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 REPLY BRIEF ON THE MERITS

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APPELLANT'S REPLY BRIEF ON THE MERITS

Appellant does not attempt herein to rebut each argument, point or authority set forth in Respondent's Answer Brief on the Merits; but rather as augmented hereby, relies on the arguments, points, and authorities set forth in Appellant's Opening Brief on the Merits and as such is not conceding, withdrawing, or waiving any issue, sub-issue, argument, or authority presented therein.[1]

[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. "ABM" refers to the Attorney General's Answer Brief on the Merits. "OBM" refers to Appellant's Opening Brief on the Merits.

ARGUMENTS

I.

CALIFORNIA'S ALLOWANCE FOR JUDICIAL FACTFINDING BEYOND PROOF OF WHAT A JURY NECESSARILY FOUND TO CONVICT A DEFENDANT OR WHAT THE DEFENDANT NECESSARILY ADMITTED IN THE CONTEXT OF A PLEA VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS AS INTERPRETED BY THE UNITED STATES SUPREME COURT IN *DESCAMPS* AND *MATHIS*.

Respondent ultimately "acknowledges that *Descamps* and *Mathis* cast doubt on *McGee*'s broad holding that *Apprendi*'s Sixth Amendment jury-trial concerns were largely, if not entirely, inapplicable to recidivist sentencing schemes." (ABM 5, 20-21.) Because of that acknowledgment, respondent "proposes an approach that distills the core Sixth Amendment principles from *Apprendi* as applied by *Descamps* and *Mathis*...[that] limit[s] a trial court's consideration of the record of conviction to determining those facts necessarily found beyond a reasonable doubt by a jury under the circumstances of the particular case, or those facts admitted by a defendant when entering a guilty plea." (ABM 6.)

However, before reaching this ostensibly correct position, respondent first endeavors to avoid the mandatory application of *Descamps v. U.S.* (2013) 570 U.S. __ (133 S.Ct. 2276) [*Descamps*] and *Mathis v. United States* (2016) 597 U.S. ___ (136 S.Ct. 2243) [*Mathis*] to California's recidivist sentencing laws through two related arguments.

First, respondent asserts that *Descamps* and *Mathis* were resolved on "statutory interpretation" grounds (ABM 14-16) and therefore the High Court's "elements-based inquiry" was not compelled by the Sixth Amendment. (ABM 15, 17.)

Second, respondent asserts that the key reason *Descamps* and *Mathis* did not overrule *People v. McGee* (2006) 38 Cal.4th 682 [*McGee*] is that the Armed Career Criminals Act (ACCA) is an "elements-based" conviction sentencing scheme and therefore the High Court did not set forth any general Sixth Amendment principles that would necessarily apply to California's "conduct based recidivist sentencing scheme." (ABM 5, 14-15.)

Appellant presented a detailed analysis in her opening brief which fully demonstrates why respondent's Sixth Amendment avoidance rationale is erroneous. (OBM 8-34.) Appellant additionally suggests respondent's positions are incorrect for two reasons.

First, the idea that the High Court has been anything but clear regarding the application of the Sixth Amendment to judicial factfinding in the context of recidivist sentencing schemes is no longer tenable based on the consistent statements in the *Shepard-Descamps-Mathis* line of authority.

In *Shepard v. United States* (2005) 544 U.S. 13 [*Shepard*], a four-justice plurality rejected the idea 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.)[2] 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*; bold added.)[3]

Then, in *Descamps*, the Supreme Court expressly stated that *Shepard* and the decisions cited therein were mandated by the Sixth Amendment (*Descamps, supra,* 133 S.Ct. at p. 2288):

> . . .[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

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

[3] Respondent's brief includes no meaningful analysis of *Shepard* and cites to it only three times for ancillary legal points. (ABM 8, 19, 36.)

impose extra punishment. (*Id.* at pp. 2288-2289; citations omitted, emphasis added.)[4]

Then yet again, in *Mathis*, the High Court reaffirmed and explained the Sixth Amendment foundation of *Descamps* and prior related cases:

> This Court has held that only a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction. See *Apprendi*.... That means a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense. He is prohibited from conducting such an inquiry himself; and so too he is barred from making a disputed determination about "what the defendant and state judge must have understood as the factual basis of the prior plea" or "what the jury in a prior trial must have accepted as the theory of the crime." **He can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of.** (*Mathis, supra*, 136 S.Ct. at p. 2252; emphasis added, citations omitted.)[5]

Thus, the Supreme Court has "said and said" again that the Sixth Amendment precludes judicial factfindng about anything other than "what a jury 'necessarily found' to convict a defendant (or what he necessarily

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

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

admitted)." (*Mathis, supra*, 136 S.Ct. at p. 2255; citations omitted.) The Court has consistently given "three reasons" for establishing the rules set forth in *Shepard*, *Descamps,* and *Mathis*, each of which "are as strong as ever." (*Id.* at pp. 2553-2554.) Nowhere in those statements has the Supreme Court suggested that the Sixth Amendment "reason" is a "secondary supporting rationale" as suggested by respondent. (ABM 16.)

In addition to the above clear statements by the Supreme Court, the definitive Sixth Amendment holding of *Descamps* is evidenced by its application by at least two states and the District of Columbia.

The Wisconsin Supreme Court in *State v. Guarnero* (2015) 2015 WI 72, Sections C and D, Paragraphs 22-25, was faced with a determination of whether a federal RICO conspiracy conviction qualified as a state predicate enhancement. The court, quoting *Apprendi*, *Shephard*, and *Descamps*, reasoned that in the context of a plea, a state court was permitted to review the charging document and plea agreement or transcript of a plea colloquy, but only to assess whether the defendant actually entered a guilty plea to the predicate offense. The court held that the state trial court was not permitted to make a factual determination of what the defendant and judge must have understood as the factual basis of the prior plea. (*Id* at p. 24.)

The Kansas Supreme Court in *State v. Dickey* (2015) 301 Kan. 1018, 1036-1040, explained the application of *Apprendi*, *Shepard*, and *Descamps* to the state court system as follows:

> Under *Apprendi*, "[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." The policy rationale behind *Apprendi* is that a court violates the United States Constitution if it invades the jury's territory by finding facts at sentencing. See Shepard....("[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."). A narrow exception exists for judicial factfinding regarding the existence of a prior conviction because of the procedural safeguards which attach to such a fact. As a result, in the typical case under our sentencing guidelines, tabulating a defendant's prior convictions to determine the criminal history score, which usually has the effect of increasing a defendant's sentence, does not violate a defendant's jury trial rights.
>
> *Apprendi* is implicated, however, when a district court, for purposes of enhancing a defendant's sentence for a current conviction, makes findings of fact at sentencing that go beyond merely finding the existence of a prior conviction or the statutory elements that made up the prior conviction. *Descamps*, 133 S.Ct. at 2288-89. (*Ibid* at pp. 1036-1038.)

Based on the above analysis, the Kansas Supreme Court concluded that the state trial court was "constitutionally prohibited from classifying Dickey's prior burglary adjudication as a [predicate offense] because doing so would have necessarily resulted from the district court making or

adopting a factual finding that went beyond simply identifying the statutory elements that constituted the prior burglary adjudication." (*Id.* at p. 1040.)

Finally, the District of Columbia in *Contreras v. United States* (2014) 121 A.3d 1271, 1274, interpreted *Descamps* as limiting sentencing courts in that jurisdiction to an analysis of the elements of the prior offense at issue "rather than to the facts of a particular case."

Thus, it is apparent based on the above authorities that the holdings of *Shepard*, *Descamps*, and *Mathis* were all firmly rooted in the Sixth and Fourteenth Amendments.

The second flaw in the Attorney General's analysis is the repeated attempts to distinguish the *Shepard-Descamps-Mathis* line of cases on the ground that the ACCA deals with convictions made up of elements while California's recidivist laws deal primarily with conduct rather than crimes, elements, or convictions. (ABM 16-18, 26-27.)

The ACCA 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. (18 U.S.C § 924(e).)[6] The ACCA defines a "violent felony" to mean any felony, whether

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[6] 18 U.S.C. § 924(e)(1)(B) provides that the "term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--(i) has as an element the use,

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*; emphasis added.)

The above language makes clear that in addition to three specifically enumerated crimes the ACCA includes any non-enumerated crime that: (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, (ii) involves the use of explosives, or (iii) involves conduct that presents a serious potential risk of physical injury to another.

California defines a strike or violent felony to include: (i) a prior conviction involving a specific crime (e.g. murder or mayhem), (ii) crimes "involving" use of a specific instrument (e.g. firearm, deadly weapon, destructive device), or (iii) crimes involving specific types of conduct (e.g. results in great bodily injury). (Section 1192.7, subd. (c), (1), (2), (8), (15), (17), (23), (25).)

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attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another..."

The above comparison demonstrates that both statutory frameworks include specific felony offenses (like arson) and both include conduct that, in the words of the Attorney General, "does not precisely match the elements of any particular offense." (ABM 17.) Thus, respondent's assertion that unlike the ACCA, California law involves "conduct rather than mere convictions" (ABM 26) and therefore "*Descamps* and *Mathis* did not reach the question of how the Sixth Amendment applies to conduct-based statutes such as the Three Strikes Law" is inaccurate. (ABM 18.)

Respondent admits as much in analyzing *Johnson v. United States* (2015) __ U.S. __, 135 S.Ct. 2551, where the Supreme Court struck down a portion of the ACCA's residual clause in part because it required judicial factfinding to determine if a prior conviction qualified as a "violent felony" based on whether the facts of the crime included "conduct presenting a serious potential risk of physical injury to another." (*Id.* at 2560.) According to respondent "the infirmity in *Johnson* was not that the ACCA predicated increased punishment on prior conduct, but that the required inquiry could not be applied to the residual clause because the clause was so vague." (ABM 26.) Thus, even respondent concedes that at least a portion of the ACCA as drafted predicated increased punishment on an inquiry concerning conduct.

While it is true that the Supreme Court in *Taylor v. United States* (1990) 495 U.S. 575, 600 [*Taylor*] discussed the importance of the word "element" in the ACCA (*id.* at p. 601), that focus does not transform the ACCA into an "elements only" scheme while leaving California's recidivist sentencing laws a conduct scheme. Both structures premise an enhanced sentence on prior convictions for certain categories of criminal conduct. Some of those categories are identified by a particular crime while others are identified by the type of conduct that might be present in any non-enumerated crime.

Furthermore, the precise reason the High Court has focused its Sixth Amendment analysis on elements is not because the ACCA is an "elements based" rather than "conduct based" sentencing scheme, but because elements are the only basis a trial court can retrospectively use to determine what a jury necessarily decided a defendant did in the context of a potentially qualifying conviction.

In *Mathis* the Supreme Court explained:

> "Elements" are the "constituent parts" of a crime's legal definition—the things the "prosecution must prove to sustain a conviction." At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant; and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty. Facts, by contrast, are mere real-world things— extraneous to the crime's legal requirements. (We have sometimes called them "brute facts" when distinguishing them from elements.) They are "circumstance[s]" or "event[s]" having no "legal effect [or] consequence": In

> particular, they need neither be found by a jury nor admitted by a defendant. (*Mathis, supra*, 136 S.Ct. at p. 2248; citations omitted.)

The Court then made clear, in reliance on *Descamps*, that a judicially imposed enhanced sentence related to a prior conviction may be, "based only on what a jury 'necessarily found' to convict a defendant (or what he necessarily admitted). **And elements alone fit that bill**...Accordingly, *Descamps* made clear that when the Court had earlier said (and said and said) 'elements,' it meant just that and nothing else." (*Mathis, supra,* 136 S.Ct. at p. 2255; emphasis added.)

For the reasons set forth in appellant's opening brief, as augmented above, it is now clear that the Sixth and Fourteenth Amendments, as fully explicated in the *Taylor-Apprendi-Shepard-Descamps-Mathis* line of cases, do not permit California trial courts to make retrospective non-elemental factual determinations based on the conduct in a prior case to establish what criminal behavior occurred and whether that behavior would satisfy the requirements for a serious felony. If proof of the elements or admissions in the prior record of conviction standing alone fails to establish that the literal crime of conviction *was* for a serious felony -- it cannot *be* a serious felony.

II.

APPELLANT AND RESPONDENT ARE IN GENERAL AGREEMENT ON THE MODIFICATION THAT SHOULD BE MADE TO THE PROCEDURE PERMITTED UNDER CALIFORNIA LAW.

Respondent concedes that *Descamps* and *Mathis* "undercut" and "cast doubt" on *McGee's* interpretation of *Apprendi*. (ABM 5, 7, 21.) As a result, respondent suggests a new approach. That approach is detailed throughout respondent's brief in a variety of ways:

> [S]hould this Court determine that *Descamps* and *Mathis* diminished the scope of a sentencing court's fact-finding under the conduct-based Three Strikes law, it should limit a trial court's consideration of the record of conviction to determining those facts necessarily found beyond a reasonable doubt by a jury under the circumstances of the particular case, or those facts admitted by a defendant when entering a guilty plea. (ABM 6.)
>
> What *Descamps* and *Mathis* require in California, assuming these cases are construed as setting forth constitutional principles binding on the states, is certainty that a jury has found particular facts unanimously and beyond a reasonable doubt, or that a defendant has admitted those same facts, prior to imposing a prior conviction enhancement based on those facts. (ABM 21.)
>
> [F]or a conduct-based scheme, a trial court should be able to consider the record of conviction to determine those facts necessarily established by a jury's verdict under the circumstances of the case, or those facts admitted by a defendant when entering a guilty plea, to assess whether the prior conduct qualifies for enhanced punishment. (ABM 22-23.)
>
> ...this Court's holding in *McGee*...remains viable in the wake of *Descamps*, as long as the trial court's examination of the record is limited to determining that the trier of fact

> necessarily found, or that the defendant necessarily admitted, the particular facts required to increase his or her sentence under the particular statute [citation]. Even if it is no longer permissible after *Descamps* for a trial court to review the record of conviction "in order to ascertain whether the 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), there would be no Sixth Amendment impediment to the trial court reviewing extrinsic record evidence pertaining to a prior conviction under California's conduct based recidivist statutes to determine that a jury necessarily found a fact to be true or that a defendant formally admitted a fact in entering a prior plea. [Citations.] (ABM 24-25.)
>
> As long as [a defendant's] conduct has been necessarily found by a jury beyond a reasonable doubt under the circumstances of the case, or admitted during a plea proceeding, the Sixth Amendment is satisfied. (ABM 30.)

Appellant fundamentally agrees with respondent that under the Sixth Amendment, as interpreted in *Descamps* and *Mathis*, a trial court is authorized to look at the actual record of conviction to answer the questions: Did the jury specifically and necessarily find the defendant guilty of a qualifying offense? or Did the defendant specifically and necessarily admit a qualifying offense?

The difficulty left by respondent's position is the failure to define how precisely a trial court can arrive at "certainty that a jury has found particular facts unanimously and beyond a reasonable doubt" (ABM 21) or determine what a jury "necessarily found beyond a reasonable doubt." (ABM 30.)

Respondent is perhaps, like the dissenters in *Descamps*, reserving the idea that there may be facts which were necessarily found by a jury beyond a reasonable doubt but which are not specifically covered by a specific jury verdict or finding.

The Supreme Court rejected this idea in *Descamps* and again in *Mathis*, 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." (*Descamps, supra,* at p. 2286, FN 3.) In *Mathis* the High Court defined elements as the "'constituent parts' of a crime's legal definition...At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant; and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty." (*Mathis, supra,* 136 S.Ct. at p. 2248.) The court then reaffirmed that "elements alone" and "nothing else" "fit [the] bill" of defining "what a jury 'necessarily found' to convict a defendant (or what he necessarily admitted)." (*Mathis, supra,* 136 S.Ct. at p. 2255.)

It is for these reasons that appellant suggests a return to the approach set forth in *People v. Alfaro* (1986) 42 Cal.3d 627, 632-635 [*Alfaro*]. Under *Alfaro*, a trial court was restricted to reviewing the record of conviction to determine the elements of the prior crime **or** issues necessarily adjudicated by the prior judgment and therefore subject to collateral estoppel. (*Alfaro,*

supra, 42 Cal.3d at p. 636; emphasis added.) The *Alfaro* rule did not permit the prosecution to "go behind" the judgment and matters necessarily adjudicated therein "to prove some fact which was not an element of the crime." (*Ibid.*)

In *People v. Crowson* (1983) 33 Cal.3d 623, 632-635, this Court explained that "the doctrine of collateral estoppel regards as conclusively determined only those issues actually and necessarily litigated in the prior proceeding....If proof of [a fact] was not required to sustain a conviction under the [prior offense] statute, neither a guilty verdict after a jury trial nor a plea of guilty may accurately be viewed as establishing that such [a fact] occurred...." (*Id.* at p. 634.)

In sum, prior to *Guerrero* and *McGee*, this Court had adopted a rule similar to the one provided by *Descamps* in an effort to avoid the inconvenience of relitigating the conduct and circumstances of past convictions and the "serious problems" or "harm akin to double jeopardy and denial of speedy trial" that could result from such litigation. (*Alfaro, supra,* 42 Cal.3d at p. 635; *People v. Jackson* (1985) 37 Cal.3d 826, 836; see also *People v. Guerrero* (1988) 44 Cal.3d 343, 355.)

Appellant asserts, as detailed in her opening brief (OBM 39-51), that to avoid a variety of potential constitutional harms and the unfairness and potentially absurd results from relitigating past offenses, this Court should

return to the least adjudicated elements test where the trial court is permitted to "do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." (*Mathis*, *supra,* 136 S.Ct. at p. 2252.)

III.

APPELLANT'S CLAIM HAS NOT BEEN FORFEITED, RESPONDENT IS INCORRECT THAT THE TRIAL COURT VALIDLY FOUND APPELLANT'S PLEA CONVICTION CONSTITUTED A STRIKE UNDER *MCGEE*, AND THEREFORE LIMITED REMAND IS REQUIRED.

The first and fourth arguments advanced by respondent are that appellant has forfeited her Sixth Amendment claim because she failed to raise it in the trial court (ABM Section A, pp. 8-9) and that the trial court's finding was valid under *McGee* (ABM Section D, pp. 30-33). Both assertions fail. As a result, a limited remand as suggested by respondent is required (ABM Section E, pp. 33-36).

A. Appellant's claim has not been forfeited.

The claim of forfeiture fails for five reasons.

First, appellant has challenged the sufficiency of the evidence to support the strike finding. A defendant's challenge to the sufficiency of the evidence, founded here in part on a violation of the Sixth Amendment, is cognizable on appeal even without objection in the trial court. (See *People*

v. Trujillo (2010) 181 Cal.App.4th 1344, 1350, fn. 3; "[A]n argument that the evidence is insufficient to support a verdict is never waived"].)

Second, it is the Attorney General who has forfeited the forfeiture claim by failing to advance it in the Court of Appeal.[7] In the appellate court the Attorney General argued the Sixth Amendment issue as follows:

> "In other words, *Descamps* suggests that courts are not permitted, under the rubric of *Apprendi's* prior conviction exception, to make a "disputed determination" about a factual matter beyond what is reflected in the elements of the prior offense. That rule is not appreciably narrower than the rule laid down by the California Supreme Court in *McGee*. As the Sixth Appellate District has observed, *Descamps* "prohibits what McGee already proscribed: A court may not impose a sentence above the statutory maximum based on disputed facts about prior conduct not admitted by the defendant or implied by the elements of the offense." (*People v. Wilson* (2013) 219 Cal.App.4th 500, 516.)
>
> Here, the trial court did not make a determination involving a factual dispute when it concluded that appellant had used a knife during the offense that resulted in her conviction for violating Penal Code section 245, subdivision (a)(1), rendering that conviction a qualifying prior offense under the Three Strikes Law. The preliminary hearing transcript demonstrates that appellant pulled a knife on her victim during a dispute over their children, pointed the knife at him, then struck him once in the head while holding the knife in the hand she used to punch him, cutting his forehead in the process. (1ACT 8-15.) Thus, the prior record does not reveal that "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), and the trial court properly determined that appellant's prior

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[7] Deputy Noah Hill also represented the Attorney General in the Court of Appeal.

> conviction qualified as a serious and or violent felony. (Court of Appeal Respondent's Brief p. 34.)

Nowhere in the above analysis is the idea of forfeiture argued or even mentioned. This Court has consistently stated that it is inappropriate to review an issue raised by either party for the first time in this Court. (Cal. Rules of Court, rule 8.500, subd. (c)(1); *People v. Camacho* (2000) 23 Cal.4th 824, 837, fn 4; but see *People v. Braxton* (2004) 34 Cal.4th 798, 809 [review permitted for important issues of policy].) Respondent also did not petition for review of this issue and therefore has forfeited the claim. (Cal. Rules of Court, rule 8.500, subd. (a)(2).)

Third, appellant could not have forfeited or affirmatively waived a right or alleged error that did not exist in California at the time of her trial. In *McGee*, this Court made clear "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." (*McGee, supra,* at pp. 692-709.) Thus the Sixth Amendment issue raised herein had been squarely rejected by this Court in *McGee* such that a change could not have been reasonably anticipated. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1215-1217; *People v. Black* (2007) 41 Cal.4th 799, 810-812.) This Court has generally declined to invoke the doctrines of waiver or forfeiture in cases, such as this, where new or evolving *Apprendi* issues are involved. (See *People v. French* (2008) 43 Cal.4th 36, 47-48.)