

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

In re WILLIAM MILTON,

Petitioner.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Are the Sixth Amendment holdings of *Descamps v. United States*, 570 U.S. 254 (2013) and *Mathis v. United States*, 579 U.S. 500 (2016) fully retroactive, because those opinions categorically prohibit imposition of a prior conviction enhancement where the enhancement requires additional facts beyond the adjudicated elements of the prior conviction offense?

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PETITION FOR WRIT OF CERTIORARI

William Milton respectfully petitions for a writ of certiorari to review the judgment of the California Supreme Court.

PARTIES TO THE PROCEEDING

The parties to the proceedings below were the defendant and petitioner, William Milton, and respondent, the People of the State of California.

OPINION BELOW

The opinion of the California Supreme Court, which was issued on August 22, 2022, and published at *In re Milton*, 13 Cal.5th 893, 515 P.3d 34 (2022), is attached as Appendix A.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The decision of the California Supreme Court for which petitioner seeks certiorari was issued on August 22, 2022. This petition is filed within 90 days of the California Supreme Court's decision pursuant to Rules 13.1 and 29.2 of this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides, in relevant part, that no person shall “be deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V.

The Sixth Amendment provides, in relevant part, “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation” U.S. Const. amend. VI.

The Fourteenth Amendment, section one, provides, in relevant part, that no “state shall deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV.

STATEMENT OF THE CASE

In 1999, petitioner was convicted of robbery (Cal. Pen. Code,¹ § 211) in California. *Milton*, 13 Cal.5th at 896. The prosecution sought an increased sentence under California’s Three Strikes Law (§§ 667, subds. (b)-(j), 667.5, subd. (c), 1170.12, subd. (a)) on account of the fact that petitioner had suffered two prior robbery convictions in Illinois in 1987. *Milton*, 13 Cal.5th at 896-97. “Because an out-of-state robbery qualifies as a serious felony only if it ‘includes all of the elements of [a California robbery]’ (§§ 667, subd. (d)(2); see 1192.7, subd. (19)), which an Illinois robbery does not, the prosecution asserted the Illinois robberies were serious felonies under section 1192.7, subdivision (c)(8) and (23), which provide that any felony in which the defendant personally uses a firearm ... is a serious felony. After reviewing the record from the Illinois robbery cases, including the charging document and sentencing hearing transcript, the trial court found petitioner used a firearm in committing both Illinois robberies and imposed a third strike sentence.” *Milton*, 13 Cal.5th at 897.

In 2017, the California Supreme Court issued its opinion in *People v. Gallardo*, 4 Cal.5th 120, 407 P.3d 55 (2017), in which the

¹ Subsequent statutory references are to the California Penal Code unless otherwise indicated.

court adopted this Court's Sixth Amendment jurisprudence, as set forth in *Descamps v. United States*, 570 U.S. 254 (2013) and *Mathis v. United States*, 579 U.S. 500 (2016), and held that only what was proven beyond a reasonable doubt or admitted as part of a plea in a prior conviction proceeding could be used to increase a sentence in a subsequent case. *Id.* at 124-25.

Following *Gallardo*, petitioner filed a petition for writ of habeas corpus on grounds that the trial court's factual findings about his conduct underlying his prior Illinois convictions, in order to qualify those convictions as strikes, violated the Sixth Amendment, as set forth in *Descamps*, *Mathis*, and *Gallardo*; therefore, he was entitled to resentencing. *Milton*, 13 Cal.5th at 897. The California Court of Appeal denied the petition on grounds that *Gallardo's* adoption of the *Descamps/Mathis* rule was not retroactive to petitioner's case. *Id.* Other California appellate courts, however, when presented with the same issue, found the *Descamps/Mathis* rule to be retroactive. *Id.*

The California Supreme Court granted review in petitioner's case to resolve the conflict amongst the California appellate courts. *Milton*, 13 Cal.5th at 897. On August 22, 2022, the California Supreme Court held that *Gallardo's* adoption of the *Descamps/Mathis* rule does not apply retroactively to cases that were final on

appeal prior to its *Gallardo* decision, and thereby upheld the denial of petitioner's petition for writ of habeas corpus. *Id.*

REASONS FOR GRANTING THE PETITION

I. Introduction and Background Law

In *Milton*, the California Supreme Court held that defendants who are **innocent** of prior conviction allegations under the current law must nevertheless continue to serve out their sentences, including life sentences, because the recent adoption of the *Descamps/Mathis* rule, which limits how prior convictions may lawfully be used to increase a sentence in accordance with the Sixth Amendment, did not amount to a substantive change in law. This travesty of justice committed by the California Supreme Court demands redress from this Court.

Prior to *Gallardo*, California had been an outlier in permitting extraneous conduct underlying a prior conviction – conduct that was neither proven nor admitted in the previous proceeding – to be used to support an increased sentence. In *People v. McGee*, 38 Cal.4th 682, 133 P.3d 1054 (2006), the California Supreme Court recognized this Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) – that defendants have the right to have a jury determine any fact

used to increase a sentence, except the fact *of* a prior conviction – but then relied upon that holding to find that trial courts could make factual findings about extraneous conduct *underlying* a prior conviction. *McGee*, 38 Cal.4th at 686-87.

In *Descamps*, 570 U.S. 254, this Court considered Sixth Amendment principles and reaffirmed that, under the “categorical approach,” only the elements of a prior conviction can support an increased sentence under the Armed Career Criminal Act (“ACCA”) (18 U.S.C. § 924(e)) in accordance with the Sixth Amendment, as opposed to any extraneous conduct from the prior conviction. *Descamps*, 570 U.S. at 261, 269-70.

A narrow exception, termed the “modified categorical approach,” applies when the prior conviction has “divisible” or “alternative” elements, in which case the court may consider a limited set of documents to determine which version of the prior offense the defendant was convicted of committing. *Descamps*, 570 U.S. at 257.

Descamps considered whether a guilty plea to burglary in California (§ 459) qualified as a prior violent felony under the Armed Career Criminal Act (“ACCA”) (18 U.S.C. § 924(e)). Because the California statute for burglary, which does *not* require an unlawful entry, is broader than the generic crime under the ACCA, a

conviction under the California statute “cannot count as an ACCA predicate, *even if* the defendant actually committed the offense in its generic form.” *Descamps*, 570 U.S. at 260, emphasis added. “The key ... is elements, not facts.” *Id.* Thus, in the case before it, “review of the plea colloquy or other approved extra-statutory documents” was not authorized because the California statute for burglary was broader than the generic offense of burglary under the ACCA. *Id.* at 265.

Subsequently, in *Mathis*, 579 U.S. 500, this Court reaffirmed *Descamps*’s holding “that the prior crime qualifies as an ACCA predicate if, but only if, its elements are the same as, or narrower than, those of the generic offense.” *Id.* at 503. A sentencing court “can do no more, consistent with the Sixth Amendment, then determine what crime with what elements, the defendant was convicted of.” *Id.* at 511-12, citing *Apprendi*, 530 U.S. at 490.

As this Court noted, however, *Descamps* recognized it was not breaking new ground; rather, it found prior “caselaw explaining the categorical approach and its ‘modified’ counterpart all but resolves this case.” *Descamps*, 570 U.S. at 260.

Indeed, the beginning point of analysis in *Descamps* was *Taylor v. United States*, 495 U.S. 575 (1990): “*Taylor* adopted a

‘formal categorical approach’: Sentencing courts may ‘look only to the statutory definitions’ – *i.e.*, the elements – of a defendant’s prior offenses, and *not* ‘to the particular facts underlying those convictions’ ” in determining whether a prior conviction can be used to increase a sentence under the ACCA. *Descamps*, 570 U.S. at 261, quoting *Taylor*, 495 U.S. at 600. As *Descamps* acknowledged, one of the grounds for the decision in *Taylor* was that the elements-centric approach “avoids the Sixth Amendment concerns that would arise from sentencing courts’ making findings of fact that properly belong to juries.” *Descamps*, 570 U.S. at 267; *see Taylor*, 495 U.S. at 601 (categorical approach avoids findings by trial court which a defendant potentially “could . . . challenge . . . as abridging his right to a jury trial”).

Thus, *Descamps* merely applied *Taylor* to find the sentencing court could not look beyond the elements of a California burglary to determine if it qualified under the ACCA.

In addition to *Taylor*, the second basis of the holding in *Descamps* was *Apprendi*. *Descamps* noted *Apprendi* had already held 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.’ ” *Descamps*, 570 U.S. at 269, quoting *Apprendi*,

530 U. S. at 490.

Again, *Descamps* merely applied *Apprendi* to find the sentencing court could not look beyond the fact of the California burglary conviction to determine if it qualified under the ACCA.

Accordingly, in 2017 in *Gallardo*, California finally reversed course and, in accordance with this Court's Sixth Amendment jurisprudence in *Taylor*, *Apprendi*, *Descamps*, and *Mathis*, found that only what was proven beyond a reasonable doubt or admitted in the prior proceeding as part of a prior conviction could be used to increase a defendant's sentence in a subsequent case. *Gallardo*, 4 Cal.5th at 124-25.

That California erroneously permitted judicial factfinding for so long after *Taylor* and *Apprendi* should not be grounds for the continued imprisonment of defendants across the State of California, who would otherwise be eligible for release if current Sixth Amendment jurisprudence were applied to them. California already has the second-highest prison population amongst the States (Kang-Brown, Jacob, *People in Prison Winter 2021-2022* VERA INSTITUTE OF JUSTICE (Feb. 2022) <https://www.vera.org/downloads/publications/People_in_Prison_in_Winter_2021-22.pdf> at p. 1), and a significant portion of that population is attributable to prior

conviction enhancements.²

Accordingly, the California Supreme Court's failure to retroactively apply its adoption of the *Descamps/Mathis* rule is a travesty of justice that must be remedied.

II. The Petition Should Be Granted Because the California Supreme Court's Decision Conflicts with Circuit Court Decisions (USSC Rule 10(b))

The petition should be granted because the California Supreme Court "has decided an important federal question in a way that conflicts with the decision ... of a United States court of appeals." Rule 10(b).

In contrast to the California Supreme Court's finding the *Descamps/Mathis* rule procedural, several circuit courts have found the *Descamps/Mathis* rule to be substantive.³

² One analysis of a set of cases showed that one out of every four years served in California jails and prisons is the result of an enhancement, and that approximately "half of the time served for enhancements was triggered by prior convictions." Dagenais et al., *Sentencing Enhancements and Incarceration: San Francisco, 2005-2017*, STANFORD COMPUTATIONAL POLICY LAB (Oct. 17, 2019) <https://policylab.stanford.edu/media/enhancements_2019-10-17.pdf> at p. 1.

³ Other circuits, however, determined that *Descamps* and/or *Mathis* did not announce a new rule at all, without addressing whether the rule was procedural or substantive. *See, e.g., Forrest v. United States*, 934 F.3d 775, 778 (8th Cir. 2019); *In re Thomas*, 823 F.3d

In *Hill v. Masters*, 836 F.3d 591 (6th Cir. 2016), the Sixth Circuit agreed with “[t]he Government[’s] conce[ssion] that, after *Descamps* and [*United States v.*] *Royal*, [731 F.3d 333 (4th Cir. 2013)], Maryland’s second-degree assault statute no longer constitutes a crime of violence for the purpose of the career-offender enhancement.” *Id.* at 595-96. The Sixth Circuit further agreed with the Government’s “conce[ssion] that *Descamps* and *Royal* apply retroactively.” *Id.* at 596.

In *Holt v. United States*, 843 F.3d 720 (7th Cir. 2016), the Seventh Circuit held that “substantive decisions such as *Mathis* presumptively apply retroactively on collateral review. [Citations.]” *Id.* at 722.

In *Allen v. Ives*, 950 F.3d 1184 (9th Cir. 2020), the Ninth Circuit found that *Descamps* and *Mathis* were retroactive because they “alter[] ‘the range of conduct ... that the law punishes’ and not ‘only the procedures used to obtain the conviction.’ ” *Allen*, 950 F.3d at 1192, quoting *Welch v. United States*, 578 U.S. 120, 131 (2016).

Although the majority in *Milton* tried to distinguish *Hill*, *Holt*, and *Allen* (*Milton*, 13 Cal.5th at 47 n.7), its attempt at distinction fails. *Milton* based its distinction on the characterization of the

1345, 1349 (11th Cir. 2016); *In re Jackson*, 776 F.3d 292 (5th Cir. 2015).

ACCA as “an elements based statutory scheme” whereas “the Three Strikes law does not define qualifying offenses strictly by their elements but looks to the conduct underlying the offense. [Citation.]” *Id.* But this technical distinction misses the point central to *Descamps* and *Mathis* and adopted by *Gallardo* – that under the Sixth Amendment, only the prior conviction *itself* may support an increased sentence in a subsequent case, *not* extraneous facts that were neither proven nor admitted in the prior proceeding. *Gallardo*, 4 Cal.5th at 133-34. It also ignores the fact that this Court has also applied the relevant Sixth Amendment principles outside of the ACCA context, such as recently in *Pereida v. Wilkinson*, ___ U.S. ___, 141 S.Ct. 754, 762 (2021), which applied the categorical rule in the context of the Immigration and Nationality Act.

Accordingly, because the California Supreme Court’s determination that the *Descamps/Mathis* rule is a procedural rule conflicts with circuit court determinations that the rule is a substantive rule, a writ of certiorari should issue to resolve the conflict.

III. The Petition Should Be Granted Because the California Supreme Court “has decided an important federal question in a way that conflicts with relevant decisions of this Court” (USSC Rule 10(c))

A. The California Supreme Court’s Decision Involved an Important Federal Question Implicating a Defendant’s Sixth Amendment and Due Process Rights

Underlying this Court’s decisions in the *Taylor*, *Apprendi*, *Descamps*, and *Mathis* line of cases was a concern for protecting the Sixth Amendment rights and due process rights of defendants.

Again, as *Descamps* acknowledged, one of the grounds for the decision in *Taylor* was that the elements-centric approach “avoids the Sixth Amendment concerns that would arise from sentencing courts’ making findings of fact that properly belonged to juries.” *Descamps*, 570 U.S. at 267. Indeed, *Taylor* noted the categorical approach avoids findings by the trial court which a defendant potentially “could ... challenge ... as abridging his right to a jury trial.” *Taylor*, 495 U.S. at 601.

In *Apprendi*, this Court held that any fact beyond the fact of the prior conviction “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*, 530 U.S. at 490. This

Court elaborated:

[In *Jones v. United States*, 526 U.S. 227 (1999)], [w]e ... noted that “under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” *Id.*, at 243, n. 6, 119 S.Ct. 1215. The Fourteenth Amendment commands the same answer in this case involving a state statute.

Apprendi, 530 U.S. at 476.

In *Descamps*, this Court explained that “[t]he Sixth Amendment contemplates that a jury – not a sentencing court – will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense – as distinct from amplifying but legally extraneous circumstances. [Citation.]” *Descamps*, 570 U.S. at 269-70.

In *Mathis*, this Court explained that a sentencing court “can do no more, consistent with the Sixth Amendment, then determine what crime, with what elements, the defendant was convicted of.”

Mathis, 579 U.S. at 511-12.

In the instant case, the California Supreme Court noted that “[t]he factfinding procedures in place prior to *Gallardo* ... [were] ultimately inconsistent with the Sixth Amendment principles upon which our decision in *Gallardo* rested” *Milton*, 13 Cal.5th at 52.

In light of the significant Sixth Amendment and due process concerns underlying this Court’s decisions in *Taylor*, *Apprendi*, *Descamps*, and *Mathis*, which then served as the basis for the *Gallardo* decision, the California Supreme Court’s determination that the *Descamps/Mathis* rule was not a substantive rule of law involves an important federal question in a way that conflicts with relevant decisions of this Court.

**B. The California Supreme Court’s Decision
Conflicts with Relevant Decisions of This Court**

Under the federal standard for retroactivity, new substantive rules of criminal law are fully retroactive, whereas procedural rules are not fully retroactive.⁴ *Montgomery v. Louisiana*, 577 U.S. 190, 198 (2016).

⁴ “Watershed” rules of criminal procedure were also previously considered fully retroactive to final cases, but this Court recently eliminated this exception. *Edwards v. Vannoy*, 593 U.S. ___, 141 S.Ct. 1547, 1560 (2021).

“Substantive rules alter ‘the range of conduct or the class of persons that the law punishes.’ ... Procedural rules, by contrast, ‘regulate only the *manner of determining* the defendant’s culpability.’ ” *Welch*, 578 U.S. at 120-21, quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004).

“[W]hen a new substantive constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule.” *Montgomery*, 577 U.S. at 200. *Montgomery* held the rule announced in *Miller v. Alabama*, 567 U.S. 460 (2012) – that mandatory life-without-parole sentences for juveniles are unconstitutional – was a substantive rule of law requiring retroactive application to cases on collateral review. *Id.* at 212.

Here, *Gallardo*’s adoption of the *Descamps/Mathis* rule announced a substantive change in law. Prior to *Gallardo*, a defendant could have his sentence increased due to prior conduct extraneous to a prior conviction; now, however, in accord with the Sixth Amendment and due process principles set forth in *Taylor*, *Apprendi*, *Descamps*, and *Mathis*, prior extraneous conduct can **not** support an increased sentence in a subsequent case. *Descamps*, *Mathis*, and *Gallardo* taken together therefore altered the range of punishable conduct and, consequently, amount to a substantive law.

Moreover, the *Descamps/Mathis* rule controls the outcome of the case. Under the *Descamps/Mathis* rule, Milton’s Illinois robbery can **never** qualify as a California strike because Illinois robbery, unlike California robbery, does not require a finding that the perpetrator specifically intended to permanently deprive the victim of their property.⁵ Thus, because “when a new substantive constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule” (*Montgomery*, 577 U.S. at 200), the California Supreme Court’s finding here that the *Descamps/ Mathis* rule does not apply retroactively was plain error.

Indeed, the *Descamps/Mathis* rule actually presents an easier and more straightforward case for a substantive rule of law than *Montgomery*’s treatment of *Miller*. *Miller* only eliminated *mandatory* life-without-parole sentences for juveniles, but still permitted discretionary findings in support of such sentences. *Miller*, 567 U.S. at 489. By contrast, under *Descamps, Mathis*, and *Gallardo*, there are **no circumstances** in which an Illinois robbery qualifies as a strike under California law due to the different

⁵ In California, robbery requires the specific intent to permanently deprive the victim of their property. § 211; *People v. Mora and Rangel*, 5 Cal.4th 442, 489 (2018). By contrast, Illinois robbery does not require any specific intent. *People v. Banks*, 388 N.E.2d 1244 [75 Ill.2d. 383, 392] (Ill. 1979).

elements. Thus, *Descamps/Mathis* presents a much stronger case for a substantive law than *Miller*.

As the California Supreme Court's decision here conflicts with this Court's definition of substantive laws, and as the decision implicates important federal constitutional concerns, the instant petition must be granted to address the California Supreme Court's injustice.

IV. The Petition Should Be Granted Because the California Supreme Court “has decided an important question of federal law that has not been, but should be, settled by this Court” (USSC Rule 10(c))

Whether the *Descamps/Mathis* rule is a substantive rule or procedural rule is an important question of federal law. The question directly implicates a critical Sixth Amendment right – the right to have a jury determine any facts used as a basis to increase a sentence. This Court should therefore take this opportunity to settle this unresolved question.

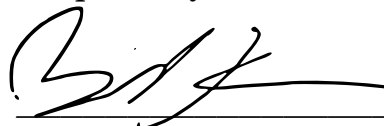
CONCLUSION

Cases like Milton's perfectly illustrate why the *Descamps/ Mathis* rule must be considered substantive: Under no circumstance can Milton's prior Illinois robbery convictions justify a Three Strikes sentence once the rule is properly applied. Unfortunately, as a result of the California Supreme Court's erroneous determination that the *Descamps/Mathis* rule is not fully retroactive, Milton is fated to continue serving a life sentence even though, if he were to be sentenced under the law today, his debt to society for his past actions would be already considered paid.

Accordingly, for the reasons presented herein, it is respectfully requested that the petition for a writ of certiorari be granted.

Dated: November 15, 2022

Respectfully submitted,



BRAD K. KAISERMAN
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WILLIAM MILTON