

No. \_\_\_ -

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 2005

---

---

JAMES McGEE

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

---

---

PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF CALIFORNIA.

---

---

Petitioner James McGee respectfully prays that a Writ of Certiorari issue to review the decision of the California Supreme Court entered on May 22, 2006.

## OPINIONS BELOW

The California Court of Appeal issued a published opinion in this case on February 9, 2004, in *People v. McGee* (2006) 38 Cal.4th 682. A copy of that opinion is attached as Appendix C. The California Supreme Court granted review by a one page order on April 28, 2004. A copy of that order is attached as Appendix B. The California Supreme Court issued its published opinion on May 22, 2006, in *People v. McGee* (2004) 9 Cal.Rptr. 3d 586 (review granted, previously published at 115 Cal.App.4th 819.) A copy of that opinion is attached as Appendix A.

### Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. section 1257(a).

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

#### **A. Federal Constitutional Provisions**

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . ."

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . ."

#### **B. State Statutory Provisions**

California Penal Code section 667(a) provides in relevant part:

“(a)(1) In compliance with subdivision (b) of Section 1385, 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 of the 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. The terms of the present offense and each enhancement shall run consecutively.

(2) This subdivision shall not be applied when the punishment imposed under other provisions of law would result in a longer term of imprisonment. There is no requirement of prior incarceration or commitment for this subdivision to apply.

(3) The Legislature may increase the length of the enhancement of sentence provided in this subdivision by a statute passed by majority vote of each house thereof.

(4) As used in this subdivision, "serious felony" means a serious felony listed in subdivision (c) of Section 1192.7.

(5) This subdivision shall not apply to a person convicted of selling, furnishing, administering, or giving, or offering to sell, furnish, administer, or give to a minor any methamphetamine-related drug or any precursors of methamphetamine unless the prior conviction was for a serious felony described in subparagraph (24) of subdivision (c) of Section 1192.7."

California Penal Code section 1170.12 provides in relevant part:

(a) Notwithstanding any other provision of law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions, as defined in subdivision (b), the court shall adhere to each of the following:

(1) There shall not be an aggregate term limitation for purposes of consecutive sentencing for any subsequent felony conviction.

(2) Probation for the current offense shall not be granted, nor shall execution or imposition of the sentence be suspended for any prior offense.

(3) The length of time between the prior felony conviction and the current felony conviction shall not affect the imposition of sentence.

(4) There shall not be a commitment to any other facility other than the state prison. Diversion shall not be granted nor shall the defendant be eligible for commitment to the California Rehabilitation Center as provided in Article 2 (commencing with Section 3050) of Chapter 1 of Division 3 of the Welfare and Institutions Code.

(5) The total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison.

(6) If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from

the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to this section.

(7) If there is a current conviction for more than one serious or violent felony as described in paragraph (6) of this subdivision, the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.

(8) Any sentence imposed pursuant to this section will be imposed consecutive to any other sentence which the defendant is already serving, unless otherwise provided by law.

(b) Notwithstanding any other provision of law and for the purposes of this section, a prior conviction of a felony shall be defined as:

(1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state. The determination of whether a prior conviction is a prior felony conviction for purposes of this section shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor. None of the following dispositions shall affect the determination that a prior conviction is a prior felony for purposes of this section:

(A) The suspension of imposition of judgment or sentence.

(B) The stay of execution of sentence.

(C) The commitment to the State Department of Health Services as a mentally disordered sex offender following a conviction of a felony.

(D) The commitment to the California Rehabilitation Center or any other facility whose function is rehabilitative diversion from the state prison.

(2) A conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison. A prior conviction of a particular felony shall include a conviction in another jurisdiction for an offense that includes all of the elements of the particular felony as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.

(3) A prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentence enhancement if:

(A) The juvenile was sixteen years of age or older at the time he or she committed the prior offense, and

(B) The prior offense is

(i) listed in subdivision (b) of Section 707 of the Welfare and Institutions Code, or

(ii) listed in this subdivision as a felony, and

(C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law, and

(D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.

(c) For purposes of this section, and in addition to any other enhancements or punishment provisions which may apply, the following shall apply where a defendant has a prior felony conviction:

(1) If a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.

(2)(A) If a defendant has two or more prior felony convictions, as defined in paragraph (1) of subdivision (b), that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of

(i) three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions, or

(ii) twenty-five years or

(iii) the term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 190 or 3046.

(B) The indeterminate term described in subparagraph (A) of paragraph (2) of this subdivision shall be served consecutive to any other term of imprisonment for which a consecutive term may be imposed by law. Any other term imposed subsequent to any indeterminate term described in subparagraph (A) of paragraph (2) of this subdivision shall not be merged therein but shall commence at the time the person would otherwise have been released from prison.

(d)(1) Notwithstanding any other provision of law, this section shall be applied in every case in which a defendant has a prior felony conviction as defined in this section. The prosecuting attorney shall plead and prove each prior felony conviction except as provided in paragraph (2).

(2) The prosecuting attorney may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior conviction. If upon the satisfaction of the court that there is insufficient evidence to prove the prior felony conviction, the court may dismiss or strike the allegation.

(e) Prior felony convictions shall not be used in plea bargaining, as defined in subdivision (b) of Section 1192.7. The prosecution shall plead and prove all known prior felony convictions and shall not enter into any agreement to strike or seek the dismissal of any prior felony conviction allegation except as provided in paragraph (2) of subdivision (d).

California Penal Code section 211 provides:

“Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.”

Nevada Revised Statutes section 200.380 provides:

“1. Robbery is the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property, or the person or property of a member of his family, or of anyone in his company at the time of the robbery. A taking is by means of force or fear if force or fear is used to:

- (a) Obtain or retain possession of the property;
- (b) Prevent or overcome resistance to the taking; or
- (c) Facilitate escape.

The degree of force used is immaterial if it is used to compel acquiescence to the taking of or escaping with the property. A taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

2. A person who commits robbery is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 15 years.”

#### STATEMENT OF THE CASE

Petitioner was charged by amended information with two counts of attempted murder with premeditation (Pen. Code, §§ 187, subd. (a), 664, subd. (a); unless otherwise indicated, subsequent statutory references are to the California Penal Code); two counts of assault with a firearm (§ 245, subd. (a)(2)); two counts of possession of a firearm by a convicted felon (§

12021, subd. (a)(1)); one count of unlawful possession of ammunition (§ 12316, subd. (b)(1)); one count of robbery (§§ 211, 212.5, subd.(c), 213, subd. (a)(2)); two counts of attempted robbery (§§ 211, 212.5, subd.(c); 213, subd. (b)); two counts of witness intimidation (§ 136.1, subd. (c)(1)); and two counts of discharging a firearm from a motor vehicle at another person (§ 12034, subd. (c)). The amended information also alleged several firearm-use enhancements (former § 12022.5, subd. (a)(1)) and firearm-discharge enhancements (§ 12022.53, subd. (c)). (CT 354.)

These charges were tried to a jury, which acquitted of attempted murder but found defendant guilty on all other charges and allegations. RT 1170-1174 CT 15, 168-181.)

#### Prior Conviction Trial Proceedings

The information alleged that petitioner had suffered two robbery convictions in the state of Nevada, and it alleged that these convictions increased defendant's maximum sentence in two ways. First, both convictions were alleged as predicates under California's "Three Strikes" law, Penal Code section 1170.12(c)(2), which increases the sentence for any new felony to a term of 25 years to life whenever two prior "serious felonies" are proven. (CT 361-362) Second, both convictions were alleged as predicates under California Penal Code section 667, subd. (a), which imposes an additional five year term for each prior "serious felony" conviction when the defendant is convicted of a new "serious felony." CT Second,(Priors 1 through 4). [CT 361-2.]

The parties at trial consistently with California law, agreed, that appellant's Nevada robbery convictions could not serve as predicate "serious felony" or "strike" prior convictions unless it was shown that the Nevada offenses had been based on conduct that included all of the elements of robbery as defined in California law. (RT 1130-1180); see, *People v. Avery*, (2002) 27 Cal.4th 49, 53.)

The parties further agreed that the Nevada convictions did not on their face establish that appellant's underlying conduct satisfied all the elements of California robbery, for the reason that California's robbery statute requires a specific intent but Nevada's robbery statute does not. (RT 1135-1136)

Hence, the prosecution sought to prove additional facts about defendant's conduct underlying the Nevada convictions by introducing copies of transcripts of preliminary hearing testimony from those proceedings, in addition to documents showing the charges, pleas, and judgments in those cases. (RT 1138-1139),

Defendant asked for a jury trial on that issue, which the court, after extended discussion of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), denied. (RT 1096, 1142-1165, RT 1181- 1182)

The court then considered the following documents from the Nevada proceedings.

//

**1. 1988 Nevada Records**

The 1988 charging document and plea transcript showed that defendant was charged with and personally admitted the elements of robbery as defined in Nevada law (i.e, there was a charge and admission that he took money from one Delmar Foust against his will and by means of fear of immediate or future injury to his person) but those documents contained neither a charge nor admission regarding a specific intent to permanently deprive Foust of the property. [1 CTA 2, 18-19, 11-12.] The preliminary hearing transcript (Court Exh. E) included the testimony of the victim, Foust, who stated that he encountered defendant, with whom he was acquainted, at a bus stop in Reno.

Foust stated that defendant slapped another boy who was present and said "that's what will happen if anybody tells on him" and then demanded money from Foust, who gave him two dollars. [2-ACT 8-12]

## **2. 1994 Nevada Records**

Again, the charging document and plea transcript showed allegations and admissions of the elements of Nevada robbery, but no admission of a specific intent to permanently deprive another of property. [1 ACT 37-8; 27, 33.] The preliminary hearing transcript (Court Exhibit F) showed that the victim, Ian Baker testified that defendant asked him for money and when Baker refused, defendant hit him, causing Baker to fall, after which Baker took \$120 from Baker's wallet. [2 ACT, RT of 9/14/04 preliminary hearing, pg. 7-9.]

Based on these documents, the court stated that it found beyond a reasonable doubt that the Nevada proceedings contained all of the elements of California robbery. (RT 1182, ST pg. 15.)<sup>1</sup>

### **Sentence**

At sentencing, the court's finding that the Nevada convictions each constituted valid "serious felony" and "strike" convictions operated to increase defendant's sentence in two ways. First, pursuant to the "Three Strikes" law, section 1170.12(c) (2)(A)(ii), the term applicable to each felony count of conviction was increased from the otherwise applicable determinate terms to an indeterminate term of 25 years to life. (CT 376 ST 46-49) Second, additional five year enhancement terms were imposed for each of the Nevada convictions, pursuant to the "serious felony" enhancement provision, Penal Code section 667(a). [CT 376 RT 48.] The court imposed a total term of 90 years to life, consisting of two consecutive terms of 25 years to life for the robbery in count 2 and the assault with a deadly weapon in count five, plus the two five year "serious felony" enhancements, plus 30 years of enhancements for firearm use and discharge, with concurrent terms of 25 years to life imposed on all other counts. [ST pg, 44-49, CT 63-65, CT 376.]

//

//

---

<sup>1</sup>

The jury was asked to determine only the very narrow question of whether the Nevada documents showed the stated convictions, and they returned true findings. [RT 1202, 1206, CT 165-167.]

### **Court of Appeal Decision**

In the California court of appeal, petitioner contended that the trial court had violated his rights under Apprendi by failing to denying him a jury determination of whether his Nevada convictions were based on conduct that included all the elements of California robbery, and the court of appeal agreed. The court of appeal concluded that “the Almendarez-Torres exception to Apprendi is confined to determinations about the past legal consequences of a defendant's conduct, such as whether his conduct has given rise to a conviction or prison term, and does not extend to determinations about the conduct itself, such as the intent with which a defendant acted.” (Appendix C, Court of Appeal Opinion, pg. 13.) The court of appeal, however, found the error harmless and affirmed. (Id., pg.16.)

### **California Supreme Court Opinion**

The California supreme court granted the California attorney general’s petition for review on the issue of whether there had been Jones - Apprendi error, but denied petitioner’s petition for review on whether the error was prejudicial. (See the Order, Appendix B.) That court issued a published opinion concluding that the trial court did not err. (Appendix A.)<sup>2</sup> The court found that California’s practice of permitting the trial judge

---

<sup>2</sup>

The California Court of Appeal and Supreme Court both found that in addition to the difference regarding specific intent, California defines robbery more narrowly with respect to the element of force or fear-- i.e., in California, a threat of injury to a person in the victim’s presence must be a threat of immediate harm, while in Nevada, a threat of future such harm is sufficient. (Appendix C, Cal. Supreme Ct. Opinion, pg. 3; Appendix C, Cal. Ct. Appeal Opinion, pg. .)

to make findings about the conduct underlying a prior conviction necessary to qualify that prior conviction as a predicate under a recidivist sentencing enhancement statute does not violate the sixth or fourteenth amendments, regardless of whether the relevant facts were found or admitted in the juror conviction proceeding itself. (Appendix A, pg. 1-3)

The court stated

“Unless and until the high court directs otherwise, we shall assume that the precedents from that court and ours support a conclusion that sentencing proceedings such as those conducted below do not violate a defendant's constitutional right to a jury trial. Although we recognize the possibility that the high court may extend the scope of the Apprendi decision in the manner suggested by the Court of Appeal, we are reluctant, in the absence of a more definitive ruling on this point by the United States Supreme Court, to overturn the current California statutory provisions and judicial precedent that assign to the trial court the role of examining the record of a prior criminal proceeding to determine whether the ensuing conviction constitutes a qualifying prior conviction under the applicable California sentencing statute. (California Supreme Court Opinion, pg. , Appendix A.; Pg. 2-3)”

## REASONS FOR GRANTING THE WRIT

- I. CERTIORARI IS APPROPRIATE TO DECIDE WHETHER THE ALMENDAREZ-TORREZ EXCEPTION TO JONES-APPRENDI PRINCIPLES PERMITS JUDICIAL FACTFINDING ABOUT ASPECTS OF THE CONDUCT UNDERLYING A PRIOR CONVICTION NOT FOUND OR ADMITTED IN THE PRIOR CONVICTION PROCEEDING ITSELF.

### A. Introduction.

This court has repeatedly stated that “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.” (*Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Jones v. United States*, 526 U.S. 227, 243, n. 6, (1999); *United States v. Booker*, 543 U.S. 220, (2005); *Blakely v. Washington*, 542 U.S. 296, (2004).)

The scope of the exception pertaining to prior convictions is presently unclear. In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), this Court rejected a Sixth Amendment claim concerning a prior conviction enhancement allegation, but on a record in which application of the increased sentence required no fact finding about the prior conviction. More recently, in *Shepard v. United States*, 544 U.S. 13 (2005), a plurality of this court rejected as constitutionally doubtful a procedure by which a trial judge could make findings on disputed issues of fact concerning the conduct underlying a prior conviction, on matters not found or admitted in the prior conviction proceeding itself.

In this case, the California supreme court has approved a form of judicial fact-finding that is essentially identical to the procedure that the plurality in *Shepard* rejected as constitutionally doubtful. The California Supreme Court has, in fact, stated that it has done so because it finds this court's decisions, including *Shepard*, insufficiently clear.

Petitioner respectfully asks that the Court grant this petition for writ of certiorari in order that this matter may be made clear.

**B: The California Supreme Court has Approved Judicial Fact-Finding of the Same Kind That was Considered by This Court in Shepard**

The California supreme court opinion has approved the same kind of procedure rejected in *Shepard* as constitutionally doubtful: judicial fact-finding about the conduct underlying a prior conviction concerning facts not found or admitted in the prior conviction proceeding itself, where the prior conviction is being used to increase the defendant's maximum sentence.

California imposes seriously increased sentences on defendants with prior "serious felony" convictions, and it has designated robbery as one of the "serious felonies." (Penal Code section 1192.7(c)(19); Penal Code section 667(a) [mandatory five year term for each prior "serious felony" of defendant convicted of new "serious felony"]; Penal Code section 1170.12, subd. (b) and (c) [mandating doubling of new felony sentence for defendants with one prior "serious felony" and 25-to-life terms for each new felony for defendant's with two "serious felonies"].) Such sentences

were imposed on petitioner in this case. Sentences of 25 years to life were imposed pursuant to the “Three Strikes” law on each felony of which he was convicted, and his sentence was further enhanced by two five year terms pursuant to section 667, subd. (a). [CT 376, ST pg. 46-49.]

Where, as here, the alleged “serious felony” prior conviction occurred in another jurisdiction, California requires that the foreign offense have included all the elements of one of the “serious felonies” enumerated in Penal Code section 1192.7, subd. (c). (*People v. Avery* (2002) 27 Cal.4th 49, 53, see §§ 667, subd. (d)(2), 1170.12, subd. (b)(2).) When the legally defined elements of the foreign offense fail to establish this equivalence, the trier of fact is authorized to review the "entire record of conviction" in the foreign court to determine if “the offense of which the defendant was previously convicted involved conduct which satisfies all the elements of the comparable California serious felony offense.” (*People v. Myers* (1993) 5 Cal.4th 1193, 1195; *People v. Woodell* (1998) 17 Cal.4th 448; *People v. Guerrero* (1988) 44 Cal.3d 343, 355.) This review may include transcripts of testimony from the prior proceeding. (*People v. Reed* (1996) 13 Cal.4th 217, 223 [statements that satisfy a hearsay exception can be used, such as testimony in a transcript]; *People v. Mobley* (1999) 72 Cal.App.4th 761, 796, [defendant’s statements in out of state probation report].)

These rules were applied here to permit the trial court to rely upon transcripts of testimony to find facts about the conduct underlying petitioner’s two Nevada robbery convictions, beyond those found or

admitted in those Nevada proceedings. In both of the Nevada prior conviction proceedings, the complaint alleged, and petitioner's plea admitted, only the essential elements of Nevada robbery (1 ACT 11-12, 18-19; 1ACT 37, 27, 33.) As the California courts found, these elements fall short of California robbery, with respect to both specific intent and the nature of the required force or fear. (Appendix A, Cal. Supreme Ct. Opinion, pg. 3.) Hence, as was found by the California courts, the preliminary hearing transcripts were necessary to supply a narrative from which it could be inferred that defendant had acted with the necessary specific intent and that California's force or fear element was satisfied. (Appendix C, Court of Appeal Opinion, pg. 6; Appendix A, Supreme Court opinion, pg. 6.)

This, of course, is the same kind of procedure found constitutionally doubtful in *Shepard*. There, the prior conviction enhancement statute, the Armed Career Criminal Act, had previously been construed to require that the defendant's prior conviction have been based on commission of a "generic burglary." (*Shepard*, at 16, citing *Taylor v. United States*, 495 U.S. 575 (1990) .) And there, as here, the government sought to prove that defendant's prior conviction was for the narrowly defined qualifying crime by going beyond facts found or admitted in the prior proceedings, and resorting instead to factual assertions contained in other material from the prior conviction proceedings. Although *Shepard* involved the use of police reports from the earlier court files, while this case involves preliminary

hearing transcripts from the prior file, the problem is the same: judicial fact-finding regarding facts not found or admitted in the prior proceeding.

This is the procedure that the Shepard plurality found to be of doubtful constitutionality under *Jones-Apprendi principles*. (Id., at 24-26.)

Defendant therefore submits that this case presents to this Court for a clear decision the same constitutional problem that was considered, but not decided, in Shepard.

**C. This Issue Deserves a Final Resolution from this Court  
and This Case Provides an Excellent Case in Which To Do  
So.**

Petitioner submits that the Court ought to conclusively resolve this issue, and that it ought to do so in this case, for the following reasons.

First, the case is on direct review and Petitioner unambiguously presented the federal constitutional claim to all of the California courts, and the California courts have addressed that claim on the merits. There is no procedural impediment to this court's review of the issue.

Second, there is every reason to believe that petitioner was prejudiced, particularly with respect to the 1988 Nevada robbery involving Delmar Foust. That case, according to the preliminary testimony, was based on a taking of two dollars, between acquaintances, at a bus stop. [1 CTA 2, 18-19, 11-12.] It looks a little like this might have been bus fare. It is certainly an open possibility that there was some kind of give and take between petitioner and Foust and that petitioner had no intent to

permanently deprive Foust of this sum as required by California law. Moreover, the lack of evidence affirmatively so showing in the Nevada record should not be given much significance, since, as matter of Nevada law, evidence of petitioner's lack of intent to permanently deprive would have been legally irrelevant in that proceeding. Certainly it cannot be said beyond a reasonable doubt that petitioner would not have received a favorable verdict from a jury on this issue. (*Washington v. Recuenco* \_\_\_ U.S. \_\_\_, 126 S.Ct. 2546.)

Third, the California Supreme Court's published decision in this case demonstrates the need for a definitive decision from this court. Although the California supreme court has acknowledged that *Shepard* has explicitly cast doubt on the constitutionality of this sort of judicial fact-finding, the California court has nevertheless declared itself unwilling to act in this area in the absence of further direction from this Court. (Appendix A, pg.3 .)

Petitioner respectfully submits that the constitutional issue presented but avoided in *Shepard* has now been clearly presented here in a state law context, where it can and should be conclusively resolved. Petitioner accordingly respectfully prays that this court grant the writ of certiorari.

### CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

DATED: September 18, 2006.

Respectfully submitted,

By: \_\_\_\_\_  
John Halley  
Attorney for petitioner  
James McGee

C:\Documents and Settings\Sally\My  
Documents\JURY\DATA\HALLEY\CLIENTS\2001-2003\McGee\\_\_Newest\_Cert\_1111.wpd