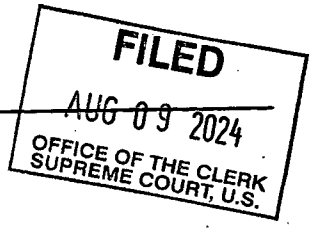
Case No. 24-5743

ORIGINAL

SUPREME COURT OF THE UNITED STATES



Rafael Gabriel,

Petitioner.

VS.

State of California,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

CHALLENGING THE SUPREME COURT OF CALIFORNIA

Rafael Gabriel, AK2509

POB-4000, B12-244

Vacaville Cal. 95696-4000

In Propria-Persona

HIGHLY UNIQUE & IMPORTANT QUESTIONS OF LAW PRESENTED

There is an epidemic of unlawful sentencing in California that exceeds beyond an accused's maximum possible release date, and only this Court can put a stop to it. Its disturbing that California imposes so many illegal or unlawful sentences, that they have formulated a term to address it in court; calling it an "unauthorized sentence."

(1. In California, a pretrial detainee is denied access to the very laws that are the cause of his or her confinement, and must rely upon his or her attorney, who in most cases, have their client plead unknowingly to an unauthorized sentence. It has been 55 years since this Court held the Sixth Amendment required an accused be advised s/he is waiving certain constitutional rights before accepting a plea (**Boykin v. Alabama**, 395 US 742, 748 (1969)). Should this apply to an unauthorized sentence?

(2. Does the "knowing and intelligent" "eyes wide open" clause of the Sixth Amendment require that an accused be advised that an negociated plea s/he is entering into is unauthorized?

(3. State law prohibits an accused from complaining about a plea s/he entered into is unauthorized (**People v. Hester**, 22 Cal.4th 290, 295 (2000)), which conflicts with clearly defined law of this Court that holds an attorney's ineffectiveness is conclusively established where that attorney either negociates, or fails to object to, an unlawful unauthorized sentence (**United States v. Glover**, 531 US 198, 203-04 (2001), also see **United States v. Conley**, 349 F.3d. 837 (5th Cir. 2003)). Should this Court invalidate **Hester** and its prodigy?

(4. Lexis-Nexis reveals that most California prisoners forced into federal court to challenge their unauthorized sentences fail due to procedural bars. As an unauthorized sentence is reprehensible to the concept of justice and fair play, should this Court preclude procedural bars for unauthorized sentences? (See e.g. **McQuiggin v. Perkins**, 569 US 383 (2013(gateway threshhold test for claims of actual innocence to overcome procedural bars [which California also ignores])).

(6. In **McNeil v. Patuxent**, 407 US 245 (1972), this Court overturned State regulations that permitted the over-detention of an inmate beyond his lawful release date, noting that such deliberate over-detention at the time only occurred in "Communist China" (Id, at 254 fn.3). If those Justices could only look ahead at 52 years of "progress"; would they be "shocked" or "appalled" to learn that it no longer occurs in China, but in the Great State of California with acquiescence of the judiciary?

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TABLE OF AUTHORITIES

I.

PETITION FOR WRIT OF CERTIORARI

"Petitioner" ("Pet.") petitions the Court to review a judgment of the California Supreme Court on writ of certiorari.

II.

JURISDICTION & OPINIONS BELOW

1. Pet. was unlawfully induced into a plea, because: (A. Judge Jefferson's order misrepresents Pet. was charged with 17 felonies facing 195 years ("Appendix" ["A"] 5:13-18); (B. Judge Butler's order said it was 6 felonies (A3); (C. the probation report described it as 3 robberies and a vehicle taking; and (D. a plea should not be a "shell game" or the product of "trickery."

2. On Oct. 10, 2011, Pet. was unlawfully sentenced to 25 years, when the correct maximum possible sentence was just 5 years. In exercising her discretion, Judge Butler stated on the record that she was sentencing Pet. to the aggravated term, absent aggravating factors, was because she had animosity towards Pet.'s Hispanic family members; who were not involved in the case (See A1, 3-4). Pet. was unaware the sentence was "unlawful" or "unauthorized" until after serving the maximum statutory sentence.

3. In Aug. 2023, Pet. submitted an unsigned, undated, unverified habeas petition which should have never been considered. Instead, Judge Jefferson issued an "objectionably unreasonable" order on the merits as follows:

(a. The court was declining to consider the merits of the petion because: (1. no appeal had been filed; (b. undue delay; and (3. Pet. "benifited" from the extra unlawful 20 years of imprisonment (citing **People v. Couch**, 48 Cal.App.4th 1053, 1056-58 (1996)), which is what the Supreme Court relied upon in making this the law of Cal. (**People v. Hester**, 22 Cal.4th 290, 295 (2000)(plea or stipulated sentence waives any right to challenge the unlawfulness of the sentence)).

(b. "Ineffective Assistance of Counsel" is conclusively established where the attorney either negociated, or failed to object to, an unlawful unauthorized sentence (**United States v. Conley**, 349 F.3d. 837 (5th Cir. 2003) and **United States v. Glover**, 531 US 198, 203-04 (2001)), and **Hester** conflicts with this Court's **Glover** opinion.

4. On Feb. 12, 2024, Pet. submitted a signed, dated verified petition under Cal.'s new "Racial Justice Act" ("RJA") showing another inmate hous-

ed in Pet.'s housing unit received an identical unauthorized sentence Judge Butler and Jefferson (who are both White)(A9-15), which was denied on April 10, 2024 (A7). The COA denied the petition on May 16, 2024 (A16), and the Cal. Supreme Court intitially granted informal review, then denied the petition on July 17, 2024 (A17). This Court has lawful jurisdiciton.

III.
STATEMENT OF THE CASE

5. On Oct. 19, 2011, Pet. was unlawfully sentenced as follows:

Robbery:	PC-211 (Max)	5 Years
	PC-12022.5(a)(Max)	10 Years
	PC-186.22(b)	10 Years
	Total Sentence:	**25 Years**

6. The sentence is unlawful because:

(A. The Cal. Supreme Court held that PC-1170.1(f) precluded both gun and gang enhancements as an unlawful double-up (**People v. Rodriguez**, 47 Cal.4th 501 (2009)).

(B. PC-170.1(d) precluded the upper term on the gun enhancement under PC-12022.5 unless it made a specific factual finding that aggravated factors existed.

(C. As a first time youthful offender, Pet. is entitled to the presumptive low term (PC-1016.7/1170(b)(6)(B))(**People v. Salazar**, 15 Cal. 5th 416, 419 (2023)("sentencing court may only depart from this lower term presumption if it finds that the aggravating circumstances out-weigh the midigating circumstances such that the lower term presumption would be contrary to the interests of justice.")

(D. Under remand, dismissal of the gang enhancement was required under AB-333 which changed the elements under PC-186.22, making it more difficult to sustain a conviction.

(E. Under the RJA (PC-745), Pet. was required to receive an evidentiary hearing an appointment of counsel upon a prima facie showing, and Judge Butler's appalling statements that she was using her discretion to sentence Pet. to the upper term because she had annomisity towards Pet.'s Hispanic family members who were not involved in the case, the fact that the transcipt of this statement has been destroyed (A1-2), there were pleanty of witnesses who remember the statement, and the fact that Judge Butler routinely imposes unlawful sentences upon Hispanic defendants (A9-15); met that requirement.

7. Pet.'s unlawful sentence should be corrected to the low term of 2 years for the PC-211, and 3 years for the PC-12022.5(a) enhancement.

IV.

REASONS FOR GRANTING THE WRIT

(a. The Plea Bargin Process:

"Critical stages of the criminal proceedings" "extends to the plea bargin process" (Missouri v. Frye, 566 US 134, 141 (2012) and Lafter v. Cooper, 566 US 156, 167-68 (2012)) as well as sentencing (Bell v. Cone, 535 US 156, 167-68 (2002)).

In California, a pretrial detainee has no access to law books until he enters prison. He has no way of knowing if a sentence is unlawful or unauthorized, and must totally trust that his attorney will not misrepresent facts (how much time he or she is actually facing) to induce a plea. In other words, a pretrial detainee is denied access to the very laws that are the cause of his or her confinement.

A Sixth Amendment waiver in accepting a plea must be "knowing and intelligent" made with the accused's "eyes wide open." (United States v. Brady, 397 US 742, 748 (1970) and Faretta v. California, 422 US 806, 835 (1975)). It has been 55 years since this Court held the Sixth Amendment required that an accused, before accepting a plea, must be advised that he or she is waiving certain constitutional rights (Boykin v. Alabama, 395 US 238, 243 (1969)).

Does the Sixth Amendment's "knowing an intelligent" "eyes wide open" clause require the State to advise an accused before accepting a plea, that the "sentence is illegal where it exceeds the statutory maximum." (United States v. Sisco, 576 F.3d. 791, 796 (8th Cir. 2009)), and the accused is pleading guilty to an unlawful or unauthorized sentence?*

(b. Blatant Disregard for this Court's Authority:

IAC is conclusively established where an attorney either negociates, or fails to object to, an illegal or unlawful sentence (United States v.

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* Its disturbing that California imposes so many illegal or unlawful sentences that they have formulated a term to address it in court.

Conley, 349 F.3d. 837 (5th Cir. 2003) and United States v. Glover, 531 US 198, 203-04 (2001)). State law, however, disregards clearly defined law of this Court, and forces state prisoners to serve every day of their unlawful sentence if that sentence is the result of a plea (People v. Hester, 22 Cal.4th 290, 295 (2000)).

"[A] unauthorized sentence is [one] issued in excess of jurisdiction ... that 'could not lawfully be imposed under any circumstances in a particular case.'" (In re G.C., 8 Cal.5th 1119, 1130 (2020)) that is subject to correction at "any time." (Id, at 1132). Waiver and forfeiture principles do not apply to an unauthorized sentence (People v. King, 77 Cal.App.5th 629, 635 (2022)). A judgment imposing punishment in excess of statutory jurisdiction is not merely "voidable" but "void." (Ex parte Lange, 85 US 163, 178 (1874)).

Hester forces Cal. inmates to seek relief in federal court (See e.g. Johnson v. Uribe, 682 F.3d. 1238, 1241 (9th Cir. 2012)(granted habeas relief for Cal. stipulated sentence that was unlawful in that it exceeded more time than the accused could have received had he gone to trial and lost)). However, most federal habeas claims for California prisoners fail for two reasons: (1. the forms provided to Cal. inmates are under 28 USC 2254 which has a one year statute of limitations (versus 28 USC 2241 which has no statute of limitations when challenging the duration of a sentence); and (2. the petitioner does not bring an IAC or over-detention claim, instead asserting the sentence is unlawful under state law.

In McNeil v. Patuxent, 407 US 245 (1972), this Court overturned state regulations that permitted the over-detention of an inmate beyond his lawful release date, noting that such deliberate over-detention only occurred at the time in "Communist China" (Id, 254 fn.3). If these Justices could only look ahead at 52 years of "progress" they'd be "shocked" and "appalled" to learn that it no longer takes place in China, but in the Great State of California with acquiescence of the judiciary.

"While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrafice of unarmed prisoners to gladiators."

(United States v. Cronic, 466 US 648, 657 (1984)).

Pet. was an unarmed sacrafice delibered bound and gagged by his clearly ineffective attorney. Glover and Cronic were asserted in all three stages of the State habeas proceedings.

(c. Cal. Maximum Sentence Absent Aggravating Factors Illegal:

Under PC-1170(b), the middle term was the statutory maximum unless the jury found, or the accused admitted, aggravating factors (Cunningham v. California, 549 US 270 (1/27/2007)). Two months later on March 30, 2007, the Legislature amended PC-1170(b) in an apparent attempt to circumvent Cunningham. The Cal. Supreme Court held that under the amended version, "a trial court is free to base an upper term sentence upon any aggravating circumstance the court deems significant." (People v. Sandoval, 41 Cal.4th 825, 848 (2007)).

An "upper term" is an "aggravated term" and CANNOT be imposed unless the court finds at least one aggravating factor (People v. Hicks, 17 Cal.App.5th 496, 512-13 (2017) and People v. Black, 41 Cal.4th 799, 817 (2007), Apprendi v. New Jersey, 530 US 466, 494 (2000)(facts justifying aggravated term is an "element" that must be determined by a jury), Ring v. Arizona, 536 US 584, 592-93 (2002)(Sixth Amendment requires a jury not a judge, to find aggravated factors justifying an aggravated term), and Hurst v. Florida, 577 US 92, 97-102 (2016)(Sixth Amendment violated where judge found aggravated factors rather than jury, and such an error cannot be deemed harmless)).

The aggravated factor requirement is not waived by plea (People v. French, 43 Cal.4th 36, 41-42 & 48-49 (2008) and Blakely v. Washington, 542 US 296 (2004)).

The Ninth Circuit noted the only difference between the post and pre Cunningham version of PC-1170(b) is that one permits "the upper term based upon facts" in aggravation, and "California now calls these facts 'rea-

sons'." (Creech v. Frauenheim, 800 F.3d. 1005, 1017 (9th Cir. 2015)).

Here, there was no finding of any aggravated factors as none existed, yet the sentencing court "selected" the upper term out of pure malice. Does it meet the "shocks the conscience" doctrine when a judge intentionally over-sentences a defendant, and refuses to correct that sentence when put on notice? (Rochin v. California, 342 US 165, 172 (1952)("methods too close to the rack and the screw" "shocks the conscience")), when the apparent goal of intentional over-detention could only possibly be to illegally pump federal dollars into the state for each day an inmate is deliberately over-detained?

(e. Equal Protection Clause:

> "[D]isparities in punishment imposed upon like individuals committing like offenses was a pernicious evil" caused by "the differences in judges." "[T]he movement to promote uniformity in sentencing" can only be occomplished by "diminish[ing] judicial discretion."

(People v. Martin, 42 Cal.3d. 437, 442-43 (1986)).

The "Determinent Sentencing Law" ("DSL") was meant to do just that; take the discretion away from judges to promote uniformity in sentencing. However, it undermines the intent of the DSL when judges impose unlawful sentences, and refuse to correct them when put on notice (Yick Yo v. Hopkins, 118 US 356, 373-74((1886)(equal protection violated where law applied unevenly "with an evil eye.")).

As a fail-safe, PC-1170.03 (now PC-1172.1) requires California prison administration to notify the court when they receive an inmate that has an unauthorized sentence. The problem is that the law is not being applied evenly. For instance, Solano prison has 100s of inmates with unlawful gang and gun enhance ments prohibited as a double-up under PC-1170 .1(f). See People v. Rodriguez, 47 Cal.4th 501 (2009)(called a Rodriguez violation)). No one at Solano prison is getting referred for resentencing for Rodriguez violations, but other California prisons are refering that inmates be resentenced for Rodriguez violations (See e.g. People v. Garcia, 2023.Cal.App.Unpub.Lexis.6331).

In Garcia, the Cal. COA documented the very lengthy unsuccessful process Garcia suffered attempting to get the court's to correct his unauthorized sentence. As Solano prison is not making Rodriguez resentencing referals, 100s of inmates at Solano prison must serve an extra decade, at minimum, soley because of which Cal. prison they are detained at. Relief from unlawful overdetention should not be "the roll of the dice" as to where they are housed at.

Pet. is not aware of any cases where a Cal. prison referred an inmate for resentencing because the sentencing court violated the aggravated factor requirement.

At this prison, two Solano inmates out of Los Angeles County filed virtually identical word-for-word habeas petitions to the Second Appellate District. While "Division Three" ("Div-3") granted habeas review for inmate Theo Bower's habeas petition (B334315), "Division One" ("Div-1") denied Raymond Rodriguez's habeas petition (B337024) over the same timeframe. One inmate will go home, the other will be unlawfully detained, solely on the bases of different judges out of the same appellate district. A Lexis-Nexis search shows that in the 15 years since Rodriguez was decided, Div-1 only granted relief once in 2010 when there were two different Justices in the Panel (B218295).

Judges are not dieties, and they should not assume that role to intentionally over-detain prisoners, and must correct them when put on notice.

V.
PRAYER FOR RELIEF

Pet. respectfully and humbly prays this Court:

(1. Grants full review and appoints counsel.

(2. Corrects the illegal unlawful unauthorized sentence.

(3. Hold that illegal unauthorized sentences are repugnant to the concept of "justice" and are precluded from any procedural bars.

(4. Hold that a court who intentionally over-sentences an accused, and refuses to correct that unlawful sentence when put on notice, meets the "shocks the conscience" doctrine.

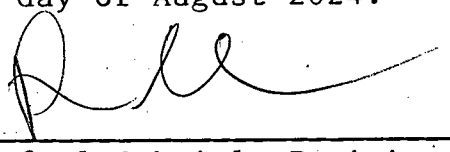
(4. Invalidate People v. Hester, 22 Cal.4th 290, 295 (2000), and its prodigy.

(5. Hold that Pet. did make a prima facie showing under the RJA.*

(6. Any other relief that is just.

VERIFICATION

I, Rafael Gabriel, declare that the foregoing is true and correct under penalty of perjury. Executed this 1st day of August 2024.



Rafael Gabriel, Petitioner

CERTIFICATE OF WORD COUNT

I, Rafael Gabriel, certify that this 8 page petition contains no more than 2,500 words.

*. "Discrimination on the bases of race, odious in all respects, is especially pernicious in the administration of justice." (Rose v. Mitchell, 443 US 545, 556 (1979)). Racial bias exists "in our criminal justice system ... because courts generally only address [it] in its most extreme and blatant form." (Ellis v. Harrison, 891 F.3d. 1160, 1160-66 (9th Cir. 2018)) when racial "toxins can be deadly in small doses." (Buck v. Davis, 580 US 100, 122 (2017)).