S231260

SUPREME COURT NO. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

SULMA MARILYN GALLARDO,

Defendant and Appellant.

APPELLATE COURT NO.
B257357

SUPERIOR COURT NO.
VA126705

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

Honorable Thomas I. McKnew, Jr., Judge

PETITION FOR REVIEW OF THE UNPUBLISHED OPINION OF THE SECOND APPELLATE DISTRICT, DIVISION SIX

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TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

PETITION FOR REVIEW

Pursuant to California Rules of Court, rule 8.500(b)(1)[1], appellant, Sulma Marilyn Gallardo, respectfully petitions this Court for review of the unpublished decision of the Court of Appeal, Second Appellate District, Division Six (per Gilbert, P.J.) filed November 16, 2015. The Court of

[1] All further rule and section references are to the California Rules of Court and California Penal Code unless otherwise noted.

Appeal Opinion (referred to herein as "OPN") is attached hereto as Appendix A. (Rule 8.504(b)(4).)

INTRODUCTION[2]

This case directly implicates the ongoing debate amongst California's Courts of Appeal regarding the impact of *Descamps v. U.S.* (2013) 570 U.S. ___ (*Descamps*) on California's procedure for determining whether a prior conviction qualifies as a strike. In both published and unpublished opinions, multiple courts have reached varying conclusions. This Court has yet to directly address the question.

Two recent published decisions by the Second Appellate District, *People v. Marin* (2015) 240 Cal.App.4th 1344 (Div 4) and *People v. Denard,* B253464, issued December 3, 3015 (Div 1), concluded that the Sixth Amendment right to a jury trial as articulated in *Descamps* precludes any judicial factfinding which looks beyond the elements of the crime to the record of conviction for purposes of making a strike finding based on the nature of the defendant's conduct. These opinions followed on the heels of *People v. Saez* (2015) 237 Cal.App.4th 1177 (First Appellate District, Div 1) which reached the same conclusion and *People v. Wilson*

[2] This Introduction is included pursuant to rule 8.504(b)(1).

(2013) 219 Cal.App.4th 500 (Sixth Appellate District) which nearly reached the same conclusion two years earlier.

Unfortunately the Court of Appeal herein did not follow in the footsteps of the above opinions, suggesting that the issue is not settled. Appellant asserts that this case presents an ideal fact pattern upon which this Court can provide the necessary definitive direction.

Here, the prior conviction at issue was appellant's entry of a no contest plea in 2005 to one generic count of violating section "245(a)(1)." To prove that the prior conviction constituted a strike, the prosecution offered the minute order from the plea hearing and a transcript of the preliminary hearing that was held a year before the plea. (ACT 1-35; 3RT 1804-1808.)[3]

The minute order reflected a plea to one count of violating section "245(A)(1)" with no additional factual basis or information on the type of assault (e.g., "likely GBI" or "deadly weapon") admitted. (ACT 1-4.) Appellant was placed on probation for the offense and no other documentation was provided to the trial court. (ACT 2-3.) Because the minute order did not constitute substantial evidence to prove that the generically defined assault constituted a strike (*People v. Banuelos* (2005)

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[3] Clerk's, Augmented Clerk's, Reporter's and Augmented Reporter's Transcripts are designated "CT," "ACT," "RT," and "ART" respectively with numerical volume references.

130 Cal.App.4th 601, 606; *People v. Davis* (1996) 42 Cal.App.4th 806, 814), the prosecution also offered the transcript from the preliminary hearing wherein the victim testified that appellant pointed a knife at him, punched him while holding the knife, and potentially nicked him with the knife. (ACT 12-15.) At the close of the preliminary hearing the court made a finding that there was sufficient evidence to hold appellant on the generic charge of violating section "245(A)(1)." (ACT 34.) The court made no factual findings regarding the type of assault or whether appellant personally used a weapon. (ACT 34.)

At the hearing on the prior held herein, defense counsel objected to the admission of the preliminary hearing transcript on hearsay and foundation grounds and to the court using the testimony to support a finding that appellant's prior conviction qualified as a strike. (3RT 1808.) The court overruled the objections and made a new disputed factual finding that the generic assault admitted by appellant in 2005 constituted a strike based on the 2004 preliminary hearing transcript testimony regarding the knife. (3RT 1808.)

Under *Marin* and *Denard*, Divisions Four and One of the Second Appellate District would have reversed the prior strike finding. However, Division Six of the same Second Appellate District refused to consider

Marin and instead held that the traditional form of judicial factfinding undertaken herein is still valid under state and federal law.

As fully set forth herein, full review is required in this case to secure uniformity in decisions between appellate courts, settle the important question of law presented in these cases, and to correct the denial of appellant's Sixth Amendment right to a jury trial on the prior allegation. (Rule 8.500(b)(1).)

In the alternative, appellant requests that this Court grant review and transfer the case back to the Court of Appeal with directions to reconsider its analysis in light of *Marin* and *Denard* which were both issued after this case was submitted for an opinion. (Rules 8.500(b)(4), 8.528(d); *People v. Howard* (1987) 190 Cal.App.3d 41, 45.)

PETITION FOR REHEARING

Appellant filed a Petition for Rehearing specifically requesting the Court of Appeal:

1. Address the analysis and holding of *Marin*, which was issued after this appeal was submitted for opinion but before the opinion was issued.

2. Address appellant's argument that this Court's holding in *People v. Reed* (1996) 13 Cal.4th 217, 220 (witnesses unavailability for prior's trials) is no longer valid under *Crawford v. Washington* (2004) 541 U.S. 36.

The petition was summarily denied on December 2, 2015. (Rules 8.500(c)(2) and 8.504(b)(3).) Both issues are raised for review.

ISSUES PRESENTED FOR REVIEW

I.

Is California's procedure for determining whether a prior conviction qualifies as a strike, insofar as it is based on judicial factfinding beyond the elements of the actual prior conviction, incompatible with the United States Supreme Court's view of the Sixth Amendment right to a jury trial as articulated in *Descamps*?

II.

If full review is not granted on Issue I, appellant requests that this Court grant review and transfer the case back to the Court of Appeal with directions to reconsider its analysis in light of *Marin* and *Denard* which were both issued after this case was submitted for an opinion.

III.

Under *Crawford,* may a trial court rely on a preliminary hearing transcript to make a determination of whether the conduct underlying a prior conviction constituted a strike without an actual showing of witness unavailability?

STATEMENT OF THE CASE AND FACTS

For purposes of this petition only, appellant adopts the procedural history and facts set forth in the court of appeal opinion. (OPN 1-3.)

ARGUMENTS AND POINTS AND AUTHORITIES

I.

CALIFORNIA'S PROCEDURE FOR DETERMINING WHETHER A PRIOR CONVICTION QUALIFIES AS A STRIKE, WHICH ALLOWS JUDICIAL FACTFINDING BEYOND THE ELEMENTS OF THE ACTUAL PRIOR CONVICTION, IS INCOMPATIBLE WITH THE UNITED STATES SUPREME COURT'S VIEW OF THE SIXTH AMENDMENT RIGHT TO A JURY TRIAL AS ARTICULATED IN *DESCAMPS*.

In *People v. Saez* (2015) 237 Cal.App.4th 1177 (*Saez*), the Court of Appeal explained the conflict between the opinions of this Court and the United States Supreme Court "on the limits of a sentencing court's ability to review the record of a prior conviction in determining whether the conviction can be used to increase a sentence under a statutory sentencing-enhancing scheme," and held California's procedure violated the Sixth Amendment under the principles recognized in *Descamps*. (*Saez*, *supra*, 237 Cal.App.4th at p. 1195.)

In so holding, *Saez* concluded that "while *Descamps* did not explicitly overrule *McGee*,...this much is clear: when the elements of a

prior conviction do not necessarily establish that it is a serious or violent felony under California law (and, thus, a strike), the court may not under the Sixth Amendment '"make a disputed" determination "about what the defendant and state judge must have understood as the factual basis of the prior plea," or what the jury in a prior trial must have accepted as the theory of the crime.' (*Descamps*, *supra*, 570 U.S. at p. ___ [133 S.Ct. at p. 2288].)" (*Saez*, *supra*, at pp. 1207–1208.)[4]

On October 7, 2015, Division Four of the Second Appellate District issued a published opinion in *People v. Marin* (2015) 240 Cal.App.4th 1344.[5] That opinion held as follows:

> The California procedure for determining whether prior convictions qualify as strikes, insofar as it is based on judicial factfinding beyond the elements of the offense, is incompatible with the United States Supreme Court's view of the Sixth Amendment right to a jury trial as articulated in *Descamps*. In short, such judicial factfinding, which looks beyond the elements of the crime to the record of conviction to determine what conduct "realistically" underlaid the conviction, violates the Sixth Amendment right to a jury trial.
>
> ...
>
> ...the scope of judicial factfinding that is incompatible with the right to a jury trial is variously described in Descamps as the following: (1) '"a disputed' determination 'about what the defendant and state judge must have understood as the factual

[4] No petition for review was filed in the case and the remittitur issued on August 20, 2015.

[5] No petition for review was filed in the case and the remittitur issued on December 9, 2015.

> basis of the prior plea,' or what the jury in a prior trial must have accepted as the theory of the crime" (citing the plurality opinion in Shepard, supra, 544 U. S. at p. 25, and Justice Thomas's concurrence that such a finding would be "'constitutional error, no doubt'" (id. at p. 28)); (2) a finding concerning "what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct"; (3) a finding about "amplifying but legally extraneous circumstances"; (4) inferences from a plea transcript based on "whatever [a defendant] says, or fails to say, about superfluous facts"; and (5) the trial court's "own finding about a non-elemental fact." In its various wordings, the court's language conveys that judicial factfinding beyond the elements of the defendant's prior conviction—so called "superfluous facts" or "non-elemental facts"—is generally constitutionally impermissible. (*Ibid.* at pp. 1363-1364; internal citations omitted.)

Likewise, on December 3, 2015, the Second Appellate District Court, Division One, issued a published opinion in *People v. Denard* (B253464, issued December 3, 3015) 2015 Cal.App.LEXIS 1080, agreeing with the fundamental holdings of *Saez* and *Marin.* Therein the court of appeal stated:

> The United States Supreme Court has held that the Sixth and Fourteenth Amendments require that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." [Citations.]
>
> The Supreme Court's most recent explication of this principle came in *Descamps*, in which an eight-justice majority concluded that serious Sixth Amendment concerns are implicated by a sentencing "court's finding of a predicate offense . . . [that goes] beyond merely identifying a prior conviction. Those concerns . . . counsel against allowing a sentencing court to 'make a disputed' determination 'about what the defendant and state judge must have understood as the factual basis of the prior plea,' or what the jury in a prior

> trial must have accepted as the theory of the crime." (*Descamps*, *supra*, 133 S.Ct. at p. 2288; *Shepard v. United States* (2005) 544 U.S. 13, 25 [125 S.Ct. 1254].)
>
> [p]
>
> ....two appellate courts issued decisions in which they considered the impact of the United States Supreme Court's holding in *Descamps* on the California procedure for proof of prior convictions under *McGee*: *Saez*, *supra*, 237 Cal.App.4th 1177 (First Dist., Div. One) and *People v. Marin* (2015) 240 Cal.App.4th 1344 (Second Dist., Div. Four) (*Marin*).
>
> In *Saez*, the court noted the conflict between the California and United States Supreme Courts "on the limits of a sentencing court's ability to review the record of a prior conviction in determining whether the conviction can be used to increase a sentence under a statutory sentencing-enhancing scheme," and held that the trial court's reliance on the Wisconsin record of conviction was proper under *McGee* but violated the Sixth Amendment under the principles recognized in *Descamps*. (*Saez*, *supra*, 237 Cal.App.4th at p. 1195; *Marin*, *supra*, 240 Cal.App.4th at p. 1348.)...
>
> *Marin* went a step further, expressly holding that "under *Descamps*, judicial factfinding authorized by [*McGee*], going beyond the elements of the crime to 'ascertain whether that record reveals whether the conviction realistically may have been based on conduct that would not constitute a serious felony under California law' ([*McGee*, *supra*, 38 Cal.4th] at p. 706), violates the Sixth Amendment right to a jury trial." (*Marin*, *supra*, 240 Cal.App.4th at p. 1348.)
>
> [P]
>
> We agree with the conclusions of the courts in *Saez* and *Marin*... (Slip Opinion pp. 17-22.)

This Court has yet to adopt or reject the *Saez* and *Marin* holdings, but it is clear that the trial court herein did precisely what *Saez* and *Marin*

held is now precluded – it made a disputed factual determination regarding what the judge and appellant must have understood the form of assault to be when it was admitted.

As detailed in the Introduction, the only actual record of appellant's plea that was offered in this case was a minute order that reflected a plea to one generic count of violating section "245(A)(1)" and did not include any factual basis for the plea or any additional information on the type of the assault. (ACT 1-4.) Because this document was totally insufficient to establish the nature of appellant's assault plea, the prosecution offered the transcript from the preliminary hearing held a year before the plea. (ACT 13-15.) At the close of that preliminary hearing the court only made a finding that there was sufficient evidence to hold appellant on the generic charge of violating section "245(A)(1)." (ACT 34.) The court made no factual findings regarding the type of assault or whether appellant personally used a weapon. (ACT 34.)

Based solely on the above record, and over defense objection, the trial court herein made a disputed factual determination that the alleged facts of the charged assault included the use of a knife and therefore, regardless of the offense that was actually plead to, appellant's generic prior assault constituted a strike offense.

In short, the trial court here did not determine what offense *was admitted*, the trial court determined what offense it thought appellant *committed*. Under *Descamps, Saez, Marin,* and *Denard*, the trial court here was precluded from making this disputed factual determination based on testimony adduced during a preliminary hearing regarding what type of assault appellant committed.

The Court of Appeal refused to grant rehearing to consider *Marin* and rejected all of the above analysis. Instead, the court generally summarized *Descamps* and *Saez* and rejected appellant's arguments exclusively on a determination that because section 245 is a "divisible statute" judicial factfinding, of any variety, is still allowed:

> After *McGee*, the United States Supreme Court decided *Descamps v. United States* (2013) _ U.S. _ [186 L.Ed.2d 438] (*Descamps*). *Descamps* involves sentence enhancements under the federal Armed Career Criminal Act (ACCA). (18 U.S.C. § 924(e).) The ACCA provides for sentence enhancements for federal defendants who have prior convictions for certain felonies, including burglary. To determine whether a prior conviction constitutes one of those crimes, courts use the so-called "categorical approach." They compare the statutory elements of the crime constituting the prior conviction with the elements of a "generic crime"; that is, the offense as it is commonly understood. The defendant had prior California convictions for burglary. The generic crime of burglary has unlawful entry as an element. But the California statutory elements for burglary do not include unlawful entry. (§ 459.) Does the defendant have the right to a jury trial on the question whether his prior burglaries involved an unlawful entry?
>
> In deciding that question, *Descamps* distinguished two types of statutes. One type of statute is a so-called "divisible statute." That kind of statute sets out one or more elements of the offense in the

alternative. If one alternative matches an element in the generic offense but the other alternative does not, the court may consult "a limited class of documents, such as indictments and jury instructions," to determine which alternative formed the basis of the prior conviction. (*Descamps*, *supra*, _ U.S. at p. _ [186 L.Ed.2d at p. 449].) Then the court can apply the categorical approach by comparing the elements of the prior conviction with the elements of the generic crime. (*Ibid.*)

The second type of statute is a so-called "indivisible statute"; that is, a statute that does not contain alternative elements. A problem arises when an indivisible statute criminalizes a broader scope of conduct than the generic offense. Thus, for example, California's burglary statute, by not having unlawful entry as an element, criminalizes more conduct than a generic burglary. The court held that a sentencing court is not authorized to go beyond the elements of the prior conviction to make a finding of fact that the defendant's conduct constituted a generic crime; for example, that he made the unlawful entry necessary for generic burglary. The court stated: "The Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances. [Citation.] Similarly, . . . when a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense's elements . . . ." (*Descamps*, *supra*, _ U.S. at p. _ [186 L.Ed.2d at p. 457].)

The recent case of *People v. Saez* (2015) 237 Cal.App.4th 1177, like *Descamps*, involved an indivisible statute. In *Saez*, the defendant had suffered prior convictions in Wisconsin. The prior convictions were under statutes that criminalized a broader scope of conduct than similar California statutes. *Saez* held that under *Descamps* the sentencing court cannot use the record of conviction to make a finding of fact that the defendant's conduct would have been a strike in California. (*Saez*, at pp. 1207-1208.)

This case is different. Here, we are concerned with a "divisible statute." The elements of the offense are stated in the alternative. Under *Descamps*, the sentencing court may consult extrinsic

documents to determine which alternative formed the basis of the prior conviction. A jury determination is not required. (OPN 8-10.)

The above analysis is fundamentally flawed because the question is not what type of statute is at issue but rather what type of factfinding is allowed.

What is now clear is that while a trial court is permitted to look at the record of a prior conviction to determine the actual elements of the actual conviction – it is not permitted to make a new factual determination based on the *conduct* in the case to establish that the criminal behavior constitutes a strike. Either proof of the conviction standing alone establishes it was a strike – or it is not a strike.

Here, the preliminary hearing transcript contained nothing more than testimony about appellant's conduct. No evidence from the plea colloquy or written form that occurred a year later was admitted to demonstrate that appellant later admitted the truth of any of the knife allegations. Therefore, the preliminary hearing transcript merely presented some information as to what appellant's *conduct* might have been, but nothing about what he actually pled guilty to. (See, e.g., *United States v. Marcia-Acosta* (9th Cir. 2015) 780 F.3d 1244, 1255 ["[T]he Shepard documents in this case at most suggest that [defendant] *committed* the crime of intentional aggravated assault. They do not show that Marcia-Acosta was *convicted* of that crime."].)

This Court should grant review to resolve the above conflict and lingering divide between *Descamps* and *McGee* and to ensure that other courts of appeal do not similarly reject the now published California authority on the issue based on an improper legal analysis.

II.

IF FULL REVIEW IS NOT GRANTED ON ISSUE I, APPELLANT REQUESTS THAT THIS COURT GRANT REVIEW AND TRANSFER THE CASE BACK TO THE COURT OF APPEAL WITH DIRECTIONS TO RECONSIDER ITS ANALYSIS IN LIGHT OF *MARIN* AND *DENARD* WHICH WERE BOTH ISSUED AFTER THIS CASE WAS SUBMITTED FOR AN OPINION.

This case was submitted for opinion on September 10, 2015.

People v. Marin (2015) 240 Cal.App.4th 1344 was issued by Division Four of the Second Appellate District on October 7, 2015, review was not sought, and *Marin* is now final.

The opinion herein was issued on November 16, 2015, and appellant's petition for rehearing to specifically address *Marin* was denied.

On December 3, 2015, the Second Appellate District Court, Division One, issued *People v. Denard* (B253464) 2015 Cal.App.LEXIS 1080.

If this Court does not grant full review, appellant requests that this Court grant review and transfer the case back to the Court of Appeal with directions to reconsider its analysis in light of *Marin* and *Denard.* (Rules 8.500(b)(4), 8.528(d); *People v. Howard* (1987) 190 Cal.App.3d 41, 45.)

It is clear that if appellant's case had been randomly assigned to Division Four or One of the Second Appellant District it would have been reversed. By chance it was assigned to Division Six and has been upheld. This is a fundamentally arbitrary and capricious outcome that should at a minimum receive further analysis from Division Six.

III.

UNDER *CRAWFORD*, A TRIAL COURT IS PRECLUDED FROM RELYING ON A PRELIMINARY HEARING TRANSCRIPT TO MAKE A DETERMINATION OF WHETHER THE CONDUCT UNDERLYING A PRIOR CONVICTION CONSTITUTED A STRIKE WITHOUT AN ACTUAL SHOWING OF WITNESS UNAVAILABILITY.

In *People v. Reed* (1996) 13 Cal.4th 217, 220 (*Reed*), this Court held that a witness from a preliminary hearing is unavailable for purposes of trial on a prior because the prosecution is judicially precluded from calling witnesses to prove the existence of the prior. This Court explained as follows:

> [D]efendant contends the preliminary hearing transcript excerpts do not come within this hearsay exception because the witnesses, Mr. and Mrs. Martinez, were not shown to be unavailable. We disagree: the witnesses were legally unavailable because, under the rule announced in *People v. Guerrero, supra,* 44 Cal. 3d 343, the prosecution was precluded from presenting any evidence outside the record of conviction to prove the circumstances of the prior crime.
>
> ...
>
> By holding in *Guerrero* that the trier of fact may look to the entire record of conviction "but no further" [citation], we

> precluded the prosecution from calling live witnesses to the criminal acts in the prior case....Under *Guerrero*, the prosecution was absolutely barred from presenting such evidence. The witnesses' live testimony was thus unavailable as a matter of law. (*Reed* at 225-227.)

Appellant asserts that the above rationale is no longer valid because *Reed* predated *Crawford v. Washington* (2004) 541 U.S. 36 ("*Crawford*") and has not been reconsidered by this Court. As explained below, under *Crawford* and its progeny the *Reed* judicially created rule of unavailability can no longer be valid.

A witness is considered "unavailable" for purposes of the constitutional right of confrontation when the prosecution has made a good-faith effort to secure his presence at trial. (See, e.g., *Ohio v. Roberts* (1980) 448 U.S. 56, 74 *(Ohio)*, overruled on other grounds by *Crawford* at p. 36.)

As the Supreme Court explained in *Ohio*: "The law does not require the doing of a futile act. Thus, if no possibility of procuring the witness exists (as, for example, the witness' intervening death), 'good faith' demands nothing of the prosecution. But if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation. 'The lengths to which the prosecution must go to produce a witness...is a question of reasonableness.' [Citation.] The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and

present that witness. As with other evidentiary proponents, the prosecution bears the burden of establishing this predicate." (*Ohio, supra*, at pp. 74-75.)

While the existence of a privilege has been held to create unavailability if properly asserted (*Crawford* involved the marital privilege), a *judicially* fashioned evidentiary rule that creates unavailability through an absolute preclusion to the right to call witnesses cannot pass constitutional muster.

The United States Supreme Court, following *Crawford,* has been clear that the Sixth Amendment precludes judicially created rules that circumvent the right to confrontation:

> [T]he guarantee of confrontation is no guarantee at all if it is subject to whatever exceptions courts from time to time consider "fair." It is not the role of courts to extrapolate from the words of the Sixth Amendment to the values behind it, and then to enforce its guarantees only to the extent they serve (in the courts' views) those underlying values. The Sixth Amendment seeks fairness indeed--but seeks it through very specific means (one of which is confrontation) that were the trial rights of Englishmen. It "does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts." [Citation.] *Giles v. California* (2008) 554 U.S. 353, 375 [171 L. Ed. 2d 488, 128 S. Ct. 2678] (*Giles*).

In *Giles*, the United States Supreme Court overturned an attempt, like the one in *Reed*, to judicially limit the right to confrontation beyond what the framers intended. This Court had expanded the rule of forfeiture by wrongdoing, which fundamentally involves unavailability, to extinguish

confrontation claims *regardless* of the wrongdoer's motivation. The Supreme Court overturned this Court's decision and clarified that for forfeiture by wrongdoing to apply, the wrongdoer's actions must have been "designed to prevent the witness from testifying." (*Giles* at pp. 353-369.)

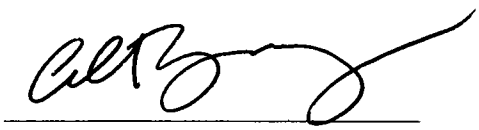
Giles is instructive because it shows that a court is not free to fashion whatever unavailability rules it deems reasonable. Instead, it is only the exceptions contemplated by the framers that can stand. Here, like in *Giles*, the *Reed* rule cannot be used circumvent a defendant's right to confrontation by precluding a witness from testifying.

As such, it is apparent that *Reed* is no longer valid under *Crawford* and that an actual showing of unavailability must be made. Appellant requests that this Court grant review to address this issue.

CONCLUSION

For the above stated reasons and pursuant to rule 8.500, petitioner requests that this Petition for Review be granted.

Respectfully submitted,



Christian C. Buckley, Esq.

CERTIFICATE OF WORD COUNT COMPUTATION
Cal. Rules of Court, rule 8.204(c)(1)

The text of this Petition consists of 4,424 words as counted by the Microsoft Word Processing Program used to prepare this document.

Dated: December 15, 2015

Christian C. Buckley
Attorney for Appellant

Appendix A

Court of Appeal Opinion

[Included in Printed Original and Court Copies Only]

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

SULMA MARILYN GALLARDO,

Defendant and Appellant.

2d Crim. No. B257357
(Super. Ct. No. VA126705-01)
(Los Angeles County)

A jury found Sulma Marilyn Gallardo guilty of robbery (Pen. Code, § 211), being an accessory after the fact (§ 32), and transportation of marijuana (Health & Saf. Code, § 11360, subd. (a)).[1] The jury also found true that a principal was armed with a firearm during the commission of the robbery. (§ 12022, subd. (a)(1).) The trial court found she suffered a prior conviction within the meaning of the three strikes law (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d)), and one prior serious felony conviction (§ 667, subd. (a)).

We reverse the accessory conviction (§ 32) because it is based on the same facts as the robbery conviction. In all other respects, we affirm.

[1] All statutory references are to the Penal Code unless otherwise stated.

FACTS

David Narvez worked for a check cashing company delivering cash to its various establishments. On September 14, 2012, at approximately 10:00 a.m., Narvez withdrew $190,000 in cash from a bank, and drove south along Long Beach Boulevard. A pickup truck with no license plates cut in front of him and came to an abrupt stop. A Chevrolet Suburban struck Narvez from behind, blocking him in. A "Black man" got out of the Suburban and broke the passenger window of Narvez's vehicle with a hammer. The man pointed a handgun at Narvez and said, "[G[ive me the fucking money you motherfucker before I kill you." Narvez gave the man two bags containing a total of $66,000. The man returned to the Suburban and the pickup truck left the scene.

Narvez called 911. As Narvez was speaking to the 911 operator, an unidentified man in the background told Narvez the license plate number of the Suburban and that three Black men and one woman had been involved. Narvez relayed the information to the operator. The man left while Narvez was still talking to the operator. He did not identify himself or leave any contact information.

On September 21, 2014, the police stopped the Suburban. Gallardo was driving and Jason Dwight Andrews was in the passenger seat.

The police searched the Suburban and recovered two loaded semiautomatic handguns, four plastic bags filled with marijuana, a potato chip canister containing 11 bags of marijuana, 0.86 grams of methamphetamine, 1.26 grams of cocaine and a digital scale.

Gallardo and Andrews were taken into custody. After being advised of her rights, Gallardo agreed to talk to the police. She admitted that she owned the Suburban. She said on the morning of the robbery, a friend asked her to give Andrews a ride. She picked up Andrews and another man. Andrews told her to follow a black pickup truck. She followed the truck until it came to a stop. Andrews and the second man got out of her Suburban and ran to a vehicle that was stopped in front of the pickup truck. She did not know what the men were doing. The men returned to the Suburban holding firearms.

Andrews told her to drive away. They gave her $40 for gas and told her not to say anything. She said Andrews and another man owned the drugs and guns the police found in her Suburban when she was arrested.

Defense

Los Angeles County Deputy Sheriff Jennifer Gutierrez testified Narvez told her the man who robbed him came from the black pickup truck and returned to the black truck after the robbery.

A sheriff's department criminalist testified the nine-millimeter handgun did not contain Gallardo's DNA.

DISCUSSION

I.

Gallardo contends the trial court erred in denying her suppression motion.

Gallardo argues her arrest was not based on sufficiently reliable information. At the hearing on the suppression motion, Detective Arturo Spencer testified he spoke with Narvez at the location of the robbery. Narvez told Spencer that a witness handed him an envelope moments after the robbery. The witness told Narvez that the envelope had the license plate number of a vehicle involved in the offense. Spencer entered the number in the law enforcement data base.

Officer Michael Gallegos testified he was on patrol when he heard a radio broadcast that Gallardo's license plate had been detected by an automated license reader in Huntington Park. Gallegos later saw the Suburban and confirmed it was wanted in connection with an armed robbery. Gallegos called for backups. When they arrived, he stopped the Suburban.

Deputy Steven Johnson testified he arrived after the Suburban had been stopped. A strong odor of marijuana emanated from the car. He searched the car and recovered firearms, drugs and a scale.

The trial court denied the suppression motion finding that the information provided to Narvez by the witness was reliable, that officers had reasonable suspicion to detain Gallardo, and that the ensuing search of the Suburban was lawful.

Gallardo argues the information supporting her detention was insufficiently reliable because it came from an unknown person. She points out the detention was made on information passed through official channels. She relies on the *Harvey-Madden* rule that an officer making the detention may rely on official channels, but the prosecution must show the officer originally supplying the information had sufficient information to justify the detention. (*People v. Madden* (1970) 2 Cal.3d 1017; *People v. Harvey* (1958) 156 Cal.App.2d 516.) Here there was no violation of the so-called *Harvey/Madden* rule.

Our Supreme Court has explained what is necessary to justify an investigative stop or detention. "[I]n order to justify an investigative stop or detention the circumstances known or apparent to the officer must include specific and articulable facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is involved in that activity. Not only must he subjectively entertain such a suspicion, but it must be objectively reasonable for him to do so: the facts must be such as would cause any reasonable police officer in a like position, drawing when appropriate on his training and experience . . . to suspect the same criminal activity and the same involvement by the person in question." (*In re Tony C.* (1978) 21 Cal.3d 888, 893; *People v. Superior Court (Kiefer)* (1970) 3 Cal.3d 807, 827.)

Under the appropriate circumstances, an anonymous tip can provide a reasonable suspicion sufficient to justify a detention. (See, e.g., *In re Richard G.* (2009) 173 Cal.App.4th 1252, 1257-1258 [anonymous caller reporting late night disturbance involving firearm and describing the people involved and their clothing].) Just as in *Richard G.*, reliability of the information surrounding the robbery established sufficient ground for the arresting officer to stop Gallardo's vehicle.

We disagree with Gallardo's assertion that the supporting facts here consist of nothing more than some numbers written on an envelope given to the victim by an unknown person. The facts include that the victim reported a robbery and that the unknown person gave the victim the license plate numbers at the scene moments after the robbery occurred. There is nothing to suggest the license plate numbers were the product of a hoax, or that the unknown person was motivated by anything other than a desire to assist the victim and the police. Any reasonable police officer would make an investigative stop or detention based on that information.

The trial court properly denied the motion to suppress.

II.

Gallardo contends the trial court erred in admitting the unidentified witness's hearsay statement heard on the victim's 911 call.

Over Gallardo's objection, the trial court admitted the unidentified witness's statements under the spontaneous statement exception to the hearsay rule. Evidence Code section 1240 provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] [p]urports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] [w]as made spontaneously while the declarant was under the stress of excitement caused by such perception." We must uphold the trial court's determination that the statements are admissible under Evidence Code section 1240 if it is supported by substantial evidence. (*People v. Brown* (2003) 31 Cal.4th 518, 541.)

Gallardo claims there is no evidence the unidentified witness was under the "stress of excitement" caused by witnessing the robbery. She argues not every witness at the scene of the crime may be assumed to be in an excited condition. That may be true of many crimes. But the trial court could reasonably conclude that anyone who witnessed an armed robbery during which a handgun was pointed at the victim would be in an excited condition. Finally, that the 911 call took place two minutes after the robbery shows that the witness was still under the influence of the event when he made the

statements. The trial court could reasonably conclude that the witness's statements are admissible under Evidence Code section 1240.

III.

Gallardo contends the trial court's failure to instruct on the firearm enhancement to count 1 (robbery) requires reversal.

The People concede that it would have been better had the trial court instructed with CALCRIM No. 3115. Nevertheless, the People point out that other instructions properly instructed the jury on all elements of the firearm enhancement.

The jury found that a principal was armed with a firearm during the commission of the robbery. The trial court instructed the jury that "principals" are those who directly and actively commit the crime or those who aid and abet in its commission; that "firearm" includes a pistol or revolver; and that "armed with a firearm" means "knowingly to carry a firearm or have it available for offensive or defensive use." The jury had all the information it needed to decide the enhancement. Due process is not violated where all the information pertaining to an enhancement in an omitted instruction is provided in other properly given instructions. (*People v. Friend* (2009) 47 Cal.4th 1, 54.)

Gallardo argues the jury could not have pieced together the information from various instructions. But there is no reason why it could not have. The instructions must be considered as a whole and we assume the jurors are capable of correlating and following the instructions. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.)

IV.

Gallardo contends that the trial court erred in relying on hearsay and undertaking judicial fact finding in finding her prior conviction to be a strike.

The information alleged that Gallardo had suffered a prior felony conviction for violating section 245, subdivision (a)(1), and that the conviction constitutes a strike within the meaning of the three strikes law.

Prior to the jury's verdict on the substantive offenses, Gallardo waived her right to a jury trial on the prior conviction allegation. In so waiving, she acknowledged that she "will not be entitled in any manner whatsoever to a jury trial concerning that prior conviction."

The trial court examined the minute order showing Gallardo pled no contest to violating section 245, subdivision (a)(1). The trial court also considered, over Gallardo's hearsay objection, the preliminary hearing transcript from that case. During the preliminary hearing, the victim testified that Gallardo pointed a knife at him and punched him while holding the knife. The victim said the knife might have nicked him by accident.

At the time Gallardo pled no contest to violating section 245, subdivision (a)(1), the offense could be committed either by assaulting another person with a deadly weapon or by use of force likely to cause great bodily injury. Only where the offense is committed by use of a deadly weapon does it constitute a serious felony, and thus a strike under the three strikes law. (§ 1192.7, subd. (c)(23), (31); *People v. Delgado* (2008) 43 Cal.4th 1059, 1065.) The trial court found true that Gallardo suffered a prior conviction and that it constituted a strike.

Gallardo relies on *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, for the proposition that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Gallardo argues that the question whether her prior conviction constitutes a strike should have been submitted to a jury. But Gallardo ignores her waiver of a jury trial "in any manner whatsoever" relating to the prior conviction allegation.

In any event, even had Gallardo not waived a jury, the question whether her prior conviction constitutes a strike would still be a matter for the trial court.

In *People v. McGee* (2006) 38 Cal.4th 682, the California Supreme Court determined the court should decide whether a prior conviction constitutes a strike. There,

the defendant had prior robbery convictions in Nevada. A prior conviction in a foreign jurisdiction is a strike in California only if the convictions involved conduct that would also constitute a strike under California law. (*Id.* at p. 691.) The court noted there are distinctions between the elements of robbery in Nevada and California such that "it was at least theoretically possible that defendant's Nevada convictions involved conduct that would not constitute robbery under California law." (*Id.* at p. 688.) The trial court examined various documents from the Nevada convictions, including transcripts from preliminary hearings. The court concluded that the defendant's conduct in the Nevada robberies constituted strikes. (*Id.* at p. 690.) The Court of Appeal reversed, concluding that under *Apprendi* the question should have been submitted to the jury.

Our Supreme Court reversed the Court of Appeal. The court held that the defendant was not entitled to have a jury decide whether his Nevada robbery convictions qualified as strikes under California law. In reversing, our Supreme Court stated: "[W]e observe that the matter presented is not, as the Court of Appeal appears to have assumed, a determination or finding 'about the [defendant's earlier] conduct itself, such as the intent with which a defendant acted.' Instead, it is a determination regarding the nature or basis of the defendant's *prior conviction*—specifically, whether *that conviction* qualified as a conviction of a serious felony. California law specifies that in making this determination, the inquiry is a limited one and must be based upon the record of the prior criminal proceeding, with a focus on the elements of the offense of which the defendant was convicted. If the enumeration of the elements of the offense does not resolve the issue, an examination of the record of the earlier criminal proceeding is required in order to ascertain whether that record reveals whether the conviction realistically may have been based on conduct that would not constitute a serious felony under California law." (*People v. McGee*, *supra*, 38 Cal.4th at p. 706.)

After *McGee*, the United States Supreme Court decided *Descamps v. United States* (2013) _ U.S. _ [186 L.Ed.2d 438] (*Descamps*). *Descamps* involves sentence enhancements under the federal Armed Career Criminal Act (ACCA). (18

U.S.C. § 924(e).) The ACCA provides for sentence enhancements for federal defendants who have prior convictions for certain felonies, including burglary. To determine whether a prior conviction constitutes one of those crimes, courts use the so-called "categorical approach." They compare the statutory elements of the crime constituting the prior conviction with the elements of a "generic crime"; that is, the offense as it is commonly understood. The defendant had prior California convictions for burglary. The generic crime of burglary has unlawful entry as an element. But the California statutory elements for burglary do not include unlawful entry. (§ 459.) Does the defendant have the right to a jury trial on the question whether his prior burglaries involved an unlawful entry?

In deciding that question, *Descamps* distinguished two types of statutes. One type of statute is a so-called "divisible statute." That kind of statute sets out one or more elements of the offense in the alternative. If one alternative matches an element in the generic offense but the other alternative does not, the court may consult "a limited class of documents, such as indictments and jury instructions," to determine which alternative formed the basis of the prior conviction. (*Descamps, supra*, _ U.S. at p. _ [186 L.Ed.2d at p. 449].) Then the court can apply the categorical approach by comparing the elements of the prior conviction with the elements of the generic crime. (*Ibid.*)

The second type of statute is a so-called "indivisible statute"; that is, a statute that does not contain alternative elements. A problem arises when an indivisible statute criminalizes a broader scope of conduct than the generic offense. Thus, for example, California's burglary statute, by not having unlawful entry as an element, criminalizes more conduct than a generic burglary. The court held that a sentencing court is not authorized to go beyond the elements of the prior conviction to make a finding of fact that the defendant's conduct constituted a generic crime; for example, that he made the unlawful entry necessary for generic burglary. The court stated: "The Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts,

unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances. [Citation.] Similarly, . . . when a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense's elements . . . ." (*Descamps, supra*, _ U.S. at p. _ [186 L.Ed.2d at p. 457].)

The recent case of *People v. Saez* (2015) 237 Cal.App.4th 1177, like *Descamps*, involved an indivisible statute. In *Saez*, the defendant had suffered prior convictions in Wisconsin. The prior convictions were under statutes that criminalized a broader scope of conduct than similar California statutes. *Saez* held that under *Descamps* the sentencing court cannot use the record of conviction to make a finding of fact that the defendant's conduct would have been a strike in California. (*Saez*, at pp. 1207-1208.)

This case is different. Here, we are concerned with a "divisible statute." The elements of the offense are stated in the alternative. Under *Descamps*, the sentencing court may consult extrinsic documents to determine which alternative formed the basis of the prior conviction. A jury determination is not required.

The next question is whether the trial court erred in basing its determination on the preliminary hearing transcript. *Descamps* states the sentencing court may consult "a limited class of documents, such as indictments and jury instructions." (*Descamps, supra*, _ U.S. at p. _ [186 L.Ed.2d at p. 449].) But nothing in *Descamps* excludes the preliminary hearing transcript from that class of documents.

Gallardo acknowledges that in *People v. Reed* (1996) 13 Cal.4th 217, 220, our Supreme Court held that statements from a preliminary hearing transcript that fell within a hearing exception could be used to prove a defendant's prior assault conviction involved the personal use of a dangerous or deadly weapon. Gallardo argues, however, that *McGee* overruled *Reed.* In support of her argument, Gallardo cites *McGee's* statement that the inquiry is to the nature of the conviction, not a relitigation of the defendant's prior conduct. (*People v. McGee, supra*, 38 Cal.4th at p. 706.) But nothing in *McGee* prohibits the use of a preliminary hearing transcript to determine the nature of

the conviction. In fact, *McGee* upheld the trial court's determination that was based on documents including transcripts from preliminary hearings. (*Id.* at p. 689.) Moreover, our Supreme Court has subsequent to *McGee* cited *Reed* with approval. (See *People v. Delgado, supra*, 43 Cal.4th at pp. 1065, 1071, fn. 5.) We are bound to follow *Reed.* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Finally, the trial court properly overruled Gallardo's hearsay objection. Evidence Code section 1291, subdivision (a)(2) provides: "Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: [¶] [t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing."

Gallardo argues that her interests and motives at the preliminary hearing were not the same as her interests and motives at the trial of the three strikes allegation. But her interests and motives need not be identical, only similar. (*People v. Zapien* (1993) 4 Cal.4th 929, 975.) Gallardo had an interest and motive at the preliminary hearing to challenge evidence that she used a knife. The use of a knife satisfied both the use of a deadly weapon element and the likelihood to inflict great bodily injury element of the offense.

Gallardo argues there was a showing that the witness who testified at the preliminary hearing was unavailable. But our Supreme Court rejected that argument in *Reed.* Because the prosecution is prevented from presenting any evidence outside the record of conviction, a witness who testified at the hearing is unavailable as a matter of law. (*People v. Reed, supra*, 13 Cal.4th at p. 226.)

V.

The People concede that Gallardo's conviction for being an accessory after the fact must be reversed.

The conviction for being an accessory was based on the same evidence underlying the robbery conviction. A conviction as both a principal and an accessory is prohibited where both convictions rest on essentially the same acts. (*People v. Mouton* (1993) 15 Cal.App.4th 1313, 1323.)

Gallardo's conviction for being an accessory after the fact (§ 32) is reversed. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

PROOF OF SERVICE

People v. Gallardo
Court of Appeal No. B257357

The undersigned declares that I am a citizen of the United States, over eighteen years of age, not a party to this cause, an attorney authorized to practice in the State of California, and my business address is 9921 Carmel Mountain Rd. #355, San Diego, California 92129.

That I served true copies of the attached **Appellant's Petition for Review** by mail or email as follows:

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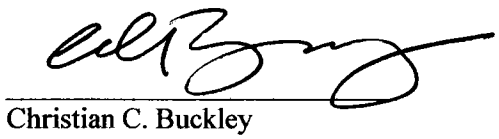
I declare under penalty of perjury that the foregoing is true and correct and that each said envelope was sealed, properly addressed, and deposited in the United States mail at San Diego County, California with postage fully prepaid on December 15, 2015.



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