

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MIGUEL ROMERO, Petitioner,

v.

CALIFORNIA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION TWO

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth and Fourteenth Amendments preclude a trial court from using a prior juvenile adjudication to increase a defendant's maximum sentence for a subsequent criminal conviction where the facts underlying the juvenile adjudication were not proved to a jury.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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Petitioner Miguel Romero (“Petitioner”) respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal, Second District, Division Two, in Case No. B293965.

OPINIONS BELOW

The reported opinion of the California Court of Appeal, Second Appellate District, Division Two, affirming the judgment on appeal is attached as Appendix A. *See also People v. Romero*, 44 Cal.App.5th 381 (Cal. 2019). The order of the California Supreme Court denying petitioner’s petition for review is attached as Appendix B.

JURISDICTION

The judgment of the California Court of Appeal, Second Appellate District, Division Two, was entered on January 16, 2020. The California Supreme Court denied a timely petition for review on April 15, 2020. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution:

In 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; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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.

STATEMENT OF THE CASE

This statement of the case is limited to the procedural background relevant to the claim raised in the instant petition. The underlying case facts are described in the appellate court opinion. *See* Appendix A at 3-6.

The information against Petitioner was filed on May 21, 2018. 1CT 167-168. As amended, the information charged Petitioner with attempted murder (Cal. Pen. Code §§ 664/187(a); count one), aggravated mayhem (Cal. Pen. Code § 205; count two), and assault by means likely to cause great bodily injury (Cal. Pen. Code § 245(a)(4); count three). 1CT 167-168. The information further alleged a gang enhancement under California Penal Code section 186.22(b)(1)(C) and a sentencing enhancement under California's Three Strikes Law (See Cal. Pen. Code §§ 667(d) and 1170.12(a)) for a 2009 juvenile adjudication. 1CT 169.

On May 29, 2018, the jury found Petitioner not guilty of attempted murder in count one, but guilty of mayhem in count two, and assault with force likely to cause great bodily injury in count three. 2RT 1504. In a bifurcated court trial, the trial court found that Petitioner's 2009 juvenile adjudication was true and qualified as a sentencing enhancement under the Three Strikes Law. 2RT 2711.

On October 17, 2018, the trial court sentenced Petitioner to the midterm of four years on the mayhem conviction and doubled the sentence as a result of the prior juvenile adjudication. 2RT 3007. The court imposed a consecutive ten-year prison sentence for the gang enhancement. 2RT 3007. Petitioner's aggregate sentence was 18 years in prison. 2RT 3007.

Petitioner filed a timely notice of appeal on November 14, 2018. 2CT 372. On appeal, Petitioner contended that the trial court's use of his prior juvenile adjudication to increase his sentence violated his rights under the Sixth and Fourteenth Amendments for the reasons articulated by this Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Descamps v. United States* 570 U.S. 254 (2013), and *Mathis v. United States* 136 S. Ct. 2243 (2016). The California Court of Appeal, Second District, Division Two, held that it was bound by the California Supreme Court's decision in *People v. Nguyen*, 209 P.3d 946, 959 (Cal. 2009), where the court held that the Sixth Amendment does not "preclude the use of a prior juvenile adjudication of criminal misconduct to enhance the maximum sentence for a subsequent adult felony offense by the same person." Appendix A at 9. Petitioner filed a petition for review in the California Supreme Court, which was denied on April 15, 2020. Appendix B. Justices Liu and Groban were of the opinion that the petition should be granted. Appendix B.

REASONS FOR GRANTING REVIEW

This petition presents the important question of whether the Sixth and Fourteenth Amendments preclude a trial court from using a prior non-jury juvenile adjudication to increase a defendant's sentence beyond the statutory maximum for a subsequent criminal conviction. Review of this case is of national importance for three reasons.

First, the issue presented in this petition affects a huge number of Americans. In 2017, a quarter of a million juveniles were adjudicated delinquent in the United States. *See Sarah Hockenberry & Charles Puzzanchera, Nat'l Ctr. for Juvenile J., Juvenile Court Statistics 2017*, at 42.

Second, there is a deep-seated split of authority among the lower courts on this issue. This conflict has produced substantially different treatment of criminal defendants based solely on where the crime took place and whether the defendant was indicted under state or federal law. This disparate treatment offends “the very essence of a healthy federalism” and creates a “needless conflict between state and federal courts.” *Elkins v. United States*, 364 U.S. 206, 221 (1960). The conflict in the lower courts is particularly observable in the Ninth Circuit. For instance, a defendant who commits a crime in California and is charged in state court can have their sentence increased beyond the statutory maximum based on a prior juvenile adjudication. But if that

same defendant is indicted in federal court, their sentence cannot be increased beyond the statutory maximum by a prior juvenile adjudication. In other words, the federal prosecutor is prohibited from using a prior juvenile adjudication, while a “State’s attorney across the street” is not “although he [or she] supposedly is operating under the enforceable prohibitions of the same Amendment.” *Mapp v. Ohio*, 367 U.S. 643, 657 (1961).

Third, the majority position—holding that the Sixth Amendment does not preclude the use of a prior juvenile adjudication to increase a criminal sentence—undermines the fundamental constitutional principle that “only a jury, not a judge, may find facts that increase the maximum penalty.” *Mathis*, 136 S.Ct. at 2246.

In sum, this case presents an ideal vehicle for this Court to address whether the Sixth and Fourteenth Amendments preclude a trial court from using a prior non-jury juvenile adjudication to increase a defendant’s maximum sentence for a subsequent criminal conviction.

I. This Court should grant the writ to resolve a conflict as to whether a trial court may use a prior juvenile adjudication to increase the maximum sentence for a subsequent criminal conviction.

Two decades ago this Court held in *Apprendi*, 530 U.S. 466, 476, 490, that “the constitutional protections of surpassing importance” of the Sixth and Fourteenth Amendments require that any fact used to

increase a defendant's sentence beyond the statutory maximum must have been found by a jury beyond a reasonable doubt. The only exception to this rule is that a judge may find that a defendant had suffered "a prior conviction." *Id.* at 490. The *Apprendi* Court reasoned that the use of a prior conviction to increase a sentence beyond the statutory maximum is permissible under the Sixth Amendment because the defendant would have had the right to a jury trial, among other rights, at the prior proceeding. *Id.* 488. *See Jones v. United States*, 526 U.S. 227, 249 (1999) ("unlike 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").

This Court noted that it is the right to "trial by jury" that serves to guard against the "spirit of oppression and tyranny" found in unchecked governmental power. *Apprendi* at 477. The *Apprendi* Court aptly summarized, albeit in a different context, the constitutional problem with using a non-jury juvenile adjudication to increase a defendant's sentence:

[T]here 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 the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.

Apprendi, 530 U.S. at 496.

A. There is a deeply entrenched split of authority among federal and state courts over whether a trial court's use of a prior juvenile adjudication to increase a subsequent criminal sentence runs afoul of *Apprendi*.

The California Court of Appeal in this case held that a trial court is not precluded from increasing a defendant's sentence beyond the statutory maximum based on a prior juvenile adjudication. See Appendix A 9-11. The appellate court relied on the California Supreme Court's decision in *Nguyen*, 209 P.3d at 959, which held "the absence of a constitutional or statutory right to jury trial under the juvenile law does not, under *Apprendi*, preclude the use of a prior juvenile adjudication of criminal misconduct to enhance the maximum sentence for a subsequent adult felony offense by the same person."

California's position is the majority position. The Third, Fourth, Sixth, Seventh, Eight, and Eleventh Circuits, as well as the high courts of Illinois, Indiana, Kansas, Minnesota, and Washington have all held that a prior juvenile adjudication may be used to increase an adult criminal sentence beyond the statutory maximum without violating *Apprendi*. See *Welch v. United States*, 604 F.3d 408 (7th Cir. 2010); *United States v. Wright*, 594 F.3d 259 (4th Cir. 2010); *United States v. Crowell*, 493 F.3d 744 (6th Cir. 2007); *United States v. Burge*, 407 F.3d 1183 (11th Cir. 2005); *United States v. Jones*, 332 F.3d 688

(3d Cir. 2003); *People v. Jones*, 67 N.E. 256, (Ill. 2016); *State v. Weber*, 149 P.3d 646 (Wash. 2006); *State v. McFee*, 721 N.W.2d 607 (Minn. 2006); *Ryle v. State*, 842 N.E.2d 320 (Ind. 2005); *State v. Hitt*, 42 P.3d 732 (Kan. 2002).

The Ninth Circuit and two state high courts have rejected the majority position. *See United States v. Tighe*, 266 F.3d 1187 (9th Cir. 2001); *State v. Hand*, 73 N.E.3d 448 (Ohio 2016); *State v. Brown*, 879 So.2d 1276 (La. 2004). The minority view holds that juvenile adjudications may not be used to increase a subsequent adult conviction beyond the statutory maximum because juvenile proceedings do not afford “the procedural necessities of a jury trial and proof beyond a reasonable doubt.” *Tighe*, 266 F.3d at 1194.

The majority view is no longer tenable in light of this Court’s decisions in *Mathis*, 136 S. Ct. 2243 and *Descamps*, 570 U.S. 254. In *Descamps*, this Court held that “[t]he Sixth Amendment contemplates that a jury—not a sentencing court” will determine the facts underlying a prior conviction. *Descamps*, 570 at 269. In *Mathis*, this Court reiterated that allowing a trial court to increase a defendant’s sentence based on facts that were not found by a jury would raise “serious Sixth Amendment concerns” because “only a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction.” *Id.* at 2252.

1. The majority position—the use of a nonjury juvenile adjudication to increase a defendant’s maximum sentence does not violate the Sixth Amendment under *Apprendi*.

The majority of courts to address this issue—six federal circuit courts and six state high courts—have held that the use of a prior juvenile adjudication to increase a criminal sentence beyond the statutory maximum does not offend this Court’s decision in *Apprendi*.

These courts reason that although a juvenile adjudication is not entered in a proceeding where the minor had the right to a jury trial, juvenile proceedings have “more than sufficient [safeguards] to ensure the reliability that *Apprendi* requires.” *United States v. Smalley*, 294 F.3d 1030, 1033 (8th Cir. 2002). The *Smalley* court explained, “while we recognize that a jury does not have a role in trials for juvenile offenses, we do not think that this fact undermines the reliability of such adjudications in any significant way.” *Ibid.*

Since *Smalley*, five other federal circuits and six states have adopted its reasoning and held that non-jury juvenile adjudications are “sufficiently fair and reliable” such that using them to increase a subsequent criminal sentence does not violate the federal Constitution. *Nguyen*, 209 P.3d at 958. These courts have each focused on the presumed reliability of a juvenile adjudication, and eschewed the notion that *Apprendi*’s prior conviction rule hinged on the right to a jury trial. *See Welch*, 604 F.3d at 426; *Wright*, 594 F.3d at 264 (juvenile

adjudications are “reliable” for the purposes of *Apprendi*); *Crowell*, 493 F.3d at 750 (juvenile proceedings “provide sufficient procedural safeguards to satisfy the reliability requirement that is at the heart of *Apprendi*”); *Burge*, 407 F.3d at 1190 (same); *Jones*, 332 F.3d at 696 (same).

2. The minority position—the use of a nonjury juvenile adjudication to increase a defendant’s maximum sentence violates the Sixth Amendment under *Apprendi*.

The Ninth Circuit was the first circuit court to address the issue of whether a juvenile adjudication qualified as a prior conviction under *Apprendi*. In *Tighe*, 266 F.3d 1187, the court explained that the use of prior convictions to increase a defendant’s sentence is unique among sentencing enhancements because “unlike virtually any other consideration used to enlarge the possible penalty for an offense,’ ... prior convictions have been, by their very nature, subject to the fundamental triumvirate of procedural protections intended to guarantee the reliability of criminal convictions: fair notice, reasonable doubt and the right to a jury trial.” *Id.* at 1193. The court explained that *Apprendi* “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 concluded 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 and proof beyond a reasonable doubt. Juvenile adjudications that do not afford the right to a jury trial and a beyond-a-reasonable-doubt burden of proof, therefore, do not fall within *Apprendi*’s ‘prior conviction’ exception.” *Tighe*, 266 F.3d at 1194.

Two state high courts have adopted the reasoning of *Tighe*. In *Brown*, 879 So.2d at 1289, the Louisiana Supreme Court held that it was “incongruous and illogical to allow a non-criminal adjudication of a juvenile to serve as a criminal sentencing enhancer.” The court aptly noted that it would be “contradictory and fundamentally unfair to provide youths with fewer procedural safeguards in the name of rehabilitation and then to use adjudications obtained for treatment purposes to punish them more severely as adults.” *Ibid.*

Similarly, the Ohio Supreme Court held that “[u]nder *Apprendi*, a fact cannot be used to increase the penalty for a crime beyond the prescribed statutory maximum unless it is submitted to a jury and proved beyond a reasonable doubt or is admitted to by the defendant.” *Hand*, 73 N.E.3d at 457. The Ohio high court explained, “at the heart of *Apprendi*’s narrow exception is the concept that the prior conviction was the result of a proceeding in which the defendant had the right to

a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt.” *Id.* at 458. The court concluded, “the proper inquiry under *Apprendi* is not simply whether juvenile adjudications are deemed to be reliable, but whether the juveniles were afforded the right to a jury.” *Ibid.*

Therefore, the minority view holds that under *Apprendi* it is beside the point that juvenile proceedings are reliable. Rather, the dispositive question is whether the defendant was afforded the right to a jury trial at the prior proceeding. Justice Kennard’s dissent in *Nguyen* cogently explains why the use of prior juvenile adjudications to increase a defendant’s sentence is antithetical to the reasoning of *Apprendi*:

The majority’s reasoning here—that prior juvenile court adjudications may constitutionally be used because they have been “reliably adjudicated in proceedings that included … every substantial safeguard” *except* the right to jury trial [citation]—misses the point. “The Sixth Amendment jury trial right … does not turn on the relative rationality, fairness, or efficiency of potential factfinders.” [Citation.] The problem here is not that prior juvenile court adjudications are unreliable. The problem is that the facts underlying a juvenile court adjudication were determined by “a single employee of the State,” namely, the judge [citation], which is contrary to “the system envisioned by a Constitution that guarantees *trial by jury*” [citation].

Nguyen, 209 P.3d at 962 (emphasis in original.)

3. **This Court clarified the scope of *Apprendi*'s prior conviction rule in *Descamps* and *Mathis*, and made clear that under *Apprendi* it the existence of the right to trial by jury at the prior proceeding, and not the presumed reliability of the proceeding itself, that is controlling.**

In *Descamps*, 570 U.S. at 257, the issue was whether a prior California burglary conviction qualified as a “violent felony” enhancement under 18 U.S.C. §924(e). For purposes of the enhancement, the prior burglary conviction must have involved proof of an unlawful entry. *Id.* at 265. Because the California burglary statute did not require unlawful entry, it was not clear from the face of the prior conviction whether it qualified under 18 U.S.C. §924(e). *Id.* at 258-259. The trial court judge examined the plea colloquy and discovered that the prosecutor had described the offense as involving “breaking and entering.” *Id.* 259. The court found this fact satisfied the unlawful entry requirement under 18 U.S.C. §924(e) and imposed the violent felony sentence enhancement. *Ibid.*

This Court held that in determining whether to impose a prior conviction enhancement, the trial court was not permitted to go beyond the facts either admitted by the defendant after waiving a jury trial or those found true by a jury. *Descamps*, 570 U.S. at 258. Although the defendant’s prior conviction was presumably the result of a fair and reliable proceeding, this Court held that “[t]he Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts,

unanimously and beyond a reasonable doubt.” *Id.* at 269. This Court held that under *Apprendi* any finding that increases the maximum statutory punishment “would (at the least) raise serious Sixth Amendment concerns if it went beyond merely identifying a prior conviction.” *Ibid.* Thus, even the trial court’s limited inquiry into the plea colloquy was a violation of the defendant’s right to a jury trial. *Id.* at 277-278.

Three years later, this Court reaffirmed its restrictive view of *Apprendi* in *Mathis*, 136 S. Ct. 2243. The issue in *Mathis* was similar to the issue in *Descamps*—whether a prior state law burglary conviction qualified as a violent felony under 18 U.S.C. §924(e). *Id.* at 2248-2251. Under 18 U.S.C. §924(e), a burglary is a violent felony if it is of a “building or other structure.” *Id.* at 2250. In *Mathis*, the defendant had a prior Iowa burglary conviction. *Ibid.* Since the Iowa statute proscribed burglary of more than just buildings, such as air, water, and land vehicles, it was not clear whether the defendant’s conviction was a violent felony under 18 U.S.C. §924(e). *Ibid.* The trial court imposed the enhancement after it inspected records from the defendant’s prior conviction and determined that the defendant had burglarized buildings. *Ibid.* This Court again held that the trial court erred when it increased the defendant’s sentence based on facts that were never determined by a jury. *Id.* at 2252. This Court stressed that

using such non-jury facts to increase a defendant’s sentence “would raise serious Sixth Amendment concerns” because “only a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction.” *Id.* at 2252.

Therefore, *Mathis* and *Descamps* clarified that the heart of *Apprendi* is not, as the majority of lower courts have held, whether the prior proceeding was reliable, but whether the facts underlying the prior proceeding were found by “*a jury, not a judge ...*” *Mathis*, 136 S.Ct. at 2246 (emphasis added). Consequently, the majority position—that the facts underlying a juvenile adjudication, found true by a single judge, are reliable enough to be used to increase a defendant’s sentence—is wholly at odds with this Court’s decisions in *Apprendi*, *Mathis*, and *Descamps*.

In sum, this Court has affirmed that its decision in *Apprendi* is firmly rooted in the Sixth Amendment right to a jury trial. Consequently, this Court should hold that since juvenile adjudications do not encompass facts that were found true by a jury, or by a judge after a waiver of the right to a jury trial, the use of juvenile adjudications to increase a defendant’s sentence beyond the statutory maximum violates the Sixth Amendment right to a jury trial. *See Apprendi*, 530 U.S. at 490; *Descamps*, 570 U.S. at 269; *Mathis*, 136 S. Ct. at 2252.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to review the judgment of the California Court of Appeal, Second Appellate District, Division Two.

Dated: August 26, 2020

Respectfully submitted,

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