IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

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

Honorable Thomas I. McKnew, Jr., Judge

APPELLANT'S OPENING BRIEF ON THE MERITS

Christian C. Buckley, SBN 216998
Buckley & Buckley
992 1 Carmel Mountain Rd. #355
San Diego, CA 92129
(858) 538-6054
ccbuckley75@gmail.com
Attorney for Appellant Gallardo

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TOPICAL INDEX OF CONTENTS

TABLE OF AUTHORITIES

Cases

US Supreme Court

California Supreme Court

California Courts of Appeal

Federal & Non-California

Constitutional Provsions

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ISSUE ON REVIEW

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

INTRODUCTION

In *People v. McGee* (2006) 38 Cal.4th 682 [*McGee*], this Court reaffirmed the *People v. Guerrero* (1988) 44 Cal.3d 343 [*Guerrero*] rule that a trial court may review a prior record of conviction to determine whether the prior offense was a serious felony based upon the conduct and facts underlying the conviction. This Court concluded that "[i]f the enumeration of the elements of the offense does not resolve the issue, an examination of the record of the earlier criminal proceeding is required in order to ascertain whether that record reveals whether the conviction realistically may have been based on conduct that would not constitute a serious felony under California law." (*McGee, supra,* 38 Cal.4th at p. 706.)

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

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

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

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

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

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

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

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

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

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STATEMENT OF THE CASE AND FACTS

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

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

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

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

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

The transcript from the preliminary hearing included testimony from the victim that appellant pointed a knife at him, punched him while holding the knife, and potentially nicked him with the knife. (ACT 12-15.) At the close of the preliminary hearing, the court made a finding that there was sufficient evidence to hold appellant on the generic charge of violating section "245(A)(1)." (ACT 34.) The preliminary hearing court made no factual findings regarding the type of assault or whether appellant personally used a weapon. (ACT 34.)

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

ARGUMENTS

I.

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

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

Under the Sixth and Fourteenth Amendments, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi, supra,* 530 U.S. at p. 490.)[2]

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

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

The reason for this limitation, as the Supreme Court explained, is that the Sixth Amendment does not "authorize the court to try to discern what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct...[because]... the Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances. Similarly,...when a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense's elements; whatever he says, or fails to say, about superfluous facts cannot license a later sentencing court to impose extra punishment." (*Descamps, supra,* 133 S.Ct. at p. 2288.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> . . .[T]he Ninth Circuit's reworking authorizes the court to try to discern what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct. And there's the constitutional rub. The Sixth Amendment contemplates that a

> jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances. Similarly, as *Shepard* indicated, when a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense's elements; whatever he says, or fails to say, about superfluous facts cannot license a later sentencing court to impose extra punishment. So when the District Court here enhanced Descamps' sentence, based on his supposed acquiescence to a prosecutorial statement (that he "broke and entered") irrelevant to the crime charged, the court did just what we have said it cannot: rely on its own finding about a non-elemental fact to increase a defendant's maximum sentence. (*Id.* at pp. 2288-2289; citations omitted.)

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

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

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

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

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

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