No. 11-_____

# In The Supreme Court of the United States

PEDRO AGUILAR-RAYGOZA,

*Petitioner,*

v.

STATE OF NEVADA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Nevada**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

After a jury convicted Petitioner of felony DUI, he was sentenced to 30 months in prison and a $2,000 fine. Under Nev. Rev. Stat. ("N.R.S.") 484C.340, had Petitioner pled guilty, he would have been eligible, subject to other conditions and court approval, for sentencing to an alcohol treatment program instead of incarceration. The court rejected Petitioner's Fourteenth Amendment claims that N.R.S. 484C.340 punished his exercise of his Sixth Amendment right to a jury trial.

Affirming, and in conflict with the highest courts of other states, the Nevada Supreme Court read *Corbitt v. New Jersey*, 439 U.S. 212 (1978) as holding that because all persons guilty of Petitioner's offense could receive the same maximum sentence, N.R.S. 484C.340, rather than punishing Petitioner's exercise of his constitutional right, merely offered possible leniency to persons who waived that right.

This Court has questioned *Corbitt*'s premise, noting that "[w]e doubt that a principled distinction may be drawn between 'enhancing' the punishment imposed upon the petitioner and denying him the 'leniency' he claims would be appropriate." *McKune v. Lile*, 536 U.S. 24, 45 (2002); *see Apprendi v. New Jersey*, 530 U.S. 466, 522 (2000) (Thomas, J., concurring) (enhancing possible minimum sentence properly characterized as punishment regardless of whether possible maximum sentence is affected).

The question presented is whether *Corbitt* should be overruled.

## PARTIES TO THE PROCEEDING

All of the parties to the proceeding below are identified in the caption.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Pedro Aguilar-Raygoza respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Nevada.

## OPINIONS AND ORDERS BELOW

The opinion of the Supreme Court of Nevada (App. 1-14) is reported at 255 P.3d 262 (Nev. 2011). The order of the Second Judicial District Court for the State of Nevada denying Petitioner's pre-sentencing motion (App. 15-20) is unreported.

## JURISDICTION

The Second Judicial District Court for the State of Nevada denied Petitioner's pre-sentencing motion challenging the constitutionality of N.R.S. 484C.340. The Supreme Court of Nevada denied Petitioner's appeal and entered judgment on June 2, 2011. This Court has jurisdiction under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public

> trial, by an impartial jury of the State and district wherein the crime shall have been committed.

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> 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 any 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.

N.R.S. 484C.110 provides in pertinent part:

> 1. It is unlawful for any person who:
>
> (a) Is under the influence of intoxicating liquor;
>
> (b) Has a concentration of alcohol of 0.08 or more in his or her blood or breath; or
>
> (c) Is found by measurement within 2 hours after driving or being in actual physical control of a vehicle to have a concentration of alcohol of 0.08 or more in his or her blood or breath,
>
> to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access.

N.R.S. 484C.400(1)(c) provides in pertinent part:

> 1. Unless a greater penalty is provided pursuant to N.R.S. 484C.430 or 484C.440, and except as otherwise provided in N.R.S. 484C.410, a person who violates the provisions of N.R.S. 484C.110 or 484C.120:
>
> . . .
>
> (c) Except as otherwise provided in 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.

The text of N.R.S. 484C.340 is reprinted at App. 21-25.

## STATEMENT OF THE CASE

### Introduction

This case concerns an important and recurring constitutional question: to what extent may a State

legislatively manipulate its sentencing laws in order to induce guilty pleas without violating an accused's constitutional rights to a jury trial, due process, and equal protection of the laws. This Court has long-recognized that a criminal defendant may not be punished solely for exercising his constitutional rights. *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). Unsurprisingly, therefore, this Court has found unconstitutional under the Sixth Amendment a statute mandating a harsher sentence for defendants found guilty after a jury trial than defendants who forego a trial and plead guilty to the same offense. *See United States v. Jackson*, 390 U.S. 570, 582 (1968). That logic, however, has not been extended to laws, like the one at issue in this case, that render defendants who exercise their Sixth Amendment right to a jury trial ineligible for the lowest end of the legislatively prescribed sentencing range for a felony offense, while allowing only defendants who forego that right by pleading guilty or *nolo contendere* to the same offense to be considered for the lowest permissible sentence. Instead, in *Corbitt v. New Jersey*, 439 U.S. 212, 221-22 (1978), this Court held that, so long as both sets of defendants could possibly receive the same maximum sentence, the Sixth Amendment was not violated if a statute enhanced the minimum permissible sentence for only those defendants who pled not guilty and exercised their right to a jury trial. *Corbitt* held that the statute should be interpreted as an offer of possible leniency that the state was not forbidden from extending to only those defendants who plead guilty. *Id.* at 218-21.

*Corbitt*'s reasoning has drawn this Court's criticism repeatedly. Merely two years after it decided *Corbitt*, this Court already retrenched from the logic underlying that decision, noting that, "[w]e doubt that a principled distinction may be drawn between 'enhancing' the punishment imposed upon the petitioner and denying him the 'leniency' he claims would be appropriate if he had cooperated." *Roberts v. United States*, 445 U.S. 552, 557, n.7 (1980). That same expression of doubt resurfaced more recently in the plurality opinion in *McKune v. Lile*, 536 U.S. 24 (2002), which quoted *Roberts'* same passage as part of an amplified criticism of the very doctrine upon which *Corbitt* rested, explaining that:

> Respondent is mistaken as well to concentrate on the so-called reward/penalty distinction and the illusory baseline against which a change in prison conditions must be measured. The answer to the question whether the government is extending a benefit or taking away a privilege rests entirely in the eye of the beholder. For this reason, emphasis of any baseline, while superficially appealing, would be an inartful addition to an already confused area of jurisprudence.
>
> . . .
>
> The Court has noted before that "[w]e doubt that a principled distinction may be drawn between 'enhancing' the punishment imposed upon the petitioner and denying him the

> 'leniency' he claims would be appropriate if he had cooperated."

*McKune*, 536 U.S. at 45-46 (Kennedy, J., plurality op.).

That same year, the Court decided *Harris v. United States*, 536 U.S. 545 (2002), a case dealing with whether the Sixth Amendment jury trial guarantee that *Apprendi* held safeguards an accused from suffering an enhanced maximum sentence above the prescribed statutory maximum sentence for the offense based on facts not found by a jury also applies to situations in which the accused faces an increase in the minimum possible sentence resulting from these same type of non-jury findings. Although *Harris* ultimately declined to extend *Apprendi* to that situation, the Court split evenly 4-4 in deciding whether a sentencing factor that enhances the permissible minimum sentence without affecting the permissible maximum sentence amounts to enhanced punishment within the meaning of Sixth Amendment jurisprudence. The four-member plurality opinion authored by Justice Kennedy espoused the view that, while enhancements to the maximum sentence brought about by judicial findings triggered the Sixth Amendment protections mandated by *Apprendi*, "[t]he same cannot be said of a fact increasing the mandatory minimum (but not extending the sentence beyond the statutory maximum), for the jury's verdict has authorized the judge to impose the minimum with or without the finding." *Id.* at 557 (Kennedy, J., plurality op.). In sharp disagreement, the four-member plurality dissenting

opinion authored by Justice Thomas rejected that view, explaining that:

> The Court truncates this protection and holds that 'facts, sometimes referred to as sentencing factors,' do not need to be 'alleged in the indictment, submitted to the jury, or established beyond a reasonable doubt,' so long as they do not increase the penalty for the crime beyond the statutory maximum. This is so even if the fact alters the statutorily mandated sentencing range, by increasing the mandatory minimum sentence. But to say that is in effect to claim that the imposition of a 7-year, rather than a 5-year, mandatory minimum does not change the constitutionally relevant sentence range because, regardless, either sentence falls between five years and the statutory maximum of life, the longest sentence range available under the statute. This analysis is flawed precisely because the statute provides incremental sentencing ranges, in which the mandatory minimum sentence varies upward if a defendant 'brandished' or 'discharged' a weapon. *As a matter of common sense, an increased mandatory minimum heightens the loss of liberty and represents the increased stigma society attaches to the offense. Consequently, facts that trigger an increased mandatory minimum sentence warrant constitutional safeguards.*

*Id.* at 577-78 (Thomas, J., dissenting plurality) (internal citations omitted, emphasis added).

*Corbitt*, upon which the Supreme Court of Nevada relied to uphold Petitioner's sentence, based its holding on the very question on which *Harris* deadlocked 4-4; namely, whether increasing the minimum permissible sentence without altering the possible maximum sentence amounts to enhanced punishment. This case, therefore, represents an opportunity to reexamine *Corbitt* and clarify the actual scope of Sixth Amendment protection, if any, from a state's mandatory imposition of enhanced minimum sentences for defendants who exercise their Sixth Amendment right to a jury trial.

**The Proceedings Below**

Pedro Aguilar-Raygoza was charged by way of information with felony driving under the influence of alcohol. App. 2. Because this was his third arrest for driving under the influence within seven years, Nevada labeled the offense as a "category B felony." *See* N.R.S. 484C.400(1)(c); App. 2. The statute mandates a sentence of "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 . . . a fine of not less than $2,000 nor more than $5,000." *Id.* A separate statutory section pertinent to the offense, however, provides that an offender like Mr. Aguilar-Raygoza who is subject to punishment under N.R.S. 484C.400(1)(c), may "apply to the court to undergo a program of treatment for alcoholism or drug abuse." N.R.S. 484C.340(1); App. 21. If the accused meets the requirements for the alcohol treatment sentencing

option (which Mr. Aguilar-Raygoza claimed to do) and the court accepts his request for that sentencing option, the court is to immediately suspend all proceedings against him, and "place the offender on probation for not more than 5 years" conditioned on him being accepted by a treatment facility, completing the treatment program, and fulfilling any other condition imposed by the court. N.R.S. 484C.340(4)(a); App. 22-23. Under Nevada's statutory sentencing scheme, therefore, for the offense of felony DUI with which Petitioner was charged, the minimum permissible sentence is referral to the alcohol treatment program with no incarceration, whereas the maximum permissible sentence for the same offense is incarceration for 6 years along with a fine of $5,000.

There is one caveat. Whereas all persons charged with the felony DUI offense face the same maximum sentence, eligibility to receive the lowest possible sentence – alcohol treatment with no incarceration – is limited by statute to only "[a]n offender who enters a plea of guilty or nolo contendere [to the offense]." N.R.S. 484C.340(1); App. 21.[1] Defendants who plead not guilty and exercise their Sixth Amendment right to a jury trial are, therefore, rendered *per se* ineligible

[1] At the time of the trial court's opinion, the statute had not yet been renumbered and was known instead as N.R.S. 484.37941. (App. 2, n.1). Following Petitioner's appeal to the Nevada Supreme Court, the statute was renumbered N.R.S. 484C.340, which is the designation reflected in the opinion of the Nevada Supreme Court, and is the designation used in this petition.

for the lowest possible sentence to the offense. The statute thus creates a differential minimum sentencing scheme that turns on a defendant's assertion of his constitutional right to a jury trial.

Petitioner pled not guilty to the charge, and proceeded to trial. The jury found him guilty of felony DUI. Prior to sentencing, Mr. Aguilar-Raygoza filed a motion to be sentenced to the alcohol treatment program. As called for by the statute, the trial court held a hearing to determine his eligibility. At the hearing,

> [Petitioner] argued that he was a suitable candidate for the program and that the statute's requirement that he must enter a guilty plea to be eligible for treatment was unconstitutional because it penalized him for exercising his fundamental right to a jury trial and deprived him of the equal protection of the law.

App. 3.

The court denied Petitioner's motion. App. 15-20. Without addressing the actual substance of Petitioner's claim that he was unconstitutionally punished for exercising his Sixth Amendment right to a jury trial, the court merely held that, "[w]hile there is a fundamental right to a jury trial in serious criminal cases, there is no fundamental right to participate in the DUI diversion program created by SB 277" App. 19.[2]

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[2] Of course, the implication of that characterization posits the claim exactly backwards. Mr. Aguilar-Raygoza never argued

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The court, therefore, subjected the statute to mere rational basis review and, unsurprisingly, held that it met that test. *Id.* Because it found Petitioner statutorily ineligible for this sentencing option, the trial court did not analyze whether he was a suitable candidate for the program by reference to the criteria set forth in N.R.S. 484C.340(1)(a) and (b).

The Nevada Supreme Court affirmed, relying at length on *Corbitt*. App. 1-14. With respect to Petitioner's due process claim, the Nevada Supreme Court parroted *Corbitt*'s holding and opined that:

> We conclude that the possibility of entering an alcohol treatment program provided in N.R.S. 484C.340 is a form of leniency that is available in exchange for a plea of guilty or nolo contendere and is not an unconstitutional penalty for refusing to enter such a plea or a burden on the exercise of constitutional rights.

App. 9.

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that sentencing to the treatment option was the fundamental right. Rather, his assertion was that his Sixth Amendment right to be tried by a jury of his peers for the felony offense he was charged with committing was a fundamental right, the exercise of which, could not be used by the State to treat him differently than similarly situated defendants who did not exercise that right. The trial court mischaracterized Petitioner's position as "arguing that he has a fundamental right to the DUI diversion program." App. 19.

It reasoned that:

> Here, as in *Corbitt*, the pressures to forgo trial and to plead to charge are not what they were in *Jackson* [because]. . . . the maximum punishment for felony DUI is not reserved only for those who insist on a jury trial; the defendant who abandons the right to a jury trial is not assured that he will not be sentenced to imprisonment under N.R.S. 484C.400(1)(c).

*Id.*

The court likewise summarily relied on *Corbitt* to affirm the lower court's rejection of Petitioner's equal protection claim, stating that "Aguilar-Raygoza's equal protection challenge fails under the holding in *Corbitt*." App. 12. In an accurate paraphrase of *Corbitt*'s logic and holding, the Nevada Supreme Court explained that:

> Those choosing to enter a plea of guilty or nolo contendere forgo the possibility of acquittal and face the same prison sentence, but they gain the possibility of leniency in the form of diversion to a treatment program. Aguilar-Raygoza was not penalized for exercising his right to a jury trial.

*Id.*

Despite its otherwise unwavering fealty to *Corbitt*'s rationale, even the Nevada Supreme Court briefly hesitated before blindly adopting *Corbitt*'s logic. In a footnote, the court conceded that, "[w]e

acknowledge that unlike the provisions at issue in *Corbitt*, N.R.S. 484C.340 offers a benefit to defendants who plead guilty that is not available to defendants who insist on going to trial." App. 11, n.3. The Nevada Supreme Court, however, never pursued the logical ramifications of this acknowledgement and, instead, limited its discussion to the one-sentence footnote conclusion to the effect that, "[w]e are not convinced, however, that this distinction turns N.R.S. 484C.340 into an unconstitutional burden on the exercise of the right to a jury trial." *Id.*[3]

The Nevada Supreme Court's judgment depends entirely on the continued vitality of *Corbitt*'s holding. Because *Corbitt*'s logic – since cast into doubt or rejected in opinions of this Court – is irreconcilable with this Court's longstanding Fourteenth Amendment case

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[3] The court's opinion also alludes that its holding is tantamount to validating plea bargaining. App. 8. But equating a mandatory statutory minimum sentence that renders a defendant *per se* ineligible for a lower sentence solely because he exercised his Sixth Amendment rights to a negotiated process of plea bargain is ill-reasoned. A plea bargain does not render a defendant *per se* ineligible for anything because the presiding judge is still free to accept or reject the terms recommended in the plea agreement. By contrast, N.R.S. 484C.340 takes away from the judge *all* discretion to impose a lower sentence (i.e., alcohol treatment program with no incarceration) on a defendant pleading not guilty because the statute forbids a judge from granting a petitioner proceeding to trial that sentencing option. *See Harris*, 536 U.S. at 570 (Breyer, J., concurring in part) ("Unlike Guideline sentences, statutory mandatory minimums generally deny the judge the legal power to depart downward, no matter how unusual the special circumstances call for leniency.").

law, and is a product of an outdated doctrinal era of Sixth Amendment jurisprudence, Mr. Aguilar-Raygoza petitions this Court for a writ of certiorari to the Supreme Court of Nevada to review the judgment entered against him.

## REASONS FOR GRANTING THE WRIT

### I. This Court's Post-*Apprendi* Sixth Amendment Case Law, As Well As Conflicts Among State Supreme Court Decisions, Calls Into Question The Very Premise On Which *Corbitt* Was Decided, Thereby Making The Decision Ripe For Reevaluation.

*Harris'* 4-4 deadlock on whether increasing the prescribed mandatory minimum sentence without altering the possible maximum sentence amounts to punishment within the meaning of Sixth Amendment jurisprudence highlights the uncertain legitimacy of *Corbitt*'s underlying reasoning on which the Nevada Supreme Court's judgment against Petitioner depends. The whole premise underlying *Corbitt* was that disparately setting the minimum sentence to which a defendant is eligible based upon whether the accused exercised his right to a jury trial is permissible precisely because reducing the minimum possible sentence for defendants who forego their jury trial rights should be viewed as an offer of possible leniency to those defendants rather than imposition of punishment (or added punishment) on the disfavored defendants who do go to trial. *Corbitt* 439 U.S. at 223. *Harris'*

stalemate on whether an enhanced minimum mandatory sentence is properly characterized as enhanced punishment, however, calls into question the very assumption upon which *Corbitt* was decided. Not surprisingly, the highest courts of various states have reached conflicting opinions on the constitutionality of enhancing the minimum permissible sentence of a defendant who exercises his Sixth Amendment right to a jury trial. Beyond an opportunity to resolve that conflict, moreover, this case offers the prospect of overruling *Corbitt*, which rests on a questionable distinction between withholding a benefit and imposing a penalty, and to thereby reconcile any superseding holding with this Court's equal protection and due process case law that has eschewed that ephemeral distinction.

The disagreement among *Harris'* dueling pluralities is only the latest airing of views from members of this Court questioning the correctness of *Corbitt*'s underlying reasoning. *See Apprendi*, 530 U.S. at 522 (Thomas, J., concurring) (enhancing minimum mandatory sentence "is part of the punishment sought to be inflicted, it undoubtedly enters into the punishment so as to aggravate it") (internal quotations and citations omitted). Likewise, the highest courts of different states have issued inconsistent and conflicting treatment to states' imposition of increased minimum mandatory sentences to those guilty defendants who exercised their Sixth Amendment right to a jury trial. Like the Nevada Supreme Court's holding that *Corbitt* rendered such a practice *per se* lawful,

the Iowa Supreme Court reached the same result. *See State v. Biddle*, 652 N.W.2d 191, 202 (Ia. 2002) (upholding statutory allowance of reduction of permissible sentence to defendants who plead guilty of methamphetamine possession because "[t]he statute here more closely resembles the statute in *Corbitt*."). By contrast, in *In re Lewallen*, 590 P.2d 383, 386 (Cal. 1979), the California Supreme Court held, over a dissent that urged faithful allegiance to *Corbitt*, that a court "may not treat a defendant more leniently because he foregoes his right to trial or more harshly because he exercises that right." (quotations omitted).

Skepticism of *Corbitt*'s rationale has also been evident among the federal courts of appeals and legal commentators. *See United States v. Jones*, 997 F.2d 1475 (D.C. Cir. 1993) (*en banc*) (recognizing that in imposing sentence upon defendant beyond otherwise applicable minimum sentence following his decision to go to trial "there remains the possibility that Jones's [sic] sentence might be classified as an impermissible burden placed on the exercise of a constitutional right" but ultimately upholding sentence because "[a]ssuming the ultimate validity of distinctions between denials of leniency and enhancements of punishment," *Corbitt* dictated that result.); Carissa Byrne Hessick et al., *Recognizing Constitutional Rights At Sentencing*, 99 Cal. L. Rev. 47, 63 (2011) ("The refusal to grant a defendant leniency that is given to others because the defendant performed some act – exercising his right to a jury – seems analytically indistinct from increasing that defendant's punishment

because he performed that same act. In both situations, greater punishment is imposed on the defendant because of his conduct."); J. Mazzone, *The Waiver Paradox*, 97 Nw. U. L. Rev. 801, 840, n.227 (2003) ("In order to avoid any constitutional difficulty of specifically penalizing defendants for exercising their right to trial, the Sentencing Commission chose not to provide for an automatic increased penalty for pleading not guilty and *not to limit the availability of a sentence reduction for acceptance of responsibility to defendants who pled guilty*.") (emphasis added).

The concerns expressed about *Corbitt*'s rationale take on particular force where, as in Petitioner's case, the offenses at issue do not a carry a prescribed determinate sentence. "Under indeterminate sentencing schemes, there is no presumptive sentence for an offense. Thus, the differential sentences between those who plead and those who go to trial cannot be conclusively categorized as the result of leniency or punishment." 99 Cal. L. Rev. at 63, n.78; *see* S. Grossman, *An Honest Approach to Plea Bargaining*, 29 Am. J. Trial Advoc. 101, 113 (2005) ("In sentencing systems in which most sentences are to some degree within the discretion of the trial judge, limited only by the range within the particular statute under which the defendant is being prosecuted, this punishment-benefit dichotomy fails theoretically as well as practically."). The change in sentencing landscape between the era in which *Jackson* and *Corbitt* were decided and the post-*Apprendi* world in which most offenses do not carry determinate sentences further undermines the

vitality of *Corbitt*'s logic. If one is unable to attach a determinate applicable sentence to an offense, then it is impossible to characterize any disparity in sentences between those who plead guilty and those who do not as an offer of leniency to the former or a punishment for the latter. *Corbitt*'s incompatibility with the prevailing present day practice of indeterminate sentencing presents a persuasive reason for reconsidering that decision.

## II. The Court Should Grant Review In Order To Rectify The Inconsistency Between *Corbitt*'s Underlying Reasoning And The Court's Rejection Of The Same Reasoning In Its Fourteenth Amendment Jurisprudence.

Mr. Aguilar-Raygoza challenged N.R.S. 484C.340 on equal protection and due process grounds. He claimed that he exercised his fundamental constitutional right to a jury trial, and as a result, was either punished for that exercise or adversely treated differently than if he had not exercised that constitutional right.[4] Aside from presenting an all-too-facile analytic framework for evaluating challenges directly under the Sixth

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[4] Petitioner does not claim that Nevada impermissibly prevented him from exercising his Sixth Amendment right to a jury trial. Rather, his claim is that he did exercise that right, but was punished for doing so. This case, therefore, does not disturb the established proposition that Sixth Amendment rights may properly be waived by a defendant. *See Boykin v. Alabama*, 395 U.S. 238 (1969) (accused may relinquish his right to a jury trial through knowing, informed, and voluntary waiver).

Amendment, adhering to *Corbitt*'s "benefit of leniency versus enhancement of punishment" paradigm would be irreconcilable with this Court's longstanding Fourteenth Amendment jurisprudence. When a plaintiff exercising a fundamental constitutional right is adversely treated in a different manner than those who do not avail themselves of that right, this Court has never adjudicated the merits of a resulting equal protection claim by determining whether the disparate treatment can be characterized as merely the withholding of benefits to the adversely affected plaintiff. Instead, this Court has reiterated that the equal protection claim turns on whether the unequal treatment is a result of a law narrowly tailored to further a compelling government interest. *See Dunn v. Blumstein*, 405 U.S. 330, 337 (1972) (defining strict scrutiny test to be applied to government classification based on assertion of a fundamental right).

Thus, in *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 900 (1986), New York's law extending bonus points to New York's civil service examination scores of only those war veterans who resided in New York at the time their military service began was challenged on equal protection grounds by New York examinees who were not residents of the state at the time of their military service and, hence, were rendered statutorily ineligible for the bonus score points extended by New York. The plaintiffs claimed that New York's statute violated their rights of equal protection under the law by adversely treating them differently for exercising their fundamental constitutional right to travel. *Id.* at 901. Both the plaintiffs

and this Court characterized the disparate treatment as the withholding of a benefit made available to others who did not exercise their right to travel, rather than the exaction of a penalty. The Court formulated the claim by explaining that, "New York's eligibility requirements for its civil service preference *conditions a benefit* on New York residence at a particular past time in an individual's life. *It favors those veterans* who were New York residents at a past fixed point over those who were not New York residents at the same point in their lives." *Id.* at 905 (emphasis added). Nevertheless, the Court did not hesitate in subjecting the statute to strict scrutiny and holding New York's law unconstitutional. *Accord Texas v. Pruett*, 414 U.S. 802 (1973), *affirming sub nom. Pruett v. Texas*, 470 F.2d 1182, 1183 (5th Cir. 1972) (*en banc*) (holding unconstitutional on equal protection grounds Texas' statute and practice of withholding time served credits from inmates who appeal their convictions).

This Court consistently has held that disparate treatment based on an individual's exercise of a fundamental right, not only gives rise to an equal protection claim, but merits strict scrutiny. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Harper v. Virginia Board of Elections*, 383 U.S. 663, 672 (1966). The opinions below leave no doubt that, in keeping with the plain text of N.R.S. 484C.340, Petitioner was rendered statutorily ineligible for the lower sentencing option of alcohol treatment instead of incarceration solely because he pled not guilty and went to trial on the charged felony DUI offense. *See* App. 2 (concluding

that because Nevada statute is constitutional Mr. Aguilar-Raygoza is ineligible for the alcohol treatment option, "as the law is written."). The jury trial right enshrined in the Sixth Amendment is a fundamental right. *See Duncan v. Louisiana*, 391 U.S. 145, 157-58 (1968) ("Our conclusion is that in the American States, as in the federal judicial system, a general grant of jury trial for serious offenses is a fundamental right."). Adhering to *Corbitt*, however, as the Supreme Court of Nevada did to validate the statutory disparate treatment accorded to Petitioner, would rewrite equal protection case law to hold that strict scrutiny is called for when the State's disparate treatment burdens only certain fundamental rights, but not others – a view that has never been adhered to by this Court.

Inquiring whether, for equal protection purposes, the disparate treatment amounts to penalizing the disfavored plaintiff as opposed to rewarding the benefitted defendant, makes no sense. As Justice Thomas has explained, "[n]o one would argue that a university could set up a lower general admissions standard and then impose heightened requirements only on black applicants. Similarly, a university may not maintain a high admissions standard and grant exemptions to favored races." *Grutter v. Bollinger*, 539 U.S. 306, 350 (2003) (Thomas, J., dissenting).

While the Equal Protection Clause of the Fourteenth Amendment is concerned with disparate treatment of similarly situated individuals, the due process clause of that amendment protects, *inter alia*, the

adequacy of the process by which the State deprives the individual of his life, liberty, or property interests. Fidelity to that constitutional safeguard requires that the process the State employs to deprive the individual of any of these protected interests (whether they be characterized as receipt of benefits or avoidance of penalties) not turn on certain considerations, foremost being the complainant's exercise of a constitutional right. This Court has explained that:

> For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests.

*Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

*Perry*'s proscription is not limited to deprivations that amount to penalties or punishment as opposed to denials of leniency or benefits. To the contrary, this Court has catalogued an array of due process cases involving "conditions and qualifications upon governmental *privileges and benefits* which have been invalidated because of their tendency to inhibit constitutionally protected activity." *Sherbert v. Verner*, 374 U.S. 398, 406, n.6 (1963) (emphasis added) (collecting cases). The Fourteenth Amendment demanded that Petitioner's sentencing proceeding, in which Nevada adjudicated whether and to what extent it

would deprive Mr. Aguilar-Raygoza of his personal liberty, have been carried out by adherence to rules and norms that comport with due process.

The Supreme Court of Nevada (as did the trial court) paid short shrift to Petitioner's due process claim, reasoning that because he had elected to proceed to trial, been found guilty, and sentenced in accordance with the statute, he received all the process he was due. App. 11, n.4. In so disposing of his claim, however, the Nevada courts failed to consider that the process by which Nevada courts were to consider whether to incarcerate Mr. Aguilar-Raygoza made his exercise of his Sixth Amendment right to a jury trial the sole and dispositive factor as to whether he would be eligible for the lowest prescribed sentence for that offense – referral for an alcohol treatment program with no incarceration.

Rationalizing that the act of pleading not guilty and demanding a jury trial, in and of itself, can constitutionally render an accused statutorily ineligible for the minimum legislatively prescribed sentence because doing so does not enhance the maximum possible punishment, should be no more acceptable than permitting a legislature to render a defendant statutorily ineligible for that minimum legislatively prescribed sentence for the sole reason that he elected to avail himself of his Sixth Amendment right to counsel.[5]

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[5] The logical fallacy in holding that Nevada's statutory sentencing scheme is constitutionally permissible because, while

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it makes those defendants asserting their right to a jury trial ineligible for the lowest end of the legislatively prescribed sentencing range it does not enhance the maximum permissible sentence, is confirmed by referring to the following hypothetical. Suppose that rather than the statutory scheme now in place, Nevada's legislature simply defined two separate felony DUI offenses, known as Felony DUI 1 and Felony DUI 2. The legislature further prescribed that a person guilty of felony DUI 1 was subject to sentencing either to an alcohol treatment program with no incarceration, at the low end, or to incarceration for a period of 1 to 7 years and a fine of up to $6,000. The legislature likewise prescribed that a person guilty of Felony DUI 2 would be subject to the same sentencing range, except that he would not be eligible for referral to the alcohol treatment program in lieu of incarceration (i.e., the sentencing range for the Felony DUI 2 offense would be the same as the permissible sentencing range for Felony DUI 1 except that the minimum possible sentence for a Felony DUI 2 conviction was greater than the minimum possible sentence for Felony DUI 1). In the hypothetical, Nevada defined the elements of its Felony DUI 1 offense to be: a) operating a motor vehicle on a public roadway while impaired due to presence of alcohol in the body exceeding .08% blood alcohol volume and b) having two prior convictions for DUI. Similarly, Nevada defined the elements of the Felony DUI 2 offense as: a) operating a motor vehicle on a public roadway while impaired due to presence of alcohol on the body exceeding .08% blood alcohol volume; b) having two prior convictions for DUI; *and*, c) pleading not guilty to the felony DUI charge and demanding a jury trial. Nobody would suggest that Nevada could so define the requisite elements of the Felony DUI 2 offense because doing so would criminalize the assertion of a constitutional right. *See Bordenkircher*, 434 U.S. at 363 ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort."). Yet, the result and effect of Nevada's current statutory scheme is exactly the same as that of the described hypothetical scheme. Under both scenarios, Nevada has formulated its statutes so that an accused's exercise of his Sixth Amendment right to a jury trial dispositively makes him ineligible to receive the lowest sentence within the permissible

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Yet, *Corbitt*'s logic would find both options constitutionally permissible. Because *Corbitt*'s ill-reasoned holding has created a proverbial Sixth Amendment tail that wags the Fourteenth Amendment dog, it should be revisited.

## III. Overruling *Corbitt* Is Consistent With The Limitations Of *Stare Decisis*.

Adherence to *stare decisis* is not sufficient reason to refrain from reconsidering *Corbitt*. Respect for precedent assuredly is a valid consideration in adjudicating a legal dispute. Judicial interpretation, however, is not to be paralyzed by blindly pledging unwavering allegiance to decisions, regardless of how wrong their reasoning is proven to be by subsequent decisions or developments in the law. "[*S*]*tare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). This Court has long recognized that overruling precedent is particularly defensible "in constitutional cases, because in such cases 'correction through legislative action is practically impossible.'" *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (*quoting Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting)).

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legislative sentencing range, all while leaving unaltered the maximum permissible sentence. To hold that the hypothetical statutory scheme described is unconstitutional while the present scheme is permissible amounts to defending *Corbitt* on the basis of semantic manipulation rather than principle.

### A. *Corbitt*'s Repeatedly Criticized Reasoning From An Outdated Era Of Sixth Amendment Jurisprudence Makes Reexamination Of That Decision Appropriate.

Almost since it was announced, *Corbitt*'s central premise – that enhancing a minimum sentence is to be viewed not as punishment but as mere withholding of leniency – has been either repudiated or severely called into question by this Court. That alone, would tag the decision as a prime candidate for reexamination. *See Payne*, 501 U.S. at 827 ("[W]hen governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'") (*quoting Smith v. Allwright*, 321 U.S. 649, 665 (1944)).

But beyond the lack of clarity that *Corbitt* has engendered, it is also a decision that was reached in a prior era of Sixth Amendment jurisprudence, since revisited by this Court. *See Dickerson v. United States*, 530 U.S. 428, 443 (2000) ("we have overruled our precedents when subsequent cases have undermined their doctrinal underpinnings."). *Apprendi* and its progeny marked a significant departure from this Court's prior pronouncements as to the scope of Sixth Amendment protections. *See United States v. Ameline*, 400 F.3d 646, 652 (9th Cir. 2005) ("*Blakely* worked a sea change in the body of sentencing law.") (internal quotations omitted); *United States v. Banks*, 2009 WL 3490280, at *1 (5th Cir. Oct. 29, 2009) (referencing "the absolute sea-change in federal sentencing wrought by

*Booker*."); B. Cohen, *The Death of Death Qualification*, 59 Case West. L. Rev. 87, 110 (2008) ("a sea change in textual exegesis occurred with the dissent in *Almendarez-Torres v. United States* and the subsequent majority opinions in *Jones* and *Apprendi*."); 6 No. 12 ABA J. E-Report 4, "A Sixth Sense About Criminal Trials" (Mar. 23, 2007) (noting that Court's recent decisions "have effected a sea change in thinking about the Sixth Amendment rights of defendants."). Eschewing prior judicial labels regarding sentencing factors or elements of an offense, *Apprendi* and its progeny evinced newfound judicial recognition that the Sixth Amendment jury trial guarantee grants criminal defendants the protection of a jury trial whenever a fact exposes a defendant to punishment above the statutorily prescribed sentence. *See Apprendi*, 430 U.S. at 490. Those decisions, however, cannot truly be given their full effect, so long as the definition of "punishment" remains shrouded in a cloud of an outdated and criticized decision. Revisiting *Corbitt* now, will ensure that the constitutionality of statutory disparate sentencing schemes for defendants demanding a jury trial is adjudged by standards compatible with the Court's current understanding of the Sixth Amendment jury trial guarantee.

### B. Neither Antiquity Nor Reliance Interests Are Factors That Militate Against Overruling *Corbitt*.

Aside from poor reasoning of a decision, this Court also looks to the "antiquity of the precedent" and the

"reliance interests at stake," in deciding whether to overrule precedent. *Montejo v. Louisiana*, 129 S. Ct. 2079, 2088-89 (2009) (overruling *Michigan v. Jackson*, 475 U.S. 625 (1986)). Neither consideration militates against overruling *Corbitt*. The decision hardly qualifies as "antique"; this Court recently has overruled older decisions, regarding both constitutional and statutory interpretation. *See, e.g., Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (overruling *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911)); *Lapides v. Board of Regents of University Sys. of Georgia*, 535 U.S. 613 (2002) (overruling *Ford Motor Co. v. Department of the Treasury of State of Indiana*, 323 U.S. 459 (1945)); *United States v. Hatter*, 532 U.S. 557 (2001) (overruling *Evans v. Gore*, 253 U.S. 245 (1920)).

Nor do any reliance interests provide compelling justification for refraining from reconsidering *Corbitt*. "[R]eliance interests are important considerations in property and contract cases, where parties may have acted in conformance with existing legal rules in order to conduct transactions," *Citizens United v. Federal Election Com'n*, 130 S. Ct. 876, 913 (2010), but "the opposite is true in cases . . . involving procedural and evidentiary rules." *Payne*, 501 U.S. at 828. There is no evidence in the legislative history that Nevada's legislature relied upon *Corbitt* in enacting N.R.S. 484C.340. And while one could hypothetically conjecture that other state legislatures, in reliance on *Corbitt*, passed laws carrying disparate minimum sentences for defendants who pled not guilty, "[t]his is not a

compelling interest for *stare decisis*. If it were, legislative acts could prevent [the Court] from overruling [its] own precedents, thereby interfering with our duty 'to say what the law is.'" *Citizens United*, 130 S. Ct. at 913 (*quoting Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803)).

### C. Revisiting And Overruling *Corbitt* Is Particularly Justifiable Because The Case's Factual Predicate Did Not Actually Support The Broad Reasoning The Case Announced.

*Corbitt* presents a particularly poor vehicle for announcing the rule of law that it has come to represent. *Corbitt*, as understood by the Supreme Court of Nevada and most other courts, announced the rule that, while the Sixth Amendment jury trial guarantee forbids the enhancement of a possible maximum sentence based on a defendant's assertion of his right to a jury trial, merely raising the permissible minimum sentence for that offense while leaving the permissible maximum sentence unaffected is not violative of the Sixth Amendment. *See Corbitt*, 439 U.S. at 217. The difficulty in relying on *Corbitt* as the chosen case for that holding is that *Corbitt* did not actually present that factual scenario.

Specifically, in the statute at issue in *Corbitt*, a defendant could plead not guilty to a murder charge. *Id.* at 216. In that event, the accused would face a jury trial, and the jury would be tasked, not only with

deciding his guilt or innocence, but also the degree of murder involved; that is, the jury, upon imposing a guilty verdict, would also pronounce whether the offense qualified as first or second degree murder. *Id.* at 214-15. If the jury returned a guilty verdict *and* found that the offense constituted first degree murder, the judge was required to impose a life sentence. *Id.* at 215. Return of a guilty jury verdict for the offense of second degree murder led to imposition of a sentence of not more than 30 years. *Id.* If, however, the accused pled *non vult* or *nolo contendere*, the statute provided that the punishment "'shall be the imprisonment for life or the same as that imposed upon a conviction for murder in the second degree.'" *Id.* at 215 (*quoting* N.J. Stat. Ann. § 2A:113-3 (West 1969)). Critically, however, in entertaining the plea and imposing sentence following a *non vult* or *nolo contendere* plea, the trial judge "need not decide whether the murder is first or second degree." *Id.* at 216.

The issue purported to be raised in and addressed by *Corbitt* was whether a statute that provides disparate minimum sentences for the same offense, depending upon whether the defendant exercises his constitutional right to a jury trial, violates the Sixth Amendment jury trial guarantee. *Id.* at 216. It was urged that this was a proper question presented in that case because, under the statute at issue, a defendant found guilty of first degree murder after a jury trial faced mandatory life imprisonment, whereas a defendant who foreswore a trial by pleading *non vult* or *nolo contendere* to a murder indictment, could

be sentenced to a lesser sentence (including, hypothetically, no jail time). But, there was a critical condition that should have precluded consideration of that specific question in *Corbitt*; namely, under the New Jersey statute, the guilty verdict at issue returned by the jury was for the offense of first degree murder, whereas the offense to which a *non vult* or *nolo contendere* plea could have been entered and for which the accused could have been sentenced to a lesser term was *not* first degree murder, but an undifferentiated murder offense charged in the indictment (i.e., not first degree murder specifically). *Id.* at 215-16.

*Corbitt*, therefore, did not present an opportunity to make the proverbial "apples-to-apples" comparison between, on the one hand, a statutory sentencing range applicable to those defendants who plead guilty (or *nolo contendere*) to a particular offense and, on the other hand, a sentencing range with an enhanced minimum possible sentence made applicable to those defendants that plead not guilty *to that same offense* and exercise their Sixth Amendment right to a jury trial. Without that factual predicate, any opinion as to whether a legislature could enhance the mandatory minimum sentence for a particular offense when an accused pled not guilty to that offense amounts to nothing more than an advisory opinion. Because advisory opinions are illegitimate under Article III, they assuredly should not be given precedential effect. Yet, that is precisely the treatment and reading that

*Corbitt* has received. It is appropriate to reexamine that decision.

### D. In Light of *Apprendi*, *Corbitt*'s Underlying Statute Would Be Found To Violate The Sixth Amendment If The Case Were Decided Today.

Adding to the dubiousness of *Corbitt*'s status as unassailable precedent is the recognition that, if considered today, the statute at issue in *Corbitt* likely would be found to violate the Sixth Amendment's jury trial right independently under this Court's *Apprendi* line of decisions (at least in certain "as applied" scenarios). Under the since-amended statute, homicide offenses in New Jersey could be classified either as first degree or second degree. *Corbitt*, 439 U.S. at 214. The possible sentence for one found guilty of second degree murder after a jury trial was not to exceed a 30 year prison term, whereas one convicted by a jury of first degree murder faced a mandatory life imprisonment sentence. *Id.* at 215. Yet, under the statute, the indictment need only charge "murder generally" without specifying specific degrees. *Id.*, at 218, n.6. Determination of the degree of homicide was done only if the defendant went to trial, and then only by the jury as part of its guilty verdict. *Id.* at 215. Under this charging and sentencing scheme, therefore, an indictment could issue for the crime of "murder generally," which set forth facts that, if proven, would spell out the elements and make out a case for second degree murder, presumably exposing the accused to a

maximum term of 30 years. Yet, because the indictment did not charge a particular degree of the offense, and that determination was left ultimately and solely to the trial jury determining the accused's guilt, the jury could return a guilty verdict for what it determined to be a first degree murder offense based on facts proven at trial but not included in the indictment, thereby exposing the defendant to the enhanced mandatory sentence of life imprisonment.

Under this Court's recent Sixth Amendment caselaw, such a circumstance would violate the jury trial guarantee because the Sixth Amendment requires that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum is, in effect, an element of the crime, which must be alleged in the indictment handed down by the grand jury. *Harris*, 536 U.S. at 549-50. *Corbitt*'s statute, permitting an indictment for unspecified murder but requiring the jury to additionally decide the specific degree of the offense charged as part of any guilty verdict returned, would permit the jury to consider and find, as part of the trial, facts exposing the defendant to an enhanced maximum sentence (from 30 years to life imprisonment) over what he would have faced based on the facts charged in the indictment. Because, as a result of Sixth Amendment holdings recently announced by the Court, *Corbitt*'s statute independently would be found unconstitutional today, it would be particularly strange to accord *stare decisis* effect to a decision that

is based upon a statutory scheme, now recognized to be constitutionally invalid.

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For all of these reasons, the Court should grant the writ to clarify that a statute marking a defendant *per se* ineligible for the lowest statutorily prescribed sentence solely on account of his exercising his Sixth Amendment right to a jury trial does not withstand Fourteenth Amendment scrutiny.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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