

No. 18-9664

In the
Supreme Court of the United States

LILRON RAVON JONES, Petitioner,

v.

STATE OF CALIFORNIA, Respondent.

On Petition for Writ of Certiorari to the California Court of
Appeal,
First Appellate District, Division Two

Reply Brief for the Petitioner

Gene D. Vorobyov
Counsel of Record
Supreme Court Bar No. 292878
450 Taraval Street, #
112 San Francisco, CA
94116 (415) 425-2693
gene.law@gmail.com

Question Presented

In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), this Court 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.” This case concerns the application of *Apprendi* to non-jury juvenile adjudications.

California courts here have held that petitioner’s juvenile adjudication fell within *Apprendi’s* prior conviction exception and hence could be used to enhance his sentence for a subsequent criminal conviction without being proved to a jury. That decision implicates an important and recurring constitutional question, which has split federal and state courts of appeal.

The importance of resolution of this conflict is particularly great in light of this Court’s decisions in *Descamps*, 570 U.S. 254 (2013) and *Mathis v. United States*, 136 S. Ct. 2243 (2016). Under those cases, a fact cannot be used to enhance a sentence unless *it is found true by a jury* (as an element of the prior charge). This narrowed the reading of the prior conviction exception to *Apprendi* and underscored that the

right to a jury trial is an *indispensable* procedural protection, without which the prior cannot be used for enhancement purposes. *Descamps* and *Mathis* counsel in favor of not allowing the use of prior juvenile adjudications to enhance a current adult sentence if the right to a jury trial was not available in the prior juvenile adjudication proceeding.

And the question presented is whether it is constitutionally permissible to use a prior juvenile adjudication to enhance a sentence regardless of whether the juvenile had a right to a jury trial in that prior proceeding?

Table of Contents

Questions Presented.....	i
Table of Contents.....	iii
Table of Authorities.....	iv
Introduction.....	2
A. This Court Has Jurisdiction to Review the Question Presented	3
B. This Case Presents a Good Vehicle to Review the Question Presented	10
Conclusion.....	13
Certificate of Word Count.....	14
Certificate of Service.....	16

Table of Authorities

Cases

United States Supreme Court Cases

<i>Apprendi v. New Jersey</i> 530 U.S. 466 (2000).....	12
---	----

<i>Betts v. Brady</i> 316 U.S. 455 (1942).....	7, 8
---	------

<i>Cohen v. Beneficial Loan Corp.</i> 337 U.S. 541 (1949).....	4
---	---

<i>Cox Broadcasting Corp. v. Cohen</i> 420 U.S. 469 (1975).....	5
--	---

<i>Matthews v. Eldridge</i> 424 U.S. 319, 331 (1976).....	4
--	---

<i>Montgomery v. Louisiana</i> 136 S. Ct. 718 (2016).....	9, 11
--	-------

<i>Republic National Gas Co. v. Oklahoma</i> 334 U.S. 62 (1948).....	4
---	---

State Court Cases

<i>In re Carlos E.</i> 127 Cal.App.4th 1529 (Cal. Ct. App. 2005).....	5, 6
--	------

<i>In re Christopher B.</i>	
156 Cal.App.4 th 1557 (Cal. Ct. App. 2007).....	5, 6

Constitutional Provisions

U.S. Constitution, 6 th Amendment.....	7
---	---

Federal Statutes

28 U.S.C.

§ 1254.....	3
§ 1257.....	3, 4

State Statutes

Cal. Pen. Code

§ 667.....	10
§ 3051.....	2, 9, 11

Cal. Welf. & Inst. Code

§ 726.....	3, 5
§ 731.....	3, 5

Introduction

In its brief in opposition, State of California (“respondent”) does not dispute that the question presented is cert-worthy. (Brief in Opposition (“BIO”) at 1).

Instead, respondent’s opposition challenges only the finality of the state court judgment, as well whether this case is a proper vehicle to address the question presented, because there is still a remand proceeding to take place in the trial court.¹ But the federal question presented is final in California courts and nothing in the remand proceeding can alter its resolution or make it irrelevant. Similarly, nothing in the remand proceeding can alter the fact that petitioner would remain ineligible for Youth Offender Parole system (Cal. Pen. Code, § 3051(b)(3) and (h)) so long as that strike

¹ Petitioner’s hearing to determine whether he would be retained in the juvenile court system or transferred back to the adult system is set for November 22, 2019. But as explained later in this brief, even if petitioner were to remain in the juvenile court system, the calculation of the maximum confinement time under California law would require determination of the adult maximum prison sentence (including the applicable enhancements). This would not remove the need to decide the question presented in this case.

remains in effect.

Finally, even if the remand leads to the case remaining in the juvenile court, that court would still have to calculate petitioner's maximum confinement time. That analysis would heed the maximum sentence a similarly situated adult offender would receive (including the enhancement, such as the prior strike allegation). (Cal. Welf. & Inst. Code, §§ 726 and 731). So the remand would not obviate the need to resolve the question presented, this Court has jurisdiction to address the question presented, and this case is a good vehicle to resolve it.

A. This Court Has Jurisdiction to Review the Question Presented

Respondent errs in claiming this Court lacks jurisdiction to address the question presented. (BIO at 1).

Under 28 U.S.C. § 1257(a), this Court has jurisdiction to review “[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had.”² The purpose of this finality rule is to (1) to avoid

² We acknowledge that in our petition, we incorrectly identified the basis for this Court's jurisdiction as 28 U.S.C. § 1254(1). But as respondent correctly

piecemeal litigation by federal courts of state court decisions, (2) to avoid giving advisory opinion when there is no real case or controversy under Article III, and (3) to minimize federal review of state court determination of federal constitutional issues. *Republic National Gas Co. v. Oklahoma*, 334 U.S. 62, 67-69 (1948).

But this Court has not uniformly interpreted § 1257(a) language literally and has given finality requirement a “practical rather than a technical construction.” *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949). The Court also held that § 1257 finality requirement should, if possible, be constructed to avoid crucial collateral claims to be lost. *Matthews v. Eldridge*, 424 U.S. 319, 331, n. 11 (1976).

The Court has found certiorari jurisdiction under § 1257(a) when a state court judgment finally resolves a federal question, though it also orders further proceedings at the trial court level. *Cox Broadcasting Corp. v. Cohen*, 420 U.S. 469, 477 (1975). One of the four categories of such cases listed in *Cox*

points out, the proper statute is 28 U.S.C. § 1257(a). We regret the error and apologize to the Court and opposing counsel.

Broadcasting is one where the resolution of the federal question will survive and will require a resolution regardless of the outcome of the state court remand proceedings. *Cox Broadcasting*, 420 U.S. at 480; see also *Brady v. Maryland*, 373 U.S. 83, 85, n. 1 (1963) [subsequent trial on the sole issue of punishment could not affect federal issue resolved on appeal from criminal conviction].

Here, as well, the question presented – whether it is constitutionally permissible to use a prior juvenile adjudication to enhance a sentence no matter if the juvenile had a jury trial right in that prior case—is finally resolved by California courts and it will not become moot no matter what happens on remand. For example, even if the juvenile court were to retain jurisdiction over this case on remand, the juvenile court would still have to determine petitioner's maximum under of imprisonment, a calculation that considers the longest period of incarceration applicable to an adult offender. Cal. Welf. & Inst. Code §§ 726 and 731; *In re Carlos E.*, 127 Cal.App.4th 1529, 1538 (Cal. Ct. App. 2005). It also takes into account enhancements that are pled and proven beyond reasonable doubt (as here). *In re Christopher B.*, 156

Cal.App.4th 1557, 1565 (Cal. Ct. App. 2007).

While the maximum confinement term can be lower than the adult maximum (and it cannot exceed it), any informed exercise of discretion by the juvenile court in this area would begin with determining what that adult maxim sentence is. *Carlos E.*, 127 Cal.App.4th at 1542 [juvenile court is to consider all facts and circumstances, rather than being restricted only to the adult sentencing choices].

In other words, the adult maximum sentencing may be a ceiling, but the juvenile court cannot intelligently decide to impose a lesser time based on facts of the case without knowing what that adult maximum sentence is. For this reason, a potential retention of the case in the juvenile system does not remove the need to resolve the federal question about the constitutional validity of using petitioner's prior juvenile adjudication to enhance his sentence.

California's brief in opposition briefly acknowledges the above point in a footnote (BIO at 7, n. 3), but does not address it.

///

Moreover, should this case remain in adult court for resentencing, nothing in the resentencing proceeding could remove the need to address the federal question presented here.³ Since the issue of whether the Sixth Amendment permits enhancing a sentence based on a prior juvenile adjudication in which there is no right to a jury trial is finally resolved by the California Supreme Court, that decision would be binding on the resentencing court.

Additionally, respondent argues that the need to resolve the federal question could go away if the resentencing court were to exercise its discretion to strike the prior strike conviction. (BIO at 7). Yet, in similar circumstances, this Court has declined to consider a theoretical possibility of future discretionary relief as a basis to defeat finality for the purpose of certiorari. *Betts v. Brady*, 316 U.S. 455, 460-61 (1942). *Betts* held that since the

³ Respondent's brief in opposition incorrectly describes the remand proceeding as involving a remand for further consideration of the ineffective assistance of counsel. (BIO at 5). The state appellate court noted the ineffective assistance claim, but decided to address the merits of petitioner's constitutional challenge to his functional life without parole sentence without finding that counsel was ineffective. (Cert App-15 to 16).

state court order denying habeas could not be reviewed by any other state court, the judgment was final for certiorari purposes. *Id.* That petitioner could make successive applications for the same relief to other judges without ever exhausting that right did not defeat finality because doing so would mean denial of relief in this Court in all such cases. *Id.*

Here, as well, while the trial court on remand retains discretionary authority to strike the prior adjudication under *Romero* (Cert App-015), such possibility is speculative. The constitutional validity of this strike prior is finally resolved in California courts. Relying on such legal possibility of discretionary striking of the enhancement would effectively preclude relief from this Court in most cases challenging the constitutional validity of using a prior juvenile adjudication as a “strike” under the Three Strikes law. *Betts*, 316 U.S. at 360-61.

Respondent is also wrong in arguing that the need to decide the question presented would be removed if the trial court on remand uses the prior adjudication in question to enhance petitioner’s sentence, but keeps the overall sentence at 70 or 75 years to life in prison. (BIO at 7). Such a

sentence, a functional equivalent of a sentence of life without parole, for a crime committed as a juvenile, would violate this Court's recent decisions on juvenile sentencing. *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016) [sentence of life without parole violates the Eighth Amendment for most juveniles].

In addition, existence of a prior strike disqualifies petitioner from the Youth Offender Parole system. Cal. Pen. Code, § 3051(h). Without the prior strike finding, petitioner would be entitled to his first parole hearing in the 25th year of incarceration.⁴ Cal. Pen. Code, § 3051(b)(3).

Finally, declining jurisdiction at this point would likely lead to significant waste of limited judicial time and resources. The legal validity of the prior strike is an issue that would likely impact many of the trial court's sentencing choices on remand, as well as first date for parole eligibility. It is also an issue that is finally resolved in California courts. And that legal issue would continue to meaningfully effect petitioner even if the case ends up in

⁴ § 3051(h) states that the statute "shall not apply to cases in which sentencing occurs pursuant to Section 1170.12, subdivisions (b) to (i), inclusive, of Section 667."

the juvenile court system. Declining jurisdiction now would mean that the lower courts and the parties would go through a complicated sentencing process, but the results would be undone if petitioner seeks certiorari on the very same issue the Court already has before it. Thus, there are many practical reasons to exercise certiorari jurisdiction, should the Court agree that the legal requirements for it are met.

B. This Case Presents a Good Vehicle to Review the Question Presented

This case is a great vehicle to resolve the long-standing circuit split about the question presented. (Pet. at 22-23). California's Three Strikes law is unambiguous about the question presented: § 667 (e) permits the use of juvenile adjudications as qualifying prior convictions. And the California Court of Appeal's decision addresses the question on the merits. (Cert App-015).

Plus, petitioner's prior juvenile adjudication was the sole statutory basis for enhancing petitioner's adult sentence under the Three Strikes Law. Addressing this question here would not lead to an advisory opinion.

///

Respondent's claim that this case is "an exceptionally poor vehicle" is based mainly on the same flawed argument respondent advanced on jurisdictional ground—that petitioner may receive a shorter sentence on remand "authorized by the jury verdict." (BIO at 9-10). But as explained earlier, in the scenarios described by the respondent (BIO 7, n 3-4), the sentence of 70 years to life (or 75 years to life) for a crime committed as a juvenile would still violate the Eighth Amendment. *Montgomery*, 136 S. Ct. at 736. It would not make the question presented irrelevant or moot.

More importantly, aside from the overall sentence structure, the existence of the prior strike would continue to be a sole basis for excluding petitioner from the Youthful Offender Parole system. Cal. Pen. Code, § 3051(h). Respondent does not explain how a remand would eliminate this problem.

Respondent's argument that this case is not a proper vehicle because Jones admitted the prior juvenile adjudication misconstrues the question presented. The question is whether the constitution permits enhancement of a sentence with a prior adjudication in which the defendant did not have a

right to a jury trial. It is not whether the enhancement *in this case* was submitted to the wrong decision maker.

Finally, respondent is also wrong in describing this case as not a proper vehicle due to what respondent sees as a mismatch between the question presented and the issue decided by the appellate court. Not so. The argument presented in the state courts and before this Court is the same—the use of the juvenile prior adjudication to enhance a sentence under the Three Strikes Law violates *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) because juveniles do not have a right to a jury trial in juvenile court proceedings. (Compare Petition at i with Petitioner’s Fourth Supplemental AOB 20-30).

///

///

///

///

///

///

Conclusion

For these reasons, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

DATE: October 4, 2019

By: *s/ Gene D. Vorobyov*

Supreme Court Bar No. 292878
Counsel of Record for Petitioner
LILRON RAVON JONES