defendant being tried for a substantive criminal offense.

After examining whether capital sentencing is a necessary trigger for double jeopardy protections, the Court turned to the second, broader legal issue: whether a sentencing decision in favor of the defendant could be analogous to an acquittal and, therefore, trigger the rule that insufficiency of evidence precludes a retrial. The majority, in holding that a sentencing proceeding does not trigger double jeopardy protections, relied on cases distinguishing sentencing proceedings from trial proceedings. The majority opinion is consistent with precedent that declined to apply constitutional protections to non-capital statutory sentencing proceedings. In Pearce and Stroud, for example, the Double Jeopardy Clause did not bar the prosecution from asking for sentence review or bar the court from applying a longer sentence after a defendant appealed an initial conviction. In DiFrancesco, the Double Jeopardy Clause did not give the defendant a right to know the final limits to his punishment at any point in time.

In his dissent in Monge, Justice Stevens argued that the Double Jeopardy Clause should prohibit any second trial in which the prosecution presents evidence that it did not introduce in the first trial, regardless of whether the trial is of guilt or innocence or is a

228. People v. Monge, 941 P.2d 1121, 1145 (Cal. 1997) (Werdegar, J., dissenting), aff'd sub. nom. Monge v. California, 118 S. Ct. 2246 (1998). Judge Werdegar also provided illustrations of the extent to which a defendant's sentence may balloon under Three Strikes law: "Such prior convictions, if two or more are sustained, can lead to a minimum term of twenty-five years to life, with a maximum term consisting of the balance of the defendant's natural life." Id. (Werdegar, J., dissenting). Statistics on how few death row inmates are executed bolster Judge Werdegar's argument that the difference is negligible between a criminal's anxiety when facing a life sentence and when facing the death penalty. See Michael Vigh, U.S. Soon Will Execute 500th Convict Since '76; 500th Convict Will Be Executed Soon, SALT LAKE TRIB., Dec. 9, 1998, at A1 (noting that the number of prisoners executed "represents a drop in the bucket" when compared with the number of prisoners sentenced to death).

229. See Burks v. United States, 437 U.S. 1, 16 (1978); see also supra note 125 and accompanying text (discussing this rule and Burks).


231. See supra notes 128-53 and accompanying text (discussing the Court's failure to apply double jeopardy protections to statutory sentence enhancements).

232. See Pearce, 395 U.S. at 723; Stroud, 251 U.S. at 18.

233. See Monge, 118 S. Ct. at 2251; see also supra notes 144-53 and accompanying text (discussing DiFrancesco).
separate sentencing proceeding. In arguing that the Double Jeopardy Clause protects a defendant after the first trial is dismissed for insufficient evidence but not after the trial is dismissed for trial error, Justice Stevens cited the Court's holding in *Burks v. United States* that double jeopardy precludes a second trial when the prosecution offered insufficient evidence in the first trial. His dissent, however, failed to explain why the holdings of *Pearce* or *DiFrancesco* did not apply to *Monge*. Although Justice Stevens accurately cited *Burks*'s holding, he failed to account for later Court decisions holding that the Double Jeopardy Clause's application is greatly influenced by whether the evidence is introduced into a trial or a sentencing proceeding. As Justice Scalia reasoned in dissent, the effects of the evolving rule that sentencing enhancements do not deserve double jeopardy protections require re-examination in light of sentencing enhancements' growing presence and similarity to criminal convictions.

The final, and perhaps most important, issue in *Monge* concerns the validity of the blanket categorization of sentence enhancements as different from offense elements; a related issue is whether a re-categorization of a sentencing enhancement as an offense element is necessary. The majority held that facts used in Monge's sentencing

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234. See *Monge*, 118 S. Ct. at 2253-54 (Stevens, J., dissenting).

235. See *id.* (Stevens, J., dissenting).

236. See *id.* at 2253-55 (Stevens, J., dissenting) (failing to note that Pearce and *DiFrancesco* both separated resentencing from convictions on trial).


240. See *Monge*, 118 S. Ct. at 2255; see also Joel W.L. Miller, Comment, *Nichols v. United States, The Right to Counsel, and Collateral Sentence Enhancement: In Search of a Rationale*, 144 U. PA. L. REV. 1189, 1190 (1996) (examining whether uncounseled misdemeanor convictions can be used to enhance a defendant's sentence or whether recidivist statutes are unconstitutional).
were not elements of the offense. The Court based this holding on its decision in Almendarez-Torres v. United States, which rejected the notion that a sentence enhancement is an element of the offense whenever the resulting punishment is greater than the maximum sentence. In Almendarez-Torres, the Court determined that a sentence increase of eighteen years was constitutionally permissible. Consequently, the Monge Court concluded that the increase of Monge's sentence from five years to eleven years was within constitutional guidelines; therefore, it did not jeopardize the defendant "for an offense." Despite this holding, Justice O'Connor conceded that notions of "fundamental fairness" might require that a fact be seen as an element of an offense.

Although Justice Scalia noted that the Almendarez-Torres Court held an eighteen-year sentence increase to be constitutional, his conclusion that the Court should revisit how legislatures define offenses is justified in light of historical protections for criminal defendants. Justice Scalia's dissent in Monge should be applied to limit broader statutory circumvention of constitutional protections accorded criminal defendants. In addressing the vast legislative discretion to create resentencing procedures, Justice Scalia highlighted an important social issue: the trend towards substituting statutory enhancements for basic criminal convictions. His dissent alerted the Court to the slippery slope of legislative denial of

241. See Monge, 118 S. Ct. at 2250-51.
243. See Monge, 118 S. Ct. at 2250-51; supra notes 204-12 and accompanying text (discussing the Almendarez-Torres Court's holding).
244. See Almendarez-Torres, 118 S. Ct. at 1222.
245. See Monge, 118 S. Ct. at 2251.
246. Id.
248. See Monge, 118 S. Ct. at 2250. The majority alternatively held that "there are also cases in which fairness calls for defining a fact as a sentencing factor." Id. The Court gave the example of a defendant wanting to make alternative pleadings of professing innocence to drug charges while disputing the amount he was charged with possessing. See id. The majority reasoned that bifurcated proceedings allowed such alternative pleadings because a defendant could profess innocence in the trial but dispute the amount for leniency in sentencing. See id. Thus, the Court concluded that fundamental fairness did not require "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." Id.
249. See id. at 2256 (Scalia, J., dissenting); see also supra note 190 and accompanying text (highlighting the trend towards statutory sentencing procedures on the state and federal level).
defendants' constitutional protections through the creation of Constitution-eluding sentence enhancements.  

Although a Court majority has not struck down a statute for treating an offense as a sentence, Justice Scalia has called attention to a statutory tendency to circumvent the Constitution. An examination of cases involving the Federal Sentencing Guidelines provides a useful analogy for the double jeopardy question by illustrating courts' struggles with whether constitutional protections apply to non-capital sentence enhancements. In referring to Almendarez-Torres in his Monge dissent, Justice Scalia drew a proper analogy between Three Strikes legislation and the Federal Sentencing Guidelines: both are sentencing statutes that weigh a defendant's likelihood to commit a further crime in meting out punishment. Both the Federal Sentencing Guidelines and California's Three Strikes law reject charge offense sentencing—or the meting out of punishment "on the basis of the offense of conviction"—in favor of real offense sentencing, a system that "metes out punishment on the basis of a defendant's actual conduct in a particular case." Additionally, a court's decision that both federal and Three Strikes sentencing statutes trigger due process protections under the Constitution would support the decision that a statute requires double jeopardy protections; both protections are constitutional rights accorded criminal defendants at trial are ordinarily not implicated by sentencing statutes. Therefore, a court's holding that particular situations might trigger the application of greater

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250. See Monge, 118 S. Ct. at 2256 (Scalia, J., dissenting).
251. See id. at 2255-57 (Scalia, J., dissenting); Almendarez-Torres v. United States, 118 S. Ct. 1219, 1244 (Scalia, J., dissenting).
253. See 18 U.S.C.A. § 3553(a)(2) (West Supp. 1999) (noting that criminal history is a reasonable factor to consider in sentencing a defendant); CAL. PENAL CODE § 667(b) (West 1988 & Supp. 1998) (noting that, through the Three Strikes law, the legislature intended to provide greater punishment for those defendants who had previously been convicted of crimes in order to deter crime).
254. Kikumura, 918 F.2d at 1098-99. For explanations of the differences between real offense sentencing and charge offense sentencing, see Herman, supra note 239, at 311; O'Sullivan, supra note 247, at 1352.
255. Although at trial an element of an offense must be proved against a criminal defendant beyond a reasonable doubt as mandated by the Constitution, see In re Winship, 397 U.S. 358, 364 (1970), under sentencing statutes, the Court has ruled that a preponderance standard is constitutional, see McMillan v. Pennslyvania, 477 U.S. 79, 91 (1986). Similarly, the Court has held that double jeopardy and other constitutional protections are not automatically triggered by sentencing statutes. See United States v. DiFrancesco, 449 U.S. 117, 134-38 (1980).
protections than those explicitly granted by the Federal Sentencing Guidelines should raise similar questions of whether greater protections need be accorded to defendants sentenced under Three Strikes laws.256

The holdings in McMillan and Kikumura bolster Justice Scalia’s argument.257 Although the McMillan Court determined that a Pennsylvania statute imposing a mandatory minimum five-year sentence 258 was constitutional,259 then-Justice Rehnquist noted that due process protections should be triggered by a statute that authorizes a grave sentence increase.260 In holding that the Constitution precludes a sentence “tail” from wagging the substantive offense “dog,” the Court acknowledged that criminal defendants deserve constitutional protection because of the immense interests at stake.261 Although, as the Kikumura Court noted, courts have

256. See Monge, 118 S. Ct. at 2250. In fact, scholars have examined the Federal Sentencing Guidelines for circumvention of both the Due Process Clause and double jeopardy protections. See Herman, supra note 239, at 314-54 (examining the Federal Sentencing Guidelines for violations of constitutional protections, including both due process and double jeopardy); Wiet, supra note 239, at 1564 (arguing that conviction for “relevant conduct” under the Federal Sentencing Guidelines is not multiple punishment for the same crime under the Double Jeopardy Clause).

257. See McMillan, 477 U.S. at 88 (limiting statutes “tailored to permit [the sentence] to be a tail which wags the dog of the substantive offense”); Kikumura, 918 F.2d at 1102 ("When the magnitude of the departure is so disproportionate, we believe that the sentencing court must ratchet up not only the standard of proof, but also the standard of admissibility."); see also Slatkin, supra note 239, at 604-05, 608 (describing Kikumura’s holding and noting that since Kikumura, courts generally have not applied a higher standard).

258. Pennsylvania’s Mandatory Minimum Sentencing Act, 42 PA. STAT. ANN. tit. 42, § 9712(a) (West 1982), subjects any defendant convicted of certain felonies to a minimum mandatory five year sentence, conditional on the judge’s finding that the defendant “visibly possessed a firearm” during the crime. Id. Under the statute, the judge may use a preponderance of the evidence standard. See id.

259. See McMillan, 477 U.S. at 91.

260. See id. at 88-91. But see Herman, supra note 239, at 323-40 (arguing that the Court in McMillan “reached a questionable conclusion by undervaluing due process considerations”).

261. See In re Winship, 397 U.S. 358, 363-64 (1970) (“The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction.”); see also Sara Sun Beale, Procedural Issues Raised by Guidelines Sentencing: The Constitutional Significance of “The Elements of a Sentence,” 35 WM. & MARY L. REV. 147, 148, 159-60 (1993) (noting that the Federal Sentencing Guidelines decline to provide procedural protections attaching to the sentencing phase and recommending that federal sentencing implement the full procedural protections used by a trial on guilt or innocence); Benjamin E. Rosenberg, Criminal Acts and Sentencing Facts: Two Constitutional Limits on Criminal Sentencing, 23 SETON HALL L. REV. 459, 461. (1993) (arguing that “current due process and Sixth Amendment doctrines have abandoned the values that those constitutional provisions were supposed to serve”);
reasoned that sentencing does not trigger constitutional protection because—unlike conviction—it occurs after a defendant is proved guilty, a sufficiently grave sentence enhancement should be indistinguishable from a conviction.

As noted by Justice Scalia in Almendarez-Torres, however, permitting enhancements of such magnitude encourages constitutional circumvention. In deferring to legislatures to
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determine what comprises an element, an offense, and a sentence, the
Court allows the conviction of criminal defendants to be disguised as
sentencing, thereby allowing legislatures to dispose of constitutional
protections.265 Justice Scalia offered the strongest argument for why
double jeopardy protections should be applied to defendants
subjected to sentence enhancements under Three Strikes law.266 In
allowing California to increase drastically an individual’s sentence
while offering only statutory procedural protections, the Supreme
Court accepts the reorganization of the criminal justice system267
“Offense” and “sentencing” become mere labels and constitutional
protections for defendants become empty rhetoric.268

In Monge, Justice Scalia noted the ability of a sentencing statute
to infringe on constitutional protections accorded criminal
defendants.269 Based on the original rationale behind constitutional
protections, a criminal defendant should not be convicted with less
than basic procedural protections, including holding the government
to a high standard of proof or safeguarding the defendant from
multiple prosecutions.270 Justice Scalia’s reasoning is consistent with
historical principles underlying a criminal defendant’s rights:
previous Court decisions holding that resentencing differs from
conviction should not apply to resentencing procedures—like
California’s Three Strikes law—that so closely resemble trials of guilt
or innocence.271

In addition to endangering constitutional protections, the Three
Strikes law has been labeled ineffective and inhumane.272 Although
the Three Strikes law successfully keeps convicted criminals off the
streets,273 many critics have expressed dissatisfaction with the law’s
effects.274 Generally, the opposition to Three Strikes legislation

| 265. See Almendarez-Torres, 118 S. Ct. at 1237-39 (Scalia, J., dissenting). |
| 266. See Monge, 118 S. Ct. at 2255 (Scalia, J., dissenting). |
| 267. See id. (Scalia, J., dissenting). |
| 268. See id. at 2257 (Scalia, J., dissenting). |
| 269. See id. at 2255 (Scalia, J., dissenting). |
| 270. See In re Winship, 397 U.S. 358, 363 (1970) (concluding that “a society that values
the good name and freedom of every individual should not condemn a man for
commission of a crime when there is reasonable doubt about his guilt”). |
| 271. See Monge, 118 S. Ct. at 2255 (Scalia, J., dissenting). |
| 272. See infra notes 273-83 and accompanying text (discussing inefficiency and unfair
results of Three Strikes laws). |
| 273. See Cowart, supra note 106, at 616-17. |
| 274. See Joseph T. Lukens, The Prison Litigation Reform Act: Three Strikes and
You’re Out of Court—It May Be Effective, but Is It Constitutional?, 70 TEMP. L. REV. 471,
473 (1997) (discussing the effect of frivolous prisoner litigation on the court system);
Vitiello, supra note 106, at 1646-47 (discussing technical drafting problems in California’s

argues three points: (1) Three Strikes laws result in disproportionate sentences; (2) they undermine judicial discretion; and (3) they are unconstitutional because they violate the separation of powers doctrine.\textsuperscript{275}

Another more concrete criticism is that the Three Strikes law is applied to nonviolent criminals in such a way that punishments are completely out of proportion with the crimes committed.\textsuperscript{276} As the \textit{Kikumura} Court held, a grave sentence enhancement may be unconstitutional and significantly unfair.\textsuperscript{277} In addition, critics have pointed to both the discriminatory results of the Three Strikes law\textsuperscript{278}
and the fact that since the implementation of Three Strikes, prison populations have increased to over capacity.\textsuperscript{279} Other concerns include the financial burden of the Three Strikes law\textsuperscript{280} and theoretical problems with the legislation, including constitutional inconsistencies inherent in its increased sentences\textsuperscript{281} as well as the building of prisons for profit.\textsuperscript{282} Finally, Three Strikes has not deterred crime successfully.\textsuperscript{283} Despite these problems, the Court has not focused on curbing Three Strikes laws or other sentencing statutes.

Previous Supreme Court decisions held that double jeopardy protections do not apply to resentencing provisions in a non-capital case.\textsuperscript{284} Constitutional protections for criminal defendants and public policy, however, urge an extension of double jeopardy protections to include non-capital sentencing statutes such as California’s Three Strikes law.\textsuperscript{285} In reaching its decision in \textit{Monge}, perhaps the Court should have considered the issues raised by Justice Scalia’s dissent. As he pointed out, the onslaught of such statutes introduces a complex state-run statutory system that disguises criminal convictions as sentence enhancements and denies criminal defendants sufficient constitutional protection.\textsuperscript{286} \textit{Monge} provided the Court with the chance to shift double jeopardy analysis in response to a society that threatens complete statutory overhaul of the criminal justice system. Although the Supreme Court was accurate to interpret the \textit{Bullington} exception as applying to capital sentencing proceedings,\textsuperscript{287} the threat of eluding constitutional protections calls for reevaluating the factors behind double jeopardy analysis.

\begin{itemize}
\item \textsuperscript{279} See Cowart, \textit{supra} note 106, at 660 (“Current prisons are not equipped to handle this increase. California’s prison system is presently operating at 192% of its intended capacity, and thirteen of California’s penal institutions are operating at more than 200% capacity.”).
\item \textsuperscript{280} See \textit{id.} at 661.
\item \textsuperscript{281} See \textit{id.} at 662-63 (examining whether cruel and unusual punishment is a valid claim after life imprisonment for stealing a pizza).
\item \textsuperscript{282} See \textit{id.} at 662.
\item \textsuperscript{283} See \textit{id.} at 666.
\item \textsuperscript{284} See \textit{supra} notes 118-89 and accompanying text.
\item \textsuperscript{285} See \textit{supra} notes 190-263 and accompanying text.
\item \textsuperscript{286} See \textit{Monge}, 118 S. Ct. at 2255 (Scalia, J., dissenting).
\item \textsuperscript{287} See \textit{id.} at 2251.
\end{itemize}
The Three Strikes law was passed amid a storm of passion and public initiative. In so hurriedly passing a bill, the California legislature ignored future ill effects. Constitutional protections exist to shield defendants from such changes in social climate and to ensure defendants a fair trial regardless of changing political atmosphere and legislative whim. In failing to ensure constitutional safeguards to defendants facing the Three Strikes law, the Court missed an opportunity to reaffirm a criminal defendant’s right to protection under the Double Jeopardy Clause and shield against legislative degradation of that right.

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288. See supra note 106 and accompanying text.
289. See Monge, 118 S. Ct. at 2255 (Scalia, J., dissenting).