S271178

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No._____

In re Miguel Angel Cabrera *on Habeas Corpus.*	) Court of Appeal of California Third District No. C091962)) Superior Court of California Siskiyou County) No.: MCYKCRBF20076242, SCCRHCCR20189121

Petition for Review

Andrew J. Marx (SBN #171237)
Law Office of Andrew J. Marx
P.O. Box 1225
Mt. Shasta, CA 96067
(530) 925-1291
andrewmarxlaw@gmail.com

Attorney for Petitioner Miguel Angel Cabrera

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PETITION FOR REVIEW

To the Honorable Tani Cantil-Sakauye, Chief Justice, and to the Honorable Associate Justices of the California Supreme Court:

Petitioner, Miguel Angel Cabrera, petitions this Court for review of the decision of the Third Appellate District, filed August 25, 2021, denying his petition for writ of habeas corpus that claimed the Judgement of the Siskiyou County Superior Court, Honorable Robert F. Kaster, retired, unlawfully imposed a five-year enhancement of his sentence. A copy of the order is appended hereto. (Cal. Rules of Court, rule 8.504(b)(4).)

Question Presented

I. Should this Court Grant Review and Transfer the Matter to the Court of Appeal with Directions to 1) Vacate its Order denying Cabrera's Petition for Writ of Habeas Corpus Seeking Relief from his Five-year Enhancement of Sentence, and 2) Issue an Order to Show Cause Why It Should Not Invalidate the Enhancement as Unauthorized by Law?

Summary of Petition

Cabrera received an indeterminate sentence after a three-strikes prosecution stemming from an altercation, which the Court of Appeal characterized as, "knocking down and injuring another man in a drunken fight."

Though Cabrera was found guilty of battery with serious bodily injury (SBI) the jury did not reach a verdict, and a mistrial was declared, on an associated great bodily injury (GBI) allegation. Despite the lack of a jury verdict on the GBI allegation the trial court imposed a 5-year enhancement of Cabrera's sentence based on its separate finding of personal infliction of GBI. The trial court based its finding, at least in part, on a line of California appellate decisions that equate a battery with SBI with GBI.

Appellate counsel for Cabrera did not raise the GBI finding and consequent 5-year enhancement during the initial post-conviction appeal.

Cabrera's petition for writ of habeas corpus sought relief from appellate counsel's failure to raise the trial court's GBI finding on initial appeal. Cabrera also sought relief from the five-years imposed because that sentence enhancement was not supported by a jury determination beyond a reasonable doubt. Cabrera asserted the legal fiction equating his battery with SBI conviction to a finding of GBI amounts to an unlawful sentence correctable at any time.

In its unpublished decision denying Cabrera's petition the Court of Appeal found the omission of the GBI finding "tantamount to an admission of deficient performance" but denied the petition

because “established law on the equivalence between SBI and GBI” meant there was no prejudice to Cabrera through appellate counsel’s failure to raise the issue because it had “little chance of success”. (*In re Cabrera* (Aug. 25, 2021, No. C091962) [2021 Cal. App. Unpub. 2021 WL 3750013].)

The Court of Appeal’s finding of no prejudice based on California law runs afoul of United States Constitutional jurisprudence that requires sentence enhancements, like the five-years exacted upon Cabrera, be proven to a jury beyond a reasonable doubt. Cabrera is entitled to relief from that enhancement and conformance of his sentence to the law. This Court should accordingly grant review to settle the question of whether California law permitting an increased sentence unsupported by a beyond reasonable doubt jury determination comports with the Constitution of the United States.

Statement of the Case and Facts

The Trial

Cabrera “[a]fter knocking down and injuring another man in a drunken fight,” received a 30 to life three-strikes sentence. (*People v.*

Cabrera (Dec. 1, 2009, No. C058828) [2009 Cal. App. Unpub. 2009 WL 3865199]; See also CT 55.[1])

The jury found defendant guilty on count 1 [Penal Code section 245 (a) (1)] assault with force likely to produce great bodily injury), count 2 [Penal Code section 243 (d)] battery with serious bodily injury (hereafter SBI)), and count 4[2] [Penal Code section 186.22 (a)] active participation in a criminal street gang[3]. The jury found true the four prior convictions, but found the gang allegations in counts 1 and 2 not true. The jury was not able to reach a verdict on the great bodily injury (Penal Code section 12022.7 hereafter "GBI") allegations in

[1] In its unpublished decision denying the petition in C091962, the Court of Appeal, on its own motion took "judicial notice of our opinion and the appellate record in petitioner's first appeal (case No. C058828, as well as the decision and appellate record in *Cabrera* (case No. C081532 and petitioner's first habeas petition (case No. C088611)." References in this petition to the record on appeal are to the record in Case No. C081532. To the degree that the Court may require those records or the record in C091962 on appeal to more fully inform itself in determination of this petition, Cabrera requests that this Court request the Court of Appeal transmit to it those records. (See Cal. Rules of Court, rule 8.512(a).)

[2] The conviction on count 4 was reversed on appeal, see the appellate opinion in C081532 referred to in footnote 1, ante.

[3] Unless otherwise noted statutory references are to the California Penal Code.

counts 1 and 2, and was not able to reach a verdict on count 3; the court declared a mistrial as to those allegations and that count." [4, 5]

The jury found four prior convictions, committed over an 8-day period in 1997, true. The trial court ruled the prior convictions qualified as serious felonies and strike priors under California's Three Strikes Law.

At sentencing Cabrera received an indeterminate term of 25 years to life on count 1. The court also enhanced, over objection, Cabrera's sentence with a 667 subdivision (a) 5-year term "based on its determination 'there [was] great bodily injury'". (*People v. Cabrera* (2018) 21 Cal.App.5th 470, 474.)

Initial Appeal

Appellate counsel did raise a meritorious issue on initial appeal regarding a gang enhancement but that issue did not impact the term Cabrera is serving. Appellate counsel for Cabrera did not raise on appeal the conflict between the jury's inability to reach a verdict on

[4] *People v. Cabrera* (Dec. 1, 2009, C058828) [nonpub. opn.] (which constitutes part of the record of conviction this court may consider. (*People v. Woodell* (1998) 17 Cal.4th 448, 454-456).)
[5] *Cabrera*, *supra*, at p. 6, paragraph 2.

the great bodily injury (GBI) finding and the sentencing judge's independent finding of GBI and consequent five-year enhancement.

Petition for Resentencing

Upon passage of the "Three Strikes Reform Act" (codified at Penal Code section 1170.126 et. seq.) Cabrera petitioned for resentencing. The court found Cabrera ineligible for resentencing because of the prior finding the conviction was a serious felony involving infliction GBI. The resentencing court rejected Mr. Cabrera's motion to dismiss the original sentencing court's GBI finding.

Resentencing Appeal

Cabrera appealed the denial of resentencing. The appellate court accepted Mr. Dwyer's request to be relieved as appellate counsel and new counsel was appointed. (See, Third Appellate District docket, case No. C081532.)

In its disposition of the appeal the court ruled the conflict between the sentencing judge's GBI finding and failure of the jury to reach a verdict on the same was not an unauthorized sentence because *Apprendi* claims of this type, facts used to increase sentence, are reviewed under a harmless error standard. Because the factual finding

of GBI was not raised during the now final initial appeal that finding was not a correctable unauthorized sentence. (*People v. Cabrera, supra*, 21 Cal.App.5th at p. 479.)

Preceding Habeas Petitions

Cabrera filed a petition for writ of habeas corpus in Siskiyou County Superior Court. The trial court habeas petition alleged the GBI finding by the sentencing judge violated the constitutional requirement of a jury verdict and that appellate counsel was ineffective in failing to raise the same as an issue in the initial appeal. The trial court petition included the same declaration of former appellate counsel which was attached as Exhibit 1 to the petition below in this matter. The trial court denied the habeas petition. Cabrera then filed a habeas petition (C081532) which was summarily denied as untimely.[6]

Petition for Review

The California Supreme Court granted Cabrera's petition for review of the summary denial (S256165). The petition was granted as reflected in the following docket entry:

[6] (California Court of Appeal, Third Appellate District order filed 5/30/19 in C088611 denying petition as untimely.)

> "The petition for review is granted. The matter is transferred to the Court of Appeal, Third Appellate District. That court is ordered to vacate its summary denial dated May 30, 2019, and is further ordered to issue an order to show cause, returnable before the Siskiyou County Superior Court. The Secretary of the Department of Corrections and Rehabilitation is to be ordered to show cause, when the matter is placed on calendar, why petitioner is not entitled to dismissal of the great bodily injury finding and the resulting five-year serious felony enhancement (see Pen. Code, § 667, subd. (a)(1)), based on his claim of ineffective assistance of appellate counsel. (See Apprendi v. New Jersey (2000) 530 U.S. 466; Blakely v. Washington (2004) 542 U.S. 296; Cunningham v. California (2007) 549 U.S. 270.)"

The Siskiyou Superior Court, in a written ruling (Petn. in C091962, Exhibit 3.), found Cabrera was "not entitled to dismissal of the great bodily injury finding and the resulting five-year serious felony enhancement based on his claim of ineffective assistance of appellate counsel." The Court found there was no "reasonable probability that he or she would have obtained a more favorable result but for counsel's alleged deficiencies. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-88: *In re Richardson* (2011) 196 Cal.App.4th 647,657.)"

Denial by Third District

The appellate court stated the omission of the trial court's GBI finding as an issue on appeal was "tantamount to an admission of deficient performance." The petition was denied because the

appellate court found no prejudice because there was no "reasonable probability of a different outcome. (*In re Cabrera* (Aug. 25, 2021, No. C091962) at pp. 12-13)[7] [2021 Cal. App. Unpub. 2021 WL 3750013])

ARGUMENT

I. THE FAILURE TO CHALLENGE THE TRIAL COURT'S FINDING OF GREAT BODILY AND CONSEQUENT 5 YEAR ENHANCEMENT WAS UNREASONABLE AT THE TIME OF THE OMISSION

The issue omitted from Cabrera's post-conviction appeal, 5 years punishment based on facts not supported by a jury verdict beyond a reasonable doubt, was "significant and obvious" rendering its omission unreasonable considering then extant federal authority. (*Apprendi v. New Jersey*, 530 U.S. 466, 490; *Blakely v. Washington*, 542 U.S. 296, 304–305; *Cunningham v. California 549* U.S. 270, 127 S.Ct. 856 (*Cunningham*).)

Cunningham, decided in 2007, shortly before Cabrera's post-conviction appeal, eviscerated the judicial fact-finding California

[7] Petitioner requests this court take judicial notice of all records, exhibits, pleadings and similar documents associated with Mr. Cabrera's matters in Siskiyou County Superior Court and those part of related matters in the California Supreme Court and Third District Court of Appeal. (*In re Ramirez* (2019) 32 Cal.App.5th 384.)

employed as a means to impose an aggravated sentence in criminal proceedings. The *Cunningham* court held that any fact, besides a prior conviction, used to impose an aggravated sentence must be found by a jury beyond a reasonable doubt. (*Cunningham, supra*, 549 U.S. at p. 871.)

The California authorities relied on when the trial judge found GBI based on the battery with SBI conviction, such as *People v. Arnett* (2006), 139 Cal.App.4th 1609 (allowing a trial judge to make a GBI/serious felony finding based on a battery with SBI conviction), cannot provide a safe harbor shielding appellate counsel from the unreasonable decision to forego that issue on appeal. Analysis of the origin of the GBI finding based on a battery with SBI jury verdict at the time of appeal should have illustrated the lack of foundational reasoning for an issue of fundamental constitutional significance.

California law equating battery with SBI to GBI finds its origin in a case where the comparison was not a means to increase punishment. In *People v. Kent* (1979), 96 Cal.App.3d 130, the appellate court disposed of the defendant's argument the victim's broken hand did not support the jury's GBI verdict by comparing the instruction for that finding with the battery with SBI instruction for

which the defendant was also convicted. The *Kent* court found the 2 instructions were "substantially the same", which, combined with the swollen and broken hand, negated any speculation the GBI finding was the product of confusion. (*Id.* at p. 136-137.)

People v. Hawkins (1993), 15 Cal.App.4th 1373 adds nothing to this analysis because its reasoning did not require wrestling with the law surrounding facts used to increase punishment: that case held a section 12022.7 GBI enhancement cannot be imposed because GBI is an element of a battery with SBI conviction.

Reliance on *Kent* and *Hawkins* to extend the "substantially similar" observation in a way that invades the rule requiring a jury find facts used to increase punishment neglects the analysis such a significant exception the fundamental constitutional shield from wrongful conviction merits. (See, *In re Harris, supra*, 5 Cal.4th at p. 826 ("[a]s with many rules of law, multiple repetitions over time may tend to obscure the original purpose of the rule. [citations]"); see also, *Hyde v. United States* (1912) 225 U.S. 347, 391 [56 L.Ed. 1114, 1135, 32 S.Ct. 793] (dis. opn. of Holmes, J.) [" 'ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis.' "].) .)

From *Kent* and *Hawkins* erupted the line of California authorities that couch a judicial GBI finding as not factual through the logic that because a battery with SBI conviction involves an element, infliction of SBI, that has "substantially the same meaning" as GBI, the court is simply transferring that factual finding rather than making a different one of its own. (See, *People v. Arnett* (2006) 139 Cal.App.4th 1609) Though the two terms both focus on the nature of injury, the fact that a jury might convict on battery with SBI and acquit on a GBI allegation became an inconvenient reality in *People v. Taylor*,118 Cal.App.4th 11 (2004).

In *Taylor* the appellate court was forced to acknowledge the statutory definitions of SBI and GBI are different, and, combined with the *Apprendi* rule prohibiting increased punishment based on facts not found by a jury, meant the contrary judicial finding of GBI and consequent 5-year serious felony enhancement must be reversed. (*Taylor, supra*, 118 Cal.App.4th at pp. 24-30.)

Taylor cannot be distinguished as an aberration (See, *People v. Thomas* (2019) 39 Cal.App.5th 930 (jury convicted on battery with SBI but found GBI enhancement not true) to legitimize a rule equating a battery with SBI conviction and a judicial GBI finding: the

facts and verdict in *Taylor* highlight the "unreasonable application" of the "substantially similar" observation because decisions like *Arnett* "extend[s] … a clearly established legal principle to a new context in a way that is objectively unreasonable." (See, *Wilson v. Knowles* (9th Cir. 2011) 638 F.3d 1213, 1216 (*Knowles*) (judicial factual characterization of injury using *Apprendi* prior conviction exception impermissibly expanded in violation of right to jury determination of facts to increase punishment).)

In *People v. Richardson*, 196 Cal.App.4th 647 (*Richardson*), this court rejected the concept of "objectively unreasonable application" employed in the *Knowles* reversal by applying the California authorities it found supported a judicial finding of GBI based on a plea to a crime whose elements included SBI. The primary California authority relied upon in *Richardson* in its rejection of *Knowles* and *Apprendi*, *People v. McGee* (2006) 38 Cal.4th 682, was disapproved in *People v. Gallardo* (2017) 4 Cal.5th 120 (*Gallardo*). (*People v. Richardson*, supra,196 Cal.App.4th at p. 658.)

Cabrera's jury received the differing instructions defining both SBI and GBI. (See Traverse in C091962, pp. 6-8;RT (C058828): pp.

746-748, 757.)[8] The jury questions during deliberations show they debated at length whether the injury amounted to "significant or substantial physical injury" the legislative definition of GBI. The fact that they agreed, beyond a reasonable doubt, the injury fit the SBI definition "serious impairment of physical condition" likely turned on trial testimony indicating the facts proved lost consciousness, a term specifically included in the legislative SBI definition and jury instruction.

Despite the court's instruction the jury apply the definition using "collective common sense and wisdom" to the facts, a beyond reasonable doubt agreement still escaped the jury and they submitted the second question "[i]f we agree the injury was severe, are we bound to agree that the great bodily injury occurred." At this point the court again told the jury to focus on whether the facts fit either legal definition of injury. The court added, over objection, that the two definitions were not "mutually exclusive" and "the same conduct could comprise serious bodily injury and great bodily injury." (See Traverse pp. 6-8; RT at pp. 819-820, 836, 840-841.)

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[8] RT refers to the Reporter's Transcript on Appeal with the Court of Appeal case number appearing in parenthesis within the citation.

Had the legislature written into the SBI and GBI definitions a catch all provision that a finding of SBI is factually equivalent to GBI, or used the same language to define both terms, the "substantially similar" bridge would be unnecessary to find the two definitions are met under the same facts. The logic, if A (SBI) equals B (facts of injury), and B equals C (GBI), then SBI equals GBI, is flawless. Employment of the "substantially similar" premise as a substitute for the factual beyond a reasonable doubt finding a jury must make before A equals C is flawed logic that attempts to solve an equation where the jury did not find the facts met the two standards.

A. A REASONABLE APPELLATE STRATEGY NECESSITATED CHALLLENGE TO THE COURT'S GBI FINDING CONSIDERING THE INCONSEQUENTIAL ISSUES ACTUALLY RAISED

Though the decision by appellate counsel regarding which trial issues are challenged on appeal is afforded deference, the IIAC analysis requires comparison between the excluded and included issues to determine if the exclusion was strategic or unreasonable.

Comparing the strength of the omitted issue versus those actually raised in the appeal sheds light on whether an issue was either "winnowed out" because it was weak and distracting as a matter of

appellate strategy (*Jones v. Barnes* (1983) 463 U.S. 745, 751-753; see also, *Hampton, supra*, 48 Cal.App.5th at p. 477.) or omitted unreasonably as a product of ineffective assistance. This objective standard is designed to promote presentation of meritorious issues and allow the discretion to exclude weak or frivolous ones:

> "Thus, '[t]he petitioner must ... allege with specificity the facts underlying the claim that the inadequate presentation of an issue or omission of any issue reflects incompetence of counsel, i.e., that the issue is one which would have entitled the petitioner to relief had it been raised and adequately presented in the initial petition, and that counsel's failure to do so reflects a standard of representation falling below that to be expected from an attorney engaged in the representation of criminal defendants.' (citation) The mere fact that prior counsel omitted a particular nonfrivolous claim, however, is not in itself sufficient to establish prior counsel was incompetent. Habeas corpus counsel, like appellate counsel, "performs *properly* and *competently* when he or she exercises discretion and presents *only* the strongest claims instead of every conceivable claim."" (*In re Reno* (2012) 55 Cal.4th 428, 464 (quoting *In re Robbins* (1998) 18 Cal.4th 770, 810, 77 Cal.Rptr.2d 153, 959 P.2d 311.))

Despite trial objection to the serious felony/great bodily injury (GBI) finding as inconsistent with the right to jury trial, the post-conviction appeal raised as the sole legal issue the court's instruction regarding the criminal acts required to prove count 4, active participation in a criminal street gang. The count 4 active participation conviction was reversed though it did not affect the term of imprisonment because it was a concurrent term. Appellate counsel

also raised 3 clerical issues associated with the abstract of judgement: one the court found moot, the second correctly pointed out the abstract did not reflect the stayed term for count 2, the third regarding apportionment of custody credits was found unmeritorious. (*Supra*, *People v. Cabrera* (2009) C058828 (unpub.).)

The issue successfully asserted did not establish new law as it turned completely on inadequate instruction combined with misleading argument. That the case was not published illustrates the idiosyncratic nature of the issue that required reversal of count 4. (See, Cal. Rules of Court, Rule 8.1105 (Publication of appellate opinions).)

Assuming, arguendo, the omission of the constitutional issues stemming from the court's factual GBI finding was a conscious choice raises significant concerns because there was no strategic benefit in promoting an issue with no potential to "reverse or modif[y] judgement or…make new law." (*People v. Johnson, supra, 123 Cal.App.3d at p. 111*.) From a cost-benefit perspective Cabrera had nothing to lose in challenging the factual GBI/serious felony/5-year term along with instructional gang crime error because from his perspective the count 4 reversal had no potential benefit; had count 4

resulted in a consecutive term an objectively reasonable justification for its strategic amplification might exist. Inclusion of the clerical mistake allegations, far weaker than the issue presented or the omitted issue, further illuminates the lack of reasonable strategy.

The omitted appellate challenge to the GBI finding and 5-year term contained enough merit to either "reverse or modif[y] judgement or…make new law." (*People v. Johnson* (1981) 123 Cal.App.3d 106, 111 (quoting *People v. Von Staich* (1980) 101 Cal.App.3d 172, 175).) A finding the court invaded the province of the jury in finding GBI would have eliminated the consequent 5-year term. The tension within California law, such as the need to distinguish *Taylor* as an aberration in order to legitimize cases like *Arnett*, and with federal authorities stemming from *Apprendi*, faced potential reconciliation had counsel challenged the court's GBI finding. If appellate counsel included the court's GBI finding but omitted the count 4 gang conviction the decision would survive scrutiny as reasonable because the forgone issue had neither the potential to make new law nor modify the judgement.

There was no tactical advantage "winnowing out" in the failure to raise an obvious issue on appeal, to find otherwise destroys the trust

criminal defendants must have in our system to rely on the sophistication of appointed counsel to preserve their constitutional rights. Though the courts are reluctant to hamper zealous advocacy through a second guess appellate process, absent a reasonable tactical justification for the omission, the prejudice in this case, beyond that suffered by Cabrera, is the potential weakening of zealous appellate advocacy involving important constitutional issues in deference to contrary legal authority.

This policy requires appellate practitioners to "'argue all issues that are arguable'" (citations) and "need not establish [that the appellant] was entitled to reversal in order to show prejudice". To protect the freedom of those unlawfully incarcerated and encourage zealous appellate advocacy "[a] habeas petitioner need not establish that he was entitled to reversal in order to show prejudice…" (*In re Spears* (1984) 157 Cal.App.3d 1203, 1210, citing *People v. Rohden* (1972) 6 Cal.3d 519, 524; *In re Smith* (1970) 3 Cal.3d 192, 200.) Citable authority invalidating judicial fact finding and dismissal of the 5 years based on prejudicial ineffective appellate assistance ensures dynamic legal evolution rather than overly deferential reliance on stare decisis.

II. THE JUDICIAL FINDING OF GREAT BODILY INJURY RESULTING IN A 5-YEAR SENTENCE IS ERROR CORRECTABLE AT ANY TIME

An overly conservative prejudice analysis is inconsistent with a hearing on the merits where "[a]n appellate court may "correct a sentence that is not authorized by law whenever the error comes to the attention of the court." (*In re Harris* (1993) 5 Cal.4th 813, 842, citing *In re Ricky H.* (1981) 30 Cal.3d 176, 191 [178 Cal.Rptr. 324, 636 P.2d 13].)

The standard applied to a habeas claim of ineffective appellate assistance requires the objectively unreasonable omission of an appellate issue and prejudice from that omission. (*In re Hampton* (2020) 48 Cal.App.5th 463, 476 quoting/citing *In re Harris* (1993) 5 Cal.4th 813, 832-833, 21 Cal.Rptr.2d 373, 855 P.2d 391; *Strickland v. Washington* (1984) 466 U.S. 668, 687, 104 S.Ct. 2052, [80 L.Ed.2d 674, 693] (*Strickland*)).)

"Under the Sixth Amendment to the United States Constitution…any fact, other than the fact of a prior conviction, that increases the statutorily authorized penalty for a crime must be found by a jury beyond a reasonable doubt." (*People v. Gallardo* (2017) 4

Cal.5th 120, 123 (*Gallardo*), citing *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*).)

Gallardo involved a conviction for robbery and a finding, resulting in a 667 subdivision (a) 5-year enhancement, that a prior felony Penal Code section 245 conviction (assault with a deadly weapon or by means of force likely to produce great bodily injury) was also a serious felony under the Three Strikes Law. The finding that the 245-conviction qualified as a serious felony came after the trial judge examined the transcript of the preliminary hearing from the prior proceeding. (*Gallardo*, supra, 4 Cal.5th at pp. 125-126.)

The *Gallardo* court reversed the appellate ruling sustaining the trial court's examination of the preliminary hearing transcript to establish the serious nature of the prior allegation. The *Gallardo* court concluded prior California law allowing the court to determine whether a prior could be classified as a serious felony under The Three Strikes Law, culminating in its own decision *People v. McGee* (2006) 38 Cal.4th 682, was wrong in light of United States Supreme Court precedent guaranteeing the right to a jury verdict beyond a reasonable doubt on any factual allegation used to increase punishment.

Beginning with *Apprendi* and culminating in *Descamps v. United States* (2013) 570 U.S. 254 (*Descamps*) and *Mathis v. United States* (2016) 570 U.S. ____ (*Mathis*) are a line of cases the *Gallardo* court acknowledged evolved into a criminal defendant's right to a jury verdict beyond a reasonable doubt where a factual allegation will increase punishment. "The cases make clear that when the criminal law imposes added punishment based on findings about the facts underlying a defendant's prior conviction, "[t]he Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt."" (*Gallardo, supra*, 4 Cal.5th 120, 124, quoting *Descamps, supra*, 570 U.S. at p. 269.) Because the finding that the prior crime factually involved assault with a deadly weapon came from a judge not a jury the *Gallardo* court reversed because the finding became an element used impose additional punishment. (*Gallardo, supra*, 4 Cal.5th 120.)

The mandate of *Apprendi*, *Blakley* and *Cunningham*, as applied in California through *Gallardo*, requires that any fact used to increase punishment must be found by a jury beyond a reasonable doubt. The failure of Cabrera's appellate counsel to challenge the 5-years imposed when the trial judge found GBI, in spite of the jury's inability to agree beyond a reasonable doubt the facts proved GBI,

was an unreasonable and prejudicial omission that resulted in an unjust sentence correctable at any time. Had Cabrera undertook the appeal without the assistance of appointed appellate counsel justice might not beg for relief from an omission by the person he wholly relied on, as did the defendant in *Hampton*, *infra*, to correct the miscarriage of his sentence.

In *In re Hampton* (2020) 48 Cal.App.5th 463 the defendant, a drug dealer, shot and killed the victim, a drug buyer, during a drug transaction. The dealer/defendant testified he fired a single fatal shot from the gun the buyer/victim pulled while attempting to rob him. The defendant testified the victim dropped the gun during the course of the robbery and it landed in the defendant's lap as he was seated in the driver's seat of his car. The defendant testified he was attempting to drive away with the gun in his lap but the victim stayed alongside his car and reached through the window to retrieve the gun. The defendant indicated that when he picked up the gun it unexpectedly fired hitting the victim in the head. The victim fell to the ground and defendant drove from the scene.

After the killing the defendant cleaned the car. Defendant then called a friend who picked him up. Defendant gave his friend a $100

bill to buy food (there was evidence the dead buyer possessed $100 bills to use in purchasing the drugs). A later search by police uncovered a pistol in the friend's bedroom. The friend made conflicting statements: he told police defendant did not tell him of the incident but testified at trial defendant disclosed the buyer tried to rob him.

Defendant's girlfriend testified he showed her a handgun the day before the shooting. Defendant wrote letters to the girlfriend's brother after his arrest suggesting the girlfriend's brother should prevent her from testifying about seeing the handgun. (*Hampton, supra*, 48 Cal.App.5th at pp. 469-472.)

Though the prosecution sought a first degree murder conviction on the theory the killing occurred during defendant's attempt to rob the buyer the *Hampton* defendant was convicted of second degree murder. (*Id.* at p. 482.)

During the initial appeal, finalized in 2010, appellate counsel did not challenge trial counsel's failure to request a voluntary manslaughter heat of passion instruction. In 2014, after unsuccessful state and federal habeas litigation, Hampton filed another trial court habeas petition asserting, for the first time, trial counsel was

ineffective because the heat of passion instruction was not requested. A centerpiece to the second 2014 state habeas petition was a 2013 appellate opinion that found omission of the heat of passion instruction, on similar facts, federal constitutional error.

The trial court granted the 2014 habeas petition after it found the intervening 2013 opinion changed the law which allowed Hampton to assert the issue despite not raising it in the first round of appellate litigation. The appellate court reversed the trial court's grant of the 2014 habeas petition regarding the omitted heat of passion instruction. The remaining ineffective assistance issues were denied after remand to the trial court.

In 2018 the appellate court denied Hampton's third habeas petition reasserting the ineffective assistance of counsel claims. The California Supreme Court "granted review and transferred the matter back to this court with directions to vacate our order denying the petition and to issue an order to show cause as to why Hampton is not entitled to relief on his claim of ineffective assistance of appellate counsel (IAAC)." (*Id.* at p. 468.)

In granting Hampton's petition this court stated:

> "[W]here appellate counsel fails to raise 'a significant and obvious issue,' the failure will generally be considered deficient performance under *Strickland, supra,* 466 U.S. 668, 104 S.Ct. 2052 if the missed issue is 'clearly stronger than those presented.' [Citations.] And where 'an issue which was not raised may have resulted in a reversal of the conviction, or an order for a new trial, the failure [is] prejudicial [Citation.]" (*Hampton, supra*, 48 Cal.App.5th at p. 478.)

The facts in Hampton indicated a remote possibility, if the jury adopted 100% the defendant's version of events and been instructed on heat of passion, of a voluntary manslaughter verdict. That a voluntary manslaughter verdict was a remote possibility given facts that conflicted with defendant's trial testimony did not impede the conclusion that appellate counsel acted unreasonably in failing to raise the issue on appeal.

That the omitted issue gained steam in 2013, after the appeal was final, did not play a role in *Hampton's* conclusion the unreasonable omission warranted relief. The *Hampton* court's finding seems calculated to preserve the integrity of criminal appeals by insuring criminal defendants' ability "to rely on his appellate counsel's judgment concerning what claims to raise on appeal." (*Hampton, supra*, 48 Cal.App.5th at p. 476, citing *In re Clark* (1993) 5 Cal.4th 750, 779-780.)

Modern *Strickland* prejudice analysis, as demonstrated in *Hampton,* focuses on "whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." (*In re Harris*, *supra*, 5 Cal.4th at p. 833, citing *Lockhart v. Fretwell* (1993) 506 U.S. 364, 372 [122 L.Ed.2d 180, 191, 113 S.Ct. 838].) Habeas has evolved into a vehicle to correct an unfair sentence stemming from ineffective counsel through exercise of its inherent power to rectify a miscarriage of justice. (*In re Harris*, *supra*, 5 Cal.4th at p. 831, 834 (claim not raised on direct appeal "cognizable in a postappeal habeas corpus petition under the ineffective counsel rubric.").)

The mechanism, examination of a preliminary hearing transcript or finding SBI and GBI are "substantially similar", that re-characterizes a non-strike conviction into a strike is immaterial: if that process turns on facts not found beyond a reasonable doubt it results in a constitutionally offensive unfair sentence. Had *Descamps* and *Gallardo* not drawn the bright line requiring any fact used to increase punishment be proved beyond a reasonable doubt the "substantially similar" SBI/GBI equalizer might survive scrutiny. Habeas relief has evolved into a shield protecting a prisoner such as

Cabrera whose sentence, through the evolution of law, becomes a clear miscarriage of justice.

CONCLUSION

For these reasons, the Court should grant review and remand the matter to the Court of Appeal with directions to issue an order to show cause why it should not grant relief on the petition as requested.

Dated: October 3, 2021

Respectfully Submitted,

By: /s/Andrew J. Marx

Attorney for Petitioner
Miguel Angel Cabrera

CERTIFICATE OF COMPLIANCE

This brief is set using 14-pt Times New Roman. According to Microsoft Word, the computer program used to prepare this brief, this brief contains 5,441 words.

The undersigned certifies that this brief complies with the form requirements set by California Rules of Court.

Dated: October 1, 2021 By: /s/ Andrew J. Marx

Attachment A

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Siskiyou)

In re MIGUEL ANGEL CABRERA on Habeas Corpus.	C091962 (Super. Ct. Nos. MCYKCRBF20076242, SCCRHCCR20189121)

Petitioner Miguel Angel Cabrera seeks relief in habeas corpus for ineffective assistance of appellate counsel in failing to challenge a sentence enhancement under *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*). The trial court imposed a five-year enhancement under Penal Code section 667, subdivision (a)(1), based on the court's determination that petitioner caused great bodily injury (GBI) to the victim (Pen. Code, § 1192.7, subd. (c)(8)).[1] However, the jury hung on special

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[1] Penal Code section 667, subdivision (a)(1), provides in relevant part: "Any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all the

allegations that petitioner personally inflicted GBI (§ 12022.7) and the trial court declared a mistrial on those allegations. Petitioner contends the sentencing enhancement violated the rule of *Apprendi* that a finding that increases punishment must be made by a jury. Therefore, petitioner maintains appellate counsel rendered ineffective assistance by failing to assign error on appeal on that basis. (*Strickland v. Washington* (1984) 466 U.S. 668 [80 L.Ed.2d 674] (*Strickland*).)

We deny the petition.

BACKGROUND

This court summarized much of the pertinent background in our decision on petitioner's appeal from denial of his petition for resentencing under section 1170.126, *People v. Cabrera* (2018) 21 Cal.App.5th 470 (*Cabrera*).[2]

We wrote that petitioner "was charged by indictment with assault by means of force likely to produce GBI (§ 245, subd. (a)(1); count 1), battery with [serious bodily injury] SBI (§ 243, subd. (d); count 2), assault with a deadly weapon (former § 245, subd. (a)(2); count 3), and actively participating in a street gang (§ 186.22, subd. (a); count 4). The charges also included gang enhancements (§ 186.22, subd. (b)(1)) as to counts 1 through 3, a special allegation of personally inflicting GBI (§ 12022.7, subd. (a)) as to count 1, an allegation of personal infliction of GBI to classify count 2 as a serious felony

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elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately." Penal Code section 1192.7, subdivision (c)(8) provides in relevant part that the meaning of " 'serious felony' " includes "any felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice . . . ." All undesignated statutory references are to the Penal Code.

[2] As we did in *Cabrera*, on our own motion, we take judicial notice of our opinion and the appellate record in petitioner's first appeal (case No. C058828), as well as the decision and appellate record in *Cabrera* (case No. C081532) and petitioner's first habeas petition (case No. C088611). (Evid. Code, §§ 452, subd. (d), 459, subd. (a).)

(§§ 667, 1192.7), as well as four prior strikes (§ 1170.12) and four prior serious felony allegations (§ 667, subd. (a)(1))." (*Cabrera, supra*, 21 Cal.App.5th at p. 473.)

"The jury found defendant guilty on counts 1, 2, and 4, but found the gang allegations not true. It could not reach verdicts on count 3 and the GBI allegations as to counts 1 and 2, but sustained the strike and prior serious felony allegations. The trial court declared a mistrial as to count 3 and the GBI allegations." (*Cabrera, supra*, 21 Cal.App.5th at p. 473.)

"At the sentencing hearing, the defense objected to serious felony findings on any of the counts of conviction, and the parties argued at length about the effect, if any, that the jury's failure to reach verdicts on the GBI allegations would have on the potential classification of counts 1 (assault) and 2 (battery with SBI) as serious felonies. The defense further argued defendant was entitled to a jury determination before the court could find GBI and thus classify counts 1 and 2 as serious felonies. The sentencing court found that counts 1, 2, and 4 were indeed serious felonies based on its determination that 'there [was] great bodily injury' but did not elaborate further on the basis or rationale for that decision. The court sentenced defendant to 30 years to life in prison on count 1, consisting of 25 years to life in prison on count 1, plus a consecutive five years for the prior felony allegation, and identical concurrent terms on counts 2 and 4." (*Cabrera, supra*, 21 Cal.App.5th at pp. 473-474.)

"On appeal, we reversed the conviction on count 4 and ordered corrections to the abstract. (*People v. Cabrera* (Dec. 1, 2009, C058828) [nonpub. opn.].) The serious felony classifications at issue here were not challenged on appeal from the judgment of conviction." (*Cabrera, supra*, 21 Cal.App.5th at p. 474.)

"On September 4, 2014, defendant filed a section 1170.126 petition for resentencing. . . . [T]he People argued that the original sentencing court had already found defendant's crimes of conviction to be serious felonies and therefore defendant was

not eligible for relief, because he was serving his current term for a serious felony. (§ 1170.126, subd. (e)(1).)" (*Cabrera, supra*, 21 Cal.App.5th at p. 474.)

Petitioner "argued that the evidence did not support the sentencing court's serious felony findings (made in 2008), and the findings violated" *Apprendi*. (*Cabrera, supra*, 21 Cal.App.5th at p. 474.) Petitioner cited *People v. Taylor* (2004) 118 Cal.App.4th 11 (*Taylor*), "which held that an acquittal on a GBI allegation precluded finding that a battery with SBI conviction was a serious felony due to personal infliction of GBI." (*Cabrera, supra*, at p. 474, citing *Taylor, supra*, at p. 29.) "He asked the trial court for 'a ruling . . . that the original sentencing court committed error.' He characterized the proposed ruling as a 'proper exercise of discretion' by the trial court." (*Cabrera, supra*, at p. 474.)

"At the final hearing on the petition, the trial court noted that at the original sentencing hearing the People had cited (to the sentencing court) cases holding sections 243 (SBI) and 12022.7 (GBI) were essentially equivalent. Citing *Taylor*, the court opined that the jury's failure to return a verdict on the GBI allegations prevented it from considering the section 243 conviction as the equivalent of a GBI finding. However, the court concluded that it could not find defendant eligible for relief because the sentencing court's finding that the current crimes were serious felonies was a final judgment. Defendant timely appealed from the trial court's denial of defendant's petition for resentencing." (*Cabrera, supra*, 21 Cal.App.5th at p. 474.)

On appeal from denial of the resentencing petition, petitioner advanced the theory "that the trial court had the authority to vacate the sentencing court's findings because they resulted in an unauthorized sentence. He contend[ed] the sentencing court erred in finding that the underlying crimes of conviction—assault and battery causing SBI—were serious felonies, and consequently imposing five-year enhancements for the prior serious felony allegations found true. It follow[ed] that, due to this error, the serious felony findings on his current offenses resulted in an unauthorized sentence that the trial court

should have corrected and that this court is now obliged to correct. [Petitioner] conclud[ed] that upon correction of the unauthorized sentence, he is entitled to resentencing based on the trial court's more favorable findings." (*Cabrera, supra*, 21 Cal.App.5th at pp. 475-476.)

We held in *Cabrera* that jurisdiction under section 1170.126 is limited and "[r]evisiting and vacating the sentencing court's conclusion that defendant's prior convictions were serious felonies under the relevant statutory scheme is . . . beyond the scope of section 1170.126's limited grant of jurisdiction." (*Cabrera, supra*, 21 Cal.App.5th at p. 477.)

Turning to petitioner's argument that "the sentencing court's alleged error in classifying the prior convictions as serious resulted in an unauthorized sentence" (*Cabrera, supra*, 21 Cal.App.5th at p. 477), we held that "*Taylor* was limited to the particular facts of that case. [Citation.] The *Taylor* court recognized the general rule that SBI as used in section 243 is synonymous with GBI in section 12022.7. [Citations.] The jury's not true findings on the GBI allegations were key to distinguishing this general principle in *Taylor*. [Citation.] That essential fact is not present here; a failure to reach a verdict on an enhancement is not an *affirmative rejection* of the enhancement as an acquittal or finding of not true would be. [¶] This difference is grounds for distinguishing *Taylor*." (*Cabrera, supra*, at p. 478, citing our decision in *People v. Arnett* (2006) 139 Cal.App.4th 1609, 1615 (*Arnett*)["*Taylor* is readily distinguishable from the present matter. Here, the jury did *not* make a determination on the great bodily injury enhancement and defendant waived jury trial on that issue for purposes of the serious prior felony enhancement"].)[3]

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[3] We also concluded "of greater import" is that an alleged *Apprendi* violation is subject to harmless error review and an error that can be found harmless cannot constitute an unauthorized sentence. (*Cabrera, supra*, 21 Cal.App.5th at pp. 478-479.)

We issued our opinion in *Cabrera* on March 19, 2018. The next day we granted the request of appointed counsel for petitioner to expand the appointment to include assisting petitioner in preparing a petition for writ of habeas corpus.

On June 21, 2018, petitioner filed a petition for writ of habeas corpus in the trial court contending that appellate counsel's failure to assign as error that the trial court's GBI finding deprived petitioner of his right to jury trial constituted ineffective assistance of counsel. The declaration of counsel for petitioner on his initial appeal was submitted as exhibit to the petition.

In the declaration, appellate counsel stated: "In my handling of the appeal in No. C058828, I identified as a potential issue the question whether, in the absence of a jury finding, the sentencing court had the authority to find that Cabrera personally inflicted GBI and on that basis to impose the serious felony enhancements. However, I cannot recall the reason why I did not argue on appeal that the court's finding and consequent imposition of the serious felony enhancements violated Cabrera's rights to trial by jury. It appears to me now that this was an arguable issue at the time of Cabrera's initial appeal to preserve it for review by a federal petition for writ of habeas corpus. I am unable at this point to offer a reasonable basis for my failure to challenge the sentencing court's imposition of the five-year enhancements as a product of the court's violation of Cabrera's state and federal rights to trial by jury on the GBI question."

On November 20, 2018, the trial court denied the petition, relying on our opinion in *Cabrera* that *Taylor* was distinguishable and petitioner's sentence not unauthorized. The court found "that it is not reasonably arguable that the sentence would have been reversed or modified on appeal, had appellate counsel timely raised the issue."

On January 4, 2019, petitioner filed a petition for writ of habeas corpus in this court. After informal briefing, we denied the petition, explaining that "[t]he jury did not acquit petitioner on the great bodily injury enhancement that was charged here. Under the circumstances, any remedy for the issue petitioner raises, had his claim been raised in

a timely manner, would have been limited to allowing for a new trial to determine whether the current crime constituted a serious felony for purposes of imposing the Penal Code section 667, subdivision (a) enhancement." (*In re Cabrera* (May 30, 2019, C088611) [petn. den. by order].)

On July 10, 2019, the California Supreme Court granted review and transferred the case to this court, directing us to vacate summary denial of the petition in case No. C088611 and issue an order to show cause returnable before the trial court "why petitioner is not entitled to dismissal of the great bodily injury finding and the resulting five-year serious felony enhancement (see Pen. Code, § 667, subd. (a)(1)), based on his claim of ineffective assistance of counsel," citing *Apprendi*, *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403] (*Blakely*), and *Cunningham v. California* (2007) 549 U.S. 270 [166 L.Ed.2d 856] (*Cunningham*).[4] (*In re Cabrera* (July 10, 2019, S256165) review granted.)

As directed by the Supreme Court, we vacated our order denying the petition and issued an order to show cause, returnable to the trial court.

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[4] In *Apprendi*, the court held that, "[o]ther 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." (*Apprendi, supra*, 530 U.S. at p. 490.) In *Blakely*, the court applied the *Apprendi* rule and held "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation], and the judge exceeds his proper authority." (*Blakely, supra*, 542 U.S. at pp. 303-304.) In *Cunningham*, the court concluded that, where a determinate sentencing scheme like California's provides for a lower, middle and upper term, and imposition of the upper term requires an aggravating circumstance determined by the sentencing court, "the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum." (*Cunningham, supra*, 549 U.S. at p. 288.)

On March 24, 2020, the trial court ruled that petitioner was not entitled to dismissal of the GBI finding resulting in a five-year serious felony enhancement based on the claim of ineffective assistance of counsel. The court addressed only the second prong of the test of ineffective assistance of counsel, i.e., whether there was a reasonable probability that petitioner would have obtained a more favorable result if appellate counsel had raised the issue. On that point, the trial court said it was "called upon to determine what the Court of Appeal was likely to have done if the issue had been raised." The court reasoned that "[i]n determining whether Petitioner would have obtained a more favorable result had his appellate attorney raised the issue of the trial court's great bodily injury finding and the resulting sentencing enhancement on appeal, the Court must consider whether the Court of Appeal would have followed the reasoning of *Arnett* or *Taylor*." Guided by our decision in *Cabrera*, the trial court ruled that "[t]here is a reasonable probability that had the issue been raised by appellate counsel in the initial appeal, the Court of Appeal would have followed their reasoning in the *Arnett* line of cases and found *Taylor* distinguishable . . . ."

On May 20, 2020, petitioner filed a petition for writ of habeas corpus in this court arguing that: (1) the petition was timely because of Cabrera's lack of sophistication and reliance on ineffective counsel; (2) the five-year enhancement equating SBI and GBI must be dismissed as an unauthorized sentence because it increased punishment without a jury verdict; and (3) appellate counsel's failure to assert constitutional issues on appeal constituted prejudicial ineffective assistance of counsel.[5] After informal briefing, we issued an order to show cause why the relief sought by petitioner should not be granted.

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[5] The People concede that the petition is not untimely, given the California Supreme Court's order to this court after our decision in case No. C088611. (*In re Robbins* (1998) 18 Cal.4th 770, 814, fn. 34; *In re Ramirez* (2019) 32 Cal.App.5th 384, 406, fn. 11 ["Were there a valid procedural bar, we would have expected the California Supreme Court to deny the petition rather than issuing an order to show cause returnable before this

DISCUSSION

Standard of Review

" ' "A criminal defendant is guaranteed the right to the assistance of counsel by both the state and federal Constitutions. [Citations] 'Construed in light of its purpose, the right entitles the defendant not to some bare assistance but rather to *effective* assistance.' [Citation, italics in original.] In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was 'deficient' because his 'representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.] Second, he must also show prejudice flowing from counsel's performance or lack thereof. [Citation.] Prejudice is shown when there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" [Citation.] The United States Supreme Court recently explained that this second prong of the *Strickland* test is not solely one of outcome determination. Instead, the question is "whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." [Citation.] [¶] Similar concepts have been used to measure the performance of appellate counsel. [Citations.]' " (*In re Richardson* (2011) 196 Cal.App.4th 647, 657; *In re Harris* (1993) 5 Cal.4th 813, 832-833; *Strickland, supra*, 466 U.S. at pp. 687-688.)

"Appellate counsel does not provide deficient, i.e., objectively unreasonable, assistance by failing to raise every nonfrivolous claim on appeal. [Citation.] As the high court has stated: 'Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one

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court"].) We reject petitioner's claim that the sentencing court's determination that "there [was] great bodily injury" was an unauthorized sentence for the reasons stated above in *Cabrera, supra*, 21 Cal.App.5th at pages 477-479.

central issue if possible, or at most on a few key issues.' [Citation.] However, where appellate counsel fails to raise 'a significant and obvious issue,' the failure will generally be considered deficient performance under [*Strickland*] if the missed issue is 'clearly stronger than those presented.' [Citations.] And where 'an issue which was not raised may have resulted in a reversal of the conviction, or an order for a new trial, the failure [is] prejudicial.' [Citation.]" (*In re Hampton* (2020) 48 Cal.App.5th 463, 477-478 (*Hampton*).)

Ineffective Assistance of Appellate Counsel

To determine whether appellate counsel's failure to raise an *Apprendi* claim on appeal "fell below an objective standard of reasonableness, and if so, whether the failure resulted in prejudice, we must assess the merits of the claim." (*Hampton, supra*, 48 Cal.App.5th at p. 478.)

Petitioner does not dispute that the jury found he committed SBI in its guilty verdict on the charge of battery with SBI, section 243, subdivision (d). His claim concerns the sentencing court's determination that the jury's SBI finding was equivalent to a GBI finding, which petitioner deems a "legal fiction."

In *People v. Johnson* (2016) 244 Cal.App.4th 384 (*Johnson*), the court identified more than a dozen appellate decisions besides *Arnett* going back more than 35 years in which California courts "long held that 'serious bodily injury,' as used in section 243, and 'great bodily injury,' as used in section 12022.7, are essentially equivalent." (*Johnson, supra*, 244 Cal.App.4th at p. 391; see, e.g., *People v. Burroughs* (1984) 35 Cal.3d 824, 831, overruled on another ground in *People v. Blakely* (2000) 23 Cal.4th 82, 89; *People v. Hawkins* (1993) 15 Cal.App.4th 1373, 1375-1376.)

In *Arnett*, we distinguished "the narrow ruling of *Taylor*" as limited to circumstances where the jury found GBI enhancements not true. (*Arnett, supra*, 139 Cal.App.4th at p. 1615.) We noted that *Taylor* acknowledged " '[i]n the absence of any contrary indication in the record, the trial court . . . [i]s justified in applying the usual

assumption that "great bodily injury" and "serious bodily injury" are "essentially equivalent." ' " (*Arnett, supra*, at p. 1615, quoting *Taylor, supra*, 118 Cal.App.4th at p. 26.)

We conclude once more that *Taylor* does not extend beyond the circumstance of a jury determination contrary to a finding of GBI. There was no such determination in this case. Rather, the jury could not reach unanimity on section 12022.7 and thus the jury's verdict that petitioner committed battery with SBI was not contradicted. The "usual assumption" that an SBI finding is equivalent to a GBI finding applies. (See *Johnson, supra*, 244 Cal.App.4th at pp. 395-396 [concluding that "the present case is more similar to *Arnett* than to *Taylor*," because the jury never reached GBI allegations but found defendant inflicted SBI].)[6]

To the extent petitioner suggests that the trial court engaged in factfinding in making the determination that section 667, subdivision (a)(1), applied, the record is to the contrary. At the sentencing hearing, the prosecutor cited *Burroughs* and *Hawkins* as holding that SBI is equivalent to GBI and battery with SBI is GBI. Defense counsel countered that "[t]he jury rejected the G.B.I. allegation" and petitioner "is entitled to a

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[6] In *Ramirez v. Lizarraga* (E.D.Cal., Dec. 13, 2018, No. 2:16-cv-02287-JKS) 2018 U.S.Dist. Lexis 210577, the federal court rejected a habeas petitioner's *Apprendi* claim that "the trial court improperly imposed a 5-year enhancement because the jury found he had inflicted 'serious bodily injury' rather than 'great bodily injury.' " (*Id.* at p. *6.) The court said that *Taylor* cited by defendant "is an aberration. It, too, accepts the fundamental proposition that a jury finding of serious bodily injury is equivalent to a finding of great bodily injury. [Citation.] The unique problem in *Taylor*, however, was that the jury found the defendant had inflicted serious bodily injury but also found, for enhancement purposes based on the same conduct, he had not inflicted great bodily injury. Faced with an express jury finding the defendant had not inflicted great bodily injury, instructions that provided different definitions for serious and great bodily injury, and the arguments of counsel distinguishing the two, the court held the imposition of the enhancement violated the defendant's right to a jury trial. [Citation.]" (*Id.* at pp. *17-*18.)

jury finding on anything that would have the effect of making his punishment more severe," therefore the court cannot "essentially override that determination in making a finding of its own that Mr. Cabrera inflicted G.B.I." We noted in *Cabrera* that the sentencing court determined that " 'there [was] great bodily injury' but did not elaborate further on the basis or rationale for that decision." (*Cabrera, supra*, 21 Cal.App.5th at p. 474.) Subsequently, as the People point out, the court clarified that "going back for a minute to whether or not the current crimes are serious felonies, I think the cases cited by [the prosecutor], the Burroughs case, 35 Cal.3d 824, and the Hawkins case, 15 Cal.App.4th 1373, are applicable." The record thus indicates that the trial court simply applied the principle stated in these cases (and many others) that SBI is equivalent to GBI and did not make a GBI finding, as defense counsel contended.

Given established law on the equivalence between SBI and GBI, including this court's decision in *Arnett*, appellate counsel's performance cannot be deemed deficient for failure to raise an *Apprendi* claim with little chance of success. To be sure, the issue was " 'significant and obvious' " in light of the debate described at the sentencing hearing, but not " 'clearly stronger than those presented' " on appeal (*Hampton, supra*, 48 Cal.App.5th at p. 477), including the challenge to petitioner's gang participation conviction in count 4 (§ 186.22, subd. (a)), which we reversed on the initial appeal. (*Cabrera, supra*, 21 Cal.App.5th at p. 474.)

On the other hand, appellate counsel's declaration that he had identified the potential *Apprendi* issue, cannot recall the reason he did not argue it on appeal, and is unable to offer a "reasonable basis" for this failure is tantamount to an admission of deficient performance. (See *In re Hernandez* (2006) 143 Cal.App.4th 459, 470 [defendant's trial counsel admitted ineffective assistance of counsel in declaration submitted with habeas petition that there was no tactical reason for failing to object on Fifth Amendment grounds to inadmissible testimony of defendant's statements to experts appointed to determine defendant's competence to stand trial].)

Accordingly, we consider whether petitioner was prejudiced by appellate counsel's deficient performance. "A defendant claiming ineffective assistance of counsel under the federal or state constitution must show both deficient performance under an objective standard of professional reasonableness and prejudice under a test of reasonable probability of a different outcome. [Citation.]" (*People v. Osband* (1996) 13 Cal.4th 622, 664.) This standard is applied to representation on appeal. (*Ibid.*; see also *In re Reno* (2012) 55 Cal.4th 428, 488.) "The defendant need not show that he or she was entitled to reversal, but must show only that inexcusable failure of appellate counsel to raise crucial assignments of error that arguably might have resulted in reversal." (5 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Criminal Trial § 271, p. 452, citing *In re Smith* (1970) 3 Cal.3d 192, 202.)

We conclude that petitioner has failed to show prejudice in the form of a reasonable probability of a different outcome had appellate counsel raised an *Apprendi* issue. As in *Cabrera*, on our order to show cause in the trial court, and on the current habeas petition, petitioner would be compelled to rely on *Taylor* whose application we concluded in *Arnett* is limited to its particular facts, which are not present here. We would have determined as we did in *Cabrera,* and the court did in *Johnson*, that "[t]he present case is more similar to *Arnett* than to *Taylor*." (*Johnson, supra*, 244 Cal.App.4th at p. 395.)

DISPOSITION

The order to show cause is discharged and the petition for writ of habeas corpus is denied.

RAYE, P. J.

We concur:

HULL, J.

MAURO, J.

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

MAILING LIST

Re: In re MIGUEL ANGEL CABRERA on Habeas Corpus
C091962
Siskiyou County
Nos. MCYKCRBF20076242, SCCRHCCR20189121

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Andrew J. Marx
Attorney at Law
2805 South Old Stage Road
Mount Shasta, CA 96067

Office of the State Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550

Eric L. Christoffersen
Office of the Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550

Honorable Robert F. Kaster
✓ Judge of the Siskiyou County Superior Court - Main (Yreka)
411 4th Street
Yreka, CA 96097

PROOF OF SERVICE BY MAIL and ELECTONICALLY

ANDREW MARX
2805 P.O. Box 1225
Mt. Shasta, Ca 96067
(530)918-8730
andrewmarxlaw@
gmail.com
S.B. #:171237

Title of Case: In re Miguel Angel Cabrera
Attorney for: Petitioner
Supreme Court Case #:
3rd D.C.A. Case #:C091962
Siskiyou County Superior Court
Case No.: MCYKCRBF20076242

IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

I, the undersigned, declare that I am, and was at the time of the within-mentioned service by mail and electronic delivery of the papers herein referred to, over the age of eighteen, and not a party to the instant action. I am employed in the County of Siskiyou, which county the within-mentioned service by mail occurred. My business address is 2805 South Old Stage Road, Mt. Shasta, CA 96067. I served the following documents: Petitioner's Petition for Review; by placing a true copy thereof in a separate envelope, or emailing an electronic copy by the end of the day, to each addressee on October 1, 2021, named hereafter, as follows:

(for delivery to Hon. Robert Kaster)
Siskiyou County Superior Court
411 Fourth Street
Yreka CA 96097

Office of the Siskiyou County
District Attorney
311 Fourth St., Rm. 204
Yreka CA 96097

Office of the Attorney General
served via Truefiling to:
sacawttruefiling@doj.ca.gov

Court of Appeal
Third Appellate District
via Truefiling

I then sealed each envelope and with postage paid thereon, deposited into the United States mail at San Diego, California on October 1, 2021. I also mailed an unbound copy of this document to the Supreme Court on October 1, 2021. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 1, 2021

/s/ ***Andrew Marx***
Andrew Marx

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **In re Miguel Angel Cabrera on Habeas Corpus**
Case Number: **TEMP-8R2168QZ**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **andrewmarxlaw@gmail.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

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ISI_CASE_INIT_FORM_DT	Case Initiation Form
PETITION FOR REVIEW	FinalPetition

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Office of Attorney General	SacAWttruefiling@doj.ca.gov	e-Serve	10/3/2021 9:12:43 PM
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

10/3/2021
Date

/s/ANDREW MARX
Signature

MARX, ANDREW (171237)
Last Name, First Name (PNum)

Law Office of Andrew J. Marx
Law Firm