Apprendi Has Trumped Guerrero ! Descamps, Gallardo, and Sixth Amendment (And Due Process) Challenges to Judicial Findings of "Non-Elemental Facts" Concerning Sentence Enhancing Prior Convictions (With Focus on Retroactivity)*

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Apprendi Has Trumped *Guerrero*! *Descamps*, *Gallardo*, and Sixth Amendment (and Due Process) Challenges to Judicial Findings of "Non-Elemental Facts" Concerning Prior Convictions Which Increase a Criminal Defendant's Maximum Sentence[1]

by William M. Robinson, Assistant Director, Sixth District Appellate Program

Introduction

The *Apprendi* Revolution.

The American Revolution was an enormous blow for liberty – unless you happened to be a slave. As we know, the revolution to end that institutionalized crime against humanity came nearly a century later, and the skirmishes which followed that revolution continue to this day.

In our lifetime as appellate and trial lawyers, a different kind of revolution has taken place in the criminal law, triggered by the landmark decision by that occasional, peculiar, left-right partnership on the U.S. Supreme Court that began to emerge in the late 1990s. In *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), a five-vote majority announced a new rule of constitutional jurisprudence: "[A]ny 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." (*Id*., p. 490.) The fallout from *Apprendi* has been considerable. Judicial factfinding used to increase sentences beyond the "statutory maximum" is now verboten. All enhancing facts have to be pled and proven to a jury.

The Exception: Prior Convictions.

The new rule applied to all types of enhancing facts except one, which was specifically exempted in *Apprendi* from the jury trial requirement. As careful readers will

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[1]This article is an update and post-*Gallardo* rewrite of an article prepared for the 2015 SDAP Annual Seminar, and included a fair amount of my original work from *Gallardo* retroactivity habeas petitions, as discussed below. I thank my colleague, outgoing SDAP Executive Director Dallas Sacher, for his help in putting together both the original article and this revision, and FDAP Assistant Director Brad O'Connell for some of the best ideas about retroactivity discussed below.

know, the foregoing statement of the holding in *Apprendi* is preceded by the phrase "[o]ther than the fact of a prior conviction. . . ." (*Ibid*.) And for those of us practicing criminal law in California, that was a truly thorny exception. In our state, the courts and the legislature had, before *Apprendi*, already required proof to a jury beyond a reasonable doubt of all sentence enhancements. (See, e.g., *In re Yurko* (1974) 10 Cal. 3d 857.) However, there was a gaping exception to this rule when it came to prior convictions. The rule of *People v. Guerrero* (1988) 44 Cal.3d 343 and its progeny gave rise to considerable judicial fact finding about the nature of prior convictions, with courts permitted, in a range of somewhat delineated circumstances, to determine facts about a prior crime beyond the elements of the conviction itself. (*Id*., at p. 355.)

Often, especially after passage of the Three Strikes law, such factfinding by a judge could be the key determinate as to whether our client's sentence was to be exponentially increased. Thus, under *People v. Kelii* (1999) 21 Cal.4th 452, our State Supreme Court held that a judge, not a jury, must make the finding of these disputed, non-elemental facts; and in *People v. Myers* (1993) 5 Cal.4th 1193, the same set of rules was found to apply to out-of-state priors where the crime of conviction lacked elements required for a serious felony under California law. As will be discussed below, we fought some pitched battles in the appellate courts, trying to undermine this limitation to *Apprendi*, mostly to no avail. (See, e.g., *People v. McGee* (2006) 38 Cal.4th 682 [rejecting *Apprendi*-based challenge to judicial factfinding].)

***Descamps* and Its Progeny**

The bad news on this issue seemed to be a fait accompli until a half dozen years ago, when the Supreme Court's decision in *Descamps v. United States* (2013) 570 U.S.254, 133 S.Ct. 2276 (*Descamps*) appeared to alter this situation to our and our clients' favor, signaling that the *Apprendi* revolution would now be applied to prior convictions – or at least to facts about prior convictions which have not already been established by the elements of the prior offense and/or enhancements which had been proven to a jury or admitted by a defendant. *Descamps* was a somewhat sneaky

revolution, in that the key constitutional ruling by the Supreme Court was mixed in with federal statutory, non-constitutional jurisprudence, a muddling practice which we had seen before, especially in *Shepard v. United States* (2005) 544 U.S. 13 (*Shepard*), where the Supreme Court had stopped short of announcing a constitutional rule for prior convictions.

However, this time the language in the majority opinion in *Descamps* made it clear to anyone reading the opinion carefully that the result – the prohibition of judicial factfinding about prior convictions beyond the elements of the prior crime – was mandated by the due process and jury trial guarantees of the federal Constitution. (*Descamps*, *supra*, 133 S.Ct. at pp. 2288-2289.)

California courts quickly took up the implication of *Descamps* to proof of prior convictions. The first court to do so was the Sixth District, in an insightful opinion authored by then-new, but now-departed Justice Marquez. *People v. Wilson* (2013) 219 Cal.App.4th 500 squarely applied the constitutional holding in *Descamps* to hold that a trial judge had wrongly made findings of facts about a prior conviction for vehicular manslaughter, beyond the elements of that offense, which elevated that crime to "serious felony" and "strike" status, and reversed the sentence imposed based on this finding. California appellate courts then bickered about the effect of *Descamps* on judicial factfinding under the *Guerrero* doctrine, and things were a bit confusing. (See, e.g., *People v. Marin* (2015) 240 Cal.App.4th 1344 and *People v. Saez* (2015) 237 Cal.App.4th 1177.)

Our state Supreme Court has now settled this dispute in our favor with its landmark decision in *People v. Gallardo* (2017) 4 Cal.5th 120 (*Gallardo*), which, on Sixth Amendment grounds, squarely undermined the foundation of *Guerrero* factfinding concerning prior convictions. Adopting the holdings in *Descamps* and a subsequent Supreme Court decision, *Mathis v. United States* (2016) 579 U.S. __ [195 L.Ed.2d 604, 136 S.Ct. 2243] (hereafter "*Mathis*" by S.Ct. pagination), as constitutionally based, *Gallardo* held that the Sixth and Fourteenth Amendments preclude trial courts from making findings about non-elemental facts of prior convictions to prove a prior

conviction allegation which increases a defendant's maximum sentence for a current crime.

The only exception left open for judicial factfinding – which parallels a similar exception recognized by the U.S. Supreme Court in its cases under the "modified categorical approach" – is for situations where the prior conviction at issue is a "divisible offense," i.e., one where a single, unified statute defines a crime committed in alternative manners, one of which is a "strike" and the other of which is not. *Gallardo* was itself such a case, as it involved former section 245, subdivision (a)(1), which included both assault with a deadly weapon, which is a strike, and assault by force likely to inflict great bodily injury, which is not a strike. In that unique situation, *Gallardo* holds, a court reviewing a prior conviction allegation can look to certain parts of the record of conviction to see if it establishes that the crime of conviction was the "strike" version, assault with a deadly weapon. (*Gallardo*, *supra*, at pp. 136-137.) What a court cannot do is look to documents, such as a preliminary hearing transcript, to discern the *nature of the conduct* underlying the conviction. (*Id*., at p. 136.)

What Does it Mean?

But leaving aside that unique situation, the jig is up. Judicial factfinding and *Guerrero* are dead. Henceforth, proof of prior convictions is limited to the elements of the prior crime, nothing more and nothing less.

Those of you who have been toiling in the battle against the unjust Three Strikes law for the last 25 years need to take a moment to realize just how momentous this change in the law is to our practice and to the lives of our clients. Under *Guerrero* and its progeny, prosecutors and trial courts have been permitted to "fill in the blanks" of prior convictions to establish numerous missing elements which make these otherwise nonserious, nonviolent convictions strikes. Some common examples of this include:

- Pre-1982 second degree burglaries, where evidence from the record was used to prove burglaries of a residence. (*Guerrero*)

- Any felony at all where the record of conviction – most commonly, a preliminary hearing transcript – could be employed to prove personal use of a deadly weapon, or arming with a firearm when these allegations were neither pled nor proven/admitted. (See *People v. Reed* (1996) 13 Cal.4th 217)
- For vehicular manslaughter cases, or other cases involving unpled, unproven allegations of personal infliction of great bodily injury, use of records of conviction to prove both *personal* infliction of GBI and that the person injured was not an accomplice. (See, e.g., *People Wilson, supra*, 219 Cal.App.4th 500.
- Out-of-state priors, where plea colloquies, trial transcripts, or other material from the record were used to bridge the gap between the elements of crimes like burglary or robbery under other states' laws and California law. (*Myers*, *supra*, 5 Cal.4th 1193.)

All of this is now finished, in my view. But, as I explain below, there are some remaining skirmishes to fight in the *Guerrero-Gallardo* wars, a kind of "mopping up" against what is likely to be stiff resistance by prosecutors and courts to the full implications of *Descamps* and *Gallardo*.

Before I describe where the next battles will be, let us pause to consider how revolutionary these cases are to proof of prior convictions in our state. Remember that before *Descamps*, our prior attacks, in cases like *McGee*, sought the modest remedy of a new trial, before a jury, as to the unadjudicated facts of a prior crime beyond the elemental facts of the prior conviction – e.g., personal use of a deadly weapon – as a prerequisite to the prior crime being considered a serious felony and a strike prior.

Make no mistake about it: *Descamps* and *Guerrero* take this a step farther. Such factfinding is now flatly prohibited – whether by a court under the *Guerrero* procedure, or by a jury as our side had envisioned in cases like *McGee*. The holdings in *Descamps* and *Gallardo* are quite explicit on this point. If a crime only becomes a serious felony, and thus a strike, by virtue, not of the elements of the crime of conviction, but of non-elemental facts concerning the defendant's "underlying conduct" in committing the crime, the Sixth Amendment under *Descamps* prohibits a sentencing judge from making

findings about such "amplifying but legally extraneous circumstances." (*Descamps*, *supra*, at p. 2288.) What this means – again – is that with the single exception of "divisible crimes" like former section 245(a)(1), the door is effectively slammed on *Guerrero* fact-finding.

As a quick preview, here's a summary of the remaining points of contestation.

- **Phantom Pleading and Proof.** A problem arises with some prior convictions such as pre-1982 second degree burglaries, where prosecutors pled and had defendants admit the non-elemental fact that the burglary was of a residence. Prosecutors will insist that this satisfies *Gallardo*. However, as explained below, the holding of the U.S. Supreme Court in *Mathis* in a near-identical situation proves them wrong.

- **The correct remedy for *Gallardo* error on appeal**. This is obviously an important question for appellate lawyers, but it is also a battle that will likely be played out in the trial courts, and deserves very careful attention from public defender offices and trial counsel generally. Plainly, I think, pre-*Gallardo* cases, and the dissenting opinion of Justice Chin in *Gallardo*, are flatly wrong in thinking that it is a sufficient remedy to give the defendant a jury trial on the missing elements of the prior crime. That was the remedy we were after in cases like *McGee*. But *Descamps* and *Gallardo* go much further by flatly precluding any factfinding – by either a court or a jury – about prior convictions beyond the elements of the prior crimes. Really, the issue here goes beyond the Sixth Amendment jury trial right, and encompasses – like the *Apprendi* rule itself, on which *Descamps* and *Apprendi* are premised – a Fifth and Fourteenth Amendment due process component.

- **Is *Gallardo* retroactive?** Clearly, for appellate purposes, *Gallardo* applies under *Estrada* to all non-final convictions. But what about cases that were final before *Gallardo* but not final *when Descamps* was decided? or not final when *Shepard* or *Apprendi* were decided?

Even more challenging is the question of whether *Gallardo* and *Descamps* are fully retroactive, i.e., whether they apply to long-final convictions involving life sentences under the Three Strikes law where judicial factfinding on priors was used to

prove strikes and elevate sentences to life terms. I argue below that these cases are eligible for relief under both the federal and state standards for retroactivity, and explain why.

Summary of What's Coming

What follows is a tour of the landscape of *Descamps* and *Gallardo* and their impact on proof of prior convictions under California law. Part A is a short discussion of *Guerrero* and its progeny – the obstacle – followed by a short summary, in Part B, of *Apprendi*, its precursors – the solution. In Part C, I discuss the "dark period" of *Apprendi* jurisprudence regarding prior convictions, and then the breaking of light in Part D, starting with *Shepard*, and then reaching full effect with the holdings in *Descamps* and reaching its apogee in *Gallardo*, which is discussed in Part E.

In Part F, I impart some suggestions as to the impact of *Descamps* and *Gallardo* on the various types of *Guerrero* fact finding about prior convictions under California law. Part G, as noted above, features a discussion of the dodgy questions of "harmless error" and prejudice in cases where *Descamps* error is raised. Finally, in Part H, I make a small effort to chart out some cognizability issues in connection with raising *Descamps* error, and then address, at some length, the thorny question of retroactivity.[2]

Let's go back to the starting line.

A. Before and After *Guerrero*: Background, Decision, and Subsequent Case Law.

Proof of prior convictions has been an area of contestation in California law for many years. As suggested above, the general framework had been favorable, with our Supreme Court holding four decades ago in *In re Yurko*, *supra*, 10 Cal. 3d at p. 862, that the elements of a prior conviction had to be proven beyond a reasonable doubt in order to

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[2]The original article included a different Part H, where borrowing some of my own briefing from Prop. 36 cases, I argued that *Descamps* should be applied to require pleading and proof for disqualifying facts of "current offense" convictions under the recent Three Strikes Reform Act of 2012. Alas, this argument flatly failed in California courts, and I could not get so much as a bite on it by means of Cert. petitions in the U.S. Supreme Court; proving, yet again, that a lot of my great ideas don't have wings.

increase a sentence. Before 1982, prior conviction enhancements were typically for no more than a year or two, and generally required proof only of the "fact of" the prior conviction, i.e., that the defendant had previously suffered a conviction for a specified crime.

However, both the stakes and the terrain of the battle over prior convictions was altered with the passage of Proposition 8, the first of a series of poorly written, punitive initiative measures which, over a dark 18 year period, exponentially increased punishment for serious crime in California. Prop. 8 created the now-familiar category of "serious felony" offenses, a specific list of crimes, or, sometimes – and here's the kicker – conduct in connection with crimes – detailed in section 1192.7 which, under the aegis of newly enacted section 667, gave rise to an additional punishment of five years for a defendant with a serious felony prior who was convicted of a new serious felony offense. The trouble, and the controversy discussed in this article, arose from the fact that some of these "serious felony" crimes were not specific offenses, but were defined in a way which required a determination of whether an offense was committed in a particular manner.

A few key examples, from the early years of "serious felony" priors controversy, will suffice to explain this. Prop. 8 included, as a serious felony, "burglary of a residence" (former § 1192.7, subd. (c)(18)), a term which did not correspond to the prior California law of burglary, as up until 1982, persons could be and were convicted of second degree burglary for a non-nighttime burglary of a residence. The list of serious felonies also included – and still includes – conduct-related facts connected to any felony crime, defining as "serious," for example, " . . . any felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice, or any felony in which the defendant personally uses a firearm . . .", and "any felony in which the defendant personally uses a deadly weapon. . . ."(§ 1192.7, subds. (c)(8) & (23).)

In these situations, an immediate controversy arose as to how the government could prove the truth of such prior convictions. Was proof that a person had incurred a prior serious felony conviction for an offense in these categories restricted to the elements of the crime and enhancements pleaded and found true or admitted by the defendant? Or

could a court determining the truth of such a prior serious felony allegation look beyond these bare elements to other parts of the record of conviction from the case to see whether the missing facts – e.g., that the burglary was of a residence, or that the defendant personally used a deadly weapon – had been established?

Our story begins with an all-too familiar sad tale of California criminal law in the 1980s, wherein a soundly reasoned Bird Court decision was overturned by a not-so soundly reasoned Lucas Court decision. In *People v. Alfaro* (1986) 42 Cal.3d 627, a four-vote majority, citing authority from two then-recent cases – and remarkably presaging the ultimate constitutional holdings in *Descamps* and *Gallardo* – held that proof that a prior burglary conviction was a "burglary of a residence" was confined to "the minimum elements of the crime," and that the prosecution could not go behind this narrow record of conviction to prove a missing fact which was not an element of the crime. In so holding, the court in *Alfaro* dismissed the notion that the "record of conviction" from the prior included anything beyond the elements of the crime admitted or found true by the conviction, specifically rejecting arguments that the record of conviction included "superfluous allegations" which were not elements of the crime of conviction – i.e., that the entry was of a residence – or "documents such as probation reports and preliminary hearing transcripts" which it found to be improper sources, and reference to which it characterized as amounting to "'going behind the record of the conviction.'" (*Alfaro*, *supra*, 42 Cal.3d at p. 636, quoting *People v. Jackson* (1985) 37 Cal.3d 826 834.)

Less than two years later – and, not coincidentally, after the intervening 1986 state election which sent packing Chief Justice Bird, Justices Reynoso and Grodin, to be replaced with extremely conservative new justices by a very conservative governor – the Supreme Court did an about-face, ruling 6 to 1 in *Guerrero*, *supra*, 44 Cal.3d 343, that, in deciding whether a prior conviction counted as a serious felony, the trier of fact could look to the "entire record of conviction" – but no further. In this reading, the "record of conviction" included what *Alfaro* had categorized as a "superfluous allegation" that the

burglary was of a residence, and a guilty plea to the crime as charged, which was sufficient to prove that the prior crime was a "burglary of a residence," and thus a serious felony. (*Id*., at pp. 355-356.)

Subsequent cases following *Guerrero* established that the "record of conviction" on which a court could rely to prove a prior conviction included a transcript of a preliminary hearing (*People v. Reed* (1996) 13 Cal.4th 217, 223-230) – though not hearsay statements in a probation report (*id*., at pp. 230-231); a transcript of a trial (*People v. Bartow* (1996) 46 Cal.App.4th 1573), and, for a time at least, a defendant's post-plea admissions to a probation officer as "party admissions," which could fill in missing elements of a serious felony. (See e.g., *People v. Monreal* (1997) 52 Cal.App.4th 670, 675.) The latter conclusion was, fortunately, overruled by the Supreme Court in *People v. Trujillo* (2006) 40 Cal.4th 165, 179, "because such statements do not reflect the facts of the offense for which the defendant was convicted."

The same rules allowing use of the entire record of conviction were held to apply to out-of-state priors. (*People v. Myers*, *supra*, 5 Cal. 4th 1193, 1195) And the Supreme Court concluded that judges – not juries – were solely responsible for deciding whether the record of conviction included the missing facts beyond the elements of the crime required to make the prior crime a serious felony and/or strike (*People v. Kelii*, *supra*, 21 Cal.4th 452, 455-459).

The import of this line of cases became considerably more grave following the legislative and initiative-measure enactments of California's Three Strikes law in 1994. Decisions about the sufficiency of proof of prior convictions now gave rise to far more egregious penal consequences than the already extreme five-year enhancements under section 667(a), and were often the tipping point between a draconian 25-to-life term for a third strike offense and a comparatively measured "doubled" term as a second striker.

We muddled on fighting, doing our best within the strictures of *Guerrero* and its progeny, winning a few battles here and there – for example, a finding that the prior strike

was not proven where the record of conviction was "ambiguous" as to whether a prior conviction for violating section 245(a)(1) was assault with a deadly weapon, a strike, or assault by force likely to inflict great bodily injury, a non-strike. (See *People v. Rodriguez* (1998) 17 Cal.4th 253, 262.) But we were losing most battles, and trial judges were permitted to comb the record of a preliminary hearing or trial transcript, or a plea colloquy, to fill in the pieces missing from the actual elements of a prior conviction and make it into a serious felony and a strike.

Meanwhile, in another part of the forest, a major change in the weather was brewing from above. . . .

B. ***Apprendi*: Decision and Background**

In June of 2000, the *Apprendi* revolution was launched by a 5 to 4 decision of the United States Supreme Court which recognized, for the first time, 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 p. 490.) Significantly, the five votes for the majority opinion, authored by Justice Stevens, came from an unlikely coalition of the most liberal members of the Court – Justices Souter and Ginsburg – and the two most conservative members – Justices Scalia and Thomas, with a pair of dissents from the more moderate justices of the left and right – Rehnquist, Kennedy, O'Connor, and Breyer.[3]

The *Apprendi* case itself concerned a conduct enhancement allegation – an alleged "hate crime" mental state in the commission of the crime. Prior to *Apprendi*, New Jersey and other states had designated the determination of such conduct-related facts as "sentencing factors" to be decided by a judge at a sentencing hearing based on a preponderance of evidence standard. This practice had seemingly been sanctioned by a prior Supreme Court ruling in *McMillan v. Pennsylvania* (1986) 477 U.S. 79, 81-82,

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[3] I may be the first person to call Chief Justice Rehnquist a "moderate."

which had found no constitutional violation where a judge, not a jury, made a determination about "visible firearm possession" during the crime, concluding that this was not an element of the offense, but a mere "sentencing factor" which a court could determine by a preponderance standard to require a mandatory minimum punishment. The *Apprendi* decision put an end to this practice once and for all where the "fact" at issue had the effect of increasing the maximum punishment for the offense.[4]

Notably, this narrow part of the holding in *Apprendi* had little effect on California law, which had always recognized that conduct enhancements – e.g., personal use of a weapon, or infliction of great bodily injury – had to be pled and proven to a jury beyond a reasonable doubt. (See, e.g., § 1170, subd. (e): "All enhancements shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact"; and see *In re Yurko*, *supra*, 10 Cal.3d at p. 862.)

Although *Apprendi* qualifies as a landmark decision, it did not come out of the blue, but was presaged by a pair of decades-old Supreme Court decisions. *In re Winship* (1970) 397 U.S. 358, 364, held that "[t]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." And *Mullaney v. Wilbur* (1975) 421 U.S. 684, overturned a Maine law requiring a defendant to prove heat of passion in order to establish a manslaughter defense to murder, based, in pertinent part, on a holding that the *Winship* requirement of proof beyond a reasonable doubt by the prosecution as to every element of a criminal charge applies with equal force to facts which, if proven, increase the "degree of culpability," and hence the range of punishments, for an offense (*id*., at 697-701), and classifying the prosecutor's obligation to prove the absence of heat of passion as such an element in a murder charge as of equal footing with any other

[4] While *Apprendi* itself did not overrule the specific holding in *McMillan* about "mandatory minimum" sentences, the Supreme Court ultimately did so directly in *Alleyne v. United States* (2013) 133 S.Ct. 2151, 2158.

Winship factors, such that "that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." (*Id*., at p. 704.)

The *Apprendi* revolution has had a number of collateral consequences to California criminal law practice, including such matters as the applicability of federal constitutional harmless error analysis to erroneous jury instructions on enhancement allegations (compare *People v. Wims* (1995) 10 Cal.4th 293 [pre-Apprendi decision applying *Watson* test to such error] with *People v. Sengpadychith* (2001) 26 Cal.4th 316 [post-Apprendi decision recognizing that standard of *Chapman v. California* (1967) 386 U.S. 987 (*Chapman*) had to apply where enhancement allegation increases maximum punishment]); and offense-related facts used to impose higher prison sentences (see *Cunningham v. California* (2007) 549 U.S. 2744 Cal.3d 343 and *People v. Sandoval* (2007) 41 Cal.4th 825). But our focus here is on the narrow issue of proof of prior convictions which increase punishment and, in particular, proof of facts beyond the elements of the prior conviction which have this effect. So, on to that subject.

C. ***Apprendi* and Proof of Prior Convictions: the Dark Period.**

As indicated above, the landmark ruling in *Apprendi* came with disappointing news about prior convictions, expressed by the caveat which precedes the catchphrase holding in *Apprendi*: "*Other 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.)

The source of this exception was a then-fairly recent decision by the Court, also by a 5 to 4 vote, in *Almendarez-Torres v. United States* (1998) 523 U.S. 224, which held that there was no constitutional right to pleading and proof of enhancing allegations based on prior convictions. The defendant in that case had previously admitted three prior convictions, each of which had been incurred pursuant to proceedings with their own

constitutional procedural safeguards, and the Supreme Court held, in effect, that there was accordingly no contested issue of fact on which a jury trial could be held. (*Id*., at p. 230; see *Apprendi*, *supra*, at 530 U.S. at p. 487, citing discussion of *Almendarez-Torres* in *Jones v. United States* (1999) 526 U.S. 227, 243-244.)

Looking back to the moment in time at which *Apprendi* was decided, there were two salient circumstances concerning the "prior conviction exception" discussed in that case which made it appear ripe for challenge regarding proof of prior serious felonies and strikes under California law. First, the justices forming the majority in *Apprendi*, while adhering to this exception in form, in several places signaled grave doubt on the continued validity of this exception. (See *Apprendi*, *supra*, at pp. 489-90 [maj. opin. describing it as "arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested," while declining to address the point as not raised in the case]; and *id*., at pp. 520-521 [conc. opn. of Thomas, J., the only justice who joined the majority in both *Apprendi* and *Almendarez-Torres*, specifically stating he had erred in joining the majority in *Almendarez-Torres* finding no right to jury trial for prior conviction allegations].)

Second, both the narrow language of the exception – "the *fact of* a prior conviction" (*id*., at p. 490) – and the constitutional underpinnings of the exception, as discussed in *Jones* – premised on the notion that "unlike virtually any other consideration used to enlarge the possible penalty for an offense, . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees . . ." (*Jones supra*, at p. 249) – left it wide open to argue that the exception did not apply to proof of facts *beyond* the "*fact of*" a prior conviction, i.e., beyond the elements of the prior offense found true by the jury or admitted by the defendant. Thus an "exception to the exception" would seem to apply to the type of contested facts at issue under the *Guerrero* line of cases, e.g., that an older second degree

burglary was of a residence, or that a defendant used a weapon or inflicted great bodily injury, where those facts had not been pleaded and either proven or admitted by the defendant.

The goal of our early, post-*Apprendi* attacks on the *Guerrero* rule was a modest one: to obtain a jury trial on the missing elements which made the prior conviction a strike, rather than have these contested facts decided by a judge. I personally launched several such challenges, even taking Cert. petitions when the challenges failed in state court. But the Supreme Court did not bite, and in 2006, a disappointing statement on denial of certiorari by Justice Stevens suggested that "the recidivism" issue in connection with *Apprendi* jurisprudence was dead. (*Rangel-Reyes v. United States* (2006) 547 U.S. 1200, 1201 [Statement by Stevens, J., on denial of cert.]; but see *id*., at pp. 1202-1203 [dissent by Thomas, J., on denial of cert., arguing that since a clear majority of court now disagrees with holding of *Almendarez-Torres*, and only the Supreme Court can overrule that case, "countless criminal defendants will be denied the full protection afforded by the Fifth and Sixth Amendments, notwithstanding the agreement of a majority of the Court that this result is unconstitutional"].)

Worse still, in *People v. McGee*, *supra*, 38 Cal.4th 682, the California Supreme Court squarely rejected an *Apprendi*-based challenge to judicial factfinding as to missing elements of a prior conviction, holding that the prior convictions exception recognized in *Apprendi* had its roots in the binding authority of *Almendarez-Torres*, and that these cases were controlling in excluding *any* recidivism-based enhancement factfinding from the *Apprendi* doctrine – unless and until the United States Supreme Court held otherwise. While noting that the Supreme Court's then-recent decision in *Shepard*, *supra*, 544 U.S. 13, suggested that the Supreme Court may be prepared to overrule *Almendarez-Torres* with respect to judicial factfinding about prior convictions beyond the elements of the charge – and more on that case in a bit – our state supreme court concluded in *McGee* that because the decision in *Shepard* was based on statutory interpretation, and not

constitutional interpretation under *Apprendi*, the holding in *Almendarez-Torres* was still controlling. (*McGee*, *supra*, 38 Cal.4th at pp. 707-708.)[5]

D. *Apprendi* and Prior Convictions: Into the Light, *Shepard, Descamps, Mathis & Gallardo*.

1. *Shepard*

As both the majority and the dissent in *McGee* suggested, in *Shepard*, the U.S. Supreme Court signaled its grave dissatisfaction, on constitutional grounds, with judicial factfinding about the nature of prior convictions beyond the elements of the prior crime. *Shepard*, like the key cases that preceded and followed it, concerned the federal "Armed Career Criminal Act" ("ACCA"), not state laws. The ACCA mandates higher punishments for certain defendants with violent current offenses if, inter alia, the person has three prior convictions for serious drug offenses or "violent felonies"; the list of "violent felonies" includes "burglary," which the Supreme Court construed as referring to "'generic burglary,' an 'unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.'" (*Shepard*, *supra*, 544 U.S. at 17, quoting *Taylor v. United States* (1990) 495 U.S. 575, 599.) The disputed issues in *Taylor*, *Shepard*, and *Descamps* were similar to ones which arise under the *Guerrero* line of cases in California law, in that the questions concerned whether a "violent felony" burglary had been proven from records of conviction where the states' burglary statutes did not include all the elements of generic burglary.

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[5] Justice Kennard dissented in *McGee*, concluding that under the *Apprendi* doctrine, a defendant is entitled to a jury trial on conduct underlying a prior conviction which was never determined by a jury or admitted by the defendant. (*Id*., at pp. 709-710.) However one chooses to view Justice Kennard's decidedly mixed legacy in the field of criminal law, she must certainly be praised for being way ahead of the curve when it came to the *Apprendi* doctrine – even before *Apprendi* was decided. (See, e.g., *People v. Wims*, *supra*, 10 Cal.4th at pp. 317-327 [dis. opn. of Kennard, J., asserting that 6th & 14th Amend. right to jury trial exists on conduct enhancements under California law, and thus the *Chapman* standard applied to instructional error].)

In *Taylor, supra,* 495 U.S. 575, the Supreme Court restricted inquiry into prior convictions under the ACCA to the statutory elements of the crime of conviction. Similarly, *Shepard* concerned a prior conviction under a Massachusetts burglary statute which allowed for convictions of burglary for entries into "boats and cars" as well as buildings, neither of which would qualify as a prior conviction for a "generic burglary" that increased the maximum punishment under the ACCA. The Court in *Shepard* authorized a sentencing court to look at the records of the prior conviction – specifically, "the terms of a plea agreement or transcript of a colloquy between judge and defendant" – to determine whether these records proved that defendant had entered a building, and thus committed a generic burglary. The purpose of such inquiry, the Court said in *Shepard*, was not to determine "what the defendant and state judge must have understood as the factual basis of the prior plea . . .", but rather to assess whether the plea "was to the version of the crime in the Massachusetts statute (burglary of a building) which, by its elements, corresponded to generic burglary." (*Descamps*, *supra*, 133 S.Ct. at 2284, citing and quoting *Shepard*, *supra*, 544 U.S. at 25-26.) Although *Shepard* discussed the *Apprendi* doctrine (*Shepard*, *supra*, at pp. 24-25), the holding in *Shepard* was premised on narrower statutory construction grounds, as our Supreme Court concluded in *McGee*.

2. ***Descamps***

The "revisiting" of this issue forecast in *McGee* at last took place in *Descamps*, *supra*, 133 S.Ct. 2276, where a broad, seven-vote majority of the High Court expressly expanded the *Apprendi* rule to include, in a delimited manner, the examination of records from a prior conviction for sentencing purposes. I will borrow from Justice Marquez's *Wilson* opinion here, as it ably explains the Sixth Amendment holding in *Descamps* in the context of *Shepard* and prior decisions discussed above.

> Like the defendant in *Shepard*, Descamps faced a 15-year minimum sentence based on the finding of a prior conviction for burglary. Descamps had pleaded guilty to burglary in California, wherein "[e]very person who enters

> [certain locations] with intent to commit grand or petit larceny or any felony is guilty of burglary." (§ 459.) This California statute sweeps more broadly than the generic definition of burglary under the ACCA, which requires the element of "unlawful or unprivileged entry." (*Taylor v. United States*, *supra*, 495 U.S. at p. 599.) To determine whether Descamps's prior offense involved "unlawful or unprivileged entry," the sentencing court looked to facts set forth in the transcript of his plea colloquy. At the plea hearing, the prosecutor had proffered that the crime involved the breaking and entering of a grocery store, and Descamps failed to object to that statement. (*Descamps*, *supra*, 570 U.S. at p. ___ [133 S.Ct. at p. 2282].) On this basis, the district court doubled his sentence.
>
> The high court rejected this factfinding as a violation of the Sixth Amendment under *Apprendi*. After first applying a statutory construction analysis as it did in *Shepard*, the court turned to the "Sixth Amendment underpinnings" of the analysis. The court held that a sentencing court's factfinding "would (at the least) raise serious Sixth Amendment concerns if it went beyond merely identifying a prior conviction." (*Descamps*, *supra*, 570 U.S. at p. ___ [133 S.Ct. at p. 2288].) The court continued, "Those concerns, we recognized in *Shepard*, 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. . . .'" (*Ibid.*) Thus, in *Descamps*, a majority of the United States Supreme Court held that a sentencing court's finding of priors based on the record of conviction implicates the Sixth Amendment under *Apprendi*.

(*Wilson*, *supra*, 219 Cal.App.4th at pp. 514-515, footnotes omitted.)

The holding in *Descamps* provides an explicit constitutional underpinning for the statutory construction interpretation which the High Court had previously put forward in *Shepard*. Both cases identify two different types of "fact determination" which a sentencing court can engage in with respect to prior convictions. Both conclude, on principles of statutory construction, that Congress intended for judges to only make factual determinations concerning prior convictions where there is a "divisible statute," such as the Massachusetts burglary law at issue in *Shepard* – or, as we will see in *Gallardo*, former section 245(a)(1) in California -- to identify which version of the

divisible statute was the crime of conviction. (*Descamps*, *supra*, 133 S.Ct. at 2285.) This "modified categorical approach" has no application in a situation like the one presented in *Descamps*, where the elements of any version of section 459 of the California Penal Code do not meet the definition of generic burglary. Thus, the Supreme Court held, "because California, to get a conviction, need not prove that Descamps broke and entered – a §459 violation cannot serve as an ACCA predicate." The Court then concluded, in a somewhat breathtaking passage that signaled the beginning of the end for *Guerrero* factfinding -- that it is "irrelevant" and "makes no difference" whether "Descamps *did* break and enter . . ." or "whether he ever admitted to breaking and entering. . . ." (*Id*., at pp. 2285-2286, emphasis in original.)

Although the foregoing reasoning was put forward as to the statutory construction portion of the opinion in *Descamps* (*ibid*.), it is underscored by the Court's subsequent discussion of the necessity for that approach based on the constitutional requirements of *Apprendi* case law and the Sixth and Fourteenth Amendments, with the Supreme Court emphasizing the error on the part of the Ninth Circuit in "flout[ing the] reasoning of this approach by "extending judicial factfinding beyond the recognition of a prior conviction." (*Id*., at p. 2288.)

> Our modified categorical approach merely assists the sentencing court in identifying the defendant's crime of conviction, as we have held the Sixth Amendment permits. But the 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. [citation] 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. See, e.g., *Richardson v. United States*, 526 U. S. 813, 817 . . . (1999). 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. See 544 U. S., at 24-26 . . . (plurality opinion). 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.

(*Descamps*, *supra*, 133 S.Ct. at 2288-2289.)

3. ***Wilson*** **and other pre-*Gallardo* California cases.**

The Sixth District's decision in *Wilson*, *supra*, 219 Cal.App.4th 500, decided some eight months after *Descamps*, marked the first occasion in which a California court directly applied the constitutional holding of *Descamps* to California law concerning proof of "strikes" under what had previously been the *Guerrero* framework, setting the table for the holding in *Gallardo*, which cites *Wilson* with approval. Because *Wilson* deals with the more common variety of *Descamps* error under California law – i.e., not involving a divisible offense – and because it came first, I will spend some time focusing on it.

Wilson concerned an alleged prior serious felony/strike conviction for vehicular manslaughter. Surprisingly, this offense is not, and has never been, one of the crimes specified as a serious or violent felony. Thus, a bit of background is required on how this offense can become a serious felony, and how the *Guerrero* doctrine has been applied to this crime. Two decades ago, the Sixth District in *People v. Gonzales* (1994) 29 Cal.App.4th 1684, held that this crime can be a serious felony by virtue of subdivision (c)(8) of section 1192.7, which defines as a serious felony "'any other felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice.'" (*Id*., at p. 1691.) *Gonzales* concluded that vehicular manslaughter will constitute a serious felony "if in the commission of the crime the defendant personally inflicts great bodily injury on any person other than an accomplice." (*Id*., at p. 1694.) The

Legislature later codified this holding in section 1192.8.

Fast forward 19 years to *Wilson*, where the issue was whether the defendant's prior conviction for vehicular manslaughter could be shown to be a serious felony by virtue of personal infliction of great bodily injury. Obviously, death is great bodily injury. (*Wilson*, *supra*, 219 Cal.App.4th at p. 511.) However, a person can be guilty of vehicular manslaughter without *personally* inflicting the injury, e.g., by aiding and abetting another person in drunk driving causing the death of another person. (*Id*., at pp. 509-510; § 1192.8.)

The pre-*Descamps* approach, typified by the opinion in *Gonzales*, involves examination of the record of conviction, in *Guerrero*-fashion, to see whether it contained proof of the "nature of the prior offense, i.e., to explain the defendant's conduct which comprised the crime he admitted to have suffered in the earlier proceeding . . .", which the court in *Gonzales*, correctly anticipating the holding in *Reed*, found from the preliminary hearing transcript. (*Gonzales*, *supra*, 29 Cal.App.4th at pp. 701-704.) Justice Marquez's opinion in *Wilson* recognized that *Descamps* changed all of this. Where proof of an element of the charged serious felony prior conviction was arguably contested, and never found by a jury, judicial factfinding is now plainly precluded by the Sixth Amendment. In *Wilson*, the contested element was "personal infliction" of great bodily injury.[6] As background, Wilson had pled guilty to the vehicular manslaughter charge but had, at a preliminary hearing, presented evidence which put into question the uncharged element of "personal infliction" of great bodily injury, in the form of conflicting

[4]A footnote in *Wilson* acknowledges that there was an additional element of vehicular manslaughter as a strike prior under section 1192.8 – the "nonaccomplice" status of the person on whom great bodily injury was inflicted – commenting that it was not challenged by the defendant in that case, and that its ultimate conclusion that there was error as to the personal infliction element made it unnecessary for the court to address this element. (*Id*., at p. 513, n. 4.) As discussed below, this element was in dispute in my own case, *Rivera*, which raised a *Descamps*-*Wilson* challenge to use of a vehicular manslaughter conviction as a strike.

testimony suggesting that a third party passenger, Horvath, had caused the fatal crash by grabbing the steering wheel. (*Wilson*, *supra*, at pp. 506, 515.)

On this record, *Wilson* found that any factfinding about "personal infliction" was prohibited by *Descamps* and the Sixth Amendment. And the holding is clear as a bell.

> [T]he Sixth Amendment under *Apprendi* precluded the [sentencing] court from finding 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. . . . To resolve the [contested] issue, the sentencing court was required to weigh the credibility of various witnesses and statements. 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*, . . . 133 S.Ct. at 2288.)

(*Wilson*, *supra*, 219 Cal.App.4th at pp. 515-516.)

Thus, by following the *Guerrero* procedure, the *Wilson* court held, the trial court violated Wilson's Sixth and Fourteenth Amendment right to jury findings beyond a reasonable doubt as to every element which increased his maximum punishment because the court improperly made "its own finding about a non-elemental fact to increase [appellant's] maximum sentence." (*Descamps*, *supra*, 133 S.Ct. at 2289.) "[T]he Sixth Amendment under *Apprendi* precluded the [sentencing] court from finding the facts – here in dispute – required to prove a strike prior based on the gross vehicular manslaughter offense." (*Wilson*, *supra*, 219 Cal.App.4th at p. 515.) The sentencing court "looked beyond the facts necessarily implied by the elements of the prior conviction . . .", in a situation where the court "could not have increased [defendant's] sentence without 'making a disputed determination of fact . . ." in a manner precluded by the holding in *Descamps*. (*Id.*, at pp. 515-516, quoting *Descamps*, *supra*, 133 S.Ct. at p. 2288.)

Two other published cases reached similar results. In *People Saez*, *supra*, 237 Cal.App.4th 1177, the First District construed *Descamps* as a constitutional mandate and

reversed a true finding on a prior strike conviction for false imprisonment while armed with a firearm where the latter fact had not been pled or proven, concluding that under *Descamps* and the Sixth Amendment a court is precluded "from increasing a criminal sentence based on facts related to a prior conviction when those facts were not necessarily established by the conviction." (*Id*., at p. 1181.) And in *People v. Marin* (2015) 240 Cal.App.4th 1344, the Second District applied *Descamps* to reverse a true finding as to a prior involuntary manslaughter conviction on grounds similar to *Wilson*, based on a lack of a proper showing, under *Descamps*, that he had personally inflicted great bodily injury.

4. ***Mathis.***

In *Mathis v. United States* (2016) 579 U.S. ___ [195 L.Ed.2d 604], the Supreme Court took another step forward in terms of making the *Apprendi* revolution apply to prior convictions. In that case, as commonly occurred with older second degree convictions under California law (more on this later), *the charging document itself* included an allegation that the burglary was of a "building," and not a vessel, and the jury's guilty verdict in the case was based on this allegation. (See *Mathis, supra*, 136 S.Ct. at p. 2260, dis. opn. of Breyer, J.) But this was plainly an improper basis for the subsequent sentencing court to conclude that the crime was a generic burglary because the jury finding concerned non-elemental facts for an offense where the elements of the crime did not match the elements of generic burglary under ACCA. (*Mathis*, *supra*, 136 S.Ct. at pp. 2250, 2252.)

The High Court in *Mathis* held that a sentencing judge is precluded from looking at the record of conviction to make conclusions about non-elemental facts underlying a prior conviction which are required to make a defendant susceptible to an increased maximum punishment. (*Mathis*, *supra*, 136 S.Ct. at pp. 2250, 2252.) As our Supreme Court ultimately recognized in *Gallardo*, the holding in *Mathis* precludes courts from

looking at "'old record materials'" to determine whether the defendant had burglarized a building or a vehicle because the Sixth Amendment precluded a judge from "'go[ing] beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense . . .'", and further "barred [a judge] 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.'" (*Gallardo, supra*, 4 Cal.5th at p. 133, quoting *Mathis*, *supra*, 136 S.Ct. at pp. 2250, 2252.)

E. ***Gallardo*: Crossing the Finish Line (So Far).**

Were *Descamps* and *Mathis* going to carry the day in California, ending *Guerrero* fact finding for good? *Wilson* and the other cases noted above clearly suggested this. But there were rumblings of dissension in the ranks. A Ninth Circuit case held that the rule in *Descamps* was not constitutionally compelled. (See *Ezell v. United States* (9th Cir. 2015) 778 F.3d 762, 766-767 [*Descamps* is not a "constitutional" decision, but rather one that follows a settled rule of statutory construction].) And in an unpublished decision, the Court of Appeal in *Gallardo* held that *Descamps* had no application to a "divisible" statute, section 245(a)(1), which made it proper to engage in *Guerrero* factfinding from a preliminary hearing transcript.

Our Supreme Court's grant of review in *Gallardo* signaled that the problem left hanging in *McGee* would now be squarely addressed. And the near-unanimous opinion which resulted signaled the beginning of the end – although not quite the end – of *Guerrero* factfinding in California. As will be explained below, it will be up to us and to courts in the next few years to drive the final nails into the coffin of the California practice of judicial fact finding about non-elemental facts of prior crimes to increase punishment under the Three Strikes law

and other punishment provisions.

1. **The Holding.**

In *Gallardo*, the issue was whether the defendant's prior conviction for violating former section 245 (a)(1) involved personal use of a deadly weapon by the defendant. The prosecutor, following the practice sanctioned in *Reed* two decades earlier, used a transcript of the preliminary hearing from the prior crime to prove this fact, and the Court of Appeal held that this practice was not precluded by the Sixth Amendment.

The Supreme Court unanimously concluded, on federal constitutional grounds, that *Descamps* precluded such proof, characterizing it as "a form of factfinding that strayed beyond the bounds of the Sixth Amendment." (*Id*., at p. 136.) Noting that the plea entered into by the defendant in *Gallardo* was to the crime of felony assault under section 245(a)(1), which could have either been assault with a deadly weapon, which is a serious felony, or assault by force likely to inflict great bodily injury, which is not a serious felony, the Supreme Court emphasized that there was no admission of personal use of a deadly weapon at the time the plea was entered. While it could have been proper to rely on documents from the record of conviction, such as "indictments and jury instructions" to establish that the plea was to the "strike" version of the crime, assault with a deadly weapon, because these documents "might help identify what facts a jury necessarily found in the prior proceeding . . ." (*id*., at p. 137), the Supreme Court effectively overruled *Reed*, holding that "defendant's preliminary hearing transcript can reveal no such thing." (*Ibid.*)

> A sentencing court reviewing that preliminary transcript has no way of knowing whether a jury would have credited the victim's testimony had the case gone to trial. And at least in the absence of any pertinent admissions, the sentencing court can only guess at whether, by pleading guilty to a violation of Penal Code section 245, subdivision (a)(1), defendant was also acknowledging the truth of the testimony indicating that she had committed the assault with a knife. [¶] By relying on the preliminary hearing transcript to determine the "nature or basis" of

> defendant's prior conviction, the sentencing court engaged in an impermissible inquiry to determine "'what the defendant and state judge must have understood as the factual basis of the prior plea.'" (*Descamps*, *supra*, 570 U.S. at p. ___ [133 S.Ct. at p. 2284].) Because the relevant facts were neither found by a jury nor admitted by defendant when entering her guilty plea, they could not serve as the basis for defendant's increased sentence here.

(*Gallardo, supra*, 4 Cal.5th at p. 137.)

Gallardo thus squarely holds that proof of facts from a preliminary hearing transcript is not a permissible substitute for the constitutionally required showing necessary to increase a defendant's maximum sentence, which can only come from facts established by the elements of the prior crimes which were pleaded by the prosecutor and either found true by a jury beyond a reasonable doubt or admitted by the defendant during the proceedings in the prior case. (*Ibid*.)

2. **"Divisible Offenses" and the Holding in *Gallardo*.**

It is somewhat unfortunate for our purposes that the Supreme Court chose, as its vehicle for upholding *Descamps* and *Mathis* as constitutional limits under the *Apprendi* doctrine, a case involving a "divisible offense," former section 245(a)(1). In that unique situation, the U.S. Supreme Court's case law permits a court to make a determination whether the defendant's prior conviction was a serious felony, and thus a strike, based on whether his or her prior conviction was for one version of criminal conduct prohibited under that subdivision – assault with a deadly weapon – which *is* a serious felony under California law, or the other version – assault by means of force likely to inflict great bodily injury – which is *not* a serious felony under California law. (*Gallardo*, *supra*, 4 Cal.5th at p. 125, citing *People v. Delgado* (2008) 43 Cal.4th 1059, 1065.) Under *Descamps* and the Sixth Amendment, a court *can* employ the "modified categorical approach" and engage in limited judicial factfinding to determine whether the record of conviction shows that the conviction was for one variant of a divisible offense

which qualifies for a punishment enhancement based on its essential elements. (See *Shepard,* 544 U.S. at p. 1326; *Gallardo*, *supra*, at pp. 130-131.) Thus, in *Gallardo*, which involved this type of divisible offense, the Supreme Court, following the federal approach, remanded the case for further proceedings to ascertain whether the record of conviction established that the prior crime was assault with a deadly weapon, and thus a serious felony and strike. (*Gallardo*, at pp. 137-138.)

Two critical points need to be made about this aspect of the holding in *Gallardo*. First, when engaging in this kind of factfinding from the record, the court is necessarily limited to documents which can establish conclusively that the version of the crime for which the defendant was convicted, by trial or plea, was the species of the divisible offense which gives rise to the increased punishment. But *Gallardo* makes it crystal clear that there is no longer any basis for examining records of conviction to determine the *nature of the conduct* underlying the conviction, a type of determination that is expressly precluded under *Descamps*, *Mathis*, *Gallardo*, and the Sixth Amendment.

Second, nothing in *Gallardo* suggests or even intimates that this limited type of judicial factfinding has any place in connection with prior conviction allegations which do not involve divisible offenses. Thus it stands to reason that as to the balance of cases involving prior conviction allegations, which require proof of facts beyond the elements of the convictions, no manner of proof from the record of conviction will any longer suffice to prove the truth of such prior convictions. This means that in situations like those presented in *Wilson*, *Saez* and *Marin*, involving unpled, unproven and/or unadmitted elements of personal infliction of great bodily injury, or personal use of a weapon, there is no longer any basis for a court to review the record of conviction to fill in the blanks in order to make a prior crime into a strike. The Court put this as clearly as possible in *Gallardo*.

> "We today hold that defendant's constitutional right to a jury trial sweeps more broadly than our case law previously recognized: While a trial court can determine

> the fact of a prior conviction without infringing on the defendant's Sixth Amendment rights, *it cannot determine disputed facts about what conduct likely gave rise to the conviction*."

(*Gallardo*, *supra*, at p. 138, emphasis added.)

F. What Does This Mean for Proof of Prior Convictions in California? Where to Go After *Descamps* and *Gallardo*.

We need to get the word out: *Guerrero* and its progeny are now dead letters, and the old ruling in *Alfaro* is now, in effect, the law of the land – at least in terms of issues concerning prior convictions where what is at issue are essential facts that are absent from the elements of the crimes-and-enhancements on which your client was convicted. When this is what is at issue, trial courts are no longer allowed to do what *Guerrero* has permitted – i.e., scour the record of conviction for evidence (from a trial, from the preliminary hearing, from plea colloquies, etc.) which proves missing facts which are not part of the elements of the offense of conviction.

The caveat, of course, is that there will still be situations where judicial factfinding will be permitted to determine the type of question that properly arose in *Shepard*, i.e., whether the offense of conviction was the particular version of a criminal statute which, based on its elements, constitutes a serious felony. Most obvious in this category is the situation presented in *Gallardo*, i.e., violations of former section 245(a)(1), when that crime was alternatively defined as either assault with a deadly weapon – which is a serious felony – or assault by force likely to inflict great bodily injury – which is not. Where this is the issue in your case, *some portion* of the *Guerrero* rules still apply, and recourse can be made to the record of conviction to prove, beyond a reasonable doubt, that the crime of conviction was the "deadly weapon" version, and not the "force likely" version." As indicated below, the case law on this is helpful, in that if the record of conviction is "ambiguous" as to which version is proven, the proof is deemed insufficient. (See *People v. Delgado* (2008) 43 Cal.4th 1059, 1071, fn 5; *People v. Banuelos* (2005)

130 Cal.App.4th 601, 605.)

However, for most other *Guerrero* disputes, *Descamps* and *Gallardo* should control, and judicial findings as to the non-elemental facts of a prior offense is squarely prohibited. What follows is a list of examples, not intended to be exhaustive, to help you figure out if you have such a case.

1. **Personal Use or Arming with Deadly Weapon or Firearm, or Personal Infliction of Great Bodily Injury (§ 1192.7(c)(8)&(23)).** The short answer is that if these elemental "facts" were not pled or proven by an enhancement allegation which potentially increased the defendant's punishment, after *Descamps* and *Gallardo*, a court can no longer go hunting for proof about them in the record of conviction No manner of proof from a preliminary hearing, or even from the transcript of a trial, can suffice to prove these facts when they were not elements of the prior crime of conviction.

2. **The "Non-Accomplice" Status of a Victim of Great Bodily Injury**. This issue, reserved by the court in *Wilson* because it was not raised, can arise where "personal infliction of great bodily injury" is shown by the conviction itself (e.g., vehicular manslaughter, battery with serious bodily injury), but where the non-accomplice status of the victim is not pled and either proven or admitted. I have thoroughly briefed this issue in a pre-*Gallardo* vehicular manslaughter case where the disputed issue was the non-accomplice status of the victim. Thus, sample briefing is available.

3. **The "Burglary of a Residence" Element of Second Degree Burglaries.** Here is a subset of *Guerrero* factfinding with a long history, starting with *Guerrero* itself, which overruled *Alfaro* and prior cases as to the propriety of factfinding to show that the burglary was of a residence. I discuss it in some detail here because I have briefed it in two recent habeas petitions involving retroactive application of *Gallardo* to some long-final Third Strike convictions.[7]

[7]In one of these cases, we got a favorable ruling granting habeas relief by Santa Clara County Judge Joshua Weinstein. To our surprise and joy, the prosecutor chose not to appeal, and our aging client, sentenced to 35 to life under the Three Strikes law in 1999, was released after resentencing. The other is pending before a different judge.

The gist of our arguments is that if the prior conviction was for second degree burglary, it simply can no longer count as a strike. However, there are two sets of complications here, discussed below.

a. **Pre-1982 Second Degree Burglaries: Is There a "Kind of Pled and Proven" Exception? No!** As explained above, prior to 1982, a first degree burglary required a showing that it was a burglary of a residence *in the nighttime*; thus daytime residential burglaries were charged in the second degree. Under *Descamps* and *Gallardo*, it is obviously the case that evidence from a trial transcript or a preliminary hearing cannot be used to prove the burglary was of a residence, the missing element to make these old burglaries into strikes.

But what about the situation presented in *Guerrero* itself, where the missing fact had been alleged in the charging document and proven or admitted by the defendant in the original proceeding? It appears that this was a common practice back in the 1970s and early 1980s. This sub-issue, which defined the different rulings in *Alfaro* and *Guerrero* discussed above, is not expressly resolved by the holdings in *Descamps* or *Gallardo*, and thus may be up-for-grabs in the post-*Descamps* universe.

However, in my view, the same reasoning which led to the majority holding in *Alfaro* – that the pleading of a burglary of a residence was entirely superfluous, and added nothing to the charges and the punishment – can now be employed through the constitutional lens of *Descamps* and *Gallardo* to show that such "pleading and proof" of non-elements does not satisfy *Apprendi* and the Sixth and Fourteenth Amendments. This must be so because there is no federal constitutional right to a jury trial as to non-elemental facts, even if they are alleged in the accusatory pleading but have no penal consequences if admitted or found true. (See *Descamps*, *supra*, 133 S.Ct. at 2288-2289 ["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"].)

As noted above, I have pretty thoroughly briefed this point in my two recent habeas claims, where I argued that second degree burglary priors where the extraneous, non-elemental fact that the burglaries were of a residence were nominally pled by the prosecutor and admitted by the defendant, cannot count as strikes under *Descamps* and *Gallardo*. The gist of this argument is that only admission of *elemental facts* can count as proof of a prior conviction for purposes of increasing a defendant's maximum sentence.

Gallardo makes this crystal clear, concluding that the trial court in that case "violated defendant's Sixth Amendment right to a jury trial when it found a disputed fact about the conduct underlying defendant's assault conviction that *had not been established by virtue of the conviction itself . . .*", expressly disapproving the prior holding in *McGee*, "insofar as it suggests that the trial court's factfinding was constitutionally permissible." (*Gallardo*, *supra*, 4 Cal.5th at pp. 124-125, emphasis added.) Thus, in a case like *Gallardo*, even if a preliminary hearing transcript establishes that the defendant personally used a deadly weapon in committing her crime, this is immaterial because non-elemental facts like this cannot be used to increase maximum punishment. (*Ibid*.) And thus, in a case like *Descamps*, even if the defendant, in a plea colloquy, admitted that he broke into the house he burglarized – the missing "breaking" element needed to prove that the crime was a generic burglary under ACCA – it cannot constitutionally establish this fact for purposes of increasing his maximum punishment in a subsequent prosecution. The holding in *Descamps* on this point is plainly determinative of the constitutional issue at stake here. "[A]s *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." (*Descamps*, *supra*, 133 S.Ct. at pp. 2288-2289, emphasis added.)

Thus under *Descamps* and *Gallardo*, when a defendant pled guilty to a pre-1982 second degree burglary, he waived his right to a jury determination *only of the elements of second degree burglary*; and whatever he said at the plea hearing about the *superfluous, non-elemental facts* concerning the nature of the building he burglarized cannot, consistent with the Sixth and Fourteenth Amendments, license a later court to increase his punishment based on such statements. (*Ibid*.)

That our Supreme Court in *Gallardo* endorsed and adopted this line of reasoning from *Descamps* is clear from the Court's reliance on the High Court's subsequent holding in *Mathis*, *supra*, 136 S.Ct. 2243, for the proposition that a sentencing judge is precluded from looking at the record of conviction to make conclusions about non-elemental facts underlying a prior conviction which are required to make a defendant susceptible to an increased maximum punishment.

Mathis is plainly controlling. In that case, like the situation we are discussing, *the charging documents themselves* included an allegation with respect to the non-elemental fact that the burglary was of a "building," and not a vessel, and the jury's guilty verdict in the case was based on this allegation. (See *Mathis, supra*, 136 S.Ct. 2243, 2260, dis. opn. of Breyer, J.)[8] But this was plainly an improper basis for the subsequent sentencing court to conclude that the crime was a generic burglary because these jury findings were of non-elemental facts for an offense where the elements of the crime did not match the elements of generic burglary under ACCA. (*Mathis*, *supra*, 136 S.Ct. at pp. 2250, 2252.)

[8]The majority opinion does not identify the documents from the record of conviction which were used. However, Justice Breyer's dissent makes it clear that "the charging documents show that the defendant was charged only with illegal entry of a 'building'—not a tent or a railroad car . . .", and that "the jury, in order to find (as it did) that the defendant broke into an occupied structure, would "necessarily [have] had to find an entry of a building." (*Ibid*.)

The elements of a former second degree burglary, are like the elements of Iowa burglary at issue in *Mathis* – i.e., a single statute which can be violated by different means, including burglary of a residence. Because a defendant has no incentive to contest or dispute any statements or averments about whether he committed such a burglary by one means or another – e.g., whether he burglarized a boat or a building, in *Mathis*, or a commercial property or a residence in the California variant – any facts stated, conceded, or admitted in the course of plea proceedings in these circumstances cannot properly be considered by a subsequent judge making findings about prior conviction allegations because, under the Sixth Amendment as construed by the Supreme Court in *Mathis*, and accepted as binding constitutional authority by the California Supreme Court in *Gallardo*, such a judge can only consider the *elements* of the prior crime, and cannot determine non-elemental facts such as "whether a defendant had burgled a building or a vehicle . . .", and cannot decide "'what the defendant and state judge must have understood as the factual basis of the prior plea. . . ." (*Ibid*; see *Gallardo*, *supra*, at pp. 124-125.)

b. **Post-1982 Second Degree Burglaries, *Garrett* and *Maestas*.**

A second point, not expressly related to *Apprendi*, must also be made as to second degree burglaries as strikes. In 2000, section 1192.7 was amended by the last bad criminal justice initiative, Prop. 21, to delete the phrase "any burglary of a residence," which was replaced by the phrase "any burglary of the first degree. . . ." (§ 1192.7, subd. (c)(18).) A Sixth District case decided soon after this amendment held that this change did not mean that older, pre-1982 second degree burglaries no longer qualified as strikes, since the intent was to continue to include any burglary of a residence, and this clear intent prevailed over the seemingly plain language of the amendment. (*People v. Garrett* (2001) 92 Cal.App. 4th 1417.) Thus, under *Garrett*, there is still a requirement of proof as to older second degree burglaries that they were "of a residence" – now precluded under *Descamps* and *Gallardo*.

However, the holding in *Garrett* was later qualified by the Third District in *People v. Maestas* (2006) 143 Cal.App.4th 247 which, to a certain extent, prefigured, on "reasonableness" grounds, the rulings in *Descamps* and *Gallardo*. Mr. Garrett's prior second degree burglary was committed in 1992, 10 years after the Legislature had redefined first degree burglary to include any burglary of a residence. In those circumstances, the Third District held, the trial court was precluded from combing the record to find evidence that showed the burglary was of a residence because this amounted to an effort to say he committed a greater crime than the one for which he was convicted, and was thus improper.

> This is not a case in which looking beyond the fact of the conviction resolves an ambiguity as to whether the prior conviction was for a serious felony. If defendant committed second degree (nonresidential) burglary, he did not commit first degree (residential) burglary. In finding that the structure defendant burgled in 1992 was a residence, the trial court essentially concluded defendant did not commit second degree burglary; second degree burglary is any burglary other than of a residence. As a result, the trial court's finding was neither fair nor reasonable. (See *Guerrero*, *supra*, 44 Cal.3d at p. 355 [justifying looking beyond fact of conviction because fair and reasonable].)

(*Maestas*, *supra*, 143 Cal.App.4th at p. 252.)

So, in my view, the combined impact of *Descamps-Gallardo*, on the one hand, and *Maestas*, on the other, is that no second degree burglary can ever count as a strike any more.

4. **Out-of State Priors with Non-Matching Elements.** A conviction from another state counts as a "strike" prior (a) if it is for a crime that would be a felony under California law and (b) "if the prior conviction in the other jurisdiction is for an offense that includes all of the elements of the particular violent felony as defined in subdivision (c) of Section 667.5 or serious felony as defined in subdivision (c) of Section 1192.7." (§ 1170.12, subd. (b)(2).) As will be recalled, the Supreme Court in *Myers*, *supra*, 5 Cal.4th 1193, held that the *Guerrero* rules applied to out-of-state priors where the elements fell

short of the elements of California priors, allowing any deficiency in the "elements" of the foreign prior to be made up for by evidence from the record of conviction which shows that the offense committed included the missing elements. Thus, the Supreme Court in a post-*Myers* case could look to pleadings and plea colloquies to determine that the "missing elements" of burglary under Alaska and Oregon law were fulfilled as to particular prior convictions, from which the court concluded that the defendant's prior convictions included "the necessary elements to convict defendant of first degree burglary in California." (*People v. Carter* (2005) 36 Cal.4th 1114, 1145.)

Descamps and *Gallardo* necessarily have altered this type of result. *Descamps* is, in fact, very closely on point, because, as explained above, it involved federal courts construing a California statute which lacked elements of a "generic burglary" under federal law. Thus, using admissions by a defendant at a plea hearing to "fill in the blanks" or missing elements under California law – which is what happened in *Descamps* – would violate the Constitution. I am not aware of any published case which has applied *Gallardo* to find that *Myers* has effectively been overruled, and enhancements based on foreign priors are limited to situations where the elements of the foreign prior correspond to a serious felony under California law. However, one unpublished Sixth District has so concluded, following remand from the Supreme Court after a "grant and hold" order in that case based on *Gallardo*. (See *People v. Williams* (4-2-2018) 2018 Cal.App.Unpub.LEXIS 2228, at *22-31; see also *People v. Jackson* (4th Dist. 2-6-19) 2019 Cal.App.Unpub.LEXIS 932, at *21-*22.)[9]

Left open is the question of what would happen on a record like the one in *Carter*, where the "extraneous facts" were pleaded and admitted by the defendant – thus creating the same unsettled issue as noted above for burglary. Again, in both situations, I think, a strong argument can be made that because there was no 6th and 14th Amendment right to

[9]These unpublished cases cannot be cited as authority. But their reasoning can be borrowed and applied, and the briefing by counsel in those cases is available on request.

jury trial as to these extraneous non-elements, the fact that they were pleaded and admitted puts them in the same status as the admission by the defendant at the plea colloquy, which the Supreme Court in *Descamps* concluded was not proper under *Apprendi* to prove the nature of the crime of conviction, and the admission of a pleading in *Mathis*. "[W]hen 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 pp. 2288-2289.)

5. **Fill in the Blank**. The foregoing list is not intended to be exhaustive. The bottom line is that if the bare, necessarily adjudicated elements of the crime and enhancements of conviction are sufficient to prove the elements of a serious felony and strike prior, we lose. If they are not, no proof from the record of conviction, a la *Guerrero*, can fill in the blanks to make the crime a serious felony if the consequence is an increase in the maximum punishment.

F. **Prejudice and Remedy for *Descamps-Gallardo* Error**.

Two remaining questions, left somewhat unclear by *Descamps* and *Gallardo*– or, at least, in my view, not satisfactorily resolved – have to do with (1) whether a trial court's *Descamps*-Wilson error is subject to harmless error analysis – as *Wilson* assumes; and (2) what the proper remedy is for such error when reversal is required.

My related theses are (1) harmless error analysis does not apply; and (2) the only remedy for *Descamps-Wilson* error – at least in cases involving "indivisible" offenses – is reversal and remand for resentencing without the challenged prior as part of the sentence.

1. **Prejudice**?

Is there really a requirement to show that the error was prejudicial? What if, for example, in the most obvious case, the facts from a prior jury trial establish without question that the element was proven: can the error be found harmless? The opinion in

Wilson suggests this, and applies harmless error analysis per *Washington v. Recuenco* (2006) 548 U.S. 212 (*Recuenco*) to conclude the error was prejudicial under *Chapman*. (*Wilson*, *supra*, 219 Cal.App.4th at pp. 518-519.)

As a general matter, the Supreme Court has made it clear that *Apprendi* trial error is not structural in nature, but is akin to federal constitutional trial error, and thus requires reversal only where it is not harmless beyond a reasonable doubt. (*Recuenco*, *supra*, 548 U.S. at p. 222; see *Wilson*, *supra*, at pp. 518-519, citing *Recuenco* and *People v. French* (2008) 43 Cal.4th 36, 52-53.) In *Wilson* itself, where the defendant had pled out to the charges in the prior case, the reviewing court ironically suggests that harmless error analysis required it, as a reviewing court, "to imagine a trial that never occurred . . ." (*Wilson*, *supra*, at p. 519, citing *Wilson v. Knowles* (9th Cir. 2011) 638 F.3d 1213, 1216), then concluded that "assuming a hypothetical jury would have seen only the evidence that was presented at the preliminary hearing, we cannot say with any certainty – much less beyond a reasonable doubt – that such a jury would have found Wilson's offense to be a serious felony." (*Id*., at p. 519.)

This type of prejudice analysis becomes dicier where, as in my *Rivera* case, there actually *was* a jury trial in the vehicular manslaughter case; and even more so where – as was fortunately *not* the case in *Rivera* – the evidence from the jury trial arguably establishes the missing element beyond a reasonable doubt. For example, if in *Wilson*, the evidence from a trial showed conclusively that Mr. Wilson, and no one else, drove the vehicle causing the victim's death, any *Descamps* error would have to be found harmless under *Chapman* analysis because the trial evidence showed that he personally inflicted great bodily injury, and one could say, beyond a reasonable doubt, that a jury would have so found.

But hold on: something is profoundly wrong with this picture. My thesis is that the controlling holding in *Descamps* provides no wiggle room for such a conclusion or for application of harmless error principles. There is no discussion of harmless error in either

Descamps or *Gallardo*; nor is there any room for such discussion. As explained above, both these cases squarely hold, on constitutional grounds, that non-elemental facts cannot be found after-the-fact by a sentencing judge, no matter how "reliable" the reasoning process involved in determining those facts, because *Apprendi* requires that these facts be pled, and either proven to a jury or admitted as part of the criminal offense and punishment in the prior case; and that absent this, the record of the prior conviction is an insufficient basis for increasing the defendant's sentence.

In taking apart the Supreme Court's favorite appellate target – the Ninth Circuit Court of Appeals – *Descamps* makes this conclusion manifest:

> [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. See [*United States v. Aguila-Montes de Oca* (9th Cir. 2011) 655 F. 3d 915], 937. 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. See, e.g., *Richardson v. United States*, 526 U. S. 813, 817, 119 S. Ct. 1707, 143 L. Ed. 2d 985 (1999).

(*Descamps*, *supra*, 133 S.Ct. at pp. 2288-2289.) Harmless error is not discussed, nor is the case sent back for any harmless error analysis by a lower appellate court. (*Ibid*.)

This is the correct view because *Descamps-Gallardo* error is fundamentally different from other forms of *Apprendi* "trial error" which the Supreme Court has held are subject to prejudice analysis. *Recuenco*, for example involved classic *Apprendi*-like trial error – a judge making a finding that the defendant was armed with a firearm, when the guilty verdict by the jury was to assault with a deadly weapon. (*Recuenco*, *supra*, 548 U.S. at pp. 218-222.) In that situation, the error can be subject to harmless analysis because it is akin to a type of trial error which the Supreme Court had already concluded was subject to harmless error – omission of an element of the offense (*Recuenco*, *supra*,

at pp. 218-222, citing *Neder v. United States*, 527 U.S. 1, 8, 20.) In this situation, one can look at the record of the actual jury trial for the crime, and determine, beyond a reasonable doubt, whether the jury would have found it proven if it had been submitted to them. (*Ibid*.)

Descamps-Gallardo error is a horse of a different color. Here, the problem is not with some defect in the proceedings in *this* trial, but with a constitutional deficiency with respect to a *prior conviction offense* that cannot be remedied by any form of factfinding at this trial. The problem is not – as we sought to argue in cases like *Kelii* and *McGee* – that the *current trial of the prior conviction* was deficient because a jury (and not the judge) in the current case needed to decide whether the missing fact/element from the prior conviction was proven by the record from the prior case. If that were the holding in *Descamps*, the error would surely be subject to harmless error analysis under *Recuenco*, and the remedy would be the one Justice Chin suggested in his *Gallardo* dissent – remand for a jury trial on the proof of the prior convictions.

Instead, the problem here involves a deficiency in the proceedings from the prior conviction that are a "done deal," as it were. The constitutional deficiency identified in *Descamps* is that the proceedings from the prior conviction itself constitutionally fail to establish the missing, non-adjudicated elements, and thus that these elements, which are essential to increasing the defendant's punishment, have not been established as a matter of record based on the fundamental constitutional guarantees that inhere in a prior conviction. Put plainly, there was no jury trial on these elements in the prior crime, nor was there notice and opportunity to prove or disprove them; thus the prior proceeding is, in effect, definitionally deficient to establish these missing elements. (See *Descamps*, *supra*, 133 S.Ct. at pp. 2288-2289 ["the only facts the [sentencing court in the current offense] can be sure the jury [in the prior conviction case] so found are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances"].)

In this reading, a reviewing court which engages in harmless error analysis as to the record of a jury trial from the prior crime ends up doing precisely what the Supreme Court in *Descamps* has said a trial court cannot do – making a beyond-a-reasonable-doubt conclusion that something in the record fills in the missing elements. It is untenable that an error could be found harmless by a reviewing court which essentially commits the same constitutional error as the trial court, and agrees with its conclusion. Put plainly, this simply cannot be the meaning of *Descamps*.

The "no harmless error" argument advanced herein is further supported by the nature of the constitutional rights which underlie the *Apprendi* doctrine. *Apprendi* jurisprudence typically refers to the doctrine as having its roots in the Sixth Amendment jury trial right (see, e.g., *Wilson*, *supra*, 219 Cal.App.4th at p. 515.) However, like *Winship* and *Mullaney* which preceded it, *Apprendi* is also based on the constitutional requirement of notice in the Fifth, Sixth, and Fourteenth Amendments. (*Apprendi*, *supra*, 530 U.S. at p. 476, quoting *Jones*, *supra*, 526 U.S. at 243, fn. 6: "'under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact . . . that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.'".) How can a defendant, charged in the prior crime with the bare elements of that crime, have any kind of meaningful notice that one of the consequences of his conviction – somewhere down the road – will be an adjudication of his culpability for *something beyond* the elements of the offense which the jury found proven or which he admitted by a plea of guilty? The *Descamps* holding is fundamentally premised on this notion, in that it categorically precludes the factfinder deciding the prior conviction issue in the current case from making any finding about a non-elemental fact from the prior crime precisely because there are no due process guarantees for such facts from the prior crime. (*Descamps*, *supra*, 133 S.Ct. at pp. 2288-2289; see also *People v. Mancebo* (2002) 27 Cal.4th 735, 749 [harmless error analysis does not apply to the trial court's error in

imposing punishment for an unpled enhancement].)

Thus, it is clear to me that the *Wilson* court erred in requiring harmless error analysis for *Descamps* error, and should have simply reversed the true finding as to the strike prior. In fact, in the situation presented in *Wilson*, involving not a trial, but a plea in the prior case, the holding in *Descamps* seems to make this even more clear than in a situation where there was a jury trial on the prior case.

> [A]s *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. See 544 U. S., at 24-26, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (plurality opinion). 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.

(*Descamps*, *supra*, 133 S.Ct. at pp. 2288-2289.) Where the source of evidence is the transcript of a preliminary hearing – as it was in *Wilson* – instead of an admission during a plea colloquy – as it was in *Descamps* – the same conclusion must be compelled. Thus, in any case with a claim of *Descamps-Wilson* error on appeal, I would strongly urge that an argument along these lines be raised asserting that harmless error analysis is improper.

2. **Remedy: Resentencing Without the Strike; Retrial is Barred.**

As noted above, *Gallardo* is unhelpful for most cases involving *Descamps* error on appeal because a remand was proper to allow the trial court to review the record to see if it demonstrated that the crime of conviction was the strike version of former section 245(a)(1), assault with a deadly weapon. However, for all instances of *Descamps-Gallardo* error involving indivisible offenses, my thesis is that the only proper remedy is a remand for resentencing without the reversed prior conviction finding. There are at least two ways in which this remedy could be challenged and a possible retrial granted.

Both, I contend, would be improper.

a. Remand for a Jury Trial on the Priors? No says the *Gallardo* Majority.

In the prior version of this article, I spent a lot of time on this point. However, it appears that the holding in *Gallardo*, and the rejection of this remedy as proposed in Justice Chin's dissent, takes care of this problem. In his *Gallardo* dissent as to remedy, Justice Chin contended that the case should be remanded so that the jury could make the contested factual determination about the prior convictions (*Gallardo*, *supra*, 4 Cal.5th at pp. 140-143, dis. opn. of Chin, J). The *Gallardo* majority flatly rejected this proposed remedy, concluding that this type of "trial" of a prior conviction would make a mockery of *Descamps*, *Apprendi*, and the Sixth Amendment.

> "[S]uch a proceeding – in which a jury would be impaneled for the sole purpose of reading the preliminary hearing transcript in defendant's prior assault case – would raise significant constitutional concerns under *Apprendi*. The basic rationale of *Apprendi* is that facts that are used to increase the defendant's maximum possible sentence are the functional equivalent of elements of the offense, and they must be proved in the same way: i.e., at a trial before a jury, and beyond a reasonable doubt. (*Apprendi, supra*, 530 U.S. at pp. 476, 490.) To permit a jury to make factual findings based solely on its review of hearsay statements made in a preliminary hearing would be to permit facts about the defendant's prior conviction to be proved in a way that no other elemental fact is proved—that is, without the procedural safeguards, such as the Sixth Amendment right to cross-examine one's accusers, that normally apply in criminal proceedings. This kind of proceeding might involve a jury, but it would not be much of a trial.

(*Gallardo*, *supra*, at pp. 138-139.)

The import of this holding in *Gallardo* should be crystal clear. Findings made by the jury in a later proceeding involving a trial of the truth of the prior conviction allegations would necessarily be focused on nonelemental facts of the prior crimes; and no later-case findings – by a judge or a jury – can cure the fundamental due process and

jury trial right to determination, made *during the proceedings of the prior crime itself*, of the elements of the prior crimes which were either made by a jury after trial or admitted by plea by the defendant at the time the prior crimes were prosecuted. (*Ibid*.)

As explained above, with *Descamps-Gallardo* error, changing the fact-finder at the trial of the prior conviction in the current case from a court to a jury does not solve the constitutional problem at stake here – that the prior conviction lacks the required safeguards of due process and jury trial with respect to proof of the required elements of the prior conviction. Thus, the remedy is a straight reversal of the true finding on the prior convictions.

b. Retrial on Remand Barred by Double Jeopardy/Res Judicata Principles? Not Clear and Maybe.

Second, and more controversially, there may be situations where a retrial of the prior conviction allegations could lead to the production of new and better documents by the prosecution which prove that the elemental facts at issue were actually adjudicated at the prior conviction hearing.

For example, imagine a case where the prosecutor proved a strike based on an abstract of judgment from an old case which only stated that there was a conviction for grand theft and a prison sentence, with a preliminary hearing transcript used to show personal use of a deadly weapon. After a reversal under *Gallardo*, the prosecutor might magically come up with a charging complaint that alleged personal use of a deadly weapon during commission of the crime as an enhancement, and a transcript of the plea hearing at which the defendant admitted this allegation, after which the sentencing court struck the punishment in the interests of justice, thus explaining its absence from the abstract. That's a kind of remand for retrial that would not, at least on its face, violate *Descamps*. So what is our argument to preclude that?

The problem is that existing California and U.S. Supreme Court case law squarely holds that retrial of prior conviction allegations following a reversal for insufficient

evidence is not barred under either double jeopardy principles (*People v. Monge* (1997) 16 Cal.4th 826 and *Monge v. California* (1998) 524 U.S. 721) or on collateral estoppel/res judicata grounds. (*People v. Barragan* (2004) 32 Cal. 4th 236.) Is there a way around these bad cases? Alas, perhaps not yet. But here are some suggestions.

i. **Double Jeopardy: Overrule *Monge*!**

The Fifth Amendment Double Jeopardy Clause, applicable to the states through the Fourteenth Amendment, "protects against successive prosecutions for the same offense after acquittal or conviction and against multiple criminal punishments for the same offense." (*Monge v. California*, *supra*, 524 U.S. at p. 728, citing *North Carolina v. Pearce* (1969) 395 U.S. 711, 717.) In *Monge*, the High Court, hearkening back to its then-recent decision in *Almendarez-Torres*, *supra*, 523 U.S. 224, rejected the notion advanced in Justice Scalia's dissenting opinion that recidivism sentencing enhancement facts amounted to an element of petitioner Monge's current underlying criminal offense. Relying on the traditional notion that the failure of proof at a sentencing hearing "does not 'have the qualities of constitutional finality that attend an acquittal . . .'" (*id*., at p.729, quoting *United States v. DiFrancesco* (1980) 449 U.S. 117, 134), the Supreme Court concluded that "the Double Jeopardy Clause does not preclude retrial on a prior conviction allegation in the noncapital sentencing context." (*Monge*, *supra*, at p. 734.)

I have been arguing for the past 14 years that *Apprendi*, if carried out to its logical consequences, meant that *Monge* is not good law anymore. My argument was a bit, shall we say, stretched and premature, because there was no express holding that *Apprendi* applied to trials of prior conviction allegations, only the rump authority of five apparent votes for this proposition which had not coalesced into an actual majority in an actual case.

Does *Descamps* change all this? Probably not, at least not yet. A majority of the Supreme Court now has concluded that *Apprendi* and its jury trial/due process rights do *Almendarez-Torres*. But for the time being, I recommend that we at least keep that ball in

the air.

ii. **Collateral Estoppel/Res Judicata.**

In *People v. Barragan*, *supra*, 32 Cal.4th 236, our State Supreme Court rejected a claim that an appellate court's finding of insufficient evidence as to the truth of a prior conviction allegation barred retrial under principles of res judicata. The discussion of this point begins with a succinct summary of the application of this doctrine.

> As generally understood, the doctrine of res judicata gives certain conclusive effect to a former judgment in subsequent litigation involving the same controversy. [Citation] The doctrine has a double aspect. [Citation] In its primary aspect, commonly known as claim preclusion, it operates as a bar to the maintenance of a second suit between the same parties on the same cause of action. [Citations.] In its secondary aspect, commonly known as collateral estoppel, the prior judgment operates in a second suit based on a different cause of action as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action. [Citations.] The prerequisite elements for applying the doctrine to either an entire cause of action or one or more issues are the same: (1) A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding. [Citations.]

(*Id*., at pp. 252-253, citations, internal quotations, brackets and ellipses omitted.)

After noting that the defendant in *Barragan* asserted that "both aspects of the doctrine bar retrial of his alleged prior conviction . . .", and passing over, without resolving, a threshold issue as to whether the res judicata doctrine "applies to further proceedings in the same litigation . . .", the court rejected the res judicata argument by means of the following rationale.

> [N]either aspect of res judicata applies because an appellate reversal, for insufficient evidence, of a true finding regarding an alleged prior conviction or juvenile adjudication does not generally constitute a final decision on the merits regarding the truth of the alleged prior conviction or juvenile adjudication. . . .

> [W]here an appellate court finds that the evidence at trial was insufficient to support the verdict, the "normal rule" is that the losing party on appeal is "entitled to a retrial" unless the record shows "'that on no theory grounded in reason and justice could the party defeated on appeal make a further substantial showing in the trial court in support of his cause.' [Citations.]" ([*Boyle v. Hawkins* (1969) 71 Cal.2d 229], 232–233, fn. 3.)

(*Barragan*, *supra*, at pp. 253-254.) In *Barragan*, the court examined the context of the disputed issue in the case before it, which involved a failure to prove that there had been a declaration of wardship at the proceedings of the prior juvenile adjudication which the prosecution sought to prove was a "strike," concluding that "nothing in the record suggests that, at a retrial, the People would be unable to make the necessary showing regarding the declaration of wardship, and the defendant has never contended otherwise." (*Id*., at p. 254.) The court then concluded that the lower appellate court's "reversal of the true finding [on the strike allegation] for insufficient evidence lacks the requisite finality for purposes of applying res judicata or collateral estoppel." (*Ibid*.)

So, how do we get around this? Without double jeopardy (see above), there is only one way: by showing that something "in the record suggests that, at a retrial, the People would be unable to make the necessary showing . . ." (*ibid*.), i.e., to prove the missing elements in a manner consistent with *Descamps* and *Wilson*. For example, in my *Rivera* case, the prosecutor included absolutely *everything* in the record used to prove the prior – pretty much the entire appellate record from the prior case, including the reporter's transcript of the trial, all pleadings, minutes, and transcripts. On such a record, and the prosecutor's representations about it, I argued that the record suggested that no such showing could be made, and that no retrial was possible. As it turned out in that case, the unpublished opinion did not apply res judicata to the prior proceeding, but at least contained language requiring the prosecutor, if retrial was sought, to produce *new* evidence from the record and explain how and why it had not been produced the first time. So, that was something.

But for the present, at least, *Barragan* is usually going to be controlling, and a remand is at least possible following reversal on *Descamps-Gallardo* grounds; and there will sometimes be the possibility, as in the hypothetical which began this discussion, that the DA could come up with something from the record of conviction which proves that the missing elements of the strike prior were, in fact elements that were pled and either proven or admitted in the prior proceedings.

G. How to Identify and Raise a *Descamps-Gallardo* Issue on Appeal and/or Habeas, and the Elephant in the Closet: Retroactivity.

Now it's time to get down to nuts and bolts. You have a trial record in a case – maybe even one where you've already filed an opening brief – where there was either a court trial or admission of prior convictions which may have included *Guerrero* elements. How can you raise this as an issue? Part of the answer depends on the timing of the proceedings in your client's case, its procedural posture, and whether there was a constitutional objection raised in the trial court.

1. Pre-*Descamps* Sentencing Hearings

a. Cases Still on Direct Review.

If you have a situation on direct appeal, like *Wilson* and my *Rivera* case, where the trial on the prior convictions took place before *Gallardo* or *Descamps* were decided, the answer is relatively easy. In such cases, it is very unlikely that trial counsel would have raised a *Descamps*-like objection. However, the issue is cognizable where there was a trial on the prior convictions allegations, as the challenge is one of insufficient evidence, and denial of the truth of the prior, and a trial to prove it, are sufficient to preserve the issue. (*Wilson*, *supra*, 219 Cal.App.4th at pp. 516-517.)

Don't stop there, because you can also argue that if a forfeiture rule could be applied to such a claim in theory, it can't be applied here because the *Descamps-Gallardo* legal challenge is based on a "significant change in the applicable law" which occurred after the trial in your case. (*Wilson*, *supra*, at p. 518, citing *People v. Senior* (1995) 33

Cal.App.4th 531, 538.) "[A]lthough challenges to procedures or to the admission of evidence normally are forfeited unless timely raised in the trial court, 'this is not so when the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change.'" (*People v. Black* (2007) 41 Cal.4th 799, 810 (overruled on other grounds in *Cunningham v. California* (2007) 549 U.S. 270), quoting *People v. Turner* (1990) 50 Cal.3d 668, 703.)

If the case is still on direct appeal, there should be no retroactivity problem, as *Descamps* would apply to any case which was not yet final when *Descamps* was decided. (See, e.g., *Teague v. Lane* (1989) 489 U.S. 288 [new constitutional rules of criminal procedure are applicable to cases which have not become final before the new rule is announced].)

That the controlling date is when *Descamps* was decided, and not *Gallardo*, is demonstrated by *In re Gomez* (2009) 45 Cal.4th 650, where our Supreme Court held the application of the *Apprendi*-based limitations on California sentencing mandated by the U.S. Supreme Court in *Cunningham v. California* (2007) 549 U.S. 270 depended on whether a defendant's case was not yet "final" at the time the Supreme Court decided *Blakely v. Washington* (2004) 542 U.S. 296, reasoning that *Cunningham* did not "break new ground" as a constitutional argument, but was "dictated" by the holding in *Blakely*. (*Gomez*, *supra*, at pp. 657-658.) Plainly, *Gallardo* makes it clear that its holding is dictated by *Descamps*. Moreover, as I argue below, a similar argument can be made on collateral habeas attacks, and can even, arguably, go back to the holdings in *Shepard* and *Apprendi*, on which *Descamps* is premised.

2. **Collateral Review? The Retroactivity Argument.**

A much more complicated issue arises with respect to cases which were final at the time *Descamps* was decided. Let us say, for example, that you have a client whose conviction is now final – perhaps it is still under collateral review on federal habeas, or you handled his Prop. 36 resentencing petition – and it is clear that one of his "strike"

priors was for a crime where the status of the crime as a serious felony depended on proof of *Guerrero* facts about the prior offense which are not elements of the charge and/or enhancements of conviction. Or let us say that you, like me, are a zealot and are digging up old cases where a former client got "struck out" and a life sentence based on one or more prior strikes that involved *Guerrero* factfinding that is now barred by *Descamps* and *Gallardo*; or, similarly, that old client gets in touch with you when he or she hears about *Gallardo*. Is there a way to raise a *Descamps* argument on habeas?

The answer is yes. But the issue is complicated, and involves a review of retroactivity principles under both California and federal law.

But first, let's go back to *Gomez* and what I like to call the "half-assed" or "relating back" variant of retroactivity.

a. **Gomez and "Relating Back" Retroactivity.**

Gomez does not involve an all-encompassing retroactivity argument as to any final conviction of the sort which I discuss below, but instead a kind of corollary rule to the usual principle, derived from *Teague* and related cases,: that a landmark decision is applicable to any conviction which has not yet become final on direct appeal. (*Teague*, *supra*, 489 U.S. at p. 301; *Gomez*, *supra*, 45 Cal.3d at p. 655.) The normal rule in that situation is that "a case is final 'when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied.'" (*Gomez*, *supra*, at p. 655, citing *Caspari v. Bohlen* (1994) 510 U.S. 383, 390.)

Gomez describes a *limited* expansion of this finality rule based on the notion that some seeming "landmark" decisions are not really novel but are, in effect, derivative of prior holdings; in *Gomez*, this mattered because our Supreme Court concluded, after careful analysis, that "*Cunningham* did not break new ground . . ." but was rather"'dictated by' *Blakely*. . . ." (*Gomez*, *supra*, 45 Cal.4th at p. 660.) Because Gomez's direct appeal, though final when *Cunningham* was decided, was not final when *Blakely* was decided, the Supreme Court held he was entitled to the retroactive benefit of the

decision in *Blakely* as applied to California sentencing law in *Cunningham*. (*Ibid*.) As suggested above, a similar argument can be advanced, as noted above, with respect to a case which was not final when *Descamps* was decided, but was final when *Gallardo* was decided. Plainly, *Gallardo*, although breaking ground in California, was derivative of the holding in *Descamps.*

But we can take this argument one, or even two steps farther. A review of the holding in *Descamps* demonstrates that its constitutional analysis is derived largely from the holding in *Shepard*, which includes a substantial discussion of the Sixth Amendment implications involved in making determinations about prior convictions. Justice Souter's majority opinion in *Shepard*, for example, noting that the Court's prior holding in *Taylor*, *supra*, 495 U.S. at 601, limiting proof of prior convictions to the bare elements of the prior crime, "anticipated the very rule later imposed for the sake of preserving the Sixth Amendment right, that any fact other than a prior conviction sufficient to raise the limit of the possible federal sentence must be found by a jury, in the absence of any waiver of rights by the defendant." (*Shepard*, *supra*, 544 U.S. at p. 24, citing Taylor, supra, 495 U.S. at 601, *Jones v. United States*, 526 U.S. 227, 243, n. 6, and *Apprendi*, *supra*, 530 U.S. at 490.) That *Descamps* relies on *Shepard* for its constitutional conclusions is relatively clear.

> We have held 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." Apprendi v. New Jersey, 530 U. S. 466, 490. . . .Under ACCA, the court's finding of a predicate offense indisputably increases the maximum penalty. Accordingly, that finding would (at the least) raise serious Sixth Amendment concerns if it went beyond merely identifying a prior conviction. Those concerns, we recognized in *Shepard*, 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. 544 U. S., at 25, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (plurality opinion); see id., at 28, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (THOMAS, J.,

> concurring in part and concurring in judgment) (stating that such a finding would "giv[e] rise to constitutional error, not doubt"). Hence our insistence on the categorical approach in the present case.

(*Descamps*, *supra*, 570 U.S. at p. 269.) Based on this language in *Descamps*, which harkens back to the Court's holding in *Shepard* in 2005 as the legal underpinning of its Sixth Amendment holding, a slightly more tenuous *Gomez* type argument can be made.

But what if, as in two of my recent habeas claims for *Gallardo* retroactivity, your client's conviction was already final when *Shepard* was decided, but not yet final when *Apprendi* was decided in June of 2000? Can any argument be made, a la *Gomez*, using *Apprendi* as the benchmark? To be honest with you, this argument never occurred to me until I saw it suggested in an Order to Show Cause authored by Santa Clara County Judge Joshua Weinstein in a case being handled by Barney Berkowitz of the Public Defender's Office. Barney and I conferred about this longshot argument, and came up with a hybrid version of the *Gomez* argument, based on the finality of *Apprendi* and *Taylor*. I have included it below in its full splendor.[10]

> The constitutional holdings in *Descamps* and *Mathis*, which are plainly the bases for our Supreme Court's decision in *Gallardo*, arguably did not themselves "break new ground," but were dictated by the combined impact of two settled decisions by the High Court – *Apprendi*, *supra*, 530 U.S. 466, and *Taylor*, *supra*, 495 U.S. 575, both of which were decided prior to the finality of petitioner's direct appeal.
>
> The 7-vote majority in *Descamps* recognized that the beginning point of its analysis is *Taylor*, a case which *Descamps* described as adopting "a 'formal categorical approach'" to determining whether a prior burglary conviction could be classified as a sentence-increasing predicate offense under the ACCA, noting that this approach required consideration only of "the statutory definitions' – i.e., the

[10] It may seem like a stretch, but it was enough to lead Judge Weinstein to grant habeas relief in my Joseph Garcia case.

elements – of a defendant's prior offenses, and not 'to the particular facts underlying those convictions.'" (*Descamps*, *supra*, at pp. 260-261, quoting *Taylor*, *supra*, at p. 600.) That this is precisely the nature of the constitutional-based holding in *Descamps* is clear from the fact that one of the rationales for this approach put forward in *Taylor*, and applied on this basis in *Descamps*, was that "it avoids the Sixth Amendment concerns that would arise from sentencing courts' making findings of facts that properly belong to juries." (*Descamps*, *supra*, 570 U.S. at p. 267; see *Taylor*, *supra*, 495 U.S. at p. 601 [categorical approach avoids findings by trial court which a defendant potentially "could . . . challenge . . . as abridging his right to a jury trial"].)

The second, more obvious basis for the holding in *Descamps* which makes it a decision which, arguably, does not "break new ground," is the landmark decision in *Apprendi*. That *Apprendi* is the key underpinning for the constitutional holding in *Descamps* is made expressly clear by the Supreme Court.

> We have held 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." [*Apprendi*, *supra*, 530 U. S. at p. 490]. Under ACCA, the court's finding of a predicate offense indisputably increases the maximum penalty. Accordingly, that finding would (at the least) raise serious Sixth Amendment concerns if it went beyond merely identifying a prior conviction.

(*Descamps*, *supra*, 570 U.S. at p. 269.)

Gallardo too makes it clear that the bases for its holding are the decisions in *Taylor* and *Apprendi*, citing *Taylor* as the origin of the *Descamps* Sixth Amendment holding limiting proof of prior convictions to the elements of the prior crime (*Gallardo*, *supra*, 4 Cal.5th at p. 130, 135), and citing *Apprendi* as the bedrock origin of the jury trial principle applied by the Supreme Court in *Descamps*, which it found binding under the Sixth Amendment in California.

"[W]hen the sentencing court must rely on a finding regarding the defendant's conduct, but the jury did not necessarily make that finding (or the defendant did not admit to that fact), the defendant's Sixth Amendment rights are violated. (See *Apprendi, supra*, 530 U.S. at p. 490.)" (*Gallardo*, *supra*, at p. 135.)

Petitioner recognizes that the landmark holding in *Apprendi* includes an express exception for prior convictions, as indicated in the much-quoted principle announced in that case 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." (*Apprendi*, *supra*, 530 U. S. at p. 490.) However, even at the time *Apprendi* was decided, it was clear that this exception applied only to "the fact of a prior conviction," i.e., to the elements of the prior conviction itself, whose validity had already been established either through a jury trial or by a lawful plea admitting all the elements of the charge by the defendant. This conclusion is plain from *Jones v. United States* (1999) 526 U.S. 227, which cites *Almendarez-Torres v. United States* (1998) 523 U.S. 224 for the proposition that recidivism can be treated as a sentencing fact, even when resulting in imposition of a greater maximum sentence, because "unlike virtually any other consideration used to enlarge the possible penalty for an offense, . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." (*Jones*, *supra*, 526 U.S. at p. 249.) *Apprendi* affirms the centrality of this factor, explaining that "the certainty that procedural safeguards attached to the 'fact' of prior conviction" was crucial to the holding in *Almendarez-Torres*. (*Apprendi*, *supra*, 530 U.S. at p. 488.)

It is thus clear that the state retroactivity analysis under *Gomez*, *supra*, 45 Cal.4th 650, compels a conclusion that *Descamps* and *Gallardo* were "dictated" by *Apprendi* and *Taylor* in the same manner that the Supreme Court's decision in *Cunningham*, on the applicability of *Apprendi* to sentence findings under

California law, was dictated by *Blakely*. In *Gomez*, this meant that "*Cunningham* applies retroactively to any case in which the judgment was not final at the time the decision in *Blakely* was issued." (*Gomez*, *supra*, 45 Cal.4th at p. 660.) In the present case, this means that *Descamps* and *Gallardo* apply retroactively to any case in which the judgment was not final at the time *Apprendi* was issued. Since, as explained above, petitioner's conviction was not yet final when *Apprendi* was issued, this principle provides a further basis for this Court to find that *Descamps* and *Gallardo* must be applied retroactively to petitioner's convictions.

Significantly, there is out-of-state authority to support this result. In *State v. Martin* (2016) 52 Kan.App.2d 474, the question was whether the defendant was entitled to a collateral remedy where the sentencing court had engaged in factfinding regarding the nature of a prior conviction. The defendant relied on the Kansas Supreme Court decision in *State v. Dickey* (2015) 301 Kan. 1018 which was akin to *Gallardo.* After determining that the sentencing proceeding occurred after *Apprendi* was decided, the court held that no question of retroactivity was presented: "Because both *Descamps* and *Dickey* are applications of *Apprendi* and Martin's current Kansas case arose well after *Apprendi* was decided, applying *Dickey* would not require retroactive application of the caselaw identifying the constitutional rights at stake. [Citation.]" (*Martin*, supra, 52 Kan.App.2d at p. 484.)

So, the bottom line here, as with all of our work, is to be creative, and use available authority as best as you can.

However, if your client's case was final before *Descamps*, the *Shepard* variant, may not be strong enough to put all your chips on. Fortunately, there are a set of three related arguments for *full* retroactivity of *Descamps* and *Gallardo* which can be advanced, and which, in my view, are based on very solid legal analysis.

b. **Full Retroactivity Arguments**

i. **The Federal Standard.**

Unfortunately, showing retroactivity under the federal standard is a daunting task. Generally, the *Teague* rule bars retroactive application to cases final when the new rule is announced. (*Teague, supra*, 489 U.S. at p. 303.) And, as explained below, *Teague* has been held to be a bar to retroactivity of other claims of error under *Apprendi*. (See *Schriro v. Summerlin* (2004) 542 U.S. 348.) Courts have generally concluded that the holdings in *Apprendi* are "procedural" and not subject to retroactivity. (*Schriro*, *supra*, 542 U.S. 348; accord, *In re Gomez* (2009) 45 Cal.4th 650, 656-661 [*Blakely-Cunningham* error is not retroactive].)

However, a strong argument can be made that *Gallardo* and *Descamps* have to be applied retroactively under *Teague* because they involve, not a *procedural* rule, but a *substantive change in the law* which concerns the fundamental integrity of the factfinding process. Under the federal standard, a new constitutional rule of "criminal procedure" does not apply to convictions which were final when the new rule was announced; however, a decision which recognizes a new "substantive rule of criminal law" must be given retroactive effect. (*Montgomery v. Louisiana* (2016) ___U.S.___; 136 S.Ct 718, 728*; Teague, supra*, 489 U.S. at p. 311)

A substantive constitutional rule is one which, as a matter of constitutional interpretation, prevents the State from outlawing certain conduct or which prohibits the imposition of certain punishment in particular situations. (*Montgomery v. Louisiana, supra,* 136 S.Ct. at p. 729; *Penry v. Lynaugh* (1989) 492 U.S. 302, 329, 330)

> Substantive rules . . . set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose. It follows that when a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful.

(*Montgomery, supra,* at p. 729, 730.) Whether a new rule bars States from proscribing certain conduct or from imposing certain punishment "[i]n both cases, the Constitution

itself deprives the State of the power to impose a certain penalty." (*Id.* at p. 729 quoting *Penry, supra,* at p. 330) "A valid result does not exist where a substantive rule has eliminated a State's power to proscribe the defendant's conduct or impose a given punishment." (*Id*., at p. 730)

When a new substantive rule of constitutional law articulated by a court controls the outcome of the case at bench, state collateral review courts are constitutionally required to give retroactive effect to that new rule whether it relates to a substantive offense or punishment regardless of whether the judgment in the case at bench was final at the time the rule was announced. (*Id*., at pp. 728, 729)

The critical factor in deciding whether a court decision recognizes a *substantive* rule of constitutional law, such that is must be applied retroactively, is the *effect* of the rule, not its form. If the decision operates to constitutionally prohibit the State from punishing certain behavior or from imposing a particular punishment in a given circumstance, as was the situation in *Montgomery,* then it constitutes a substantive rule which must be applied retroactively. In such circumstances what is at issue is not the manner the punishment was imposed but that the State was simply barred from imposing a particular punishment for the crime or enhancement regardless of what procedures it followed.

People v. Trujeque (2015) 61 Cal.4th 227 is illustrative of this principle and is very helpful to a retroactivity argument under *Teague*. In that case, the defendant was prosecuted and found guilty of capital murder and sentenced to death. One of the charged special circumstances was that the defendant had previously been convicted of second degree murder. In a rather confusing procedural history, the defendant had unsuccessfully challenged his 1971 second degree murder conviction on double jeopardy grounds based on a prior plea in the case to involuntary manslaughter in juvenile court, which plea was later vacated by the court, with a subsequent murder finding in adult court put into its place; this same conviction was the basis for the later murder special circumstance allegation. (*Trujeque, supra,* 61 Cal.4th at pp. 245-247)

After Trujeque's conviction had become final, the Supreme Court in *Breed v. Jones* (1975) 421 U.S. 519 found that where a minor had been adjudicated in juvenile court, his subsequent prosecution and conviction in adult court for the same conduct violated his Constitutional right against double jeopardy. At issue in *Trujeque* was whether *Breed* would apply retroactively to prevent the State from using the defendant's prior murder conviction, which was final at the time the Supreme Court issued its decision in *Breed*, as a special circumstance in his current murder prosecution. The State argued that because the defendant's earlier murder conviction was final when *Breed* was decided he was prevented from relying on that decision to challenge using his earlier murder conviction as a special circumstance in his current prosecution.

Trujeque noted that while new rules of criminal procedure do not ordinarily apply retroactively to cases already final a "new rule may be given retroactive effect if (1) the rule is, in fact 'substantive." (*Trujeque, supra,* 61 Cal.4th at p. 250) *Trujeque* noted that the "practical result" of the guarantee against double jeopardy recognized in *Breed* would have been to prevent any adult court adjudication concerning the crime involved in the defendant's earlier juvenile robbery and murder from taking place at all, rather than to prescribe rules which would govern the conduct of that trial. "The Court had recognized full retroactivity as a necessary adjunct to a ruling that a trial court lacked authority to convict or punish a criminal defendant in the first place." (*Id.,* at p. 251 quoting in part *United States v. Johnson* (1982) 457 U.S. 537, 550) *Trujeque* characterized *Breed's* double jeopardy prohibition "as more substantive than procedural because without the rule's retroactive application, a defendant would otherwise face[] a punishment that the law cannot impose upon him." (*Id.,* at p. 251) *Trujeque* makes clear that in determining whether a court decision establishes a substantive rule of constitutional law which must be applied retroactively depends upon what effect its application has. If the rule prevents someone in the position of the defendant from being subject to a particular punishment, it is substantive and must be applied retroactively regardless of whether the defendant's conviction is final or not. (*Id*., at p. 251)

The applicability of this holding to the retroactivity of the holdings in *Gallardo*, *Descamps*, and *Mathis* should be readily apparent. These cases make it clear that where a prior conviction is for an indivisible offense – i.e., one which sets forth a single basis for criminal liability – the trial court must employ the "formal categorical approach" in determining if that conviction satisfies the requirements for increasing punishment under a statutory scheme. Under the formal categorical approach, a court may look only at the statutory definition of the crime on which the defendant was convicted, and not at any particular facts underlying that conviction. (*Descamps, supra,* 133 S.Ct. at p. 2281, 2283.) Simply put, where the prior conviction is for an indivisible offense, the Sixth Amendment bars the sentencing court from considering anything save the statutory elements of that crime. (*Ibid*.)

Thus, plainly, this is not at all a question of which trier of fact makes this decision, judge or jury. Where the prior conviction is for an indivisible offense *no one* – neither judge *nor* jury – may look to documents which are part of the "record of conviction," including a preliminary hearing transcript, the accusatory pleading, or any admissions which the defendant made during a plea colloquy. (See *Mathis*, *supra*, 136 S.Ct. at pp. 2250-2252.) If the statutory elements of the prior conviction do not, on their face, establish that it falls within some recidivist based sentencing scheme, then the prior offense simply cannot be used to enhance punishment. (*Ibid*.) Thus the "practical result" of *Descamps*, *Mathis* and *Gallardo* is a *substantive* rule of Constitutional law which prohibits using a conviction for an offense to enhance punishment unless its statutory elements alone place it within the sentencing scheme. Under these three cases, no factfinder in the subsequent case – neither judge nor jury – may consider other documents, such as an accusatory pleading, a plea colloquy, or a preliminary hearing transcript, to determine whether the defendant admitted or was found to have committed some element which, while necessary to bring the matter within a particular recidivist sentencing scheme, was unnecessary to the adjudication for the prior offense.

As such, this means there is a *substantive rule* from *Descamps*, *Mathis* and *Gallardo*: where the statutory elements of the prior conviction for an indivisible offense, standing alone, are insufficient to bring it within an enhanced punishment sentencing scheme like the Three Strikes Law, the prior conviction simply may not be used. *Gallardo*, citing *Descamps* and *Mathis*, put this point plainly: "a sentencing court may identify those facts it is 'sure the jury … found' in rendering its guilty verdict, or those facts as to which the defendant waived the right of jury trial in entering a guilty plea. [citation] But it may not 'rely on its own finding' about the defendant's underlying conduct 'to increase a defendant's maximum sentence.'" (*Gallardo, supra*, 4 Cal.5th at p. 134, quoting *Descamps*, *supra*, 133 S.Ct. at pp. 2288-2289.)

In this sense, the present case is readily distinguishable from *Schriro v. Summerlin*, *supra*, 542 U.S. 348, which held that retroactivity does not apply to an *Apprendi* argument. At issue in *Schriro* was the retroactivity of the Supreme Court's *Apprendi*-based decision in *Ring v. Arizona* (2002) 536 U.S. 584, a case which held that the *Apprendi* jury trial right applied to the penalty phase of a capital case. The Court in *Schriro*, applying the *Teague* rule, concluded that the *Ring* rule was nonsubstantive, in that it did not alter the nature of the conduct necessary to impose the death penalty, but only concerned the determination of who the factfinder would be – i.e., a jury, not a judge. (*Schriro*, *supra*, 542 U.S. at pp. 353-355; see also *In re Consiglio* (2005) 128 Cal.App.4th 511, 514-516 [similarly holding that there is no retroactive effect to the Supreme Court's decisions affecting California sentencing law in *Blakely* and *Cunningham* because these new rules only altered procedural rules about who made findings and what standard would apply].)

In neither of these situations did we have the type of watershed change in substantive law ushered in by the decisions in *Descamps*, *Mathis* and *Gallardo*. Retroactive application of *Gallardo* and *Descamps* is thus compelled because under a proper, constitutional interpretation of the recidivism statutes, a defendant's conviction for prior crimes which required *Guerrero* factfinding to make them strikes simply cannot

be serious felonies or strikes because the alleged facts that make these crimes strikes were not elements of these crimes and were not pleaded and either proven or admitted as enhancements when the prior crimes were prosecuted.

That's my *Teague* argument. But don't stop there. California has its own rules about retroactivity of landmark decisions which can be applied on their own, and which provide a strong basis for arguing for full retroactivity of *Descamps-Gallardo*. Again, I have briefed these in three recent habeas petitions, and am going to import this briefing here in slightly revised form.

ii. **Retroactivity Under California Law.**

There are two complementary arguments as to why, under California law, *Descamps* and *Gallardo* must be applied retroactively to final convictions and sentences. First, these landmark holdings essentially mean that there was a complete absence of proof satisfying fundamental constitutional standards to establish that prior convictions challengeable under *Gallardo* are actually strikes, rendering the judgment and sentence previously imposed as unauthorized; and it is well settled that an unauthorized sentence can be corrected at any time.

Second, California's liberal standard for assessing whether decisional changes in the law are to be applied retroactively, focused largely on whether the decision affects the "fundamental integrity of the factfinding process," requires that *Descamps* and *Gallardo* be applied retroactively to anyone still serving a sentence based on findings concerning prior convictions which are contrary to *Descamps*, *Gallardo*, and the Sixth and Fourteenth Amendment protections which they embody.

A discussion of both contentions follows.

(a). **In Light of the Constitutional Interpretations of Our Two High Courts in *Descamps* and *Gallardo*, Life Sentences Under the Three Strikes law and Five-Year Serious Felony Enhancements Imposed in Violation of *Descamps* and *Gallardo* are Unauthorized and Subject to Correction on Habeas.**

A fundamental rule of California criminal law jurisprudence is that an unauthorized sentence can be corrected at any time. (See, e.g., *People v. Scott* (1994) 9 Cal.4th 331, 354-355; *People v. Guillen* (1994) 25 Cal.App.4th 756, 764.) A longstanding application of this rule permits the granting of habeas relief as to final convictions upon a showing that a defendant is serving an unauthorized sentence. (See *In re Harris* (1993) 5 Cal.4th 813, 838-839, citing *In re Lee* (1918) 177 Cal. 690.) Our Supreme Court in *Harris* explains why this is so.

> This aspect of habeas corpus jurisprudence has been invoked in the past by this court to review claims that a criminal defendant was sentenced to serve an illegal sentence. Thus, for example, where a defendant was sentenced to an indeterminate term when the law provided for a determinate term, habeas corpus was available. (*In re Lee* (1918) 177 Cal. 690.) The writ was likewise available to review a claim that the sentencing court acted in excess of its jurisdiction by imposing a sentence on the petitioner that was longer than that permitted by law. (*Neal v. State of California* (1960) 55 Cal.2d 11, 16- 17; see also *In re Estrada* (1965) 63 Cal.2d 740, 750 [denial of parole consideration based on wrong statute].)

(*In re Harris*, *supra*, at pp. 838-839.) In *Harris*, our Supreme Court granted habeas relief to a youthful offender who received an adult-criminal life sentence based on an erroneous conclusion that he was 16 years old when he committed his crime, when it was later demonstrated conclusively on habeas that he had not yet turned 16 when the crime was committed. "In entertaining such claims in collateral challenges to final judgments, past cases have suggested it was significant that 'there [was] no material dispute as to the facts' [citation], or that the judgment may be corrected "without the redetermination of any facts.'" (*Ibid.*, citing *Neal v. State of California*, *supra*, 55 Cal.2d at p. 17.)

This principle has been applied to situations akin to the present one, involving

defects in the proof of prior conviction allegations, to permit post-appeal challenges via habeas corpus. In a different *Harris* habeas case, *In re Harris* (1989) 49 Cal.3d 131, the Supreme Court held that "the requirement in section 667 that the predicate charges must have been 'brought and tried separately' demands that the underlying proceedings must have been formally distinct, from filing to adjudication of guilt . . .", concluding that this had not happened in the petitioner's case because the two convictions had originally been commenced by means of a single felony complaint. (*Id*., at p. 136.) The Supreme Court held that habeas corpus was a proper vehicle to challenge this error, notwithstanding the fact that this issue had already been presented and rejected by the petitioner in his direct appeal.

> Petitioner may properly attack the sentence enhancements on habeas corpus despite the fact the underlying claim was raised and rejected on appeal. Habeas corpus will lie when the trial court "exceeded its jurisdiction by sentencing a defendant 'to a term in excess of the maximum provided by law' [citation], or *to correct a misinterpretation of [a] statute resulting in confinement 'in excess of the time allowed by law'* [citation] . . . ."

(*Harris*, *supra*, 49 Cal.3d at p. 134, fn. 2, emphasis added, quoting *In re Huffman* (1986) 42 Cal. 3d 552, 555; see also *In re Preston* (2009) 176 Cal.App.4th 1109, 1114 [rejecting substantive argument attacking lawfulness of prison prior findings but upholding, based in *Harris*, petitioner's right to raise jurisdictional challenge on habeas after conviction was final].)

The unauthorized sentence exception to the rule precluding habeas relief on final judgments should apply to the *Descamps-Gallardo* claims we are discussing. It is unquestionable after *Descamps* and *Gallardo* that true findings as to strike and/or serious felony allegations which were made in a manner that is now plainly contrary to the constitutional rule of these cases were based on a "misinterpretation of a statute" (*Harris*, *supra*, 49 Cal.3d at p. 134, fn. 2) by the Supreme Court in *Guerrero* and *McGee*. Properly construed in connection with the constitutional principles of *Descamps* and *Gallardo*, there can be no material dispute as to the fact that where *Guerrero* factfinding

is the lynchpin which turns a defendant's priors into serious felonies and strikes, the elements of the prior crimes lack the requisite facts required to make these offenses serious felonies. Since no redetermination of the facts is required, and the matter "poses a strictly legal issue . . .", the state's interest in the finality of the judgment is reduced, and petitioner's "interest in obtaining judicial review of an allegedly illegal sentence cannot be ignored." (*Harris*, *supra*, 5 Cal.4th at p. 841.)

Once again, case law from Kansas is helpful. In *State v. Dickey* (2016) 305 Kan. 217, the Supreme Court of Kansas considered the situation where the defendant's punishment in three probation revocation cases was increased due to a 1992 juvenile conviction for a "person felony." Although the time to directly challenge the sentences in the probation cases had passed under state law, the defendant contended that use of the 1992 prior was foreclosed by the rule of *Descamps v. United States*, supra, 570 U.S. 254. Under Kansas law, the defendant was not permitted to advance a collateral attack on constitutional grounds. Nonetheless, the Supreme Court granted relief because the new understanding of state statutory law, as informed by *Descamps*, rendered the defendant's sentence "illegal" which allowed for correction under a statute which permitted relief at any time for an "illegal" sentence. Having found that the sentence imposed in violation of *Descamps* was illegal under state law, the court concluded that:

> "The State's remaining efforts to impose a procedural bar to the relief Dickey seeks-arguments concerning retroactivity and res judicata - are all unavailing in the context of a motion to correct an illegal sentence which can be made at any time. Dickey's prior 1992 conviction was misclassified as a person felony, and the resulting sentences are illegal." (*Id*. at p. 222.)

The reasoning in *Dickey* parallels California law. When it has been shown that a California defendant is serving an "unauthorized" sentence, relief is warranted on habeas corpus. (*In re Harris*, supra, 5 Cal.4th 813, 838-839; *People v. Wilson*, supra, 219 Cal.App.4th 500, 518 [sentence imposed in violation of *Descamps* is "unauthorized"].)

Under California law as explained in *Gallardo*, petitioner is serving an "unauthorized" sentence.

Thus, we can argue, a court has jurisdiction to consider a habeas corpus claim on its merits based on the corrected interpretation of controlling law mandated by the Constitution under the decisional authority of *Descamps* and *Gallardo*.

(b). **The Change in Law Effected by *Descamps* and *Gallardo* Affects the Fundamental Integrity of the Factfinding Process; Thus, the Holdings of These Cases Must Be Applied Retroactively to Persons Who Are Entitled to the Benefit of this Fundamental Change in the Controlling Law Regarding Adjudication of Prior Conviction Allegations.**

The same result can be obtained by looking at this question from a somewhat different angle. Historically, California courts have permitted retroactive application of rulings. (See, e.g., *In re Johnson* (1970) 3 Cal.3d 404, 410.) Our Supreme Court has explained the criteria to be considered in deciding whether to make a landmark ruling retroactive.

> Whether a judicial decision establishing new constitutional standards is to be given retroactive effect is customarily determined by weighing the following factors: '(a) the purpose to be served by the new standards, (b) the extent of reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of retroactive application of the new standards.' [Citations.] 'It is also clear that the factors of reliance and burden on the administration of justice are of significant relevance only when the question of retroactivity is a close one after the purpose of the new rule is considered.' [Citation] Decisions have generally been made fully retroactive only where the right vindicated is one which is *essential to the integrity of the fact-finding process*. On the other hand, retroactivity is not customarily required when the interest to be vindicated is one which is merely collateral to a fair determination of guilt or innocence. [Citation.]"

(*In re Joe R.* (1980) 27 Cal.3d 496, 511 (emphasis added); see also *In re Hansen* (2014) 227 Cal.App.4th 906*,* 917; *In re Lucero* (2011) 200 Cal.App.4th 38, 45.)

The fundamental purpose of *Descamps* and *Gallardo* is to increase the constitutional reliability of a conviction and sentence so that a jury in the original trial, not a judge (or jury) at a hearing in a subsequent case, determines all facts that serve to increase a defendant's sentence. The founders of our country determined that the most reliable method of proving a fact is through a jury trial. (U.S. Const., 6th Amend.) The Supreme Court has taken this directive to mean that when a defendant pleads to a crime and waives the right to a jury trial, the only things that can be determined with reliability are the elements of the crimes, not the underlying facts which were never contested. (*Descamps, supra*, 133 S.Ct. at pp. 2288-2289.) While the court can consider the fact *of* the prior conviction itself, any findings about *the facts which underlie that conviction* must have already been determined by a jury or admitted by a defendant in connection with the proceedings of the prior crime itself in order to constitute a proper basis for increasing that defendant's sentence based on recidivism. (*Ibid*.)

The Supreme Court explained this principle with alacrity in *Apprendi, supra ,* 530 U.S. at pp. 476-477, 484. *Descamps* extended these bedrock protections to prior convictions, requiring that courts making findings about prior convictions under the ACCA must use the categorical approach – meaning, that nothing but the *elements* of the prior crime can be considered – to determine whether a prior conviction qualifies to enhance the sentence where the crime is not divisible. (*Descamps, supra*, 133 S.Ct. at pp.

2288-2289; accord, *Gallardo*, *supra*, 4 Cal.5th at p. 133.)

In light of these constitutional principles, it is plain that a defendant whose life sentence is premised in pertinent part on proof of prior convictions based on *Guerrero* factfinding simply cannot be found to have suffered the serious felony and/or strike priors which were found true. Under the Sixth and Fourteenth Amendments, he cannot be punished for these prior convictions beyond the bare elements of the crimes of conviction; and it is clear beyond dispute that prior convictions which required *Guerrero* factfinding – now barred by *Descamps* and *Gallardo* – in order to make them into strikes – e.g., that the prior offenses were committed by personal use of a deadly weapon and/or personal infliction of great bodily injury upon a nonaccomplice – are deficient to establish the missing *Guerrero* facts which turn the prior convictions into strikes.

Put bluntly but correctly, after *Descamps* and *Gallardo*, an inmate serving a sentence based on true findings on strike priors premised on *Guerrero* factfinding now barred by *Gallardo* is *factually innocent* of the allegations that his prior convictions are strikes. Yet that person is now serving a life sentence based on recidivism allegations that could not be found to be true under a constitutionally proper interpretation of California law.

Plainly then, the wrong here – permitting judicial factfinding of non-elemental facts – is one which fundamentally concerns the "integrity of the factfinding process" (*In re Joe R.*, *supra*, 27 Cal.3d at p. 511), and thus the change in the law signaled by *Descamps* and *Gallardo* must be applied retroactively.

In this sense, the present situation is directly analogous to the one that prevailed in California following our Supreme Court's holding, in *People v. Daniels* (1969) 71 Cal.2d 1119, that the crime of kidnapping for robbery under section 209 required substantial movement of the victim, overruling prior cases which held that a kidnap was committed so long as there was *any* movement of the victim, even if it was merely incidental to the robbery. Not long after *Daniels* was decided, our Supreme Court held in *People v. Mutch* (1971) 4 Cal.3d 389 that *Daniels* must be applied retroactively to final convictions because "when the statute is properly construed the evidence there introduced was insufficient to support the judgments." Retroactive application was required because a person convicted of robbery who moved his victim only in a slight manner incidental to the commission of robbery "was convicted under a statute which did not prohibit his acts at the time he committed them." (*Id*., at p. 395.) Viewed in this light, the Supreme Court explained, "'what defendant did was never proscribed under section 209.'" (*Id*., at p. 396, quoting *People v. Ballard* (1969) 1 Cal.App.3d 602, 605.) Applying the principles discussed above, which require retroactive application of substantive changes in the law where "there is no material dispute as to the facts relating to his conviction and if it appears that the statute under which he was convicted did not prohibit his conduct . . ." (*ibid*., citing, e.g., *In re Zerbe* (1964) 60 Cal.2d 666, 667-668), the Supreme Court in *Mutch* concluded that "[i]n such circumstances, it is settled that finality for purposes of appeal is no bar to relief, and that habeas corpus or other appropriate extraordinary remedy will lie to rectify the error. . . ." (*Ibid*.)

The same retroactivity holding has been applied to long final convictions involving second degree felony murder following our Supreme Court's decision in *People v. Chun* (2009) 45 Cal.4th 1172, which fully reinstated the "merger" bar (*People v. Ireland* (1969) 70 Cal.2d 522) for all assaultive felonious crimes, overruling *People v. Hansen* (1994) 9 Cal.4th 300 and other Supreme Court cases which carved out hard-to-follow exceptions to the *Ireland* rule. In both *In re Lucero*, *supra*, 200 Cal.App.4th 38 and *In re Hansen, supra*, 227 Cal.App.4th 906 – the latter case involving the identical inmate who was the subject of the earlier *Hansen* decision by the California Supreme Court – the appellate courts concluded that *Chun* had to be applied retroactively to long-final judgments because "application of the new rule announced in *Chun* directly affects inmates such as Lucero [and Hansen], who might have been acquitted of murder but for application of the felony-murder rule . . .", holding that it thus "impacts the reliability of [their] murder conviction . . ." and must be applied retroactively. (*Lucero*, *supra*, at p. 46; *Hansen*, *supra*, at p. 917.)

The same principles must be applied here. Under a proper, constitutional interpretation of the recidivism statutes at issue here, convictions for prior crimes which require unconstitutional *Guerrero* factfinding to make them into strikes cannot, standing alone, be serious felonies or strike priors because they lack the requisite facts needed to make them strikes. Like the petitioner in *Mutch*, who was factually innocent of kidnapping under a proper interpretation of section 209, a petitioner in this situation is factually innocent of any charged strike and/or serious felony allegations for such prior

crimes. And like the petitioners in *Lucero* and *Hansen*, the new rule announced in *Descamps* and *Gallardo* "impacts the reliability" of the factfinding procedure used to find such prior convictions to be serious felonies and/or strikes. Thus, under the settled principles discussed above, *Descamps* and *Gallardo* must be applied retroactively.

c. **Retroactivity, Last Word.**

You can expect great resistance to these retroactivity arguments in the trial and appellate courts. Courts are always going to resist retroactive application of changes in the law which will result in a revisiting of a flood of Third Strike sentences over the past 25 years based on prior conviction findings that are constitutionally suspect under *Descamps* and *Gallardo*. Thus, I don't expect easy victories on this issue.

But I do think the foregoing arguments, and variations upon them, are strong and worth raising, and that there is a good chance that some trial and appellate courts – and, ultimately, the California Supreme Court – will agree with us on retroactivity. And the upshot of such wins – release of a number of inmates locked up for life under the unjust Three Strikes law – will be worth the effort.

CONCLUSION

So much for my "small" topic. I have managed to fill a lot of pages, hopefully confounding, yet again, the dictum favored by SDAP's outgoing Executive Director, Dallas Sacher, that "brevity is the soul of wit." Of course, if that dictum were true, I would surely be witless. And it bears noting that this phrase was uttered in Hamlet by Polonius, a man of many words who, as my grandfather once wittily said of my father, seemed to get hypnotized by the sound of his own voice.

The goal of this article was to apprise all of you of the monumental significance of *Descamps*, *Mathis*, and *Gallardo* to a small but sometimes critical corner of our practice, and to hopefully arm and energize you to battle for our clients about an issue which can, in many instances, result in preventing or reversing an unjust sentence. I hope at least to some extent, that I have accomplished this objective.

Finally, I invite any of you with *Descamps/Gallardo* issues to contact me by phone or e-mail, so that I may help you, if I can, to make such a challenge pay off for your clients.