No. 23-

IN THE

Supreme Court of the United States

CHRISTOPHER RYAN MARTIN,

Petitioner,

v.

TOM LAWSON, CHIEF OF NEVADA DIVISION OF PAROLE AND PROBATION AND STATE OF NEVADA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Petitioner is entitled to a Certificate of Appealability (COA) from the Court of Appeals for the Ninth Circuit by his showing that reasonable jurists have read *Apprendi, infra*, and *Jones, infra*, as limiting prior convictions for judicial enhancement where the safeguard of a jury trial was available.

II. Whether the merits of Petitioner's constitutional claim (which has and will affect many other defendants) is " . . . adequate to deserve encouragement to proceed further." *Buck, infra*; *Miller-El, infra; Slack, infra.*

STATEMENT OF RELATED CASES

1. *State v. Martin*, No. C-18-336705-1, District Court, Clark County, Nevada. Judgment (Judgment of Conviction) entered January 29, 2021.

2. *Martin v. State,* No. 82498-COA, Court of Appeals of the State of Nevada. Judgment (Order of Affirmance) entered September 13, 2021.

3. *Martin v. State,* No. 82498-COA, Court of Appeals of the State of Nevada. Judgment (Order Denying Rehearing) entered October 20, 2021.

4. *Martin v.* State, No. 82498, Supreme Court of the State of Nevada. Judgment, (Order Denying Petition for Review) *en banc* entered January 27, 2021.

5. *Martin v. Tom Lawson, et al*., No. 2:22-cv-00850-APG-VCF, United States District Court, District of Nevada. Judgment, (Order Denying (1) Petition for Writ of Habeas Corpus and a COA, and (2) Motion to Strike entered May 4, 2023.

6. *Martin v. Tom Lawson, et al*., No. 2:22-cv-00850-APG-VCF, United States District Court, District of Nevada., (Order Denying Motion to Alter or Amend Judgment) entered May 25, 2023.

7. *Martin v. Tom Lawson, Chief, Nevada Division Parole and Probation; et al*, No. 23-15835, United States Court of Appeals for the Ninth Circuit, (Order [denying COA]) entered January 31, 2024.

8. *Martin v. Tom Lawson, Chief, Nevada Division Parole and Probation; et al*, No. 23-15835, United States Court of Appeals for the Ninth Circuit, (Order [denying reconsideration]) entered February 29, 2024.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Christopher Martin (Martin) respectfully prays that a writ of certiorari be granted for the issuance of a Certificate of Appealability (COA) because Martin has met the requisite standard set by this Court, to wit: (1) Martin has shown that reasonable jurists could (***and have***) read *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct 2348, 147 L.Ed.2 435 (2000) and *Jones v. United States*, 526 U.S. 227, 119 S.Ct 1215, 143 L.Ed.2d 311 (1999), contrary to the district court and court of appeals, as limiting prior convictions for judicial enhancement to priors where the safeguard of a jury trial was available, (2) Martin is not required to show that he would be successful on appeal. *Miller-El v. Cockrell*, 537 U.S. 322, 342, 123 S.Ct 1029, 1042, 154 L.Ed.2d 931 (2003) ("The question is the debatability of the underlying constitutional claim, not the resolution of that debate.") and (3) the merits of Martin's constitutional claim (which has and will affect many other defendants) is one " . . . that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Buck v. Davis*, 580 U.S. 100, 115, 137 S.Ct 759, 773, 197 L.Ed.2d 1 (2017); *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S.Ct 1029, 1034, 154 L.Ed.2d 932 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct 1595, 1603-1604, 146 L.Ed.2d 542 (2000).

OPINIONS BELOW

The Nevada Court of Appeals' ORDER OF AFFIRMANCE in Martin gives rise to this Petition and is reprinted in Appendix 4a-7a. *See also*, Appendix 8a and Appendix 9a.

The United States District Court District of Nevada Order Denying Martin's 28 U.S.C. § 2254 Habeas Petition. Appendix 10a-31a.

The United States District Court District of Nevada Order Denying Motion to Alter or Amend Judgment. Appendix 32a-34a.

The United States Court of Appeals for the Ninth Circuit Order Denying request for Certificate of Appealability. Appendix 2a-3a.

The United States Court of Appeals for the Ninth Circuit Order Denying reconsideration of its denial of to issue a Certificate of Appealability. Appendix 1a.

JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 Section 1. (certiorari is available " . . . upon the petition of any party to any civil or criminal case, before or after rendition of judgment . . . .") *See also, Hohn v. United States*, 524 U.S. 236, 253, 118 S.Ct 1969, 1978, 141 L.Ed.2d 242 (1998) ("We hold this Court has jurisdiction under § 1254(1) to review denials of applications for certificates of appealability by a circuit judge or a panel of a court of appeals.")

The date of the court of appeals' denial of petitioner's motion for reconsideration of his application for a COA was February 29, 2024. Appendix 2a-3a. Petitioner's petition for a writ of certiorari is timely. *See*, Rules of the United States Supreme Court, Rule 13 – "Review on Certiorari; Time for Petitioning." (a writ of certiorari is timely when it

is filed within 90 days of a United States court of appeals judgment.)

CONSTITUTIONAL AND STATUTORY PROVISIONS

SIXTH AMENDMENT:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

FOURTEENTH AMENDMENT:

"Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive and person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. § 2253:

> **(a)** In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> **(b)** There shall be no right of appeal from a final order in a proceeding to test the validity of a

warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

NEVADA STATUTES:

NRS 484C.400(1)(c) & (2)(b);

(c) Except as otherwise provided in NRS 484C.340, for a third offense within 7 years,

> is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years, and shall be further punished by a fine of not less than $2,000 nor more than $5,000. An offender who is imprisoned pursuant to the provisions of this paragraph must, insofar as practicable, be segregated from offenders whose crimes were violent and, insofar as practicable, be assigned to an institution or facility of minimum security.
>
> 2. An offense that occurred within 7 years immediately preceding the date of the principal offense or after the principal offense constitutes a prior offense for the purposes of this section; * * * (b) when evidenced by a conviction, without regard to the sequence of the offenses and convictions. The facts concerning a prior offense must be alleged in the complaint, indictment or information, must not be read to the jury or proved at trial but must be proved at the time of sentencing and, if the principal offense is alleged to be a felony, must also be shown at the preliminary examination or presented to the grand jury.

STATEMENT OF THE CASE

Petitioner Martin (Martin) was charged with driving under the influence, having two (2) prior Nevada misdemeanor DUI convictions. Martin's two

(2) prior convictions were non-jury judgments. Nevada misdemeanor DUI's do not trigger the constitutional right of trial by jury. *Blanton v. N. Las Vegas*, 489 U.S. 538, 109 S. Ct 1289, 103 L.Ed.2d 550 (1989)[1]. NRS 484C.400(1)(c) sets forth penalties for a core misdemeanor offense of NRS 484C.110 with enhanced penalties for prior convictions[2]. Section 2(b) of NRS 484C.400 states in relevant part, " . . . a prior offense . . . must not be proved at trial **but must be proved at the time of sentencing** . . . ." (emphasis added.) It is the judge, not the jury who enhances punishment.

Martin appealed his conviction to the Nevada Supreme Court arguing that the text of *Apprendi, supra* and *Jones, supra*, precluded judicial enhancement of non-

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1. The core offense under NRS 484C.400(1)(c) is NRS 484C.110, a misdemeanor. It is the "prior convictions" enhancement which transmute the misdemeanor to a felony with the attendant felony penalties. Judicial elevation of a misdemeanor to a felony is not recidivism. *See, Apprendi, supra*, 530 U.S. at 496, 120 S.Ct 2366. (explaining that recidivism "does not relate to the commission of the offense itself".) (internal quotation marks omitted).

2. *Blanton v. N. Las Vegas*, *supra*, involved first offense misdemeanors. Enhancement of the misdemeanors was not before the Court. However, *Blanton* recognized the potential constitutional infringement involving enhancements using non-jury misdemeanor convictions and explicitly reserved " . . . **whether a repeat offender facing enhancement penalties may state a constitutional claim because of the absence of a jury trial in a prior DUI prosecution**." *Id.*, 489 U.S. at 545, n. 12., 109 S.Ct 1294, n.12. (emphasis added.) The text of *Apprendi* and *Jones*, at least debatably resolves *Blanton's* reservation question in favor of a constitutional claim prohibiting non-jury obtained priors for enhancement in adult criminal prosecutions.

jury prior convictions. Martin's appeal was transferred to the Nevada Court of Appeals.

The Nevada Court of Appeals denied Martin's enhancement issue stating,

> Martin contends that only prior convictions obtained through a jury trial can be used to enhance a sentence. In support, Martin relies on *Apprendi v. New Jersey*, 530 U.S. 466, 496 (2000), and *Jones v. United States*, 526 U.S. 227, 249 (1999). These cases are unequivocal: *"Other 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".
>
> ***
>
> Martin thus has not demonstrated that only prior convictions that were subject to a jury trial may be considered when enhancing a sentence due to recidivism. . . .

Appendix 4a-7a (italics original).

Martin's request for rehearing by the Court of Appeals and review by the Nevada Supreme Court were denied. Appendix 1a and 9a.

Martin filed a 28 U.S.C. § 2254 Habeas Petition challenging the constitutionality of NRS 484C.400(1)(c) authorizing the enhancement of punishment by prior convictions which did not have the safeguard of a jury

trial. The district court denied Martin's § 2254 Petition. Appendix 10a-31a. In addition, the district judge denied Martin a COA stating,

> A certificate of appealability is unwarranted here. Examining the Supreme Courts' holdings in *Apprendi, Jones, and Almendarez*-Torres, and taking into consideration the Ninth Circuit's rulings in *Boyd* and *Boyd's* progeny, reasonable jurists would not find debatable my conclusion that there is no clearly established federal law requiring that the use of prior convictions for enhancement must, under the federal constitution, be limited to prior convictions obtained in proceedings with the safeguard of trial by jury. I will, therefore, deny Martin a certificate of appealability.

Appendix 31a.

The district court also denied Martin's FRCP 59(e) motion. Appendix 32a-34a. Martin filed a timely appeal to the Court of Appeals for the Ninth Circuit, requesting a COA which was denied. Appendix 2a-3a. The reconsideration was also denied. Appendix 1a. Martin has now filed the instant Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I.

MARTIN HAS MET THE REQUISITE STANDARD FOR THE ISSUANCE OF A CERTIFICATE OF APPEALABILITY

a. Reasonable jurists could not only debate but have held that "prior convictions" for judicial enhancement under *Apprendi, supra* and *Jones, supra* must have had the safeguard of a jury trial.

Certificate of Appealability (COA):

A habeas petitioner may not appeal the denial of his habeas petition unless the District Court or Court of Appeals "issues a certificate of appealability." 28 U.S.C. § 2253(c); *See also, Buck v. Davis, supra* 580 U.S. at 115, 137 S.Ct. 773. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a COA "may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." § 2253(c)(2). To make that showing, a habeas petitioner must demonstrate ". . . .that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell, supra,* 537 U.S. at 327, 123 S.Ct. 1034. (cites omitted). *See also*, *Slack v. McDaniel*, *supra*, 529 U.S. at 484, 120 S. Ct at 1603-1604. ([T]he only showing required by the habeas petitioner is "that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were

'adequate to deserve encouragement to proceed further.'") *Miller-El v. Cockrell*, *supra*, stated,

> . . . our opinion is *Slack* held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in *Slack* would mean very little if appellate review was denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner "has already failed in that endeavor." Internal citation omitted.
>
> ***
>
> We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. Internal citation omitted.

537 U.S. at 337-338; 123 S.Ct 1039-1040.

At the COA stage, the only question is whether "the District Court's decision was debatable." *Buck v. Davis*, *supra*, 580 U.S. at 116, 137 S.Ct 774.

A threshold exanimation shows that the federal district court's decision denying Martin's § 2254 Habeas Petition is, at a minimum, reasonably debatable. Therefore, the denial to issue Martin a COA by the district court and court of appeals is contrary to this Court's precedents.

***Apprendi* and *Jones* textual support for Martin's COA:**

The prior convictions used to enhance punishment in *Almendarez-Torres* 523 U.S. 224, 118 S.Ct 1219, 140 L.Ed.2d 350 (1998) were obtained in proceedings where Almendarez-Torres had the right to a jury trial. Id., 523 U.S. at 227, 118 S.Ct 1222. *Apprendi* and *Jones,* both adopting the *Almendarez-Torres* "prior conviction" exception, explained the meaning and scope of the "prior conviction" exception.

The text of *Apprendi* states,

> Moreover, there is a vast difference accepting the validity of a prior conviction entered in a proceeding in which the Defendant **had the right to a jury trial** and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.

Apprendi, 530 U.S. at 496, 120 S.Ct 2366. (emphasis added.)

The text in *Jones* stated,

> One basis for that possible constitutional distinctiveness is not hard to see: Unlike virtually any other consideration used to enlarge the possible penalty for an offense . . . a prior conviction **must** itself have been established through the procedures satisfying the . . . jury trial guarantees.

Jones, 526 U.S. at 249, 119 S.Ct 1227[3] (footnote omitted) (emphasis added.)

"Must" is mandatory. The language of *Apprendi* and *Jones* is unequivocal. At a minimum, the legal meaning and scope of this Court's "prior conviction" exception is debatable by reasonable jurists. In fact, a number jurists have gone beyond debate and have held that *Apprendi* and *Jones* limit judicial enhancement of prior convictions to those priors where the defendant had the right to a jury trial.

The Ninth Circuit itself reads *Apprendi* and *Jones* as clearly established Federal law:

The Ninth Circuit in *United States v. Tighe*, 266 F.3d 1187 (9th Cir. 2001), both the majority and dissent, read *Jones* as limiting the use of prior convictions for enhancement to only those priors that were obtained in proceedings where the right to a jury trial existed. The two majority judges stated,

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3. Martin's use of ellipses does not change the meaning of the quote.

> Thus, *Jones*' recognition of prior convictions as a constitutionally permissible sentencing factor was rooted in the concept that prior convictions have been, by their very nature, subject to the fundamental triumvirate of procedural protections **intended to guarantee the reliability of criminal convictions**: fair notice, reasonable doubt **and the right to a jury trial**.

Id., 266 F.3d at 1193. (emphasis added.)

The dissenting judge stated,

> In my view, the language in *Jones* stands for the basic proposition that Congress has the constitutional power to treat prior convictions as sentencing factors subject to a lesser standard of proof because the defendant presumably received all the process that was due when he was convicted of the predicate crime. **For adults, this would indeed include the right to a jury trial**. For juveniles, it does not.

Tighe, 266 F.3d at 120 (dissent) (emphasis added.)

Tighe also addressed *Apprendi*.

The *Tighe* majority stated,

> One year later, in *Apprendi,* the Court further elaborated on the importance of such procedural protections being inherent in prior convictions used as sentencing factors to increase statutory

> penalties. The Court explained that "the certainty that procedural safeguards attached to the 'fact' of prior conviction" was crucial to *Almendarez–Torres*' constitutional holding regarding prior convictions as sentencing factors. *Apprendi,*530 U.S. at 488, 120 S.Ct. 2348. The Court identified the right to a jury trial as one of the requisite procedural safeguards to which it referred: **"There is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof."** *Apprendi,* 530 U.S. at 496, 120 S.Ct. 2348. The Court's continued acceptance of *Almendarez–Torres*' holding regarding prior convictions, then, was premised on sentence-enhancing prior convictions being the product of proceedings that afford crucial procedural protections—particularly the right to a jury trial and proof beyond a reasonable doubt.

Id., 266 F.3d at 1193–1194. (emphasis added.)

The *Tighe* majority concluded,

> Thus, as we read *Jones* and *Apprendi,* the "prior conviction" exception to *Apprendi* 's general rule **must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial . . . .**

Id., 266 F.3d at 1194 (emphasis added.)

The Ninth Circuit cases of *Boyd v. Newland*, 467 F.3d 1139 (9th Cir. 2006), *cert. denied* (*other grounds*) 550 U.S. 733 (2007), and *John-Charles v. California*, 646 F.3d 1243 (9th Cir. 2011), *cert. denied*, 565 U.S. 1097 (2011), are in accord with *Tighe*'s reading of *Apprendi* and *Jones.*

Boyd stated, "[w]e have held that *Apprendi's* 'prior conviction' exception **encompasses only those proceedings that provide a defendant with the procedural safeguards of a jury trial** . . . ." , *citing Tighe. Boyd*, 467 F.3d at 1151. (emphasis added.) *John-Charles* stated, "[w]e are bound by *Boyd* . . . ." *Id*., 646 F.3d at 1253. *Boyd* held that *Tighe's* holding extending *Apprendi* and *Jones* to juvenile prior adjudications for enhancement is not clearly established Federal law under AEDPA purposes. *John-Charles*, 646 F.3d at 1254. However, *John-Charles* reference to *Tighe* and *Boyd* reading of *Apprendi* and *Jones*' prior adult convictions for enhancement remain unchallenged. *John-Charles* stated, " . . . John-Charles received all the process due him in the juvenile proceedings (**as opposed to in an adult criminal trial**) . . . ." *Id*., 646 F.3d at 1252 (emphasis added.)

One would be hard pressed to argue that the Ninth Circuit judges in *Tighe*, *Boyd* and *John-Charles* are not reasonable jurists.

Other Jurisdictions Support Martin.

The Court in *United States v. Rojas*, 522 F.3d 502 (5th Cir. 2008), stated, (" . . . one of the reasons the Supreme Court has countenanced the use of a prior conviction

to enhance a sentence is that a prior conviction is the product of procedures that encompass the constitutional guarantees of fair notice, reasonable doubt, and a jury. *Jones*, 526 U.S. at 249.") *Rojas*, 522 F.3d at 505.

The Court in *United States v. Smalley*, 294 F.3d 1030 (8th Cir. 2003), read *Apprendi* and *Jones*' "prior conviction" meaning as clearly established law. *Smalley* stated,

> The Supreme Court stated in *Apprendi* that prior convictions are excluded from the general rule because of the "certainty that procedural safeguards," such as trial by jury . . . undergird them.
>
> ***
>
> We read *Jones* . . . to mean that if prior convictions resulted from proceedings outfitted with these safeguards [fair notice, reasonable doubt and jury trial guarantees] then they can constitutionally be used to increase the penalty for a crime without those convictions being submitted and proved to a jury.

Id., 294 F.3d at 1032 (bracketed material added.)

See also, State v. Hitt, 273 Kan. 224, 42 P.3d 732 (2002), ("*Apprendi* created an exception allowing the use of a prior conviction to increase a defendant's sentence, based on the historical role of recidivism in the sentencing decision **and the procedural safeguards attached to a prior conviction**", one safeguard being the opportunity of a jury trial.) *Id.*, 42 P.3d at 740. (emphasis added.); *State*

v. Brown, 879 So.2d 1276 (La. 2004), *cert denied*, 543 U.S. 1177 (2005) ("The Court [*Apprendi*] exempted the fact of a prior conviction from its holding because defendants enjoyed criminal procedural safeguards, including the right to a jury trial . . . which assured the accuracy and reliability of the prior record. *Id.*") *Brown*, 879 So.2d at 1282. (bracketed material added.)

United States District Judge John Z. Lee in *Williams v. Hardy*, 2016 WL 1247448 (U.S. Dist. Ct., N.D., Ill., Eastern Division – 3/30/2016) considered prior conviction enhancement under *Almendarez-Torres*, *Apprendi* and *Jones* stating,

> The sentencing judge, however, does not have *carte blanche* when considering the prior convictions at sentencing. The judge may consider the prior conviction only when it has "been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Jones v. United States*, 526 U.S. 227, 249 (1999). "[T]here is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof." *Apprendi*, 530 U.S. at 496.

Id., 2016 WL 1247448 at 3.

There is no evidence that the judges in *Rojas, Smalley, Hitt*, *Brown* and *Hardy* are not reasonable jurists.

Three Justices of the United States Supreme Court Support Martin.

The Ninth Circuit overlooked the importance of *Shepard v. United States*, 544 U.S. 13, 125 S. Ct 1254, 161 L.Ed.2d 205 (2005) (" . . . Shepard's prior convictions were themselves 'established through procedures satisfying the fair notice, reasonable doubt, and **jury trial guarantees"**, *citing*, *Jones, supra*, 526 U.S. at 249, 119 S.Ct. at 1227. *Shepard*, 544 U.S. at 38, 125 S.Ct 1269-1270. (O'Connor, J., dissenting.) (emphasis added.) These three justices surely qualify as "reasonable jurists".

Reliance on Juvenile Enhancement Cases is erroneous.

The district court relied on *Montgomery's, supra, Barno's, supra* and *Solorzano's, supra,* "not clearly established law" which referred to enhancement challenges of non-jury juvenile adjudications under *Apprendi*, to deny Martin's federal habeas petition and a COA. The district court's footnote reads as follows:

> *See also Johnson v. Montgomery*, 899 F.3d 1052, 1059 (9th Cir. 2018) ("But our interpretation of *Apprendi* [in Tighe] 'does not represent clearly established federal law "as determined by the Supreme Court of the United States,"' as required to overturn a state court decision regarding a federal claim under the Antiterrorism and Effective Death Penalty Act

> of 1996 (AEDPA)."); *Barno v. Neotti*, 569 Fed. App'x 543, 544 (9th Cir.), *cert. denied*, 574 U.S. 867 (2014) ("it is not clearly established that the Sixth Amendment prohibits a sentencing court from using a defendant's prior juvenile adjudication to enhance his sentence beyond the statutory maximum"); *Solorzano v. Yates*, 264 Fed. App'x 576, 577 (9th Cir. 2008) ("the use of *Solorzano's* prior nonjury juvenile adjudications to enhance his sentence was neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States").

Appendix 29a, fn2.

The district court's reliance here was grossly misplaced. Martin's § 2254 habeas petition had *nothing* to do with non-jury juvenile adjudications for enhancement.[4]

It is uncontroverted that juvenile proceedings are materially and legally different than adult prosecutions. The district court itself recognized the difference stating, " . . . although it [*Tighe*] is clearly different in that it concerns prior juvenile adjudications rather than prior misdemeanor convictions . . . ." Appendix 27a. *Apprendi* and *Jones'* narrow "prior conviction" exception limiting enhancement to those priors where the defendant

4. It should easily be recognized that those courts relying on the extension of *Apprendi* and *Jones'* jury trial "prior convictions" to juvenile proceedings necessarily read *Apprendi* and *Jones* as limiting adult prior convictions to only those priors where the safeguard of a jury trial was available. Otherwise, there would be to basis for said reliance.

had the opportunity of a jury trial applies to adult criminal prosecutions. Courts' holdings, such as *Montgomery, Barno, Solorzano*, that there is no clearly established law that non-jury juvenile adjudications are mandated by *Apprendi* and *Jones,* has no effect, legal or otherwise, on *Apprendi* and *Jones*' "prior conviction" exception applying to adult criminal prosecutions. *Again*, respectfully, the district court's reliance on footnote 2's cited cases is grossly misplaced. It is "apples and oranges".

Martin's constitutional issue is more than "adequate to deserve encouragement to proceed further."

The Court in *Blanton, supra,* held that Nevada defendants who are charged with misdemeanor DUI's, as Martin, for a first or second offense, are not constitutionally entitled to trial by jury. However, *Blanton* explicitly reserved "**whether a repeat offender facing enhance penalties may state a constitutional claim because of the absence of a jury trial in a prior DUI prosecution.**" *Id*., 489 U.S. at 545, n.12, 109 S.Ct 1294, n.12. (emphasis added.) Martin's constitutional claim has its roots in *Blanton's* enhancement reservation. *Apprendi* and *Jones*' text supports Martin's constitutional claim – a claim that is more than "adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell,* 537 U.S. at 327, 123 S.Ct 1034*; Slack v. McDaniel,* 529 U.S. at 484, 120 S.Ct 1595, 1603-1604.

The keystone of *Apprendi* and its progeny is the preservation of the constitutional right to be tried by a jury of peers – not a judge. U.S. Const., Amend. VI; U.S. Const., Amend. XIV. It cannot be disputed that the

absence of trial by jury more often favors the prosecution and provides less protection for defendants.[5] The lack of a jury trial right in "petty" criminal cases is not as onerous as allowing "petty" convictions to be used to enhance punishment of defendants to incarceration in excess of six months. Here, Martin's judicial enhancement increased a misdemeanor penalty (limited to 6 months jail) to a minimum of one-year to a maximum of six years in the Nevada State Prison, a non-probationable offense. Martin should be allowed to pursue the merits of his constitutional claim on appeal.[6]

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5. The Court in *Baldwin v. New York,* 399 U.S. 66, 90 S.Ct 1886, 26 L.Ed.2d 437 (1970) stated, "[w]here the accused cannot possibly face more than six months imprisonment, we have held that these disadvantages, onerous though they may be, **may be outweighed by the benefits that result from speedy and inexpensive non-jury adjudications**." *Baldwin*, 399 U.S. at 73, 90 S. Ct. 1890. (emphasis added.) The Court in *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L.Ed.2d 530 (1972) noted that summary adjudications of misdemeanors are "assembly-line" justice which are most often unfair to those defendants. "The misdemeanor trial is characterized by insufficient and frequently irresponsible preparation . . . ." where defendants are "numbers on dockets, faceless ones to be processed and sent on their way… Everything is rush, rush." *Id.* 407 U.S. at 35-36, 92 S. Ct. 2011-2012. Summary adjudications are widespread ". . . regardless of the fairness of the result." *Argersinger*, 407 U.S. at 34, 92 S. Ct. 2011. No doubt these are reasons for *Blanton's, supra,* reservation. *Blanton*, 489 U.S. at 545, n.12, 109 S. Ct. 1294, n. 12.

6. *Apprendi* recognized that the prior conviction exception first adopted in *Almendarez-Torres* was wrongly decided. Justice Thomas who made the crucial fifth vote in the five (5) to four (4) *Almendarez-Torres* majority, later recognized that his vote was wrong. *Apprendi* telegraphed its disapproval of *Almendarez-Torres'* "prior conviction exception" for enhancement and

CONCLUSION

The basis of the district court's denial of a COA, as well as Martin's § 2254 Habeas Petition, was based on its finding that,

> . . . reasonable jurists would not find debatable my conclusion that there is no clearly established federal law requiring that the use of prior convictions for enhancement must, under the federal constitution, be limited to prior convictions obtained in proceedings with the safeguard of trial by jury.

Appendix 2a-3a.

The only requirement for the issuance of a COA is that Martin show that reasonable courts could (and have done so) debate the district court's reason for denying Martin a COA. *Miller El. v. Cockrell, supra*, 537 U.S. at 337-338, 123 S. Ct 1034; *Slack v. McDaniel, supra*, 580 U.S. at 115, 120 S. Ct 1595, *citing Miller El*, 537 U.S. at 327; *Buck v. Davis, supra*, 580 U.S. at 117, 137 S. Ct. 773. Martin has overwhelmingly complied with § 2253(c)(2) by showing that the reason for the district court's and court of appeals' denial of a COA is not only debatable by reasonable jurists but that many jurists have held to the

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recognized the issue was decided in error. *Apprendi*, 530 U.S. at 520-521, 120 S. Ct. 2378-2379. *Apprendi*, while criticizing *Almendarez-Torres*, did not overrule the prior conviction exception because the defendant in *Apprendi* did not challenge it. *Apprendi*, 530 U.S. at 489, 120 S. Ct. 2362. **Thus, *Almendarez-Torres* is now extremely questionable at best and reversal appears inevitable.** However, this fact does not affect Martin's constitutional claim.

contrary. Also, Martin should be entitled to pursue his constitutional claim on appeal because it is " . . . adequate to deserve encouragement to proceed further." *Buck, infra; Miller-El,* and *Slack*.

It is incongruent for the Ninth Circuit to deny Martin a COA when its own Circuit judges specifically hold that *Apprendi* and *Jones* limit prior adult convictions for enhancement to those priors where the defendant had the right to a jury trial.

Based on this Court's precedents, Martin is legally entitled to a COA.

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Respectfully submitted,

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