

S231260

COPY

SUPREME COURT NO. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

SULMA MARILYN GALLARDO,

Defendant and Appellant.

APPELLATE COURT NO.

B257357

SUPERIOR COURT NO.

VA126705

**SUPREME COURT
FILED**

DEC 17 2015

Frank A. McGuire Clerk

Deputy

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

Honorable Thomas I. McKnew, Jr., Judge

**PETITION FOR REVIEW OF THE UNPUBLISHED OPINION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

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II.

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

III.

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

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Honorable Thomas I. McKnew, Jr., Judge

**PETITION FOR REVIEW OF THE UNPUBLISHED OPINION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

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

PETITION FOR REVIEW

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unpublished decision of the Court of Appeal, Second Appellate District,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

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

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

INTRODUCTION²

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 In both published and unpublished opinions, multiple courts have reached varying conclusions.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

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

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

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

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

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

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

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

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

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

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

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

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

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

PETITION FOR REHEARING

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

1. Address the analysis and holding of *Marin*, which was issued after this appeal was submitted for opinion but before the opinion was issued.
2. Address appellant's argument that this Court's holding in *People v. Reed* (1996) 13 Cal.4th 217, 220 (witnesses unavailability for prior's trials) is no longer valid under *Crawford v. Washington* (2004) 541 U.S. 36.

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



ISSUES PRESENTED FOR REVIEW

I.

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

II.

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

III.

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



STATEMENT OF THE CASE AND FACTS

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

ARGUMENTS AND POINTS AND AUTHORITIES

I.

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

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

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

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

On October 7, 2015, Division Four of the Second Appellate District issued a published opinion in *People v. Marin* (2015) 240 Cal.App.4th 1344.⁵ That opinion held as follows:

The California procedure for determining whether prior convictions qualify as strikes, insofar as it is based on judicial factfinding beyond the elements of the offense, is incompatible with the United States Supreme Court's view of the Sixth Amendment right to a jury trial as articulated in *Descamps*. In short, such judicial factfinding, which looks beyond the elements of the crime to the record of conviction to determine what conduct “realistically” underlaid the conviction, violates the Sixth Amendment right to a jury trial.

...

...the scope of judicial factfinding that is incompatible with the right to a jury trial is variously described in *Descamps* as the following: (1) “a disputed’ determination ‘about what the defendant and state judge must have understood as the factual

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

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

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

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

The United States Supreme Court has held that the Sixth and Fourteenth Amendments require that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." [Citations.]

The Supreme Court's most recent explication of this principle came in *Descamps*, in which an eight-justice majority concluded that serious Sixth Amendment concerns are implicated by a sentencing "court's finding of a predicate offense . . . [that goes] beyond merely identifying a prior conviction. Those concerns . . . counsel against allowing a sentencing court to 'make a disputed' determination 'about what the defendant and state judge must have understood as the factual basis of the prior plea,' or what the jury in a prior

trial must have accepted as the theory of the crime.”
(*Descamps, supra*, 133 S.Ct. at p. 2288; *Shepard v. United States* (2005) 544 U.S. 13, 25 [125 S.Ct. 1254].)

[p]

....two appellate courts issued decisions in which they considered the impact of the United States Supreme Court’s holding in *Descamps* on the California procedure for proof of prior convictions under *McGee*: *Saez, supra*, 237 Cal.App.4th 1177 (First Dist., Div. One) and *People v. Marin* (2015) 240 Cal.App.4th 1344 (Second Dist., Div. Four) (*Marin*).

In *Saez*, the court noted the conflict between the California and United States Supreme Courts “on the limits of a sentencing court’s ability to review the record of a prior conviction in determining whether the conviction can be used to increase a sentence under a statutory sentencing-enhancing scheme,” and held that the trial court’s reliance on the Wisconsin record of conviction was proper under *McGee* but violated the Sixth Amendment under the principles recognized in *Descamps*. (*Saez, supra*, 237 Cal.App.4th at p. 1195; *Marin, supra*, 240 Cal.App.4th at p. 1348.)...

Marin went a step further, expressly holding that “under *Descamps*, judicial factfinding authorized by [*McGee*], going beyond the elements of the crime to ‘ascertain whether that record reveals whether the conviction realistically may have been based on conduct that would not constitute a serious felony under California law’ ([*McGee, supra*, 38 Cal.4th] at p. 706), violates the Sixth Amendment right to a jury trial.” (*Marin, supra*, 240 Cal.App.4th at p. 1348.)

[P]

We agree with the conclusions of the courts in *Saez* and *Marin*... (Slip Opinion pp. 17-22.)

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

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

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

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

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

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

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

In deciding that question, *Descamps* distinguished two types of statutes. One type of statute is a so-called "divisible statute." That kind of statute sets out one or more elements of the offense in the

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

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

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

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



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

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

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

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

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

II.

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

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

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

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

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

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

