

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

[client's name]
Petitioner

v.

PEOPLE OF THE STATE OF CALIFORNIA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA
COURT OF APPEAL, **[DCA #]** APPELLATE DISTRICT

[counsel of record's name]*
[any other desired counsel names]
[counsel of record's address]
[counsel of record's email address]
[counsel of record's telephone #]

Counsel of Record for the Petitioner
[Client's name]

QUESTION PRESENTED (Rule 14.1(a))

Whether a criminal defendant's right to a jury trial under the Sixth and Fourteenth Amendments is violated when a prior juvenile adjudication – not itself decided by a jury – is used by a judge to impose a longer sentence than otherwise would be permissible.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

[Client's name], Petitioner

v.

PEOPLE OF THE STATE OF CALIFORNIA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA
COURT OF APPEAL, **[DCA#]** APPELLATE DISTRICT

Petitioner, **[client's name]**, respectfully asks that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, **[DCA#]** Appellate District, filed on **[date of opinion]**.

OPINION BELOW

The opinion of the California Court of Appeal, which was **[unpublished/published]**, was issued on **[opinion date]**, and is attached as Appendix A. The California Supreme Court's one-page order denying review is attached as Appendix B. The transcript of the trial court sentencing hearing is attached as Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The decision of the California Court of Appeal for which petitioner seeks review was issued on **[opinion date]**. The California Supreme Court order **[denying/dismissing]** petitioner's timely petition

for discretionary review was filed on **[date denying or dismissing review]**. This petition is filed within 90 days of the California Supreme Court's **[denial/dismissal]** of discretionary review, under Rules 13.1 and 29.2 of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment 6 provides, in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury

United States Constitution, Amendment 14 provides, in relevant part:

No state . . . shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The California statutory provisions and court rules that are relevant to this petition, **[list applicable statutes and rules of court]**, are reprinted in Appendix D.

STATEMENT OF CASE

Petitioner was convicted by jury of **[state counts of conviction]**. At petitioner's judgment and sentencing on **[date of sentencing]**, the trial court found true one aggravating factor: his prior felony convictions. App.C at **[xx]**. The trial court then sentenced petitioner to **[total length of sentence]**, including the upper term on count **[list applicable count]**. App.C at **[xxx]**.

In the state Court of Appeal, petitioner argued that this aggravating factor violated his federal constitutional right to a jury trial because the prior convictions consisted solely of juvenile adjudications to which he had no right to a jury trial. AOB at pages **[xx-xx]**.

The California Court of Appeal rejected petitioner's argument on the merits and affirmed his sentence. App. A at **[xx-xx]**.

Petitioner sought discretionary review of the issue in the California Supreme Court, making the same federal constitutional argument and citing the same basic authorities set forth above. Petition for Review pages **[xx-xx]**. The California Supreme Court **[granted review pending disposition of a lead case, then subsequently, summarily dismissed review without opinion/summarily denied review/other disposition or series of dispositions]**. App. B.

REASONS FOR GRANTING THE PETITION

I

This case presents an important issue over which the federal and state courts across the country are divided. *Apprendi v. New Jersey* 530 U.S. 466 [120 S. Ct. 2348] (2000), *Blakely v. Washington*, 542 U.S. 296 [124 S.Ct. 2531] (2004), and *Cunningham v. California* 549 U.S. ___ [127 S.Ct. 856] (2007), establish that the Sixth Amendment right to a jury determination applies to any factual finding, other than that of a prior conviction, necessary to warrant any sentence beyond the presumptive maximum. *Blakely*, 542 U.S. at pp. 301, 303-304; *Apprendi*, 530 U.S. at p. 490. However, the question remains whether a court may use a prior juvenile adjudication that was not decided by a jury to impose a longer sentence than otherwise would be permissible.

As noted above, federal and state courts are divided on whether juvenile adjudications fall within *Apprendi's* prior conviction exception. The Third, Eighth and Eleventh Circuits, along with the Kansas, Indiana, Minnesota, and Washington Supreme Courts have all held that the lack of a jury trial in juvenile proceedings does not prevent courts from increasing adult defendants sentences based on the conduct alleged in those prior proceedings. These courts focus their inquiry on a reliability inquiry. They find juvenile adjudications are just reliable as criminal convictions because the proceedings are afforded many of the same constitutional protections. See *United States v. Smalley*, 294 F.3d 1030, 1032-33 (8th Cir. 2002) [“the question of whether juvenile adjudications should be exempt from *Apprendi's* general rule should . . . [turn] on an examination of whether juvenile adjudications, like adult convictions, are so reliable that due process of law is not offended by such an exemption]; *United States v. Jones*, 332 F.3d 688, 696 (3d Cir. 2003) [“we find nothing in *Apprendi* or *Jones* . . . that requires us to hold that prior

nonjury juvenile adjudications that afforded all required due process safeguards cannot be used to enhance a sentence...”; *United States v. Burge*, 407 F.3d 1183, 1190 (11th Cir. 2005) [Juvenile adjudications . . . provide more than sufficient safeguards to ensure the reliability that *Apprendi* requires...”]; *State v. Hitt*, 42 P.3d 732, 740 (Kan. 2002) [“The *Apprendi* Court spoke in general terms of the procedural safeguards attached to prior conviction. It did not specify all procedural safeguards nor did it require certain crucial procedural safeguards”]; *Ryle v. State*, 842 N.E.2d 320, 323 (Ind. 2005) [“The main concern [in the *Apprendi* exception] was whether the prior conviction’s procedural safeguards ensured a reliable result, not that there had to be a right to a jury trial”]; *State v. McFee*, 721 N.W.2d 607, 615 (Minn. 2006) [“Absent clear direction from the United States Supreme Court, we will not upset our precedent upholding the use of juvenile criminal behavior in sentencing....”]; *State v. Weber*, 149 P.3d 646, 652-653 (Wash. 2006) [“In the absence of authoritative instruction from the United States Supreme Court that juvenile adjudications are not prior convictions, ... we hold that juvenile adjudications are convictions for the purposes of *Apprendi*’s prior conviction exception”].

Other courts have reached opposite results. The Louisiana Supreme Court reasoned that the right to trial by jury does not turn on reliability and that a criminal defendant must have at least one opportunity to challenge allegations before a jury before those allegations may serve as a basis for criminal punishment. *State v. Brown*, 879 So.2d 1276 (La. 2004). Consequently, a court may not increase a defendant’s sentence above an otherwise binding threshold based on allegations of juvenile criminal behavior that the defendant did not have the ability to challenge before a jury.

The *Brown* court emphasized that “the history of juvenile courts illustrates why juvenile courts have fewer [procedural] safeguards.” *State v. Brown*, 879 So.2d at 1285.

“Under the guise of *parens patriae*, juvenile courts emphasized treatment, supervision, and control rather than punishment, and exercised broad discretion to intervene in the lives of young offenders.” *Id.* at 1286. Because of these distinctions between juvenile and criminal contexts, which still exist today, the court found that “there is a difference between a ‘prior conviction’ and a prior juvenile adjudication.” *State v. Brown*, 879 So.2d at 1289. “If a juvenile adjudication, with its lack of a right to a jury trial which is afforded to adult criminals, can then be counted as a predicate offense the same as a felony conviction . . . then ‘the entire claim of *parens patriae* becomes a hypocritical mockery.’” *Ibid.* Because a juvenile adjudication is not “afforded all the guarantees afforded adult criminals under the constitution,” and “is not a conviction of any crime” *Ibid.*, the court held that it “cannot be excepted from *Apprendi*’s general rule.” *Id.* at 1290.

In *United States v. Tighe* 266 F.3d 1187 (9th Cir. 2001), the Ninth Circuit similarly concluded that automatically treating juvenile adjudications as “prior convictions” under *Apprendi* “ignores the significant constitutional differences between adult convictions and juvenile adjudications.” *Id.* at 1192-1193. The court noted that *Apprendi*’s tolerance for *Almendarez-Torres* was “premised on sentence-enhancing prior convictions being the product of proceedings that afford crucial procedural protections – particularly the right to a jury trial and proof beyond a reasonable doubt.” *Id.* at 1194. The Ninth Circuit accordingly held that “the prior conviction” exception to *Apprendi*’s general rule must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial.” *Ibid.* Because Tighe’s prior juvenile adjudication lacked the right to a jury trial, the trial court’s use of it to increase Tighe’s sentence violated *Apprendi*. *Ibid.*

The Oregon Supreme Court has adopted something of a middle ground. In *State v. Harris*, 118 P.3d 236 (Or. 2005), the Oregon Supreme Court, like the Louisiana Supreme Court, recognized that under the United States Supreme Court’s jurisprudence, “the jury’s importance in establishing the general validity of convictions under the Sixth Amendment is founded upon more than the relatively narrow function of the jury as a reliable factfinder.” *Id.* at 243. “From the framers’ perspective, the jury was also meant to serve as the people’s check on judicial power at the trial court level.” *Ibid.* Thus the Oregon court specifically rejected the position first adopted by the Eighth Circuit, recognizing that the High Court “has made clear that reliability is not the sine qua non of the Sixth Amendment; that constitutional provision also serves to divide authority between judge and jury.” *State v. Harris*, 118 P.3d at 245. It accordingly held that the “Sixth Amendment requires that when . . . an adjudication is offered as an enhancement factor to increase a criminal sentence, its existence must either be proved to a trier of fact or be admitted by a defendant.” *Id.* at 246.

At the same time, the Oregon Supreme Court declined to hold (as the Louisiana Supreme Court held) that when a state conducts juvenile adjudications without juries, such adjudications “cannot be used to enhance adult criminal sentences unless, and until, the facts giving rise to those adjudications are presented to a jury and relitigated.” *State v. Harris*, 118 P.3d at 243. The Oregon enhancement law at issue in *Harris* did not require the state to prove to the sentencing court that the defendant actually committed the conduct alleged in a prior juvenile adjudication; it required the state to prove only the “existence” of the prior juvenile adjudication – that is, only the fact that the adjudication was indeed part of the defendant’s record. *Ibid.* Nonetheless, the Oregon court permitted

this to enhance a defendant's sentence only of the Sixth Amendment right to jury trial on the existence of the prior juvenile adjudication was honored. *Ibid.*

The latter cases finding that a juvenile adjudication is not the equivalent of a prior conviction for *Apprendi* purposes are correct under this Court's Sixth Amendment jurisprudence. Furthermore, the Louisiana approach is the only one which is fully faithful to that jurisprudence. This very question is now pending before the California Supreme Court in *People v. Nguyen*, S154847, 2007 Cal. Lexis 10885,(review granted Oct. 10, 2007).

Apprendi's prior conviction exception derives from this Court's decision in *Almendarez-Torres*, *supra*, 523 U.S. 224, in which the Court held that a court may increase a defendant's sentence beyond an otherwise binding statutory limit based on the fact that the defendant has previously been convicted of a crime. *Id.* at 243-244.

But the following term, this Court made clear that the judicial fact finding that *Almendarez-Torres* allows is a limited exception, not the rule, concerning the right to trial by jury:

“[U]nlike virtually any other consideration used to enlarge the possible penalty for an offense . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.” *Jones v. United States*, 526 U.S. 227, 249 (1999).

It was against this background that this Court, in *Apprendi v. New Jersey*, 530 U.S. 466, “confirm[ed] the opinion that [it] expressed in *Jones*. Other 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.” *Id.* at 490. Again, the Court emphasized that the prior conviction exception is “narrow” and that “there is a vast difference between accepting the validity of a prior judgment of

conviction entered in a proceeding in which the defendant had the right to a jury trial . . . and allowing the judge to find the required fact.” *Id.* at 490, 496.

To state what should be obvious, a juvenile adjudication in which the defendant did not have the right to a jury trial is not, in *Apprendi*’s words, “a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial.” *Apprendi*, 530 U.S. at 496. Non-jury juvenile adjudications do not satisfy a prerequisite for the prior conviction exception, namely, that the defendant already have had one opportunity to dispute the state’s allegations before a jury.

But even apart from the empty jury box in juvenile proceedings, a juvenile adjudication is not even a “conviction” of any crime. It is a finding of civil delinquency that allows the state to require the juvenile to undergo rehabilitative treatment. Accordingly, this Court has made clear that a court’s role in a modern, non-jury juvenile proceeding is not to ascertain whether the child [is] guilty or innocent, but rather to determine whether the child needs the state’s “care and solicitude.” *In re Gault*, 387 U.S. 1, 15 (1967); see also *Brown*, 879 So.2d at 1286-1289.

The *Gault* principle is not only desirable but necessary: If modern juvenile proceedings lost this “intimate, informal protective” focus, their dispensing with juries would be unconstitutional, for they would directly constitute “criminal proceedings” covered by the Sixth Amendment’s Jury Clause. *McKeiver v. Pennsylvania*, 403 U.S. 528, 545-50 (1971).

It is no answer to say that *Apprendi*’s prior conviction exception should nonetheless be extended to include juvenile adjudications because such adjudications “are so reliable that due process of law is not offended.” *State v. Weber*, 149 P.3d at 652, quoting *United States v. Smalley*, 294 F.3d at 1032-33. Due process reliability is beside

the point. The concern here is with the procedural right to trial by jury. And “the jury’s importance in establishing the general validity of convictions under the Sixth Amendment is founded upon more than the relatively narrow function of the jury as a reliable factfinder. From the framers’ perspective, the jury was also meant to serve as the people’s check on judicial power at the trial court level.” *State v. Harris*, 118 P.3d at 243; see also *Blakely v. Washington*, 542 U.S. at 306 [“jury trial is meant to ensure [the people’s] control in the judiciary”]; *Schriro v. Summerlin*, 542 U.S. 348, 355 (2004) [Framers installed jury trial right because of the jury’s perceived independence, not any fact-finding accuracy]. A court may no more “dispens[e] with jury trial because the defendant is obviously guilty” *Crawford v. Washington*, 541 U.S. 36, 62 (2004), than it may dispense with a jury trial right with respect to a sentence enhancement because the state’s proffered support for the enhancement is obviously reliable.

It is true that recent changes to juvenile proceedings throughout the country have somewhat modified that law’s focus and imposed more traditional criminal punishment following an adjudication of guilt. But juveniles accused of criminal behavior in most states, including California, still have no right to a trial by jury. See, e.g., *Tiffany A. v. Superior Court*, 150 Cal.App.4th 1344, 1361 (2007). Only twelve provide for jury trials in juvenile courts. These states are: Alaska, Colorado, Kansas, Massachusetts, Michigan, Minnesota, New Mexico, Oklahoma, Texas, West Virginia, Wisconsin, and Wyoming. Bureau of Justice Statistics, U.S. Dep’t of Justice, Sourcebook of Criminal Justice Statistics-1993. And the constitutionality of that state of affairs under *McKeiver v. Pennsylvania*, 403 U.S. 528, depends on the continuing reality of the unique rehabilitative nature of juvenile proceedings.

The simple rule should be that if a legislature refuses to equip a hearing (be it labeled criminal or adjudicatory) with all of the protections that the Constitution guarantees to criminal defendants, including trial by jury, it cannot later call an adverse outcome a “conviction” for the purpose of the *Apprendi* prior conviction exception. Here, no jury has ever found that appellant committed the juvenile adjudications in question. As such, petitioner submits the trial court violated the Sixth Amendment by increasing his sentence on this basis.

Petitioner urges this Court to take review in order to delineate the scope of criminal defendants’ jury trial rights relating to sentencing based upon prior juvenile adjudications.

CONCLUSION

For the foregoing reasons, petitioner requests that this Court grant the petition for certiorari.

Dated: _____

Respectfully submitted,