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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. SULMA MARILYN GALLARDO, Defendant and Appellant.	SUPREME COURT NO. S231260 COURT OF APPEAL NO. B257357 SUPERIOR COURT NO. VA126705-01

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

Honorable Thomas I. McKnew, Jr., Judge

APPELLANT'S OPENING BRIEF ON THE MERITS

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Frank A. McGuire Clerk
Deputy

Christian C. Buckley, SBN 216998
Buckley & Buckley
9921 Carmel Mountain Rd. #355
San Diego, CA 92129
(858) 538-6054
ccbuckley75@gmail.com
Attorney for Appellant Gallardo

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Honorable Thomas I. McKnew, Jr., Judge

APPELLANT'S OPENING BRIEF ON THE MERITS

ISSUE ON REVIEW

"Was the trial court's decision that defendant's prior conviction constituted a strike incompatible with *Descamps v. U.S.* (2013) 570 U.S. __ (133 S.Ct. 2276) because the trial court relied on judicial fact-finding beyond the elements of the actual prior conviction?"

INTRODUCTION

In *People v. McGee* (2006) 38 Cal.4th 682 [*McGee*], this Court reaffirmed the *People v. Guerrero* (1988) 44 Cal.3d 343 [*Guerrero*] rule that a trial court may review a prior record of conviction to determine whether the prior offense was a serious felony based upon the conduct and facts underlying the conviction. This Court concluded that "[i]f 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." (*McGee, supra,* 38 Cal.4th at p. 706.)

In reaching the above conclusion, this Court agreed with the People "that a criminal defendant has no federal constitutional right to a jury trial on factual circumstances and conduct underlying a prior conviction used to enhance punishment." (*Id.* at pp. 692-709.) However, this Court acknowledged that in light of *Shepard v. United States* (2005) 544 U.S. 13 [*Shepard*] a "majority of the high court" might view California's allowance for judicial factfinding to be a violation of the Sixth and Fourteenth Amendments under *Apprendi v. New Jersey* (2000) 530 U.S. 466 [*Apprendi*]. (*People v. McGee, supra*, 38 Cal.4th at pp. 686, 708-709.)

The United States Supreme Court in *Descamps v. U.S.* (2013) 570 U.S. __ (133 S.Ct. 2276) [*Descamps*] and again in *Mathis v. United States* (2016) 597 U.S. ___ [*Mathis*] has now made clear that California's rule authorizing factfinding beyond the elements of the prior offense violates the federal constitution. The Sixth and Fourteenth Amendments, as interpreted in *Apprendi* and *Shepard*, allow a trial court to determine the prior "crime of conviction" based only on "an elements-based inquiry" and not "an evidence-based one" that permits any consideration of the conduct or facts underlying the prior conviction. (*Descamps, supra,* 133 S.Ct. at pp. 2287-2288.)

The trial court "can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." (*Mathis, supra,* 597 U.S. ____, slip opinion p. 10.) The Sixth Amendment does not "authorize the court to try to discern what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct…[because]… the Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt." (*Descamps, supra,* 133 S.Ct. at p. 2288.)

The High Court clarified that "the only facts the court can be sure the jury [found beyond a reasonable doubt] are those constituting elements of the offense—as distinct from amplifying but legally extraneous

circumstances. Similarly,...when a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense's elements; whatever he says, or fails to say, about superfluous facts cannot license a later sentencing court to impose extra punishment." (*Id.* at p. 2288.) Under the Sixth and Fourteenth Amendments, the trial court may not make a 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." (*Ibid*; see also *Shepard, supra,* 544 U.S. at p. 25.)

In sum, *Descamps* concluded that a trial court is not permitted under the Sixth Amendment to use a "circumstance-specific review" to "look beyond the elements to the evidence or...to explore whether a person convicted of one crime could also have been convicted of another, more serious offense." (*Descamps, supra,* 133 S.Ct. at p. 2292.)

In the context of this case, pursuant to *Descamps* and the Sixth Amendment, the trial court was only permitted to review evidence of the plea proceeding to answer the question: "Did appellant plead guilty to assault with a deadly weapon?" The court was not permitted to instead answer the question: "Did appellant *commit* an assault with a deadly weapon?" The first question asks for a legal answer based on proof of the elements of the crime of conviction already admitted by the defendant. The

second asks for a disputed factual answer based on evidence of conduct not specifically admitted by the defendant as part of the plea. (*Apprendi, supra,* 530 U.S. at p. 490; *Descamps, supra,* 133 S.Ct. at p. 2288.)

In this case, appellant did not admit and a jury did not agree that she used a knife during the assault. And "even if...[a] jury could have readily reached consensus" that she did, this "sentencing court [could not] supply that missing judgment. Whatever the underlying facts or the evidence presented," appellant was not "convicted, in the deliberate and considered way the Constitution guarantees" of a serious felony offense. (*Descamps, supra,* 133 S.Ct. at p. 2290.) Therefore, under *Descamps*, no actual conviction for assault with a deadly weapon exists, and it was error for the trial court to reach the opposite conclusion based on conduct detailed in the preliminary hearing transcript.

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STATEMENT OF THE CASE AND FACTS

On April 4, 2014, a jury found Sulma Gallardo (appellant) guilty of the September 14, 2012, robbery of David Narvez in violation of Penal Code section 211 and of the September 21, 2012, possession of a firearm in violation of Penal Code section 29800, subdivision (a)(1). (2CT 345-347, 352-355, 359-361; 3RT 1504-1509.)[1] The jury also found a section 12022, subdivision (a)(1), firearm allegation true with respect to the Count 1 robbery. (2CT 345; 3RT 1504.)

As relevant here, the Information also alleged that appellant previously suffered one felony conviction that qualified as a "serious felony" within the meaning of sections 667, subdivision (a), and 667, subdivisions (b) through (i). (1CT 148-149.)

The prior conviction at issue involved appellant's entry of a no contest plea in 2005 to one generic count of violating section "245(a)(1)" on October 23, 2004. (ACT 9.) To prove that the prior conviction constituted a serious felony, the prosecution offered two items of evidence: the minute order from the April 21, 2005, plea hearing; and a transcript of the November 16, 2004, preliminary hearing. (ACT 5; 3RT 1804-1808.)

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[1] Clerk's, Augmented Clerk's, Reporter's and Augmented Reporter's Transcripts are designated "CT," "ACT," "RT," and "ART" respectively with numerical volume references. All further section references are to the California Penal Code unless otherwise noted.

The minute order reflected a plea to one generic count of violating section "245(A)(1)" with no additional factual admission or specific description of the type of assault admitted (e.g., "likely GBI" or "deadly weapon"). (ACT 1-4.) Appellant was placed on probation for the offense, and no other documentation was provided to the trial court. (ACT 2-3.)

The transcript from the preliminary hearing included testimony from the victim 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 preliminary hearing court made no factual findings regarding the type of assault or whether appellant personally used a weapon. (ACT 34.)

At the prior strike hearing 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 serious felony. (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 serious felony based on the 2004 preliminary hearing transcript testimony regarding use of the knife. (3RT 1808.)

ARGUMENTS

I.

UNDER THE SIXTH AND FOURTEENTH AMENDMENTS, AS INTERPRETED BY THE UNITED STATES SUPREME COURT IN *DESCAMPS V. U.S.* (2013) 570 U.S. __ AND *MATHIS V. UNITED STATES* (2016) 597 U.S. ___, A TRIAL COURT'S DETERMINATION REGARDING THE NATURE OF A PRIOR CONVICTION FOR THE PURPOSE OF USING IT TO ENHANCE A CURRENT SENTENCE MUST BE BASED EXCLUSIVELY ON THE ELEMENTS OF THAT ACTUAL PRIOR CONVICTION WITHOUT ANY CONSIDERATION OF THE FACTS AND CONDUCT UNDERLYING THE OFFENSE.

A. Analysis of *Descamps* and prior related Supreme Court authorities.

Under the Sixth and Fourteenth Amendments, "[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." (*Apprendi, supra,* 530 U.S. at p. 490.)[2]

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[2] To avoid unnecessary redundancy appellant omits further references to the Fourteenth Amendment acting in concert with the Sixth Amendment. *Apprendi* based a defendant's right to jury trial, with proof beyond a reasonable doubt, on facts that increase the sentence beyond the statutory maximum on the due process clause of the Fourteenth Amendment. (*Apprendi, supra,* 530 U.S. at pp. 469, 476, 490.) The High Court in *Shepard* referenced both amendments: "[T]he Sixth and Fourteenth Amendments guarantee a jury standing between a defendant and the power of the State, and they guarantee a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence. (*Shepard, supra,* 544 U.S. at p. 25.) Other High Court decisions, including *Descamps* reference only the Sixth Amendment right to a jury trial. (see *Blakely v. Washington* (2004) 542 U.S. 296, 298, 305, 308–312.) Appellant asserts that *Apprendi, Shepard, Descamps* and their progeny should be "best viewed as being based on both amendments." (*McGee, supra,* 38 Cal.4th at p. 713, fn 3; dis. opn. of Kennard, J.)

The United States Supreme Court in *Descamps* made clear that the Sixth Amendment, as interpreted in *Apprendi* and *Shepherd*, only allows a trial court to identify "the defendant's crime of conviction" which is "an elements-based inquiry" not "an evidence-based one." (*Descamps, supra,* 133 S.Ct. at pp. 2287-2288.) Under *Descamps*, the "conviction" that is covered by the *Almendarez-Torres* "fact of a prior conviction" exception to *Apprendi* is the statutory offense defined solely by the elements of the charge that was found by the jury or admitted by the defendant.[3]

The reason for this limitation, as the Supreme Court explained, is that the Sixth Amendment does not "authorize the court to try to discern what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct...[because]... 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. Similarly,...when a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense's elements; whatever he says, or fails to say, about superfluous facts cannot license a later sentencing court to impose extra punishment." (*Descamps, supra,* 133 S.Ct. at p. 2288.)

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[3] *Almendarez-Torres v. United States* (1998) 523 U.S. 224.

In *Descamps*, the prosecution sought to enhance the defendant's maximum ten year penalty through application of The Armed Career Criminals Act (ACCA) which prescribes a mandatory minimum sentence of 15 years for a person who is guilty of possession of a firearm and has three previous convictions for a "violent felony" or a serious drug offense. (*Id.* at p. 2882.) The ACCA defines a "violent felony" to mean any felony, whether state or federal, that "has as an element the use, attempted use, or threatened use of physical force against the person of another," or that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." (*Ibid.*)[4]

As one of the qualifying offenses necessary to apply the ACCA to Descamps, the prosecution sought to rely on a guilty plea to a California burglary. Over objection, the trial court used the modified categorical approach (detailed below) to examine the record of the plea colloquy to discover whether Descamps had "admitted the elements" of a qualifying federal burglary offense when entering his plea. (*Descamps, supra,* 133 S.Ct. at p. 2882.) At that plea hearing, the prosecutor proffered that the

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[4] The implications of the Supreme Court's rejection of the judicial factfinding required by the final portion of this provision on Due Process grounds in *Johnson v. United States* (2015) __ U.S. __, 135 S.Ct. 2551 is discussed in Argument I, Subsection C below.

crime "'involve[d] the breaking and entering of a grocery store,'" and Descamps failed to object to that statement. (*Ibid.*) Based on that exchange, the trial court found that the California burglary factually qualified as a burglary under the ACCA. (*Ibid.*)

The Supreme Court rejected the trial court's finding and the Ninth Circuit's approach which allowed judicial analysis of the facts and conduct underlying the prior conviction. (*Id.* at pp. 2286-2291.) Because the Supreme Court based the *Descamps* holding on a series of its prior opinions and a rejection of the Ninth Circuit's system, the opinion must be placed in the context of those cases.

In *Apprendi*, the Supreme Court held that the Sixth Amendment requires that "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." (*Apprendi, supra,* 530 U.S. at pp. 490, 476.) The limited *Almendarez-Torres* exception to this general rule was recognized for the "fact of a prior conviction." (*Id.* at pp. 489-490.) The rationale for the exception was that the defendant received the protections of the Sixth Amendment in the prior trial that gave rise to the conviction. (*Id.* at p. 488.) As a result, a later court could confidently rely on the fact that the elements of the prior conviction were either found true beyond a reasonable doubt by a jury or admitted by the defendant.

In the federal ACCA system and to apply the *Almendarez-Torres* exception to *Apprendi*, a court must determine what state offense was committed and then compare that offense to the applicable ACCA federal predicate. To facilitate this process, the Supreme Court authorized the categorical and modified categorical approaches to identify the elements of the state offense and complete the comparison.[5]

In *Taylor v. United States* (1990) 495 U.S. 575, 600 [*Taylor*] a pre-*Apprendi* case, the Supreme Court established the "formal categorical approach" where sentencing courts may "look only to the statutory definitions" of prior convictions and not "to the particular facts underlying those convictions." (*Ibid.*) Under this approach, a state offense qualifies as a federal enhancement predicate if it's statutory elements match or are

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[5] The Court of Appeal herein attempted to sidestep the constitutional issue by concluding that California's assault statute would qualify for application of the modified categorical approach rather than the categorical approach. (Opinion p. 10.) Even if true, that distinction has nothing to do with the Sixth Amendment issue which precludes judicial factfinding under both approaches. "[T]he modified approach merely helps implement the categorical approach....[It] acts not as an exception, but instead as a tool. It retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime. And it preserves the categorical approach's basic method: comparing those elements with the generic offense's. All the modified approach adds is a mechanism for making that comparison when a statute lists multiple, alternative elements, and so effectively creates "several different... crimes." [Citation.]....[The] job, as we have always understood it, of the modified approach [is] to identify, from among several alternatives, the crime of conviction so that the court can compare it to the generic offense." (*Descamps, supra,* 133 S.Ct. at p. 2285.)

narrower than the relevant federal offense. If, on the other hand, the state offense is broader than the federal crime then the state offense could not serve as an ACCA predicate. The Supreme Court emphasized that only the elements were at issue - not the facts. (*Id.* at p. 591.)

In *Shepard* a post-*Apprendi* case, the Supreme Court formally extended the above *Taylor* rule to plea cases and provided guidance where the state statute included alternative versions of an offense, only some of which qualified as a federal predicate. Under the so called "modified categorical" approach, the Supreme Court authorized sentencing courts to scrutinize a restricted set of materials to determine, based on the elements found by a jury or admitted by the defendant, which of the alternative versions of the state "divisible offense" formed the basis for the conviction. (*Shepard, supra,* 544 U.S. at pp. 25-26.)

This Court correctly noted in *McGee, supra,* 38 Cal.4th at p. 708, that the decision in *Shepard* to apply the ACCA and the *Taylor* rules to plea cases was partially resolved on statutory interpretation grounds. (*Shepherd, supra,* 544 U.S. at pp. 19-24, Part II.)

However, in Part III of *Shepard*, a four-justice plurality expressed the view that Sixth Amendment jurisprudence "provide[d] a further reason to adhere to the demanding requirement that any sentence under the ACCA rest on a showing that a prior conviction 'necessarily' involved (and a prior

plea necessarily admitted) facts equating to" the applicable predicate offense. (*Id.* at p. 24.)

The *Shepard* plurality rejected the suggestion that it would be permissible for a trial court to "make a disputed finding of fact about what the defendant and state judge must have understood as the factual basis of" the prior plea to be. (*Id.* at p. 25.) The High Court stated that such a finding would "rais[e] the concern underlying *Jones v. United States* (1999) 526 U.S. 227… and *Apprendi*…: the Sixth and Fourteenth Amendments guarantee a jury standing between a defendant and the power of the state, and they guarantee a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence. (*Ibid.*) "[A] fact **about a prior conviction**, it is too far removed from the conclusive significance of a prior judicial record…to say that *Almendarez-Torres*…clearly authorizes a judge to resolve the dispute." (*Id.* at p. 25; bold added.)[6]

Despite the above authorities, the Ninth Circuit adopted a different fact and conduct based approach. Such approach was remarkably similar to the rule advanced by this Court in *Guerrero* and *McGee*.

In *United States v. Aguila-Montes de Oca* (9th Cir. 2011) 655 F.3d 915 (en banc) [*Aguila-Montes*], the Ninth Circuit dramatically revised the

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[6] Writing separately, Justice Thomas concurred in the judgment on the basis that *Apprendi* precludes all judicial factfinding. (*Id.* at p. 28.)

Supreme Court's traditional modified categorical approach by applying it to a broad range of cases and by allowing trial courts to look at the facts underlying the state conviction to decide whether the defendant would theoretically have been convicted of an ACCA predicate offense had he been tried under the federal definition. (*Id.* at p. 935.) [7]

Aguila-Montes authorized a review of the record form the prior case (*id.* at pp. 935-936) to determine "what facts" can "confident[ly]" be thought to underlie the defendant's conviction in light of the "prosecutorial theory of the case" and the "facts put forward by the government." (*Id.* at pp. 936-937.) In adopting this approach, the Ninth Circuit allowed the trial court to ignore the "specific words in the statute" or actual elements found by the jury or admitted by the defendant in favor of examining the record of conviction to identify facts about what the defendant did. (*Ibid.*)

The Supreme Court in *Descamps* emphatically rejected the above approach because it "turns an elements-based inquiry into an evidence-based one. It asks not whether 'statutory definitions' necessarily require an adjudicator to find the [ACCA qualifying offense], but instead whether the

[7] The Ninth Circuit was actually fiercely divided. An extensive "concurring-dissent," joined in by five justices vehemently disagreed with the majority's expansion of the modified categorical approach and allowance for "impermissible and unreliable judicial factfinding" beyond the elements of the prior offense. (*Aguila-Montes, supra,* 655 F.3d at pp. 947-975, 975; concurrence.)

prosecutor's case realistically led the adjudicator to make that determination. And it makes examination of extra-statutory documents not a tool used in a 'narrow range of cases' to identify the relevant element from a statute with multiple alternatives, but rather a device employed in every case to evaluate the facts that the judge or jury found." (*Descamps, supra,* 133 S.Ct. at p. 2287.)

The Supreme Court criticized the approach because it allowed trial judges to determine "what facts" can "confident[ly]" be thought to underlie the defendant's conviction in light of the "prosecutorial theory of the case" and the "facts put forward by the government" rather than to ascertain what specific elements were found true by a jury or admitted by the defendant as part of the plea. (*Id.* at p. 2286.)

The Supreme Court continued by explaining that the Ninth Circuit approach violated its prior *Taylor-Apprendi-Shepard* line of precedents because instead of allowing a trial court to review admissible documents to determine the elements of the actual conviction it "looks to those materials to discover what the defendant actually did." (*Id.* at pp. 2287-2288.) The court made clear that it was rejecting any approach that allowed a court to make a determination of what the defendant "hypothetically could have been convicted [of] under a law criminalizing [his] conduct" or "what might have or could have been charged" (*Ibid.*; citations omitted.)

Under *Descamps*, the "fact of a prior conviction" means what it says – a judge is permitted to determine what actual conviction the defendant in fact suffered. Again narrowly construing *Almendarez-Torres*, the High Court concluded that the only non-disputed facts to which *Apprendi* need not apply are the facts represented by the elements found true by the jury or admitted as a result of the defendant's plea. All other facts remain disputed and are not part of the crime of conviction. (*Id.* at p. 2287-2288.)

At Footnote 3 of the plurality opinion in *Descamps*, the court addressed the dissent's claim that a class of non-elemental yet non-disputed facts existed upon which a sentencing court should be able to make reasonable inferences about what the factfinder found. (*Id.* at p. 2286, FN 3.) The majority rejected this assertion, concluding that a factfinder cannot be deemed to have "necessarily found" a "non-element—that is, a fact that by definition is not necessary to support a conviction." (*Id.* at p. 2286, FN 3.)

Most importantly, the Supreme Court made clear that all of the above problems ran afoul of not just the ACCA statutes and prior precedents, but of the Sixth Amendment. (*Descamps, supra,* 133 S.Ct. at p. 2288.) The Supreme Court stated:

> . . .[T]he Ninth Circuit's reworking authorizes the court to try to discern what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct. And there's the constitutional rub. 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. Similarly, as *Shepard* indicated, when a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense's elements; whatever he says, or fails to say, about superfluous facts cannot license a later sentencing court to impose extra punishment. So when the District Court here enhanced Descamps' sentence, based on his supposed acquiescence to a prosecutorial statement (that he "broke and entered") irrelevant to the crime charged, the court did just what we have said it cannot: rely on its own finding about a non-elemental fact to increase a defendant's maximum sentence. (*Id.* at pp. 2288-2289; citations omitted.)

The above language makes clear that the preclusion of judicial factfinding extensively detailed in both *Descamps* and *Shepherd* was based in the Sixth Amendment, not just the ACCA statutes and general theories of practicability and equity.

Nevertheless, the High Court did recognize the same inequity and impracticability of a fact based approach that this Court noted in *McGee* and *Guerrero.* (*Guerrero, supra,* 44 Cal.3d at p. 355.). The High Court reasoned:

> [T]he Ninth Circuit's decision creates the same "daunting" difficulties and inequities that first encouraged us to adopt the categorical approach. In case after case, sentencing courts… would have to expend resources examining (often aged) documents for evidence that a defendant admitted in a plea colloquy, or a prosecutor showed at trial, facts that, although unnecessary to the crime of conviction, satisfy an element of the relevant…offense. The meaning of those documents will often be uncertain. And the statements of fact in them may be

> downright wrong. A defendant, after all, often has little incentive to contest facts that are not elements of the charged offense—and may have good reason not to. At trial, extraneous facts and arguments may confuse the jury. (Indeed, the court may prohibit them for that reason.) And during plea hearings, the defendant may not wish to irk the prosecutor or court by squabbling about superfluous factual allegations....
>
> Still worse, the [Ninth Circuit] approach will deprive some defendants of the benefits of their negotiated plea deals. Assume (as happens every day) that a defendant surrenders his right to trial in exchange for the government's agreement that he plead guilty to a less serious crime, whose elements do not match an ACCA offense. Under the Ninth Circuit's view, a later sentencing court could still treat the defendant as though he had pleaded to an ACCA predicate, based on legally extraneous statements found in the old record. *Taylor* recognized the problem: "[I]f a guilty plea to a lesser, nonburglary offense was the result of a plea bargain," the Court stated, "it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty" to generic burglary. That way of proceeding, on top of everything else, would allow a later sentencing court to rewrite the parties' bargain. (*Descamps, supra,* 133 S.Ct. at p. 2289.)

This analysis demonstrates that the finding of non-elemental facts also implicates other statutory and constitutional protections that make a new determination of the crime of conviction invalid.

In sum, *Descamps* concluded that a trial court is not permitted to use a "circumstance-specific review" under the Sixth Amendment to "look beyond the elements to the evidence." (*Descamps, supra,* 133 S.Ct. at p. 2292.) "Whatever the underlying facts or the evidence presented" a trial court is not permitted to find the existence of a prior conviction except

based on the elements of that offense which resulted in the conviction "in the deliberate and considered way the Constitution guarantees." (*Id.* at p. 2290.)

B. The Supreme Court recently reaffirmed the elements only based approach mandated by *Descamps* in *Mathis v. United States* (June 23, 2016) 597 U.S. ____.

On June 23, 2016, the Supreme Court in *Mathis v. United States* (2016) 597 U.S. ____ [*Mathis*] issued yet another opinion in the *Taylor-Apprendi-Shepard-Descamps* line.[8]

In *Mathis*, the High Court was forced to wrestle with an Iowa burglary statute that listed multiple locations (i.e. building, structure, land, or vehicle) that satisfied the "location" element of the state offense. The Eighth Circuit applied the modified categorical approach to the factual location alternatives despite them not being actual elements of the offense. (*Mathis* at slip opinion pp. 4-6.) The Supreme Court concluded that the modified categorical approach could not be applied to a statute listing multiple *alternative means* of satisfying a *single element* and ratified the holding and arguments of *Descamps* and the related prior authorities. Three portions of the opinion are particularly relevant here.

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[8] Justice Kagan delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Thomas, and Sotomayor, JJ., joined. Kennedy, J., and Thomas, J., filed concurring opinions. Breyer, J., filed a dissenting opinion, in which Ginsburg, J., joined. Alito, J., filed a dissenting opinion.

First, the Supreme Court succinctly explained the difference between elements and ancillary facts for purposes of the scope of permissible review stressing that the courts must "focus solely on whether the elements of the crime of conviction sufficiently match the elements of [the predicate offense], while ignoring the particular facts of the case." (*Mathis* at slip opinion p. 2.) The court further explained:

> "Elements" are the "constituent parts" of a crime's legal definition—the things the "prosecution must prove to sustain a conviction." At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant; and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty. Facts, by contrast, are mere real-world things— extraneous to the crime's legal requirements. (We have sometimes called them "brute facts" when distinguishing them from elements.) They are "circumstance[s]" or "event[s]" having no "legal effect [or] consequence": In particular, they need neither be found by a jury nor admitted by a defendant. (*Mathis* at slip opinion pp. 2-3; citations omitted.)

The second important point is that the Supreme Court reaffirmed and explained the Sixth Amendment foundation of *Descamps* and the prior cases:

> This Court has held that only a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction. See *Apprendi*.... That means a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense. He is prohibited from conducting such an inquiry himself; and so too he is barred from making 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." **He can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of**. (*Mathis* at slip opinion at p. 10; emphasis added, citations omitted.)

Third, in response to the dissent, the High Court again made clear in reliance on *Descamps* that a judicially imposed enhanced sentence related to a prior conviction may be, "based only on what a jury 'necessarily found' to convict a defendant (or what he necessarily admitted). And elements alone fit that bill; a means, or (as we have called it) 'non-elemental fact, is 'by definition[] not necessary to support a conviction.' **Accordingly, *Descamps* made clear that when the Court had earlier said (and said and said) 'elements,' it meant just that and nothing else.**" (*Mathis* at slip opinion pp. 14-15, emphasis added, citations omitted.)

The short majority and concurring opinions in *Mathis* ratified that the Sixth Amendment and *Apprendi* compel an elements, and nothing but the elements, approach to evaluating the existence of a prior conviction. *Mathis* forecloses any notion that *Descamps* or *Shepard* were somehow not based on the Sixth and Fourteenth Amendments and therefore inapplicable to state court factfinding.

C. The implications of *Johnson v. United States* (2015) __ U.S. __ on *Descamps* and judicial factfinding.

In addition to *Descamps*, the Supreme Court has precluded judicial factfinding under other constitutional standards.

In *Johnson v. United States* (2015) __ U.S. __, 135 S.Ct. 2551, the Supreme Court struck down a portion of the residual clause contained in the ACCA on the ground that it was unconstitutionally vague and did not give defendants fair notice of which prior convictions qualify as "violent felonies." (*Id.* at 2558.) The High Court found that the words "conduct presenting a serious potential risk of physical injury to another" were "confusing" and "nearly impossible to apply consistently." (*Id.* at 2560.)

As particularly relevant here, the Supreme Court reaffirmed the rejection of judicial factfinding in the *Taylor* line of cases:

> In *Taylor v. United States*..., this Court held that the Armed Career Criminal Act requires courts to use a framework known as the categorical approach when deciding whether an offense "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." Under the categorical approach, a court assesses whether a crime qualifies as a violent felony "in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion."
>
> Deciding whether the residual clause covers a crime thus requires a court to picture the kind of conduct that the crime involves in "the ordinary case," and to judge whether that abstraction presents a serious potential risk of physical injury. The court's task goes beyond deciding whether creation of risk is an element of the crime...[and]...asks

> whether the crime "involves conduct" that presents too much risk of physical injury....[P] We are convinced that the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges. Increasing a defendant's sentence under the clause denies due process of law. (*Id.* at 2557, citations omitted.)

While *Johnson* is not in the *Apprendi* line of cases, the High Court's reference to *Taylor* and continued focus on the harms created by trial judges making conduct based assessments to impose prior offense enhancements is instructive. It reaffirms the importance of the "elements v. conduct" demarcation so clearly detailed in *Descamps* and establishes that the Supreme Court clearly believes it is constitutionally impermissible for trial judges to make any non-elemental conduct or fact based assessments in the context of prior offense enhancements.

D. Conclusion

It is now clear that the Sixth and Fourteenth Amendments, as fully explicated in the *Taylor-Apprendi-Shepard-Descamps-Mathis* line of cases, do not permit non-elemental factual determinations based on the conduct in a prior case to establish what criminal behavior occurred and whether that behavior would satisfy the requirements of a serious felony.

If proof of the elements of a prior conviction standing alone fails to establish that it *was* for a serious felony -- it cannot *be* a serious felony regardless of what actually occurred.

II.

CALIFORNIA'S ALLOWANCE FOR JUDICIAL FACTFINDING BEYOND PROOF OF THE ELEMENTS OF THE ACTUAL PRIOR CONVICTION VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS AS INTERPRETED BY THE UNITED STATES SUPREME COURT IN *DESCAMPS* AND *MATHIS*.

In *McGee*, this Court explained the scope of inquiry that is currently allowed under California law when a trial court must determine whether a defendant's prior conviction constitutes a serious felony for purposes of enhancing a current sentence. This Court clarified that it is a limited inquiry regarding the nature or basis of the prior conviction based upon the record of the prior criminal proceeding with a *focus* on the elements of the offense. (*McGee, supra,* 38 Cal.4th at p. 706.) However, the language in *McGee* permits a trial court to go beyond pure proof of the elements of the prior offense:

> 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. The need for such an inquiry does not contemplate that the court will make an independent determination regarding a disputed issue of fact relating to the defendant's prior conduct, but instead that the court simply will examine the record of the prior proceeding to determine whether that record is sufficient to demonstrate that *the conviction* is of the type that subjects the defendant to increased punishment under California law. (*Ibid.*; original italics, internal citations removed.)

In reaching the above conclusion, this Court agreed with the People "that a criminal defendant has no federal constitutional right to a jury trial on factual circumstances and conduct underlying a prior conviction used to enhance punishment." (*Id.* at p. 692.)

McGee relied on this Court's opinion in *Guerrero, supra,* 44 Cal.3d at p. 355, which created the rule that "in determining the truth of a prior-conviction allegation, the trier of fact may look to the entire record of the conviction" to determine if the conduct underlying the offense establishes the prior to be a serious felony. (*Ibid.*)

In creating the conduct based approach, this Court in *Guerrero* overruled *People v. Alfaro* (1986) 42 Cal.3d 627, 632-635 [*Alfaro*] and the previous California rule that was strikingly akin to the rule set forth in *Descamps*. Under *Alfaro*, a trial court was restricted to reviewing the record of conviction to determine the elements of the prior crime or issues necessarily adjudicated by the prior judgment and therefore subject to collateral estoppel. (*Alfaro, supra,* 42 Cal.3d at p. 636.) The *Alfaro* rule did not permit the prosecution to "go behind" the judgment and matters necessarily adjudicated therein "to prove some fact which was not an element of the crime." (*Ibid.*)

It is now apparent that the United States Constitution precludes the type of judicial factfinding previously precluded by *Alfaro* but allowed by

Guerrero-McGee. Multiple California Courts of Appeal have recognized this.

In *People v. Wilson* (2013) 219 Cal.App.4th 500, 515-516, the Sixth Appellate District, based on *Descamps* and *McGee*, concluded that the exact type of judicial factfinding undertaken in this case is now constitutionally prohibited. The court reasoned as follows:

> [W]e hold that the Sixth Amendment under *Apprendi* precluded the court from finding the facts—here in dispute—required to prove a strike prior based on the gross vehicular manslaughter offense. Like the court that sentenced *Descamps*, the trial court looked beyond the facts necessarily implied by the elements of the prior conviction. The record here was even barer than that in *Descamps*. There is no record of any plea colloquy, or any other admissions—factual or otherwise—made by Wilson on the record of the prior conviction. The only facts in the record—apart from those necessarily implied by the elements of the offense—are those found in the transcript of the preliminary hearing....The trial court could not have increased Wilson's sentence without "'mak[ing] a disputed' determination" of fact—a task the United States Supreme Court specifically counseled against. (*Descamps, supra...*)" (*Ibid.*)

The *Wilson* decision followed remand from federal habeas proceedings that occurred before *Descamps* was decided. In *Wilson v. Knowles* (9th Cir. 2011) 638 F.3d 1213 [*Wilson v. Knowles*], the Ninth Circuit concluded that the state trial judge violated *Apprendi* by making a finding of non-elemental facts to increase the sentence:

> Courts may reasonably disagree about some of the precise boundaries of the [*Almendarez-Torres*] exception. . . . It would be unreasonable to read *Apprendi* as allowing a

> sentencing judge to find the kinds of disputed facts at issue here—such as the extent of the victim's injuries and how the accident occurred. These are not historical, judicially noticeable facts. The judge in 2000 speculated as to how a jury in 1993 might have evaluated the evidence if the evidence had been offered and if a jury had been impaneled to evaluate it. Wilson did not have any reason to contest these alleged facts when he was convicted in 1993. The judge's fact-finding seven years after the 1993 conviction extended beyond any reasonable interpretation of the prior conviction exception. It is utterly unreasonable to hold that what a judge in 2000 imagines might have happened in 1993 is the same as a conviction in 1993. (*Wilson v. Knowles, supra,* 638 F.3d 1213 at pp. 1115-1116; citations omitted.)

Judge Kozinski dissented because he believed Wilson had failed to satisfy the "bitter pill" of the AEDPA, but he nevertheless opined that "[r]ead literally, *Apprendi* itself seems to limit judges to finding the mere fact of the prior conviction" and "[i]t's hard to believe that the Sixth Amendment permits a sentencing judge to find disputed facts about what happened during a defendant's prior offense." (*Id.* at pp. 1216-1217, J. Kozinski.)

Following the long procedural road taken by *Wilson* to reversal, other Courts of Appeal began to engage the issue.

Division Three of the Second Appellate District cited *People v. Wilson, supra,* 219 Cal.App.4th at p. 515, and commented that the entire framework created in *Guerrero* by which a trial court is free to look at the underlying circumstances of a prior conviction to authorize an enhancement "may no longer be tenable." (*People v. Manning* (2014) 226 Cal.App.4th 1133, 1141, FN 3.)

In *People v. Saez* (2015) 237 Cal.App.4th 1177 [*Saez*], Division One of the First Appellate District, extensively 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 that California's procedure violated the Sixth Amendment under the principles recognized in *Descamps.* (*Id.* 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*...)" (*Saez, supra*, 237 Cal.App.4th at pp. 1207–1208.)

Division Four of the Second Appellate District in *People v. Marin* (2015) 240 Cal.App.4th 1344, followed and extended *Saez*:

> 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.
>
> . . .
>
> [T]he 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 basis of the prior plea,' or what the jury in a prior trial must have accepted as the theory of the crime" [Citation]; (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. (*People v. Marin, supra,* 240 Cal.App.4th at pp. 1363-1364; internal citations omitted.)

Division One of the Second Appellate District in *People v. Denard* (2015) 242 Cal.App.4th 1012, summarized and agreed with the fundamental holdings of *Saez* and *Marin.* (*Id.* at pp. 1030-1034.)

Finally, on July 12, 2016, Division Five of the Second Appellate District issued a published opinion in *People v. McCaw* (B266497) 2016 Cal.App.LEXIS 567, concurring with the reasoning in the above line of appellate cases, extensively analyzing *Descamps*, and concluding that "[w]hile the precise reach of the Sixth Amendment may not be fully defined

as to California law, '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.' [Citations.]." (*McCaw* (B266497) slip opinion at p. 16.)

The above authorities are all correct. The potential change prophesied by this Court in *McGee* has arrived.

In *McGee,* this Court acknowledged that in light of *Shepard* a "majority of the high court" might view *Guerrero's* allowance for judicial factfinding as a violation of the Sixth and Fourteenth Amendments under *Apprendi.* (*McGee, supra*, 38 Cal.4th at pp. 686, 708-709.) However, this Court declined to change the California rule at that time for two reasons.

First, this Court concluded that *Shephard* was resolved on statutory grounds. (*McGee, supra*, 38 Cal.4th at p. 708.) This was only partially true. Multiple references to the "constitutional" problem, including almost the entirety of Part III of the *Shepard* opinion, clearly demonstrate that the Supreme Court based the holding on both statutory grounds and the Sixth and Fourteenth Amendments. "[T]he Sixth and Fourteenth Amendments guarantee a jury standing between a defendant and the power of the State,

and they guarantee a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence." (*Shepard, supra,* 544 U.S. at p. 25.) Furthermore, *Descamps*, and now *Mathis*, through their invocation of *Shepard* and direct connection to the holdings in *Taylor* and *Apprendi*, have clearly refuted any notion that the outcomes therein were not based in part on the Sixth and Fourteenth Amendments.

Second, this Court did not believe the Supreme Court had made it abundantly clear in *Shephard* or issued a "definitive ruling" that the Sixth Amendment precluded state judicial consideration of the facts and conduct underlying a prior conviction. (*McGee, supra,* 38 Cal.4th at pp. 686, 708.) However, unlike *Shepard*, in *Descamps*, eight justices either joined in the lead opinion or concurred in the outcome, with only Justice Alito dissenting. (*Descamps, supra,* 133 S.Ct. at p. 2281.)[9] Furthermore, a majority of the Supreme Court in *Mathis*, along with the Ninth Circuit and

[9] Justice Kagan delivered the opinion of the Court and was joined by Justices Roberts, Scalia, Ginsburg, Breyer, and Sotomayor. Justice Kennedy concurred in the opinion and wrote a separate concurrence to suggest Congress may want to revisit the ACCA's design and structure. (*Id.* at p. 2294.) Justice Thomas concurred in the judgement, and again wrote a concurring opinion arguing that *Apprendi* precludes the sentencing court from any factfinding whatsoever. (*Id.* at pp. 2294-2295.) Justice Alito dissented.

numerous other states, have applied *Descamps* as a definitive resolution of the application of the Sixth Amendment to state judicial factfinding.[10]

Perhaps the most compelling reason for concluding that California's *Guerrero-McGee* rule does not pass constitutional muster is that it is nearly identical in application to the 9th Circuit rule struck down in *Descamps.* The Ninth Circuit's rule authorized a review of the record form the prior case to determine "what facts" can "confident[ly]" be thought to underlie the defendant's conviction in light of the "prosecutorial theory of the case" and the "facts put forward by the government." (*Aguila-Montes, supra,* 655 F.3d at pp. 936-937.) In so doing, the trial court could ignore the "specific words in the statute" or actual elements found by the jury or admitted by the defendant (*Id.* at p. 936) in favor of examining the record of conviction to identify facts about what the defendant actually did. (*Ibid.*) The High Court in *Descamps* found this rule to violate the Sixth Amendment. (*Descamps, supra*, 133 S.Ct. at pp. 2288-2289.)

The *Guerrero-McGee* rule permits the same review with the same goal. This Court stated in *McGee*, "If the enumeration of the *elements* of the

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[10] See: *United States v. Sahagun-Gallegos* (9th Cir. 2015) 782 F.3d 1094, 1100-1101; *United States v. Quintero-Junco* (9th Cir. 2014) 754 F.3d 746, 749, 752; *United States v. Marcia-Acosta* (9th Cir. 2015) 780 F.3d 1244, 1251-1253; *State v. Guarnero* (2015) 2015 WI 72, Sections C and D, Paragraphs 22-25 [Wisconsin]; *State v. Dickey* (2015) 301 Kan. 1018, 1036-1040 [Kansas], *Contreras v. United States* (2014) 121 A.3d 1271, 1274 [District of Columbia].

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." (*McGee, supra,* 38 Cal.4th at p. 706, emphasis added.) The emphasized portions of this quote demonstrate that California's *Guerrero-McGee* rule has the same failings as the Ninth Circuit's rule.[11]

The allowance in *McGee* and *Guerrero* for judicial factfinding beyond the elemental facts of the prior conviction does not comply with the Sixth Amendment and cannot survive *Descamps* and *Mathis*.

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[11] In *McGee* itself, Justice Kennard, joined by Justice Werdegar, recognized that the federal constitution precluded such factfinding, and urged that if a prior, plus previously unadjudicated facts related thereto, were to be used in combination to increase a sentence, the defendant should be first afforded a jury trial as to those additional facts. (*McGee, supra,* 38 Cal.4th at p. 710, dis. opn. of Kennard, J.) This remedy, however, suffers from the same problems noted in *Guerrero* and Argument III herein by violating the limitations and protections of double jeopardy and speedy trial. (*People v. Guerrero, supra,* 44 Cal.3d at p. 355.)

III.

THIS COURT SHOULD RETURN THE CALIFORNIA RULE TO THE LONGSTANDING LEAST ADJUDICATED ELEMENTS TEST TO AVOID UNFAIRNESS, IMPRACTICALITY, POTENTIAL DUE PROCESS VIOLATIONS OF PLEA AGREEMENTS, AND "HARM AKIN" TO VIOLATING STATE AND FEDERAL DOUBLE JEOPARDY AND SPEEDY TRIAL RIGHTS.

Under the *Taylor-Apprendi-Shepard-Descamps-Mathis* line of cases, it is now clear that the "fact of a prior conviction" refers only to the specific crime found by the jury or admitted by the defendant. The only facts established by that conviction are those necessary to support the elements of the verdict or plea. Ancillary "facts" established from any other source are not deemed adjudicated in the prior proceeding and therefore cannot be considered in evaluating the existence or nature of the prior conviction.

As a result, the above cases authorize a trial court to look at the actual record of conviction to answer the questions: Did the jury specifically find the defendant guilty of a strike offense? or Did the defendant specifically admit at strike offense? If these questions cannot be answered from a judicial review of the admissible record, then regardless of what occurred in the prior proceeding, the prior conviction cannot be used to enhance the defendant's sentence because there is insufficient evidence that the prior conviction constituted a serious felony. In short, if the elements do not establish that a serious felony exists – then it does not exist.

Because the *Taylor-Apprendi-Shepard-Descamps-Mathis* line of cases also makes clear that non-elemental facts and conduct related to the prior offense are not part of the crime of conviction there is no basis in the above authorities to conclude that a jury, any more than a trial court, would be permitted to rely on those facts or conduct to determine what conviction the defendant suffered. Those ancillary facts and conduct were not subjected to a jury determination or admission in the prior case and therefore they cannot be used in a later proceeding, even by a jury, to find the existence of a prior conviction.

The facts of this case perfectly exemplify the issue. Assume arguendo that this Court finds the trial court's judicial factfinding violated the Sixth Amendment under *Descamps* and *Mathis*. What could remand for a jury trial seek to resolve?

Would the jury be asked to review the preliminary hearing transcript to determine whether appellant *admitted* in her guilty plea an assault likely to produce great bodily injury or assault with a deadly weapon? Presumably not. The preliminary hearing provides no evidence on that question and even if it did, the determination of what conviction the defendant admitted or suffered is still, for the time being, reserved for the trial court under *Descamps* and California law.

Would the jury be asked to review the preliminary hearing transcript to determine if appellant *committed* an assault with a deadly weapon? Perhaps, but that determination would not result in a jury finding that appellant entered a guilty plea to that offense years ago. Instead, it could only result in a new jury determination that she could have been convicted of that offense. Such a new jury verdict does not establish a prior serious felony conviction for purposes of California's sentencing enhancement laws but rather a form of theoretical new conviction.

The Court of Appeal in *Saez* addressed this precise issue in response to the Attorney General's petition for rehearing:

> Respondent argues that "[a]ny Sixth Amendment error arising from the trial court's (rather tha[n] the jury's) consideration of statements" in the affidavit of probable cause "was harmless" because "if a jury had considered the same evidence, . . . it would also have found the...conviction [to be] a strike."... [W]e reject the argument...In the opinion, we held that "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 [trial] 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." [Citation.] The error below would not have been avoided, as respondent contends, had a jury rather than the trial court determined the basis of the prior conviction. The Sixth Amendment problem is that appellant's plea in the Wisconsin case did not establish, and a Wisconsin jury never found true beyond a reasonable doubt, all the required strike elements. Given that the only evidence submitted below that could prove the basis of the prior conviction was the affidavit of probable cause, no factfinder in this proceeding-trial court or jury-could have

> found that the conviction constituted a strike without "mak[ing] a disputed" determination "about what the defendant and state judge must have understood as the factual basis of the prior plea." [Citation.]...[W]hen a strike determination is made based on evidence that does not sufficiently establish the basis of a prior conviction, the Sixth Amendment is violated regardless of who makes that determination.[12]

As perfectly explained by the *Saez* court, under *Descamps*, it is apparent that the Sixth Amendment right at issue is not the right to have a jury participate in the current sentencing process, but rather the right to have a jury make a full determination of guilt on the alleged prior criminal conduct. Here, appellant never had a jury trial and the record does not prove she admitted a strike assault. When the trial court unilaterally made a finding of the fact that appellant committed an assault with a deadly weapon, it effectively convicted her of that offense and deprived her of a jury trial for that conviction. *McGee* style judicial factfinding regarding the conduct and facts related to the prior offense takes the place of a full jury trial on the original offense – not the existence of a current statutory sentencing enhancement.

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[12]Text at: http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=1&doc_id=2046927&doc_no=A138786

Because a new jury trial would not solve the *Descamps* problem, the proper remedy is to apply the least adjudicated elements test utilizing the "elements only" based review permitted by the Sixth Amendment.

The least adjudicated elements test provides that if a law can be violated in different ways and the record does not establish which version of the offense was actually committed, the "court will presume that the prior conviction was for the least offense punishable...." (*People v. Rodriguez* (1998) 17 Cal.4th 253, 262; *People v. Warner* (2006) 39 Cal.4th 548, 552–553.) "Under that approach, only the foreign jurisdictions statutory or common law definition of the offense may be considered to determine if the offense would be a serious felony in California. Only the elements of the offense which must be proved to sustain a conviction of the offense are considered in deciding if the offense 'includes all of the elements of the particular felony as defined under California law.' (§ 667.5, subd. (f).)" (*People v. Myers* (1993) 5 Cal.4th 1193, 1199.) Where the nature of an "alternative element" California offense is in question, such as assault, the same elements analysis applies. (*People v. Banuelos* (2005) 130 Cal.App.4th 601, 606; *People v. Cortez* (1999) 73 Cal.App.4th 276, 280.)

This Court has applied the above rule in the context of a prior strike allegation involving California assault. In *People v. Delgado* (2008) 43 Cal.4th 1059, this Court considered the sufficiency of the abbreviated

notation "'Asslt w DWpn'" on an abstract of judgment from a prior conviction to permit the inference that the conviction was for a serious felony. (*Id.* at p. 1065.) Delgado's alleged prior conviction was for a violation of section 245(a)(1). (*Id.* at p. 1065.) The version of section 245, subdivision (a)(1), in effect when Delgado violated that statute, as here, made it a "felony offense to 'commit an assault upon the person of another with a deadly weapon or instrument other than a firearm *or* by any means of force likely to produce great bodily injury.' [Citation.]" (*Ibid.*)

This Court noted that under California law a conviction under the deadly weapon prong of section 245(a)(1) is a serious felony but a conviction under the GBI prong is not. (*Id.* at p. 1065.) Therefore this Court applied the rule that "if the prior conviction was for an offense that can be committed in multiple ways, and the record of the conviction does not disclose how the offense was committed, a court must presume the conviction was for the least serious form of the offense. [Citations.] In such a case, if the statute under which the prior conviction occurred could be violated in a way that does not qualify for the alleged enhancement, the evidence is thus insufficient, and the People have failed in their burden. [Citation.]" (*Id.* at p. 1066.)

The above well-established rules should apply in the context of this and other similar cases. The record should be reviewed for the elements of

the prior conviction. Because the facts of the crime cannot be considered under *Descamps*, if proof of the elements of that prior crime is insufficient to qualify that conviction as the alleged strike offense, the trial court should presume the conviction was for the least adjudicated or non-strike offense.

Prior to *Guerrero*, a long series of decisions from this Court leading up to *Alfaro* applied this rule and recognized that limiting prior offense findings to consideration of elements was crucial to avoiding unfairness, potential constitutional problems, and impracticality.

In *In re McVickers* (1946) 29 Cal.2d 264, 279, this Court held that the nature of a prior conviction, for purposes of enhancing a current sentence, must be established "upon the face of the record" of the "specific charge of previous conviction." (*Ibid.*) This Court explained that "[b]y no process of law or reason acceptable to American standards can [the] admission of [a] defendant be construed to admit more than the charge laid." (*Ibid.*)

As particularly applicable here, this Court warned that any allowance for factfinding outside of the specific conviction would lead to "absurd" consequences:

> [The enhancement provisions at issue] contemplate that a defendant shall have been convicted in a judicial proceeding of a[n] [enumerated] crime.... All the essential facts of his guilt must be res judicata. In applying [the enhancement provision] the courts of this state may take cognizance only of what has been lawfully adjudicated. Any other rule would

> lead to absurd consequences. If our trial courts could take evidence to prove, and upon that evidence adjudicate for themselves, that a defendant had been convicted in another state of grand theft as defined in our code despite the fact that he had been there charged, tried, and convicted under a statute defining another offense (here, an offense the only adjudicated elements of which amount to petty theft in California), then our courts could also take evidence and decide that the defendant had been convicted in the other state of robbery or burglary or bribery, or any other [enhancement] offense…, even though he had never been charged with, placed upon trial for, or adjudged guilty of, any of those offenses in such other state. (*In re McVickers, supra,* 29 Cal.2d at p. 276.)

In *In re Finley* (1968) 68 Cal.2d 389, Chief Justice Traynor, writing for a unanimous court, explained that the determination of whether a foreign conviction could be used as a basis for increased punishment under former enhancement section 644 "does not [involve] the opening or reopening of questions calling for resolution on the basis of the testimony of witnesses who may have died or disappeared or where memories have faded…" (*Id.* at p. 392.)

Justice Traynor explained that "[t]he fact that an accused suffered a foreign conviction of a crime is made officially of record at the time and place of such conviction…*The least adjudicated elements of the prior conviction remain the same…[and]…[n]either the People nor the defendant can go behind those adjudicated elements in an attempt to show that he committed a greater, lesser, or different offense*. [Citations.]" (*Id.* at p. 393, italics added.)

In *People v. Crowson* (1983) 33 Cal.3d 623, 632-635, this Court was faced with the need to resolve a divide amongst courts of appeal on the proper application of section 667.5, subdivision (f), when the elements of a foreign crime were not identical to those of the related California felony. One line of authority held that a court "may look only to the elements of the other jurisdiction's crime" and compare those elements to the California offense. The other line of authority "suggested that in some circumstances it is permissible for a court to go beyond the elements of the foreign crime in order to determine whether the defendant's conduct in the prior incident would have subjected him to a felony conviction in California." (*Id.* at p. 632.)

Citing *Finley* and interpreting the language of the statute to refer to a "specific crime as defined by law," this Court concluded that use of a prior foreign offense as a California enhancement predicate "is only permissible when the elements of the foreign crime, as defined by that jurisdiction's statutory or common law, include all of the elements of the California felony." (*Id.* at p. 632.) This Court rejected non-elemental factfinding because "the doctrine of collateral estoppel regards as conclusively determined only those issues actually and necessarily litigated in the prior proceeding....If proof of [a fact] was not required to sustain a conviction under the [prior offense] statute, neither a guilty verdict after a jury trial nor

a plea of guilty may accurately be viewed as establishing that such [a fact] occurred…." (*Id.* at p. 634.)

In *People v. Jackson* (1985) 37 Cal.3d 826, 834, this Court held that *Crowson* established: "(1) that proof of a prior conviction establishes only the minimum elements of the crime, even if the charging pleading contained additional, superfluous allegations; and (2) that the prosecution cannot go behind the record of the conviction and relitigate the circumstances of the offense to prove some fact which was not an element of the crime." (*Ibid.*)

This Court explained that "[a] contrary holding, permitting the People to litigate the circumstances of a crime committed years in the past, would raise serious problems akin to double jeopardy and denial of speedy trial." (*People v. Jackson, supra* 37 Cal.3d at p. 836.) Despite rejecting *Alfaro's* reliance on *Jackson*, in *Guerrero* this Court repeated the same concept as follows: "To allow the trier to look to the record of the conviction -- but no further -- is also fair: it effectively bars the prosecution from relitigating the circumstances of a crime committed years ago and thereby threatening the defendant with harm akin to double jeopardy and denial of speedy trial." (*Guerrero, supra,* 44 Cal.3d at p. 355.)

Finally, in *People v. Alfaro, supra,* 42 Cal.3d at p. 634, this Court affirmed the rules previously established in *Crowson* and *Jackson* and explained that, "[t]he virtue of [the elements based approach] is that proof

of the prior conviction is limited to matters which fall within the doctrine of collateral estoppel and thus cannot be controverted. Proof is simple and conclusive." (*Ibid.*) This Court elaborated that the "contrary view" which would allow the conduct underlying the prior offense to be "proved like any other controverted question of fact -- creates obvious difficulties. The prosecution could then introduce documentary and testimonial evidence...[and the] defendant could introduce contrary evidence or argue that the prosecution's evidence does not prove the point beyond a reasonable doubt. The net result would resemble retrial of the original...charge." (*Id.* at pp. 634-635.)[13]

The *Alfaro* Court went on to note that permitting examination of the conduct underlying the prior conviction would place a "burden upon the courts" and "potential unfairness to the defendant" and reaffirmed that limiting proof of a prior conviction to matters established by collateral estoppel avoids the "great inconvenience" and potentially "absurd consequence" of "relitigating the circumstances of long past convictions." (*Id.* at p. 635.)

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[13] This point is presumably based on the defendant's Sixth and Fourteenth Amendment rights to present a full and fair defense including the right to present all relevant evidence of significant probative value in his favor. (*People v. Marshall* (1996) 13 Cal.4th 799, 836; *People v. Seijas* (2005) 36 Cal.4th 291, 304.)

In sum, prior to *Guerrero* and *McGee*, this Court had adopted a rule similar to the one provided by *Descamps* in an effort to avoid the inconvenience of relitigating the conduct and circumstances of past convictions and the "serious problems" or "harm akin to double jeopardy and denial of speedy trial" that could result from such litigation. (*Alfaro, supra,* 42 Cal.3d at p. 635; *People v. Jackson, supra,* 37 Cal.3d at p. 836; see also *Guerrero, supra,* 44 Cal.3d at p. 355.)[14]

While this Court did not expand on the manner in which such double jeopardy "harm" or "serious problem" would arise, presumably it was referring to the implications of having a second trial in which previously adjudicated facts and conduct were readjudicated so that the prosecution was afforded a new opportunity to ligate and establish the elements of a strike conviction. These concerns also follow from the repeated invocation of the doctrine of collateral estoppel in *Crowson, Jackson,* and *Alfaro*. Here, the record only establishes that appellant plead guilty to assault. Any new trial aimed at modifying or augmenting that conviction to make it an assault

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[14] Justice Broussard, the author of *Alfaro*, dissented in *Guerrero*, protesting that the court was improperly overruling *Alfaro* without analyzing *Crowson* and *Jackson* upon which *Alfaro* was based. (*Guerrero, supra*, 44 Cal.3d at pp. 357-358; Broussard J., dissenting.) Regardless of the merits of that claim, *Alfaro* and its predecessors clearly reflect reasoning and rules that more closely resemble what the Supreme Court has now required. Determining whether *Guerrero* was wrongly decided *at the time* on its merits is unnecessary because the *Guerrero-McGee* rule is no longer tenable under *Descamps* and *Mathis*.

with a deadly weapon would presumably be deemed a successive prosecution for the same conduct that was adjudicated in the first prosecution and resolved by plea.[15]

Likewise, the problem of denying the defendant a speedy trial potentially arises because the prosecution is being afforded a new opportunity to litigate allegedly criminal conduct that could have occurred

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[15] The Double Jeopardy Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, provides: "Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." The Supreme Court has held that the Double Jeopardy Clause protects against successive prosecutions for the same offense after acquittal or conviction and against multiple criminal punishments for the same offense. (*North Carolina v. Pearce* (1969) 395 U.S. 711, 717.) The California Constitution provides that "[p]ersons may not twice be put in jeopardy for the same offense." (Cal. Const., art. I, § 15.) In the context of successive prosecutions, this Court has largely treated the provisions coextensively. (*People v. Monge* (1997) 16 Cal.4th 826, 844.)

Collateral estoppel, in criminal cases, is connected to, and part of, the Fifth Amendment protection against double jeopardy. (*Ashe v. Swensen* (1970) 397 U.S. 436, 444-446 ["Collateral estoppel... means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit...[T]his established rule of federal law is embodied in the Fifth Amendment guarantee against double jeopardy."].) Collateral estoppel bars relitigation of an issue decided at a previous proceeding only if, among other things, the issue decided at the previous proceeding (i) is identical to the one which is sought to be relitigated, (ii) was actually litigated, and (iii) was necessarily decided. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341; *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 828.)

years earlier.[16] Here, a new trial would be held in 2016 or 2017 on facts and events that occurred in 2004 and were originally adjudicated in 2005. Because no trial occurred in the first instance, appellant would be forced to defend herself for the first time against a general charge that she thought had been resolved. The impact of this type of lengthy delay on a substantive trial would have to be assessed on a case by case basis.

Finally, in addition to the harms identified above, one additional substantial problem of fundamental fairness arises in cases where a new trial would potentially violate the terms of the plea and be a due process denial of the benefit of the prior bargain.

This unfairness was specifically referenced by the Supreme Court in *Descamps* when it noted that plea deals "happen every day" and are typically based on a negotiation where the "defendant surrenders his right to trial in exchange for the government's agreement that he plead guilty to a less serious crime" whose elements may not match a later enhancement predicate. If "a later sentencing court could still treat the defendant as

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[16] "The due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 15 of the California Constitution protect a defendant from the prejudicial effects of lengthy, unjustified delay between the commission of a crime and the defendant's arrest and charging." (*People v. Cowan* (2010) 50 Cal.4th 401, 430; *United States v. Lovasco* (1977) 431 U.S. 783, 789; *People v. Nelson* (2008) 43 Cal.4th 1242, 1250.) "[T]he right of due process protects a criminal defendant's interest in fair adjudication by preventing unjustified delays that weaken the defense." (*Cowan, supra,* at p. 430; citations omitted.)

though he had pleaded to [a strike]" based on some evidence in the record it would "rewrite" the parties' bargain and allow the imposition of sentence as if the plea was to the greater offense even if it was not. (*Descamps, supra,* 133 S.Ct. at p. 2289.)

When a guilty plea is entered in exchange for specified benefits, both parties, including the state, must honor the agreement. (*People v. Kim* (2011) 193 Cal.App.4th 1355, 1359.) "A plea agreement is, in essence, a contract between the defendant and the prosecutor to which the court consents to be bound.' [Citations.] When a guilty [or nolo contendere] plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties, including the state, must abide by the terms of the agreement." (*People v. Segura* (2008) 44 Cal.4th 921, 930–93.) A criminal defendant has a federal due process right to enforce the terms of his plea agreement (*Buckley v. Terhune* (9th Cir. 2006) 441 F.3d 688, 694; *Santobello v. New York* (1971) 404 U.S. 257, 261–262, 266-267) and material deviations from the agreement are constitutionally impermissible. (*People v. Walker* (1991) 54 Cal.3d 1013, 1024.)

The strike or non-strike nature of a conviction is axiomatically a material term of the plea. As such, any revision to that resolution would likely violate due process and firmly established California authority. The

implications of this problem extend to the question of whether the defendant would have to be given the right to withdraw the prior plea in its entirety if she was forced to face trial on the underlying charges. Here, it is dubious that due process would allow the prosecution to try appellant for the greater offense while protecting their conviction on the lesser.

This Court repeatedly stated that it never intended the *Guerrero-McGee* rule to be used to relitigate the circumstances of a past offense. In *Alfaro, supra,* 42 Cal.3d at p. 637, Justice Mosk dissented but stated, "I agree that the prosecution should not be permitted to relitigate the circumstances of a past offense; this could be a substantial burden on the defendant and on the courts." (*Ibid.*) Then, in *Guerrero, supra,* 44 Cal.3d at p. 355, Justice Mosk penned the majority opinion and stated, "To allow the trier to look to the record of the conviction -- but no further --...effectively bars the prosecution from relitigating the circumstances of a crime committed years ago...." (*Ibid.*)[17] These ideas were reiterated in *McGee, supra,* 38 Cal.4th at p. 694, where this Court stressed that 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." (*Id.* at p. 706.)

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[17] Justices Broussard and Mosk essentially traded places in *Alfaro* and *Guerrero.*

However, relitigation and its attendant harms were inevitable once an *elements based* focus on the *record of conviction* was replaced by "an examination of the *record of the prior criminal proceeding* to determine the *nature or basis of the crime* of which the defendant was convicted." (*McGee, supra*, 38 Cal.4th at p. 691; italics added.) A search for the fact of a specific conviction was replaced by an assessment of "conduct" where the trier of fact was empowered to "draw inferences" from the "factual content" of "court records" and "transcripts of testimony." (*Id.* at p. 694.)

Once the permitted factual examination went beyond what the Supreme Court in *Shepard, supra*, 544 U.S. at pp. 20-21 described as "conclusive records made or used in adjudicating guilt" from which a later court could definitively tell what elemental facts the conviction, by plea or trial, "necessarily rested on," the harms detailed above were inescapable.

Appellant asserts that to avoid all of the above potential constitutional harms, unfairness, and potentially absurd results from relitigating past offenses, this Court should return to the least adjudicated elements test where the trial court is permitted to "do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." (*Mathis*, *supra,* 597 U.S. ____, slip opinion p. 10.)

IV.

BECAUSE APPELLANT'S PLEA CONVICTION "REALISTICALLY MAY HAVE BEEN BASED ON CONDUCT THAT WOULD NOT CONSTITUTE A SERIOUS FELONY" THE STRIKE FINDING MUST BE REVERSED EVEN IF *MCGEE* IS LEFT UNDISTURBED.

Even if this Court rejects any change to *McGee*, the documents in this case did not establish a qualifying conviction and therefore reversal is required.

Under *McGee,* this case fell under the scenario where "proof of the elements did not resolve the issue" and therefore the trial court was permitted to "examin[e] of the record of the earlier criminal proceeding...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." (*McGee, supra,* 38 Cal.4th at p. 706; italics added.)

Here, the actual record of appellant's *conviction* only establishes that as part of a negotiated plea she admitted a generic assault. There is absolutely no evidence that establishes the type of assault admitted. Because the minute order from the plea and sentencing hearing does not provide any indication as to the nature of the admission, and no other evidence was offered to establish the actual nature of the conviction, the People could not and did not prove that appellant admitted an assault with a deadly weapon.

In the absence of proof of the nature of the *conviction*, the prosecution used evidence adduced at the preliminary hearing to have the court make a new factual determination, based solely on the circumstances of the alleged crime, that appellant's conduct *did constitute* a strike.

However, under *McGee*, this is the inverse of what a trial court is permitted to do. The only non-elemental factual question even allowed by *McGee* is "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.) In simpler parlance, *McGee* asks whether there is any realistic chance that it could have been anything other than a strike.

Here, the conviction obviously could have been based on conduct that would not constitute a serious felony because appellant could have entered the negotiated plea to assault likely to produce great bodily injury rather than assault with a deadly weapon under a negotiated disposition. It is entirely possible that the People chose that resolution because evidence not presented at the preliminary hearing created some inherent weakness relative to the knife.

As the Supreme Court pointed out in *Descamps*, the statements of alleged fact from a court record like the preliminary hearing transcripts are not definitive statements of truth. "The meaning of those documents will

often be uncertain. And the statements of fact in them may be downright wrong. A defendant, after all, often has little incentive to contest facts that are not elements of the charged offense—and may have good reason not to." (*Descamps, supra,* 133 S.Ct. at p. 2289.) Appellant did not present an affirmative defense at the preliminary hearing and likely did not do everything in her power to disprove the facts regarding the knife because it was not at all clear that they were charged or relevant at that time.

Furthermore, appellant entered into a negotiated guilty plea for conduct that might not have included the knife allegation or use. She was awarded probation, which would certainly imply the lesser degree of assault. Here, it is entirely plausible that the parties agreed to the lesser version of assault to avoid trial and therefore the conduct underlying that plea would realistically not constitute a strike.

Therefore, even under *McGee*, this is not a case where the record definitively proved that the conduct at issue was necessarily, in all cases, a strike offense. Appellant asserts that even if this Court does not find *Descamps* error, the strike finding must be reversed under existing law.

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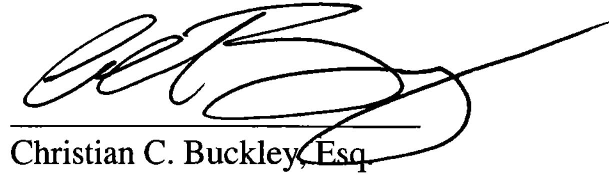
CONCLUSION

For the above stated reasons and pursuant to the authorities cited, the Court of Appeal opinion should be reversed.[18]

Respectfully submitted,



Christian C. Buckley, Esq.

[18] Appellate counsel thanks Suzan Hier, Esq. of the California Appellant Project Los Angeles for her substantial contributions to this brief.

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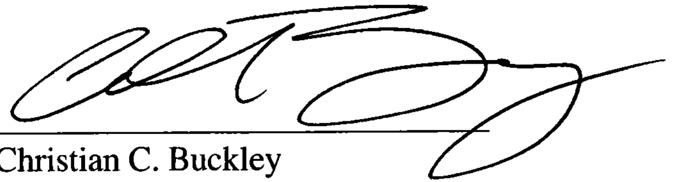

Christian C. Buckley
Attorney for Appellant

PROOF OF SERVICE

PEOPLE V. GALLARDO
SUPREME COURT NO. S231260
COURT OF APPEAL NO. B257357
SUPERIOR COURT NO. VA126705-01

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 Opening Brief on the Merits** by mail or email as follows:

State Attorney General
by e-service:
docketingLAawt@doj.ca.gov

Court of Appeal
Second Appellate District, Division Six
Court Place
200 East Santa Clara Street
Ventura, CA 93001

District Attorney's Office
County of Los Angeles
Attn: Appellate Division
12720 Norwalk Blvd., Rm. 201
Norwalk, Ca. 90650

Hon. Thomas McKnew Jr., Judge
c/o LA Superior Court Clerk
Norwalk Courthouse
12720 Norwalk Blvd.
Norwalk, CA 90650

California Appellate Project
Los Angeles Office
520 S. Grand Avenue, 4th Floor
Los Angeles, CA 90071

Glen T. Kiyohara, Esq.
8020 E. 2nd St
PO Box 4219
Downey, CA 90241

SULMA M. GALLARDO
WE9794
16756 Chino-Corona Road
Corona, CA 92880

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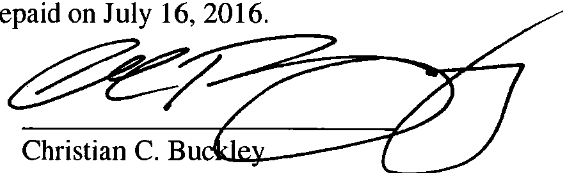

Christian C. Buckley