No. _____

In the

Supreme Court of the United States

In re Steven L. Haden,

Petitioner

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

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Petition for Writ of Certiorari

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Question Presented

Are the Sixth Amendment holdings of *Descamps v. United States*, 570 U.S. 254 (2013) and *Mathis v. United States*, 579 U.S. 500 (2016) fully retroactive, because those opinions categorically prohibit imposition of a prior conviction enhancement when the enhancement requires additional facts beyond the adjudicated elements of the prior conviction offense?

This is the same question presented in this Court case number 22-6094, distributed for January 6, 2023, conference.

Parties to the Proceeding

Petitioner is Steven L. Haden.

Respondent is the State of California.

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A published opinion of the California Court of Appeal was filed June 5, 2020, and is attached at Appendix-001-31.-. The California Supreme Court granted a discretionary petition for review August 12, 2020; it is APPNDX-. After the California Supreme Court filed its published opinion in *In re Milton*, 13 Cal. 5th 893 (2022), the California Supreme Court ordered review dismissed. That Court's November 9, 2022, order dismissing review is Appendix-032.

Jurisdiction

The California Supreme Court dismissed review November 9, 2022. Jurisdiction of this Court is thus timely invoked under 28 U.S.C. § 1257(a). Appendix-032. Under this Court's rules 13.1 and 20.2, this petition is timely because it is filed within 90 days from the California Supreme Court's order dismissing review

Constitutional Provisions

The Fifth Amendment provides, in relevant part, that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Sixth Amendment provides, in relevant part, "[i]n 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 …." U.S. Const. amend. VI.

The Fourteenth Amendment, section one, provides, in relevant part, that no "state shall deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

Statement of Case

In 1998, Haden was convicted of inflicting corporal injury on a spouse and admitted a special allegation of personal use of a deadly weapon. *In re Haden*, 49 Cal. App. 5th 1094, 1095 (2020). The prosecution sought to increase Haden's sentence under the California Three Strikes Law (Cal. Penal Code § 667(b)-(j), 667.5(c), and 1170.12(a) (West)) because Haden had suffered two North Dakota robbery convictions.

Under the Three Strikes Law, an out-of-state robbery conviction qualifies as a "strike" only if it includes all elements of a California

robbery. Cal. Penal Code § 667(d)(2)((1). A conviction under North Dakota robbery statute does not contain all elements of a California robbery because, unlike California, it is possible to commit robbery in North Dakota without committing theft. *In re Haden*, 49 Cal. App. 5th at 1095, 1108.

Yet relying on its own examination of the record of conviction, the trial court found the two North Dakota convictions to be strikes and sentenced Haden to 25 years to life in prison. *In re Haden*, 49 Cal. App. 5th at 1108. The trial court examined the charging documents for both robberies, court minutes for the hearing where the court took Haden's plea, and criminal judgment forms. *Id.* at 1107-08. The court found that the version of the events described in the charging documents matched the elements of California robbery. *Id.*

In 2017 (years after *Haden*'s direct appeal became final), the California Supreme Court issued its opinion in *People v. Gallardo*, 4 Cal. 5th 120 (2017). Relying on this Court's decisions in *Descamps*, and *Mathis*, *Gallardo* limited the use of a prior conviction to increase a current sentence to those cases when the jury clearly found beyond a

reasonable doubt or the defendant admitted all elements of the predicate offense. *Id.* at 124-12.

After *Gallardo*, Haden filed a post-conviction petition, challenging his enhanced sentence under the Sixth Amendment. Haden argued that he was entitled to resentencing under *Gallardo* because the trial court's findings about the conduct underlying Haden's North Dakota robbery convictions violated the Sixth Amendment, as interpreted in *Gallardo*, *Descamps*, *Mathis*, and *Gallardo*. *In re Haden*, 49 Cal. App. 5th at 1094.

The California Court of Appeal denied *Haden*'s petition because Gallardo's adoption of the Descamps/Mathis rule was not retroactive to petitioner's case. *Id.* Other California appellate courts, however, when presented with the same issue, found the Descamps/Mathis rule to be retroactive. *Id.*

The California Supreme Court granted review in Haden's case, pending resolution of *In re Milton*, where that court was considering whether *Gallardo's* application of the *Descamps / Mathis* rule was retroactive on collateral review. After *Milton* held that it was not

retroactive (*In re Milton*, 13 Cal. 5th at 897), the California Supreme Court dismissed review in this case November 9, 2022.

The cert petition in *Milton*, which also raises retroactivity of the *Gallardo* application of the *Descamps / Mathis* rule is pending before the Court, 22-6094., and is distributed for the January 6, 2023, conference.

Reasons for Granting the Petition

Cert Should Be Granted Because the California Supreme Court's Decision on Non-Retroactivity of Gallardo Only Deepened the Already Existing Split Between Federal Appellate Courts About Whether *Descamps* and *Mathis* Apply Retroactively Under *Teague*

A. Introduction and Background Law

In *Milton*, the California Supreme Court held that defendants who are *innocent* of prior conviction allegations under the current law must still keep serving out their sentences, including life sentences, despite the recent adopt of the *Descamps / Mathis* rule.[1] While that rule limits how prior convictions may lawfully be used to increase a sentence in accordance with the Sixth Amendment, *Milton* found that adopting the *Descamps / Mathis* rule was a procedural change, not a substantive

[1] Haden's claim that he is entitled to resentencing under the *Descamps / Mathis* rule announced in *Gallardo* was rejected based on *Milton*. (Appendix-032).

change in law. That grave injustice counsels heavily in favor of granting certiorari.

The nature of the change created by adopting the *Descamps / Mathis* rule shows it to be substantive, not procedural. Before *Gallardo* adopted that rule, California had been an outlier in permitting extraneous conduct underlying a prior conviction – conduct that was neither proven nor admitted in the previous proceeding – to be used to support an increased sentence. In *People v. McGee*, 38 Cal. 4th 682 (2006), the California Supreme Court recognized this Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) – that defendants have the right to have a jury determine any fact used to increase a sentence, except the fact *of* a prior conviction – but then relied on it to find that trial courts could make factual findings about extraneous conduct *underlying* a prior conviction. *McGee*, 38 Cal. 4th at 686–87.

While California continued to cling to that constitutionally dubious approach to judicial fact-finding, this Court's decisions continued to show the constitutional need to limit judicial fact-finding at sentencing to those facts necessarily found beyond reasonable doubt by a prior trier of fact or necessarily admitted by the defendant (elements of the prior charge). In

Descamps and *Mathis*, this Court reaffirmed that under the Sixth Amendment, only the elements found true beyond reasonable doubt by a trier of fact or admitted by the defendant could support an enhanced sentence.

In *Descamps v. United States*, 570 U.S. 254 (2013), this Court considered Sixth Amendment principles and reaffirmed that under the "categorical approach," only prior conviction *elements* can support an increased sentence under the Armed Career Criminal Act ("ACCA") (18 U.S.C. § 924(e)) in accordance with the Sixth Amendment, rather than any extraneous conduct from the prior conviction. *Descamps*, 570 U.S. at 261, 269–70.

Descamps also recognized a limited exception to this rule, really more of a tool to implement the categorial approach. Under the "modified" categorical approach, when the prior conviction is under a divisible statute (i.e., a statute that has an alternative that matches the predicate definition and one that does not), the court may consider a limited set of documents to determine under which version of the prior offense the defendant was convicted. *Descamps*, 570 U.S. at 257.

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Descamps considered whether a guilty plea to burglary in California (§ 459) qualified as a prior violent felony under the Armed Career Criminal Act ("ACCA") (18 U.S.C. § 924(e)). Because the California statute for burglary, which does *not* require an unlawful entry, is broader than the generic crime under the ACCA, a conviction under the California statute "cannot count as an ACCA predicate, even if the defendant actually committed the offense in its generic form." *Descamps*, 570 U.S. at 260. "The key… is elements, not facts." *Id.* Thus, as to *Descamps* himself, "review of the plea colloquy or other approved extra-statutory documents" was not authorized because the California statute for burglary was categorically broader than the generic offense of burglary under the ACCA and not divisible. *Id.* at 265.

This Court reaffirmed those same principles in *Mathis v. United States*, 579 U.S. 500 (2016). *Mathis* held "that the prior crime qualifies as an ACCA predicate if, but only if, its elements are the same as, or narrower than those of the generic offense." *Id.* at 503. A sentencing court "can do no more, consistent with the Sixth Amendment, then determine what crime with what elements, the defendant was convicted of." *Id.* at 511-12, citing *Apprendi*, 530 U.S. at 490.

Neither *Descamps* nor *Mathis* were breaking new ground. Instead, *Descamps* found prior "caselaw explaining the categorical approach and its 'modified' counterpart all but resolves this case." *Descamps*, 570 U.S. at 260. The foundation for the analysis in *Descamps* was laid in this Court's decisions in *Taylor v. United States*, 495 U.S. 575 (1990) and *Apprendi*, 530 U.S. 466.

In *Taylor*, this Court first adopted a formal categorical approach, which permits sentencing courts to look only at statutory elements of a prior conviction – and not to the underlying facts of the prior case – to decide whether a prior conviction can be used to increase a defendant's sentence. *Descamps*, 570 U.S. at 261, citing *Taylor*, 495 U.S. at 600. *Taylor* reasoned that this approach "avoids the Sixth Amendment concerns that would arise from sentencing courts' making findings of fact that properly belong to juries." *Descamps*, 570 U.S. at 267; see *Taylor*, 495 U.S. at 601 (categorical approach avoids findings by trial court which a defendant potentially "could . . . challenge . . . as abridging his right to a jury trial").

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Another basis for the *Descamps-Mathis* rule was *Apprendi*. *Descamps* cited *Apprendi's* holding 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." *Descamps*, 570 U.S. at 269, quoting *Apprendi*, 530 U.S. at 490. On the facts of *Descamps,* this Court relied on *Apprendi* to find the sentencing court could not look beyond the fact of the California burglary conviction to determine whether it qualified under the ACCA.

Then, in 2017, in *Gallardo*, California finally reversed course, based on this Court's Sixth Amendment jurisprudence in *Taylor*, *Apprendi*, *Descamps*, and *Mathis*. Relying on that jurisprudence, *Gallardo* held that only what was proven beyond a reasonable doubt or admitted in the prior proceeding as part of a prior conviction could be used to increase a defendant's sentence in a subsequent case. *Gallardo*, 4 Cal. 5th at 124–25.

That California erroneously permitted judicial factfinding for so long after *Taylor* and *Apprendi* should not be grounds for the continued imprisonment of defendants across California,

who would otherwise be eligible for release if current Sixth Amendment jurisprudence were applied to them. California already has the second-highest prison population among the States (Kang-Brown, Jacob, People in Prison Winter 2021-2022 VERA INSTITUTE OF JUSTICE (Feb. 2022) <https://www.vera.org/downloads/publications/People_in_Prison_in_Winter_2021-22.pdf> at p. 1), and much of that population is serving long sentences based on prior conviction enhancements.[2]

For these reasons, the California Supreme Court's failure to retroactively apply its adoption of the Descamps/Mathis rule is a travesty of justice that must be remedied by resolving the question presented.

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[2] One analysis of a set of cases showed that one out of every four years served in California jails and prisons stems from an enhancement, and that around "half of the time served for enhancements was triggered by prior convictions." Dagenais et al., *Sentencing Enhancements and Incarceration: San Francisco*, 2005-2017, STANFORD COMPUTATIONAL POLICY LAB (Oct. 17, 2019) <https://policylab.stanford.edu/media/enhancements_2019-10-17.pdf> at 1.

B. This Court Should Grant This Petition to Resolve a Deep Conflict Between the California Supreme Court's Finding the *Descamps / Mathis* Rule Procedural and Federal Circuit Court Decisions That Found the *Descamps / Mathis* Rule to be Substantive

This Court should grant this petition to resolve a clear and irreconcilable conflict between *Gallardo* – which found the *Descamps / Mathis* rule to be procedural for retroactivity purposes – and federal circuit court decisions that found the rule to be substantive. The Sixth, the Seventh, and the Ninth Circuits have concluded that *Descamps* is retroactive to cases on collateral review. *Hill v. Masters*, 836 F.3d 591 (6th Cir. 2016); *Holt v. United States*, 843 F.3d 720 (7th Cir. 2016); *Allen v. Ives*, 950 F.3d 1184 (9th Cir. 2020).

In *Hill v. Masters*, 836 F.3d 591 (6th Cir. 2016), the Sixth Circuit agreed with "[t]he Government['s] conce[ssion] that, after *Descamps* and [*United States v. Royal*, 731 F.3d 333 (4th Cir. 2013) (4th Cir. 2013)], Maryland's second-degree assault statute no longer constitutes a crime of violence for the purpose of the career-offender enhancement." *Id.* at 595-96. The Sixth Circuit also agreed with the Government's "conce[ssion] that Descamps and Royal apply retroactively." *Id.* at 596.

And in *Holt*, the Seventh Circuit held that "substantive decisions such as Mathis presumptively apply retroactively on collateral review. [Citations.]" *Id.* at 722.

Next, in *Allen*, the Ninth Circuit held *Descamps* and *Mathis* to be retroactive because they "alter the range of conduct that the law punishes and not only the procedures used to obtain the conviction. *Allen*, 950 F.3d at 1192, quoting *Welch v. United States*, 578 U.S. 120, 131 (2016).

Finally, several other circuits have held that *Descamps* and / or *Mathis* did not announce a new rule, without addressing whether the rule was procedural or substantive. See, e.g., *Forrest v. United States*, 934 F.3d 775, 778 (8th Cir. 2019); *In re Thomas*, 823 F.3d 1345, 1349 (11th Cir. 2016); *In re Jackson*, 776 F.3d 292 (5th Cir. 2015). These cases only underscore the continuing conflict among circuit courts about whether the *Descamps / Mathis* rule is retroactive on collateral review.

And the conflict between the 6th, 7th, and 9th Circuits on the one hand and *In re Milton* is clear and irreconcilable – several federal circuits correctly view the rule as substantive while *Milton* mistakenly adopted a view that the rule is procedural.

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While *Milton* tried to distinguish the federal decisions finding the *Descamps / Mathis* rule to be retroactive, the distinction *Milton* drew is immaterial. In re Milton, 13 Cal.5th at p. 947, fn. 7. *Milton* sought to justify its alternative approach because while ACCA is an elements-based statute, the Three Strikes Law looks to the conduct underlying the prior charge. *Id.* But this technical distinction misses the point central to *Descamps* and *Mathis* and adopted by *Gallardo.* Under the Sixth Amendment, only the prior conviction *itself* may support an increased sentence in a subsequent case, *not* extraneous facts that were neither proven nor admitted in the prior proceeding. *Gallardo*, 4 Cal. 5th at 133–34. How the particular predicate statute is worded does not address the Sixth Amendment problems created by pre-*Gallardo* approach.

Milton's analysis also ignores the fact that this Court has also applied the relevant Sixth Amendment principles outside the ACCA context. See e.g., *Pereida v. Wilkinson*, 209 L. Ed. 2d 47 (Mar. 4, 2021) (applying the categorical rule in the context of the Immigration and Nationality Act); *United States v. Taylor*, 213 L. Ed. 2d 349 (June 21, 2022) (applying the categorical approach in the case involving 18 U.S.C. §

924(c)(3)(A)). So application of these Sixth Amendment principles does not depend on any specific structure of ACCA or any other federal statute.

Additionally, the time to resolve this conflict is now. It is untenable that a defendant may have to continue serving a life sentence despite *Descamps* and *Mathis* only because he happens to have been convicted in the wrong jurisdiction. In fact, even for California defendants, the outcome may differ based purely on timing of t heir conviction and on whether they seek habeas relief in California or federal courts. Because of the importance to relief the *Descamps / Mathis* rule provides to the defendants and the dire consequences of not applying the rule in many cases, there should be a uniform rule about how this relief applies.

In sum, because the California Supreme Court's determination that the Descamps/Mathis rule is a procedural rule conflicts with circuit court determinations that the rule is a substantive rule, this Court should grant the petition to resolve this conflict.

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C. This Court Should Grant the Petition Because the Question Presented Is an Important Constitutional Question, which *Milton* Resolved in a Way That Conflicts with This Court's Decisions

1. The importance of question presented

Resolution of the conflict about the question presented is a question of nationwide importance. As noted earlier, the consequences for the criminal defendants can be dire – if their sentences were enhanced based on improper judicial fact-finding, they would have to continue to serve long sentences, including life in prison, despite their sentence being unconstitutional under the *Descamps / Mathis* rule. And that would be only based on fortune or misfortune of where the defendant happened to commit their crime or whether they seek relief from California or federal courts. Because of the importance of interests involved, there should be uniform resolution of the retroactivity issue.

Plus, living behind bars a person despite their sentence resulting from unconstitutional judicial fact finding contradicts our constitutional system of justice. These dire consequences for many prisoners in California and across the nation should counsel heavily in favor of resolving this conflict now.

Another factor demonstrating importance of the question presented is the nature of the Sixth Amendment and due process rights of the defendants at stake. The concerns that animated the *Descamps-Mathis* rule are the judges usurping fact-finding functions of a jury *in a prior proceeding*. *Descamps*, 570 U.S. at 267. One of the reasons for this Court's adoption of the categorical approach were the potential constitutional and practical difficulties that would arise if sentencing judges in a subsequent case had a right to look to the underlying conduct. 495 U.S. at 601–02.

And *Milton* recognized that California's judicial fact-finding process before *Gallardo* "[were] ultimately inconsistent with the Sixth Amendment principles upon which our decision in *In re Milton*, 13 Cal.5th at 952..

Because of the importance of these concerns to the fairness and constitutionality of the sentencing proceedings, often with dire consequences for the defendant, the time to resolve the conflict about the question presented is now.

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2. *Milton's* resolution of the question presented conflicts with this Court's decisions

Under the federal standard for retroactivity, new substantive rules of criminal law are fully retroactive, while procedural rules are not fully retroactive. *Montgomery v. Louisiana*, 577 U.S. 190, 198 (2016).

A rule is considered substantive when it, for example, forbids criminal punishment for certain category of conduct or when it prohibits certain category of punishment for a class of defendants of their status or offense. *Montgomery*, 577 U.S. at 198. In *Montgomery*, this Court held that the rule announced in *Miller v. Alabama*, 567 U.S. 460 (2012) – that mandatory life-without-parole sentences for juveniles are unconstitutional – was a substantive rule of law requiring retroactive application to cases on collateral review. *Montgomery* reasoned that the rule of *Miller* made life-without-parole punishment constitutionally prohibited to virtually all juvenile offenders (i.e., to a class of offenders. *Montgomery*, 577 U.S. at 198. Like other substantive rules, this rule had to be applied retroactively because it carried a risk that many individuals faced punishment that the law cannot imposed on them. *Id.* And while

the rule has a procedural component—it requires sentencing courts to consider a juvenile's youth and attendant characteristics before imposing life without parole sentence—that procedural component is necessary to implement a substantive guarantee. *Id.* This is unlike a procedural rule that regulates the manner of determining an offender's culpability. *Id.*

Under the above-described standard, *Gallardo*'s adoption of the *Descamps* / *Mathis* rule announced a substantive change in law. Before *Gallardo*, a defendant could have his sentence increased based on prior conduct not necessarily established by the elements of a prior conviction. But after *Gallardo*, based on the Sixth Amendment principles in the *Descamps / Mathis* rule, a fact not established by an element of a prior conviction cannot support an increased sentence in a subsequent case. Imposition of enhanced punishment based on a prior conviction is prohibited unless the State can show that (1) the prior conviction is under a statute that has the same or narrower scope than the predicate statute (2) the factual basis for the plea is to a version of the offense matching the California predicate. *Gallardo*, 4 Cal. 5th at 135–37.

And as in Montgomery, while the *Descamps / Mathis* rule has a procedural component (such as limiting the type of evidence in the record

of conviction a sentencing court may consider, and how it may consider that evidence), this procedural component is necessary to implement the substantive guarantee. That guarantee is that a defendant is not subject to enhancement punishment based on a prior conviction finding unless the prior statute has the same or narrower scope (as established by the elements) than the predicate statute.

For these reasons, the rule announced by *Gallardo* was substantive, not procedural.

In reaching a contrary conclusion, *Milton* misread this Court's decisions. *Milton* reasoned that *Gallardo* did not announce a substantive rule because under the *Descamps* / *Mathis* rule, not *all* defendants whose sentence had been enhanced under the Three Strikes Law are categorically excluded from the reach of the Three Strikes Law. *In re Milton*, 13 Cal. 5th at 909.

Yet this Court rejected an analogous argument in *Montgomery*. Louisiana had argued that the rule of *Miller* was procedural, not substantive because it did not categorically place any punishment beyond the State's power to impose. *Montgomery*, 577 U.S. at 209. This Court rejected this argument because under *Miller*, all but the rarest of

juveniles (considered irreparably corrupt) would be excluded from a life-without-parole-sentence. *Id.* "The fact that life without parole could be a proportionate sentence for the latter kind of juvenile offender does not mean that all other children imprisoned under a disproportionate sentence have not suffered the deprivation of a substantive right." *Id.*

And while *Milton* also argued this analysis does not carry the day because most procedural rules likely narrow the universe of defendants subject to punishment, *Milton* missed a critical distinction between substantive rules and procedural rules (like the one at issue in *Edwards v. Vannoy*, 209 L. Ed. 2d 651 (May 17, 2021). When a new rule announces a purely procedural change in the manner of adjudication (such as prohibition of non-unanimous jury verdict at issue in *Edwards*), the potential narrowing of liability or punishment is purely theoretical and it does not apply to any specific class of defendants.

In contrast, the *Descamps / Mathis* rule announced in *Gallardo* narrows the scope of punishment for a very specific and recognizable class of defendants – those whose sentence was enhanced based on non-elemental judicial fact-finding. Under the *Descamps / Mathis* rule, those

individuals are now categorically excluded from enhanced punishment under the Three Strikes Law.

Milton made another critical error in describing the change resulting from the *Descamps / Mathis* rule as being about the *form* of judicial fact-finding. *In re Milton*, 13 Cal. 5th at 910. As required by *Apprendi*, *Descamps*, and *Mathis*, the error in this scenario is not merely that the wrong entity engaged in fact-finding *in the subsequent case*. Indeed, *Gallardo* explicitly rejected the view of Justice Chin who had argued that the violation of a jury trial right can be remedied by empaneling a jury in the current case to engage in fact-finding. *Gallardo*, 4 Cal. 5th at 138–40.

Instead, as *Apprendi*, *Descamps*, and *Mathis* require, unless the facts subjecting the defendant to enhanced punishment were *necessarily* found by a *prior* jury (as established by the prior conviction's elements), the defendant is not eligible for an enhanced sentence. This is a substantive limitation on punishment, not an error in the form of adjudication (as *Milton* incorrectly described it).

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Finally, this case is a good vehicle to resolve the question presented because retroactive application of the *Descamps / Mathis* rule announced in *Gallardo* is outcome-determinative. Under *Descamps* and *Mathis*, North Dakota robberies (which were used to enhance Haden's sentence) could never be strikes under California law because North Dakota does not require the defendant to commit theft to be convicted of robbery; California does. *In re Haden*, 49 Cal. App. 5th at 1095. So if the *Descamps / Mathis* rule is found to be applicable retroactively to Haden's case, as we believe it should, Haden is entitled to resentencing.

Conclusion

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

Respectfully submitted,

DATE: December 22, 2022

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