

IN THE SUPREME COURT
OF THE UNITED STATES

CARLOS MARTINEZ, Petitioner,

VS.

CALIFORNIA, Respondent,

Docket No: 23-6432

PETITION FOR REHEARING

RECEIVED

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SUPREME COURT, U.S.

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

PETITION FOR REHEARING

Petitioner after being granted to filed his Petition for writ of Certiorari in forma pauperis and thereafter the Petition was denied by this Court on February 20, 2024, presents this Petition for Rehearing and he believes that if this Court on June 25, 1962, decided the California Health & Safety Code §11721 made the status of being addicted to the use of narcotics a criminal offense, i.e. to be unconstitutional and in violation of U.S. Const. amend XIV for inflicting cruel and unusual punishment, see Robinson v. Cal. 370 U.S. 660, 661-668 (1962) (punishing that status with 90 days in county jail), then this case deserves even more attention because P.C. §1170.12(a)-(d) transforms a pre-serious-criminal-status [that before its enactment carried a five year-enhancement sentence under the annexed P.C. §667(a)] into a striker-criminal status and made that serious status as a criminal offense itself, and imposes life in prison which violates all the provisions of the U.S. Const. and review is nessessary to resolve the issue of "reliability" between these two different criminal-status-degree that was left pending by Justice Scalia in Monge v. Cal., 524 U.S. 721, 724, 734-741 (1998), and this Court noticed, but it ignored because was not raised by Monge. id. 728

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CALIFORNIA, Respondent,

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

PETITION FOR REHEARING
CARLOS MARTINEZ #E16085
VALLEY STATE PRISON-A1-9-3Low
P.O. BOX 92
CHOWCHILLA, CALIFORNIA, 93610

PETITION FOR REHEARING

Petitioner presents its petition for a rehearing of the above-entitled cause pursuant this Court Rule 44.2, and, in support of it, respectfully shows:

GROUND'S FOR REHEARING

A rehearing of the decision in the above-matter is in interest of justice

and should be granted because:

1. First, certiorari¹ should be granted because on the face of the record shows that Petitioner is guilty as convicted of being a predicate felony offender and innocent of being a persistent felony offender.

A predicate-felony-offender is: "someone who has at least twice been convicted of felonies of specified level of seriousness and often within a specified period, as a result of which the criminal sentence is to be enhanced." See, Black's Law Dictionary, 11th ed. (2019), at p. 1300 (hereinafter "Black's")

A persistent-felony-offender is: "Someone who at least thrice been convicted of felonies of specified field level of seriousness and often within a specified period, as a result of which the criminal sentence is to be enhanced, see Black's at p. 1300

Since all the facts of the case have been written in the Petition For Writ Of Certiorari (hereinafter "Petition") Petitioner would be very briefly in his argument.

On 1992 Petitioner was convicted of two counts of serious burglaries and a consolidate judgment of conviction was rendered. At this date of conviction California through its laws warned Petitioner that under California Penal Code Section (P.C. §) 667(a) (ed. 1992) his conviction of two counts of serious burglaries qualifies as a single serious prior conviction because were not brought and tried separately; P.C. § 667(a)(1), See also, In re Harris, 49 Cal.3d 131, 134-36 (1989) (Interpreting and construing P.C. § 667(a)(1) as mandating that the predicate charges must be [have] been brought and tried separately, from filing to adjudication of guilt to count as a single serious prior conviction); Cf. People v. Deay, 194 Cal. App. 3rd 280, 287 (1987) ("charges separately brought and tried" means a defendant may not be adjudged an habitual criminal when multiple prior convictions resulted from a single proceeding); Also Petitioner was warned that this single serious prior conviction would be recorded on his criminal record for future procee-

1) Petitioner was granted permission to proceed in forma pauperis permitting him to file his Petition for a writ of Certiorari and on February 20, 2024 this Court denied review.

dings, see, *People v. Leslie*, 47 Cal App. 4th 198, 204-205 (2nd Dist. 1996) (P.C. § 969f was enacted in order to prequalify a crime as a serious felony in the event of a defendant future conviction of another serious felony. Its stated purpose was to avoid requiring the prosecutor to reprove a previous conviction; when it is alleged that the defendant has a prior serious felony conviction...); and that if convicted again in the future his sentence for a new serious felony would be enhanced with additional five years.² See, *People v. Jackson*, 37 Cal. 3rd 826, 837-838 (1985) ("The enhanced term of five years imposed by section 667 is applicable upon a conviction for burglary of a residence if the defendant was previously convicted of a serious felony. The former carries base terms of two, four or six years (§ 461 subd. 1)) and the First Appellate District Court of Appeals of California put it another way to clear any doubts as follows: "The purpose of the language [referring to P.C. § 667(a)(1)], "prior conviction on charges brought and tried separately" is to disallow imposition of the statutory five-year enhancement for each of several crimes committed in one criminal escapade"; Cf. 9 Witkin Cal. Crim. Law Punish § 411 (2023) ("Each prior conviction must stem from "charges brought and tried separately.... But conviction of two serious felonies in one proceeding warrants only one enhancement under P.C. § 667(a)) (citing *People v. Deay*, supra, 194 Cal. App. 3rd at p. 286 (applying similar construction of former P.C. § 644)). Therefore, Petitioner's mind was more than clear that if convicted [again after this conviction was recorded in his criminal record] for a new serious burglary the annexed P.C. § 667(a)(1) would denounce the punishment to be inflicted upon Petitioner, which would be five-year enhancement sentence for having suffered a single serious prior conviction, plus the upper or high term of six years it would equal to eleven (11) years total, see, *People v. Jackson*, supra, 37 Cal. 3rd at pp. 837-838; and according to the U.S. Constitution and precedents of this court will bar or prohibit the application or annexation of any other provision of law or a new ha-

² See Williams Blackstone's, Commentaries on the law of England, (1776-1779), Vol. 4, at, p. 378 ("Whereas, where an established penalty is established annexed to crimes, the criminal may read their certain consequence in the law") (hereinafter "Blackstone")

habitual criminal statute enacted afterwards this 1992 serious prior conviction was rendered and credited against Petitioner. See, U.S. Const., Art. IV, Section 1 which provides in part: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state". Cf. *Chicago & A. Railroad v. Wiggins Ferry Co.* 119 U.S. 615, 622-624 (1877) and *People v. Laino*, 32 Cal. 4th 878, 887-895 (Cal. 2004); In much or less words the Full Faith and Credit Clause do not preclude this Court from enforcing the Victims' Bill of Rights Act, which enacted on June 8, 1982 P.C. § 667(a) as a habitual criminal statute to punish recidivists or repeat offenders and held that this section and only this section governs⁴ Petitioner's 1992-single-serious prior conviction and that Petitioner's 1997-serious prior conviction as alleged below under the new 1994-habitual criminal statute called three strikes law (P.C. § 1170.12(A)-(D)) is governed by that law because "under the three strikes law when guilt was established... by verdict, Petitioner stand convicted and thereafter has a strike prior conviction," see *People v. Laino*, supra, 32 Cal. 4th at pp. 895-896 (quoting and citing with approval *People v. Williams*, 49 Cal. App. 4th 1632, 1636 (6th Dist. 1996) & *People v. Rosbury*, 15 Cal. 4th 206, 210 (1997).)

On June 20, 1997, as predicted above Petitioner was convicted of a new serious felony-burglary. This conviction is not being challenged in the Petition

On July 8, 1997, California choose or elected to prosecute Petitioner for suffering the single serious prior conviction [in case number NA008309 mentioned above] to prove that he was a predicate felony offender [herein-after "serious offender" to distinguish the two habitual criminal terms].

At the first-stage-trial-adjudicatory-hearing, California introduced as evidence the commitment records from prison which contained three pieces of evidence: (a) an abstract of judgment with the name of Pedro Calderon; (b) a photograph; and (c) a fingerprint card from prison dated April 8, 1997,

⁴ Blackstone at Vol. 4, p. 258 ("Inquiries will be the method of inflicting those punishment which the law has annexed to particular offenses"). Cf. *People v. Wingo*, 14 Cal. 3rd 169, 183 (1975) (A defendant has an undeniable "vested" right in insuring that his term be fixed proportionally to his offense.)

see, Petition at pp. 75-77, please notice that the photograph is not included because was never turned or discovered to Petitioner. After the trial Judge (hereinafter "Judge") review this evidence for three minutes he rendered his verdict as follows: "I find true the serious prior conviction allegation as charged within the meaning of P.C. § 667(a)(1)". See Petition at p. 45; Therefore, at this first-stage of the trial proceeding there is no doubt that Petitioner was placed in jeopardy for the first accusation of whether or not he was a serious offender⁵ for suffering a 1992 single serious prior conviction and a new current serious felony (burglary) conviction and thus in the words of this Court Petitioner "was once made to run the gantlet" on whether he was guilty of being a serious offender under P.C. § 667(a)(1) and having once run that gantlet unsuccessfully, he may not be compelled to run it again, see, Chief Justice Warren's dissent in *Hoag v. New Jersey*, 356 U.S. 464, 479 (1958); Cf. *Green v. U.S.*, 355 U.S. 184, 186-189 (1957); In this case the Judge's findings of fact that Petitioner was a serious offender is equivalent of guilty and conviction and has the effect of a verdict of a jury, See *Reynolds v. U.S.*, 98 U.S. 145, 159 (1878); *Deals v. U.S.*, 508 U.S. 129, 132 (1993) (we think it unambiguous that "conviction refers to the finding of guilty by a judge..."); Cf. *Shorter v. State*, 891 So.2d 1146, 1146 (4th Dist. Fla. 2005) (per curiam) (for purpose of the habitual offender statute the term "conviction" is equivalent to adjudication); In conclusion is that even though the judge did not imposed the warned five-years-enhancement, California was prohibited from placing Petitioner twice in jeopardy for the same "fact of the 1992-serious prior conviction" under the due process clause, equal protection clause, ex post facto clause, double jeopardy clause and its doctrines, that are, merger, collateral estoppel and res judicata doctrines, however in violation of these constitutional laws California reprosecuted, tried, convicted and sentenced Petitioner as

5] Here, the Judge's decision resembled a factual determination of whether or not Petitioner was guilty or innocent of being a serious offender. Such determination is one to which the actual innocence exception typically applies, see, *Sawyer v. Whitley*, 112 S.Ct. 2514, 2519 (1992)

Follows: After the Judge found Petitioner guilty as a serious offender under P.C. § 667(a)(1), the Judge commenced a second-stage-trial-adjudicatory hearing placing Petitioner for second-time in jeopardy for the same 1992-single serious prior conviction from case number NA008309, but this time California accused Petitioner of being a persistent felony offender (hereinafter "striker offender") by converting the two consolidated count-burglary conviction as two new strikes prior convictions within the meaning of P.C. § 1170.12(a)-(d) (ed. 1994). To prove that Petitioner was a striker offender California reintroduced the same evidence that was already used to convict Petitioner as a serious offender and the Judge found two strikes prior convictions within the meaning of P.C. § 1170.12(a)-(d) and therefore the judge found Petitioner guilty of being a **striker offender**⁶ under the new 1994 habitual criminal statute (P.C. § 1170.12(b)). Finally, the Judge imposed the following sentence on the current serious felony conviction: (a) 25 years to life sentence under P.C. § 1170.12(c)(2)(A)(ii) and (b) five years-enhancement sentence under the same P.C. § 1170.12(c), against the mandate of P.C. § 667(a)(2).

P.C. § 667(b) (ed. 1992) and now P.C. § 667(a)(2) provides: "This subdivision shall not be applied when punishment under other provision of law would result in a longer term of imprisonment..."

Therefore, since California was barred to impose the five-year-enhancement sentence according to P.C. § 667(a)(1) because of the mandate of subdivision (b) due to P.C. § 1170.12(c)(2)(A)(ii) qualifying as other provision of law that resulted obviously in punishment [25 years to life] longer than the five years-enhancement sentence that would had been applied or imposed directly under P.C. § 667(a)(1), but the Judge went around subdivision (b) and applied subdivision (c) of the P.C. § 1170.12 to impose illegally an unauthorized and cumulative punishment. Subdivision (c) provides: "For purposes of this section, and in addition to any other enhancement or punishment provi-

⁶ Had California used other or another prior conviction as proof to prosecute Petitioner as a "persistent felony offender" under P.C. § 1170.12(a)-(d), he would have been convicted as such constitutionally, see, *Lockhart v. Nelson*, 488 U.S. 33, 42 (1988) ("The double jeopardy clause does not bar the prosecution from seeking to resentence the felon under habitual criminal statute with proof of another prior conviction")

sions which may apply,..." This subdivision (c) has been construed by California Courts in much or less words that "once [the trial court imposes] the minimum term of life sentence under either options (i)-(iii) of paragraph (A), clause (2), subd. (c) of the P.C. § 1170.12, the trial court must impose a five-year-enhancement sentence for each such serious prior conviction that was brought and tried separately under P.C. § 667(a)(1), pursuant P.C. § 1170.12(c)," see, *People v. Dotson*, 16 Cal.4th 547, 552-560, 80 mn. 3-4 (1997); Furthermore, the *Dotson* court held: "the three strikes law [referring to P.C. § 1170.12] expressly subject a defendant to a separate determinate term for enhancements, even when those enhancements are used in calculating the minimum indeterminate life term." *Dotson* at p. 560. In other words the California supreme court has held that the due process, ex post facto and double jeopardy clauses of the U.S. Constitution did not prohibits the double use of "a fact of a prior conviction", that in addition to the law and punishment annexed to such prior conviction the trial court could apply a new law enacted after such prior conviction was rendered by a penal judgment and that two habitual criminal statutes could be applied to a single prior conviction to impose multiple punishments.⁷

Now, Petitioner contends that the facts and authorities cited and quoted above clearly shows on the face of the record the following:

- (a) Petitioner is guilty of being a serious offender and innocent as striker offender;
- (b) This is a case very clear in which California not only changed the punishment and inflicted other punishment in place of that one annexed to the accusation of being a serious offender, but it increased the punishment to 25 years and in addition to the five years enhancement sentence for being a serious offender, a life sentence was imposed and thus review is necessary to settled a precedent to establish definitely whether or not the: (1) Double Jeopardy Clause of the Fifth Amendment applies to sentence-enhancement final determination whether or not results in a conviction or acquittal (including factual determinations of whether or not a defendant is a habitual criminal offender) in a non-capital case like the present case because there are conflicts between the States

7] On its face P.C. § 1170.12(a)-(d) as applied in this case become repugnant to the U.S. Constitution requiring review of this case, see, *Marbury v. Madison*, 5 U.S. 137, 176 (1803) ("The question whether an act, repugnant to the Constitution, can become the law of the land, is a question deeply interesting to the United States.")

and federal courts in general.

States and federal courts applying the double jeopardy to non-capital cases: *State v. Hennings*, 100 Wn.2d 379, 380-381, & 390 (Wash. 1983) (The double jeopardy clause bars a second habitual criminal proceeding where the state initially fails to prove beyond a reasonable doubt the validity of each conviction) (quoting *Bullard v. Estelle*, 665 F.2d 1347, 1349 (5th Cir 1982) (same), vacated on other grounds, 459 U.S. 1139 (1983)); *State v. Aspen*, 412 N.W.2d 881, 882-885 (S.D. 1987); *Ex Parte Gonzalez*, 707 S.W.2d 570, 571-573 (Tx. Ct. App. 1986); *Briggs v. Procnier*, 764 F.2d 368, 373 (5th Cir 1985); *Baker v. Buckworth*, 752 F.2d 302, 303-304, 7th Cir 1985; *Duros Ko v. Lewis*, 882 F.2d 357, 359 (9th Cir 1989) cert. den. 495 U.S. 907 (1990); *U.S. v. Blanton*, 476 F.3d 767, 770-771 (9th Cir 2007); These cases are only a few ones of many cases applying the double jeopardy and its components-doctrines and precedents of this Court. If Petitioner is obligated by this Court to cite more cases like these ones he would be more than happy to comply with this court's orders

States and federal courts refusing to apply the double jeopardy or precedents of this Court. *People v. Monge*, 16 Cal.4th 826 (1997) affirmed by this court in *Monge v. California*, 524 U.S. 721, 731-735 (1998); *State v. Maggard*, 24 Kan App.2d 868, 877-881 (Kan. Ct. App. 1998); *State v. Aragon*, 116 NM 267, 268-272 (NM. 1997); *Carpenter v. Chapple*, 72 F.3d 1269, 1272-1274 (6th Cir) cert. den. 519 U.S. 835 (1996); *Denton v. Buckworth*, 873 F.2d 144 (7th Cir 1989); and *Linam v. Griffin* 685 F.2d 369 (10th Cir 1982)

Therefore, there is not only a division as observed by Justice White in *Hunt v. New York*, 116 L.Ed.2d 451, 452 (1991) between the Circuit Court of Appeals but also between the States and also different opinions have been filed by the members of this Court, e.g. *Lockhart v. Nelson*, 488 U.S. 33, 43-50 (1988) in which justices Marshall, Brennan and Blackmun held that "Nelson's retrial was squarely foreclosed by *Burks v. U.S.*, 437 U.S. 1, 11-14 (1978); see also dissent of Justice

8] By the way Petitioner was written this Petition appears that he is raising a question that this Court resolved in *Monge v. Cal.*, *infra*, but to be clear Petitioner's question is whether the double jeopardy applies to the reliability-fact-finding to determine whether or not to impose punishment under the four or more options

Stevens in *Caspari v. Bohlen*, 510 U.S. 383, 398 (1994) (stating that the double jeopardy-protections include the right not to be twice put in jeopardy for the same prior conviction accusation); with *Monge v. Cal.*, 524 U.S. 721, 734-735 (1998) (Stevens-dissent); see also dissenting of Justice Scalia, with whom Justice Souter and Justice Ginsburg joined in which he agreed with the Court that *Bullington v. Missouri*, 451 U.S. 430 (1981), should not be extended to non-capital sentencing proceedings, *id.* at 737, however Justice Scalia was right when he discovered that more than sentencing proceeding was at issue in *Monge*, *id.* at p. 737, but somehow he reserved for himself the basis of his opinion and in much or less words limited his disagreement by stating that the issue was a matter of reliability to be determined by the trier of fact to impose the maximum, minimum, or life in prison under California three strikes law, *id.* at pp. 724, 737-741 & n.2; See also the three justices dissenting, and asserting that *Bullington's* rationale, the Double Jeopardy Clause precludes successive efforts to prove prior conviction allegations, *People v. Monge*, 16 Cal. 4t at 847

Therefore, Petitioner would argued what Justice Scalia reserved and the argument that should have be presented to this court in *Mongue v. Cal.* *supra*, and a different resulted had been rendered.

California three strikes law's crucial factor in this case, as in *Bullington*, is the gravity of petitioner's prior and current offenses and based on the facts and elements of these offenses a determination shall be made whether it warrants the ultimate punishment, in this case, life in prison. This is mandate under P.C. § 1170.12(b)(1) which provides:

(b) Notwithstanding any other provision of law and for the purposes of this section, a prior conviction of a felony shall be defined: (1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7, as a serious

under the three strikes law of California. See options at P.C. § 1170.12(c)(1) and (2)(A)(i), (ii) & (iii). This is because in this case the Judge elected option (ii) which carried 25 years to life, plus in violation of P.C. § 667(b) and in violation of the single subject clause of the Cal. Const. Art. II, Section 8(d), imposed additional five years-enhancement.

Felony in this state: The determination of whether a prior conviction is a prior felony conviction for purposes of this section shall be made upon the date of that prior conviction.

No court in California has given the real meaning of the above-underlined "determination clause", instead they wrongly interpreted this determination clause as follows: "The determination reference to the 'date of conviction' means that the court is presently required to look backward to the date of the conviction of the past offense and see if such past offense qualified as a misdemeanor, felony, serious felony or violent felony, and that there is no reason, however, to require a trial court to determine whether the current or present offense conviction may serve as a strike prior conviction for future sentencing proceedings." See *People v. Green*, 36 Cal. App. 4th 280, 283 (2nd Dist. 1995) rev. den.; *People v. Reed*, 33 Cal. App. 4th 1608, 1611 (1st Dist. 1995); *Gonzalez v. Sup. Ct.*, 37 Cal. App. 4th 1302, 1311 (5th Dist. 1995); *People v. Murillo*, 39 Cal. App. 4th 1298, 1307 (6th Dist. 1995); This construction is wrong for the following reasons: (1) First, subdivision (b)(1) without the determination clause instructs or guide the trial courts facing prior conviction accusations that they must first determine whether the alleged prior conviction is serious or violent felony. To discover this the trial court must look to the record of judgment of conviction and see under what law such conviction was prosecuted, e.g. if the record shows P.C. § 459, then the trial court would discover that the prior felony is a serious felony under P.C. § 1192.7(c)(18), and (2) Second, the determination clause directs and mandates that the trial court once had found that the alleged prior conviction is a serious prior conviction it shall make a determination based/upon the date of conviction whether it qualifies as a strike prior conviction for purpose of sentencing⁹ under subdivision (c)(1)-(2) of the P.C. § 1170.12

9] Imposing an increased or life sentence under P.C. § 1170.12(b)(1) ⁵ determination clause violated the fourteenth Amendment's guarantee of due process since the indeterminacy of the wide-made inquiry required by the determination clause both denied fair notice to defendants and invited arbitrary enforcement by judges; The determination clause did not survive the prohibition of vague criminal laws because the determination clause left grave uncertainty about how to estimate the risk

Therefore, P.C. §§ 667(a)(1) and 1170.12(b)(1) requires an assessment of reliability of the elements, facts, circumstances and seriousness of the serious prior and current offenses to determinate the category of recidivism-level of the accused and his degree of criminal culpability, see, *Spencer v. Texas*, 385 U.S. 554, 576 (1967) (CJ. Warren dissent) ("past convictions are directly relevant to the question of guilt or innocence of the crime currently charged. It is admitted because its probative value, going to elements of the current charges"); Cf. *Mullaney v. Wilbur*, 421 U.S. 684, 697-698 (1975) (criminal law "is concerned not only with guilt or innocence in the abstract, but also with the degree of criminal culpability" assessed.)

The first and second stages adjudication hearing in this case as in *Bollington* included a consideration or determination by the judge of the elements, seriousness and facts bearing on guilt or innocence. The life sentence involved in this case is a part of the current burglary conviction. This uniqueness of the life penalty unquestionable serves or deserves protection by the U.S. Constitution. Cf. *Lockett v. Ohio*, 438 U.S. 586, 605 (1978); See also *People v. Superior Court (Romero)* 13 Cal. App. 4th 497, 527 (1996) (holding that the Three Strikes law, ... articulates an alternative sentencing scheme for the current offense rather than an enhancement)

Therefore, this court should grant review to settled whether or not the double jeopardy to the final judgment of the court that petitioner is a serious offender due to being convicted on two different dates barring second-stage trial-adjudication hearing to re prosecute him as a striker offender under a second habitual criminal statute enacted after the first prior conviction was rendered on 1992

posed by a crime and left uncertainty about how much and when the risk it took for a serious or violent [prior] crime to qualify as a strike prior conviction. In conclusion this determination clause is identical as the residual clause declared vague and unconstitutional in *Johnson v. U.S.*, 576 U.S. 591, 593-606, (2015)

(c) Review should be granted to settle the conflict between the Circuit¹⁰ Court of Appeals as to whether the innocence exception to non-capital cases

Circuit Court of Appeals applying the Innocence exception to noncapital cases: *Spence v. Superintendent, Great Meadow Correctional Facility*, 219 F3d 162, 172 (2d Cir 2000); *U.S. v. Maybeck*, 23 F3d 888, 894 (4th Cir 1994); *Haley v. Cockrell*, 306 F3d 257, 264 (5th Cir 2002); *Jones v. Arkansas*, 929 F2d 375, 381 (8th Cir 1991); & *Mills v. Jordan*, 979 F2d 1273, 1279 (7th Cir 1992)

Contrary view

Reid v. Oklahoma, 101 F3d 628, 630 (10th Cir 1996); *U.S. v. Richards*, 5 F3d 1369, 1371 (10th Cir 1993); *Henderson v. Thieret*, 671 Fsupp. 1193, 1201 (N.D. Ill 1987) aff'd. on other grounds 859 F2d 492 (7th Cir 1988) cert. den. 490 U.S. 1009 (1989); *U.S. v. Flores*, 981 F2d 231 (5th Cir 1993); *Embrey v. Hershberger*, 131 F3d 739, 740, (8th Cir 1997) (en banc) (actual innocence not applicable to non-capital sentence)

Herein Petitioner prays this court to grant review because on the face of this case shows that in fact he was convicted first of being serious offender according to California law that was annexed to his 1992 single serious prior conviction see Blackstone at Vol. 4, p. 276, "the court must pronounce the judgment which the law hath annexed to the crime"; and California is presumed to know and had knowledge of the precedents of this court barring her to prosecute Petitioner on basis of the same 1992 single serious prior conviction's record of judgment and its underlying elements and facts, so California violated the following precedents of this court and the provision of the

10 Petitioner's true cause for not raising his claim of free-standing, factual or legal innocence is that as a Mexican National without education did not know the English language and less how to research the law to learn and discover the legal basis of his claims and it was not till the year of 2023 that he became a lay-man in the law and he diligently began filing state habeas corpus on the year 2023 and since the record shows that he was wrongly convicted and sentenced under an habitual criminal statute that not even applies to him, then

U.S. Constitution:

1. This is a case that on its face clearly shows that California charge, prosecuted, convicted and sentence Petitioner under P.C. § 1170.12 that not even applies to Petitioner because another habitual criminal statute (P.C. § 667(a)) is that one that has been annexed and governing Petitioner's 1992-single prior conviction and this court must grant review to determinate whether or not the ex post facto clause applies to habitual criminal statutes increasing and imposing additional punishment to that one already annexed at the time the alleged prior conviction was rendered. See *Calder v. Bull*, 3 U.S. 386, 390 (1798) (Chase, J., establishing a third category); see also *id.* at p. 395 (If I ever exercise the jurisdiction I will not decide any law to be void, but in a very clear case); To the same effect see *Iredell, J.*, opinion at p. 399; This is a very clear and urgent case in which this court must strike down this repugnant habitual criminal statute as applied in this case.
2. This is a case in which the State of California choosed and elected to prosecute Petitioner under the annexed P.C. § 667(a) to the alleged 1992-single serious prior conviction which resulted in a judgment of guilty and conviction, see, *Batchelder v. U.S.*, 442 U.S. 114, 125 (1979) (holding that a prosecutor must choose only one of two statutes available to prosecute whether they have different elements or penalties); Thus, by her own election California was barred by *Batchelder* and the double jeopardy clause from continuing a second prosecution under a second habitual criminal statute that not even was annexed to Petitioner's criminal conduct.
3. This case shows clearly that California imposed punishments under two different habitual criminal statutes without expressing on their texts languages to be applied cumulatively requiring review under the merger and lenity rules for two reasons: (a) The new P.C. § 1170.12(b)(1) contains an ambiguous "determination clause" (see Petition at 30-34) and, (b) Second, because P.C. § 667(a) is more specific as to serious prior convictions and is that one annexed at the time the 1992-single serious prior conviction was rendered by the judgment of the State Court, See, *Simpson v. U.S.*, 435 U.S. 6, 11-14

he is innocent of being a striker offender, which is a criminal category higher in degree than the criminal status obtained under the P.C. § 667(a) in existence when it was recorded on 1992 in his criminal record and therefore he has cause for the delay, Cf. *Sawyer, supra*, at p. 2518 (allowing review even if a petitioner cannot meet the cause and prejudice if the successive claims have merits); *Murray v. Carrier*, 477 U.S. 478, 491-496 (1986); Cf. *Dretke v. Haley*, 541 U.S. 386, 393-394 (2004)

(1978); In this case the elements or facts proving conviction under P.C. § 667(a) subsumed those require to convict Petitioner under P.C. § 1170.12(b), or the conviction under P.C. § 1170.12(b) merged with that one under P.C. § 667(a) and thus must be reversed. See *Jones v. U.S.*, 527 U.S. 375, 397-398 (1999); Thus, review is necessary to apply the test established in *Blackburger v. U.S.*, 284 U.S. 299, 303-305 (1932), to determine that in fact California unconstitutionally imposed additional 25 years to life sentence; Cf. 21 Am. Jur. 2d. Criminal Law § 21 (2024) (the doctrine of merger does... apply... only where the identical criminal act constitutes both offense); *Prince v. U.S.*, 352 U.S. 322, 327-329 (1957); & *Will v. Hallok*, 546 U.S. 345, 354-355 (2006);

4. Also, the face of this case shows that the second conviction under P.C. § 1170.12(b) was obtained in violation of this court precedents, e.g. the facts and elements litigated to obtain a conviction under P.C. § 667(a), were relitigated twice to prosecute petitioner for second time, see *Ashe v. Swenson*, 397 U.S. 436, 443 (1970) (holding explicitly that collateral estoppel rule applies to an issue of fact "determined by a valid and final judgment"); also the evidence used already in the conviction under P.C. § 667(a) was reused for second time to reproved that Petitioner was convicted of two counts of burglary on 1992, resulting in violation of the evidence test, see *Grady v. Corbin*, 495 U.S. 508, 521-522, n.12 (1990); Furthermore, at the first prosecution California obtained a judgment on her favor, that is, Petitioner's suffered a 1992-serious prior conviction under P.C. § 667(a) and thus, was a final word by the Judge constituting *res judicata*, see *Restatement of Judgment* § 13 (1982) (the judgment¹¹ must ordinarily be a firm and stable one the "last word" on the rendering court - a "final judgment"); see also *id.* comment (e); Cf. *Id.* § 17, subsection (3) (A judgment in favor of either the

¹¹ See *Green v. U.S.*, 355 U.S. 184, 189 (1957) ("It is not essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge. A defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again"); Cf. *Arizona v. Washington*, 434 U.S. 497, 503 (1978) (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)).

plaintiff or the defendant is conclusive, in a subsequent action between them on the same or different claim, with respect to any issue actually litigated and determined if its determination was essential to that judgment); see also id. comment(c);

5. This Court should grant review because Petitioner is innocent of being a serious offender one way or the other whether not this Court finds him guilty of being serious offender as the following illustrations: (a) First, if this court finds that P.C. § 1170.12 do not applies because: (i) become an *ex post facto* law, (ii) violates the components, rules or doctrines of the double jeopardy clause, (iii) violates the due process clause as vague and gives no notice at the time Petitioner was convicted on 1992, (iv) it could not transform or convert Petitioner's 1992 two count burglary conviction into two strikes prior convictions under the Full Faith and credit clause; then if this occur the sentence would be eleven year total, six year for the current burglary conviction under P.C. § 461 and five years under P.C. § 667(a) for the suffering a 1992 single serious prior conviction; (b) Second, even if this court find P.C. § 1170.12 applicable, then Petitioner's 1992 single serious prior conviction could count only a single strike prior conviction because since were brought and tried together under P.C. § 667(a) the two count 1992 single serious prior conviction could not be separated, so petitioner's sentence would be 13 years total, the middle term of four year for the current burglary conviction under P.C. § 461, double due to the 1992 strike prior conviction to 8 years, plus 5 year under P.C. § 667(a), or (c) Even if this court finds two valid strike prior conviction, the sentence would be 25 years to life without the five years enhancement under P.C. § 667(b) and not 31 years to life as originally was done, so Petitioner would be innocent of six years

CONCLUSION

For the reasons just stated, CARLOS MARTINEZ, urges that this petition for rehearing be granted, and that, on further consideration, this Court should grant review the Petition for a Writ of Certiorari on file to determine the novel claims that have never been decided by this court. I declare under the penalty of perjury under the law of the United States of America Dated: March 5, 2024 that the foregoing is true and correct.

Respectfully submitted, Carlos Martinez

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PROOF OF SERVICE BY MAIL
BY PERSON IN STATE CUSTODY

(Fed. R. Civ. P.5;28 U.S.C. §1746)

I, CARLOS MARTINEZ, declare:

I am over 18 years of age and a party to this action. I am a resident of: Valley State prison, in the county of Madera in the State of California. My Prison is: at Chowchilla, California

On March 5, 2024

I served the attached documents: Petition For Rehearing with the attached Certificate of Good Faith and the Certification of Compliance with Words Limits

(Describe Document)

On the parties herein by placing true and correct copies thereof, enclosed in a sealed envelope. With postage therein fully paid in the United States Mail in a deposit box so provided at the above-named correctional institution in which I am presently confined. The envelope was addressed as follows:

Attorney General
300 S. Spring st.
Los Angeles, CA 90013

and to: _____

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on March 5, 2024

(Date)

Carlos Martinez

(Signed)

Certificate of Good Faith by Petitioner

I CARLOS MARTINEZ, the Petitioner acting in Propria Persona in Martinez v. California No. 23-6432, certify that this Petition for Rehearing is presented in good faith and not for delay and that it is restricted to the grounds specified in Supreme Court Rule 44 of the Rules of this Court.

Carlos Martinez

CARLOS MARTINEZ

Certification of Compliance With Word Limits

As required by Supreme Court Rule 33.1(h), I certify that the document contains no more than 3,000 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

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

Executed on March 5th, 2024

Carlos Martinez

CARLOS MARTINEZ