IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, v. VALENTIN CARBAJAL, Defendant and Appellant.	)	No. S195600 Court of Appeal No. B222616

After Decision of the Court of Appeal,
Second Appellate District, Division Five

Appeal from the Superior Court of Los Angeles County,
Case No. BA316526

The Honorable Larry P. Fidler, Judge

ANSWER TO PETITION FOR REVIEW

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Appeal under the California
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ANSWER TO PETITION FOR REVIEW

TO THE HONORABLE CHIEF JUSTICE CANTIL-SAKAUYE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA: Pursuant to California Rules of Court, rule 8.500(a)(2), appellant Valentin Carbajal answers respondent's petition for review of the July 5, 2011 published opinion of the Court of Appeal for the Second District, Division Five, which reversed a true finding on a Penal Code section 667.61 allegation, and

remanded appellant's case for resentencing. Respondent presents no sufficient grounds for review pursuant to rule 8.500(b), and appellant respectfully asks this Court to deny respondent's petition for review.

ARGUMENT

WHERE THE RECORD INDICATES THE JURY RETURNED A NOT TRUE FINDING ON A SENTENCING ALLEGATION IN THE FIRST TRIAL THE COURT OF APPEAL'S CONCLUSION THAT RETRIAL ON THE ALLEGATION IS BARRED DURING A SECOND TRIAL DOES NOT PRESENT AN "IMPORTANT QUESTION OF LAW" FOR THIS COURT'S REVIEW

A. Introduction

There were two trials in this case. The jury in the first trial convicted appellant of two counts of lewd conduct as to victim Jessica R., but was unable to reach verdicts on any charges involving the named victim, Zelene C. When the jury returned its verdicts as to Jessica R., it found the single multiple-victim allegation that was charged as to all eligible counts (Pen. Code, § 667.61, subjecting appellant to "one strike" sentencing), to be true. (3 R.T. 2108.) After establishing with the jury foreman that the jury had been mistaken in its understanding of the allegation, the judge sent the jury back to reconsider its finding. The jury quickly returned with what the judge assumed was a "not true" finding on the allegation. (3 R.T. 2109-2110.)

After asserting, "that's not what they should have done," the judge discussed the matter with the jury, broadly and confusedly hinting the verdict form should have been left blank, and sent the jury back again for further deliberations. (3 R.T. 2110-2113.) After retiring for a third time, the jury quickly asked for a blank verdict form, and returned that form unsigned. (3 R.T. 2113.) In a retrial of the charges related to Zelene C., the jury found the section 667.61 allegation to be true.

A majority of the Court of Appeal agreed with appellant that resubmitting the section 667.61 allegation to the jury in the second trial violated principles of double jeopardy, and reversed the allegation. (Slip Op., pp. 7-12.) One justice dissented, arguing the jury did not actually return a finding on the allegation, and there was no double jeopardy bar to retrial. (Slip Op., dissent pp 1-4 (Kumar, J. dissenting).)

Respondent filed a Petition for Review, arguing the dissenting opinion of Justice Kumar to be the correct position. To support its argument, respondent misstates the procedural facts, and reverses

its own previous position in the appeal. Moreover, respondent fails to cite conflicting authority in support of its claim that the double jeopardy clause does not apply to a "not true" finding on a sentencing allegation when the jury is unable to decide on related substantive charges. In fact, the Court of Appeal applied well-settled principles in reaching its decision in this case. The decision raises no new questions of law, nor is it in conflict with previous decisions by this or any other courts. Thus, there do not appear to be any valid grounds for review. (Cal. Rules of Court. rule 8.500(b).)

B. By Misconstruing Underlying Procedural Facts Respondent Reversed Its Previous Concession That The Jury Found The Section 667.61 Allegation To Be Not True And Presents A Question To This Court For Which The Premise Is Not Found In The Record

In the Court of Appeal decision, the court notes:

> It is undisputed that, following a brief period of reconsideration, the jury again returned a finding. The trial court and both parties believed that the jury finding was 'not true,' and both parties on appeal still share that belief.

(Slip Op. at p. 9.)

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

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

(Resp. Br. 15.)

Respondent does an about face in its Petition for Review, faulting the Court of Appeal for "adopt[ing] the position that the jury actually returned with another finding, and that Penal Code

section 1161 'prohibited the court from sending the jury back for reconsideration in either case.'" (Resp.Br. 2, quoting Slip Op. at p. 9.) Respondent goes on to claim that before the jury actually returned with a second finding on the allegation, "the trial court called the jurors back and explained that the special allegation was inapplicable unless the jury returned with guilt findings as to two different victims or if the jury unanimously concluded there was only a single victim, and again directed the jury to reconvene and clarify its decision." (Resp.Br. 2, citing 3 R.T. 2110-2113.)

As the Court of Appeal states, it was undisputed that the jury did return with a finding (Slip Op. at p. 9 and fn. 2), and respondent's attempt to "walk back" from its earlier acknowledgment does not change what is plainly shown in the record.

Similarly unavailing is respondent's argument that the jury did not return a verdict on the special allegation because "the record is devoid of any indication that the former jury resolved the issue of the Penal Code section 667.61 allegation as it applied to the counts

on which the jury was hung and which formed the basis for the second trial." (Resp.Br. 9-10.) Respondent fails to acknowledge or discuss that there was only a single section 667.61 allegation that applied to all eligible counts, and the jury was only asked to make a single finding. (1 C.T. 157; 3 R.T. 1863.) There is nothing in the record to support respondent's conclusion that the jury made a finding on the allegation as to one set of charges and not as to the other. Nor does respondent provide any legal authority for dividing up a single charged allegation in such a way.

Respondent, therefore, presents no valid issue for this court to consider. Respondent asks, "Whether double jeopardy bars retrial as to a multiple-victim enhancement that the first jury never reached because no verdict was received, and was never resolved because the jury deadlocked on the underlying offenses?" (Resp. Br. 1.) Respondent asks this court to resolve an issue that is not present in the instant case. The jury did reach and return with a verdict on the allegation – twice – and the trial court's refusal to accept the verdict does not change the analysis of double jeopardy principles. (*Bigelow*

v. Superior Court (1989) 208 Cal.App.3d 1127, 1136; *People v. Guerra* (2009) 176 Cal. App. 4th 933, 944; Pen. Code, §§ 1161, 1164, 1165.)

C. The Majority Applied Well-Settled Legal Principles To A Record-Based Analysis Making Review Unnecessary

The Court of Appeal in this case properly read the record as indicating that the jury did, in fact, return with a finding on the allegation after being sent back for further deliberations. It recognized that "'once the jury submits a verdict of acquittal to the trial court, the court may not order reconsideration of that verdict but rather must order that judgment be entered on the verdict. (§§ 1161, 1165; *People v. Blair* (1987) 191 Cal.App.3d 832, 839.) Second, a trial court may not coerce a jury by rejecting its verdict and requesting it to continue deliberating. (*Ibid.*; see also *People v. Gainer* (1977) 19 Cal.3d 835, 842-843.)'" (Slip Op. at p. 10, quoting *Bigelow v. Superior Court, supra,* 208 Cal.App.3d at p. 1134.)

There is no basis for disputing the trial court's assumption that the jury had "manifested its intention to acquit," and therefore, the Court of Appeal correctly found the trial court had no authority

to "declare a mistrial without giving effect to that verdict." (Slip Op. at p. 10, quoting *Bigelow v. Superior Court, supra,* 208 Cal.App.3d at p. 1135.) The appellate court rejected respondent's argument the verdict was inconsistent with the failure to reach verdicts on some counts because generally, "inherently inconsistent verdicts are allowed to stand." (Slip Op. at p. 11, quoting *People v. Avila* (2006) 38 Cal.4th 491, 600.)

The Court of Appeal also commented on the parties' agreement that "if the jury in the first trial found the section 667.61 allegation not true, retrial of the allegation would be barred under *People v. Seel* (2004) 34 Cal.4th 535." (Slip Op. at 8, *People v. Anderson* (2009) 47 Cal.4th 92, 119.) Respondent backs away from this agreement as well, arguing the court's decision in this case would create "an anomaly in the law" when read in tandem with this court's decision in *Anderson*. (Resp.Br. 11; Slip Op. Dissent at p. 3.) There is no anomaly. In *Anderson*, this court held that if there is a conviction on the substantive offense but the jury deadlocks on a sentencing allegation, there is no double jeopardy bar to retrial on

the sentencing allegation. (*People v. Anderson, supra*, 47 Cal.4th at p. 105.) In this case, it is merely the converse, and while there were no double jeopardy issues to prevent retrial on the underlying substantive offenses, the jury's two findings on the allegation in the first trial prevent retrial on that allegation.

There is no question the jury had a verdict when it returned from deliberations the second time, and the trial court, both parties, and the Court of Appeal all assumed it was a finding of not true. Even if the jury returned with a true finding, however, the Court of Appeal recognized retrial would still be barred because "such a finding would not be supported by the evidence as a matter of law." (Slip Op. at p. 8, citing *People v. Seel, supra*, 34 Cal.4th at pp. 548-550.) The trial court would have been required pursuant to section 1161 to enter the second true finding, so regardless of what the jury's finding was, there can be no retrial of the allegation.

The Court of Appeal concluded in this case that it was not "aware of any authority which permits a trial court to send the jury back for further deliberations on a punishment allegation because it

is inconsistent with the jury's verdicts on the charges." (Slip Op. at p. 12.) There does not appear to be any such authority, as the law is well settled. There are, therefore, no grounds for review as described in rule 8.500(b). Accordingly, a grant of respondent's petition would likely result in a substantial "waste of judicial resources." (*Avila v. Citrus Community College District* (2006) 38 Cal.4th 148, 165, fn. 12.)

CONCLUSION

Respondent has failed to describe an issue that is supported by the factual record, and has not stated an issue of law that requires clarification by this court. Based on the foregoing and the entire appellate record, Mr. Carbajal requests that this court deny review.

Dated: September 1, 2011

Respectfully submitted,

_____

NANCY J. KING
Attorney for appellant CARBAJAL

CERTIFICATE OF WORD COUNT

I certify that the word count of this computer-produced document, calculated pursuant to rule 8.504(d)(1) of the rules of court, does not exceed 25,5000 words, and that the actual count is: 1,835 words.

Dated: September 1, 2011

Nancy J. King

CERTIFICATE OF MAILING

Case Name: People v. Carbajal (S195600)

I, the undersigned, certify and declare that:

I am over 18 years of age and not a party to this action. My business address is 1901 First Avenue, Suite 138, San Diego, California 92101. I served the APPELLANT'S ANSWER TO PETITION FOR REVIEW by placing a true and correct copy thereof in a sealed envelope with postage affixed thereto in the United States mail addressed to:

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Dated: September 1, 2011

NANCY J. KING