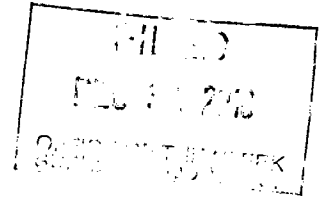


No. 18-7365



**IN THE
SUPREME COURT OF THE UNITED STATES**

ROBERT ALLEN DeVORE,

PETITIONER

VS.

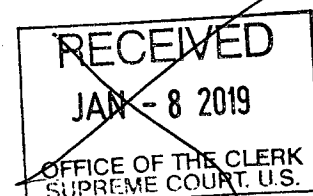
BRANDON KELLY,

RESPONDENT

**ON PEITITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF OREGON**

PEITITION FOR WRIT OF CERTIORARI

Robert Allen DeVore #2845576
2605 State Street
Salem, OR 97310-1346
Pro se



QUESTION(S) PRESENTED

1. Does the combined sentence totaling of 495 years with a 247½ year minimum violate the Eight Amendment against cruel and unusual punishment?
2. Does the use of unconstitutional statutes, i.e., consecutive sentence and dangerous offender sentence statutes that make trial court the factfinder instead of the jury unconstitutional, violate the Fifth, Sixth and Fourteenth Amendments to the United States Constitution?
3. Did the Supreme Court of the State of Oregon's denial to void an illegal sentence that violated a substantive rule of constitutional law contravene the criteria set forth in *Montgomery v. Louisiana*, 136 S. Ct. 718, 193 L. Ed. 2D 599 (2016)?
4. Is petition for writ of habeas corpus a proper avenue to collaterally attack a void sentence imposed by use of an unconstitutional statute?

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1
2
3 **IN THE**

4 **SUPREME COURT OF THE UNITED STATES**

5 **PETITION FOR WRIT OF CERTIORARI**

6 The Petitioner, Robert Allen DeVore, respectfully requests that this court issue a writ of
7 certiorari to review the judgment of the Supreme Court of the State of Oregon.

8 **OPINIONS BELOW**

9 The opinion of the Supreme Court of the State of Oregon, Case No. S066124, was denied
10 on October 4, 2018, Appellate Judgment effective date October 30, 2018 and appears at
11 Appendix A, page 1, to the petition and is unpublished.

12 The original judgment/opinion of the Circuit Court of the State of Oregon for the County
13 of Multnomah, Case No. C89-03-31354 was handed down on December 7, 1989, appears at
14 Appendix B, pages 2-5 and is unpublished.

15 The original judgment/opinion of the Circuit Court of the State of Oregon for the County
16 of Multnomah, Case No. C89-06-33049 was handed down on November 21, 1989, appears at
17 Appendix C, pages 6-9 and is unpublished.

18 **JURISDICTIONAL STATEMENT**

19 The effective date on which the highest state court decided this case was on October 30,
20 2018, Case No. S066124, appears at Appendix A, page 1.

21 The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

22 **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

23 Fifth Amendment rights to the United States Constitution:
24

25 No person shall be held to answer for a capital, or otherwise infamous crime, unless on a
26 presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in
27 the Militia, when in actual service in time of War or public danger; nor shall any person be subject
28 for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any
29 criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without
30 due process of law; nor shall private property be taken for public use, without just compensation.

1 Sixth Amendment rights to the United States Constitution:

2 In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an
3 impartial jury of the State and district wherein the crime shall have been committed, which district
4 shall have been previously ascertained by law, and to be informed of the nature and cause of the
5 accusation; to be confronted with the witnesses against him; to have compulsory process for
6 obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

7 Eighth Amendment rights to the United States Constitution:

8 Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual
9 punishments inflicted.

10 Fourteenth Amendment rights to the United States Constitution:

11 Section 1

12 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are
13 citizens of the United States and of the State wherein they reside. No State shall make or enforce
14 any law which shall abridge the privileges or immunities of citizens of the United States; nor shall
15 any State deprive any person of life, liberty, or property, without due process of law; nor deny to
16 any person within its jurisdiction the equal protection of the laws.

17 Article 1 Section 11 of the Oregon State Constitution:

18

19 In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in
20 the county in which the offense shall have been committed; to be heard by himself and counsel; to
21 demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the
22 witnesses face to face, and to have compulsory process for obtaining witnesses in his favor;
23 provided, however, that any accused person, in other than capital cases, and with the consent of
24 the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court
25 alone, such election to be in writing; provided, however, that in the circuit court ten members of
26 the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first
27 degree murder, which shall be found only by a unanimous verdict, and not otherwise; provided
28 further, that the existing laws and constitutional provisions relative to criminal prosecutions shall
29 be continued and remain in effect as to all prosecutions for crimes committed before the taking
30 effect of this amendment.
31

32 Article 1 Section 23 of the Oregon State Constitution:

33 The privilege of the writ of habeas corpus shall not be suspended unless in case of rebellion, or
34 invasion the public safety require it.

35 Oregon Revised Statutes: 34.610:

36

37 If it appears on the return that the prisoner is in custody by virtue of an order or civil process of
38 any court legally constituted, or issued by an officer in the course of judicial proceedings before
39 the officer, authorized by law, such prisoner shall be discharged only if one of the following cases
40 exists:

- 41 (1) The jurisdiction of the court or officer has been exceeded, either as to matter, place,
42 sum or person.
43 (2) The original imprisonment was lawful, yet by some act, omission or event which has
44 taken place afterwards, the party has become entitled to be discharged.
45 (3) The order or process is defective in some matter of substance required by law, rendering
46 the same void.
47 (4) The order or process, though in proper form, has been issued in a case not allowed by
48 law.

(5)The person having the custody of the prisoner under such order or process is not the person empowered by law to detain the prisoner.

(6) The order or process is not authorized by any judgment of any court, nor by any provision of law.

Oregon Revised Statutes: 137.122 Concurrent and consecutive sentences; court discretion; findings required:

(4) The court has discretion to impose consecutive terms of imprisonment for separate convictions arising out of a continuous and uninterrupted course of conduct only if the court finds: (a) The criminal offense for which a consecutive sentence is contemplated was not merely an incidental violation of a separate statutory provision in the course of the commission of a more serious crime; or (b) The criminal offense for which a consecutive sentence is contemplated caused or created a substantial risk of causing greater or qualitatively different loss, injury or harm to the victim or caused or created a substantial risk of causing loss, injury or harm to a different victim than was caused or threatened by the other offense or offenses committed during a continuous and uninterrupted course of conduct.

Oregon Revised Statutes: 161.725: Standards for sentencing of dangerous offenders:

(1) Subject to the provisions of ORS 161.737, the maximum term of an indeterminate sentence of imprisonment for a dangerous offender is 30 years, if the court finds that because of the dangerousness of the defendant an extended period of confined correctional treatment or custody is required for the protection of the public and if it further finds, as provided in ORS 161.735, that one or more of the following grounds exist:

STATEMENT OF THE CASE

The issue is that during a single ongoing criminal episode several crimes were alleged to have been committed. The Petitioner was arrested on March 14, 1989 and indicted March 24, 1989 in the Circuit Court of the State of Oregon on an 9 count indictment entitled State of Oregon v. Robert Allen DeVore, Case No. C89-03-31354, charging violations of ORS 163.115 (cts.1,2), ORS 163.175 (cts.3,4), ORS 164.415 (ct.5), ORS 164.225 (ct.6), 163.235 (ct.7), ORS 475.992-P2 (ct.8) and ORS 166.270 (ct.9) (Appendix E, Pgs. 27-31), was found guilty by a jury of 8 various counts and lessor counts on September 25, 1989. Then on December 5, 1989 the trial court imposed greater punishment than the juries verdict allowed, sentencing the Petitioner on those counts for total of 135 years with a 67½ year minimum. (Appendix B, Pgs. 2-5).

The Petitioner was indicted again on June 13, 1989 on an 12 count indictment entitled State of Oregon v. Robert Allen DeVore, Case No. C89-06-33049 charging violations of ORS 163.405 (Appendix F, Pgs. 32-37), was found guilty by a jury on October 3, 1989 of all 12

1 counts. Then November 20, 1989 the trial court imposed greater punishment than the juries
2 verdict allowed, sentencing Petitioner to 360 years with a 180 year minimum. (Appendix C, Pgs.
3 6-9). Note; Petitioner was tried without an attorney on this case without a valid waiver.

4 During sentencing in these cases, which in a default portion should have carried a
5 sentence of twenty (20) years maximum each that had to be run concurrent, yet the courts used
6 unconstitutional statutes i.e., O.R.S. 137.122(4) for consecutive sentence's and O.R.S.
7 161.725(1) for dangerous offender sentence's, thus Petitioner received a total of 495 years with a
8 247½ year minimum, which violates the due process clauses of the Fifth and Fourteenth
9 Amendments, and, the jury trial clause of the Sixth Amendment as it interlocks with the to be
10 informed clause of the Sixth Amendment to the United States Constitution and Article I, Section
11 11 of the Oregon State Constitution plus, the Eight Amendment to the United States
12 Constitution: "... nor cruel and unusual punishments inflicted."

13 REASONS FOR GRANTING THE WRIT

14 The Petitioner filed the Petition for Writ of Habeas Corpus Case to the Supreme Court of
15 the State of Oregon, Case No. S066124, on August 1, 2018 (Appendix D, Pgs. 10-26). The
16 Memorandum in Opposition was due on August 15, 2018, but the Attorney General did not
17 respond. The effective date of the denial to the petition for writ of habeas corpus was October
18 30, 2018. (Appendix A, Pg. 1).

19 The Supreme Court of the State of Oregon's denial is in effect suspension of habeas
20 corpus, i.e., a non-decision that has so far departed from the accepted and usual course of judicial
21 proceedings, while ignoring mandated case law on important state and federal questions in a way
22 that is in conflict with its own States decision's and relevant decision's of the United States
23 Supreme Court so as to call for an exercise of this Court's supervisory power. See, *Arizona v.*
24 *Rumsey*, 467 U.S. 203, 212, 81 L.Ed.2d 164, 104 S.Ct. 2305 (1984) Although adherence to
25 precedent is not rigidly required in constitutional cases, any departure from the doctrine of stare

1 decisis demands special justification.

2 When the Petitioner was sentenced in 1989, O.R.S. 161.725 (1) Standards for sentencing
3 of dangerous offenders, read:

4 (1) Subject to the provisions of ORS 161.737, the maximum term of an indeterminate sentence of
5 imprisonment for a dangerous offender is 30 years, *if the court finds* that because of the
6 dangerousness of the defendant an extended period of confined correctional treatment or custody is
7 required for the protection of the public and *if it further finds*, as provided in ORS 161.735, that one
8 or more of the following grounds exist: (emphasis added).

9 And, ORS 137.122 (4) Concurrent and consecutive sentences; court discretion; findings required,
10 read:

11 (4) The *court has discretion* to impose consecutive terms of imprisonment for separate convictions
12 arising out of a continuous and uninterrupted course of conduct only *if the court finds*: (a) The
13 criminal offense for which a consecutive sentence is contemplated was not merely an incidental
14 violation of a separate statutory provision in the course of the commission of a more serious crime;
15 or (b) The criminal offense for which a consecutive sentence is contemplated *caused or created a*
16 *substantial risk of causing greater or qualitatively different loss, injury or harm to the victim or*
17 *caused or created a substantial risk of causing loss, injury or harm to a different victim than was*
18 *caused or threatened by the other offense or offenses committed during a continuous and*
19 *uninterrupted course of conduct.* (emphasis added).

20 As shown in both these statutes make the trial court alone the factfinder of facts of
21 elements of the crimes that were not found in the juries guilty verdicts thus are unconstitutional.
22 A statute, if unconstitutional, would be void and the conviction a nullity ab initio, see
23 *Montgomery v. Louisiana*, 136 S. Ct. 718, 731, 732, 193 L. Ed. 2d 599 (2016), citing *Ex parte*
24 *Siebold*, 100 U.S. 371, 376-77, 25 L.Ed. 717 (1880):

25 the Court addressed why substantive rules must have retroactive effect regardless of when the
26 defendant's conviction became final. At the time of that decision, "[m]ere error in the judgment or
27 proceedings, under and by virtue of which a party is imprisoned, constitute[d] no ground for the
28 issue of the writ." Before *Siebold*, the law might have been thought to establish that so long as the
29 conviction and sentence were imposed by a court of competent jurisdiction, no habeas relief could
30 issue. In *Siebold*, however, the petitioners attacked the judgments on the ground that they had been
31 convicted under unconstitutional statutes. The Court explained that if "this position is well taken, it
32 affects the foundation of the whole proceedings." A conviction under an unconstitutional law "is
33 not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. It is true,
34 if no writ of error lies, the judgment may be final, in the sense that there may be no means of
35 reversing it. But . . . if the laws are unconstitutional and void, the Circuit Court acquired no
36 jurisdiction of the causes." As discussed, the Court has concluded that the same logic governs a
37 challenge to a punishment that the Constitution deprives States of authority to impose. *Penry*, *supra*,
38 see also *Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, ("Broadly
39 speaking, the original sphere for collateral attack on a conviction was where the tribunal lacked
40 jurisdiction either in the usual sense or because the statute under which the defendant had been
41 prosecuted was unconstitutional or because the sentence was one the court could not lawfully
42 impose" (footnotes omitted)). A conviction or sentence imposed in violation of a substantive rule is
43 not just erroneous but contrary to law and, as a result, void. It follows, as a general principle, that a

1 court has no authority to leave in place a conviction or sentence that violates a substantive rule,
2 regardless of whether the conviction or sentence became final before the rule was announced.
3 (Citations omitted)

4 As shown below in 1989 when the Petitioner was sentenced in these cases the Court of
5 Appeals of the State of Oregon had already declared the statute of the Dangerous Offender Act
6 unconstitutional because it made the trial court the factfinder instead of the jury, then twice since
7 ruled dangerous offender statute violated the rule of law announced by this Court in *Appendi v.*
8 *New Jersey* and *Blakely v. Washington*. See the following; *State v. Mitchell*, 84 Or. App. 452,
9 734 P.2d 379 (1987):

10 Or. Rev. Stat. § 161.735 provides that the trial court, rather than the jury, determines if a defendant
11 falls within the Dangerous Offender Act. That authorizes an enhanced penalty based in part on a
12 determination of the existence of an element of the crime that the jury did not necessarily find and
13 violates defendant's right to trial by jury under Or. Const. art. I, § 11. *The statute is*
14 *unconstitutional insofar as it makes the trial court the factfinder whether the crime seriously*
15 *endangered the life or safety of another.* (emphasis added).

16 Also; *State v. Williams*, 197 Ore. App. 21, 104 P.3d 1151 (2005):

17 The imposition of a 30-year dangerous offender sentence on a defendant based on a finding that
18 the defendant suffers from a severe personality disorder indicating a propensity toward crimes that
19 seriously endanger the life or safety of another, Or. Rev. Stat. § 161.725, violates the rule of law
20 announced in *Appendi v. New Jersey* and *Blakely v. Washington* that, other than the fact of a
21 prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory
22 maximum must be submitted to a jury, and proved beyond a reasonable doubt.

23 And, *State v. Warren*, 195 Ore. App. 656, 98 P.3d 1129 (2004), rev. den., 340 Ore. 201, 131 P.3d
24 195 (2006):

25 for the following proposition: "Dangerous offender sentences in excess of the prescribed statutory
26 maximum sentence that otherwise would apply run afoul of *Blakely v. Washington*, and *Appendi*
27 *v. New Jersey*, because such enhanced sentences are based on judicial findings of fact rather than
28 on facts found by the jury or admitted by the defendant." *Gildersleeve*, We affirm defendants
29 convictions and remanded for resentencing, without addressing defendant's other arguments
30 regarding his sentence. (Citations omitted).

31 On January 12, 2016, this Court clarified once more in *Hurst v. Florida*, 136 S. Ct. 616,
32 193 L. Ed. 2d 504 (2016):

33 *Id.* 621, 193 L.Ed.2d 504:

34 The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to
35 a speedy and public trial, by an impartial jury ***." This right, in conjunction with the Due
36 Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable
37 doubt. *Alleyne v. United States*, ***. In *Appendi v. New Jersey*, ***, this Court held that any fact
38 that "expose(s) the defendant to a greater punishment than that authorized by the jury's guilty
39 verdict" is an "element" that must be submitted to a jury. In the years since *Appendi*, we have

1 applied its rule to instances involving plea bargains, Blakely v. Washington, ***, sentencing
2 guidelines, United States v. Booker, ***, criminal fines, S. Union Co. v. United States, ***,
3 mandatory minimums, Alleyne, ***, and, in Ring, ***, capital punishment.

4 Id. 623, 624, 193 L.Ed.2d 504:

5 The State next argues that stare decisis compels us to uphold Florida's capital sentencing scheme.
6 As the Florida Supreme Court observed, this Court "repeatedly has reviewed and upheld Florida's
7 capital sentencing statute over the past quarter of a century." Bottoson v. Moore, *** (per curiam)
8 (citing Hildwin, ***, Spaziano, ***. "In a comparable situation," the Florida court reasoned, "the
9 United States Supreme Court held:

10 'If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected
11 in some other line of decisions, the [other courts] should follow the case which directly controls,
12 leaving to this Court the prerogative of overruling its own decisions.'" Bottoson, *** (quoting
13 Rodriguez de Quijas v. Shearson/American Express, Inc., ***).

14 We now expressly overrule Spaziano and Hildwin in relevant part.

15 Spaziano and Hildwin summarized earlier precedent to conclude that "the Sixth Amendment does
16 not require that the specific findings authorizing the imposition of the sentence of death be made
17 by the jury." Hildwin, ***. Their conclusion was wrong, and irreconcilable with Apprendi.
18 Indeed, today is not the first time we have recognized as much. In Ring, we held that another pre-
19 Apprendi decision-Walton, *** - could not "survive the reasoning of Apprendi." ***. Walton, for
20 its part, was a mere application of Hildwin's holding to Arizona's capital sentencing scheme. ***.

21 "Although 'the doctrine of stare decisis is of fundamental importance to the rule of law[.]" . . .
22 [o]ur precedents are not sacrosanct.' . . . '[W]e have overruled prior decisions where the necessity
23 and propriety of doing so has been established.'" Ring, *** (quoting Patterson v. McLean Credit
24 Union, ***. And in the Apprendi context, we have found that "stare decisis does not compel
25 adherence to a decision whose 'underpinnings' have been 'eroded' by subsequent developments
26 of constitutional law." Alleyne, ***; see also United States v. Gaudin, *** (overruling Sinclair v.
27 United States, ***; Ring, *** (overruling Walton, ***; Alleyne, *** (overruling Harris v. United
28 States, ***.

29 Time and subsequent cases have washed away the logic of Spaziano and Hildwin. *The decisions*
30 *are overruled to the extent they allow a sentencing judge to find an aggravating circumstance,*
31 *independent of a jury's factfinding,* that is necessary for imposition of the death penalty.

32 Id. 624, 193 L.Ed.2d 504:

33 The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida
34 to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding. Florida's
35 sentencing scheme, *which required the judge alone to find the existence of an aggravating*
36 *circumstance, is therefore unconstitutional.* (Citations omitted)(Emphasis added).

37 The *Hurst* court was the last in a line of cases that explain a law (statute) that allowed the
38 sentencing judge to be the factfinder instead of the jury is unconstitutional and void, which is a
39 substantive rule of constitutional law that can be collaterally attacked. That decision overruled
40 prior decisions, i.e., Spaziano and Hildwin because it allowed the court to find aggravating
41 circumstance's. ORS 137.122 (4)(b) reads; "The criminal offense for which a consecutive
42 sentence is contemplated caused or created a substantial risk of causing greater or qualitatively
43 different loss, injury or harm to the victim or caused or created a substantial risk of causing loss,
44 injury or harm to a different victim than was caused or threatened by the other offense or
45 offenses committed during a continuous and uninterrupted course of conduct", which clearly are

1 aggravating circumstance's, thus *Oregon v. Ice*, 129 S. Ct. 711, 172 L. Ed. 2d 517, 2009 U.S.
2 LEXIS 582 (U.S., 2009) should also be overruled.

3 Then on January 25, 2016, in *Montgomery v. Louisiana*, 136 S. Ct. 718, 731, 732, 193 L.
4 Ed. 2d 599 (2016), this Court also explained under the Supremacy Clause of the Constitution,
5 when the Constitution establishes a rule that requires retroactive application, if a state court's
6 refusal to give the rule retroactive effect it is reviewable by this Court. Plus States may not
7 disregard a controlling, constitutional command in their own courts, and when a State has not
8 placed any limit on the issues that it will entertain in collateral proceedings . . . it has a duty to
9 grant the relief that federal law requires. In adjudicating claims under its collateral review
10 procedures a State may not deny a controlling right asserted under the Constitution, assuming the
11 claim is properly presented in the case. Which the Oregon Supreme Court did not do in this case.

12 Filing a Petition for Writ of Habeas Corpus to the Supreme Court of the State of Oregon
13 is a valid way to collaterally attack an unconstitutional statute. As shown in *State v. Dixon*, 238
14 Ore. 121, 393 P.2d 204 (1964) Under Oregon law, a sentence may also be attacked at any time if
15 it is imposed under an unconstitutional statute. Also, *Drew v. Thaw*, 59 L. Ed. 302, 235 U.S. 432
16 (1914) The judgment of any state court, based upon a statute which is in contravention of the
17 Constitution of the United States, is a nullity and is open to attack, either by direct proceedings
18 or collaterally.

19 Even in the pre-1953 era of restricted federal habeas, however, an exception was made
20 "when the habeas petitioner attacked the constitutionality of the state statute under which he had
21 been convicted. Since, in this situation, the State had no power to proscribe the conduct for
22 which the petitioner was imprisoned, it could not constitutionally insist that he remain in jail."
23 *Montgomery, supra*, at 730, 193 L. Ed. 2d 599.

24 The Petitioner asserts miscarriage of justice under federal and state law occurred when
25 Martha L. Walters, Chief Justice, Oregon Supreme Court, denied the petition for writ of habeas

1 corpus, did not void illegal sentence's as mandated by this Court numerous times. The decision
2 entered by Chief Justice Walters is in direct conflict with decision's of this Court in *Ex parte*
3 *Siebold*, 100 U.S. 371, 376-77, 25 L.Ed. 717 (1880) (The judgment of any state court, based
4 upon a statute which is in contravention of the Constitution of the United States, is a nullity and
5 is open to attack, either by direct proceedings or collaterally.); *Apprendi v. New Jersey*, 530 U.S.
6 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (This Court has held that only a jury, and
7 not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior
8 conviction.); *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)
9 (which involved state criminal statutes, the court held, pursuant to the Constitution's Sixth
10 Amendment right to a jury trial, that other than the fact of a prior conviction, any fact that
11 increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to
12 a jury and proved beyond a reasonable doubt.); *Hurst v. Florida*, 136 S. Ct. 616, 193 L. Ed. 2d
13 504 (2016) (held that process, "which required the judge alone to find the existence of an
14 aggravating circumstance," to be unconstitutional.); and *Montgomery v. Louisiana*, 136 S. Ct.
15 718, 193 L. Ed. 2d 599 (2016) (Substantive rules, then, set forth categorical constitutional
16 guarantees that place certain criminal laws and punishments altogether beyond the State's power
17 to impose. It follows that when a State enforces a proscription or penalty barred by the
18 Constitution, the resulting conviction or sentence is, by definition, unlawful.).

19 Plus the decision is in direct conflict with the following Oregon State cases, *State v.*
20 *Mitchell*, 84 Or.App. 452, 734 P.2d 379 (1987) (The statute is unconstitutional insofar as it
21 makes the trial court the factfinder whether the crime seriously endangered the life or safety of
22 another.); *State v. Warren*, 195 Ore.App. 656, 98 P.3d 1129 (2004) (dangerous offender
23 sentencing based upon judicial factfinding violates Sixth Amendment); *Pederson v. Patterson*,
24 124 Ore. 105;258 P. 204 (1927). (Statute which contravenes Constitution is invalid from time of
25 enactment, and judicial decision declaring it unconstitutional is only for purpose of declaring

1 pre-existing fact.); and *State v. Williams*, 197 Ore. App. 21, 104 P.3d 1151 (2005). Or. Rev. Stat.
2 § 161.725, violates the rule of law announced in *Apprendi v. New Jersey* and *Blakely v.*
3 *Washington* that, other than the fact of a prior conviction, any fact that increases the penalty for a
4 crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond
5 a reasonable doubt.

6 This case also effects numerous other indigent, i.e., pro se prisoners in the Oregon
7 judicial system, who collaterally attack use of unconstitutional statutes in imposing consecutive
8 sentence's and dangerous offender sentence's. The courts routinely issue a denial, without
9 addressing the issues of law or facts properly before them and writing a decision based on case
10 law presented to them.

11 **CONCLUSION**

12 The petition for a writ of certiorari should be granted.

13 Respectfully submitted,

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Robert Allen DeVore, Petitioner, pro se

15 Dated: December 28, 2018.