No. __________

In the Supreme Court of the United States

EDGAR SANDOVAL CATARINO, PETITIONER

V.

STATE OF CALIFORNIA, RESPONDENT

On Petition for a Writ Of Certiorari to
The Supreme Court of California,

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Do the Sixth and Fourteenth Amendments confer a right to a jury trial with respect to a fact that has the dual effect of (1) increasing the mandatory minimum sentence on an individual criminal count and (2) requiring the sentence on that count to be imposed consecutively?

2. In a trial of charges of child molestation, does it deny Fourteenth Amendment due process to admit the testimony of an expert witness that false allegations of child molest are rare?

3. Does it violate the Fourteenth Amendment for a judge to apply an incorrect legal standard to making a finding that increases the mandatory minimum sentence?

4. Is the record sufficient to support a judge's finding that each crime of which a jury convicted a defendant occurred on a "separate occasion" where (1) the witness described many criminal acts, some occurring on the same occasion as others, some occurring on separate occasions, but (2) the jury found that only a few of these acts had been proved, and (3) the jury did not specify which acts were the basis for its guilty verdicts?

List of Parties

All parties appear in the caption of the case on the cover page.

List of Related Cases

- *People v. Edgar Sandoval Catarino*, S271828, Supreme Court of California. Judgment entered May 25, 2023.
- *People v. Edgar Sandoval Catarino*, D078832, California Court of Appeal, Fourth Appellate District, Division One. Judgment entered October 14, 2021.
- *People v. Edgar Sandoval Catarino*, C1635441, Santa Clara County Superior Court. Judgment entered November 9, 2018.

Table of Contents

Index of Appendices ---vi

Table of Authorities --vii

Petition for Writ of Certiorari --1

Opinions Below --1

Jurisdiction ---2

Constitutional Provisions, Statutory Provisions, and Rule of Court Involved --2

Statement of the Case ---3

1. The charges and the evidence in support of the charges.-----------------3

2. Expert testimony that false allegations of child molest are rare.------3

3. The verdicts.---4

4. The sentencing as supported by the judge's finding that the offenses of which the jury convicted the defendant were committed on "separate occasions."---5

5. The issues as raised and addressed in the California Court of Appeal.---6

A. The testimony that false allegations of child molest are rare as a denial of due process. ---6

B. The Sixth Amendment right to a jury trial. ---------------------------6

C. Other arguments related to the judge's findings in support of sentencing under California Penal Code section 667.6(d). ---------8

6. The Petition for Review in the California Supreme Court. --------------9

7. The Opinion of the California Supreme Court. ---------------------------11

Reasons for Granting the Writ ---12

1. The petition should be granted to address whether it denies due process of law and the constitutional right to a jury trial for a finding of fact that increases the mandatory minimum sentence for a crime to be made by a judge, not the jury, when that finding also has the effect of requiring the sentence to be imposed consecutively. --12

A. This Court should grant certiorari because the California Supreme Court has created a broad exception to the holdings of this Court in *Apprendi v. New Jersey* and *Alleyne v. United States*. --12

B. The California Supreme Court further muddles this Court's analysis of the Sixth Amendment. -------------------------------------17

2. The instant case presents three additional issues that this Court may wish to address.--21

A. The petition presents the issue of whether it is a denial of due process to admit expert testimony that false allegations of child molest are rare. ---21

B. The petition presents the issue of whether the sentencing judge's application of the wrong legal standard of "separate" to the finding prerequisite to the application of California Penal Code section 667.6(d), denied Petitioner due process of law. ------------23

C. The petition presents the issue of whether, when a witness has described many criminal acts, some on the same occasion, some on separate occasions, but the jury credited only a few acts, and did not specify which ones, the evidence is, as a matter of due process, sufficient for a judge later to find that each act of which the jury convicted the defendant occurred on a "separate occasion."---25

Conclusion ---28

Index of Appendices[1]

Appendix A: Decision of the California Supreme Court, *People v. Catarino*, S271828 (May 25, 2023) ---3

Appendix B: Decision of the California Court of Appeal, Fourth Appellate District, Division One, *People v. Catarino*, D078832 (October 14, 2021) --18

Appendix C: Order Denying Rehearing, California Court of Appeal, Fourth Appellate District, Division One, *People v. Catarino*, D078832 (October 19, 2021) ---38

Appendix D: Order Granting Review, issues limited, California Supreme Court, *People v. Catarino*, S271828 (January 19, 2022) -----------------------40

Appendix E: Motion to Limit the Use of Evidence to Dispel Myths; Motion to Exclude Introduction of Profile Evidence; Motion to Exclude Introduction of Statistical Evidence as to the Frequency of False Accusations; Motion to Exclude Hearsay under *Sanchez* (March 21, 2018) ----------------------------42

Appendix F: Excerpts of Reporter's Transcript Regarding Motion to Exclude Introduction of Statistical Evidence as to the Frequency of False Accusations (April 2, 2018) ---52

Appendix G: Jury Verdict Forms (April 6, 2018) ----------------------------------60

Appendix H: Reporter's Transcript of Sentencing (November 9, 2018)-------72

Appendix I: Abstract of Judgment (November 9, 2018) --------------------------92

Appendix J: Constitutional Provisions, Statutes, and Court Rule Involved---96

[1] The Appendix to the Petition for Writ of Certiorari has been filed as a separate document. Page numbers here are to the pages of that document.

Table of Authorities

CASES

Alleyne v. United States, 570 U.S. 99 (2013) ------------------7, 12-13, 17-18, 20

Apprendi v. New Jersey, 530 U.S. 466 (2000) -----------------7, 12-14, 16-18, 20

Chapman v. California, 386 U.S. 18 (1967) ---------------------------6, 10, 21, 22

Hicks v. Oklahoma, 447 U.S. 343 (1980) ---23

In re Winship, 397 U.S. 358 (1970) --13

Oregon v. Ice, 555 U.S. 160 (2009) ---------------------------------------7, 11, 14-19

People v. Catarino, 14 Cal. 5th 748, 529 P.3d 60, 308 Cal. Rptr. 3d 401 (2023)--1

People v. Catarino, 2021 WL 4785745 (Cal. Ct. App. 2021) ---------------------1

People v. Johnson, 88 Cal. App. 5th 487, 305 Cal. Rptr. 3d 27 (2023) ---18-19

People v. Julian, 34 Cal. App. 5th 878, 246 Cal. Rptr. 3d 517 (2019)---------21

People v. Wilson, 33 Cal. App. 5th 559, 245 Cal. Rptr. 3d 256 (2019) --------21

Jackson v. Virginia, 443 U.S. 307 (1979) ---25

Jones v. United States, 526 U.S. 227 (1999) ------------------------------------20

Ramos v. Louisiana, 140 S. Ct. 1390 (2020) ------------------------------------13

Snowden v. Singletary, 135 F.3d 732 (11th Cir. 1998) --------------------------22

State v. Apprendi, 159 N.J. 7, 731 A.2d 485 (1999) -------------------------------17

State v. Catsam, 148 Vt. 366, 534 A.2d 184 (1987) --------------------------------22

State v. Lindsey, 149 Ariz. 472, 720 P.2d 73 (1986) -------------------------------22

State v. MacRae, 141 N.H. 106, 677 A.2d 698 (1996) -----------------------------22

State v. W.B., 205 N.J. 588, 17 A.3d 187 (2011) -----------------------------------22

United States v. Gaudin, 515 U.S. 506 (1995) -------------------------------------13

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V --20

U.S. Const. amend. VI ---2, 5-12, 14, 16-21

U.S. Const. amend. XIV --2, 9-12, 20-21, 23, 25

STATUTES

18 U.S.C. § 924(c)(1)(A)(i)-(ii) ---------- 18
18 U.S.C. § 1257(a) ---------- 2
Cal. Penal Code § 288 ---------- 2, 8, 10
Cal. Penal Code § 288(a) ---------- 27
Cal. Penal Code § 288(b)(1) ---------- 3, 4, 18, 26
Cal. Penal Code § 667.6 ---------- 2, 24
Cal. Penal Code § 667.6(c) ---------- 13, 15
Cal. Penal Code § 667.6(d) ---------- 5, 7-11, 13-15, 18-19, 23, 27
Cal. Penal Code § 1170.1 ---------- 2, 11, 13, 19

RULES

Cal. Rules of Court, rule 4.426 ---------- 2, 7
Cal. Rules of Court, rule 4.426(a)(2) ---------- 23

OTHER AUTHORITIES

CALCRIM No. 3501 ---------- 10, 24
CALCRIM No. 3515 ---------- 24

Petition for Writ of Certiorari

Edgar Sandoval Catarino respectfully petitions for a writ of certiorari to review the judgment of the California Supreme Court, in the case of *People v. Catarino*, S271828.

Opinions Below

- *People v. Catarino*, 14 Cal. 5th 748, 529 P.3d 60, 308 Cal. Rptr .3d 401 (2023) (published). App. A, at 4-17.
- *People v. Catarino*, 2021 WL 4785745 (Cal. Ct. App. 2021) (unpublished). App. B, at 19-37.
- *People v. Catarino*, (Santa Clara Cty. Super. Ct. No. C1635441), Judgment Entered November 9, 2018. There is no written opinion. Portions of the reporter's transcript containing the rulings on relevant issues are included in the Appendix. App. F, at 53-59, App. H, at 73-91.

Jurisdiction

The California Supreme Court issued its opinion on May 25, 2023. App. A, at 4.

Petitioner invokes this Court's jurisdiction under 18 U.S.C. § 1257(a), on the ground that his rights under the Sixth and Fourteenth Amendments to the United States Constitution were violated.

Constitutional Provisions, Statutory Provisions, and Rule of Court Involved

Reproduced in Appendix J are:

- The Sixth Amendment of the United States Constitution
- The Fourteenth Amendment of the United States Constitution
- California Penal Code section 288
- California Penal Code section 667.6
- California Penal Code section 1170.1
- California Rules of Court, Rule 4.426

Statement of the Case

1. The charges and the evidence in support of the charges.

An information charged Petitioner with eight counts of violating California Penal Code[2] section 288(b)(1) [lewd or lascivious act with child under the age of 14 accomplished by means of force, violence, duress, or threat of immediate bodily injury]. 1 Clerk's Transcript ["CT"] 75-79. All counts were alleged to have been committed against B.D. and to have been committed between June 8, 2015, and March 9, 2016. 1 CT 76-79.

In interviews with law enforcement and at trial, B.D. described multiple acts of sexually inappropriate touching having occurred in conjunction with one another. App. B, at 21. B.D. also described sexually inappropriate touchings that occurred on an unspecified but multiple number of days. App. B, at 22.

2. Expert testimony that false allegations of child molest are rare.

Petitioner's trial counsel sought to exclude evidence that false allegations of child molest are rare. App. E, at 44, 47-50; App. F, at 53-59. Counsel objected that such evidence was irrelevant, without

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[2] Except as otherwise specified, all statutory citations herein are to the California Penal Code.

sufficient foundation, and a denial of Petitioner's state and federal constitutional rights to trial by jury, to a fair trial, to present a defense, and to due process. App. E, at 48-50. The trial court overruled this objection. App. F, at 59.

A psychologist testified that he had read a number of studies that had evaluated the percentages of false complaints versus true complaints in allegations of child molest. 6 Reporter's Transcript ["RT"] 1648. In a 2006 study of 9,000 cases of child maltreatment of which 1,000 were child sexual abuse, zero percent of the false allegations had been made by children; all of the false allegations had been made by parents. App. B, at 26; 6 RT 1648-1649. In another study, between 2 and 5 percent of allegations of sexual abuse were found to be false. App. B, at 26; 6 RT 1649. The psychologist testified that the incidence of false allegations by children is "very low," meaning between zero and five or six percent. 6 RT 1659.

3. The verdicts.

A jury found Petitioner not guilty of Count 8 and not guilty of the lesser included offenses of Count 8. App. G, at 69-70. The jury found Petitioner not guilty of Count 7, but on that count guilty of the lesser included offense of an attempted violation of section 288(b)(1).

App. G, at 67-78. The jury found Petitioner guilty of Counts 1 through 6. App. G, at 61-66.

4. The sentencing as supported by the judge's finding that the offenses of which the jury convicted the defendant were committed on "separate occasions."

In a sentencing memorandum filed after the jury had been discharged, the district attorney alleged that the offenses had occurred on "separate occasions" within the meaning of section 667.6(d), and on that basis argued that Petitioner should receive full-term, consecutive sentences on each count. 2 CT 380-384. In response, Petitioner's counsel argued, "[R]elying on the jury question and/or the closing arguments of counsel to speculate on which specific acts Mr. Catarino was convicted on constitutes a violation of Mr. Catarino's right to Due Process and a violation of his Sixth Amendment rights. The jury's question is not a jury finding." 2 CT 387.

The sentencing judge found that each offense had been committed on a "separate occasion." App. H, at 80-82. The judge then sentenced Petitioner to full-term, consecutive sentences on each count —8 years on Count 1, consecutive terms of 5 years each on Counts 2 through 6, and a consecutive term of 2 years, 6 months, on Count 7—

for a total determinate term of 35 years, 6 months. App. H, at 87-88; App. I, at 92.

5. The issues as raised and addressed in the California Court of Appeal.

A. The testimony that false allegations of child molest are rare as a denial of due process.

To the California Court of Appeal, Petitioner argued that the error of admitting testimony that false allegations of child molest are rare was a denial of due process, the prejudicial effect of which should be reviewed under the standard of *Chapman*. App. B, at 28; Appellant's Opening Brief ["AOB"] 19-21 (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)).

The Court of Appeal held that it was error to admit the testimony that false allegations of child molest are rare, but held that it was a matter of state law, only, not a denial of federal due process. App. B, at 28.

B. The Sixth Amendment right to a jury trial.

In the California Court of Appeal, Petitioner argued that he was "denied due process of law and his Sixth Amendment right to a jury trial in that the finding of fact that triggered full-term sentences on the

subordinate counts had to have been made by a jury, not a judge."

AOB 51.

> Subdivision (d) of section 667.6 involves a finding of fact that increases the minimum and maximum sentence on each subordinate count. Under the California Rules of Court, the finding of fact is to be made by a judge. (Cal. Rules of Court, rule 4.426(a).) The United States Supreme Court has held, however, that the Sixth Amendment requires such findings to be made by a jury. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435]; *Alleyne v. United States* … (2013) 570 U.S. 99, 111-112, 114-115 [133 S.Ct. 2151, 186 L.Ed.2d 314].) The imposition of a longer sentence based on subdivision (d) of section 667.6 without having submitted to the jury the question of whether each of appellant's offenses was committed on a "separate occasion" denied appellant his Sixth Amendment right to a jury trial.

AOB 51.

The Court of Appeal treated as dispositive the fact that "the United States and California Supreme Courts have held that the decision whether to run individual sentences consecutively or concurrently does not implicate the Sixth Amendment right to jury trial." App. B, at 34 (citing inter alia *Oregon v. Ice*, 555 U.S. 160, 162-165 (2009)).

Petitioner filed a petition for rehearing pointing out that the Court of Appeal had failed to address Petitioner's argument.

> Appellant has argued that the imposition of longer terms on each of the five subordinate counts, without having submitted to the jury the question of whether each count was committed on a "separate occasion," denied appellant his Sixth Amendment right to a jury trial. (AOB 51-59; ARB 22-27.) This

> court rejected this argument because the sentences upon those five counts were imposed consecutively. (Slip Op. 16.)

Petition for Rehearing, 7.

> At the outset of its disposition of appellant's Sixth Amendment argument this court attributes to appellant an argument that appellant explicitly has not made. "Appellant has not argued that the fact that subdivision (d) of section 667.6 requires sentences on subordinate counts to be consecutive, not concurrent, triggers the Sixth Amendment right to a jury trial." (ARB 23, emphasis in original.) This court says, "As an initial matter, Catarino contends that, because no jury made factual findings as to whether the offense took place on 'separate occasions,' mandatory consecutive sentences are prohibited as a violation of his right to a jury trial." (Slip Op., p. 16.)
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> …
>
> This court has addressed a Sixth Amendment argument that appellant explicitly eschewed. To address the Sixth Amendment argument that appellant has made in his opening brief, in his reply brief, and again here, rehearing should be granted.

Petition for Rehearing, 12.

Rehearing was summarily denied. App. C, at 39.

C. Other arguments related to the judge's findings in support of sentencing under California Penal Code section 667.6(d).

To the Court of Appeal, Petitioner argued that because B.D. described many acts in violation of section 288, some occurring on the same occasion as others, some occurring on separate occasions, but the jury found only a few of these acts to have been proved, and because

the jury did not specify which acts were the basis for its guilty verdicts, the record was insufficient as a matter of Fourteenth Amendment due process to support the judge's finding that each count of which the jury convicted Petitioner had occurred on a "separate occasion." AOB 28-36. The Court of Appeal disagreed. App. B, at 34-35.

Petitioner argued that the sentencing judge had denied him Fourteenth Amendment due process of law in that he had used an incorrect legal standard to find that the offenses had been committed on "separate occasions." AOB 36-44. The Court of Appeal disagreed. App. B, at 35-36.

Petitioner argued that as a matter of statutory construction, because section 667.6(d) does not apply to attempts, it was error to apply that section to Count 7. AOB 61-62. On this last point, only, the Court of Appeal agreed and ordered a remand for resentencing on Count 7. App. B, at 36-37.

6. The Petition for Review in the California Supreme Court.

Petitioner sought review in the California Supreme Court, presenting four issues.

> 1. Given that subdivision (d) of Penal Code section 667.6 increases the mandatory minimum sentence on each subordinate count committed on a "separate occasion," does the

> Sixth Amendment require the fact of being on a "separate occasion" to be found by a jury?
>
> 2. What standard of prejudice applies to the error of admitting, in a trial of charges under Penal Code section 288, evidence that false allegations of child molest are rare?
>
> 3. Is the record sufficient to support a judge's finding that each count of Penal Code section 288 of which the jury convicted the defendant occurred on a "separate occasion" for the purposes of Penal Code section 667.6, subdivision (d), where (1) the witness described many acts in violation of section 288, some occurring on the same occasion as others, some occurring on separate occasions, but (2) the jury found that only a few of these acts had been proved, and (3) the jury did not specify which acts were the basis for its guilty verdicts?
>
> 4. Did the trial court deny appellant due process of law by applying the standards of CALCRIM No. 3501 to the determination of whether each offense was committed on a "separate occasion" for the purposes of subdivision (d) of Penal Code section 667.6?

Petition for Review ["PFR"] 5. As to the second issue, Petitioner "argued that as a denial of due process, the prejudice of this error should be reviewed under the standard of *Chapman v. California* (1967) 386 U.S. 18." PFR 12. As to the third and fourth issues, Petitioner cited the Fourteenth Amendment and argued that they were matters of due process. PFR 14, 16.

The California Supreme Court granted review, but limited review to the issue of: "Does Penal Code section 667.6, subdivision (d), which requires that a 'full, separate, and consecutive term' must be imposed for certain offenses if the sentencing court finds that the

crimes 'involve[d] the same victim on separate occasions,' comply with the Sixth Amendment to the U.S. Constitution?" App. D, at 41.

7. The Opinion of the California Supreme Court.

On May 25, 2023, the California Supreme Court issued an opinion holding that the failure to grant a jury trial as to the finding specified in section 667.6(d) does not violate the Sixth and Fourteenth Amendments. App. A, at 6, 11-17. The California Supreme Court held that even though that finding increased the term on each count after the first, because it also required consecutive sentencing, it was not subject to the right to a jury trial.

> Catarino … argues that section 667.6(d) has "two distinct consequences": first, it requires that each term imposed be a full term instead of one-third of the middle term as authorized by section 1170.1; second, it requires that each term be imposed consecutively. The latter, he asserts, is controlled by *Ice*, while the former is not. We conclude that although the high court in *Ice* was confronted with a statutory regime that only addressed concurrent versus consecutive sentencing, its rationale is equally applicable to section 667.6(d).
>
> …
>
> Like the statutes in *Ice*, section 667.6(d) is a "specification of the regime for administering multiple sentences," which "has long been considered the prerogative of state legislatures." (*Ice*, *supra*, 555 U.S. at p. 168.)

App. A, at 13-14.

Reasons for Granting the Writ

1. The petition should be granted to address whether it denies due process of law and the constitutional right to a jury trial for a finding of fact that increases the mandatory minimum sentence for a crime to be made by a judge, not the jury, when that finding also has the effect of requiring the sentence to be imposed consecutively.

There is one issue in the instant case as to which the need for this Court's review is compelling. The Sixth and Fourteenth Amendments confer a right to a jury trial on any fact that increases the mandatory minimum sentence on a crime. *Alleyne v. United States*, 570 U.S. 99, 112, 113, 116 (2013). The question presented by the opinion of the California Supreme Court in the instant case is: Is there no such right to a jury trial when a legislature includes a fact that increases the mandatory minimum sentence for a crime within a "regime for administering multiple sentences"?

A. This Court should grant certiorari because the California Supreme Court has created a broad exception to the holdings of this Court in *Apprendi v. New Jersey* and *Alleyne v. United States.*

The California Supreme Court acknowledges this Court's holdings that Sixth Amendment right to a jury trial applies to any finding of fact that increases the penalty for an offense, including any fact that increases the mandatory minimum term. App. A, at 11-13

(citing *Apprendi v. New Jersey*, 530 U.S. 466, 478, 483, 490 (2000), *Alleyne v. United States*, 570 U.S. 99, 112, 113, 116, *Ramos v. Louisiana*, 140 S. Ct. 1390, 1395-1397 (2020), *United States v. Gaudin*, 515 U.S. 506, 511 (1995), and *In re Winship*, 397 U.S. 358, 364, (1970)).

> "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

App. A, at 12 (quoting *Apprendi*, 530 U.S. at 490).

> For purposes of *Apprendi*, "there is no basis in principle or logic to distinguish facts that raise the maximum [sentence] from those that increase the minimum . . . ." (*Alleyne*, at p. 116.) Both must be "submitted to the jury and found beyond a reasonable doubt." (*Ibid*.)

App. A, at 12-13.

The California Supreme Court provides a description of California sentencing law more detailed than need be repeated here. App. A, at 8-10. The critical point is that, as the California Supreme Court acknowledges, section 667.6(d) increases the mandatory minimum term based upon a finding of fact.

> A court that makes a section 667.6(d) finding cannot impose one-third of the middle term for the defendant's subordinate term as prescribed by section 1170.1 …. It must impose a full-term for each offense it finds to have involved a different victim or to have been committed on a separate occasion. In Catarino's case, this means the lowest term the sentencing court could impose for each of his non-attempt subordinate terms was five years as opposed to the term of two years and eight months that would have been available if he had been sentenced under either the determinate sentencing law or section 667.6(c).

App. A, at 11.

Nonetheless, the California Supreme Court has held that the Sixth Amendment right to a jury trial does not apply because, in addition to increasing the mandatory minimum term, section 667.6(d) also requires the terms to which it applies to be imposed consecutively. App. A, at 13-16. For this result, the California Supreme Court relies not so much upon the holding of *Oregon v. Ice* as it does upon words that this Court happened to use in its opinion in *Oregon v. Ice*. App. A, at 13-14 (citing *Ice*, 555 U.S. 160, 168).

In *Oregon v. Ice*, the question presented was, "When a defendant has been tried and convicted of multiple offenses, each involving discrete sentencing prescriptions, does the Sixth Amendment mandate jury determination of any fact declared necessary to the imposition of consecutive, in lieu of concurrent, sentences?" *Ice*, 555 U.S. at 163. In answering "no" to this question, this Court used the words "specification of the regime for administering multiple sentences." *Id.* at 168.

> These twin considerations—historical practice and respect of state sovereignty—counsel against extending *Apprendi*'s rule to the imposition of sentences for discrete crimes. The decision to impose sentences consecutively is not within the function that "extends down centuries into the common law." *Apprendi*, 530 U.S., at 477, 120 S.Ct. 2348. Instead, specification of the regime for administering multiple sentences has long been considered the prerogative of state legislatures.

Ibid. In context, the words "specification of the regime for administering multiple sentences" clearly refer to the "decision to impose sentences consecutively" of the previous sentence.

The California Supreme Court has pulled the phrase "regime for administering multiple sentences" from this context and read it to permit fact-finding that increases the sentences for discrete crimes to be made by a judge so long as that increase is linked to the decision to impose sentences consecutively. App. A, at 14, 16 (citing *Ice*, 555 U.S. at 168).

> [I]f Catarino had been sentenced under the determinate sentencing law or under section 667.6(c), the trial court could have imposed concurrent sentences or partial consecutive sentences on Catarino's seven counts of conviction, i.e., a full term on one principal count and partial terms on six subordinate counts. Section 667.6(d), by contrast, requires full-term consecutive sentencing upon a finding that "the crimes involve separate victims or involve the same victim on separate occasions." Like the statutes in *Ice*, section 667.6(d) is a "specification of the regime for administering multiple sentences," which "has long been considered the prerogative of state legislatures." (*Ice*, *supra*, 555 U.S. at p. 168.)

App. A, at 14.

California is the most populous state and the influence of the decisions of its court of last resort may be felt far beyond its borders. If the rule in the instant case is allowed to stand, any state legislature may reasonably conclude that fact-finding that increases the term for any crime may be done by a judge without running afoul of the Sixth

Amendment so long as that increase in the term is linked to a requirement that the term be imposed consecutively. For any crime, large or small, so long as that increase in the term is part of the "specification of [a] regime for administering multiple sentences," the Sixth Amendment would not apply. This same logic would allow a state legislature to specify that in a charge of reckless driving causing death, the jury could find the facts of the reckless driving and the judge could find the facts of the death and the causation so long as the statute not only increased the term from that specified for ordinary reckless driving, but also required the term for this greater offense to be imposed consecutively to the term for any other offense of which the defendant was convicted. Such an approach would go far to nullify the Sixth Amendment right to a jury trial.

In the instant case, California has presented this Court with a kind of manipulation of its precedents similar to that anticipated in *Oregon v. Ice*.

> [N]ot every state initiative will be in harmony with Sixth Amendment ideals. But as we have previously emphasized, "structural democratic constraints exist to discourage legislatures from" pernicious manipulation of the rules we articulate. *Apprendi*, 530 U.S., at 490, n. 16, 120 S.Ct. 2348. In any event, if confronted with such a manipulation, "we would be required to question whether the [legislative measure] was constitutional under this Court's prior decisions." *Id.* at 491, n. 16, 120 S.Ct. 2348.

Ice, 555 U.S. at 172. Certiorari should be granted.

B. The California Supreme Court further muddles this Court's analysis of the Sixth Amendment.

In *Alleyne*, this Court held that a fact that increases the mandatory minimum term for an offense increases the punishment for that offense and, as such, is subject to the Sixth Amendment right to a jury trial. *Alleyne*, 570 U.S. at 116. And this Court held, "It is no answer to say that the defendant could have received the same sentence with or without that fact." *Id*. at 115. "[I]f a judge were to find a fact that increased the statutory maximum sentence, such a finding would violate the Sixth Amendment, even if the defendant ultimately received a sentence falling within the original sentencing range (*i.e.*, the range applicable without that aggravating fact)." *Ibid*.

Further, this Court has emphasized that it makes no difference that the findings that govern the defendant's sentence are defined in more than one statute. *Apprendi*, 530 U.S. at 495, quoting *State v. Apprendi*, 159 N.J. 7, 20, 731 A.2d 485, 492 (1999) ["[M]erely because the state legislature placed its hate crime sentence 'enhancer' 'within the sentencing provisions' of the criminal code 'does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense.'"].

The California Supreme Court has held, however, that because a full-term sentence was "authorized" even without the operation of 667.6(d), the Sixth Amendment is not implicated by the factfinding specified in that section. And it has held that the placement of the provision for a partial-term sentence in a separate statute makes a difference to the constitutional analysis.

> Section 667.6(d) does not change what is a "full" term or otherwise define the sentence for any particular offense. In this regard, it differs from the statute at issue in *Alleyne*, which provided that a defendant using or carrying a firearm must "'be sentenced to a term of imprisonment of not less than 5 years,'" but if the firearm was brandished, the sentence must be "'not less than 7 years.'" (*Alleyne*, *supra*, 570 U.S. at pp. 103, 104, quoting 18 U.S.C. § 924(c)(1)(A)(i)-(ii).) Rather than set or change the term authorized on an individual count as the statute in *Alleyne* did, section 667.6(d) requires that the term already authorized (§ 288, subd. (b)(1)) be meted out as a full term. Under the high court's reasoning in *Ice*, section 667.6(d) does not define or alter the term for any particular offense in a manner that invades the historical province of the jury.
>
> Catarino contends that section 667.6(d) "has the effect" of raising the term on each subordinate count from two years and eight months to five years in a manner implicating *Apprendi*. The Court of Appeal in *Johnson* took a similar view, reasoning that a finding under section 667.6(d) "increases the 'floor' of the range [of sentences] from two years eight months to five years." ([*People v.*] *Johnson* [(2023)] 88 Cal.App.5th [487,] 504 [305 Cal. Rptr. 3d 27, 39].)[3] But the lowest term set by section 288, subdivision (b)(1) — before any aggregation — is five years, not two years and eight months. The jury's verdict thus authorized at least a five-year sentence for each violation of this section.

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[3] In the instant case, the California Supreme Court disapproved *People v. Johnson*. App. A, at 17.

> In arguing otherwise, Catarino and the *Johnson* court erroneously import the term of two years and eight months authorized by section 1170.1 into the analysis of section 667.6(d)'s constitutionality.

App. A, at 15-16.

The California Supreme Court goes on to opine that the Sixth Amendment requirement of a jury trial when a finding of fact increases the term on an individual count "make[s] scant sense" when in addition to increasing the term on an individual count, the fact is linked to consecutive sentencing.

> Just as "it would make scant sense" to "hem in States by holding that they may not … choose to make concurrent sentences the rule, and consecutive sentences the exception" (*Ice*, *supra*, 555 U.S. at p. 171), it would make little sense to forbid California from making partial-term consecutive sentences the rule and full-term consecutive sentences the exception.

App. A, at 16.

To be clear, the interpretation of the Sixth Amendment that California has adopted is one that permits partial-term sentences to be the rule absent an exception providing for an increased sentence based upon judicial factfinding. The California Supreme Court opines that a rule that would "hem in the States" by conferring a right to a jury trial on any fact prerequisite to the imposition of full-term sentences "would make little sense." App. A, at 16. The hem that the California Supreme Court describes as making little sense is this: "'[U]nder the Due

Process Clause of the Fifth Amendment and the notice and jury trial guarantee of the Sixth Amendment, any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.' … The Fourteenth Amendment commands the same answer in this case involving a state statute." *Apprendi,* 530 U.S. at 476, quoting *Jones v. United States*, 526 U.S. 227, 243, n. 6. And this principle "applies with equal force to facts increasing the mandatory minimum." *Alleyne*, 570 U.S. at 112.

The analysis by the California Supreme Court is a departure from the Sixth Amendment jurisprudence of this Court. Allowed to stand and to influence the law beyond the borders of California, in this way, too, the opinion of the California Supreme Court undermines the Sixth Amendment rule of *Apprendi*.

For this reason, too, this Court should grant certiorari.

2. The instant case presents three additional issues that this Court may wish to address.

Although they may be less compelling than the Sixth Amendment issue addressed above, the instant case presents three additional issues that this Court may wish to address.

A. The petition presents the issue of whether it is a denial of due process to admit expert testimony that false allegations of child molest are rare.

Petitioner argued to the California Court of Appeal that it was a denial of Fourteenth Amendment due process of law to permit an expert witness to testify that false allegations of child molest are rare. AOB 16-22 (citing inter alia *People v. Wilson*, 33 Cal. App. 5th 559, 568-570, 245 Cal. Rptr. 3d 256, 262-265 (2019), and *People v. Julian*, 34 Cal. App. 5th 878, 886-887, 246 Cal. Rptr. 3d 517, 523-524 (2019)); ARB 35. Petitioner also argued that as a denial of due process, the prejudice of this error should be reviewed under the standard of *Chapman*. AOB 19-21 (citing inter alia *Chapman*, 386 U.S. at 23-24); ARB 36-39 (same).

The State conceded and the California Court of Appeal held that the admission of such testimony was error. App. B, at 28. The Court of Appeal held, however, that such error is a matter of state law only. App. B, at 28-29. Although Petitioner presented this issue in his

petition for review in the California Supreme Court, that court did not grant review on this issue. PFR 12-13; App. D, at 41.

The Eleventh Circuit has held that the admission of testimony of this kind can be a matter of "fundamental unfairness [that] violates the Due Process Clause of the Federal Constitution." *Snowden v. Singletary*, 135 F.3d 732, 737 (11th Cir. 1998). The New Jersey Supreme Court and the Vermont Supreme Court have held that the appropriate test for determining the prejudicial effect of an error of this kind is the beyond-a-reasonable-doubt test of *Chapman*. *State v. W.B.*, 205 N.J. 588, 614, 17 A.3d 187, 202 (2011) (citing inter alia *Chapman*, 386 U.S. at 24); *State v. Catsam*, 148 Vt. 366, 371-372, 534 A.2d 184, 188 (1987) (same). Without citing *Chapman*, the New Hampshire Supreme Court and the Arizona Supreme Court have also applied this same test of prejudice to error of this kind. *State v. MacRae*, 141 N.H. 106, 110-111, 677 A.2d 698, 702 (1996); *State v. Lindsey*, 149 Ariz. 472, 477, 720 P.2d 73, 78 (1986).

This Court may wish to include in its grant of certiorari the issue of whether, in a trial of charges of child molest, it is a denial of due process to admit expert testimony that false allegations of child molest are rare.

B. The petition presents the issue of whether the sentencing judge's application of the wrong legal standard of "separate" to the finding prerequisite to the application of California Penal Code section 667.6(d), denied Petitioner due process of law.

A clear misapplication of state constitutional, statutory, or case law may constitute a deprivation of federal due process. *Hicks v. Oklahoma,* 447 U.S. 343, 346-347 (1980). Petitioner has argued that he was denied Fourteenth Amendment due process of law in that the sentencing judge made such an error of state law. AOB 36-44,

In a case involving only one victim, section 667.6(d) provides for full-term consecutive sentencing only on offenses that occurred on "separate occasions." In making such a finding, section 667.6(d) requires the finder of fact to determine "whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect on his or her actions and nevertheless resumed sexually assaultive behavior." § 667.6(d); Cal. Rules of Court, rule 4.426(a)(2).

Rather than determine whether there had been a reasonable opportunity to reflect as specified in section 667.6(d), the sentencing

judge relied on the fact that the jury had been instructed in the terms of CALCRIM Nos. 3501 and 3515.[4] App. H, at 81-82.

Petitioner argued to the California Court of Appeal that the application of the wrong legal standard to the question of whether Petitioner's offenses were on "separate occasions" within the meaning of section 667.6 was a deprivation of liberty without due process of law.

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[4] In the terms of CALCRIM No. 3501, the jury was instructed:

> The defendant is charged with LEWD OR LASCIVIOUS ACT ON A CHILD BY FORCE, VIOLENCE, DURESS MENACE AND FEAR in Counts 1-8 sometime during the period of June 8, 2015 to March 9, 2016.
>
> The People have presented evidence of more than one act to prove that the defendant committed these offenses. You must not find the defendant guilty unless:
>
> 1. You all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed for each offense;
>
> OR
>
> 2. You all agree that the People have proved that the defendant committed all the acts alleged to have occurred during this time period and have proved that the defendant committed at least the number of offenses charged.

2 CT 321; 9 RT 2428-2429. In the terms of CALCRIM No. 3515, the jury was instructed:

> Each of the counts charged in this case is a separate crime. You must consider each count separately and return a separate verdict for each one.

2 CT 322; 9 RT 2929.

AOB 39-40. The California Court of Appeal held that, notwithstanding the sentencing judge's explicit reliance upon the jury instruction and the judge's failure to mention the correct standard, the judge was presumed to have applied the correct legal standard. App. B, at 35-36. Although Petitioner presented this issue in his petition for review in the California Supreme Court, that court did not grant review on this issue. PFR 16; App. D, at 41.

In its grant of the writ of certiorari, this Court may wish to include the issue of whether it denies due process of law to fail to apply the correct legal standard to a finding of fact prerequisite to the sentence imposed.

C. The petition presents the issue of whether, when a witness has described many criminal acts, some on the same occasion, some on separate occasions, but the jury credited only a few acts, and did not specify which ones, the evidence is, as a matter of due process, sufficient for a judge later to find that each act of which the jury convicted the defendant occurred on a "separate occasion."

A conviction that rests on insufficient evidence violates a defendant's right to due process under the Fourteenth Amendment of the United States Constitution. *Jackson v. Virginia,* 443 U.S. 307, 313-324 (1979).

Petitioner was charged with eight counts of violating section 288(b)(1), but the jury convicted appellant of only six counts. 1 CT 75-79; App. G, at 61-66. The jury acquitted on one count and on one count found appellant guilty of the lesser-included offense of an attempted violation of section 288(b)(1). App. G, at 67-68.

Thus, while B.D. described many more than six acts, some of which occurred on separate occasions and some of which occurred on the same occasion, the jury found six, and only six, completed acts to have been proved. The jury's verdict does not specify which incidents described by B.D. were the basis for the convictions on each of the counts of which the jury found Petitioner guilty nor, conversely, which were not. App. A, at 6; App. B, at 21-22; see AOB 31-32 (citing 3 RT 628-632, 636, 640-641, 647-650). Because the record provided the judge no rational way to discern which acts were the basis of the jury's verdicts, there was no rational way for the judge to determine whether the acts that were the basis for the jury's verdicts had each occurred on a "separate occasion."

To the California Court of Appeal, Petitioner argued that because there is insufficient evidence in the record in the instant case for anyone other than the original jury to make a finding that each of the counts of which Petitioner was convicted occurred on a separate

occasion, and because the jury did not make that finding, the sentence under section 667.6(d) was a denial of due process of law. AOB 28-36; ARB 28-35. The California Court of Appeal held that because B.D. testified to six distinct acts having occurred "the first time abuse occurred," the evidence was sufficient for the sentencing judge later to hold that Petitioner "committed six separate acts in violation of section 288, subdivision (a), i.e., that he 'had a reasonable opportunity to reflect upon his … actions and nevertheless resumed sexually assaultive behavior.'" App. B, at 34-35. Although Petitioner presented this issue in his petition for review in the California Supreme Court, that court did not grant review on this issue. PFR 14-15; App. D, at 41.

This Court, in its grant of certiorari, may wish to include the due process issue of whether, on a record such as this, there is or can be sufficient evidence to support a finding that each of the counts of which the defendant was convicted occurred on a separate occasion.

Conclusion

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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