No. _____

# In The
# Supreme Court of the United States

ANTHONY PENTON,

*Petitioner,*

v.

A. MALFI,

*Respondent.*

**Petition For A Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether evidence covered by *Brady* v. *Maryland*, 373 U.S. 83 (1963), and withheld by prosecutors is considered suppressed under the Fifth Amendment regardless of whether the defendant already knew or should have known of the substance of the evidence.

2. Whether the Sixth Amendment permits judges to enhance a prison sentence based on the nature of a defendant's prior convictions that were not found by the jury beyond a reasonable doubt.

## RELATED PROCEEDINGS

*Penton* v. *A. Malfi*, No. 19-56201 (9th Cir.) (opinion issued April 16, 2021; order denying rehearing issued May 26, 2021).

*Penton* v. *Kernan*, No. 3:06-cv-00233-WQH-RBM (S.D. Cal.) (order granting certificate of appealability issued December 4, 2019; order denying petition for habeas corpus issued September 12, 2019; order granting motion for relief from judgment issued August 28, 2018; order denying petition for habeas corpus issued December 26, 2007).

*In re Anthony Penton on Habeas Corpus*, No. S129053 (Cal.) (order denying petition for habeas corpus issued January 18, 2006).

*In re Anthony Penton on Habeas Corpus*, No. D044788 (Cal. Ct. App.) (order denying petition issued September 14, 2004).

*In the Matter of the Application of Anthony Penton*, No. HC 17680, SCD 147553 (Cal. Super. Ct.) (order denying petition for writ of habeas corpus issued May 5, 2004).

*People* v. *Edward Jones et al.*, No. S111271 (Cal.) (order denying petition for review issued January 15, 2003).

*People* v. *Edward Jones et al.*, No. D038250 (Cal. Ct. App.) (order denying petition for writ of habeas corpus on direct appeal and affirming superior court judgment issued October 2, 2002).

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**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

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Petitioner Anthony Penton respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## OPINIONS BELOW

The Ninth Circuit's opinion affirming the denial of Petitioner's petition for habeas corpus (App. 1) is unpublished but is available at 851 Fed. Appx. 662. The Ninth Circuit's order denying rehearing (App. 104) is unpublished.

The district court's order adopting the magistrate judge's Report and Recommendation (App. 15) is unpublished but is available at 2019 WL 4345871. The magistrate judge's report and recommendation recommending denial of habeas corpus (App. 39) is available at 528 F. Supp. 2d 1020. The district court's order granting Petitioner's motion for certificate of appealability to the Ninth Circuit (App. 9) is unpublished but is available at 2019 WL 6611507.

Petitioner's petition for habeas corpus in California state court was denied, and the opinions of the superior court, the Court of Appeal, and the California Supreme Court denying his petition are attached in the Appendix hereto at App. 105–114. The orders of the Court of Appeal and California Supreme Court on Petitioner's direct appeal from his conviction and sentence are attached in the Appendix hereto at App. 115–151.

## JURISDICTION

The Ninth Circuit entered judgment on April 16, 2021. App. 1. A petition for rehearing and rehearing en banc was denied on May 26, 2021. App. 104. On July 19, 2021, this Court ordered that the deadline for filing a petition for a writ of certiorari is extended to 150 days from the date of the court of appeals order denying a timely petition for rehearing, including the date of the filing of this petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the U.S. Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]"

## INTRODUCTION

This case presents two important questions requiring the Court's review. The first question relates to this Court's foundational decision in *Brady* v. *Maryland*, 373 U.S. 83 (1963), and its recognition of prosecutors' burden to timely discover and disclose impeachment evidence. The second question relates to this Court's landmark decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and whether criminal defendants' sentences may be increased by a judge based on a *sua sponte* finding that a defendant's past crimes are numerous and of increasing seriousness.

The first question is whether a prosecutor may suppress exculpatory police reports when the defendant "already knew" the contents of those police reports. This Court has already held in *Brady* that the answer is no. *Brady* imposes an absolute duty on the prosecutor to disclose exculpatory evidence, directs that a prosecutor must always err on the side of disclosure,

and places on the prosecution the burden of obtaining and disclosing exculpatory evidence. Despite the Court's direction, some courts of appeals—including the Ninth Circuit in this case—have eroded that due process protection by allowing prosecutors to withhold *Brady* materials if the defendant or his lawyer knew or could have known about the substance of the materials.

This Court should grant certiorari to prevent further erosion of *Brady*. Some courts have recognized this Court's clear message and have declined to read a knowledge-based limit into *Brady*'s protections. But many other courts have eroded this Court's *Brady* jurisprudence, carving out a broad *Brady* exception for materials that contain any facts that are—or may be—within a defendant's knowledge. These courts have *de facto* shifted the prosecutor's burden to disclose, pressuring defendants to waive their Fifth Amendment self-incrimination right by testifying, and incentivizing prosecutors to withhold *Brady* evidence. This Court should halt the creeping erosion of defendants' *Brady* protections and clarify that *Brady*'s protections apply to all defendants, regardless of their diligence or whether they "already knew" about the exculpatory or impeachment information. This issue places the integrity and reputation of the American justice system at stake, particularly when lower court limitations on *Brady* are increasing, even while the nation is seeing more and more *Brady* violations. *See* Annual Report, National Registry of Exonerations (Mar. 30, 2021).

In this particular case, as discussed further *infra*, the courts below disregarded *Brady* when they approved prosecutors' withholding of police reports that corroborate Petitioner's defenses at trial on the grounds that Petitioner "already knew" or should have known the underlying substance of the reports and therefore should have pursued those facts by taking the stand. The rule espoused by the Ninth Circuit would mean that essentially *any* withheld material corroborating an accused's defense would be immune from a *Brady* claim. The accused would lose the crucial protections that allow them to obtain supplementary or documentary evidence from sources such as the police. Such an approach also means that the accused would face sustained pressure to testify, in further conflict with the Fifth Amendment.

The second question, unrelated to the first, is also a frequently recurring issue of national importance, and implicates this Court's landmark decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). The question is whether a judge, unaided by the jury, can enhance a defendant's sentence based on a *sua sponte* finding that the defendant's prior convictions are numerous and of increasing seriousness. This Court, through its extensive *Apprendi* jurisprudence, has squarely settled that the answer is no: 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. And yet the courts of appeals, including the Ninth Circuit in this case, have whittled away at the Court's *Apprendi* jurisprudence

by allowing sentencing based on facts not derived from the jury's verdict, reasoning that the Supreme Court's pre-*Apprendi* opinion in *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998) contemplates this judicial power.

This Court should grant certiorari to clarify that it meant what it said when it has consistently held since *Apprendi* that a sentencing court may not impose extra punishment based on its own conclusions about the nature or basis of the criminal defendant's prior convictions. The sentencing court's role is limited to identifying those facts that were established by virtue of the conviction itself—that is, facts the defendant admitted or that the jury was necessarily required to find to render a guilty verdict.

For these reasons, certiorari should be granted.

## STATEMENT

The State of California has imprisoned Petitioner Anthony Penton for almost 20 years, with over 20 more years to go, for a robbery he did not commit. The case record is rife with instances of prosecutorial abuse and judicial indifference thereto. The injustice is especially acute in light of signed declarations by key trial witnesses that Mr. Penton was framed for the crimes for which he was sentenced. App. 189–198.

On November 1, 2000, Mr. Penton and Edward Jones were charged with robbery, attempted robbery,

and false imprisonment. App. 176–177. The charges arose out of a June 26, 1999 event wherein the Symbolic Motors car dealership in La Jolla, California was robbed by whom the victims described as two black males, each carrying a gun and one using a cell phone during the robbery. App. 40–41. When police arrived at Symbolic Motors, the perpetrators were gone. Detective Johnny Keene of the San Diego Police Department ("SDPD") led the investigation into the Symbolic Motors robbery. App. 41. Unlike for Mr. Jones—whose fingerprints were found on a plastic bag left at the scene—there was no physical evidence linking Mr. Penton to the robbery. App. 41.

Trial began on November 1, 2000 in the California Superior Court for the County of San Diego. App. 44–45. To link Mr. Penton to the crime, the prosecution relied on three disparate stories: (1) that Mr. Penton was an associate of Mr. Jones, based on the fact that three days after the robbery, Mr. Jones was arrested in a rental car issued to Mr. Penton by Enterprise Leasing; (2) that two eyewitness identifications, one of which was made more than a year after the robbery, pointed to Mr. Penton as Mr. Jones's co-conspirator; and (3) that cell phone records from the time and place of the robbery were associated with Mr. Penton and Thess Good, another person investigated by police but not named defendant.

Before trial, the trial judge granted the prosecutor's *in limine* motion to exclude as hearsay all evidence related to Mr. Penton's attempts on the morning of June 29, 1999—the day Mr. Jones was arrested—to

immediately report to Enterprise Leasing and the police that his Enterprise rental car had been stolen. App. 45. Such evidence would have weakened Mr. Penton's link to Mr. Jones by showing that they were not "partners in crime," as the prosecution's story went, because Mr. Penton immediately went to the police to report Mr. Jones when his rental car went missing. Indeed, at the motion hearing, the judge asked "at what point in time vis-à-vis the arrest of Mr. Jones in the automobile was the report filed [by Mr. Penton] with [Enterprise]" and whether Mr. Penton made a police report. App. 173–174. The prosecutor said he did not know of any such police report. *Id.*

In fact, a police report exactly matching this description, the Spear Report, was taken, but produced by the prosecution only on the last day of evidence at trial. That report shows that Mr. Penton reported his car stolen almost contemporaneously with "the pursuit" of Mr. Jones. App. 206. In denying Mr. Penton's motion for a new trial, the trial judge indicated that these facts were crucial, stating that "the most telling" evidence of Mr. Penton and Mr. Jones's supposed collaboration was testimony from a key witness that she called Mr. Penton at "about five" o'clock "in the evening"—much later on in the day than Mr. Penton had actually reported per the Spear Report—to let him know that Mr. Jones had been arrested in his car.[1] App.

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[1] As Mr. Penton has argued consistently in the courts below—and maintains—he did not have the opportunity to cross-examine Janice Thomas's testimony, in violation of the Confrontation Clause. *See* App. 5–6. Ms. Thomas has since recanted her

154; *Penton* v. *Malfi*, No. 19-56201, ECF 8-4 (9th Cir. Mar. 9, 2020), at IV-ER667-668. Under the prosecution's story credited by the judge, Mr. Penton reported his car stolen only later in the day in an attempt to distance himself from Mr. Jones and the robbery.

The prosecution also disclosed on the last day of evidence at trial another police report, the Good Report, which would have cast serious doubt on the eyewitness identification and cell phone records that the prosecution relied upon. The Good Report, authored by Sergeant Anthony Johnson, detailed police interactions with Thess Good during the Symbolic Motors robbery investigation. The Good Report shows that Mr. Good was so physically similar to Mr. Penton that the police and those they talked to during their investigation confused the identities of the two men. App. 199–203.

The Good Report would have also impeached the two already questionable eyewitness identifications offered by the prosecution at trial. On August 30, 1999, Detective Keene presented a photo lineup to witnesses of the robbery containing pictures of Mr. Penton and four other men; *four out of five* witnesses who later testified at trial did not identify Mr. Penton as one of the perpetrators. On August 30, 2000—more than a year after the Symbolic Motors robbery—Detective Keene conducted a live lineup for the witnesses of the robbery, consisting of Mr. Penton and four other men.

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statement and has signed a declaration indicating that she falsely testified against Mr. Penton under duress. App. 196–198.

App. 43–44. Only two out of five witnesses who testified at trial identified Mr. Penton in the live lineup—and one of the two had identified another man in the August 1999 lineup. *Id*.

The Good Report also would have discredited the prosecution's reliance on cell phone records to implicate Mr. Penton in the robbery because those cell phone records equally implicated Thess Good. Those cell phone records consisted of phone numbers—registered under aliases or unknown names—which Detective Keene associated with Mr. Penton and Mr. Good, and were numbers that made phone calls in La Jolla around the time of the robbery. The Good Report makes clear what the call records and recently developed evidence show: Thess Good was the real perpetrator, not Mr. Penton.[2]

Mr. Penton was convicted by a jury, and sentenced to 54 years and 8 months in prison, after the trial judge denied his motion for new trial. App. 47. The Court of Appeal reduced Mr. Penton's sentence to 52 years and 8 months to reflect pre-sentence credits, but otherwise affirmed the judgment. App. 48. Mr. Penton's Petition for Review in the California Supreme Court was denied on January 15, 2003. Mr. Penton then filed a habeas petition in state superior court on April 11, 2004, which was denied on May 5, 2004. The California Court of Appeal affirmed that denial without a reasoned

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[2] Mr. Penton's co-defendant, Mr. Jones, has signed a declaration that he committed the robbery with Thess Good, not Mr. Penton. App. 192–195.

opinion on September 14, 2004. The California Supreme Court, again without a reasoned opinion, denied Mr. Penton's petition on January 18, 2006. Mr. Penton's conviction became final on March 18, 2006. App. 105–151.

On October 6, 2006, Mr. Penton filed the operative federal habeas petition at issue in this appeal in the U.S. District Court for the Southern District of California, under 28 U.S.C. §§ 1331, 2241, and 2254. On August 31, 2007, the magistrate judge recommended the denial of Mr. Penton's petition on all grounds. App. 40. The district court adopted most of the magistrate judge's reasoning, including the portions affirming the suppression of the Spear and Good Reports. App. 15–24. The Ninth Circuit affirmed on this point as well. App. 3.

The Ninth Circuit also affirmed Mr. Penton's enhanced sentence, imposed by the trial judge after finding, *sua sponte*, that Mr. Penton's prior convictions were "numerous and of increasing seriousness" under California's Determinate Sentencing Law. App. 2. This was one of several enhancements to Mr. Penton's sentence, including under California's Three Strikes Law.

Mr. Penton had objected in the proceedings below that the trial judge could not enhance his sentence based on a finding that his prior convictions were "numerous and of increasing seriousness," since such would be contrary to this Court's jurisprudence in *Apprendi*. The jury found Mr. Penton guilty only of the charged crimes related to the Symbolic Motors robbery,

making no judgment regarding the nature of his prior convictions. App. 164–171.

The Ninth Circuit denied rehearing and rehearing en banc, and this petition followed.

## REASONS FOR GRANTING THE PETITION

### I. THIS COURT SHOULD PREVENT LOWER COURTS FROM ERODING *BRADY* BY ALLOWING PROSECUTORS TO SUPPRESS INFORMATION THAT DEFENDANTS KNEW OR SHOULD HAVE KNOWN

The Ninth Circuit's rejection of Mr. Penton's *Brady* claim raises the important question of whether prosecutors can withhold evidence on the grounds that the defendant already knew or should have known of the evidence. This would add a new burden to defendants in addition to the three components of a successful *Brady* claim: "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler* v. *Greene*, 527 U.S. 263, 281–282 (1999).

Under the rule espoused by the Ninth Circuit in this case, suppressing exculpatory or impeaching evidence does not violate *Brady* if the defendant "already knew" or should have known about the exculpatory or impeaching evidence. App. 3 (citing *Milke* v. *Ryan*, 711 F.3d 998, 1017 (9th Cir. 2013)). In other words, the

prosecutors were free to withhold police reports that undermine the timeline of events, eyewitness testimony, and cell phone records they put forth implicating Mr. Penton, because Mr. Penton knew about certain facts contained in the police reports and therefore could have testified as to those facts on the stand.

But this Court has been clear in *Brady* v. *Maryland* that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). Accordingly, this Court has imposed an absolute duty on the prosecutor to disclose impeachment or exculpatory evidence. *United States* v. *Bagley*, 473 U.S. 667, 676–677 (1985). This Court has also counseled prosecutors to err "in favor of disclosure." *United States* v. *Agurs*, 427 U.S. 97, 108 (1976); *Kyles* v. *Whitley*, 514 U.S. 419, 439 (1995). And this Court has squarely placed on the prosecution the burden of obtaining and disclosing evidence "known to the others acting on the government's behalf in the case, including the police." *Kyles*, 514 U.S. at 437.

The Court recognizes that the integrity of the American justice system rises and falls with the integrity of the prosecutor, who is a "representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Strickler*, 527 U.S. at 281 (quoting *Berger* v. *United States*, 295

U.S. 78, 88 (1935)). In other words, the principles of disclosure and truth that animate *Brady* are of paramount importance to our justice system.

The decision before the Court represents a marked erosion of this precedent, providing no recourse for defendants to obtain relevant documentary information and thereby immunizing a prosecutor who decides to withhold evidence that includes information that a defendant may know. This approach changes the fundamental protections offered by *Brady*. And it is spreading across the lower courts.

### A. The Ninth Circuit Denied Mr. Penton's *Brady* Claim on the Basis That He Already "Knew" the Information Suppressed

Mr. Penton's *Brady* claim focuses on two police reports withheld by the prosecutor until the last day of trial. One report included information regarding a call Mr. Penton made to police—information that conflicted with the theory of the case that the prosecution provided. The other report detailed hiccups in the police investigation caused by mistaken identity between Mr. Penton and another man named Thess Good.

Citing Ninth Circuit precedent, the Ninth Circuit held that neither of these reports were suppressed for *Brady* purposes because Mr. Penton "already knew" the facts within the reports. This test has no precedent.

Mr. Penton was convicted on the basis of three primary pieces of evidence: Mr. Penton's relationship with Mr. Jones, witness identification of Mr. Penton,[3] and phone records. Unlike for Mr. Jones—whose fingerprints were found on a plastic bag left at the scene—there was no physical evidence linking Mr. Penton to the crime. App. 41. Accordingly, any evidence that goes to the weight of these three pieces of evidence is material.[4]

Yet at trial, the prosecutor suppressed two key police reports with material evidence weakening the strength of the circumstantial and eyewitness evidence that formed the entirety of the State's case against Mr. Penton.

*The Spear Report.* The first suppressed piece of evidence was a report by Officer Spear, an SDPD police officer who arrested Mr. Jones in the Enterprise rental car stolen from Mr. Penton. During the arrest, Officer Spear learned that Mr. Penton had reported this car as stolen. Officer Spear's report accordingly includes details related to the theft of the car and Mr. Penton's

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[3] "Wrongful convictions studies and case profiles are replete with cases showing that eyewitness identifications can be unreliable and lead to wrongful convictions. According to a recent study, eyewitness misidentifications were involved in seventy-two percent of all DNA exonerations." Cynthia E. Jones, *Here Comes the Judge: A Model for Judicial Oversight and Regulation of the* Brady *Disclosure Duty*, 46 Hofstra L. Rev. 87, 115 (2017).

[4] *See Banks* v. *Dretke*, 540 U.S. 668, 701 (2004) (discussing greater magnitude of prejudice in case where suppressed material was not additional to "considerable forensic and other physical evidence link[ing] the defendant to the crime") (quoting *Strickler*, 527 U.S. at 293).

attempt to report the theft, particularly noting that "[m]inutes after the pursuit [of Mr. Jones], Penton called police and wanted to report the car stolen." App. 206. Officer Spear's report of the approximate time of Mr. Penton's call to police conflicts with the prosecution's theory of the case that Mr. Penton and Mr. Jones were "partners in crime."

In sum, the Spear Report is material because it provides police evidence weakening the prosecution's theory of the case (i.e., that Mr. Penton and Mr. Jones were engaged in a criminal partnership). In other words, the Spear Report shows that the prosecutor presented an incomplete record to both the court and the jury. Because the Spear Report was material and it was not disclosed until the last day of evidence, Mr. Penton argued that it was suppressed for purposes of *Brady*.

*The Good Report.* The second suppressed piece of evidence was another police report. This report was authored by SDPD Sergeant Johnson, who conducted surveillance on Mr. Penton following the arrest of Edward Jones. App. 199–203. Sergeant Johnson's report detailed the police's surveillance of what they thought was Mr. Penton's home, including multiple instances of mistaken identity. For example, Johnson explained how he "saw a black male" that "looked like the photograph of Anthony Penton." App. 200. However, when Johnson saw the man again, he discovered that the man "was not Anthony Penton, but an entirely different person named Thess Good." App. 201. Additionally, Johnson talked with a witness who, looking at a picture of *Mr. Penton*, identified Mr. Penton as the man

who Johnson had seen go into the house and later discovered was Thess Good. App. 200. Johnson learned that both Thess Good and Mr. Penton used the same nickname and "look[] very much" alike. App. 201.

The Good Report is material because it provides evidence documenting (1) the police's difficulty investigating Mr. Penton due to the physical similarity between and same names used by Mr. Penton and Thess Good, and (2) the police's cooperation with Thess Good. The Good Report thus impeaches the witness identifications, exculpates Mr. Penton, and inculpates Thess Good—the same man that Mr. Penton has learned, thanks to recently uncovered actual innocence evidence, was Mr. Jones's real co-conspirator in the Symbolic Motors robbery. App. 193. Like the Spear Report, the Good Report was not disclosed until the last day of evidence. Accordingly, Mr. Penton argued that the prosecution suppressed the Good Report.

In a page-long analysis that ostensibly covered both reports, the Ninth Circuit held that the prosecutor did not violate *Brady*. App. 3. The Ninth Circuit found that the police reports were not material because, "[w]hile Petitioner argues that the prosecutor's untimely production of the reports materially impacted his defense, the state court reasonably determined that Petitioner *already knew the information contained within the reports* and could have presented it had he elected to take the stand." *Id.* (citing *Milke*, 711 F.3d at 1017) (emphasis added). The Ninth Circuit went on to explain that Mr. Penton "already knew when he had reported his rental car as stolen and he

already knew Thess Good, a friend of his discussed in one of the reports." *Id.* "Considering the substantial incriminating evidence presented at trial, and the fact that Petitioner chose not to pursue the information contained within the reports that he already knew, earlier disclosure of the reports would not have reasonably resulted in a different outcome." *Id.* at 3–4.

In sum, the Ninth Circuit declined to find that the withheld police reports were material because Mr. Penton purportedly already "knew" the facts disclosed within the police reports. Mr. Penton knew that he reported that his rental car had been stolen. Mr. Penton knew Thess Good. Accordingly, under the Ninth Circuit's reasoning, documentary evidence setting forth police accounts of facts touching upon these two issues were not suppressed in violation of *Brady*.

### B. The Ninth Circuit's Approach Reflects a Nationwide Erosion of *Brady* Through the "Due Diligence" Exception

The Ninth Circuit's approach reflects what courts and scholars have referred to as the "due diligence" exception to *Brady*. The exact contours of the "due diligence" exception vary by jurisdiction, but courts applying it generally inquire into whether the defendant knew about the information included in suppressed material, whether the defendant could have discovered the material on her own, or whether the defense had equal opportunity to discover the material. *See* Kate Weisburd, *Prosecutors Hide, Defendants Seek:*

*The Erosion of* Brady *Through the Defendant Due Diligence Rule*, 60 UCLA L. Rev. 138, 141 (2012).

The First, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits have adopted versions of a due diligence *Brady* carve-out. *See*, *e.g.*, *United States* v. *Cruz-Feliciano*, 786 F.3d 78, 87 (1st Cir. 2015) ("*Brady* does not require the government to turn over information which, with any reasonable diligence, the defendant can obtain himself.") (internal quotation marks omitted); *United States* v. *Catone*, 769 F.3d 866, 872 (4th Cir. 2014) (holding that defendants must demonstrate that evidence was "known to the government but not the defendant" and did not "lie[] in a source where a reasonable defendant would have looked"); *Holly* v. *Collins*, 9 F.3d 103 (5th Cir. 1993) ("Awareness of the information purportedly suppressed neutralizes any otherwise impropriety for purposes of a *Brady* claim implicating evidence of that information."); *Carter* v. *Bell*, 218 F.3d 581, 601 (6th Cir. 2000) ("Further, there is no *Brady* violation if the defendant knew or should have known the essential facts permitting him to take advantage of the information in question, or if the information was available to him from another source."); *Petty* v. *City of Chicago*, 754 F.3d 416, 423 (7th Cir. 2014) ("To establish that evidence was suppressed, a plaintiff must demonstrate that: (1) the state failed to disclose known evidence before it was too late for [a defendant] to make use of the evidence; and (2) the evidence was not otherwise available to [a defendant] through the exercise of reasonable diligence.") (internal quotation marks omitted); *Felker* v. *Thomas*, 52

F.3d 907, 910 (11th Cir.), *op. supplemented on denial of reh'g*, 62 F.3d 342 (11th Cir. 1995) ("We have held numerous times that there is no suppression, and thus no *Brady* violation, if either the defendant or his attorney knows before trial of the allegedly exculpatory information. . . . Because the information in question was not suppressed from Felker's own personal knowledge, his *Brady* claim fails for that reason.").

Other circuits, such as the Second, Tenth, and District of Columbia Circuits, have rejected the due diligence rule, placing the *Brady* duty on prosecutors alone, not on defendants. *See*, *e.g.*, *Banks* v. *Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 1995) ("However, the prosecution's obligation to turn over the evidence in the first instance stands independent of the defendant's knowledge."). Some courts, in rejecting the "due diligence" exception, have emphasized that the "requirement of due diligence was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Amado* v. *Gonzalez*, 758 F.3d 1119, 1137 (9th Cir. 2014) (quoting 28 U.S.C. § 2254(d)).

### C. The Due Diligence Exception Conflicts with this Court's *Brady* Jurisprudence

The Ninth Circuit's reliance on Mr. Penton's supposed "knowledge" of the information contained in the police reports is in conflict with *Brady* and its progeny. This Court has never endorsed a rule excusing *Brady* violations when the defendant could have gained

access to the evidence himself, and none of this Court's cases ever turned on the diligence of the defendant in pursuing evidence he "already knew."

The Supreme Court clearly stated in *Brady* itself that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." *Brady*, 373 U.S. at 87. There is no exception in *Brady* for evidence that a defendant knew or could have discovered upon due diligence. On the contrary, the Court has held that a prosecution's duty to disclose is "broad." *Strickler*, 527 U.S. at 281.

In fact, the Supreme Court "has never required a defendant to exercise due diligence to obtain *Brady* material," *Lewis* v. *Conn. Comm'r of Corr.*, 790 F.3d 109, 121 (2d Cir. 2015), and has declined to adopt rules creating a regime in which "prosecutor may hide, defendant must seek." *Banks* v. *Dretke*, 540 U.S. 668, 696 (2004).

When specifically invited to adopt a "due diligence" exception to evidence suppressed by the government, the Supreme Court declined to do so. In *United States* v. *Agurs*, the Court considered "whether the prosecutor has any constitutional duty to volunteer exculpatory matter to the defense, and if so, what standard of materiality gives rise to that duty." 427 U.S. 97, 107 (1976). The Court concluded that "if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed.

This means that the omission must be evaluated in the context of the entire record." *Id.* at 112.

Thus, in setting the test for materiality, the Court focused solely on the *effect* of evidence rather than the ease with which it could have been discovered. In doing so, the Court declined to adopt the government's approach, which would have provided an exception based on due diligence: "[i]f the defense was on notice of the essential facts concerning exculpatory evidence before trial but elected not to investigate that information." Br. of the United States, *United States* v. *Agurs*, No. 75-491 (filed Feb. 5, 1976), 1976 WL 181371, at *16. The Supreme Court declined to adopt the government's due diligence test, instead noting that "the fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category." *Agurs*, 427 U.S. at 111.

This Court's more recent *Brady* jurisprudence further entrenches the defendant's right to exculpatory evidence. In *Kyles* and *Bagley*, the Court clarified that "regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Kyles*, 514 U.S. at 433–434 (quoting *Bagley*, 473 U.S. at 682). The Court's explicit test provides no room for potential exceptions to the *Brady* disclosure requirement.

By ruling that Mr. Penton was not entitled to *Brady* relief because he purportedly "knew" the facts in the suppressed reports, the Ninth Circuit implicitly adopted the due diligence exception proliferating among lower courts. And as explored in the next Section, *infra* at I.D., the increase in the number of courts adopting this approach to *Brady* creates fundamental tensions with *Brady*.

This erosion of the Court's jurisprudence is of fundamental importance. The proliferation of a due diligence exception creates a harmful precedent that handicaps defendants' ability to present a complete defense and contradicts the purposes of the *Brady* doctrine.

First, a due diligence exception would erect nonsensical roadblocks for defendants in marshaling and discovering evidence to create a fulsome defense. In the matter at hand, for example, the Ninth Circuit failed to appreciate that a defendant telling his lawyer about an exculpatory fact is different from the lawyer having independently verifiable evidence of that fact. Mr. Penton's position would be far more credible with the jury with the suppressed police reports in hand. But the trial court instead gave Mr. Penton the option of either waiving his Fifth Amendment rights to cross-examine the prosecution's witnesses based only on his own uncorroborated testimony, or hold his tongue to save his credibility with the jury. App. 154–155. Mr. Penton is forced in between a rock and a hard place contrary to common-sense *Brady* principles.

Second, the due diligence exception erodes defendants' Fifth Amendment rights. Defendants should not need to testify to introduce evidence that the government has in its possession. But by focusing on defendants' "knowledge" above all other factors, the due diligence exception—as it does here—essentially requires defendants to testify to preclude the possibility that, upon a later finding of suppressed evidence, their decision not to testify is held against them.

Third, a due diligence exception complicates prosecutors' decisions regarding the disclosure of evidence. As this Court has noted, prosecutors are poor substitutes for defense lawyers in determining what is helpful to the defense and therefore should be disclosed. This Court has recognized that "in the often competitive enterprise of ferreting out crime," prosecutors "simply cannot be asked to maintain the requisite neutrality with regard to their own investigations." *Coolidge* v. *New Hampshire*, 403 U.S. 443, 449–450 (1971). Thus, the Court has favored rules that "tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." *Kyles*, 514 U.S. at 440. The due diligence rule only gives prosecutors more factors to consider when deciding whether to disclose evidence, confusing the analysis.

Fourth, the due diligence exception encourages nondisclosure by prosecutors. While this Court has acknowledged that in close cases, the "prudent prosecutor" will disclose, *id.* at 430 (quoting *Agurs*, 427 U.S. at 108), a due diligence exception incentivizes prosecutors

to withhold evidence by essentially removing almost all risk that such a decision will be challenged. If the prosecution withholds evidence on the grounds that the defendant could have or should have discovered the evidence and the defendant only later does discover the evidence, the due diligence exception can be used against the defendant. Alternatively, if the prosecution withholds the evidence because it assumes that the information is discoverable and the defendant does not later discover it, then the evidence is not discovered. As such, the due diligence rule encourages prosecutors to deny (whether truthfully or otherwise) the existence of exculpatory evidence, which in turn discourages defendants from pursuing such evidence, in reliance upon prosecutors' statements that *Brady* material does not exist.

### D. The Question Presented Is a Frequently Recurring Issue of National Importance

The Ninth Circuit based nearly its entire *Brady* opinion on Mr. Penton's purported knowledge of selected facts contained in the withheld police reports. Accordingly, the question of whether an accused's subjective knowledge of facts contained in materials withheld by the prosecution during trial can be a barrier to *Brady* relief is squarely before the Court.

*Brady* is one of the primary barriers protecting the accused from wrongful conviction. One study sponsored by the National Institute of Justice found that *Brady* violations are one of the primary factors

distinguishing wrongful convictions from "near misses"—in other words, when an innocent person walks into a courtroom, a *Brady* violation by the prosecution makes it more likely that that person will be convicted.[5]

Unfortunately, "*Brady* violations have reached epidemic proportions in recent years, and the federal and state reporters bear testament to this unsettling trend." *United States* v. *Olsen*, 737 F.3d 625, 631 (9th Cir. 2013) (Kozinski, J., dissenting from denial of reh'g en banc) (collecting cases). According to one study, prosecutors withheld or delayed disclosing favorable evidence in roughly one-third of the cases sampled. Veritas Initiative, *Material Indifference: How Courts are Impeding Fair Disclosure in Criminal Cases* 38 (2014). And according to a recent study by the National Registry of Exonerations, nearly a third of all exonerations involved misconduct by prosecutors. National Registry of Exonerations, *Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement* 1 (2020). Concealed exculpatory evidence about suspects other than the wrongfully convicted defendants—like the suppressed Good Report which implicates Thess Good for the Symbolic Motors robbery—accounted for 22% of exonerations with official misconduct, or about 12% of all

[5] Jon B. Gould et al., *Predicting Erroneous Convictions: A Social Science Approach to Miscarriages of Justice*, at iii (Dec. 2012), https://www.ojp.gov/pdffiles1/nij/grants/241389.pdf. Multiple other factors that make wrongful conviction more likely are also present in Mr. Penton's case: weak prosecution case, inadvertent misidentification, and lying by a non-eyewitness. *See id.*

exonerations. *Id.* at 125. Also occurring frequently are exonerations based on authorities' concealment of evidence uniquely available to the police that would have confirmed alibis the defendants already presented—such as the Spear Report, which confirmed Mr. Penton's explanation that he reported his rental car stolen earlier. *Id.* at 127.

Courts opting to focus on what the defendant "already knew" or should have known, thereby adding a fourth due diligence prong to the *Brady* analysis, threaten to exacerbate this "epidemic." When courts excuse violations on the basis of a due diligence exception, the public may be led to conclude that "prosecutors don't care about *Brady* because courts don't *make* them care." *Olsen*, 737 F.3d at 631.

## II. THIS COURT SHOULD PREVENT THE EROSION OF *APPRENDI* BY THE LOWER COURTS' EXPANSION OF THE PRIOR CONVICTION EXCEPTION

This Court has been exceedingly clear: "[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." *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2002) (emphasis added). This Court has since reaffirmed this rule and clarified that it applies to any fact, other than a prior conviction, that increases the penalty for a crime beyond the prescribed

statutory maximum. *Cunningham* v. *California*, 549 U.S. 270, 282 (2007).

While a judge may increase a defendant's sentence based on an identification of a prior conviction—the so-called "prior conviction exception" introduced by this Court prior to *Apprendi* in *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998)—this exception is of "narrow" applicability. *Apprendi*, 530 U.S. at 489. Accordingly, this Court has found unconstitutional a scheme within the California Determinate Sentencing Law which "assign[ed] to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence." *Cunningham*, 549 U.S. at 288–289 (quoting *Apprendi*, 530 U.S. at 490).

Nevertheless, disregarding this Court's post-*Apprendi* jurisprudence, the federal courts of appeals have affirmed increased prison sentences based on facts found by judges at sentencing. In this case, for instance, the Ninth Circuit found no constitutional error with the state trial court's imposition of an enhanced sentence based on a finding that Mr. Penton's prior convictions were "numerous and of increasing seriousness." App. 2. In so doing, the Ninth Circuit rejected Mr. Penton's argument that the prior conviction exception is narrow. *Id*. It reasoned that "the Supreme Court did not specify the prior conviction exception's precise contours" and, therefore, the scope of the exception is not clearly established. *Id*. at 2.

The Ninth Circuit's decision muddles this Court's *Apprendi* jurisprudence and undermines the Sixth

Amendment's role as a "bulwark between the State and the accused at the trial for an alleged offense." *S. Union Co.* v. *United States*, 567 U.S. 343, 350 (2012). It is part of a trend expanding the prior conviction exception under *Almendarez-Torres* from a rule with "narrow" application to one with amorphous, potentially expansive, boundaries. This Court should take up Mr. Penton's petition to send a clear message to the lower courts that, notwithstanding *Almendarez-Torres*, prison sentences must be based on findings by the jury beyond a reasonable doubt under *Apprendi* and its progeny.

### A. The Ninth Circuit's Decision Undermines the Sixth Amendment Jury Trial Guarantee

This Court has already reversed the Ninth Circuit in at least one prior instance for "extending judicial factfinding beyond the *recognition* of a prior conviction." *Descamps* v. *United States*, 570 U.S. 254, 269 (2013) (emphasis added). Under the Sixth Amendment, a sentencing court should merely "identify[ ] the defendant's . . . conviction," not try to "discern what a trial showed, or a plea proceeding revealed, about a defendant's conduct." *Id.* "[T]he only facts the court can be sure the jury so found are those constituting the elements of the offense—as distinct from amplifying but legally extraneous circumstances." *Id.* at 269–270 (citing *Richardson* v. *United States*, 526 U.S. 813, 817 (1999)). Any "superfluous facts" beyond the elements of the offense for which a defendant is convicted "cannot

license a later sentencing court to impose extra punishment." *Id.* at 270. In other words, under the Sixth Amendment, a court *cannot* "rely on its own finding about a non-elemental fact to increase a defendant's maximum sentence." *Id.*

Yet that is exactly what Mr. Penton's sentencing judge did by concluding that Mr. Penton's prior convictions were "numerous" and "of increasing seriousness"—without any such finding from the jury to the same effect—and adding an extra ten years to his sentence. App. 159–160. The conclusions of the sentencing court went far beyond recognizing the fact of conviction. For instance, the sentencing judge explicitly noted that Mr. Penton had "served a prior prison term for another violent robbery utilizing a gun" as the basis for the increasing seriousness allegation. *Id.* But this is not a necessary element of *any* verdict rendered by the jury. *Id.* at 164–171. This is exactly the kind of "superfluous fact" that the sentencing court cannot use to impose extra punishment. *Descamps*, 570 U.S. at 269.

However, the Ninth Circuit on appeal affirmed the increased sentence under the prior conviction exception. In particular, the Ninth Circuit reasoned that because this Court "did not specify the prior conviction exception's precise contours," there is a "lack of clearly established law on its scope" and therefore Mr. Penton cannot avail of an *Apprendi*/*Cunningham* claim on a habeas petition. App. 2.

The Ninth Circuit's incorrect and unqualified holding severely curtails the jury trial guarantee. The

state sentencing court engaged in conduct that this Court has explicitly disapproved of. And the Ninth Circuit's reasoning that the prior conviction exception lacks "precise contours" and is marked by a "lack of clearly established law on its scope" flouts this Court's clear statement that *Apprendi* set a "bright-line rule" designed to preclude precisely the inquiry that the Ninth Circuit asserts this Court has not yet explored: "whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge." *Cunningham*, 549 U.S. at 272.

As is relevant here, the jury trial right is a "fundamental reservation" of jury power that ensures that a judge's "authority to sentence derives *wholly* from the jury's verdict." *Blakely* v. *Washington*, 542 U.S. 296, 306 (2004) (emphasis added). This Court was also clear in *Apprendi* that the prior conviction exception—as it was outlined in *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998)—was "at best an exceptional departure" from historic practice. *Apprendi*, 530 U.S. at 487. *See also id.* at 520–521 (Thomas, J., concurring, noting that *Almendarez-Torres* was "an error to which I succumbed"). And in any case, even assuming *arguendo* that the contours of *Apprendi* lack precision, that does not necessarily mean that Mr. Penton cannot rely on *Apprendi* as a clearly established right. *See*, *e.g.*, *Safford Unified Sch. Dist. No. 1* v. *Redding*, 557 U.S. 364, 378 (2009) ("[T]he fact that a single judge, or even a group of judges, disagrees about the contours of

a right does not automatically render the law unclear if we have been clear.").

In *Apprendi*, this Court held that "facts that increase the prescribed range of penalties to which a criminal defendant is exposed" must either be admitted by the defendant or submitted to the jury. 530 U.S. at 490. The Court reaffirmed that principle in *Alleyne* v. *United States*, 570 U.S. 99 (2013), explaining that, "[w]hen a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." *Id.* at 114–115.

As provided by the Supreme Court's precedent in *Apprendi*, the jury—not the judge—should have conducted this evaluation of the seriousness and numerosity of Mr. Penton's prior convictions. The increase of Mr. Penton's sentence based on the judge's finding that Mr. Penton's prior convictions were "of increasing seriousness" was an unreasonable application of *Apprendi*. These factual determinations were essential to the imposition of Mr. Penton's enhanced sentence and are exactly the type of factfinding *Apprendi* was meant to exclude. *See Cunningham*, 549 U.S. at 288 (noting that *Apprendi*'s holding was designed to exclude judicial factfinding of facts essential to punishment).

### B. The Question Presented Will Frequently Recur as an Issue of National Importance Until *Almendarez-Torres* is Explicitly Overruled

In *Apprendi*, this Court recognized the Framers' fears that "the jury right could be lost not only by gross denial, but by erosion." 530 U.S. at 483. The Court is facing such an erosion in this case. Because this Court has not taken up the issue of judicial factfinding at sentencing in recent years, the lower courts "have uniformly taken [this Court's] silence to suggest that the Constitution *does* permit otherwise unreasonable sentences supported by judicial factfinding. . . ." *Jones* v. *United States*, 574 U.S. 948, 949 (2014) (Scalia, J., dissenting from denial of certiorari). The Court should grant certiorari and clarify its *Apprendi* jurisprudence once more, just as it did in *Alleyne*, *Cunningham*, and *Descamps*, and make explicit that the Sixth Amendment precludes the imposition of punishment based on factors that the jury did not find. *See also Shepard* v. *United States*, 544 U.S. 13, 28 (2005) (Thomas, J., concurring in part) ("*Almendarez-Torres* . . . has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided.").

The expansion of the prior conviction exception does not seem to have an end in sight. For instance, the appellate courts in at least one state have already crafted a broad Sixth Amendment exception on a

theory similar to the one in *Almendarez-Torres*.[6] Likewise, the Second, Sixth, and Eleventh Circuits have acknowledged a "tension" between this Court's post-*Apprendi* jurisprudence and *Almendarez-Torres*, but nevertheless felt "bound" by *Almendarez-Torres*, which has not yet been explicitly overruled by this Court. *United States* v. *Estrada*, 428 F.3d 387 (2d Cir. 2005) (Sotomayor, J.); *United States* v. *Melton*, 239 Fed. Appx. 192, 195 (6th Cir. 2007); *United States* v. *Greer*, 440 F.3d 1267, 1275–1276 (11th Cir. 2006) (overruling district court but noting that it "probably is correct" in finding that *Apprendi*, *Blakely*, and *Booker* should lead to the eventual overruling of *Almendarez-Torres*). In multiple instances, the Seventh Circuit has remarked that "*Almendarez-Torres* is vulnerable to being overruled" because of this Court's post-*Apprendi* decision in *United States* v. *Booker*, 543 U.S. 220 (2005), which held that "there is a right to a jury trial and to the reasonable doubt standard in a sentencing proceeding (that is, the Sixth Amendment is applicable) if the judge's findings dictate an increase in the maximum penalty." *See*, *e.g.*, *United States* v. *Elliott*, 703 F.3d 378,

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[6] The Arizona courts of appeals have upheld a sentencing scheme wherein the trial court can authorize an aggravated sentence if "all of the aggravating circumstances taken together outweigh the mitigating factors *found by the court*." *State* v. *Aleman*, 109 P.3d 571, 581 (Ariz. 2005) (emphasis added); *see also* Carissa Byrne Hessick, *New Reason to Doubt the Constitutionality of Arizona's Sentencing System*, Ariz. Atty. at 22–24 (2017) ("Not only does the Arizona sentencing system appear to conflict with *Hurst* [v. *Florida*, 577 U.S. 92 (2016)], but it is also based entirely on *Almendarez-Torres* v. *United States*—a case whose continued constitutional vitality is in serious doubt.").

381 (7th Cir. 2012). And as Justice Thomas aptly observed:

> Innumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of *Almendarez-Torres*, despite the fundamental "imperative that the Court maintain absolute fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond-a-reasonable-doubt requirements."

*Shepard*, 544 U.S. at 28 (Thomas, J., concurring in part). The unconstitutional practice of judicial factfinding is unfortunately widespread and "has gone on long enough." *Jones*, 574 U.S. at 948 (Scalia, J., dissenting from the denial of certiorari).

These courts will not be the last, until the Supreme Court makes explicit the necessary logical consequence of *Apprendi* and its progeny: that the prior conviction exception as outlined in *Almendarez-Torres* is no longer good law. In fact, a number of commentators have expected the Supreme Court to explicitly overrule *Almendarez-Torres*. *See*, *e.g.*, Erwin Chemerinsky, *Making Sense of* Apprendi *and Its Progeny*, 37 McGeorge L. Rev. 531 (2006) ("[O]ne would predict that the Court will soon overrule *Almendarez-Torres*, but that has been the prediction ever since *Apprendi*."); *id.* at 542 ("Ever since *Apprendi* it has been predicted that *Almendarez-Torres* would be overruled. . . ."); Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross Purposes*, 105 Colum. L. Rev. 1082 (2005) ("*Almendarez-Torres* . . . is yet another of the Court's flimsy 5-4 decisions."); *United*

*States* v. *Andrews*, 479 F.3d 894, 899–900 (2007) ("*Almendarez-Torres* itself relied on an arguably formalistic distinction between elements and sentencing factors . . . that has since been heavily eroded by the *Apprendi* line.") (Williams, J., concurring).

This Court should step in to prevent further erosion of its *Apprendi* jurisprudence, as it is the *only* court that can. *See Agostini* v. *Felton*, 521 U.S. 203, 237 (1997) ("We reaffirm that if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). Until then, countless criminal defendants will be denied the full protection afforded by the Fifth and Sixth Amendments, notwithstanding the logical import of *Apprendi* and its progeny.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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