# In the Supreme Court of the State of California

| | |
|---|---|
| THE PEOPLE OF THE STATE OF CALIFORNIA,<br>Plaintiff and Respondent,<br>v.<br>SULMA MARILYN GALLARDO,<br>Defendant and Appellant. | Case No. S231260 |

SUPREME COURT
FILED
OCT 17 2016
Jorge Navarrete Clerk
Deputy

Second Appellate District, Case No. B257357
Los Angeles County Superior Court, Case No. VA126705
The Honorable Thomas I. McKnew, Jr., Judge

## ANSWER BRIEF ON THE MERITS

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
SHAWN MCGAHEY WEBB
Supervising Deputy Attorney General
LOUIS W. KARLIN
Deputy Attorney General
NOAH P. HILL
Deputy Attorney General
State Bar No. 190364
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-8884
Fax: (213) 897-6496
Email: DocketingLAAWT@doj.ca.gov
Noah.Hill@doj.ca.gov
*Attorneys for Plaintiff and Respondent*

## TABLE OF CONTENTS


Page

Issue Presented ..... 1

Statement of Facts and the Case ..... 1

Summary of Argument ..... 4

Argument ..... 7

The trial court did not engage in impermissible judicial fact-finding when it determined that appellant's prior conviction under former Penal Code section 245, subdivision (a)(1), had been for assault with a deadly weapon, rather than for assault by force likely to produce great bodily injury ..... 7

A. Appellant forfeited her claim that her Sixth Amendment rights were violated by her express waiver of a jury trial on the prior conviction allegations and her failure to object on Sixth Amendment grounds ..... 8

B. *Descamps* and *Mathis* did not overrule this Court's opinion in *McGee* ..... 9

1. *McGee*, *Descamps*, and *Mathis* ..... 9

2. *McGee*'s approach to determining conduct-based prior conviction allegations has not been overruled by *Descamps* and *Mathis* ..... 14

C. Neither *Descamps* nor *Mathis* requires California to employ the least adjudicated elements test to determine the truth of prior conviction allegations ..... 20

D. Under *McGee*, the record is sufficient to demonstrate that appellant's prior conviction constitutes a serious felony under California law ..... 30

E. If this Court determines that appellant's Sixth Amendment right to a jury trial was violated or the evidence was insufficient to support the prior conviction allegations, a limited remand is the proper remedy ..... 33

Conclusion ..... 37

## TABLE OF AUTHORITIES

**Page**

**CASES**


*Almendarez-Torres v. United States*
(1998) 523 U.S. 224 [118 S.Ct. 1219, 140 L.Ed.2d 350] .......... 9

*Apprendi v. New Jersey*
(2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] .......... *passim*

*California Ins. Guar. Ass'n v. Workers' Compensation Appeals Bd.*
(2004) 117 Cal.App.4th 350 .......... 16

*Clark v. Martinez*
(2005) 543 U.S. 371 [125 S.Ct. 716, 160 L.Ed.2d 734] .......... 15

*Descamps v. United States*
(2013) 570 U.S. __ [133 S.Ct. 2276, 186 L.Ed.2d 438] .......... *passim*

*Ezell v. United States*
(9th Cir. 2015) 778 F.3d 762 .......... 19

*Johnson v. United States*
(2015) ___ U.S. ___ [135 S.Ct. 2551, 192 L.Ed.2d 569] .......... 25, 26

*Mathis v. United States*
(2016) ___ U.S. ___ [136 S.Ct. 2243, 195 L.Ed.2d 604] .......... *passim*

*Metromedia, Inc. v. City of San Diego*
(1982) 32 Cal.3d 180 .......... 17

*Monge v. California*
(1998) 524 U.S. 721 [118 S.Ct. 2246, 141 L.Ed.2d 615] .......... 34

*Nijhawan v. Holder*
(2009) 557 U.S. 29 [129 S.Ct. 2294, 174 L.Ed.2d 22] .......... 22, 25, 27

*People v. Barkley*
(2008) 166 Cal.App.4th 1590 .......... 28

**TABLE OF AUTHORITIES**
**(continued)**

**Page**

*People v. Barragan*
(2004) 32 Cal.4th 236 .......... 35

*People v. Black*
(2007) 41 Cal.4th 799 .......... 9

*People v. Bow*
(1993) 13 Cal.App.4th 1551 .......... 18

*People v. Briceno*
(2004) 34 Cal.4th 451 .......... 18, 26, 30

*People v. Burton*
(1989) 48 Cal.3d 843 .......... 18

*People v. Caraballo*
(2016) 246 Cal.App.4th 936 .......... 29

*People v. Cortez*
(1999) 73 Cal.App.4th 276 .......... 28

*People v. Covarrubias*
(2016) 1 Cal.5th 838 .......... 29

*People v. Davis*
(1997) 15 Cal.4th 1096 .......... 29

*People v. Delgado*
(2008) 43 Cal.4th 1059 .......... 31, 35

*People v. Demetrulias*
(2006) 39 Cal.4th 1 .......... 9

*People v. Denard*
(2015) 242 Cal.App.4th 1012 .......... 20

*People v. Equarte*
(1986) 42 Cal.3d 456 .......... 18, 24, 26, 28

## TABLE OF AUTHORITIES
## (continued)

Page


*People v. Gonzalez*
(2005) 131 Cal.App.4th 767 .......... 33

*People v. Guerrero*
(1988) 44 Cal.3d 333 .......... 17, 19, 29, 36

*People v. Jackson*
(1985) 37 Cal.3d 826 .......... 18, 24, 26, 30

*People v. Kilborn*
(1996) 41 Cal.App.4th 1325 .......... 29

*People v. Leng*
(1999) 71 Cal.App.4th 1 .......... 28

*People v. Lent*
(1975) 15 Cal.3d 481 .......... 31

*People v. Leslie*
(1996) 47 Cal.App.4th 198 .......... 28

*People v. Marin*
(2015) 240 Cal.App.4th 1344 .......... 20, 34, 35, 36

*People v. McCaw*
(2016) 1 Cal.App.5th 471, 482 .......... *passim*

*People v. McGee*
(2006) 38 Cal.4th 682 .......... *passim*

*People v. Miles*
(2008) 43 Cal.4th 1074 .......... 32

*People v. Monge*
(1997) 16 Cal.4th 826 .......... 33

*People v. Murphy*
(2001) 25 Cal.4th 136 .......... 18, 23, 26, 30

## TABLE OF AUTHORITIES
## (continued)

**Page**

*People v. Reed*
(1996) 13 Cal.4th 217 ........................................................... 19, 31, 32

*People v. Saez*
(2015) 237 Cal.App.4th 1177 ....................................................*passim*

*People v. Sample*
(2011) 200 Cal.App.4th 1253 ..........................................................28

*People v. Thomas*
(1986) 41 Cal.3d 837 .....................................................................28

*People v. Tompkins*
(2010) 185 Cal.App.4th 1253 ............................................................9

*People v. Towne*
(2008) 44 Cal.4th 63 .......................................................................9

*People v. Wilson*
(2013) 219 Cal.App.4th 500 ..............................................................20

*Shepard v. United States*
(2005) 544 U.S. 13 [125 S.Ct. 1254, 161 L.Ed.2d 205]............. 8, 19, 36

*Taylor v. United States*
(1990) 495 U.S. 575 [110 S.Ct. 2143, 109 L.Ed.2d 607]......................19

*United States v. Byun*
(9th Cir. 2008) 539 F.3d 982 ...........................................................22

*United States v. Cotton*
(2002) 535 U.S. 625 [122 S.Ct. 1781, 152 L.Ed.2d 860].......................9

*United States v. Dodge*
(11th Cir. 2010) 597 F.3d 1347.........................................................22

*United States v. Gonzalez-Medina*
(5th Cir. 2014) 757 F.3d 425 ...........................................................22

## TABLE OF AUTHORITIES
## (continued)

**Page**

*United States v. Hayes*
(2009) 555 U.S. 415 [129 S.Ct. 1079, 172 L.Ed.2d 816].... 22, 25, 27, 29

*United States v. Hill*
(8th Cir. 2016) 820 F.3d 1003............................................................22

**STATUTES**

Armed Career Criminal Act (18 U.S.C. § 924(e)) .............................*passim*

Health & Saf. Code,
§ 11360, subd. (a)..........................................................................1

Pen. Code,
§ 32 ..............................................................................................1
§ 211 ............................................................................................1
§ 245, subd. (a)(1) .....................................................................2, 3
§ 667, subd. (a)(1) .....................................................................2, 7
§ 667, subds. (b)-(i) .......................................................................2
§ 667, subd. (d)......................................................................17, 26
§ 969f..........................................................................................28
§ 1170.12, subds. (a)-(d).................................................................2
§ 1192.7.......................................................................................18
§ 1192.7, subd. (c)(8)...........................................................17, 24, 26
§ 1192.7, subd. (c)(12).........................................................17, 24, 26
§ 1192.7, subd. (c)(23)...............................................................*passim*
§ 1192.7, subd. (c)(31)...............................................................31, 35
§ 12022, subd. (a)(1).......................................................................2

Stats. 1994, ch. 12, § 2 ...................................................................29

**CONSTITUTIONAL PROVISIONS**

U.S. Const, 6th Amend. ...............................................................*passim*

## ISSUE PRESENTED

This Court has ordered that the issue on review is limited to the following: "Was the trial court's decision that [appellant's] prior conviction constituted a strike incompatible with *Descamps v. United States* (2013) 570 U.S. __ [133 S.Ct. 2276, 186 L.Ed.2d 438], because the trial court relied on judicial fact-finding beyond the elements of the actual prior conviction?"

## STATEMENT OF FACTS AND THE CASE

In 2012, appellant aided and abetted Jason Andrews and a second man, identified as Jose, in the commission of the armed robbery of $66,000 in cash from David Narvez, a financial courier. (2RT 322-339, 342-343, 349, 607.) During the offense, appellant and Andrews followed Narvez in appellant's vehicle as he left a bank. Jose followed Narvez in a second vehicle, and forced Narvez to stop by cutting in front him and stopping abruptly. Appellant then struck Narvez's vehicle from behind and pushed it into Jose's vehicle, preventing Narvez's escape. (2RT 325-332, 349.) Andrews exited appellant's vehicle, smashed Narvez's driver's side window with a hammer, pointed a semiautomatic handgun at Narvez, and stated, "Give me the fucking money you motherfucker before I kill you." (2RT 332-335, 342-343, 607.) Narvez handed Andrews two bags of cash. Andrews got back into appellant's vehicle and she fled. (2RT 338-339.) When police stopped appellant's vehicle later that day, she was still in the company of Andrews. Police recovered two firearms, marijuana, and a digital scale from appellant's vehicle. (2RT 633-638.)

In 2014, a Los Angeles County jury found appellant guilty of robbery (Pen. Code, § 211; count I), being an accessory after the fact (Pen. Code, § 32; count II), and transportation of marijuana (Health & Saf. Code, §

11360, subd. (a); count V).[1] The jury found true an allegation that a principal was armed with a firearm during the commission of count I (§ 12022, subd. (a)(1)). (2CT 345-361.)

The information alleged that appellant suffered one prior conviction for assault with a deadly weapon or with force likely to produce great bodily injury (§ 245, subd. (a)(1)), on April 21, 2005, in case number BA273269, and that the prior conviction qualified as a strike offense under the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), as well as a prior serious felony conviction (§ 667, subd. (a)(1)). (1CT 74.) While the jury was deliberating on the substantive offenses, appellant personally waived her right to a jury trial on the prior conviction allegations. (3RT 1502-1503.) The following exchange occurred:

> THE COURT: [Appellant], you have been charged with having a prior conviction, that is a conviction in case number BA273269, charge was a violation of Penal Code section 245(a)(1), that conviction date was April 21, 2005 in the Los Angeles County Superior Court. Your counsel has advised that you are willing to waive jury but not admit to the prior. That means that the prior would have to be tried before this Court. If you should be found guilty, the Court - - of any of the charges, the Court more likely than not would remand you, which you are already in custody, and I could try it on the date set for sentencing or we can try it on some other day. . . . Ma'am, do you waive a jury and will then allow this Court to determine whether or not you sustained that judgment?
>
> THE DEFENDANT: Yes.
>
> THE COURT: You knowingly, intelligently, and with the full understanding realize that in so waiving you will not be entitled in any manner whatsoever to a jury trial concerning that prior conviction?
>
> THE DEFENDANT: Yes.

---

[1] All further unspecified statutory references are to the Penal Code.

THE COURT: All right. Counsel join?

[DEFENSE COUNSEL]: I do, Your Honor.

(3RT 1502-1503.)

After the jury's verdicts, the trial court conducted a court trial with respect to the recidivist allegations. (3RT 1804-1808.) Appellant admitted that she was the individual who had suffered the prior conviction. (3RT 1804-1806.) The trial court examined a minute order from case number BA273269, which demonstrated that appellant had pleaded no contest to violating section 245, subdivision (a)(1). (3RT 1806-1807; 1ACT 1-4.) The trial court also examined the preliminary hearing transcript from case number BA273269, which established that appellant used a knife during the course of her prior offense. (3RT 1807-1808; 1ACT 5-35.) Appellant's victim was the only witness who testified at the preliminary hearing. He testified that appellant pulled a knife on him 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. Appellant did not contest her use of the knife during the preliminary hearing, but instead, through defense counsel's cross-examination of the victim, sought to establish that she had acted in self-defense. (1ACT 8-34.) The trial court overruled defense counsel's hearsay objection to the admission of the preliminary hearing transcript, and found the prior conviction allegations to be true. (3RT 1808.)

The trial court sentenced appellant to a total of 11 years in state prison, comprised of a three-year middle base term in count I, doubled pursuant to the Three Strikes law, plus a consecutive five-year serious-felony conviction enhancement. The trial court stayed the firearm enhancement in count I, stayed imposition of sentence in count II, and imposed a concurrent term of six years in count V (three-year midterm,

doubled pursuant to the Three Strikes law). (3RT 1822-1828; 2CT 386-391; see minute order dated August 25, 2014, and amended abstract of judgment, filed in the Court of Appeal on September 3, 2014.)

Appellant appealed, alleging, among other claims, that the trial court's true finding on the prior conviction allegation violated her federal constitutional right to a jury trial under *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435]. In a unpublished opinion, the Court of Appeal reversed appellant's conviction in count II, but otherwise affirmed the judgment. (See Opn. at p. 1-12.) The Court of Appeal concluded that appellant had expressly waived any right to a jury trial on the prior conviction allegations (Opn. at p. 7), and that in any event, under *Descamps*, the trial court had properly looked to "extrinsic documents," including the preliminary hearing transcript, consistent with a modified "categorical approach" applicable to a "divisible statute," to determine whether appellant had previously been convicted of assault with a deadly weapon, rather than assault with force likely to produce great bodily injury (Opn. at pp. 9-11).

Appellant filed a petition for rehearing pertaining to the trial court's true finding on the prior conviction allegations, which the Court of Appeal denied.

This Court granted appellant's petition for review.

## SUMMARY OF ARGUMENT

Appellant contends that this Court's opinion in *People v. McGee* (2006) 38 Cal.4th 682 must be overruled, and that recidivist enhancements such as the second-strike and prior serious-felony conviction enhancements in this case may not be imposed unless the statute at issue in the earlier conviction satisfies the categorical approach that the United States Supreme Court has applied to federal recidivism statutes, under which a sentencing court's fact-finding is strictly limited to establishing the elements of the

prior offense. (AOB 2-5, 24, 34-35, 51.) It follows, appellant asserts, that the trial court violated her constitutional jury trial right by reviewing the preliminary hearing transcript and determining that she committed a "serious felony" for the purposes of the Three Strikes law because she committed her prior offense by using a deadly weapon, rather than with force likely to produce great bodily injury. (AOB 4-5.) Appellant's argument fails for three reasons.

First, appellant not only failed to raise her current claims in the trial court, but expressly waived any right to a jury trial—a waiver that should be enforced.

Second, California's approach to the permissible reach of judicial fact-finding in applying recidivism statutes, articulated in *McGee*, *supra*, 38 Cal.4th at pp. 704-706, was not overruled by *Descamps* or *Mathis*. The Sixth Amendment aspect of *Descamps*'s holding was made in the context of applying the constitutional avoidance doctrine, and *Descamps*'s holding applies only to elements-based sentencing schemes like the one at issue therein, the Armed Career Criminal Act (ACCA) (18 U.S.C. § 924(e)). An elements-based sentencing scheme authorizes an enhancement on the basis of a prior conviction for a specific statutory violation, regardless of the manner in which a prior offense was committed. Contrary to appellant's assertion, neither *Descamps* nor *Mathis v. United States* (2016) ___ U.S. ___ [136 S.Ct. 2243, 195 L.Ed.2d 604], reached the question of how the Sixth Amendment applies to conduct-based recidivist sentencing schemes like the Three Strikes law, but both cases recognized that legislatures are entitled to enact such statutes. (*Mathis*, *supra*, 136 S.Ct. at p. 2252; *Descamps*, *supra*, 133 S.Ct. at p. 2287.)

Third, although *Descamps* and *Mathis* undercut *McGee*'s interpretation of *Apprendi* as being generally inapplicable to recidivist sentencing, appellant's approach is flawed because it overlooks the narrow

nature of the Court's Sixth Amendment rationale in *Descamps* and *Mathis*: judicial fact-finding is limited to the determination of those facts necessarily found beyond a reasonable doubt by a jury or those facts admitted by a defendant when entering a guilty plea. *Descamps* and *Mathis* did not consider the impact of that Sixth Amendment principle on conduct-based recidivism statutes, and a wholesale importation of the holdings in *Descamps* and *Mathis* to the Three Strikes law, a conduct-based statute, would ignore the critical difference between such schemes.

Respondent proposes an approach that distills the core Sixth Amendment principles from *Apprendi* as applied by *Descamps* and *Mathis*, and modifies them so that they take account of the basic difference between the two types of recidivist sentencing schemes. Accordingly, should 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. In the event this Court adopts this approach, it should remand the instant matter to the trial court for a retrial on the prior conviction allegations, as the record does not establish whether appellant admitted that she had been convicted of assault with a deadly weapon, rather than assault with force likely to produce great bodily injury, or that she made any other admissions rendering her prior conviction a serious felony offense, during her prior plea proceeding.

## ARGUMENT

### THE TRIAL COURT DID NOT ENGAGE IN IMPERMISSIBLE JUDICIAL FACT-FINDING WHEN IT DETERMINED THAT APPELLANT'S PRIOR CONVICTION UNDER FORMER PENAL CODE SECTION 245, SUBDIVISION (A)(1), HAD BEEN FOR ASSAULT WITH A DEADLY WEAPON, RATHER THAN FOR ASSAULT BY FORCE LIKELY TO PRODUCE GREAT BODILY INJURY

Appellant contends that the *Apprendi-Descamps-Mathis* line of cases holds that the Sixth Amendment's jury trial right requires that a criminal defendant's sentence cannot be enhanced under a recidivist sentencing statute, unless a sentencing court's fact-finding is strictly limited to establishing the elements of the prior offense. (AOB 8-51.) Appellant's argument fails for three reasons. First, appellant waived her Sixth Amendment and due process jury trial rights when she expressly gave them up in the trial court in favor of having the trial court make all necessary findings as to the prior conviction allegations. Second, California's approach to the permissible reach of judicial findings in applying recidivism statutes, articulated in *McGee*, was not overruled by *Descamps* or *Mathis*; neither of those cases reached the question of how the Sixth Amendment applies to conduct-based recidivist sentencing schemes like the Three Strikes law or the prior serious-felony conviction enhancement statute (§ 667, subd. (a)(1)). Finally, although *Descamps* and *Mathis* may undercut *McGee*'s interpretation of *Apprendi* as being generally inapplicable to recidivist sentencing, appellant's suggested approach is flawed because it overlooks the narrow nature of the Court's Sixth Amendment rationale in those cases, and it would frustrate the intent of the Legislature and electorate in enacting conduct-based recidivist sentencing schemes. Respondent proposes an alternative approach that distills the core Sixth Amendment principles from *Apprendi* as applied by *Descamps* and

*Mathis*, and modifies them so that they take account of the basic difference between conduct-based and elements-based recidivist sentencing schemes.

### A. Appellant Forfeited Her Claim That Her Sixth Amendment Rights Were Violated by Her Express Waiver of a Jury Trial on the Prior Conviction Allegations and Her Failure to Object on Sixth Amendment Grounds

Prior to the trial on the prior conviction allegations, appellant waived her right to a jury trial on the allegations "in any manner whatsoever." (3RT 1503.) Defense counsel joined in the waiver. (3RT 1503.) Whatever the scope of a defendant's Sixth Amendment rights regarding determinations of prior convictions might be, a defendant in appellant's position has no claim of constitutional error. At a minimum, appellant's waiver of a jury trial "in any manner whatsoever" concerning her prior conviction (3RT 1502-1503), is inconsistent with preserving her Sixth Amendment jury trial rights.

*Apprendi* rights, like other rights, may be waived. (*Shepard v. United States* (2005) 544 U.S. 13, 24 [125 S.Ct. 1254, 161 L.Ed.2d 205] ["any fact other than a prior conviction sufficient to raise the limit of the possible [] sentence must be found by a jury, *in the absence of any waiver of rights by the defendant*"], italics added; see also *id.* at p. 26, fn. 5 [if a defendant's *Apprendi* rights apply to proof of prior convictions, a defendant "can waive the right to have a jury decide questions about his prior conviction"].) Here, as the Court of Appeal determined below, because appellant waived any right to a "jury trial 'in any manner whatsoever' relating to the prior conviction allegation[s]," she may not assert this claim on appeal. (Opn. at p. 7; see 3RT 1502-1503.)

Although the trial on appellant's prior conviction allegations occurred a year after *Descamps* was decided, appellant raised no Sixth Amendment objection to the trial court's determination of the strike allegation in her

case. (3RT 1501-1503, 1801-1827.) Thus, there is no reason to excuse appellant's failure to raise the claim in the trial court. (Cf. *People v. Black* (2007) 41 Cal.4th 799, 812 [excusing failure to raise an *Apprendi* objection because of subsequent clarifying "sea change" in case law]; see also *United States v. Cotton* (2002) 535 U.S. 625, 628-634 [122 S.Ct. 1781, 152 L.Ed.2d 860] [finding that defendant forfeited his *Apprendi* claim by failing to object during trial even though *Apprendi* was not decided until defendant's case was on appeal]; *People v. Tompkins* (2010) 185 Cal.App.4th 1253 [*Apprendi* rights may be forfeited by a defendant's failure to object].) Here, appellant made only hearsay and foundational objections to the introduction of the preliminary hearing transcript (3RT 1808), but these objections went to the scope of the materials to be considered, and not to the trial court's constitutional competence to resolve factual matters (*People v. Demetrulias* (2006) 39 Cal.4th 1, 22 [requiring specific objections to preserve issues for appeal]). Accordingly, she has forfeited any Sixth Amendment claim.

### B. *Descamps* and *Mathis* Did Not Overrule This Court's Opinion in *McGee*

#### 1. *McGee*, *Descamps*, and *Mathis*

In *Apprendi*, the United States Supreme Court explained that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi*, *supra*, 530 U.S. at p. 490; see also *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 243-247 [118 S.Ct. 1219, 140 L.Ed.2d 350].) This Court has consistently "rejected a narrow or literal application of the [United States Supreme Court's] reference to 'the fact of a prior conviction.'" (*People v. Towne* (2008) 44 Cal.4th 63, 79.)

In *McGee*, *supra*, 38 Cal.4th 682, this Court found no constitutional impediment to judicial determination that a prior conviction qualifies as a serious felony for purposes of enhanced punishment under the Three Strikes law. This Court's holding was based on its understanding that *Apprendi*'s prior-conviction exception "is not limited simply to the bare fact of a defendant's prior conviction, but extends as well to the nature of that conviction, thereby permitting sentencing courts to determine whether the prior conviction is the type of conviction (for example, a conviction of a 'violent' felony) that renders the defendant subject to an enhanced sentence." (*Id.* at p. 704, italics omitted.)

*McGee* explained that the sentencing court's inquiry "must be based upon the record of the prior criminal proceeding, with a focus on the elements of the offense." (*McGee*, *supra*, 38 Cal.4th at p. 706.) However, "[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." (*Ibid.*) This "does not contemplate that the court will make an independent determination regarding a disputed issue of fact relating to the defendant's prior conduct, but instead that the court simply will examine the record of the prior proceeding to determine whether that record is sufficient to demonstrate that *the conviction* is of the type that subjects the defendant to increased punishment under California law." (*Ibid.*, internal citation omitted, italics in original.)

The Court also added:

> We recognize the possibility that the United States Supreme Court, in future decisions, may extend the *Apprendi* rule in the manner suggested by the court of appeal below. But because in our view there is a significant difference between the

nature of the inquiry and the factfinding involved in the type of sentence enhancement at issue in *Apprendi* and its progeny as compared to the nature of the inquiry involved in examining the record of a prior conviction to determine whether that conviction constitutes a qualifying prior conviction for purposes of a recidivist sentencing statute, we are reluctant to assume, in advance of such a decision by the high court, that the federal constitutional right to a jury trial will be interpreted to apply in the latter context.

(*Id.* at p. 709.)

Six years later, in *Descamps, supra,* 133 S.Ct. 2276, the United States Supreme Court addressed how federal courts are to determine whether a state-court conviction qualifies as a violent felony under a federal recidivist sentencing statute, the ACCA. The issue presented in *Descamps* was whether the federal sentencing court could look beyond the elements of the defendant's California burglary conviction to the record of the state-court proceedings in order to determine whether the burglary conviction satisfied the federal definition of a violent felony. (*Id.* at pp. 2282-2283.) The Court explained the approved approach for determining whether a prior conviction is a crime that qualifies as a predicate offense under the ACCA:

[C]ourts use what has become known as the 'categorical approach': They compare the elements of the statute forming the basis of the defendant's conviction with the elements of the 'generic' crime—*i.e.*, the offense as commonly understood. The prior conviction qualifies as an ACCA predicate only if the statute's elements are the same as, or narrower than, those of the generic offense.

(*Descamps*, *supra*, 133 S.Ct. at p. 2281.)

The Court then described its approved "variant" method:

We have previously approved a variant of this method—labeled (not very inventively) the 'modified categorical approach'—when a prior conviction is for violating a so-called 'divisible statute.' That kind of statute sets out one or more elements of the offense in the alternative—for example, stating

> that burglary involves entry into a building or an automobile. If one alternative (say, a building) matches an element in the generic offense, but the other (say, an automobile) does not, the modified categorical approach permits sentencing courts to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction. The court can then do what the categorical approach demands: compare the elements of the crime of conviction (including the alternative elements used in the case) with the elements of the generic crime.

(*Descamps*, *supra*, 133 S.Ct. at p. 2281.) The specific issue in *Descamps* was,

> whether sentencing courts may also consult those additional documents when a defendant was convicted under an 'indivisible' statute—*i.e.*, one not containing alternative elements—that criminalizes a broader swath of conduct than the relevant generic offense.

(*Ibid.*)

The Court in *Descamps* concluded that, where a defendant has been convicted under an indivisible statute, a sentencing court may apply only the categorical approach in determining whether that prior offense constituted a predicate under the ACCA, looking only to the elements of the prior offense to determine if they are the same as, or narrower than, the generic offense. (*Descamps*, *supra*, 133 S.Ct. at pp. 2282-2283.) The Court based its conclusion that the categorical approach should continue to be applied to indivisible statutes under the ACCA on three grounds: (1) the text and history of the ACCA; (2) a desire to "avoid[] Sixth Amendment concerns"; and (3) practical inequities applying the modified categorical approach to all cases. (*Id.* at p. 2287.)

As relevant here, in the second part of its analysis, the Court examined the "categorical approach's Sixth Amendment underpinnings," and stated that its *Apprendi* line of authority "counsel[s] 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, citation omitted.) The Court also criticized the lower court's decision authorizing federal sentencing courts "to try to discern what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct," noting: "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 the elements of the offense—as distinct from amplifying but legally extraneous circumstances." (*Ibid.*)

Subsequently, in *Mathis*, the United States Supreme Court considered whether the modified categorical approach may be applied to determine whether a prior conviction constitutes a predicate offense under the ACCA, where the statute defining the prior offense does not list "multiple elements disjunctively, but enumerates various means of committing a single element." (*Mathis*, *supra*, 136 S.Ct. at p. 2249.) The Court concluded that the modified categorical approach may not be applied in such instances (*id.* at p. 2248), because "long standing principles, and the reasoning that underlies them," pertaining to the categorical approach, "apply regardless of whether a statute omits or instead specifies alternative possible means of" committing a single element (*id.* at p. 2251). The Court grounded its holding on the same three considerations identified in *Descamps*: (1) the text of the ACCA; (2) "serious Sixth Amendment concerns" in allowing a sentencing judge to go beyond the elements of a predicate offense; and (3) practical inequities in applying the modified categorical approach to all cases. (*Id.* at pp. 2252-2253.) In describing the application of the categorical approach and its intersection with the Sixth Amendment, the Court held that "a judge cannot go beyond identifying the crime of

conviction to explore the manner in which the defendant committed the offense." (*Id.* at p. 2252.) Instead, a judge determining whether a crime constitutes a predicate offense under the ACCA "can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." (*Ibid.*)

### 2. *McGee*'s Approach to Determining Conduct-Based Prior Conviction Allegations Has Not Been Overruled by *Descamps* and *Mathis*

Appellant contends that the United States Supreme Court's post-*Apprendi* decisions effectively overruled *McGee* because the "categorical approach" (or "modified categorical approach") mandated in *Descamps* and *Mathis* must be applied to all recidivist sentencing statutes, including the Three Strikes law, in order to preserve a defendant's Sixth Amendment jury trial right. (AOB 8-34.) This contention fails for two reasons. First, the Sixth Amendment aspect of *Descamps*'s holding was made in the context of applying the constitutional avoidance doctrine, and, second, *Descamps*'s holding that a sentencing court may do no more than compare elements in determining the truth of a prior conviction allegation applies only to elements-based sentencing schemes like the ACCA. Contrary to appellant's assertion, neither *Descamps* nor *Mathis* reached the question of how the Sixth Amendment applies to conduct-based recidivist sentencing schemes like the Three Strikes law, but both opinions recognized that legislatures are entitled to enact such statutes. (*Mathis*, *supra*, 136 S.Ct. at p. 2252; *Descamps*, *supra*, 133.S.Ct. at p. 2287.)

The holdings in *Descamps* and *Mathis* resolved issues of statutory interpretation. (*Mathis, supra,* 136 S.Ct. at pp. 2252-2253; *Descamps*, *supra*, 133 S.Ct. at p. 2288.) *Descamps* recognized a potential conflict with *Apprendi*'s Sixth Amendment jurisprudence and, thus, elected to read the ACCA narrowly to avoid having to reach and resolve that constitutional

question. (*Descamps*, *supra*, 133 S.Ct. at p. 2288.) *Mathis* went no further than *Descamps*. (*Mathis, supra,* 136 S.Ct. at pp. 2252-2253.) The whole purpose of the United States Supreme Court's constitutional avoidance canon is to avoid deciding constitutional issues. (*Clark v. Martinez* (2005) 543 U.S. 371, 381 [125 S.Ct. 716, 160 L.Ed.2d 734 ["the canon [of constitutional avoidance] is not a method of adjudicating constitutional questions by other means. . . . Indeed, one of the canon's chief justifications is that it allows court to *avoid* the decisions of constitutional questions"].)

Under *Descamps*'s three-part analysis, the constitutional aspect was secondary and limited by the Court's prior statutory construction determination. That is, the "elements-based inquiry" or "categorical approach" was not compelled by Sixth Amendment concerns, but rather resulted primarily from the high court's interpretation of the federal sentencing statute at issue in *Descamps* and *Mathis*—the ACCA. As *Descamps* explained, the ACCA's text and legislative history showed that a punishment enhancement was to be based on three prior convictions for an enumerated violent felony, and "'Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions.'" (*Descamps, supra,* 133 S.Ct. at p. 2287, citation omitted).) Although Congress could have chosen "to increase a sentence based on the facts of a prior offense," it did not do so, presumably because "Congress instead meant ACCA to function as an on-off switch, directing that a prior crime would qualify as a predicate offense in all cases or in none." (*Ibid.*) In *Mathis,* the high court again emphasized that the "categorical approach," which focuses "solely on whether the elements of the crime of conviction sufficiently match the elements" of an enumerated generic offense under the ACCA, was "central to ACCA's operation." (*Mathis, supra,* 136 S.Ct. at p. 2248.)

Thus, when *Descamps* turned to its secondary supporting rationale for establishing an "elements-centric, 'formal categorical approach'"—avoidance of "the Sixth Amendment concerns that would arise from sentencing courts making factual findings that properly belong to juries"—it had already determined that such an approach was the only one compatible with the ACCA, as properly interpreted. (*Descamps, supra,* 133 S.Ct. at p. 2287.) Given that *Descamps* had also previously recognized that Congress was entitled to enact statutes that demanded a """circumstance-specific," not a "categorical,"' approach," (*ibid.* (citation omitted)), it is clear that the Court did not reach the question of how the Sixth Amendment would apply to such statutes.

Finally, with regard to *Descamps*' tertiary rationale—concern for the practical difficulties and potential unfairness of a factual approach—all the "'daunting' difficulties" that the Court identified arose precisely because they would require additional judicial resources and pose additional challenges to defendants than would be the case if fact-finding were strictly limited to ascertaining the prior crime's elements. (See *Descamps, supra,* 133 S.Ct. at p. 2289.) Such a cost-benefit analysis, however, would play out differently under California's conduct-based schemes, which have been in place for decades, as the Legislature and electorate intended that enhanced punishment would be premised on the offender's conduct. More fundamentally, these practical concerns are not matters of constitutional law, but are considerations for the Legislature or the electorate in enacting a recidivist sentencing scheme. (See *California Ins. Guar. Ass'n v. Workers' Compensation Appeals Bd.* (2004) 117 Cal.App.4th 350, 362 ["Crafting statutes to conform with policy considerations is a job for the Legislature not the courts; our role is to interpret statutes, not to write them"], internal quotation marks and citation omitted; see also *Metromedia, Inc. v. City of San Diego* (1982) 32 Cal.3d 180, 187.)

Thus, *Descamps* made it clear that it was the structure of the ACCA—not the Sixth Amendment—that required a focus on the elements, rather than the facts, of the prior offense in order to determine whether the sentencing enhancement applied. At the same time, *Descamps* cautioned that other types of recidivist-sentencing schemes exist, ones that do not focus on the elements of the prior conviction (like the ACCA), but ones that focus on the defendant's conduct in committing the prior offense. (*Descamps*, *supra*, 133 S.Ct. at p. 2287; see also *Mathis*, *supra*, 136 S.Ct. at p. 2252.)

The Three Strikes law is such a scheme. It is not an elements-based enhancement statute like the ACCA; rather, application of enhanced punishment for prior convictions under the Three Strikes law depends on the defendant's conduct in committing the prior offenses. (*McGee*, *supra*, 38 Cal.4th at pp. 691-692 [California's recidivism statute deals with conduct rather than mere convictions]; *People v. Guerrero* (1988) 44 Cal.3d 333, 355-356 [same]; *People v. McCaw* (2016) 1 Cal.App.5th 471, 482 [California's "recidivism statutes are largely conduct-based, unlike the elements based ACCA"]; *People v. Saez* (2015) 237 Cal.App.4th 1177, 1208, fn. 22 [the Three Strikes law is a conduct-based statute]; see §§ 667, subd. (d)(1), 1192.7, subds. (c)(8) [including as a prior offense "any felony" in which the defendant personally inflicts great bodily injury or personally uses a firearm]; subd. (c)(12) [assault by a life prisoner on a noninmate], (c)(23) [any felony in which the defendant personally used a dangerous or deadly weapon].) California allows for the imposition of additional punishment for recidivists based on their prior conduct in committing *any* felony offense. (§§ 667, subds. (a), (d), 1192.7, subd. (c)(8), (c)(23).) The inclusion of conduct that does not precisely match the elements of any particular offense demonstrates the intent of the Legislature and the electorate to deter such conduct regardless of whether it refers to specific

criminal offenses because it is perceived as dangerous and deserving of additional punishment when committed by recidivists. (*People v. Murphy* (2001) 25 Cal.4th 136, 145.) By enacting a conduct-based recidivism scheme, the Legislature and the electorate did not intend for a defendant who personally used a deadly weapon or inflicted great bodily injury during the commission of "any felony" to avoid additional punishment merely because the underlying felony for which he or she was convicted did not include the personal use of a weapon or infliction of great bodily injury as an element of that offense. (See *People v. Briceno* (2004) 34 Cal.4th 451, 463-464; *People v. Equarte* (1986) 42 Cal.3d 456, 463-466 [section 1192.7 refers to conduct rather than to specific offenses, and the electorate intended that a defendant's sentence be enhanced based on such prior conduct when it has been pled and proven]; see also *People v. Jackson* (1985) 37 Cal.3d 826, 832 [same], disapproved on other grounds in *People v. Burton* (1989) 48 Cal.3d 843, 863; *People v. Bow* (1993) 13 Cal.App.4th 1551, 1557 [section 1192.7 defines categories of "serious felonies" by conduct rather than by reference to a particular offense].) Instead, the Legislature and the electorate intended for defendants who had committed prior felony offenses in a particular manner to be subject to enhanced penalties.

Neither *Descamps* nor any of the federal Supreme Court's post-*Apprendi* decisions purports to apply the categorical approach to a conduct-based recidivist sentencing scheme. Understood in this light, *McGee*'s analytical approach to the permissible reach of judicial findings under recidivism statutes is not negated by the United States Supreme Court's construction of congressional intent underlying federal recidivism statutes in *Descamps* or *Mathis*. Because *Descamps* and *Mathis* did not reach the question of how the Sixth Amendment applies to conduct-based statutes such as the Three Strikes law, *McGee* remains viable. Indeed, the

application of the categorical approach to the ACCA was already in place when *McGee* held that trial courts determining the truth of prior conviction allegations may look to the entire record of conviction for the purposes of California's recidivism laws. (See *Taylor v. United States* (1990) 495 U.S. 575, 602 [110 S.Ct. 2143, 109 L.Ed.2d 607] [establishing the categorical approach]; *Shepard, supra*, 544 U.S. at p. 16 [reaffirming the categorical approach]; *McGee*, 38 Cal.4th at pp. 707-708 [discussing *Shepard*].) Thus, in terms of binding precedent, *Descamps* and *Mathis* were no more decisive or determinative than was *Shepard*, the United States Supreme Court opinion distinguished in *McGee*; while these new cases "may suggest that a majority of the high court would view the legal issue presented in the case before us as presenting a serious constitutional issue, the high court's decision[s] did not purport to resolve that issue." (*McGee, supra*, 38 Cal.4th at p. 708.)

In California, it is expressly permissible for courts ruling on a prior conviction allegation to go beyond the elements of the offense and to consider, if not precluded by the rules of evidence or other statutory limitation, evidence found within the entire record of the conviction. (See *People v. Reed* (1996) 13 Cal.4th 217, 226; *Guerrero, supra*, 44 Cal.3d at p. 345; see also *McGee, supra*, 38 Cal.4th at 706.) While *Descamps* and *Mathis* resolve the issue of determining predicate offenses under the ACCA, they do not "provide the type of clear resolution of the issue that would justify overturning the relevant California precedents." (*McGee, supra*, 38 Cal.4th at p. 708; see *Ezell v. United States* (9th Cir. 2015) 778 F.3d 762, 766 ["even if the Supreme Court did announce a new rule in *Descamps*, that rule is not constitutional". . . ."Although *Descamps* discusses the Sixth Amendment, the discussion does not make the decision 'constitutional'"]; *McCaw, supra*, 1 Cal.App.5th at p. 484 [*Descamps* did not decide the "precise reach of the Sixth Amendment" "as to California

law"]; *Saez, supra*, 237 Cal.App.4th at p. 1207 ["the Sixth Amendment discussion in *Descamps* . . . was not an unequivocal holding," and "*Descamps* did not explicitly overrule *McGee*"]; *People v. Wilson* (2013) 219 Cal.App.4th 500, 516 [*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"]; but see *People v. Marin* (2015) 240 Cal.App.4th 1344, 1362-1363 [although the *Descamps*' discussion of the Sixth Amendment was "not a holding," California's "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*"]; see also *People v. Denard* (2015) 242 Cal.App.4th 1012, 1030-1034 [agreeing with *Saez* and *Marin*].) Accordingly, "unless and until the high court directs otherwise," this Court is entitled to "assume that the precedents from that court and ours support a conclusion that sentencing proceedings such as those conducted below do not violate a defendant's constitutional right to a jury trial." (*McGee, supra*, 38 Cal.4th at p. 686.)

### C. Neither *Descamps* nor *Mathis* Requires California to Employ the Least Adjudicated Elements Test to Determine the Truth of Prior Conviction Allegations

Appellant argues that *Descamps* and *Mathis* require trial courts in California to employ the least adjudicated elements test in determining the truth of prior conviction allegations, with trial courts being required to presume that the offense "was for the least adjudicated or non-strike offense." (AOB 41; see also AOB 35-51.) Appellant is mistaken. While it is true that the *Apprendi-Descamps-Mathis* line of cases did not overrule *McGee* for the reasons discussed above, respondent 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. (*McGee*, *supra*, 38 Cal.4th at pp. 697-699, 706-709.) However, it does not follow that this Court should take the United States Supreme Court's interpretation of the ACCA and transplant it into California's Three Strikes law jurisprudence. Appellant's approach fails because the Sixth Amendment rationales in *Descamps* and *Mathis* were predicated on an elements-based recidivist sentencing scheme that required a categorical approach to determining whether a prior conviction qualified for enhanced punishment, and these rationales must be modified to apply sensibly to conduct-based schemes like the Three Strikes law. Respondent proposes an alternative approach, one that tailors the core Sixth Amendment jury-trial concerns voiced in *Descamps* and *Mathis* to the kind of sentencing findings that the Legislature and electorate required under the Three Strikes law.

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. (*Descamps*, *supra*, 133 S.Ct. at p. 2288; see also *Mathis*, *supra*, 136 S.Ct. at 2256.) *Descamps* does not prevent a California trial court from reviewing the record of conviction to determine that a jury has necessarily made such findings or that a defendant has made such admissions, because California's recidivism statutes are concerned with conduct rather than mere convictions. (*Descamps*, *supra*, 133 S.Ct. at p. 2287 [Congress determined not to increase sentences under the ACCA based on "the facts of a prior offense," but it could have done so as "other statutes, in other contexts, speak in just that way"]; see *Nijhawan v. Holder* (2009) 557 U.S.

29, 36 [129 S.Ct. 2294, 174 L.Ed.2d 22] ["categorical approach" not required for statute involving deportation for a prior conduct-based felony offense]; *United States v. Hayes* (2009) 555 U.S. 415, 418-421 [129 S.Ct. 1079, 172 L.Ed.2d 816] [statute imposing punishment on the basis of prior conduct allows sentencing court to consider non-elemental facts established beyond a reasonable doubt]; *United States v. Hill* (8th Cir. 2016) 820 F.3d 1003, 1005-1006 [statutes targeting prior conduct do not require a "categorical approach," instead, courts should examine the particular circumstances in which an offender committed the crime on a particular occasion]; *United States v. Gonzalez-Medina* (5th Cir. 2014) 757 F.3d 425, 428-430 [distinguishing *Descamps* and finding that a statute's "reference to [prior] conduct, rather than elements, is consistent with a circumstance-specific analysis"]; *United States v. Dodge* (11th Cir. 2010) 597 F.3d 1347, 1356 (en banc) [statutes targeting prior conduct do not require a "categorical approach"; instead, courts should examine the particular circumstances in which an offender committed the crime on a particular occasion]; *United States v. Byun* (9th Cir. 2008) 539 F.3d 982, 991-992 [same].)

*Descamps* and *Mathis* held that, for an elements-based scheme, the Sixth Amendment limits judicial fact-finding to establishing the elements of the defendant's prior offense and proscribes judicial fact-finding as to any facts concerning the manner in which the particular defendant actually committed the crime because such additional facts are "extraneous" under the ACCA. (*Descamps*, *supra*, 133 S.Ct. at p. 2288.) When such limitations are in place, there can be no Sixth Amendment violation because the judicial determination assures that the defendant was "'necessarily . . . guilty of all the [generic crime's] elements'" or "'necessarily admitted [the] elements of the generic offense.'" (*Id.* at pp. 2283-2284.) Moreover, it is permissible even under an elements-based

scheme to apply a "'modified categorical approach,' which permits a court to look at a limited class of documents from the record of a prior conviction to determine what crime, with what elements, a defendant was convicted of before comparing that crime's elements to those of the generic offense." (*Mathis, supra,* 136 S.Ct. at pp. 2245-2246.) However, under a conduct-based statute, factual findings or admissions concerning the manner in which a prior offense was committed are not extraneous, but essential. It follows, *mutatis mutandis*, that for 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.

Application of *Descamps*'s categorical approach or modified categorical approach would be unworkable in the context of the Three Strikes law because it would forbid making the very findings that the California Legislature and electorate demand. Even under the modified categorical approach for divisible statutes, a trial court may look to extrinsic documents in the record, but only to determine the particular elements of the offense for which a defendant was convicted. (*Mathis*, *supra*, 136 S.Ct. at p. 2249, 2256; *Descamps*, *supra*, 133 S.Ct. at pp. 2283-2284, 2290.) It may be modified, but it remains categorical. (*Mathis*, *supra*, 136 S.Ct. at pp. 2253-2254.) The dichotomy between divisible and indivisible crimes set forth in *Descamps* "springs in large part from the ACAA's focus on the elements of the prior conviction: unlike the Three Strikes law, the ACCA prohibits consideration of the conduct underlying the conviction." (*Saez, supra*, 237 Cal.App.4th at p. 1208, fn. 22, citing *Descamps*, *supra*, 133 S.Ct. at pp. 2283-2288; *Murphy*, *supra*, 25 Cal.4th at p. 145; *Equarte*, *supra*, 42 Cal.3d at pp. 463-466; *Jackson*, *supra*, 37 Cal.3d at p. 832; *McCaw*, *supra*, 1 Cal.App.5th at p. 482.) Under the Three Strikes

law, a defendant's conduct in committing any felony offense can serve as the basis for an enhanced sentence, even where that conduct does not constitute an element of the underlying offense. (See e.g., § 1192.7, subds. (c)(8), (c)(12), (c)(23).)

Although, as the Court of Appeal found, appellant's prior offense would be considered "divisible" under *Descamps* (Opn. at p. 9-11), in California, a trial court's examination of the record may establish that the predicate conduct of a prior strike offense was found true beyond a reasonable doubt in a prior proceeding, even though the underlying statute was indivisible within the meaning of *Descamps*. For example, if a defendant's conviction for the reckless use of a firearm stemmed "from a jury trial, and the record of conviction showed that no aiding-and-abetting instructions were given, we think it unlikely that a determination that the prior conviction involved *personal* use of a firearm would violate the Sixth Amendment under *Descamps*'s rationale." (*Saez*, *supra*, 237 Cal.App.4th at p. 1208, fn. 22.) Under such circumstances, the trial court's act of looking to the record of conviction to determine what facts a jury had *necessarily* found in convicting a defendant would not require the trial court to make a disputed determination about "what the jury in [the] prior trial must have accepted as the theory of the crime." (*Descamps*, *supra*, 133 S.Ct. at p. 2288.)

Viewed in this way, this Court's holding in *McGee* that trial courts are not to "make an independent determination regarding a disputed issue of fact relating to the defendant's prior conduct," but instead, should simply "examine the record of the prior proceeding to determine whether that record is sufficient to demonstrate that *the conviction* is of the type that subjects the defendant to increased punishment under California law" (*McGee*, *supra*, 38 Cal.4th at p. 706), 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 (see *Saez*, *supra*, 237 Cal.App.4th at pp. 1206-1207, & fn. 22). 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. (*Descamps*, *supra*, 133 S.Ct. at p. 2288; see also *Mathis*, *supra*, 136 S.Ct. at 2256; *Nijhawan, supra,* 557 U.S. at pp. 36-38; *Hayes*, *supra*, 555 U.S. at pp. 418-421; *Saez*, *supra*, 237 Cal.App.4th at p. 1208, fn. 22.)

Appellant errs in suggesting that the United States Supreme Court's opinion in *Johnson v. United States* (2015) ___ U.S. ___ [135 S.Ct. 2551, 192 L.Ed.2d 569], supports his claim that "non-elemental factual determinations," even where such facts are necessarily found by a jury or formally admitted by a defendant, may not be used to enhance a defendant's sentence under a recidivism statute. (AOB 23-24.) In *Johnson*, the Court found the ACCA's "residual clause" to be unconstitutionally vague. The clause allowed for an enhanced sentence where a defendant had three or more prior convictions for a "violent felony," which the statute defined to include any felony that "involves conduct that presents a serious potential risk of physical injury to another." (*Johnson*, *supra*, 135 S.Ct. at pp. 2555-2556.) The Court concluded that "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges" because of the

"grave uncertainty about how to estimate the risk posed by a crime," especially a generic crime under the ACCA, which constitutes a "judge-imagined abstraction." (*Id.* at pp. 2257-2258; see also *id.* at p. 2562 [the ACCA's residual clause "requires application of the "serious potential risk" standard to "an idealized ordinary case of the crime"].) The Court declined the dissent's invitation to "save the residual clause from vagueness by interpreting it to refer to the risk posed by the particular conduct in which the defendant engaged," by "jettison[ing] the categorical approach" for that portion of the statute. (*Id.* at pp. 2561-2562.) The Court first noted that the Government had not asked them to discard the categorical approach in residual clause cases. (*Id.* at p. 2562.) It then explained that the ACCA was concerned with "convictions," and not with a person "who has committed" prior felonies or offenses. (*Ibid.*) Thus, 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.

Unlike the ACCA, California's Three Strikes law deals largely with defined conduct rather than mere convictions. (§§ 667, subds. (a)(1), (d), 1192.7, subds. (c)(8), (c)(12), (c)(23); see *Briceno*, *supra*, 34 Cal.4th at pp. 463-464; *Murphy*, *supra*, 25 Cal.4th at p. 145; *Equarte*, *supra*, 42 Cal.3d at p. 463-466; *Jackson*, *supra*, 37 Cal.3d at p. 832; *Saez, supra*, 237 Cal.App.4th at p. 1208, fn. 22.) Implicit in *Descamps* was the recognition that if Congress had wanted all offenses under the ACCA examined under a "modified categorical" or "circumstance-specific" approach, it could have drafted the statute to deal with prior conduct rather than mere convictions. (*Descamps*, *supra*, 133 S.Ct. at p. 2287.) "Congress instead meant ACCA to function as an on-off switch, directing that a prior crime would qualify as a predicate offense in all cases or in none." (*Ibid.*) Unlike the federal statute at issue in *Descamps* and *Mathis*, trial courts determining whether a

prior conviction constitutes a serious or violent felony in California must determine whether the prior felony involved certain conduct that is not necessarily an element of the prior offense. Where that conduct has been necessarily established by a jury's verdict or a defendant's plea, no Sixth Amendment violation occurs, even under the constitutional logic of *Descamps* and *Mathis*. Given that under California law, certain offenses may qualify as predicate offenses if committed in a particular manner, the state did not share the intent of Congress in enacting the ACCA, and a trial court should be able to look to the record of conviction to determine whether a trier of fact necessarily found, or a defendant admitted, a particular fact that may be used to increase his or her sentence.

Appellant errs in suggesting that "the facts of the crime cannot be considered under *Descamps*." (AOB 41; see also AOB 22 [a trial court is not permitted to use a 'circumstance-specific' review" under the Sixth Amendment to "look beyond the elements to the evidence"].) Appellant's argument reaches too far because it means that only elements-based statutes comport with the Sixth Amendment. What *Descamps* precludes is a sentencing court 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." (*Descamps*, *supra*, 133 S.Ct. at p. 2288, citation omitted.) Again, where there can be no dispute, based on a review of the record of conviction, regarding the facts that a defendant admitted while pleading guilty to a felony offense, or the facts a jury or other trier of fact found true beyond a reasonable doubt, no Sixth Amendment violation occurs. (See *Descamps*, *supra*, 133 S.Ct. at pp. 2287-2288; *Nijhawan, supra,* 557 U.S. at pp. 36-38; *Hayes*, *supra*, 555 U.S. at pp. 418-421; *Saez*, *supra*, 237 Cal.App.4th at p. 1208, fn. 22.)

Given that the Three Strikes law has existed for more than 22 years (*People v. Leng* (1999) 71 Cal.App.4th 1, 5, fn. 3), and the serious felony enhancement statute has existed for approximately 35 years (*People v. Thomas* (1986) 41 Cal.3d 837, 839), defendants making factual admissions pertaining to conduct that brings them within the ambit of California's recidivism statutes are not merely admitting "superfluous facts" or "extraneous circumstances" (*Descamps*, *supra*, 133 S.Ct. at p. 2287), but instead, the particular facts the Legislature and the electorate have determined merit additional punishment based on the prior conviction (*Equarte*, *supra*, 42 Cal.3d at pp. 465-466). Thus, unlike those subject to the ACCA, defendants in California have great "incentive to contest facts that are not elements of the charged offense." (*Descamps*, *supra*, 133 S.Ct. at p. 2289.) In fact, many plea agreements require such factual admissions as part of the bargain in order for the defendant's conduct to be used in a later proceeding to enhance a future sentence. (See e.g., *People v. Barkley* (2008) 166 Cal.App.4th 1590, 1596; see also *People v. Sample* (2011) 200 Cal.App.4th 1253, 1265 ["The possibility of future consequences, including the application of habitual offender statutes, further necessitates the parties ensure the record accurately reflects the factual basis for the plea"]; *People v. Cortez* (1999) 73 Cal.App.4th 276, 284, fn. 6.) By adopting a rule that would prohibit a trial court from considering a defendant's factual admissions triggering a prior conviction enhancement, this Court would deprive the People of the legitimate benefit of their bargains in entering into such agreements. For example, where a defendant pleading guilty to the reckless use of a firearm has formally and specifically admitted the additional fact that he or she was personally armed, nothing in the federal Supreme Court's Sixth Amendment jurisprudence should disable this admission from subsequently enhancing his sentence under California law. (See § 969f; *People v. Leslie* (1996) 47 Cal.App.4th 198, 204-205.)

Moreover, to allow trial courts to look to the entire record of conviction to determine that a defendant necessarily admitted particular facts while pleading guilty to a felony offense or that a trier of fact necessarily found facts true beyond a reasonable doubt "promotes the efficient administration of justice and, specifically, furthers the evident intent of the people in establishing" recidivism enhancements based, in part, on conduct rather than on specific convictions. (*Guerrero*, *supra*, 44 Cal.3d at p. 356; see also *McGee*, *supra*, 38 Cal.4th at p. 691.) In addition, this procedure will not entail any "elaborate factfinding process," as the record of conviction will typically disclose whether a defendant has formally admitted, or a jury has necessarily found, the particular facts necessary to enhance a defendant's sentence. (*Hayes*, *supra*, 555 U.S. at p. 427, fn. 9; see also *People v. Covarrubias* (2016) 1 Cal.5th 838, ___, 207 Cal.Rptr.3d 228, 271 [authorizing judicial determination of what a jury necessarily found in assessing prejudice stemming from constitutional error].)

Appellant's elements-based approach would contravene the intent of the Legislature and the electorate in enacting the Three Strikes law. The Three Strikes law was enacted as an urgency statute "to protect the public from the imminent threat posed by . . . repeat offenders." (Stats. 1994, ch. 12, § 2.) The "unambiguous purpose" of the statute "is to provide greater punishment for recidivists. (§ 667, subd. (b)" (*People v. Davis* (1997) 15 Cal.4th 1096, 1099), and "enhance public safety" (*People v. Caraballo* (2016) 246 Cal.App.4th 936, 940). (See *People v. Kilborn* (1996) 41 Cal.App.4th 1325, 1329 [punishing recidivist criminals more severely than others "is a proper goal," aimed at "preventing and punishing crime, and with protecting the public from criminals"; the "core idea is that those who have not drawn the proper lesson from a previous conviction and punishment should be punished more severely when they commit more

crime"].) An elements-based approach would impede the achievement of these objectives by artificially limiting the reach of the Three Strikes law. By enacting a conduct-based recidivism scheme, the Legislature and the electorate did not intend for a defendant who previously engaged in proscribed conduct, which he or she admitted or was necessarily found to have occurred by a jury, to avoid additional punishment in a subsequent case merely because that culpable conduct was not an essential element of the prior conviction. (See *Briceno*, *supra*, 34 Cal.App.4th at pp. 463-464; *Murphy*, *supra*, 25 Cal.4th at p. 145; *Jackson*, *supra*, 37 Cal.3d at p. 832.) As long as such 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.

Accordingly, should this Court determine that *Descamps* and *Mathis* diminished the scope of a sentencing court's fact-finding under the conduct-based Three Strikes law or prior serious-felony conviction statute, it should permit a trial court ruling on a prior conviction allegation under those statutes to consider the record of conviction in determining those facts necessarily found beyond a reasonable doubt by a trier of fact under the circumstances of the particular case or those facts admitted by a defendant when entering a guilty plea.

### D. Under *McGee*, the Record Is Sufficient to Demonstrate That Appellant's Prior Conviction Constitutes a Serious Felony under California Law

Appellant contends that even if *McGee* still controls, the trial court's true finding on the prior conviction allegations must be reversed due to insufficient evidence. (AOB 52-54.) Respondent disagrees. The trial court did not make an improper determination involving a factual dispute when it concluded that appellant had used a knife during the offense that resulted in

her conviction for violating section 245, subdivision (a)(1), rendering that conviction a qualifying prior offense under the statutes at issue.

A minute order demonstrated that in 2005 appellant pleaded guilty to violating section 245, subdivision (a)(1). (1CT 1-4.) At that time, section 245, subdivision (a)(1), provided: "Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm *or* by means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years . . . ." (See *People v. Delgado* (2008) 43 Cal.4th 1059, 1065; see § 1192.7, subds. (c)(23), (c)(31).) The preliminary hearing transcript demonstrated 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. Appellant did not contest her use of a knife during the preliminary hearing, but instead, sought to establish that she had acted in self-defense through defense counsel's cross-examination of the victim, who was the sole witness presented at the hearing. (1ACT 8-34.) Preliminary hearing transcripts have long been considered to be reliable portions of the record of conviction. (*Reed, supra,* 13 Cal.4th at pp. 223-224.) Thus, the record of conviction established that appellant used a knife during her prior offense, and it did not show 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).[2]

---

[2] Moreover, the minute order from appellant's plea and sentencing hearing showed that the trial court imposed, and appellant agreed to, the following probation condition: "Do not own, use or possess any dangerous or deadly weapons, including any firearms, knives or other weapons." (1ACT 3-4.) The trial court could not have imposed such a condition

(continued...)

Accordingly, the trial court properly determined that appellant's prior conviction qualified as a serious or violent felony.

Appellant contends that the People failed to prove that her prior conviction was for assault with a deadly weapon, rather than assault with force likely to produce great bodily injury, because she "could have entered the negotiated plea to assault likely to produce great bodily injury rather than assault with a deadly weapon." (AOB 54.) Appellant was free to present evidence demonstrating that she entered a negotiated disposition to assault with force likely to produce great bodily injury during the trial on her prior conviction allegations, assuming such evidence exists, but she chose not to do so. (*People v. Miles* (2008) 43 Cal.4th 1074, 1083 [a trier of fact may draw reasonable inferences from the record of conviction, and "absent rebuttal evidence," a document in the record of conviction "standing alone, is sufficient evidence of the facts it recites about the nature and circumstances of the prior conviction"].) Appellant's speculation regarding what other evidence might have established does not alter the sufficiency of the evidence establishing that she used a knife during her prior offense, and, as such, the evidence did not establish 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.)

Appellant's claim that she "likely did not do everything in her power to disprove the facts regarding the knife" at her preliminary hearing "because it was not at all clear that they were charged or relevant at the time," is unavailing given that she had been charged with a violation of

---

(...continued)
unless it was relevant to the crime of conviction. (*People v. Lent* (1975) 15 Cal.3d 481, 486.)

section 245, subdivision (a)(1), in the complaint. (1ACT 34.) Moreover, because a violation of section 245, subdivision (a)(1), was a potential strike at the time of appellant's preliminary hearing, and because *Reed* allowed trial courts to use a preliminary hearing as record evidence proving a prior conviction allegation at the time, appellant had ample motivation to challenge the evidence presented regarding her use of a knife during the preliminary hearing. (See *People v. Gonzalez* (2005) 131 Cal.App.4th 767, 774-775 [a defendant's interest and motive during a preliminary hearing is similar to that at the trial on a prior conviction allegation].) In addition, appellant had every incentive to try to disprove the use of the knife as a way to disprove the potential to produce great bodily injury, because her use of a knife made it likely that great bodily injury would occur. Accordingly, the evidence was sufficient under the procedures established by this Court in *McGee* to demonstrate that appellant's prior conviction for violating section 245, subdivision (a)(1), constituted a serious felony and a prior strike offense under California law.

### E. If This Court Determines That Appellant's Sixth Amendment Right to A Jury Trial Was Violated or the Evidence Was Insufficient to Support the Prior Conviction Allegations, a Limited Remand Is the Proper Remedy

Should this Court determine that *Descamps* and *Mathis* limit the scope of the sentencing court's factual findings under the Three Strikes law, the matter should be remanded to the trial court for a retrial of the prior conviction allegations. Respondent acknowledges that the record before the trial court did not contain the information in appellant's prior case, the reporter's transcript of appellant's plea hearing, or any formal plea agreement, and thus, did not affirmatively demonstrate that appellant confirmed the preliminary hearing transcript as the factual basis for her prior plea, or that she otherwise necessarily admitted that she had

committed an assault with a deadly weapon rather than an assault with force likely to produce great bodily injury. In the event this Court determines that appellant's Sixth Amendment right to a jury trial was violated by the trial court's true finding on the prior conviction allegations, or that the evidence was otherwise insufficient to support the trial court's finding, the matter should be remanded to the trial court for a second court trial, or for a jury trial, on the allegations.

Double jeopardy does not bar a retrial of the prior conviction allegations. In *People v. Monge* (1997) 16 Cal.4th 826, this Court held that retrial of a prior conviction allegation does not violate the federal or state constitutional prohibitions on double jeopardy. The United States Supreme Court affirmed this Court's decision, concluding that "the Double Jeopardy Clause does not preclude a retrial on a prior conviction allegation in the noncapital sentencing context." (*Monge v. California* (1998) 524 U.S. 721, 734 [118 S.Ct. 2246, 141 L.Ed.2d 615].) As the federal Supreme Court explained, double jeopardy "protects against successive prosecutions for the same offense after acquittal or conviction and against multiple criminal punishments for the same offense," but not against repeated "sentencing proceedings because the determinations at issue do not place a defendant in jeopardy for an 'offense,'" and "[a]n enhanced sentence imposed on a persistent offender thus 'is not to be viewed as either a new jeopardy or additional penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.'" (*Id.* at p. 727, internal citations omitted.) Where the result of a sentencing proceeding is reversed for insufficient evidence, that finding is not the equivalent of an acquittal of an offense, because

> pronouncement of sentence simply does not have the qualities of constitutional finality that attend an acquittal, and the Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his

> punishment will turn out to be. Consequently, it is a well-established part of our constitutional jurisprudence that the guarantee against double jeopardy neither prevents the prosecution from seeking review of a sentence nor restricts the length of a sentence imposed upon retrial after a defendant's successful appeal.

(*Id.* at pp. 729-730; see also *People v. Barragan* (2004) 32 Cal.4th 236, 241-259 [retrial of a strike allegation after reversal for insufficient evidence is permissible]; *McCaw*, *supra*, 1 Cal.App.5th at p. 487 [remanding matter to the trial court for a jury trial on prior conviction allegations]; *Marin*, *supra*, 240 Cal.App.4th at p. 1366 [same].)

Because appellant has already waived her right to a jury trial on the prior conviction allegations, should this Court reverse the trial court's true finding on the prior conviction enhancements, the matter should be remanded so that the People may present additional evidence to the trial court, such as the information, the reporter's transcript from appellant's prior plea hearing, and any formal plea agreement, in order to prove that she pled no contest to the offense of assault with a deadly weapon, rather than assault with force likely to produce great bodily injury (see *Delgado*, *supra*, 43 Cal.4th at p. 1072; § 1192.7, subd. (c)(31)), or that she admitted the personal use of a weapon while entering her plea (§ 1192.7, subd. (c)(23)). This process would not violate appellant's Sixth Amendment rights. (*Mathis*, *supra*, 136 S.Ct. at p. 2249, 2256; *Descamps*, *supra*, 133 S.Ct. at pp. 2283-2284, 2290; *Marin*, *supra*, 240 Cal.App.4th at p. 1363.)

Moreover, remanding the matter to the trial court will not require relitigation of the prior offense or violate the terms of appellant's prior plea agreement (AOB 48-50), because the trial court will merely be making a determination about what facts appellant necessarily admitted in entering her plea. By the same token, appellant's speedy trial rights are also not implicated by this procedure (AOB 47-48), which would be confined to the

record of the prior plea proceedings (see *McGee*, *supra*, 38 Cal.4th at p. 698; *Guerrero*, *supra*, 44 Cal.3d at p. 356). Finally, because appellant has already enjoyed all procedural safeguards attendant to due process involved with her plea, the retrospective determination that she necessarily admitted particular facts by pleading guilty to a particular offense, or to a particular count of the information specifically alleging such facts, would not offend the Sixth Amendment or appellant's right to due process. (See *Apprendi*, *supra*, 530 U.S. at p. 488; *McGee*, *supra*, 38 Cal.4th at p. 698.)

In the alternative, this Court should remand the matter to the trial court for a jury trial on the prior conviction allegations, at which time appellant could elect a jury trial, or could choose to waive her right to a jury trial and either admit the allegations or agree to judicial fact-finding as she did before. (See *Shepard*, *supra*, 544 U.S. at p. 26, fn. 5 [a defendant "can waive the right to have a jury decide questions about his prior conviction"]; see *McCaw*, *supra*, 1 Cal.App.5th at p. 487; *Marin*, *supra*, 240 Cal.App.4th at p. 1366.)[3]

---

[3] Although the issue is not raised by the circumstances presented in the instant case, to the extent that appellant claims a defendant's right to a jury trial on prior conviction allegations can never be satisfied by a subsequently impaneled jury (see AOB 36, 38 ["the Sixth Amendment right at issue is not the right to have a jury participate in the current sentencing process, but rather the right to have a jury make a full determination of guilt on the alleged prior criminal conduct"]), appellant is mistaken. *Descamps* and *Mathis*, like *Apprendi* itself, were concerned with impermissible "judicial factfinding." (*Descamps*, *supra*, 133 S.Ct. at p. 2288; see also *Mathis*, *supra*, 136 S.Ct. at p. 2252; *Apprendi*, *supra*, 530 U.S. at p. 490.) The United States Supreme Court has not resolved the permissible scope of a jury's fact-finding under recidivist sentencing schemes. (*Shepard*, *supra*, 544 U.S. at p. 26, fn. 5.)

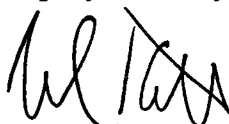
## CONCLUSION

Accordingly, for the reasons stated, respondent respectfully requests this Court to affirm the judgment of the Court of Appeal. In the alternative, this Court should remand the matter to the trial court for a retrial on the prior conviction allegations, and otherwise affirm the judgment.

Dated: October 14, 2016

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
SHAWN MCGAHEY WEBB
Supervising Deputy Attorney General
LOUIS W. KARLIN
Deputy Attorney General



NOAH P. HILL
Deputy Attorney General
*Attorneys for Plaintiff and Respondent*

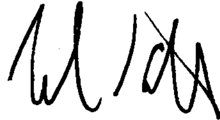
LA2016500462
52261017.doc

## CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 11,004 words.

Dated: October 14, 2016

KAMALA D. HARRIS
Attorney General of California



NOAH P. HILL
Deputy Attorney General
*Attorneys for Plaintiff and Respondent*

## DECLARATION OF SERVICE

Case Name: **People v. Sulma Marilyn Gallardo**
Case No.: **S231260**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On October 14, 2016, I served the attached **Answer Brief on the Merits** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

**Christian C. Buckley**
**Attorney at Law**
**Buckley & Buckley**
**9921 Carmel Mountain Road, #355**
**San Diego, CA 92129**

**Brandon Wong**
**Deputy District Attorney**
**L.A. County District Attorney's Office**
**Bureau of Central Operations, CT-11**
**18000 Foltz Criminal Justice Center**
**210 West Temple Street, 18th Floor**
**Los Angeles, CA 90012**

**Hon. Thomas I. McKnew, Jr., Judge**
**Los Angeles County Superior Court**
**Southeast District, Norwalk Courthouse**
**12720 Norwalk Boulevard, Dept. H**
**Norwalk, CA 90650-3188**

**California Appellate Project – LA**
**520 South Grand Avenue, 4th Floor**
**Los Angeles, CA 90071-2600**
[2 copies]

On October 14, 2016, I caused an **original and eight copies** of the **Answer Brief on the Merits** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102-4797 by **Federal Express, Tracking # 8107 8403 3305.**

On October 14, 2016, I caused one electronic copy of the **Answer Brief on the Merits** in this case to be submitted electronically to the California Supreme Court by using the Supreme Court's Electronic Document Submission system.

On October 14, 2016, I caused one electronic copy of the **Answer Brief on the Merits** in this case to be served electronically on the California Court of Appeal by using the Court's Electronic Service Document Submission system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 14, 2016, at Los Angeles, California.

| K. Amioka | |
|---|---|
| Declarant | Signature |

LA2016500462
52262859.doc