HAS APPRENDI TRUMPED GUERRERO? DESCAMPS, WILSON, AND SIXTH AMENDMENT CHALLENGES TO JUDICIAL FINDINGS OF "NON-ELEMENTAL FACTS" CONCERNING PRIOR CONVICTIONS WHICH INCREASE A CRIMINAL DEFENDANT'S MAXIMUM SENTENCE

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STATUTES

Has *Apprendi* Trumped *Guerrero*? *Descamps*, *Wilson*, and Sixth Amendment Challenges to Judicial Findings of "Non-Elemental Facts" Concerning Prior Convictions Which Increase a Criminal Defendant's Maximum Sentence

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

Introduction

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 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 (or maneuvered around by tinkering with the "maximum" – a subject not covered by this article).

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 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. Under the rule of *People v. Guerrero* (1988) 44 Cal.3d 343 and its progeny, there has been 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 applied 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].)

The bad news on this issue seemed to be a fait accompli until just a couple years ago, when the Supreme Court's decision in *Descamps v. United States* (2013) 570 U.S. __, 133 S.Ct. 2276 (*Descamps*) altered 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 is mixed with federal court, non-constitutional jurisprudence which we had seen before, especially in *Shepard v. United States* (2005) 544 U.S. 13 (*Shepard*), where it had stopped short of announcing a constitutional rule for prior convictions. But 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.)

Surprisingly, only one California appellate decision since *Descamps* has squarely tackled this issue. In an insightful opinion authored by then-new Justice Marquez, the Sixth District, in *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.

What does all this mean? It signifies that the table is now set for us to attack the heart of the *Guerrero* doctrine. 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 *Wilson* 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 holding in *Descamps* is quite explicit on this point. If a crime is only 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 which, if proven, would make it a "strike," 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 is that the door is effectively slammed on *Guerrero* fact-finding.

There is a glaring exception, discussed in Parts D and E below, in which this sort of factfinding is not unconstitutional under *Descamps*, i.e., where the controversy is not over missing elements, but over which *version* of a crime was committed, where a crime can be committed more than one way, one of which is a strike, and one of which is a non-strike. (See *Descamps*, *supra*, at p. 2288.) This situation arises with some commonality under

California law with respect to a prior conviction for a violation of former Penal Code section 245, subdivision (a)(1) ("section 245(a)(1)"), because one version of the offense in that section, assault with a deadly weapon, is a serious felony, but the other version, assault by force likely to inflict great bodily injury, is not a serious felony. (See *People v. Delgado* (2008) 43 Cal.4th 1059, 1065.)[1]

There is one further complication, discussed in Part F below. The Sixth District, in *Wilson*, held that the *Apprendi-Descamps* error in that case was subject to harmless error analysis, citing the general rule from *Washington v. Recuenco* (2006) 548 U.S. 212, 222 that *Apprendi* error requires reversal only when it was not harmless beyond a reasonable doubt. (*Wilson*, *supra*, 219 Cal.App.4th at pp. 518-519, citing *People v. French* (2008) 43 Cal.4th 36, 52-53.) In *Wilson*, the court found the error prejudicial (*ibid*.), so no problem arose from that. But my contention, explained in Part F-1 below, is that there is no basis for harmless error analysis for *Descamps* error by a trial court, as no determination by an appellate court that a hypothetical jury could have found the missing elements can substitute for the requirement that the jury actually find – or the defendant admit – the required elements of the prior conviction as necessary elements of the crime of conviction.

What follows is a tour of the landscape of *Descamps* and its 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 *Wilson*. In Part E, I impart some suggestions as to the impact of *Descamps* and *Wilson* on the various types of *Guerrero* fact finding about

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[1]Statutory references are to the Penal Code unless otherwise indicated. Note that section 245 has recently been amended to eliminate this potential ambiguity, with subdivision (a)(1) now defining only assault with a deadly weapon, and assault by force likely to inflict great bodily injury now relocated to subdivision (a)(4). (Stats. 2011, ch. 183, eff. 1/1/12.)

prior convictions under California law.

Part F, as noted above, features a discussion of the dodgy questions of "harmless error" and prejudice in cases where *Descamps* error is raised. In Part G, I make a small effort to chart out some cognizability issues in connection with raising *Descamps* error, as well as the thorny question of retroactivity. Finally, in Part H, borrowing some of my own briefing from Prop. 36 cases, I make an argument 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.

So, let's get to the starting line.

A. *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 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 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, 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 one or more serious felony priors 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 the 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 – designations of conduct-related offense connected to any felony crime, defining as "serious" " . . . 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) & (c)(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, 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 by a very conservative governor with extremely conservative new justices), 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 conviction and make it into a serious felony and a strike.

But meanwhile, in another part of the forest, a major change 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.

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, 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.[2]

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)

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

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 *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 a disappointing caveat

about prior convictions, expressed by the phrase which states the 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. Such 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 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 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 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.)[3]

D. *Apprendi* and Prior Convictions: Into the Light, From *Shepard* to *Descamps* to *Wilson*.

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,'

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[3] 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. opin. of Kennard, J., holding that 6th & 14th Amend. right to jury trial exists on conduct enhancements under California law, and thus the *Chapman* standard applied to instructional error].)

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.

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* has now taken place in *Descamps*, *supra*, 133 S.Ct. 2276, where a 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 the *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, for example, 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 . . .", with the Court further concluding 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 subsequent discussion of the necessity for that approach based on the constitutional requirements of *Apprendi* case law and the Sixth and Fourteenth Amendment, 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 Background.***

The Sixth District's decision in *Wilson*, *supra*, 219 Cal.App.4th 500, decided some eight months after *Descamps*, marks the first – and thus far, only – 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. For the most part, it is a template for my recommendation of an approach for using the *Apprendi* jurisprudence of *Descamps* to attack and, ultimately, undermine the *Guerrero* line of cases condoning judicial factfinding.

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.[4] 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

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[4]In one of those "only in California" twists of statutory language, a conviction for vehicular manslaughter while intoxicated, under section 192.5, disqualifies a person from eligibility for resentencing under Proposition 36, the Three Strikes Reform Act of 2012, whereas a prior conviction for voluntary manslaughter – which is, and has always been a serious felony – is not a disqualifier. (See § 1170.12, subd. (c)(2)(C)(iv)(IV), and § 1170.126, subd. (e)(3) [disqualifiers include "[a]ny homicide offense . . . defined in Sections 187 to 191.5, inclusive"].)

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.) The Sixth District 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.[5] As background, Wilson

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[5]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

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 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 . .

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vehicular manslaughter conviction as a strike.

." in a manner precluded by the holding in *Descamps*. (*Id*., at pp. 515-516, quoting *Descamps*, *supra*, 133 S.Ct. at p. 2288.)

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

The word needs to get out: *Guerrero* and it progeny are now dead letter, 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 "elemental facts" that are missing from 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, under *Descamps*, 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 are 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, 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 *Wilson* 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, subds. (c)(8)&(23).** The short answer is that if these elemental "facts" were not pled or proven by an enhancement, after *Descamps* and *Wilson*, a court can't go looking for them in the record any more.

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 the *Apprendi-Wilson* issue in a vehicular manslaughter case where the disputed issue was the non-accomplice status of the victim. Thus, sample briefing is available.[6]

3. **The "Burglary of a Residence" Element of Second Degree Burglaries.** 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? Hopefully Not.** The only exception here – which would arguably sometimes apply in the two foregoing categories as well – might be the situation presented in *Guerrero* itself, where the missing fact had been pled and proven or admitted by the defendant in the original proceeding. This sub-issue, which defined the different rulings in *Crowson* and

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[6] We prevailed in this case based on *Guerrero*-style sufficiency of evidence analysis, with the Court of Appeal concluding that there was insufficient evidence to prove that the decedent was a non-accomplice, while making some favorable background noise about the effect of *Descamps*. (The excellent opinion in that case, *People v. Rivera*, H038702, was, alas, unpublished and thus cannot be cited.)

Guerrero discussed above, is not expressly resolved by the holdings in *Descamps*, 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 *Crowson* – that the pleading of a burglary of a residence was entirely superfluous, and added nothing to the charges and the punishment – can be used to show that such "pleading and proof" of non-elements does not satisfy *Apprendi* and the Sixth Amendment. 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"].)

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 *Wilson*.

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 *Wilson*. 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-Wilson*, on the one hand, and *Maestas*, on the other, is that no second degree burglary can 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 necessary 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 *Wilson* 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.

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 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. "[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-Wilson* Error**.

Two remaining questions, left somewhat unclear by *Descamps* and *Wilson* – or, at

least not, in my view, 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) that harmless error analysis really does not apply, and (2) that the only remedy for *Descamps-Wilson* error 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*, *supra*, 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*, *supra*, 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 *Descamps*, nor any room for such discussion. That case squarely holds 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* depends on these facts having been pled, and either proven 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 – the Court in *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 court. (*Ibid*.)

This is the correct view because the error here differs 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 conclude that if the issue had been submitted to the jury, it is apparent whether, beyond a reasonable doubt, the jury would have found it proven. (*Ibid*.)

Descamps-Wilson 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 a jury trial on the priors issues on remand.

Instead, the problem here involves a deficiency in the proceedings of the prior conviction that are a "done deal," as it were. The constitutional deficiency identified in *Descamps* is that proceedings of the prior conviction itself simply fail to establish the missing, non-adjudicated elements, and thus that they have not been established as a matter of record which includes the constitutional guarantees that inhere in a prior conviction. There was no jury trial on these elements in the prior crime, no notice and opportunity to prove or disprove them. And 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 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? *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 of 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 imposing a harmless error analysis to *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.

Mind you, since *Wilson* is the only extant authority on this question, I would recommend to anyone raising a claim of *Descamps-Wilson* error to alternatively brief harmless error under *Recuenco* and *Wilson*, as it will typically be easy to argue that the error was prejudicial in any plea case, and often arguable in a jury trial case that the missing elements were not established beyond any possibility of defense had they been disputed at trial. But there will some cases where such an argument will be untenable, and a per se reversal argument will be needed to obtain a reversal.

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

My cautious thesis is that the only proper remedy for *Descamps-Wilson* error 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.

First, there is the risk that courts will misread *Descamps* error as involving our earlier jury trial claim in cases like *McGee*, and remand for a jury trial on the truth of the prior convictions, based on the record of conviction from the prior, decided now by a jury, not a judge. That was what we sought under *McGee*; but we got much more under *Descamps* and *Wilson*. With *Descamps* 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. Having a jury convened now to decide extraneous, non-elemental facts no more cures this problem than having a trial judge or an appellate court make this determination. Thus, the remedy is a straight reversal of the true finding on the prior convictions.

b. 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, in a case where the prosecution – as they often do – simply relied on an abstract of judgment from an old case which only stated that there was a conviction for grand theft and a prison sentence, the prosecutor could produce, on remand, 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, where the 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 convictions 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 away around these bad cases? Maybe not yet, alas. But here are some suggestions.

i. **Double Jeopardy**

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 any more. 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 apply to prior convictions where there are unadjudicated elements required for the prior conviction to impose an increased punishment. But there is no holding that there is a constitutional jury trial right in the current proceedings on the trial of the prior convictions. (But see *Descamps*, *supra*, 133 S.Ct. at p. 2294, conc. opin. of Thomas, J.) Unless and until the Supreme Court reaches this conclusion, and expressly overrules *Almendarez-Torres*, *Monge* will still be "good law" which lower courts are required to follow.

However, I would urge everyone to push this issue in any case where it matters. I have briefing on why *Monge* is no longer good law, including a Cert. petition. I have had no luck with this issue, and it is unclear if there ever really will be a reconsideration of *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 "[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 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 can and did argue 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.

G. How to Identify and Raise a *Descamps-Wilson* Issue on Appeal and/or Habeas.

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

If you have a situation on direct appeal, like *Wilson* and my *Rivera* case, where the trial on the prior convictions took place before *Descamps* was 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-Wilson* legal challenge is based on a "significant change in the applicable law" which occurred after the trial in your case. (*Id*., 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].)

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 for federal habeas, or you are handling 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. Is there a way to raise a *Descamps* argument on habeas?

The answer is complicated. Generally, the *Teague* rule bars retroactive application to cases final when the new rule is announced. (*Id*., at p. 303.) But there are exceptions, one of which arguably applies to this situation. Here is a fine recent discussion of the exceptions, from the Second District in *In re Wilson* (2015) 233 Cal.App.4th 544, which recently held that the Eighth Amendment ruling in *Miller v. Alabama* (2012) 567 U.S. ___ [132 S.Ct. 2455] applies retroactively to any conviction in which the defendant is still serving a

sentence.

The *Teague* court articulated two exceptions to the general rule of nonretroactivity for new rules in cases on collateral review. First, a new rule should be applied retroactively if it "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" (*Teague, supra*, 489 U.S. at p. 307.) Second, a new rule should be applied retroactively if it "requires the observance of 'those procedures that … are "implicit in the concept of ordered liberty."'" (*Ibid*.) Thus "[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." (*Id*. at p. 310.)

In *Schriro v. Summerlin* (2004) 542 U.S. 348 [159 L. Ed. 2d 442, 124 S. Ct. 2519] (*Schriro*), the Supreme Court revisited Teague's retroactivity analysis. The *Schriro* court defined the key distinction in the retroactivity analysis as whether the new rule is substantive or procedural.

Schriro held that substantive rules apply retroactively, and include those rules that (1) narrow the scope of a criminal statute by interpreting its terms or (2) alter the range of conduct or the class of persons covered by the statute and place them beyond the State's power to punish. (*Schriro, supra*, 542 U.S. at pp. 351–352.) Included within the second category are rules prohibiting a certain category of punishment for a class of defendants because of their status or offense. Such rules apply retroactively because they carry a "'significant risk'" that a defendant stands convicted of "'"an act that the law does not make criminal"'" or "faces a punishment that the law cannot impose upon him." (*Id*. at p. 352.) The court explained that although it had sometimes referred to rules of this type as "falling under an exception to Teague's bar on retroactive application of procedural rules, … they are more accurately characterized as substantive rules not subject to the bar." (*Id*. at p. 352, fn. 4, citation omitted.)

The court further explained that new "rules of procedure" generally do not apply retroactively because they do not produce a class of persons convicted on conduct that the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise. The court found that because of the speculative connection to innocence, retroactive effect is only given to a small set of "'"watershed rules of criminal procedure"'" implicating the fundamental fairness and accuracy of the criminal

> proceeding. (*Schriro, supra*, 542 U.S. at p. 352.) This class of rules is extremely narrow; a watershed rule is one "'without which the likelihood of an accurate conviction is seriously diminished.'" (542 U.S. at p. 352, italics omitted.)

(*In re Wilson*, *supra*, 233 Cal.App.4th at pp. 559-560.)

I think a good argument can be made that *Descamps* amounts to a new substantive rule not subject to the *Teague* bar because the defendant "faces a punishment that the law cannot impose on him." (*Ibid*.) The rule of *Descamps* is categorical in application – if there are facts which are extrinsic to the elements of the crime from a prior conviction, the Sixth and Fourteenth Amendments categorically preclude these facts from being used or found by the trier of fact to prove up the "truth" of a prior conviction allegation which increases the defendant's maximum punishment. (*Descamps*, *supra*, 133 S.Ct. at 2288-2289.) Thus, one can arguably fit, within this *Teague* exception, persons subject to 25-to-life sentences under California's Three Strikes law by virtue of proceedings where proof of such "elemental" facts was necessary to the imposition of such a sentence.

You can expect great resistance to this argument in the trial and appellate courts, who will most decidedly not want to revisit a host of prior convictions over the past 21 years which resulted in Third Strike sentences based on the application of the *Guerrero* doctrine to proof of prior convictions. But I think this is an arguable claim that should be made, and made as soon as possible.

2. **Post-*Descamps* Sentencing Hearings**

A different set of cognizability problems are likely to arise in cases where trials or admissions of prior convictions occurred after *Descamps* was decided in June of 2013. Here's where some creativity and determination will come in handy.

The *Guerrero* rules are by now very well ingrained in the practice of criminal law in California. Prosecutors, defense lawyers and trial judges pretty much know which serious felony/strike allegations require some additional proof from the record of conviction beyond the "fact of" the prior conviction and its elements. But at least so far, there is not yet much recognition of how *Descamps* has altered this landscape. If your case involves a prior

conviction which included proof of "non-elemental facts" to make it a serious felony, and there was no *Descamps* objection raised in the trial court – or, worse still, your client's trial lawyer had him admit the prior conviction in the trial court – can the issue be raised? The answer is yes, using three familiar types of claims.

First, as the court in *Wilson* held, it is enough that your client had a trial, and required the prosecution to prove the truth of the prior convictions beyond a reasonable doubt. Although the prosecution introduced records of conviction to prove the truth of the prior conviction allegations, the legal significance of *Descamps* and *Wilson* is that such evidence can't prove such allegations if they increase the maximum punishment. (*Wilson*, *supra*, 219 Cal.App.4th at pp. 516-517.)

Second, we can contend that the issue of the impropriety of using non-elemental facts to prove the truth of a prior conviction is a pure question of law that can be addressed by the reviewing court even without an objection to the use of such evidence. (See, e.g., *In re Sheena K.* (2007) 40 Cal.4th 875, 888, and authorities discussed therein.)

And last, whether or not either of the above arguments about cognizability can be made, a backup claim of ineffective assistance of counsel for failure to object to admission of documentary evidence from the record of conviction used to prove non-elemental facts should be raised on direct appeal. (See, e.g., *People v. Roberts* (2011) 195 Cal.App.4th 1106, 1132 [Sixth District case holding that trial counsel's failure to object to admission of post-plea statements of defendant used to prove truth of strike prior allegations, which were clearly inadmissible under *Guerrero-Trujillo* principles, amounted to ineffective assistance of counsel with no conceivable tactical justification].)

Where a defendant, represented by counsel at a post-*Descamps* plea hearing, admitted the truth of a strike prior allegation which depended on proof of non-elemental facts to establish the strike, the only recourse would appear to be a petition for writ of habeas corpus based on counsel's ineffectiveness in not advising the client that the strike could be challenged under *Descamps*. I have a sample habeas which I did in an analogous situation

some years back in the *Newton* case, where counsel had his client admit a vehicular manslaughter prior was a strike when it could not be shown to be a strike even under the *Guerrero* rules. We got an OSC in that case from the Court of Appeal, together with an unpublished opinion, and ultimately prevailed in superior court, resulting in the elimination of a Third Strike sentence for the client.

H. Does *Descamps/Apprendi* Apply to Proof of Facts About the "Current Offense" for Purposes of Eligibility Determinations Under Proposition 36?

One intriguing question about a collateral impact of *Descamps* has arisen with respect to the analogous situation presented in Proposition 36 resentencing eligibility cases. Must a "fact" which disqualifies a defendant from resentencing under Proposition 36 have been pled and either proven to a jury or admitted by a defendant? Unfortunately, the answer to this question from the appellate courts has been entirely negative. But I think they are wrong. So here, cut and pasted from my own briefing, only slightly edited to fit this article, is why I think that *Descamps* applies.

Courts are obligated to construe any ambiguity in a penal statute in a manner which avoids constitutional problems. (*People v. Leiva* (2013) 56 Cal.4th 498, 506-507.) In *Wilson*, *supra*, 219 Cal.App.4th 500, the Sixth District carefully analyzed the impact of *Apprendi* and its progeny on the question of judicial factfinding with respect to prior convictions, explaining how the High Court in *Descamps v. United States*, *supra*, 133 S. Ct. 2276, found that such factfinding was violative of the Sixth Amendment under *Apprendi*, and the impact of that ruling upon courts "filling in the blanks" of convictions by determining unadjudicated facts. (*Wilson*, *supra*, 219 Cal.App.4th at pp. 514-515 [lengthy quote from my brief omitted].)

As the foregoing analysis shows, the *Apprendi* doctrine, as construed in cases like *Shepard* and *Descamps*, calls into serious question the constitutionality of judicial factfinding about the nature of prior convictions for purposes of increasing a sentence. In like manner, judicial factfinding about the nature of the "current" conviction is constitutionally dubious

under the same analysis, where the consequence of such factfinding is to render a defendant ineligible for a dramatic sentence reduction to which he would otherwise be entitled under the Three Strikes Reform Act of 2012 ("Reform Act"). Assuming that there is ambiguity as to whether section 1170.126(e)(2) incorporates the pleading and proof requirement of section 1170.12(c)(2)(C), appellate courts should find that it does include such a requirement to avoid the strong constitutional challenge suggested in *Shepard*, *Descamps*, and *Wilson*.

It is recognized that the court in *People v. Blakely* (2014) 225 Cal.App.4th 1042 rejected a similar *Apprendi*-based argument advanced in that case, holding that the *Apprendi* jury trial right does not apply to an initiative provision which reduces a punishment already lawfully imposed. (*Id*., at pp. 1059-1063.) In so holding, the *Blakely* opinion followed a similar holding in *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, which, addressing the standard of proof at a section 1170.126 hearing, held that the U.S. Supreme Court has decided that the Sixth Amendment does not come into play with regard to a statutory amendment that serves to decrease punishment for a previously final judgment. (*Id*. at pp. 1304-1305.) Respectfully, *Kaulick* and *Blakely* are wrongly decided as to this point.

Both cases rely on the Supreme Court's decision in *Dillon v. United States* (2010) 560 U.S. 817. In *Dillon*, the court considered a statutory amendment that provided district courts with jurisdiction to lower previously imposed sentences based on new guidelines promulgated by the Sentencing Commission. The issue was whether the guidelines were mandatory or discretionary. The defendant contended that the guidelines had to be deemed discretionary since the Supreme Court had previously held that the guidelines used at initial sentencing hearings were discretionary since mandatory guidelines would have fallen afoul of the jury trial right recognized in *Apprendi*, *supra*, 530 U.S. 466. The court held that the new guidelines were mandatory since the statutory revision limited "the extent of the reduction authorized" and did not permit the courts to conduct "plenary resentencing proceedings." (*Dillon*, *supra*, 560 U.S. at pp. 827-828.)

Significantly, the statutory scheme at issue in *Dillon* did not serve to redefine a

normative punishment for the defendant. Rather, the statutory amendment, consistent with prior law, merely provided discretion to the court to lower the sentence. Most importantly, a lesser sentence is allowed "[o]nly if the sentencing court originally imposed a term of imprisonment below the guidelines range . . ." (*Id*., at pp. 827-828.)

Section 1170.126 presents an entirely different scheme than the one analyzed in *Dillon*. It creates a *new* statutory presumption for a second-strike sentence. The court must mandatorily impose the second-strike sentence unless a defendant is found ineligible or there is a factual finding of dangerousness. At issue herein is whether a defendant can be found ineligible, and thus not subject to the new maximum punishment, i.e., a second strike sentence, based on factual findings about "arming" made by a judge at a later proceeding which were not pled and proven in the original proceedings.

In its dispositive paragraph, the court in *Dillon* observed that the statutory amendment at issue did not "serve to increase the prescribed range of punishment. . . ." (*Dillon*, *supra*, 560 U.S. at p. 828.) Rather, the court was required to take "the original sentence as given" and had no power to find "any facts" that would allow for enhanced punishment. (*Ibid*.)

Here, in pertinent part, section 1170.126 manifestly *requires* the court to find a section 1170.126 petitioner eligible for resentencing unless, in pertinent part, his life sentence under the former Three Strikes law was imposed for a current offense in which he was armed with a deadly weapon. (§ 1170.126(e)(2) & § 1170.12(c)(2)(C)(iii).) In effect, the change in the law means that for a person with a "current offense" conviction that is not a serious felony, the new "maximum" sentence is a doubled-determinate, second-strike sentence, *unless* the prosecution is able to demonstrate the "fact" giving rise to a greater punishment – that he was armed with a deadly weapon in the commission of the current offense. As the court in *Blakely* recognizes, *Wilson*, following *Descamps*, stands for the proposition that "a court may not impose sentence above [the] statutory maximum based on disputed facts about prior conduct not admitted by defendant or implied by elements of the offense." (*Blakely*, *supra*, 225 Cal.App.4th at p. 1062, citing *Wilson*, *supra*, 219 Cal.App.4th at pp. 503-504,

515-516.)

In this sense, the court in *Blakely* erred in concluding that the *Apprendi* doctrine, as recently updated in *Descamps* and in the scope recognized by the Sixth District in *Wilson*, is inapplicable. In fact, as suggested above, *Descamps* and *Wilson* erect a barrier to the type of after-the-fact judicial factfinding which took place in the present case, where a subsequent judge combs the record from an already-final criminal conviction to make disputed findings about facts which were never adjudicated, or even at issue, in the original proceeding. Thus, to avoid this type of constitutional challenge, it must be concluded that a "pleading and proof" requirement was intended for the "arming" exception to resentencing eligibility under the Reform Act. [End of excerpt from brief.]

Given the fact that the statutory construction argument for pleading and proof has seemingly fallen on deaf ears in the appellate courts, it appears that the *Apprendi-Descamps* construction is the last, albeit weak, hope to prevail on this issue; and only, I am afraid, by means of a Cert. petition.

CONCLUSION

So much for my "small" topic. I have managed to fill a lot of pages, hopefully confounding, yet again, the dictum that "brevity is the soul of wit." Of course, that 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. Anyway, if that dictum were true, I would surely be witless.

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

Let me close by observing an historical irony. If my analysis is correct, *Descamps* will ultimately trump *Guerrero*, and restore the holding in *Alfaro* to its rightful place in the

jurisprudence of prior conviction enhancements under California law. If such a result comes to pass, it will be in no small part because of the sea change at the California Supreme Court in the past few months. Thus, while the turnaround from *Alfaro* to *Guerrero* was largely the product of a mid-1980s political-judicial upheaval from left to right, the correcting of the course will come with a parallel mid-2010s upheaval, this time from right to left.

In conclusion, I invite any and all of you with *Descamps/Wilson* 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.