IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S271178

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 (Honorable Robert F. Kaster)

Petitioner's Opening Brief On The Merits

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QUESTION PRESENTED

Petitioner Miguel Angel Cabrera quotes the question presented by the Court:

> Did the sentencing court err by finding petitioner's conviction for battery with serious bodily injury (Pen. Code, § 243, subd. (d)) was a serious felony (id., §§ 667, subd. (a)(1), 1192.7, subd. (c)(8)), despite the jury's failure to reach a verdict on the attached allegation that petitioner personally inflicted great bodily injury (id., §12022.7, subd.(a))? (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.)

STATEMENT OF THE CASE AND FACTS

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])

[1] In its unpublished decision denying the petition in C091962, the Court of Appeal, on its own motion took "judicial notice of our opinion and the appellate record in petitioner's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 *People v.*

The jury received the following instructions during the trial regarding the definitions of both serious bodily injury (SBI) and great bodily injury (GBI):

> "A serious bodily injury means a serious impairment of physical condition. Such an injury may include but is not limited to loss of consciousness, concussion, bone fracture, protracted loss or impairment of function of any bodily member or organ, a wound requiring extensive suturing, and serious disfigurement. Loss of consciousness and a wound or cut requiring extensive suturing is a serious bodily injury." (RT (C058828): pp. 747-748.) [2]

> "Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm." (RT (C058828): pp. 746-747, 757.)

During deliberations the jury submitted a written question to the court, "[m]ay we have specific definitions of mild and moderate injury as they relate to assault?" (RT (C058828): p. 816.)

Cabrera (2018) 21 Cal.App.5th 470 (case No. C081532) and petitioner's first habeas petition (case No. C088611)." References in this brief to the record on appeal are primarily to the record in Case No. C058828. To the degree that the Court may require those records or the record in C091962 to more fully inform itself in determination of this petition, Cabrera requests that this Court, to the extent it already has not done so, request the Court of Appeal transmit to it those records. (See Cal. Rules of Court, rule 8.512(a).)

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

After discussion with counsel the court explained to the jury there was no more specific definition than that previously read and contained within the provided jury instruction packet. After referring the jury to the oral and written instructions the court added:

> "So that is where the jury comes in. It's basically, I think, up to you at apply your collective common sense and wisdom, to apply the terminology to the case before you. So that is more your job than our job to try to find you an express definition. The answer is that there is no more specific definition." (RT (C058828): pp. 819-820.)

After further deliberation the jury submitted another question:

> "We are having problems reconciling the differences between great bodily injury and serious bodily jury [*sic*]. If we agree the injury was severe, are we bound to agree that the great bodily injury occurred?" (RT (C058828): p. 836.)

After discussion with counsel the court repeated its earlier definitions of SBI and GBI with the following comment:

> "Referring to the definition of battery with serious bodily injury and the language is different, it says serious bodily injury versus great bodily injury." (RT (C058828): p. 840.)
>
> "The word "severe" which you had mentioned in your question is actually not in either one of those definitions. So I would like you to focus on whether in your mind you to have [*sic*] determine what conduct did occur, and then in your mind you have to determine whether it comes within the meaning of serious bodily injury as defined in that section or it comes within the meaning of great bodily injury as defined in that section." (RT (C058828): p. 841.)

Over defense objection the court added:

> "They are not necessarily mutually exclusive so it's entirely – it could certainly occur that the same conduct could comprise serious bodily injury and great bodily injury.
>
> In other words, they are not mutually exclusive." (RT (C058828): p. 841.)

The jury found defendant guilty of assault with force likely to produce great bodily injury (Pen. Code § 245, subd. (a) (1) - count 1), battery with serious bodily injury (Pen. Code § 243, subd. (d)) - count 2), and active participation in a criminal street gang (Pen. Code § 186.22, subd. (a) - count 4[3])[4]. Because the jury was not able to reach a verdict on the GBI allegations (Pen. Code § 12022.7, subd. (a)) in counts 1 and 2, nor a verdict on count 3, "the court declared a mistrial as to those allegations and that count."[5, 6]

The jury found four prior convictions true. The trial court ruled the prior convictions qualified as serious felonies and strike priors under California's Three Strikes Law.

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[3] The conviction on count 4 was reversed on appeal, see the appellate opinion in C081532 referred to in footnote 1, ante.
[4] Unless otherwise noted statutory references are to the California Penal Code.
[5] *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, 71 Cal.Rptr.2d 241).)
[6] *Cabrera, supra, (C058828)* at p. 6, paragraph 2.

Cabrera received an indeterminate term of 25 years to life on count 1. The court also enhanced Cabrera's sentence with a Penal Code § 667, subdivision (a) 5-year term when it found the current conviction a serious felony "based on its determination 'there [was] great bodily injury' ". (*People v. Cabrera* (2018) 21 Cal.App.5th 470, 474, 230 Cal.Rptr.3d 373 quoting RT (C058828): p. 900.) Regarding the GBI finding the court elaborated that "the Burroughs case, 35 Cal.3d 824, and the Hawkins case, 15 Cal.App.4th 1373, are applicable." (RT (C058828): p. 901.) Cabrera objected to the GBI finding that enabled the 5-year Penal Code § 667, subdivision (a) enhancement stating "Cabrera is entitled to a jury finding on anything that would have had the effect of making his punishment more severe". (RT (C058828): p. 891.)

In 2014 Cabrera petitioned for resentencing pursuant to the "Three Strikes Reform Act" (Pen. Code § 1170.126 et. seq.). The appellate court affirmed Cabrera's ineligibility for resentencing because "defendant's crimes were found to be serious felonies" by the sentencing court. (*People v. Cabrera*, supra, 21 Cal.App.5th at p. 479.)

SUMMARY OF ARGUMENT

Though Cabrera was found guilty of battery with serious bodily injury the jury did not reach a verdict, and a mistrial was declared, on an associated great bodily injury 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 on a line of archaic California appellate decisions that equate the SBI element with GBI. The court's factual GBI finding violated Cabrera's right to a jury determination of "any fact (other than a prior conviction) that exposes a defendant to a sentence in excess of the relevant statutory maximum" (*Cunningham v. California* (2007), 549 U.S. 270, 127 S.Ct. 856 citing *Apprendi v. New Jersey* (2000) 530 U.S. 466, 483, 120 S.Ct. 2348, 147 L.Ed.2d 435.)

ARGUMENT

I. A BATTERY WITH SERIOUS BODILY INJURY CONVICTION CANNOT SUBSTITUE FOR THE CONSTITUTION'S MANDATE THAT INCREASED PUNISHMENT FOR GREAT BODILY INJURY REQUIRES A UNANIMOUS AND BEYOND REASONABLE DOUBT JURY VERDICT ON FACTS SUPPORTING THAT ELEMENT

Using Cabrera's jury finding of SBI as a vehicle for a judicial finding of GBI is the first step toward realization of the "Framer's fears 'that the jury right could be lost not only by gross denial, but by erosion.' " (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 483, 120 S.Ct. 2348, 147 L.Ed.2d 435 (*Apprendi*).) The foundational holding of *Apprendi* states "[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." (*Id.* at 490.)

The defendant in *Apprendi* received an increased sentence after the court, based on a post plea evidentiary hearing, found "by a preponderance of the evidence" that the defendant's actions were taken "with a purpose to intimidate" warranting the application of a hate crime enhancement. The hate crime enhancement resulted in a greater sentence than was possible based solely on the facts acknowledged through the defendant's guilty plea. (*Id*. at 471.)

The *Apprendi* court found the historical foundation for the constitutional shield against deprivation of liberty, embodied in the Fourteenth Amendment as "due process of law" and in the Sixth Amendment's guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a…trial…by a jury", left no room for

judicial fact finding as a proper exercise of sentencing discretion. (*Id.* at pp. 476-477.) The constitutional requirement for a jury and the reasonable doubt standard derived from the Framer's conviction that the imposition of punishment by the government only maintains legitimacy where the underlying facts are found independently through "the unanimous suffrage of twelve of [the defendant's] equals and neighbours…" [citations] (*Apprendi*, supra, 530 U.S. at pp. 477-480.)

Four years later, in *Blakely v. Washington* (2004) 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (*Blakely*) the Supreme Court found the *Apprendi* rule offended when a defendant's sentence was increased by 3 years based on a post plea judicial determination the crimes were committed with deliberate cruelty. The state argued judicial fact finding did not result in a sentence above the maximum range for the class of crimes containing the particular one plead guilty to. The *Blakely* Court deconstructed this argument to find the sentence, because it included facts not found by a jury beyond a reasonable doubt, exceeded the maximum authorized by the facts admitted through the guilty plea. The *Blakely* court defined the maximum sentence as that "a judge may impose *solely on the basis of*

the facts reflected in the jury verdict or admitted by the defendant."
(*Id*. at p. 303.)

Blakely expanded on *Apprendi's* theme when it described protection of jury factual findings as necessary to preserve a jury's intended constitutional purpose as a check on judicial power, consistent with the "people's ultimate control in the legislative and executive branches." (*Blakely, supra*, 542 U.S. at p. 306.) The Court described the non-jury factual findings that enabled the additional 3 years punishment as a step over the "bright-line" written into the Constitution by the Framers who "were unwilling to trust government to mark out the role of the jury." (*Id.* at p. 308.) *Blakely* emphasized agreement with time-tested confidence the Framer's placed in a jury's ability to best discover factual truth and the role that factual determination plays in preserving confidence in any consequent punishment. (*Id.* at pp. 313-314.)

In *Cunningham v. California* (2007) 549 U.S. 270, 127 S.Ct. 856, the defendant plead guilty to a crime with 3 possible determinate sentencing law (DSL) options: 6, 12 or 16 years. The sentence imposed, 16 years, was selected after the judge found, by a preponderance of evidence, additional facts listed as statutory factors

in aggravation. The *Cunningham* Court's examination of the DSL convinced it the statutory scheme authorized the procedure employed to elevate the sentence: judicial factual findings by a preponderance of evidence.

The Court found the statutory maximum under California's DSL was the 12 year middle term because it represented, "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (*Cunningham, supra*, 549 U.S. at p. 288, quoting *Blakely, supra*, 542 U.S. at p. 303 (emphasis in original).) The decision in *People v. Black* (2005) 35 Cal.4th 1238, 29 Cal.Rptr.3d 740, 113 P.3d 534 that preceded *Cunningham* and found the DSL consistent with *Apprendi* and its progeny compelled the Court's emphatic statement:

> "the DSL violates *Apprendi's* bright-line rule: Except for 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…'" *Cunningham, supra*, 549 U.S. at p. 288-289, citing *Apprendi*, supra,530 U.S. at p. 490.

The bright-line *Apprendi* rule applies to the 5-years punishment imposed under section 667 (a) because GBI was a factual conclusion the jury did not (and in fact could not) reach. The trouble stems from the judicially created premise employed to find GBI; that a jury finding of the SBI element beyond a reasonable doubt is identical to GBI. If this equality of SBI to GBI is based on a judicial determination of the facts that underly the SBI verdict the 5-years imposed is a clear departure from the Constitution's due process and jury trial protections. If the elements SBI and GBI are **exactly** the same, in terms of their factual components, the finding survives the scrutiny warranted by 5-years added to Cabrera's term. *Descamps v. U.S.* (2013) 570 U.S. 254 133 S.Ct. 2276, illustrates the offense of this equation to *Apprendi's* bright-line rule where the ambiguous, albeit like sounding, elements SBI and GBI caption undefined factual components.

The defendant in *Descamps* faced a federal prosecution with a punishment enhancement based on a prior burglary conviction. To qualify the burglary prior had to include a proven element of unlawful entry that matched the punishment enhancement's generic definition that burglary involves unlawful entry. The burglary prior used to enhance Descamps' sentence involved a state statute that did not

require breaking and entering or similar proof of unlawful entry and in fact also covered shoplifting.

Because the unlawful entry element of the prior and generic definition did not match, the sentencing court engaged in the "modified categorical approach" which permits examination of "certain documents, including the record of the plea colloquy, to discover whether Descamps had " 'admitted the elements of generic burglary' ". The sentencing court found the burglary conviction qualified for additional punishment because the prosecutor, during the plea colloquy, made the unchallenged statement "that the crime involved " 'the breaking and entering of a grocery store.' " (*Id.* at pp. 258-259.)

The *Descamps* Court reversed because it found the categorical approach only applicable to statutes with alternative elements that required the examination of documents, such as a plea colloquy or jury instruction, which then enabled use of the modified categorical approach to discern which alternative element had been proven to enable comparison to the generic offense element. Because the statute did not list alternative elements, but rather a single element encompassing conduct much broader that the required "unlawful entry

along the lines of breaking and entering", the court found the statute ineligible for categorical approach dissection because it could never be deemed a generic burglary enhancement. (*Id.* at pp. 263-265.)

The attempt to expand inquiry beyond a bare determination of whether the necessary element for the generic offense, out of several alternatives, had been either admitted or proven unanimously beyond a reasonable doubt into "an evidence based one" extended the inquiry into a realm that offended "Sixth Amendment concerns…from sentencing courts' making findings of fact that properly belong to juries." (*Id.* at pp. 266-267.) Employing *Apprendi's* bright-line rule, the Court found, "counsel against allowing a sentencing court to 'make a disputed' determination [about] 'what the jury in a prior trial must have accepted as the theory of the crime.'" (*Descamps*, 570 U.S., at p. 269 citing *Shepard v. U.S.* (2005) 544 U.S. 13, at p. 25, 125 S.Ct. 125.)

The differences between the definitions, reflected in the respective jury instructions for SBI and GBI, implicate Sixth Amendment concerns similar to those *Descamps* cited in refusing to allow expansion of the categorical approach into inquiry of what facts might have supported an ambiguous element. SBI is ambiguously

defined "a serious impairment of physical condition." GBI is defined differently, though equally ambiguously, as "significant or substantial physical injury" and "an injury that is greater than minor or moderate harm."

The critical role Cabrera's jury engaged when it weighed and debated the trial evidence to conclude, unanimously and beyond a reasonable doubt, he inflicted SBI, would be devalued as a check on judicial power if a judicially created equation is permitted to erode that process. A legal rule that SBI equals GBI can only logically survive if the same facts are included within each definition; this type of factual inquiry is the exact fact-based inquiry reserved by the Framers as the jury's province.

II. CALIFORNIA LAW NO LONGER PERMITS THE COURT TO ENGAGE IN AN INQUIRY TO DETERMINE FACTS UNDERLYING A CONVICTION AS A MEANS TO IMPOSE ADDITIONAL PUNISHMENT

California's implementation of *Apprendi* and its progeny has evolved into an uncompromising examination and elimination of judicial factual inquiry to discern facts underlying a plea or jury verdict as a means to increase punishment. (See *People v. Gallardo* (2017) 4 Cal.5th 120, 123 (*Gallardo*).)

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 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 concluded prior California law allowing a judicial factual inquiry to discern whether a conviction 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, 42 Cal.Rptr.3d 899, 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.

The *Gallardo* Court relied on the line of cases, from *Apprendi* through *Descamps* and *Mathis v. United States* (2016) 570 U.S. ____, 136 S.Ct. 2243 (*Mathis*), to conclude "[t]he 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.) Though the *Gallardo* court recognized that a prior conviction was a proper judicial consideration effecting punishment, the absence of either an admission as part of the plea proceeding or an explicit jury verdict regarding specific conduct barred " 'try[ing] to discern what a trial showed, or a plea proceeding revealed about the defendant's underlying conduct.' " (*Gallardo, supra*, 4 Cal.5th 120, 135, quoting *Descamps, supra*, 570 U.S. at p. 269.)

A. THE ARCHAIC LEGAL FICTION RELIED UPON TO FIND CABRERA INFLICTED GREAT BODILY INJURY WARRANTING AN ADDITIONAL 5-YEAR SENTENCE RESULTED IN THE ERRONEOUS DEPRIVATION OF HIS DUE PROCESS AND JURY TRIAL RIGHTS

California authorities equating battery with SBI to GBI began in *People v. Kent* (1979), 96 Cal.App.3d 130, a decision where the comparison was not a means to increase punishment. The *Kent* court disposed of the 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.)

Reliance on *Kent* 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 Constitution's shield from wrongful conviction merits. (See *In re Harris* (1993) 5 Cal.4th 813, 826, 21 Cal.Rptr.2d 373 ("[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, 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.' "].)

Similarly, the GBI/serious felony finding that enabled the 5-years added to Cabrera's sentence stemmed from the sentencing court's analysis that "the Burroughs case, 35 Cal.3d 824, and the Hawkins case, 15 Cal.App.4th 1373, are applicable." Unfortunately for Cabrera neither of these authorities (both of which relied on *Kent*) presented an issue implicating *Apprendi's* due process and jury trial

guarantees associated with enhanced punishment . (*Compare People v. Burroughs* (1984) 35 Cal.3d 824, 678 P.2d 894 (GBI/SBI comparison in evaluation of whether unlicensed practice of medicine was at felony level) *and People v. Hawkins* (1993) 15 Cal.App.4th 1373, 19 Cal.Rptr.2d 434 (equating GBI to SBI in course of reversing, on statutory grounds, imposition of a section 12022.7 enhancement to battery with SBI conviction).)

From *Kent* erupted the California authorities that attempt to couch a judicial GBI finding as non-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 equating the terms rather than making an independent factual finding. (See, e.g., *People v. Arnett* (2006) 139 Cal.App.4th 1609, 44 Cal.Rptr.3d 206; *People v. Johnson* (2016) 244 Cal.App.4th 384, 198 Cal.Rptr.3d 636.) Though the two terms both focus on the extent 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* (2004) 118 Cal.App.4th 11, 12 Cal.Rptr.3d 693.)

In *Taylor* the appellate court was forced to acknowledge a jury's conclusion that the statutory definitions of SBI and GBI are

factually different. The *Taylor* verdict compelled application of the *Apprendi* rule to reverse the judicial finding of GBI and consequent 5-year serious felony enhancement. (*Taylor, supra,* 118 Cal.App.4th at pp. 24-30.)

Taylor cannot be distinguished as an aberration to protect the judicially created rule equating a jury's battery with SBI conviction to GBI: 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." (*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) quoting *DeWeaver v. Runnels* (9th Cir.2009) 556 F.3d 995, 997 (citation and internal quotations marks omitted).)

In re Richardson (2011) 196 Cal.App.4th 647, 126 Cal.Rptr.3d 720 (*Richardson*), rejected the concept of "objectively unreasonable application" employed in the *Knowles* reversal when it found California authorities supported a judicial finding of GBI based on a

plea to a crime with a SBI element. The primary California authority *Richardson* relied on in its rejection of *Knowles* and *Apprendi*, *People v. McGee* (2006) 38 Cal.4th 682, 42 Cal.Rptr.3d 899, was disapproved in *Gallardo, supra,* 4 Cal.5th at p. 134. (*In re Richardson*, supra, 196 Cal.App.4th at p. 658.)

Cabrera's jury received the differing instructions defining both SBI and GBI. The jury questions during deliberations show they debated at length whether the injury met the legislative definition of GBI as a "significant or substantial physical injury" versus the SBI definition "serious impairment of physical condition". 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." (RT (C058828): pp. 819-820, 836, 840-841.)

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 a legally flawless conclusion. Employment of the judicially created "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, as contemplated by the Constitution, could not factually equate the two standards.

CONCLUSION

The mandate of *Apprendi*, *Blakely* 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 mechanism, examination of a preliminary hearing transcript or finding SBI and GBI are "substantially similar", that re-characterizes a conviction to enable 5-years of additional punishment is immaterial: if that process turns on facts not found beyond a reasonable doubt it results in a constitutionally offensive sentence. Had *Descamps* and *Gallardo* not employed *Apprendi's* bright-line requirement that 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 5-year sentence enhancement, through the evolution of law, perpetuates a clear miscarriage of justice.

Dated: January 13, 2022

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 5,100 words.

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

Dated: January 12, 2022 By: /s/ Andrew J. Marx

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Supreme Court Case #: S271178
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 Opening Brief; 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 January 13, 2022, named hereafter, as follows:

(for delivery to Hon. Robert Kaster)
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served via Truefiling to:
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/s/ ***Andrew Marx***
Andrew Marx

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **CABRERA (MIGUEL ANGEL) ON H.C.**
Case Number: **S271178**
Lower Court Case Number: **C091962**

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