No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DeSHAUN D. STAUNTON
Petitioner,

vs.

THE STATE OF CALIFORNIA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SIXTH APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the trial court's use of petitioner's prior juvenile adjudication, in which he was never afforded a jury trial, to double a state prison sentence violate his rights to due process and a jury trial under the Sixth and Fourteenth Amendments?

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner, DeShaun D. Staunton, respectfully asks that a writ of certiorari issue to review the judgment below[1].

OPINION BELOW

The opinion of the California Court of Appeal, Sixth Appellate District which was unpublished**,** was issued on October 13, 2011, and is attached as Appendix A. The California Supreme Court's one-page order denying review is attached as Appendix B. The transcript of the trial court sentencing hearing is attached in relevant part as Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The decision of the California Court of Appeal for which petitioner seeks review was issued on October 13, 2011. The California Supreme Court order denying petitioner's timely petition for discretionary review was filed on January 4, 2012. This petition is filed within 90 days of the California Supreme Court's denial of discretionary review, under Rules 13.1 and 29.2 of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

[1] The case caption lists the codefendant Thyochus Huggins followed by et.al., as defendants and respondents. The State of California was the respondent. Petitioner, DeShaun D. Staunton, and Mr. Huggins were the appellants. Petitioner's claim of error is addressed in the state appellate court's opinion at page 6. (Appendix A.) Petitioner filed the Petition for Review in the state Supreme Court. (Appendix B.) Mr. Huggins is not a party to the petition for writ of certiorari.

United States Constitution, Sixth Amendment

> 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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Fourteenth Amendment

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Unites 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.

The California statutory provisions relevant to this petition are reprinted in Appendix D. They are California Penal Code sections 667, subdivisions (b)-(i); 667.5, subdivision (c)(9); 1170.12, subdivisions (a)-(d); 1192.7, subdivision (c)(19); and California Welfare and Institutions Code section 707, subdivision (b)(3).

STATEMENT OF CASE

Petitioner entered no contest pleas to two counts of residential burglary and trespassing. He also admitted that he had a prior juvenile adjudication, which was charged under Penal Code sections 667, subdivisions (b)-(i) and 1170.12, subdivisions (a)-(d). At petitioner's sentencing hearing held on October 28, 2010, the trial court sentenced petitioner to six years and eight months in state prison, based on the lower term for the burglary, doubled because of the juvenile adjudication, and a consecutive and concurrent term for the remaining courts. App. C at p**.** 36.

In the California Court of Appeal, petitioner argued that imposing the aggravating factor, the juvenile adjudication, violated his federal constitutional right to a jury trial because there is no right to jury trial in a juvenile adjudication. AOB[2] at 4-6. .

The California Court of Appeal rejected petitioner's argument on the merits and affirmed his sentence. App. A at 6.

Petitioner sought discretionary review of the issue in the California Supreme Court, making the same federal constitutional argument and citing the same authorities set forth above. The California Supreme Court summarily denied review without opinion. App. B.

REASONS FOR GRANTING THE PETITION

[2]"AOB" refers to appellant's opening brief.

A. Question Presented

This case presents an important issue over which the federal and state courts remain divided. *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely v. Washington*, 524 U.S. 296 (2004) establish that the Sixth Amendment right to a jury determination applies to any factual finding, other than that of a prior conviction, necessary to warrant any sentence beyond the presumptive maximum. *Blakely*, 542 U.S. at 301, 303-04; *Apprendi*, 530 U.S. at 490.

However, the question remains whether a court may use a prior juvenile adjudication not decided by a jury to impose a longer sentence than otherwise would be permissible. That question arises in light of this Court's opinion in *Jones v. United States*, 526 U.S. 227, 249 (1999), which held that "unlike virtually any other consideration used to enlarge the possible penalty for an offense . . . *a prior conviction must itself have been established through procedures satisfying the* fair notice, reasonable doubt, and *jury trial guarantees*." (Emphasis added.) It also arises in light of this Court's *Apprendi* opinion, which followed *Jones* and also rejected the application of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) on the ground that "there is a vast difference between accepting the validity of a prior judgment entered in a proceeding *in which the defendant had the right to a jury trial* and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof." *Apprendi*, 530 U.S. at 496 (emphasis added).

Because there is a division among courts (with petitioner's position also supported by the vast majority of commentators), because the State's position is arguably contrary

to language from this Court's *Jones* and *Apprendi* opinions, and because petitioner might not be able to seek relief on this ground in federal habeas, since his federal Circuit has held there is no clearly established authority of this Court on the subject under 28 U.S.C. § 2254(d)(1), *see Boyd v. Newland*, 467 F.3d 1139, 1152 (9th Cir. 2006), *cert. denied*, 550 U.S. 933 (2007), petitioner asks this Court to grant review to resolve the division and ensure there is clearly established authority.

B. Argument

Most courts to date have held that the lack of a jury trial in juvenile proceedings does not prevent courts from increasing adult defendants' sentences based on the conduct alleged in those prior proceedings. These courts focus their conclusions on a reliability inquiry. They find juvenile adjudications are just as reliable as criminal convictions because the proceedings are afforded many of the same constitutional protections. *See, e.g., United States v. Smalley*, 294 F.3d 1030, 1032-33 (8th Cir. 2002) ["*Smalley*"] ["the question of whether juvenile adjudications should be exempt from *Apprendi's* general rule should . . . [turn] on an examination of whether juvenile adjudications, like adult convictions, are so reliable that due process of law is not offended by such an exemption], *cert. denied*, 537 U.S. 1114 (2003); *United States v. Jones*, 332 F.3d 688, 696 (3d Cir. 2003) ["we find nothing in *Apprendi* . . . that requires us to hold that prior nonjury juvenile adjudications that afforded all required due process safeguards cannot be used to enhance a sentence"], *cert. denied*, 540 U.S. 1150 (2004); *United States v. Burge*, 407 F.3d 1183, 1190 (11th Cir. 2005) [juvenile adjudications "provide more than sufficient safeguards to ensure the reliability that *Apprendi* requires"], *cert. denied*, 546

U.S. 981 (2005); *State v. Hitt*, 42 P.3d 732, 740 (Kan. 2002) ["The *Apprendi* Court spoke in general terms of the procedural safeguards attached to prior conviction. It did not specify all procedural safeguards nor did it require certain crucial procedural safeguards"], *cert. denied*, 537 U.S. 1104 (2002); *Ryle v. State*, 842 N.E.2d 320, 323 (Ind. 2005) ["The main concern [in the *Apprendi* exception] was whether the prior conviction's procedural safeguards ensured a reliable result, not that there had to be a right to a jury trial"], *cert. denied*, 549 U.S. 836 (2006); *State v. McFee*, 721 N.W.2d 607, 615 (Minn. 2006) ["Absent clear direction from the United States Supreme Court, we will not upset our precedent upholding the use of juvenile criminal behavior in sentencing...."]; *State v. Weber*, 159 Wn.2d 252, 149 P.3d 646, 652-653 (Wash. 2006) ["In the absence of authoritative instruction from the United States Supreme Court that juvenile adjudications are not prior convictions, . . . we hold that juvenile adjudications are convictions for the purposes of *Apprendi 's* prior conviction exception."], *cert. denied*, 551 U.S. 1137 (2007). California is now squarely within the majority view that relies on reliability, which is the occasion for this petition for certiorari. *People v. Nguyen*, 46 Cal.4th 1007, 1021-22, 95 Cal.Rptr.3d 615, 209 P.3d 946 (2009) ["[I]t makes little sense to conclude, under *Apprendi*, that a judgment of juvenile criminality which the Constitution deemed fair and reliable enough, when rendered, to justify confinement of the minor in a correctional institution is nonetheless constitutionally inadequate for later use to establish the same individual's recidivism as the basis for an enhanced adult sentence."].

The Louisiana Supreme Court has reached the opposite result, reasoning that the Sixth Amendment right to trial by jury does not turn on reliability and that a criminal

defendant must have at least one opportunity to challenge allegations before a jury before those allegations may serve as a basis for criminal punishment. *State v. Brown*, 879 So.2d 1276 (La. 2004), *cert. denied*, 543 U.S. 826 (2004). Consequently, a court may not increase a defendant's sentence above an otherwise binding threshold, based on allegations of juvenile criminal behavior, which the defendant did not have the ability to challenge before a jury. *Id*. at 1289-90.

The *Brown* court emphasized that "the history of juvenile courts illustrates why juvenile courts have fewer [procedural] safeguards." *Id.* at 1285. "Under the guise of parens patriae, juvenile courts emphasized treatment, supervision, and control rather than punishment, and exercised broad discretion to intervene in the lives of young offenders." *Id*. at 1286. Because of these distinctions between juvenile and criminal contexts, which still exist today, the court found that "there is a difference between a 'prior conviction' and a prior juvenile adjudication." *Id*. at 1289. "If a juvenile adjudication, with its lack of a right to a jury trial which is afforded to adult criminals, can then be counted as a predicate offense the same as a felony conviction . . . then 'the entire claim of parens patriae becomes a hypocritical mockery.'" *Ibid*. Because a juvenile adjudication is not "afforded all the guarantees afforded adult criminals under the constitution," and "is not a conviction of any crime," *ibid.*, the court held that it "cannot be excepted from *Apprendi's* general rule." *Id*. at 1290.

In *United States v. Tighe*, 266 F.3d 1187 (9th Cir. 2001), the Ninth Circuit also concluded that automatically treating juvenile adjudications as "prior convictions" under *Apprendi* "ignores the significant constitutional differences between adult convictions

and juvenile adjudications." *Id*. at 1192-93. The court noted that *Apprendi's* tolerance for the prior conviction exception of *Almendarez-Torres v. United States*, 523 U.S. 224, was "premised on sentence-enhancing prior convictions being the product of proceedings that afford crucial procedural protections – particularly the right to a jury trial and proof beyond a reasonable doubt." *Tighe*, at 1193. The Ninth Circuit accordingly held that "the prior conviction" exception to *Apprendi's* general rule must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial." *Tighe*, at 1194.

Scholarly commentators have overwhelmingly agreed with opinions such as *Brown* and *Tighe*. As cited in the 2007 California Court of Appeal opinion that was overruled by *Nguyen*, they included Note and Comment, A Tale of Three Strikes: Slogan Triumphs Over Substance as Our Bumper-Sticker Mentality Comes Home to Roost, 28 Loyola L.A. L.Rev. 1047 (1995); Comment, Juvenile Justice and the Punishment of Recidivists Under California's Three Strikes Law, 90 Cal. L.Rev. 1157 (2002); Recent Case, Constitutional Law—Right to Jury Trial—Eighth Circuit Holds An Adjudication of Juvenile Delinquency to Be a "Prior Conviction" for the Purpose of Sentence Enhancement at a Subsequent Criminal Proceeding—*United States v. Smalley*, 294 F.3d 1030 (8th Cir. 2002), 116 Harv. L.Rev. 705 (2002); Feld, The Constitutional Tension Between *Apprendi* and *McKeiver*: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts, 38 Wake Forest L.Rev. 1111 (2003); California's Three Strikes Law - Should a Juvenile Adjudication Be a Ball or a Strike? 32 San Diego L.Rev. 1297 (1995); Comment, Prior "Convictions" Under

Apprendi: Why Juvenile Adjudications May Not Be Used to Increase an Offender's Sentence Exposure if They Have Not First Been Proven to a Jury Beyond a Reasonable Doubt, 87 Marq. L.Rev. 573 (2004); Murphy, The Use of Prior Convictions After *Apprendi*, 37 U.C. Davis L.Rev. 973 (2004); Marrus, "That Isn't Fair, Judge": The Costs of Using Prior Juvenile Delinquency Adjudications in Criminal Court Sentencing, 40 Hous. L.Rev 1323 (2004); Note, Juvenile Strikes: Unconstitutional Under *Apprendi* and *Blakely* and Incompatible with the Rehabilitative Ideal, 15 So.Cal. Rev. L. & Women's Stud. 171, 174 (2005); Note, Should Juvenile Adjudications Count as Prior Convictions For *Apprendi* Purposes? 45 Wm. & Mary L.Rev. 1159 (2004); Note, But I Was Just A Kid!: Does Using Juvenile Adjudications To Enhance Adult Sentences Run Afoul Of *Apprendi*? 26 Cardozo L.Rev. 837 (2005); Note, The Use of Juvenile Adjudications Under the Armed Career Criminal Act, 85 B.U. L.Rev. 263 (2005); and Note, The Problem with Forgiving (But Not Entirely Forgetting) the Crimes of Our Nation's Youth: Exploring the Third Circuit's Unconstitutional Use of Nonjury Juvenile Adjudications in Armed Career Criminal Sentencing, 66 U. Pitt. L.Rev. 887 (2005); *but see contra* Note & Comment, Should Little Joey's Juvenile Adjudication Be Used Against Him When He Becomes Joe The Habitually Violent Felon? 25 J. Juv. L. 45 (2005).

The Oregon Supreme Court also disagreed with the *Smalley* approach that reliability is enough to satisfy the *Almendarez-Torres* exception to *Apprendi*, on the ground that reliability is not the *sine qua non* of the Sixth Amendment, and the jury trial right implicates a common-law limitation on state power which gives every defendant the right to insist that a prosecutor prove to a jury all facts essential to his punishment. *State*

v. Harris, 339 Ore. 157, 174-75, 118 P.3d 236 (2005). However, it concluded that the prosecution needed only to prove to a jury the defendant's juvenile adjudication to comply with *Apprendi*, 339 Ore. at 175, a position also taken by the California Supreme Court in its opinion in *Nguyen*. 46 Cal.4th at 1015. While Oregon's rejection of *Smalley* is part of the split among courts, petitioner respectfully disagrees with the Oregon remedy because a prior adjudication has no function merely because it exists; its only function is to serve as conclusive evidence of prior criminal conduct, and a defendant must at some point have the right to a jury trial and proof beyond a reasonable doubt on such alleged conduct. If *Smalley* is incorrect as the Oregon courts conclude, then requiring only proof of the *existence* of a prior juvenile adjudication for which there was no jury trial right would no more satisfy the Sixth Amendment than would increasing punishment based on a prior criminal conviction by mandatory bench trial, via a current jury trial to determine what the result of the prior bench trial was.

The Kansas Supreme Court has taken a converse approach to protecting the Sixth and Fourteenth Amendment guarantees consistent with *Apprendi*. While it had earlier agreed with the majority view that prior juvenile adjudications can be used as prior convictions under *Apprendi*, although there was no right to a jury trial, *State v. Hitt*, 42 P.3d 742, it then held that depriving juveniles in Kansas of the right to a jury trial violates the Sixth and Fourteenth Amendments as well as the state Constitution. *In re L.M.*, 286 Kan. 460, 469-70 (2008). This is also a logical outgrowth of the conclusion in *Jones*, as echoed by *Apprendi*, that using a factor for enhanced punishment requires the right to a

Sixth Amendment jury trial and Fourteenth Amendment proof beyond a reasonable doubt at *some* point as to the conduct underlying that factor.

Many courts, including several federal Circuits, have not yet weighed in on the subject. Still other jurisdictions hold that prior juvenile adjudications cannot be used for prior conviction purposes as a matter of state law, thereby bypassing the *Apprendi* problem. *See, e.g., People v. Taylor* (2006) 221 Ill.2d 157, 302 Ill. Dec. 697, 850 N.E.2d 134 [observing that the issue there was "somewhat analogous" to the issue now before this Court]; *State v. Boehl*, 697 N.W.2d 215, 222-23 (Minn. 2005); *Conkling v. Commonwealth*, 45 Va. App. 518, 522-25, 612 S.E.2d 235 (2005).

In California, a juvenile adjudication legislatively is not and has not been considered a criminal conviction, Cal. Welf. & Inst. Code § 203 ["An order adjudging a minor to be a ward of the juvenile court shall not be deemed a conviction of crime for any purpose, nor shall a proceeding in the juvenile court be deemed a criminal proceeding."], including for prior conviction purposes. *People v. West*, 154 Cal.App.3d 100, 107-10, 201 Cal.Rptr. 63 (1984). This case is about a state-law exception to that rule, although this Court has never held that "prior conviction" for federal constitutional purposes means anything other than what it says.

Apprendi's prior conviction exception derives from this Court's decision in *Almendarez-Torres*, 523 U.S. 224, in which the Court held that a court may increase a defendant's sentence beyond an otherwise binding statutory limit based on the fact that the defendant has previously been convicted of a crime. *Id*. at 243-44.

The following term, however, this Court made clear that the judicial fact finding that *Almendarez-Torres* allows is a limited exception concerning the right to trial by jury, and that prior convictions can only be used to enlarge the possible penalty for an offense when the defendant had notice, proof beyond a reasonable doubt, *and the right to trial by jury*:

> "[U]nlike virtually any other consideration used to enlarge the possible penalty for an offense . . . *a prior conviction must itself have been established through procedures satisfying the* fair notice, reasonable doubt, and *jury trial guarantees*."

Jones v. United States, 526 U.S. at 249 (emphasis added); *see also Shepard v. United States*, 544 U.S. 13, 38 (O'Connor, J., dissenting) [relying on this factor] (2005).

It was against this background that this Court in *Apprendi v. New Jersey*, *supra*, 530 U.S. 466 "confirm[ed] the opinion that [it] expressed in *Jones*. Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id*. at 490. Again, this Court emphasized that the prior conviction exception is "narrow," *ibid.,* and that "there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial . . . and allowing the judge to find the required fact." *Id*. at 496.

Obviously, a juvenile adjudication in which the defendant did not have the right to a jury trial is not, in *Apprendi's* words, "a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial." 530 U.S. at 496. Consequently, it cannot properly be used to enhance criminal punishment. Any other

conclusion would contravene not only *Apprendi*, but also this Court's holding in *Jones v. United States* that "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." 526 U.S. at 249. Non-jury juvenile adjudications do not satisfy one of the necessary prerequisites for the prior conviction exception as discussed in *Jones* and *Apprendi*, namely, that the defendant already had had one opportunity to dispute the state's allegations before a jury. *See also People v. Nguyen*, 46 Cal.4th at 1033 (Kennard, J., dissenting) [reaching the same conclusion based on the same holdings of this Court].

In *Apprendi* itself, this Court explained the limited *Almendarez-Torres* exception in terms that do not apply to nonjury juvenile cases: "Both the certainty that procedural safeguards attached to any 'fact' of prior conviction, and the reality that *Almendarez-Torres* did not challenge the accuracy of that 'fact' in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range." *Apprendi*, 530 U.S. at 488. A contested juvenile hearing where the minor has no right to a jury trial, by contrast, does not have those safeguards.

In addition to all of this, as noted above, a juvenile adjudication by its nature is not a "conviction" of any crime. *See, e.g.,* Cal. Welf. & Inst. Code § 203. It is a finding of delinquency that allows the state to require the juvenile to undergo rehabilitative treatment. Accordingly, this Court has made clear that a court's role in a modern, non-jury juvenile proceeding is not to ascertain whether the child [is] guilty or innocent, but

rather to determine whether the child needs the state's "care and solicitude." *In re F*, 387 U.S. 1, 15 (1967); *see also State v. Brown*, 879 So.2d at 1286-89.

If modern juvenile proceedings were to lose this "intimate, informal protective" focus, or their unique rehabiltative nature, then dispensing with juries would be unconstitutional, for the proceeding would constitute a "criminal proceeding" covered by the Sixth Amendment's Jury Clause. *McKeiver v. Pennsylvania*, 403 U.S. 528, 545-50 (1971); *see also United States v. Kent*, 383 U.S. 541, 556 (1966) ["there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children"]. As noted above, that was also the conclusion recently reached by the Kansas Supreme Court, when it held that denial of a jury trial right in Kansas juvenile proceedings violates the Sixth and Fourteenth Amendments. *In re L.M.*, 286 Kan. at 469-70. The Illinois Supreme Court used similar reasoning in concluding that prior juvenile adjudications could not be used as felony convictions on state-law grounds. *State v. Taylor*, 221 Ill.2d at 172, and authorities cited. "Though [this] Court has characterized the prior conviction exception as a narrow one, the larger issue at the heart of the *Smalley-Tighe* circuit split—the constitutional status of juvenile adjudications—is of broad significance, given the doctrinal and institutional changes that have transpired since the Supreme Court decided *McKeiver* in 1971." Recent Case, Constitutional Law—Right to Jury Trial—*United States v. Smalley*, 116 Harv. L.Rev. at 712.

It should be no answer to say that *Apprendi's* prior conviction exception should nonetheless be extended to include juvenile adjudications because such adjudications "are

so reliable that due process of law is not offended." *State v. Weber*, 149 P.3d at 652, quoting *United States v. Smalley*, 294 F.3d at 1032-33. The Sixth Amendment has never been about a concept of "sufficient reliability" *per se*; rather, it is a fundamental limitation on the power of government to deprive an individual of his or her liberty through criminal punishment, deeply rooted in Anglo-American tradition as "a fundamental decision about the exercise of official power." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). "[T]he jury's importance in establishing the general validity of convictions under the Sixth Amendment is founded upon more than the relatively narrow function of the jury as a reliable factfinder. From the framers' perspective, the jury was also meant to serve as the people's check on judicial power at the trial court level." *State v. Harris*, 118 P.3d at 243; *see also Blakely v. Washington*, 542 U.S. at 306 ["jury trial is meant to ensure [the people's] control in the judiciary"].

A court may no more "dispens[e] with jury trial because the defendant is obviously guilty," *Crawford v. Washington* 541 U.S. 36, 62 (2004), than it may dispense with a jury trial right with respect to a sentence enlargement because the state's proffered support for the enlarged sentence is deemed obviously "reliable"—a position which would obviously be incompatible with *Apprendi*. Were it otherwise, we might as well just do away with the Sixth Amendment altogether. Why not just have presumptively reliable bench trials every time a person is potentially subject to a penal loss of liberty?

This Court held the contrary in no uncertain terms, when in rejecting Louisiana's former practice of denying jury trials to most criminal defendants this Court first held the Sixth Amendment jury trial guarantee applicable to the states:

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968). This, of course, was also a basic premise of *Apprendi.* 530 U.S. at 476-77.

In addition, this Court's own precedent has cast doubt on the "reliability" theory, by pointing to studies showing that reliability diminishes as the size of the decision-making body diminishes. *Ballew v. Georgia*, 435 U.S. 223, 231-39 (1978). Based significantly on this body of empirical data, this Court held in *Ballew* that five-member juries in criminal cases are unconstitutional. While not all of the concerns expressed in *Ballew* would apply to a mandatory bench trial (a judge, for example, can and would take notes), many of the most important ones would. For example, if "the risk of convicting an innocent person rises as the size of the jury diminishes," *Ballew,* 435 U.S.

at 234, then that risk would be highest for an involuntary jury of one—that is, a mandatory bench trial.

Mandatory bench trials may be considered reliable enough for a rehabilitative, noncriminal *parens patriae* system that does not result in actual criminal punishment, just as the civil legal system has many types of proceedings that do not permit juries. But for a deprivation of liberty by means of imprisonment constituting criminal punishment, this Court has made clear there *is* a reliability component to the right to a jury trial; not just in *Ballew*, but in many other cases, including this Court's opinion in *Duncan v. Louisiana*: "[A] general grant of jury trial for serious offenses is a fundamental right *essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants*. . . . Even when defendants [waive jury] trials, the right to a jury trial very likely serves its intended purpose of *making judicial or prosecutorial unfairness less likely*." 391 U.S. at 157-58 (emphasis added). Reliability might not be the paramount basis of the Sixth Amendment, since in most cases tried before an independent judiciary, there will be no miscarriages of justice, no judicial or prosecutorial unfairness, no arbitrary action. But the Sixth Amendment jury trial guarantee was intended by the framers to provide extra protection against those scenarios whatever their likelihood, which promoted reliability as well as providing a bulwark against improper use of government power. Thus, "[b]oth [this] Court's recent jury trial jurisprudence and its findings in *Ballew* concerning the relative reliability of larger factfinding bodies suggest that the *Tighe* court's understanding of juvenile adjudications is more constitutionally

sound than that espoused by the *Smalley* court." Recent Case, Constitutional Law—Right to Jury Trial—*United States v. Smalley*, 116 Harv. L.Rev. at 712.

This further undermines the contention that augmented punishment in adult court should be based on prior juvenile adjudications with mandatory bench trials, a decision-making body of one. That may have been considered adequate for determining a disposition within the rehabilitative purposes of the juvenile justice system under *McKeiver v. Pennsylvania* just as it is adequate in many civil contexts. But when it comes to enlarging a purely punitive prison sentence in adult court, nothing has replaced this Court's pronouncement in *Jones v. United States*—like a current conviction, "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, *and jury trial guarantees*." 526 U.S. at 249 (emphasis added). To the contrary, that pronouncement was reiterated in *Apprendi* itself, since *Apprendi* was based expressly on *Jones*, 530 U.S. at 476, and it also echoed *Jones* in holding "there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding *in which the defendant had the right to a jury trial* and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof." *Id*. at 496 (emphasis added).

Here, petitioner never had a right to have a *jury* find that he, beyond a reasonable doubt, committed the conduct underlying the juvenile adjudication in question. Consequently, his alleged prior conduct was never "established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Jones*, 526 U.S. at 249. "Two out of three ain't bad" might have worked in the popular music of the 1970s,

but it doesn't work in the far more profound area of fundamental constitutional analysis. Petitioner respectfully submits that the trial court violated the Sixth Amendment by increasing his sentence on this basis.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Dated: February 6, 2012

Respectfully submitted,

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Elaine Forrester
Counsel for Petitioner