

**In the Supreme Court of the United States**

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**LILRON RAVON JONES,**

Petitioner,

v.

**STATE OF CALIFORNIA,**

Respondent.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

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**BRIEF IN OPPOSITION**

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**QUESTION PRESENTED**

Whether the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), was violated when the state court, pursuant to a recidivist sentencing law, relied on petitioner's admitted prior juvenile adjudication of a felony to impose a higher sentence than that authorized by the jury's verdicts.

## DIRECTLY RELATED CASES

California Supreme Court:

*People v. Bhushan et al.*, No. S253098, judgment entered March 13, 2019  
(this case below)

California Court of Appeal, First Appellate District, Division Two:

*People v. Bhushan et al.*, No. A145855, judgment entered November 30, 2018 (this case below)

Alameda County Superior Court:

*People v. Vijay Bhushan, Lilron Jones, and Marquise Thompson*, No. C175094, judgment entered July 10, 2015 (this case below)

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## JURISDICTION

The Court lacks jurisdiction to review the judgment of the California Court of Appeal, which conditionally reversed and directed further sentencing proceedings in the juvenile court and potentially also in the adult court. That disposition, as explained below, is not a final judgment of a state court reviewable under 28 U.S.C. § 1257(a) and does not fall within any of the exceptions to the finality requirement identified in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Petitioner's asserted basis of jurisdiction—28 U.S.C. § 1254(1)—does not apply.

## STATEMENT

1. In July 2012, teenager Hadari Askari was shot to death in a housing complex in Oakland, California. Pet. App. 1. Askari's family and friends believed that another young man, Wyone Bordley, had killed Askari, and they in turn "wanted to see Bordley dead." *Id.* There was an "understanding" that several young men—petitioner Lilron Jones, Marquise Thompson, and Vijay Bhushan—"would 'take care of it.'" *Id.* In December 2012, Jones and Bhushan fired at least 20 rounds at Bordley. *See id.* at 1, 3. Bordley was shot in the foot and a bystander—15-year-old Jubrille Jordan—was killed by a shot to her head. *Id.* at 1.

2. Jones and Bhushan were tried together, while Thompson was tried separately. Pet. App. 3. After being advised of his constitutional rights, Jones admitted that he had suffered a juvenile adjudication for robbery, alleged as a

strike for recidivist punishment under California's Three Strikes law. *Id.* at 3, 11-12. A jury convicted Jones of first-degree murder, Cal. Penal Code §§ 187(a), 189; premeditated attempted murder, *id.* §§ 187(a), 664(a); and unlawful firearm activity, *id.* § 29820(b). *See Pet. App.* 3. It also found true various sentence-enhancing firearm allegations under Cal. Penal Code § 12022.53(c). *Pet. App.* 3.

Jones's sentence involved increased punishment for recidivism under California's Three Strikes law. *See Cal. Penal Code §§ 667(b)-(j), 1170.12.* That law applies where "a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior serious or violent convictions." *Id.* § 667(c). It requires that the "determinate term or minimum term for an indeterminate term" of the sentence for the current felony conviction shall be "twice the term otherwise provided" for that felony. *Id.* § 667(e); *see generally Ewing v. California*, 538 U.S. 11, 14-17 (2003) (plurality opinion).<sup>1</sup> A prior conviction for robbery is a "strike." Cal. Penal Code §§ 667(d)(1), 667.5(c)(9), 1192.7(c)(19). A prior juvenile adjudication for robbery, under certain circumstances, also may qualify as a strike. *Id.* § 667(d)(3).

California law further authorizes a five-year sentence enhancement—which is not part of the Three Strikes law, *see People v. Jones*, 5 Cal. 4th 1142 (1993)—for a defendant "convicted of a serious felony who previously has been

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<sup>1</sup> Jones's appendix includes the current version of the law. That is the version the State quotes.

convicted of a serious felony." Cal. Penal Code § 667(a). A juvenile court adjudication does not constitute a conviction for purposes of the five-year serious felony enhancement. *People v. West*, 154 Cal. App. 3d 100, 108-110 (1984).

In this case, the trial court sentenced Jones to a prison term of 25 years to life for the murder count, doubled to 50 years to life under the Three Strikes law, plus consecutive terms of 20 years for the firearm enhancement and five years as a separate enhancement based on the prior robbery. Pet. App. 3. For the attempted murder count, the court sentenced Jones to a consecutive term of seven years to life, doubled to 14 years under the Three Strikes law, plus an additional 20 years for the firearm enhancement and five years as a separate enhancement based on the prior robbery. *Id.* On the unlawful firearm activity count, the court sentenced him to a concurrent term of two years, doubled on account of the Three Strikes law. *Id.*<sup>2</sup> Jones thus was sentenced to a total term of 114 years to life. *Id.*

3. The California Court of Appeal rejected Jones's challenges to his convictions. Pet. App. 3-5, 8-10. It struck the two 5-year serious felony enhancements, imposed on the murder and the attempted-murder counts, because

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<sup>2</sup> Jones's description of the two 20-year firearm enhancements as being a product of Three Strikes doubling (Pet. 23) is incorrect. Personally and intentionally discharging a firearm results in a 20-year enhancement. Cal. Penal Code § 12022.53(c). One 20-year term was added to the murder and a second 20-year term was added to the attempted murder. Pet. App. 3.

Jones's prior juvenile adjudication for robbery did not constitute a prior conviction under the applicable sentencing statute. *Id.* at 11. But it rejected Jones's claim that the murder and attempted murder sentences, which were doubled on the basis of a prior juvenile adjudication, "violated his constitutional right to a jury trial because he had no right to jury trial in the prior proceeding." Pet. App. 12. The court explained "that this argument was rejected in *People v. Nguyen*, 46 Cal.4th 1007 (2009)." *Id.*

For a variety of additional reasons, the court of appeal vacated Jones's sentence. Pet. App. 16. First, it concluded that Jones, who was 17 years old when he committed the crimes and who had been charged by the district attorney directly in adult court, was entitled to the benefit of a recent change in state law restricting the jurisdiction of adult courts over juveniles. *Id.* at 10. Application of the new law, the court held, required that the judgment be conditionally reversed and the case remanded for a determination of Jones's fitness for treatment in the juvenile system. *Id.* at 11. The court instructed that, if the juvenile court determines that the case would have been transferred to adult court had the new law been in effect at the time of Jones's offenses, it should transfer the case to adult court, which would reinstate the convictions and reconsider the sentence in light of the appellate court's further directions on remand. *Id.* If the juvenile court instead determines that it would not have transferred the case to adult court, Jones's current convictions will be deemed

juvenile adjudications, and the court should enter a disposition under the juvenile court law. *Id.*

Second, in light of another recent change in California law broadening a court's sentencing discretion to include striking or dismissing firearm enhancements, the appellate court remanded the case so that the trial court could consider whether to exercise that discretion. Pet. App. 12-13.

Third, the appellate court concluded that trial counsel had acted incompetently by failing to ask the trial court "to consider whether a sentence of 114 years to life—foreclosing any opportunity for release regardless of Jones's potential for change—was proportionate to the crimes committed by" Jones, given the "constitutional obligation to consider youth related factors" under *Miller v. Alabama*, 567 U.S. 460 (2012). Pet. App. 15. The court determined that "[r]emand is required" for consideration of those matters. *Id.* at 16.

Jones sought discretionary review in the California Supreme Court, presenting the question: "Does the use of a prior juvenile adjudication to enhance a sentence under the Three Strikes law violate the Sixth and Fourteenth Amendment right to a jury trial." Jones Pet. for Review 8, *People v. Bhushan et al.*, S258098, Jan. 2, 2019. On March 13, 2019, that court denied review. Pet. App. 21

## ARGUMENT

Jones contends that, under the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the fact that he had been previously adjudicated as a delinquent

for felony robbery could not be used to sentence him under California's Three Strikes law because that prior adjudication occurred in juvenile proceedings at which he had no right to a jury trial. Pet. 15-21. Because the state court of appeal remanded for further sentencing proceedings, there is no jurisdiction under 28 U.S.C § 1257. Jones's case does not fall within any of the exceptions to Section 1257's finality requirement identified in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). In any event, this case would be an especially poor vehicle for addressing Jones's claim. The further sentencing proceedings could well relieve Jones of the sentence that he challenges here, and, under the circumstances of this case, that sentence could not violate *Apprendi* because Jones admitted the fact of the prior adjudication.

1. This Court lacks jurisdiction based on 28 U.S.C. § 1257. That statute limits this Court's jurisdiction "to review of '[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had.'" *Johnson v. California*, 541 U.S. 428 (2004) (per curiam) (brackets added by *Johnson*). Here, Jones petitioned for review in, and was denied review by, the California Supreme Court, satisfying the "highest court" component of Section 1257. *E.g.*, *Banks v. California*, 395 U.S. 708 (1969) (per curiam). But Section 1257 also requires a judgment that is "subject to no further review or correction in any other state tribunal" and "final as an effective determination of the litigation

and not of merely interlocutory or intermediate steps.” *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997). In light of the multilayered remand order here, *see* Pet. 23 n.8, the state-court judgment lacks the requisite finality.

That remand gives rise to a variety of possible scenarios in which Jones would be relieved of the sentence that he challenges in this petition. If the juvenile court on remand were to retain jurisdiction, then its disposition of the proceeding would not be based on the Three Strikes law, because that law applies to adult sentences but not to juvenile adjudications. Cal. Penal Code § 667(b).<sup>3</sup> If the juvenile court were to transfer the case to the adult court, that court could resentence Jones in a variety of ways that would obviate his *Apprendi* claim. For example, the adult court could dismiss (or strike) the recidivism allegation in its discretion. *See People v. Superior Court (Romero)*, 13 Cal. 4th 497, 504 (1996). Or it could re-impose the doubled sentence under the Three Strikes law but strike the firearms enhancements, which would result in a total sentence within the range authorized by the jury verdicts alone.<sup>4</sup>

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<sup>3</sup> The juvenile court would calculate the maximum term an adult could serve, Cal. Welf. & Inst. Code § 726(b), but would set Jones’s maximum “based upon the facts and circumstances of the matter,” *id.* § 731(c).

<sup>4</sup> Without the strike (or the two inapplicable five-year serious felony enhancements), the maximum sentence authorized by the verdict was 75 years to life (25 years to life for murder, plus 7 years to life for attempted murder, plus 40 years for the two firearm enhancements, plus 3 years for the firearm activity). *See* Pet. App. 3; Cal. Penal Code §§ 18(a), 29820(c). Were the court on remand to strike the 40 years’ enhancements but apply the Three Strikes law, the maximum sentence would be 70 years to life (50 years to life for murder, plus 14 years to life for attempted murder, plus 6 years for firearm activity).

Alternatively, the court's consideration of the *Miller* factors could lead it to impose a lesser sentence falling within that range.

In *Cox Broadcasting*, this Court recognized "four exceptional categories of cases to be regarded as 'final' on the federal issue despite the ordering of further proceedings in the lower state courts." *Johnson v. California*, 541 U.S. at 429-430. None of those four exceptions applies here. First, this case is not one in which "the federal issue is conclusive or the outcome of further proceedings preordained." *Cox Broadcasting*, 420 U.S. at 479. There are, as discussed, a variety of outcomes that are not pre-ordained by the state appellate court's resolution of the *Apprendi* issue. Second, given some of those possible outcomes, the *Apprendi* issue will not necessarily "survive and require decision regardless of the outcome of future state-court proceedings." *Id.* at 480. Third, this is not a case "in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481. If the *Apprendi* issue persists after resentencing, Jones could seek further review in the state appellate courts and in this Court. *Cf. Johnson*, 541 U.S. at 431.

The fourth and final *Cox* exception encompasses cases "in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation." *Cox*, 420 U.S. at 482-483. "In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal

policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.” *Id.* at 483. Here, Jones can make no serious claim that denying review at this time would “seriously erode federal policy.” *Id.*; *cf. Johnson*, 541 U.S. at 430.

As *Cox Broadcasting* noted, in most cases falling within its four exceptions, “immediate rather than delayed review would be the best way to avoid” “economic waste,” “delayed justice,” and “precipitate interference with state litigation.” 420 U.S. at 477-478 (footnotes omitted). Here, given the varied outcomes available on remand and the possibility of subsequent review in the state appellate courts, addressing Jones’s Sixth Amendment claim at this time would be far less efficient and would risk interference with ongoing state litigation.

The petition does not address Section 1257 or *Cox Broadcasting*. Jones instead asserts that there is jurisdiction under 28 U.S.C. § 1254(1). Pet. 2. But that provision establishes jurisdiction over “[c]ases in the courts of appeals” and therefore does not cover Jones’s challenge to a state court decision.

2. Apart from the jurisdictional problem, this case presents an exceptionally poor vehicle for considering the constitutional issue raised by the petition. *See* Pet. 6-14. As noted, Jones may obtain a shorter sentence—within the range authorized by the jury verdicts alone—as a result of the ongoing proceedings in the lower state courts. *Cf. Texas v. United States*, 523 U.S. 296,

300 (1998) (“A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.”) (internal quotation marks omitted).

Moreover, the rule in *Apprendi* “proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant.” *Cunningham v. California*, 549 U.S. 270, 274-275 (2007) (emphasis added). Jones’s principal argument is that a juvenile adjudication does not qualify for *Apprendi*’s exception for “prior conviction[s].” *Id.* at 275; *see, e.g.*, Pet. 5-6. But even if that were so, the sentence challenged here would not offend the Sixth Amendment because Jones admitted that he had suffered the juvenile robbery adjudication. Pet. App. 3.

At times, Jones appears to advance the broader argument that the fact that a defendant suffered a juvenile adjudication can *never* be used to increase the defendant’s sentence, no matter how that fact is proven at trial. *E.g.*, Pet. App. 5 (emphasizing “importance of a jury trial right in the prior proceeding to allow the use of the prior for enhancement purposes”); *id.* at 14 (“the special nature of juvenile proceedings precludes the use of prior juvenile adjudications as a sentence enhancement”). But that is different from the issue that the court of appeal resolved below, *see* Pet. App. 12, and Jones does not identify any compelling reason why it warrants review in this case.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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