SUPREME COURT OF THE UNITED STATES

No. 97–6146

ANGEL JAIME MONGE, PETITIONER *v.* CALIFORNIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

[June 26, 1998]

JUSTICE SCALIA, with whom JUSTICE SOUTER and JUSTICE GINSBURG join, dissenting.

I agree with the Court's determination that *Bullington* v. *Missouri*, 451 U. S. 430 (1981), should not be extended, and its conclusion that the Double Jeopardy Clause does not apply to noncapital sentencing proceedings. I do not, however, agree with the Court's assumption that only a sentencing proceeding was at issue here.

Like many other guarantees in the Bill of Rights, the Double Jeopardy Clause makes sense only against the backdrop of traditional principles of Anglo-American criminal law. In that tradition, defendants are charged with "offence[s]." A criminal "offence" is composed of "elements," which are factual components that must be proved by the state beyond a reasonable doubt and submitted (if the defendant so desires) to a jury. Conviction of an "offence" renders the defendant eligible for a range of potential punishments, from which a sentencing authority (judge or jury) then selects the most appropriate. That sentencer often considers new factual issues and additional evidence under much less demanding proof requirements than apply at the conviction stage. 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 juris-

prudence– including the "same elements" test for determining whether two "offence[s]" are "the same," see *Blockburger* v. *United States*, 284 U. S. 299 (1932), and the rule (at issue here) that the Clause protects an expectation of finality with respect to offences but not sentences. The same distinction also delimits the boundaries of other important constitutional rights, like the Sixth Amendment right to trial by jury and the right to proof beyond a reasonable doubt.

I do not believe that that distinction is (as the Court seems to assume) simply a matter of the label affixed to each fact by the legislature. Suppose that a State repealed all of the violent crimes in its criminal code and replaced them with only one offense, "knowingly causing injury to another," bearing a penalty of 30 days in prison, but subject to a series of "sentencing enhancements" authorizing additional punishment up to life imprisonment or death on the basis of various levels of *mens rea*, severity of injury, and other surrounding circumstances. Could the state then grant the defendant a jury trial, with requirement of proof beyond a reasonable doubt, solely on the question whether he "knowingly cause[d] injury to another," but leave it for the judge to determine by a preponderance of the evidence whether the defendant acted intentionally or accidentally, whether he used a deadly weapon, and whether the victim ultimately died from the injury the defendant inflicted? If the protections extended to criminal defendants by the Bill of Rights can be so easily circumvented, most of them would be, to borrow a phrase from Justice Field, "vain and idle enactment[s], which accomplished nothing, and most unnecessarily excited Congress and the people on [their] passage." *Slaughter-House Cases*, 16 Wall. 36, 96 (1873).[1]

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[1] The Court suggests that "fundamental fairness" will sometimes call for treating a particular fact as a sentencing factor rather than an element,

Although California's system is not nearly that sinister, it takes the first steps down that road. The California Code is full of "sentencing enhancements" that look exactly like separate crimes, and that expose the defendant to additional maximum punishment. Cal. Penal Code §12022.5 (1982) is typical: "[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." Compare that provision with its federal counterpart, 18 U. S. C. §924(c)(1), which provides that "[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." Everyone agrees that 18 U. S. C. §924(c)(1) describes a separate crime entitling those who are charged to the constitutional protections that accompany criminal convictions. Indeed, the undisputed fact that each of the elements of §924(c)(1) must be submitted to a jury and found beyond a reasonable doubt, combined with the fact that many courts were mistaken as to what those elements consisted of, has created consider-

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even if it increases the defendant's maximum sentencing exposure, because "[a] defendant might not, for example, wish to simultaneously profess his innocence of a drug offense and dispute the amount of drugs allegedly involved." *Ante*, at 6. Even if I agreed that putting a defendant to such a choice would be fundamentally unfair, I see no reason to assume that defendants would be eager to pursue such a strategy at the cost of forfeiting their traditional rights to jury trial and proof beyond a reasonable doubt. But in any event, there is no need to contemplate such Faustian bargains. If simultaneous consideration of two elements *would* be genuinely prejudicial to the defendant (as, for example, when one of the elements involves the defendant's prior criminal history), the trial can be bifurcated without sacrificing jury factfinding in the second phase. See *Almendarez-Torres*, 523 U. S. ___, ___ (1998) (slip op., at 15, 22-23) (SCALIA, J., dissenting).

able juridical chaos in recent years. See, *e.g.*, *Bailey* v. *United States*, 516 U. S. 137 (1995); *Bousley* v. *United States*, 523 U. S. ___ (1998). Perhaps Congress should have taken a lesson from the California Legislature, which (if my worst fears about today's holding are justified) may have stumbled upon the El Dorado sought by many in vain since the beginning of the Republic: a means of dispensing with inconvenient constitutional "rights." For now, California has used this gimmick only to eviscerate the Double Jeopardy Clause; it still provides a right to notice, jury trial, and proof beyond a reasonable doubt on "enhancement" allegations as a matter of state law. But if the Court is right today, those protections could be withdrawn tomorrow.

Earlier this Term, in *Almendarez-Torres* v. *United States*, 523 U. S. ___ (1998), I discussed our precedents bearing on this issue and concluded that it was a grave and doubtful question whether the Constitution permits a fact that increases the maximum sentence to which a defendant is exposed to be treated as a sentencing enhancement rather than an element of a criminal offense. See *id*., at ___ (slip op., at 13) (dissenting opinion). I stopped short of answering that question, because I thought the doctrine of constitutional doubt required us to interpret the federal statute at issue as setting forth an element rather than an enhancement, thereby avoiding the problem. *Ibid*. Since the present case involves a state statute already authoritatively construed as an enhancement by the California Supreme Court, I must now answer the constitutional question. Petitioner Monge was convicted of the crime of using a minor to sell marijuana, which carries a *maximum* possible sentence of seven years in prison under California law. See California Health & Safety Code Ann. §11361(a) (West 1991). He was later sentenced to *eleven* years in prison, however, on the basis of several additional facts that California and the Court have chosen to label "sentence enhancement allegations." However

California chooses to divide and label its criminal code, I believe that for federal constitutional purposes those extra four years are attributable to conviction of a new crime.[2] Monge was functionally acquitted of that crime when the California Court of Appeal held that the evidence adduced at trial was insufficient to sustain the trial court's "enhancement" findings, see *Burks* v. *United States*, 437 U. S. 1, 18 (1978). Giving the State a second chance to prove him guilty of that same crime would violate the very core of the Double Jeopardy prohibition.

That disposition would contradict, of course, the Court's holding in *Almendarez-Torres* that "recidivism" findings do not have to be treated as elements of the offense, *even if* they increase the maximum punishment to which the defendant is exposed. That holding was in my view a grave constitutional error affecting the most fundamental of rights. I note, in any event, that *Almendarez-Torres* left open the question whether "enhancements" that increase the maximum sentence and that do not involve the defendant's prior criminal history are valid. That qualification is an implicit limitation on the Court's holding today.

I respectfully dissent.

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[2] The Court contends that this issue "was neither considered by the state courts nor discussed in petitioner's brief before this Court." A*nte*, at 6. But Monge has argued consistently that reconsideration of the enhancement issue would violate the Double Jeopardy Clause. He did not explicitly contend that the enhancement was in reality an element of the offense with which he was charged, but I believe that was fairly included within the argument he did make. "When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen* v. *Kemper Financial Services, Inc.*, 500 U. S. 90, 99 (1991). See also *United States Nat. Bank of Ore.* v. *Independent Ins. Agents of America, Inc.*, 508 U. S. 439, 446 (1993).