No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 2022 TERM

_____ ◆ _____

RICHARD ANTHONY RODRIGUEZ,
PETITIONER

V.

PEOPLE OF THE STATE OF CALIFORNIA,
RESPONDENT

_____ ◆ _____

ON PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF CALIFORNIA

_____ ◆ _____

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Can juvenile adjudications, obtained without a trial by jury, be relied upon to enhance a defendant's sentence in a later proceeding?

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 v. United States* (2013) 570 U.S. 254,and *Mathis v. United States* (2016) 579 U.S. 500. 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.

Thus, 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?

LIST OF PARTIES

PETITIONER: RICHARD ANTHONY RODRIGUEZ,

RESPONDENT: PEOPLE OF THE STATE OF CALIFORNIA

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

Circuit Court Cases

State Court Cases

Constitutional Provisions

Federal Statutes

Federal Rules

State Statutes

Secondary Sources

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ON PETITION FOR WRIT OF CERTIORARI TO

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the California Court of Appeal, First District, review denied by the Supreme Court of California.

OPINIONS BELOW

The unreported opinion of the California Court of Appeal, First

Appellate District, No. A164251, affirming the judgment on appeal is attached as Appendix A. The unreported order of the California Supreme Court denying review, No. S274319, is attached as Appendix B.

JURISDICTION

The Court of Appeal, First Appellate District, entered its judgment on March 21, 2022. The California Supreme Court denied a timely petition for review on June 15, 2022. The instant petition for writ of certiorari is filed within 90 days of that order, pursuant to Rules 13.1, 30.1 and 29.2.

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1). *Hohn v. United States*, 524 U.S. 236 (1998).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to United States Constitution provides:

> 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 defense.

California Penal Code § 667 provides:

> (a)
>
> (1) A person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any

offense committed in another jurisdiction that includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively.

(2) This subdivision shall not be applied when the punishment imposed under other provisions of law would result in a longer term of imprisonment. There is no requirement of prior incarceration or commitment for this subdivision to apply.

(3) The Legislature may increase the length of the enhancement of sentence provided in this subdivision by a statute passed by majority vote of each house thereof.

(4) As used in this subdivision, "serious felony" means a serious felony listed in subdivision (c) of Section 1192.7.

(5) This subdivision does not apply to a person convicted of selling, furnishing, administering, or giving, or offering to sell, furnish, administer, or give to a minor any methamphetamine-related drug or any precursors of methamphetamine unless the prior conviction was for a serious felony described in subparagraph (24) of subdivision (c) of Section 1192.7.

(b) It is the intent of the Legislature in enacting subdivisions (b) to (i), inclusive, to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of one or more serious or violent felony offenses.

(c) Notwithstanding any other law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior serious or violent felony convictions as defined in

subdivision (d), the court shall adhere to each of the following:

(1) There shall not be an aggregate term limitation for purposes of consecutive sentencing for any subsequent felony conviction.
(2) Probation for the current offense shall not be granted, nor shall execution or imposition of the sentence be suspended for any prior offense.
(3) The length of time between the prior serious or violent felony conviction and the current felony conviction shall not affect the imposition of sentence.
(4) There shall not be a commitment to any other facility other than the state prison. Diversion shall not be granted, nor shall the defendant be eligible for commitment to the California Rehabilitation Center as provided in Article 2 (commencing with Section 3050) of Chapter 1 of Division 3 of the Welfare and Institutions Code.
(5) The total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison.
(6) If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e).
(7) If there is a current conviction for more than one serious or violent felony as described in paragraph (6), the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.
(8) A sentence imposed pursuant to subdivision (e) shall be imposed consecutive to any other sentence that the defendant is already serving, unless otherwise provided by law.

(d) Notwithstanding any other law and for the purposes of subdivisions (b) to (i), inclusive, a prior conviction of a serious or

violent felony shall be defined as:

(1) An offense defined in subdivision (c) of Section 667.5 as a violent felony or an offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state. The determination of whether a prior conviction is a prior felony conviction for purposes of subdivisions (b) to (i), inclusive, shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor. The following dispositions shall not affect the determination that a prior conviction is a prior felony for purposes of subdivisions (b) to (i), inclusive:

(A) The suspension of imposition of judgment or sentence.
(B) The stay of execution of sentence.
(C) The commitment to the State Department of State Hospitals as a mentally disordered sex offender following a conviction of a felony.
(D) The commitment to the California Rehabilitation Center or any other facility whose function is rehabilitative diversion from the state prison.

(2) A prior conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison constitutes a prior conviction of a particular serious or violent felony if the prior conviction in the other jurisdiction is for an offense that includes all of the elements of a particular violent felony as defined in subdivision (c) of Section 667.5 or serious felony as defined in subdivision (c) of Section 1192.7.

(3) A prior juvenile adjudication constitutes a prior serious or violent felony conviction for purposes of sentence enhancement if it meets all of the following:

(A) The juvenile was 16 years of age or older at the time the juvenile committed the prior offense.

(B) The prior offense is listed in subdivision (b) of Section 707 of the Welfare and Institutions Code or described in paragraph (1) or (2) as a serious or violent felony.
(C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law.
(D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.

(e) For purposes of subdivisions (b) to (i), inclusive, and in addition to any other enhancement or punishment provisions that apply, the following apply if a defendant has one or more prior serious or violent felony convictions:

(1) If a defendant has one prior serious or violent felony conviction as defined in subdivision (d) that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.

(2)
(A) Except as provided in subparagraph (C), if a defendant has two or more prior serious or violent felony convictions as defined in subdivision (d) that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greatest of:
(i) Three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior serious or violent felony convictions.
(ii) Imprisonment in the state prison for 25 years.
(iii) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period

prescribed by Section 190 or 3046.

(B) The indeterminate term described in subparagraph (A) shall be served consecutive to any other term of imprisonment for which a consecutive term may be imposed by law. Any other term imposed subsequent to an indeterminate term described in subparagraph (A) shall not be merged therein but shall commence at the time the person would otherwise have been released from prison.

(C) If a defendant has two or more prior serious or violent felony convictions as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7 that have been pled and proved, and the current offense is not a serious or violent felony as defined in subdivision (d), the defendant shall be sentenced pursuant to paragraph (1) of subdivision (e) unless the prosecution pleads and proves any of the following:

(i) The current offense is a controlled substance charge, in which an allegation under Section 11370.4 or 11379.8 of the Health and Safety Code was admitted or found true.
(ii) The current offense is a felony sex offense, defined in subdivision (d) of Section 261.5 or former Section 262, or a felony offense that results in mandatory registration as a sex offender pursuant to subdivision (c) of Section 290 except for violations of Sections 266 and 285, paragraph (1) of subdivision (b) and subdivision (e) of Section 286, paragraph (1) of subdivision (b) and subdivision (e) of Section 288a, Section 311.11, and Section 314.
(iii) During the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.
(iv) The defendant suffered a prior serious or violent felony conviction, as defined in subdivision (d) of this section, for any of the following felonies:

(I) A “sexually violent offense” as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code.
(II) Oral copulation with a child who is under 14 years of age and more than 10 years younger than the defendant as defined by Section 288a, sodomy with another person who is under 14 years of age and more than 10 years younger than the defendant as defined by Section 286, or sexual penetration with another person who is under 14 years of age and more than 10 years younger than the defendant, as defined by Section 289.
(III) A lewd or lascivious act involving a child under 14 years of age, in violation of Section 288.
(IV) Any homicide offense, including any attempted homicide offense, defined in Sections 187 to 191.5, inclusive.
(V) Solicitation to commit murder as defined in Section 653f.
(VI) Assault with a machinegun on a peace officer or firefighter, as defined in paragraph (3) of subdivision (d) of Section 245.
(VII) Possession of a weapon of mass destruction, as defined in paragraph (1) of subdivision (a) of Section 11418.
(VIII) Any serious or violent felony offense punishable in California by life imprisonment or death.

(f)

(1) Notwithstanding any other law, subdivisions (b) to (i), inclusive, shall be applied in every case in which a defendant has one or more prior serious or violent felony convictions as defined in subdivision (d). The prosecuting attorney shall plead and prove each prior serious or violent felony conviction except as provided in paragraph (2).
(2) The prosecuting attorney may move to dismiss or strike a prior serious or violent felony conviction allegation in the

furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior serious or violent felony conviction. If upon the satisfaction of the court that there is insufficient evidence to prove the prior serious or violent felony conviction, the court may dismiss or strike the allegation. This section shall not be read to alter a court's authority under Section 1385.

(g) Prior serious or violent felony convictions shall not be used in plea bargaining as defined in subdivision (b) of Section 1192.7. The prosecution shall plead and prove all known prior serious or violent felony convictions and shall not enter into any agreement to strike or seek the dismissal of any prior serious or violent felony conviction allegation except as provided in paragraph (2) of subdivision (f).

(h) All references to existing statutes in subdivisions (c) to (g), inclusive, are to statutes as they existed on November 7, 2012.

(i) If any provision of subdivisions (b) to (h), inclusive, or the application thereof to any person or circumstance is held invalid, that invalidity shall not affect other provisions or applications of those subdivisions that can be given effect without the invalid provision or application, and to this end the provisions of those subdivisions are severable.

(j) The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

STATEMENT OF THE CASE

A. Procedural History.

A California jury convicted petitioner of torture and corporal injury on a spouse or cohabitant. Petitioner was sentenced to 50 years to life plus 13 years. The trial court relied on prior offenses petitioner committed at age 16 to bring him within California's Three Strikes Law. Petitioner's prior robbery offense was a juvenile adjudication, while the attempted murder conviction was obtained in the superior court.

On appeal, petitioner argued that enhancing his sentence under California's Three Strikes Law based on the juvenile adjudication without a right to a jury trial violated his Sixth and 14th Amendment rights.

Petitioner recognized that the California Supreme Court had rejected this argument in *People v. Nguyen*, 46 Cal.4th 1007 (Cal. 2009), but argued that *Nguyen* has been implicitly overruled by this Court's decisions in *Descamps v. United States*, 570 U.S. 254 (2013) and *Mathis v. United States*, 579 U.S.500 (2016) following *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

The Court of Appeal rejected petitioner's constitutional argument, declaring itself bound by *Nguyen.*

Petitioner raised the same issue in a Petition for Review to the California Supreme Court, but that court summarily denied the petition.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition because federal and state courts are divided on this issue of nationwide importance. The need to resolve this conflict is acute, given this Court's holdings in *Descamps* and *Mathis*. As noted earlier, those decisions narrowed the prior conviction exception to *Apprendi* and reinforced the continuing importance of the right to a jury trial right in the prior proceeding before allowing use of the prior to enhance a sentence.

This case presents no procedural obstacles, and is therefore, an excellent vehicle to resolve the existing conflict.

I. INCREASING A DEFENDANT'S SENTENCE BASED ON A PRIOR JUVENILE ADJUDICATION VIOLATES THE RIGHTS TO A JURY TRIAL AND TO DUE PROCESS.

A. There Is a Deepening and Intractable Three-Way Split Among Federal and State Courts Over the Use of Prior Non- jury Juvenile Adjudications In Extended Sentencing.

Many courts—six circuits and six states—hold that prior non-jury juvenile adjudications are convictions for the purposes of *Apprendi*. These courts interpret *Apprendi* as being mainly concerned with reliability, as

opposed to the right to a jury trial. Thus, as long as there were constitutionally sufficient safeguards in the juvenile proceedings, the outcome of those proceedings has "more than sufficient [safeguards] to ensure the reliability that *Apprendi* requires." See, e.g., *United States v. Smalley*, 294 F.3d 1030, 1033 (8th Cir. 2002).

California state courts have adopted this view. But this conflicts with the Ninth Circuit and those of supreme courts in Louisiana, Ohio, and Oregon that reject the reliability-based reading of *Apprendi*. Instead, these courts interpret *Apprendi* as mainly being concerned with the jury's role as a structural protection against the tyranny of the state. The Ninth Circuit, Ohio, and Louisiana never allow prior juvenile adjudications to be used for enhancement purposes. And Oregon allows the use of juvenile adjudications as prior convictions under *Apprendi* only if the defendant admits it or it is proven to a jury beyond reasonable doubt.

1. The view of the Ninth Circuit and the Supreme Courts in Ohio, Oregon, and Louisiana.

a. The Ninth Circuit:

The Ninth Circuit was the first circuit court to address whether juvenile adjudications qualified as prior convictions under *Apprendi*.

In *United States v. Tighe*, 266 F.3d 1187 (9th Cir. 2001), the

defendant pled guilty to, among other things, being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1); that statute carries a maximum sentence of 10 years, without previous convictions for violent felonies, see *id.* § 924(a)(2). *Tighe*, 266 F.3d at 1190. The district court relied on the defendant's prior juvenile adjudication to increase his sentence above the 10-year maximum. *Id.* at 1191.

The Ninth Circuit held that use of the prior juvenile adjudication to enhance a sentence violates the Sixth and the 14th Amendments. *Tighe* reasoned that the right to a jury trial has been one of the three fundamental protections intended to guarantee the reliability of a prior criminal conviction. *Tighe*, 266 F.3d at 1193. *Tighe* reasoned also that the validity of the prior conviction exception to *Apprendi* was based on the prior convictions being obtained in a proceeding that gives the accused the right to a jury trial. *Id.* at 1194. The prior conviction exception thus does not apply to juvenile adjudications, to which a jury trial right does not attach. *Id.*

b. Supreme Courts in Ohio and Louisiana

While acknowledging the split of authority among the circuits and states, both Ohio and Louisiana hold—in line with *Tighe*— that juvenile adjudications obtained without the right to a jury trial may not be used to

enhance later adult sentences. *State v. Hand*, 149 Ohio St.3d 94 (2016); *State v. Brown*, 879 So.2d 1276 (La. 2004).

In *Brown*, the Louisiana Supreme Court held that the use of a non-jury juvenile adjudication to increase a penalty beyond the statutory maximum violated the defendant's due process rights guaranteed by the 14th Amendment. *Id.* at 1290. The court explicitly rejected the majority's reliability-based rationale and instead focused on the important structural differences between the juvenile and adult criminal systems. *Id. Brown* reasoned also that using juvenile adjudications to enhance a sentence in an adult criminal case is illogical and unfair:

It would be incongruous and illogical to allow the non-criminal adjudication of a juvenile delinquent to serve as a criminal sentencing enhancement. To equate this adjudication with a conviction as a predicate offense ... would subvert the civil trappings of the juvenile adjudication to an extent to make it fundamentally unfair and thus, violative of due process. ... It seems 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.

Id. at 1289.

And in *State v. Hand*, the Ohio Supreme Court held that juvenile adjudications could not be used to enhance a defendant's sentence during subsequent criminal proceedings because doing so violated due process. *Hand*, 149 Ohio St. 3d at 103-04. Agreeing with *Tighe* and citing this Court's emphatic pronouncements about the importance of the jury trial right, *Hand* limited the prior conviction exception to those cases when the prior conviction was obtained in a proceeding with a jury trial right. *Id.* at 104.

c. Oregon

Like the Ninth Circuit and the Ohio Supreme Court, the Supreme Court of Oregon recognized that reliability "is not the sine qua non of the Sixth Amendment." *State v. Harris*, 118 P.3d 236, 245 (Or. 2005). Instead, *Harris* found *Apprendi* was mainly concerned with the structural importance of the jury as "the people's check on judicial power" that "serves to divide authority between judge and jury." *Id.* at 242–43, 245. *Harris* thus held that the "Sixth Amendment requires that when ... an adjudication is offered as an enhancement factor to increase a criminal sentence, its existence must be proved to a trier of fact or be admitted by a defendant for sentencing

purposes following an informed and knowing waiver." *Id.* at 246. Oregon's position thus represents what the court below described as the "middle ground position."

2. Six circuits and six state supreme courts hold that prior non-jury juvenile adjudications are prior-convictions under *Apprendi*.

The position of the majority of the circuit courts of appeal is that prior juvenile adjudications can be used to enhance a sentence without violating *Apprendi*.

This line of authority originated with *United States v. Smalley*, *supra,* 294 F.3d 1030. *Smalley* held that prior convictions are excepted from *Apprendi's* general rule because of the "'certainty that procedural safeguards,' such as trial by jury and proof beyond a reasonable doubt, undergird them." *Id.* at 1032 (quoting *Apprendi*, 530 U.S. at 488). Because juvenile adjudications are afforded all constitutionally required protections, see *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (holding that juveniles in juvenile proceedings are not entitled to a jury trial by the Sixth or Fourteenth Amendments), juvenile adjudications are sufficiently reliable that their exemption from *Apprendi's* rule does not offend due process. *Smalley*, 294 F.3d at 1033.

In the 14 years since *Smalley*, five other circuits have embraced its reasoning and held that juvenile adjudications "are sufficiently reliable so as to not offend constitutional rights if used to qualify for the *Apprendi* exception." *United States v. Jones*, 332 F.3d 688, 696 (3d Cir. 2003). These courts reason that, "when a juvenile is adjudicated guilty beyond a reasonable doubt in a bench trial that affords all the due process protections that are required, the adjudication should be counted as a conviction for purposes of subsequent sentencing." *Jones*, 332 F.3d at 696; see also *United States v. Wright*, 594 F.3d 259, 265 (4th Cir. 2010) (*Apprendi* "hinges in part on whether non-jury adjudications are so reliable that due process of law is not offended by their inclusion in the prior conviction exception"); *United States v. Crowell*, 493 F.3d 744, 750 (6th Cir. 2007) (same); *Welch v. United States*, 604 F.3d 408, 426 (7th Cir. 2010) (same); *United States v. Burge*, 407 F.3d 1183, 1190 (11th Cir. 2005) (same).

Six other states, including California, embrace this position (though in opinions that include dissenting views on the issue).[1/]

[1/] Many of these decisions included dissenting opinions, further highlighting that the split in authority results from fundamentally different interpretations of the rationale underlying *Apprendi* and the importance of the jury trial right. See, e.g., *Welch*, 604 F.3d at 431–32 (Posner, J., dissenting) (explaining that *Apprendi* mandated that "a prior conviction used to increase the

In *Nguyen*, the California Supreme Court concluded that the Fifth, the Sixth, and the 14th Amendments, as interpreted by *Apprendi*, do not preclude the use of a prior juvenile adjudication to enhance an adult sentence provided that the juvenile adjudication provided all constitutional protections available (even if they do not include a right to a jury trial).[2/] *Nguyen*, 46 Cal.4th at 1019; see also *State v. McFee*, 721 N.W.2d 607, 616–618 (Minn. 2006) (adopting explicitly the rationale and conclusions reached in *Jones*, *Smalley*, and *Burge*); *State v. Weber*, 149 P.3d 16 646, 652 (Wash. 2006) (en banc); *Ryle v. State*, 842 N.E.2d 320, 323 (Ind. 2005) (stating that *Apprendi's* "main concern was whether the prior conviction's procedural safeguards ensured a reliable result, not that there had to be a right to a jury trial"); *State v. Hitt*, 42 P.3d 732, 739 (Kan.

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length of the sentence must be the outcome of a proceeding in which the defendant had a right to have a jury determine his guilt"); *Nguyen*, 46 Cal.4th at 1028 (Kennard, J., dissenting) (stating that the majority opinion "misses the point" because "[t]he problem is that the facts underlying a juvenile court adjudication were determined by . . . the judge); *State v. McFee*, 721 N.W.2d at 622 (Meyer, J., dissenting) ("The proper inquiry under *Apprendi* is not whether McFee's juvenile adjudications were 'fairly' or 'reliably' determined [but] whether the fact of McFee's prior juvenile adjudication was ever determined by a jury."); *Weber*, 149 P.3d at 663–64 (Madsen, J., dissenting) ("There is no substitute for the right to trial by jury.").

[2/] As for California's view, while the California Supreme Court has not repudiated *Nguyen*, the recent decision in *People v. Gallardo*, 4 Cal.5th 120 (2017) critically undermines it. Citing *Descamps* and *Mathis*, *Gallardo* held that the prior conviction exception must be read more narrowly to prohibit enhancement with facts that are not established by the elements of the prior conviction found by the jury. *Nguyen*, 46 Cal.4th at 1019.

2002).

3. This issue has fully percolated.

The lower courts have repeatedly recognized the existing three-way split and exhibited no willingness to alter their positions. The Ninth Circuit has acknowledged the split in cases since *Tighe*, but has indicated it is not inclined to overrule or reconsider the rationale in *Tighe*. See, e.g., *United States v. Strickland*, 601 F.3d 963, 978 (9th Cir. 2010) (noting that *Almendarez-Torres* stands on "shaky constitutional ground" and citing *Tighe* approvingly); *Boyd v. Newland*, 467 F.3d 1139, 1152 (9th Cir. 2006) (refusing to entertain suggestion that *Tighe* was incorrectly decided).

There is no need for further percolation. Over the past decade the split has only deepened and solidified. Courts on all sides believe that their reasoning is mandated by, or at least, firmly supported by *Apprendi*. The contradictory approaches reflect a fundamental philosophical split on the scope of the due process right and the constitutional significance and structural importance of the jury trial right in the context of the criminal justice system. This is not a division that will be resolved without the intervention of this Court.

/

B. Importance of the Question Presented

The rule adopted by the California appellate courts raises serious constitutional issues for three reasons. First, the absence under California law of the right to a jury trial removes a critical constitutional safeguard. This Court's decisions in *Descamps* and *Mathis* underscore this point. Second, apart from the jury trial right, the special nature of juvenile proceedings precludes the use of prior juvenile adjudications as a sentence enhancement. Third, the split creates tensions in outcomes between defendants and within our federal system.

1. The rule adopted by California violates defendants' Sixth and 14th Amendment rights.

Apprendi's logic is firmly rooted in the fundamental importance of the right to a jury trial as the embodiment of the protections enshrined in the Sixth and 14th Amendments. Beyond a "mere procedural formality" aimed at guaranteeing the accuracy of judicial proceedings, the jury trial right was understood to be a "fundamental reservation of power in our constitutional structure." *Blakely v. Washington*, 542 U.S. 296, 306 (2004). As the structural "intermediary between the State and criminal defendants," *Alleyne v. United States*, 133 S. Ct. 2151, 2161 (2013), a jury therefore stands as "the great bulwark of [our] civil and political liberties." *Apprendi*,

530 U.S. at 477 (quoting 2 J. Story, Commentaries on the Constitution of the United States 540–41 (4th ed. 1873)). Without *Apprendi's* requirement that a jury find all facts used to enhance a sentence beyond a term statutorily authorized, "the jury would not exercise the control that the Framers intended." *Id.*

So, in carving out the prior-conviction exception, the *Apprendi* court recognized it as "at best an exceptional departure from the historic practice" of proving facts relied on to enhance a sentence before a jury. *Apprendi*, 530 U.S. at 487. This Court has made clear that "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Jones v. United States*, 526 U.S. 227 (1999) (emphasis added).

But when a judge bases a sentencing enhancement on a juvenile adjudication—a proceeding without a jury trial guarantee—the judge facilitates an illicit transfer of power from jury to judge, leading to an erosion of the jury right that conflicts with the Sixth Amendment. This result is not supported by *Apprendi*.

This conclusion is especially apt given this Court's decisions in *Descamps* and *Mathis*. Though *Descamps* and *Mathis* did not deal

explicitly with juvenile adjudications, they addressed a closely related issue of whether the Sixth Amendment permits a sentencing judge to enhance a defendant's sentence by making findings of fact beyond those established by elements of a prior jury trial. This Court held that the Sixth Amendment prohibits non-elemental judicial fact-finding, i.e., judicial reliance on facts that were not found true by a jury in the prior proceeding. *Descamps, supra*, 133 S. Ct. at p. 2288; *Mathis, supra*, 136 S. Ct. at p. 2252.

In reaching that conclusion, *Descamps* pointedly observed that "[t]he Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt." *Descamps*, 133 S. Ct. at 2288.

Similarly, in *Mathis*, this Court reaffirmed that except for a simple fact of a prior conviction, "only a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction." *Mathis*, 136 S. Ct. at 2252.

Both *Descamps* and *Mathis* reflect this Court's continuing view that availability of the jury trial in the prior proceeding is critical in allowing the use of the prior conviction to enhance a current sentence. Allowing the use of juvenile adjudications to enhance the sentence when the juvenile did not

have a right to a jury trial is inconsistent with that view.

2. Fundamental differences between the juvenile court and criminal justice systems prohibit a juvenile adjudication from qualifying as a "prior conviction."

Beyond absence of a jury, three aspects of the juvenile court system show the significant constitutional concerns that arise from classifying an adjudication as a "prior conviction."

First, although a criminal court's responsibility is to establish a defendant's culpability, the role of the juvenile court is "not to ascertain whether the child [is] 'guilty' or 'innocent,'" but to determine whether the child needs the state's "care and solicitude." *In re Gault*, 387 U.S. 1, 15 (1967) (quoting Julian Mack, The Juvenile Court, 23 HARV. L. REV. 104, 119–20 (1909)). Indeed, California's juvenile justice system's purpose is to rehabilitate, in contrast to the purpose of the state's criminal justice system to punish. *In re Myresheia W.*, 61 Cal. App. 4th 734, 740–41 (Cal. Ct. App. 1998).

Second, the unique nature of the juvenile system creates an environment in which judges are more likely to convict the juvenile than a jury would be to convict an adult defendant in a criminal trial. Juvenile court

judges are exposed to inadmissible evidence.[3/] They repeatedly hear the same stories from defendants, leading them to treat defendants' testimony with skepticism.[4/] They become chummy with the police and apply a lower standard of scrutiny to the testimony of officers they trust.[5/] And they make their decisions

alone, meaning their decisions lack the benefits of group deliberation.[6/]

As Judge Posner has commented, research confirms that the "noncriminal 'convictions [of the juvenile courts] may well lack the reliability of real convictions in criminal courts." Welch, 604 F.3d at 432 (Posner, J., dissenting). Indeed, the Louisiana Supreme Court adopted the minority position when faced with the fact that the defendant before it had, with "no

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[3/] Joseph B. Sanborn, Jr., Second-Class Justice, First-Class Punishment: The Use of Juvenile Records in Sentencing Adults, 81 JUDICATURE 206, 212 (1998).

[4/] Barry C. Feld, The Constitutional Tension Between Apprendi and McKeiver: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts, 38 Wake Forest L. Rev. 1111, 1164 (2003); Martin Siim & Randy Hertz, Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials, 33 Wake Forest L. Rev. 553, 574–75 (1998).

[5/] Martin Guggenheim & Randy Hertz, Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials, 33 Wake Forest L. Rev. 553, 574–75 (1998).

[6/] This Court has recognized that "[j]uries fairly chosen from different walks of life bring into the jury box a variety of different experiences, feelings, intuitions and habits . . . [and] may reach completely different conclusions than would be reached by specialists in any single field." United States ex rel. Toth v. Quarles, 350 U.S. 11, 18 (1955); cf. Ballew v. Georgia, 435 U.S. 223, 233–34 (1978).

evidence of being an accessory to anyone, [been] adjudicated as guilty [of attempted second degree murder] by a judge and sent to juvenile prison," while, paradoxically, his adult "accomplice" was tried before a jury and acquitted of all charges. *State v. Brown*, *supra*, 853 So.2d at p. 13.

Third, as this Court has recognized, "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." *Graham v. Florida*, 560 U.S. 48, 68 (2010). The same lack of maturity, vulnerability to outside pressure, and underdeveloped character that render children "constitutionally different from adults for the purposes of sentencing," cast a cloud of doubt over the reliability and due process sufficiency of juvenile adjudications when wielded to enhance adult sentences. *Miller v. Alabama*, 567 U.S. 460, 471 (2012).

For example, although well over 90 percent of juveniles waive their protection against self-incrimination, they often neither understand the function nor the consequences of waiving *Miranda* rights, rendering a knowing and intelligent waiver near impossible to obtain. See Steven A. Drizin & Greg Luloff, Are Juvenile Courts a Breeding Ground For Wrongful Convictions?, 34 N. Ky. L. Rev. 257, 266, 268 (2007). The combination of

juveniles' lack of cognitive capacity with their susceptibility to coercive pressure leads to an omnipresent danger of false confessions nearly unparalleled in the justice system.[7/]

3. The split creates tensions in outcomes between defendants and in our federal system.

The conflicting approaches in the lower courts have produced substantially disparate treatment among criminal defendants, based solely on the accident of location. Indeed, the split between circuit and states courts within their geographic boundaries means that defendants will receive different procedural protections based solely on whether a defendant is indicted under federal or state law. Compare *Tighe*, 266 F.3d at 1194–95, and *Hand*, 149 Ohio St.3d at 104 with *Crowell*, 493 F.3d at 750, and *Nguyen*, 46 Cal.4th at 118-20. Such disparate results undermine a core precept of criminal proceedings— "justice must satisfy the appearance of justice." *Levine v. United States*, 362 U.S. 610, 616 (1960)

[7/] See *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (recognizing that a fourteen year-old is "a person who is not equal to the police in knowledge and understanding of the consequences of the questions . . . and who is unable to know how to protest his own interests or how to get the benefits of his constitutional rights"); *Haley v. Ohio*, 332 U.S. 596, 599 (1948) (describing a fifteen-year- old child as "an easy victim of the law"); Barry C. Feld, Behind Closed Doors: What Really Happens When Cops Question Kids, 23 Cornell J.L. & Pub. Pol'y 395, 440 (2013) (finding that 58.6% of juveniles in the study confessed "within the first few minutes waiving *Miranda*").

(quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

The conflicting approaches also disrupt "the very essence of a healthy federalism" by creating a "needless conflict between state and federal courts." *Mapp v. Ohio*, 367 U.S. 643, 657–58 (1961) (quoting *Elkins v. United States*, 364 U.S. 206, 221 (1960)). Currently, in both the Ninth and Sixth Circuits "a federal prosecutor may" present prior convictions in one way during sentencing, while a "State's attorney across the street may" use it in another, "although he supposedly is operating under the enforceable prohibitions of the same Amendment." *Id.* at 657.

In short, this is an issue as to which this Court should no longer tolerate the lack of uniformity between state and federal courts.

C. This Case is an Ideal Vehicle to Resolve the Split.

The California statutory scheme is unambiguous about the question presented: 1) Penal Code section 667, subdivision (e), clearly permits the use of juvenile adjudications as qualifying prior convictions and 2) the California Court of Appeal's decision raises the question presented. *People v. Rodriguez*, 2022 Cal. App. Unpub. LEXIS 1719, 15-16.

Plus, petitioner's prior juvenile adjudication was the statutory basis for enhancing petitioner's adult sentence and bringing him under the Three

Strikes Law which mandates a 25 years to life sentence for each qualifying conviction. With the prior juvenile adjudication, petitioner received a 50-years to life indeterminate term plus 13 years. Without it, he would have received a 14-years to life indeterminate term, plus 13 years.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court grant his petition for writ of certiorari and review the judgment of the California courts.

CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 33

This brief complies with the length limits permitted by Supreme Court Rule 33-1. The brief is under 40 pages excluding exempted portions. The brief's type size and type face comply with Rule 33.2(a)(b).

Dated: September 12, 2022

Respectfully submitted,

/s/ Laura P. Gordon
Laura P. Gordon
Counsel of Record for
Richard Anthony Rodriguez

No. _____
SUPREME COURT OF THE UNITED STATES
OCTOBER 2022 TERM

RICHARD ANTHONY RODRIGUEZ, PETITIONER, V. PEOPLE OF THE STATE OF CALIFORNIA, RESPONDENT.	)	**PROOF OF SERVICE**

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO
I, Laura P. Gordon ,do swear or declare that on this date, September 12,2022, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.
The names and addresses of those served are as follows:

California Attorney General SACAWTTrueFiling@doj.ca.gov

Central California Appellate Program Eservice@capcentral.org

Richard Anthony Rodriguez, CDCR# BL5785
CCI
PO Box 1031
Tehachapi, CA 93561

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 12, 2022

/S/ Laura P. Gordon
Laura P. Gordon

APPENDIX A

Filed 3/21/22

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RICHARD ANTHONY RODRIGUEZ, Defendant and Appellant.	A164251 (Kern County Super. Ct. No. MF013128A)

After an incident in which defendant Richard Rodriguez beat his then girlfriend with two golf clubs while she was asleep, a jury convicted him of torture and domestic violence and he was sentenced to a lengthy prison term. Rodriguez argues that the evidence was insufficient to support the intent element of his torture conviction, that the trial court had a sua sponte duty to instruct the jury on the definition of "cruel or extreme pain and suffering" in the jury instructions on torture, and that convictions for crimes he committed as a juvenile should not have been used to enhance his sentence. We affirm.

BACKGROUND

On July 24, 2019, the Kern County District Attorney filed an amended information charging Rodriguez with torture of Jazmin P. on August 28, 2018 (Pen. Code, § 206)[1] (count 1), domestic violence against Jazmin on August

[1] Further statutory references are to the Penal Code.

27–28, 2018 and Desarae B.-C. in March 2017 (§ 273.5, subd. (a)), (counts 2 and 4), and dissuading a witness on August 27–28, 2018 (§ 136.1, subd. (b)(2)) (count 3). With respect to count 1, the information included two enhancements for use of a dangerous weapon (§ 12022, subd. (b)(1)), and an allegation that Rodriguez committed the offense while on bail (§ 12022.1). With respect to count 2, the information included the same enhancements as count 1, with an additional enhancement for inflicting great bodily injury (§ 12022.7, subd. (e)). With respect to count 3, the information again alleged an enhancement based on Rodriguez committing the offense while on bail (§ 12022.1), and with respect to count 4, the information alleged that Rodriguez personally used a dangerous weapon (§ 12022, subd. (b)(1)) and inflicted great bodily injury (§ 12022.7, subd. (e)). Finally, the information alleged with respect to all four counts that Rodriguez had previously been convicted of two serious or violent offenses—namely, a 2003 conviction for attempted murder that took place in 2001 and a 2001 juvenile adjudication for robbery— (§ 667, subds. (a) & (c)–(j), § 1170.12, subds. (a) – (e)), and with respect to count 2, that he had a 2018 conviction for domestic violence (§ 273.5, subd. (f)(1)).

The case went to trial in July and August of 2019, where Jazmin testified as follows:

Jazmin was Rodriguez's girlfriend from March of 2017 until September of 2018. On the night of August 27, 2018, Jazmin and Rodriguez got into an argument in the kitchen at his sister's house. Rodriguez was being "belligerent," "calling [her] names," and accusing her of "being a hoe and stuff like that." Because of the argument, Jazmin did not go home with Rodriguez as she would have normally done, but instead ended up falling asleep on the couch.

The next morning, Jazmin was still asleep on the couch when Rodriguez came in looking for his sister, and then left with his sister and his niece. After he left, Jazmin went back to sleep. When Jazmin woke up again, Rodriguez "was just really angry at me and he was hitting me with a golf club." The golf club, which was made of "strong plastic or wood," broke and a piece of it got stuck in Jazmin's hand. Jazmin's dog was next to her on the couch, and she was concerned for his life, because he was little, and Jazmin was concerned that if he was hit with the club he would die. Jazmin blocked the blows from the club with her left hand, which "sustained a lot of the impact." When the first golf club broke, Rodriguez obtained a second club made of metal and continued hitting Jazmin. After the attack ended, Rodriguez walked out. Before he left, Rodriguez told Jazmin " 'that's what you get for being a hoe,' " and " 'you're going to get fucked up every time I see you.' "

After the attack, Jazmin's hand was swollen and she had a piece of the first golf club lodged across her hand, under the skin. She could not feel her hand, her circulation had been cut off, and her hand was turning black, so she removed the piece of golf club herself. A friend helped Jazmin cut off her ring.

Two days later, on August 30, Jazmin became concerned about her circulation and felt her injuries were getting worse, so she went to the hospital. She had extensive bruising along the left side of her body from her shoulder down to her lower leg, numerous photos of which were taken at the hospital and shown to the jury. The bruising lasted about three weeks.

Jazmin was not able to fully use her left hand, and an X-ray revealed that her index finger, two other fingers, and her palm were all fractured. She

wore a hand brace for two weeks and her hand healed, except for her pinky finger, which remained "crooked."

Jazmin testified that Rodriguez had been violent with her approximately 10-15 times before the incident. He would get mad and hit her, including one incident in which he gave her a black eye, although "never anything that extensive" and not involving a weapon.

Desarae B.-C. testified that she had a relationship with Rodriguez that ended in March of 2016, but in March of 2017, they were dating again. That month, Rodriguez and Desarae got into an argument in the bedroom at his aunt's house, with his children present. Rodriguez "told his daughter that he was going to whip my ass and she needed to leave." Rodriguez began hitting Desarae, first with his hands and then with a wooden baseball bat on her left arm and left thigh. Desarae had bruising on her thigh and a puncture wound on her arm. Desarae managed to run away but Rodriguez caught up with her in the driveway and continued hitting her with the baseball bat.

After the incident, Desarae could not walk for two weeks, and could not extend her arm for about a week. About a week or a week and a half later, Rodriguez sent Desarae a text message with a picture of the bat with the text "remember this?"

On August 1, 2019, the jury found Rodriguez guilty on counts 1, 2, and 4, and not guilty on count 3. The jury found the dangerous weapon enhancements true with respect to count 1, 2, and 4. The jury also found the great bodily injury enhancement true on count 2, and not true on count 4.

A bench trial followed on the prior conviction and bail allegations, after which the trial court found the bail allegations not true but found all of the prior conviction allegations true.

On September 11, the trial court sentenced Rodriguez to 25 years to life plus 25 years to life plus 13 years, calculated as follows: 25 years to life on count 2, plus two years for the two weapons enhancements (§ 12022, subd. (b)(1)), plus five years for the great bodily injury enhancement (§ 12022.7, subd. (e)) and a further five years for the prior strike (§ 667, subd. (a)(1)); 25 years to life on count 4, plus a one-year weapons enhancement (§ 12022, subd. (b)(1)), to be served consecutively to the sentence on count 1. The trial court exercised its discretion to strike the five-year strike prior enhancement (§ 667, subd. (a)(1)) on count 4. On count 1, the trial court imposed a sentence of 25 years to life, with two one-year weapons enhancements (§ 12022, subd. (b)(1)) and a five-year enhancement for the strike prior (§ 667, subd. (a)(1)), but stayed the sentence on that count pursuant to section 654.

Rodriguez filed a notice of appeal. [2]

DISCUSSION

Rodriguez argues that (1) substantial evidence does not support the jury's finding that he had the intent to cause cruel or extreme pain and suffering, (2) the trial court had a duty to instruct the jury sua sponte on the definition of "cruel or extreme pain and suffering," and (3) two of his prior convictions could not be used as strikes because the crimes took place when he was 16-years old.

Substantial Evidence Supports the Jury's Torture Verdict

Applicable Law

[2] This appeal was originally to the Fifth District Court of Appeal with case number F080106. On December 20, 2021, the Chief Justice ordered this appeal transferred to the First District Court of Appeal, where it was assigned case number A164251.

"Every person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury as defined in Section 12022.7 upon the person of another, is guilty of torture." (§ 206.) And so the jury was instructed, pursuant to CALCRIM No. 810:

"The defendant is charged in Count 1 with torture in violation of Penal Code Section 206. To prove that the defendant is guilty of this crime, the People must prove that: [¶] First, the defendant inflicted great bodily injury on someone else; [¶] And, second, when inflicting the injury, the defendant intended to cause cruel or extreme pain and suffering for the purpose of revenge, persuasion, or for any sadistic purpose. [¶] Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm. It is not required that a victim actually suffer pain. [¶] Someone acts with a sadistic purpose if he or she intends to inflict pain on someone else in order to experience pleasure himself or herself."

" 'In reviewing the sufficiency of the evidence to support a criminal conviction, we review the record " 'in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. ' [Citation.]" We do not reweigh the evidence or revisit credibility issues, but rather presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence.' ([*People v.*] *Pham* [(2009)] 180 Cal.App.4th [919,] 924–925.)" (*People v. Sommer* (2021) 61 Cal.App.5th 696, 702.)

Analysis

Rodriguez concedes that substantial evidence supports the jury's conclusion that he inflicted great bodily injury on Jazmin, but contends that there was insufficient evidence for the jury to conclude that he "intended to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose." (CALCRIM No. 810.)

First, he argues that Jazmin's "injuries were not sufficiently severe to establish [he] had the specific intent to commit torture," going on to cite several cases finding that the severity of the victim's injuries could support the jury's conclusion that the defendant *did* have the requisite intent for torture. (See *People v. Jung* (1999) 71 Cal.App.4th 1036, 1041–1042 [evidence supported intent to torture where defendants burned victim with cigarettes, applied Ben-Gay to his penis, poured alcohol on fresh wounds, and beat, bit, and kicked him]; *People v. Hale* (1999) 75 Cal.App.4th 94, 106 [evidence supported intent where defendant struck the victim twice with a hammer in the face while she slept]; *People v. Pre* (2004) 117 Cal.App.4th 413, 422 [evidence supported intent where defendant choked victim to unconsciousness and then nearly bit through her ear].) But obviously this proposition does not apply in reverse. Rodriguez has already conceded that he the jury's finding that he inflicted great bodily injury on Jazmin is supported by substantial evidence. The severity of her injuries does not mean that the jury was prohibited from concluding that he had the intent to cause cruel or extreme pain. As one of the cases cited by Rodriguez explains: "That other victims of torture may have suffered more than the victim in this case sheds no light on the sufficiency of the evidence of defendants' intent to cause [Jazmin] severe pain and suffering." (*People v. Jung*, *supra*, 71 Cal.App.4th at p. 1043; *People v. Pre*, *supra*, 117 Cal.App.4th at p. 423

["Other Court of Appeal decisions have similarly found little utility in looking to the facts of other torture cases when faced with assessing the sufficiency of the evidence"].)

Second, Rodriguez relies on four older cases where the defendant was convicted of first-degree murder and our Supreme Court reversed, holding that the evidence was insufficient to support that verdict on the theory that the murder was committed "by means of . . . torture" (§ 189, subd. (a)).[3]

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[3] The cases are: (1) *People v. Bender* (1945) 27 Cal.2d 164, where the Supreme Court found that that the mere fact that the victim was struck with a blunt instrument did not support a first-degree murder by torture verdict, adding that "[t]he killer who, heedless of the suffering of his victim, in hot anger and with the specific intent of killing, inflicts the severe pain which may be assumed to attend strangulation, has not in contemplation of the law the same intent as one who strangles with the intention that his victim shall suffer." (*Id.* at p. 177.)

(2) *People v. Tubby* (1949) 34 Cal.2d 72, where the defendant was drunk and was seen from a distance striking his elderly stepfather with his fist. (*Id.* at pp. 74–75.) The court found the first-degree murder verdict unsupported by a theory of torture because the "record is devoid of any explanation of why the defendant might have desired his stepfather to suffer" and "[i]t is too apparent to admit of serious doubt that the unprovoked assault was an act of animal fury produced when inhibitions were removed by alcohol." (*Id.* at. pp. 77–78.)

(3) *People v. Anderson* (1965) 63 Cal.2d 351, where the defendant—who had been drinking—killed the 10-year-old victim by stabbing her some 41 times, including one cut through her tongue and another "from the rectum through the vagina." (*Id.* at p. 356.) The court found no evidence demonstrating the requisite intent for murder by torture, but rather that "the evidence in the instant case shows only an explosion of violence without the necessary intent that the victim should suffer." (*Id.* at p. 360.)

(4) *People v. Steger* (1976) 16 Cal.3d 539, where the defendant killed her three-year old stepdaughter by beating her and causing her head injuries. (*Id.* at p. 543.) After explaining that "murder by means of torture under section 189 is murder committed with a willful, deliberate, and premeditated intent to inflict extreme and prolonged pain" (*id.* at p. 546), the court

These cases are all inapposite, first because "[t]he intent required for torture as defined by section 206 is not identical to the intent for murder by torture under section 189. (*People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1206 [premeditation is an element of section 189 but not section 206]; *People v. Vital* (1996) 45 Cal.App.4th 441, 444 [a premeditated intent to cause pain not a requirement of section 206].)" (*People v. Hale*, *supra*, 75 Cal.App.4th at p. 107.) And in these cases—two of which involved drunk defendants—there was *no* evidence of the defendant's intent, and the necessary premeditated intent to inflict extreme and prolonged pain could not be inferred merely from the nature of the victim's injuries.

Here, there was ample evidence from which the jury could conclude that Rodriguez had the intent to cause cruel or extreme pain and suffering. In particular, the attack was unprovoked, while Jazmin was asleep and therefore vulnerable and defenseless. Rodriguez beat her several times with a golf club, and when that club broke, continued beating her with a second one. The attack caused Jazmin to fear for her dog's life and led her to try to protect her dog with her hand, which sustained severe—and in the case of her pinky finger, permanent—injury. And Rodriguez's own statements after the attack ended—" 'that's what you get for being a hoe,' " and " 'you're going to get fucked up every time I see you' "—support the inference that the attack

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concluded that "the evidence shows that defendant severely beat her stepchild. But there is not one shred of evidence to support a finding that she did so with coldblooded intent to inflict extreme and prolonged pain. Rather, the evidence introduced by the People paints defendant as a tormented woman, continually frustrated by her inability to control her stepchild's behavior. The beatings were a misguided, irrational and totally unjustifiable attempt at discipline; but they were not in a criminal sense willful, deliberate, or premeditated." (*Id.* at p. 548.)

was revenge or retaliation for her imagined infidelity. All this is substantial evidence in support of the jury's finding that Rodriguez intended to cause cruel or extreme pain or suffering.

Indeed, the facts of *People v. Hale*, *supra*, 75 Cal.App.4th 94, are similar to those here. There, the victim was asleep with her three-year old daughter in bed beside her, and woke up to the loud cracking sound of a hammer hitting her face. (*Id.* at p. 101.) The defendant shouted " 'Die, bitch' and something to the effect of 'That's what you get' or 'You're going to get it.' [The defendant then] struck [the victim] in the face with the hammer a second time." (*Ibid.*) The Court of Appeal held that substantial evidence supported the intent element of defendant's torture conviction because the defendant "entered [the victim']s bedroom in the middle of the night," "attacked her while she was asleep, with her three-year old daughter in bed beside her," and "struck her once while she slept, and then a second time after she awoke screaming." (*Id.* at p. 106.) From the fact that defendant attacked the victim "with a hammer at night when she was asleep in bed with her daughter beside her," the jury could infer that he intended her "to suffer cruel physical pain as well as extreme anguish and terror" in the form of "extreme fear for the safety of her daughter" (*ibid.*), and from his statements along the lines of "that's what you get," the jury could infer the defendant "intended to cause [the victim] to suffer cruel pain for the purpose of revenge." (*Id.* at p. 107.) So too here. Jazmin was attacked while asleep, in a way that caused her not only extreme physical pain but also fear and terror for the safety of her small dog on the couch beside her.

In short, we easily conclude that substantial evidence supports the jury's torture verdict.

The Trial Court Did Not Have a Duty to Instruct the Jury on the Meaning of Cruel or Extreme Pain Sua Sponte

Rodriguez next argues that the jury instructions on torture was ambiguous, in that "cruel" can mean "bloodthirsty, ferocious, merciless, relentless," and "extreme" can mean "immoderate" and "beyond the ordinary or average," such that "intent to cause cruel or extreme pain and suffering" could mean either "intent to cause bloodthirsty, merciless, or relentless pain and suffering of the outermost degree" or "intent to cause immoderate pain and suffering beyond the ordinary or average." Because of this purported ambiguity, Rodriguez argues that the trial court had a duty to instruct the jury sua sponte that "intent to cause cruel or extreme pain and suffering" meant "intent to cause the utmost, or an exceedingly great degree of pain and suffering." (See *People v. Roberge* (2003) 29 Cal.4th 979, 988 [duty to instruct sua sponte where "a statutory term 'does not have a plain, unambiguous meaning,' has a 'particular and restricted meaning,' or 'has a technical meaning peculiar to the law or an area of law' "].)

We do not agree that there was any ambiguity requiring a sua sponte clarifying instruction. To begin with, since the instruction refers to cruel *or* extreme pain, there is no ambiguity introduced by replacing cruel and extreme with their definitions—"cruel or extreme pain" encompasses both. In addition, "cruel" and "extreme" are not words with particular, restricted, or technical meanings—they are ordinary words that the jury is easily equipped to understand. (See *People v. Bland* (2002) 28 Cal.4th 313, 334 ["A court has no sua sponte duty to define terms that are commonly understood by those familiar with the English language"].) They are also the words used in section 206. (See *People v. Poggi* (1988) 45 Cal.3d 306, 327 ["The language of a statute defining a crime or defense is generally an appropriate and

desirable basis for an instruction, and is ordinarily sufficient when the defendant fails to request amplification"].)

In addition, section 206 has repeatedly been upheld against challenges that it is unconstitutionally vague. Thus, for example, *People v. Aguilar* (1997) 58 Cal.App.4th 1196 (*Aguilar*), where the court held as follows: "In section 206, the word 'cruel' modifies the phrase 'pain and suffering.' In at least two other cases, courts have held that 'cruel pain' is the equivalent to 'extreme' or 'severe' pain. (*People v. James* (1987) 196 Cal.App.3d 272, 297; *People v. Talamantez* (1985) 169 Cal.App.3d 443, 457.) This definition comports with the common dictionary definition of 'cruel' (see Webster's New Internat. Dict. (3d ed. 1965) p. 546 [as an adjective, 'cruel' means 'extreme' or 'severe']), and, in our view, is a reasonable and practical interpretation of that phrase (*Williams v. Garcetti* [(1993)] 5 Cal.4th [561,] 568). We therefore conclude that the phrase 'cruel or extreme pain and suffering,' as used in section 206, is not unconstitutionally vague." (*Aguilar*, *supra*, 58 Cal.App.4th at p. 1202, fn. omitted.) Other cases are in accord. (See *People v. Misa* (2006) 140 Cal.App.4th 837, 844 ["We reject his contention that an ordinary person cannot understand what conduct is prohibited by section 206 and thus decline his invitation to hold the statute unconstitutional on this basis"]; *People v. Barrera* (1993) 14 Cal.App.4th 1555, 1572 ["The terms used in section 206 . . . are of such common usage that they are presumed to be within the understanding of reasonable jurors"].) We conclude that the trial court had no sua sponte duty to clarify the meaning of "cruel or extreme pain and suffering."[4]

[4] Because of our conclusion, we need not reach the Attorney General's argument that Rodriguez waived this argument by failing to raise it below, or

Juvenile Adjudications May Be Used as Strikes Under the Sixth Amendment

Rodriguez's final argument is that his 2001 juvenile adjudication for robbery and his 2003 conviction for an attempted murder that took place in 2001—when he was 16 years old—could not be used as strikes, because doing so violated his right to trial by jury under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*). However, as Rodriguez acknowledges, our Supreme Court rejected his argument in *People v. Nguyen* (2009) 46 Cal.4th 1007 (*Nguyen*), and that decision binds this court. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) He goes on to argue that *Nguyen* was wrongly decided in order to preserve his right to review. However, unless and until our Supreme Court does reconsider *Nguyen*, that authority forecloses Rodriguez's argument here. (See *Nguyen*, *supra*, 46 Cal.4th at pp. 1022–1028 [juvenile adjudications may be used as strikes consistent with *Apprendi* and the Sixth Amendment].)

DISPOSITION

The judgment is affirmed.

Rodriguez's alternative argument that if he did waive the argument, his counsel was ineffective in failing to raise it.

_____
Richman, Acting P.J.

We concur:

_____
Stewart, J.

_____
Miller, J.

People v. Rodriguez (A164251)

APPENDIX B

Court of Appeal, First Appellate District, Division Two - No. A164251

S274319

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

RICHARD ANTHONY RODRIGUEZ, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice