19-6385

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

NEIL GRENNING,

Petitioner,

vs.

JAMES KEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1

Mr. Grenning's life sentence upon post-trial allegation of aggravating elements raises a significant issue: Integrity of appeals that circumvent Supreme Court authority on the Sixth Amendment right to Notice by use of 'straw man' arguments. Grenning was sentenced to 116 years using aggravators he received no notice of before trial, as only after trial ended did the State allege them. The habeas court ruled he had no right to receive aggravators in the charging document, recharacterizing the ground to a narrower 'federal indictment clause' claim Grenning never made. Did the Ninth Circuit Court of Appeal's summary denial of Certificate of Appealability subject Grenning to a stricter standard than prescribed by the Supreme Court, when jurists of reason could disagree with the district court using a 'straw man' to knock down an appeal of a cornerstone Constitutional right?

2

Mr. Grenning's case raises a substantial question on the scope of Oregon v. Ice, when Washington and several other states paint this Court's ruling more broadly that its language holds: Does Oregon v. Ice grant as exempt from the Sixth Amendment right to jury trial all facts used for consecutive sentencing? Or is it the 'narrow exception' described by Justice Gorsuch in United States v. Haymond, and not applicable to consecutive sentencing that creates 'above-standard-range' discrete sentences? Washington's scheme, by statute, authorities, and in the record, is a "sentence above the standard range for each of the defendant's convictions." Did summary denial of COA by the Ninth Circuit subject Grenning to an unduly burdensome standard for granting COA, when jurists of reason could debate removing from the jury determination of facts supporting above-standard-range consecutive sentences, and the claim deserves encouragement to proceed further on appeal?

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PETITION FOR WRIT OF CERTIORARI

Neil Grenning respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The July 22, 2019, opinion of the Court of Appeals denying reconsideration en banc is unpublished and attached to this petition as Appendix A. The April 25, 2019, panel opinion of the Court of Appeals denying Mr. Grenning a Certificate of Appealability (COA) is unpublished and attached as Appendix B. The August 8, 2018, Order and Memorandum of the United States District Court for the Western District of Washington adopting the Report and Recommendation to deny Mr. Grenning's Petition for Writ of Habeas Corpus is unreported, available at Greening v. Key, 2018 U.S.Dist. LEXIS 133792 (Aug. 8, 2018), and attached as Appendix C.[1] The May 8, 2018, Report and Recommendation of the Western District Court to deny Writ of Habeas Corpus is available at Grenning v. Key, 2018 U.S.Dist. LEXIS 134647 (May 8, 2018), and attached as Appendix D.

JURISDICTION

The Court of Appeals entered its judgment on July 22, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

1 The District Court filed this decision as "Greening" instead of "Grenning," an error carrying over to the electronic database reporting.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a state criminal defendant's constitutional rights under the Fifth, Sixth and Fourteenth Amendments. The Fifth Amendment provides in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...nor shall any person...be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right...to be informed of the nature and cause of the accusation...and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment provides in relevant part:

> No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the application of 28 U.S.C. § 2253(c), which states:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;
>
> . . .
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

A. Introduction

In Mr. Grenning's case the habeas court departed drastically from accepted core rulings by the United States Supreme Court, and the Court of Appeals sanctioned that departure when it denied COA. He remains sentenced to 50 aggravated offenses he never went to trial on, the use of post-trial allegation of aggravating 'factors' used to give him 116 years instead of the standard range 26 year sentence.

Seven current members of this Court have authored or joined numerous decisions upholding the Sixth Amendment right to be informed of the nature of charges so a defendant may prepare his defense, and of that Amendment's grant of the right to a jury trial on any factor that would aggravate his sentence above the standard range.

The late Justice Antonin Scalia steadfastly trumpeted the importance of these rights throughout his tenure on the Court, rights that Justice Gorsuch recently reiterated in the strong language of United States v. Haymond, No. 17-1672 (June 26, 2019).

When the State alleged aggravating elements (to the jury's verdict on base offenses) well after trial ended, and there was no further opportunity to present evidence to a jury or hear witnesses, the state court in place of the jury entered findings of guilt on the aggravators. It then sentenced him to a de facto life sentence of 116 years, or more than four times the top of the standard range of 318 months, predicated on those aggravators.

Faced with these indisputable facts, the habeas court simply altered the petitioner's ground, adopting a 'straw man' argument to deny Grenning rights

this Court has unambiguously championed.

After denying habeas and COA, the Appellate Court denied both COA and En Banc review with summary denial orders.

B. State court trial

In 2002 Mr. Grenning, who had no criminal history, was charged at age 24 with 50 offenses relevant to this appeal. Each charge was based on separate pictures recovered from his computer. Forty of the charges relate to images showing him engaging one boy in acts of sexual misconduct, (most of the charges for taking of the pictures, and the rest for the conduct itself). Ten of the charges relate to a different boy in a separate situation.

The sequence of court events is not disputed by any party: the State filed its final version of charges on 6-07-2004, the day before trial. The 50 charges were base offenses, and contained no allegation of aggravating elements.[2] No other notice was filed in any fashion before trial. See Appendix F, Traverse, p.4-5.

Trial began 6-08-2004 and lasted two weeks. Appendix F, p.5.

Nearly two months after trial ended, the State filed on 8-13-2004 a notice of intent to seek an exceptional sentence above the standard range, and alleged a number of aggravating factors that all related to the offenses. Appendix F, p.5. Defense counsel Kawamura objected to the lack of pretrial notice in that it deprived him of soliciting evidence at trial in defense: "[T]here would have been additional pieces of evidence that I likely would have introduced [at

2 A fifty-first charge of assault, not relevant to this appeal, charged also 'sexual motivation' as an aggravator to that solitary charge, but which was not alleged on any of the remaining 50 charges, which had no aggravating elements.

trial]." He exampled the 'position of trust' post-trial allegation, saying "there could have been an argument made that the...victim's mother in this case[, that] there was not a position of trust. She barely knew this defendant and left the child. And I certainly would have pursued that. But obviously, you know, we couldn't know then [at trial] what's occurred [filing of post-trial aggravators]." Appendix E, p.5.

Rather than vacate the trial to preserve the due process right to present a defense to the now aggravated charges, the trial court entered its own findings in place of the jury. Appendix E, p.8; Appendix F, p.15-16. The judge made findings that (1) defendant's conduct was more egregious than in other cases, (2) the standard range sentence was 'clearly too lenient,' (3) multiple offenses made the standard range sentence 'clearly too lenient,' and (4) multiple offenses made the conduct more egregious. Appendix E, p.8; Appendix F, p.15-16. These findings allowed aggravation of each charge above the standard range pursuant to RCW 9.94A.589(1)(a) and 9.94A.535. Appendix F, p.17-18.

The court declared Grenning's sentence was outside (above) the standard range:

> There are substantial and compelling reasons to impose an exceptional sentence above the standard range for each of the defendant's convictions.

Appendix F, p.8 (quoting from court's findings). The Judgment and Sentence further imposed an "Exceptional sentence...above the standard range for all counts." Appendix F, p.18. The statutes under which Grenning was sentenced rely on aggravating elements to impose "an exceptional sentence", defined as "a sentence outside the standard range". RCW 9.94A.535; 9.94A.589(1)(a); see also: Appendix F, p.18.

Thus, even though RCW 9.94A.589(1)(a) allows the aggravated sentence to be accomplished either by giving more time to discrete charges, or by running multiple charges consecutively, the purpose is to effect a sentence above the standard range for each charge. The statute removed judicial discretion to impose consecutive sentences without finding an above-standard-range sentence is warranted. The ability to give consecutive sentences where each count is still deemed within the standard range (like the statute in Oregon v. Ice[3]) only applies to "serious violent offenses". RCW 9.94A.589(1)(b). Mr. Grenning's are not 'serious violent offenses' (i.e., murder, first degree assault - RCW 9.94A.030(46)).

The standard range sentence for all crimes Grenning was convicted of by a jury was a maximum of 318 months. Appendix E, p.6 and 8; Appendix F, p.5. Judicially found aggravating elements ballooned this to an "above the standard range" sentence of 1404 months for all (and each) of the counts (later reduced to 1392 months). Id.

C. Habeas proceedings

1. Notice issue

Grenning filed habeas raising the issue "The State gave no notice of aggravated charges". Appendix E, p.6; Appendix F, p.6 ("'no notice' before trial, regardless of by what means"). He "received no notice [of the aggravators]—such that he could prepare a defense—until after trial". Appendix F, p.4.

Despite this clear statement, the State recharacterized his issue as an

3 Oregon v. Ice, 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517 (2009)

'indictment clause' claim, that the aggravating elements were "required to be alleged in the charging document" as opposed to a different document "at a later time." Appendix F, p.6. The State obscured the fact that the 'later time' implied was in fact after trial, on 8-13-2004.

Adopting the State's straw man, the magistrate's Report and Recommendation said Grenning's claim was "The State failed to provide Petitioner with notice that it intended to seek an exceptional sentence in the charging document." Appendix D, p.7 and 18. He recommended dismissal: "Petitioner fails to show the State was required to provide notice in the Fifth Amended Information that it intended to seek or that it was required to provide notice in the Fifth Amended Information of the factors which would be argued to impose an exceptional sentence in the Fifth Amended Information. [sic]" and "Petitioner has not shown, nor does this Court find, Petitioner's constitutional right to receive notice of the charges against him was violated when the State failed to inform Petitioner in the charging document that it intended to seek an exceptional sentence." Appendix D, p.22.

The court's repeated emphasis on 'the Fifth Amended Information' obscured the fact the claim was Grenning received no notice before trial of aggravating elements at all, and it compounded the straw man by reliance on the unpublished case, Brady v. Miller-Stout, 2013 U.S.Dist. LEXIS 122156 (W.D.Wash. Aug 27, 2013), a strictly 'indictment clause' claim, and not a notice of 'nature and cause' of accusation before trial claim.

The recommendation was adopted by the judge, who also denied COA. Appendix C, p.4-5.

Grenning applied for COA with the Ninth Circuit, both demonstrating the straw man error, and giving myriad U.S. Supreme Court and federal cases

analogous to his (overturned for failure to give notice before trial of aggravating elements). Appendix G, p.3-6. The Ninth Circuit denied COA without explanation in a summary order. Appendix B.

Grenning sought reconsideration and en banc review (Appendix H), and received another summary denial order. Appendix A.

2. Right to jury trial issue

In Ground 2 Grenning claimed, "After trial on the base offenses, the court entered findings in support of an exceptional sentence outside the standard range...[based] on the State's post-trial allegation of aggravating elements". Appendix E, p.8. These aggravating elements were (1) defendant had two victims, making his conduct more egregious: finding XIV; (2) the standard range sentence was 'clearly too lenient': finding XV; (3) the multiple offenses against each victim made his standard range sentence 'clearly too lenient': findings XVI, XVII, XVIII, XX, XXI and XXII; and (4) defendant's multiple offenses were more egregious than typical: findings XXIII, XXIV, XXV, XXVI, XXVII and XXVIII. Appendix E, p.8; Appendix F, p.14.

Without any evidence to support it, the State's counterclaim was, "Although Grenning's sentence is referred to as an 'exceptional sentence,' none of the individual terms of his total sentence exceeded the statutory guidelines range for the particular offense." Appendix F, p.17.

The state court's judicial findings repeatedly declare a "standard range sentence was 'clearly too lenient'" because Washington's RCW 9.94A.598(1)(a) is to effect an above-standard-range sentence for each offense, even if that operation is achieved by running multiple offenses consecutively. This is borne out by language of the statute, unanimous state authorities (one which

expressly says Blakely[4] and Apprendi[5] concerns are triggered by RCW 9.94A. 589(1)(a) because it is a sentence outside the standard range), and by repeated language in the sentencing operation:

> There are substantial and compelling reasons to impose an exceptional sentence **above the standard range for each of the defendant's convictions.**

Appendix F, p.18 (emphasis added). The Judgment and Sentence imposed an "Exceptional sentence...above the standard range for all counts". Appendix F, p.18.

Oregon v. Ice[3] allows consecutive sentencing without running afoul of the Sixth Amendment right to jury trial, but only because in Oregon each sentence was a standard range one, and not already increased by a sentencing scheme unique to Washington. In Washington, the sentencing range for each offense is driven up by the multiplicity of offenses (Grenning's standard range went from a max of 123 months, to 318 months, RCW 9.94A.525 and 9.94A.510), which is not the case in Oregon. Thus, Oregon's consecutive sentencing scheme is standard range, non-elevated discrete sentences; Washington's is above-standard-range for each count because it is aggravating the charges above the already elevated standard ranges.

Grenning showed there was no support for the theory his were merely consecutive standard range sentences. Appendix F, p.17-23.

Citing pre-Blakely/Apprendi era authority and California cases that were standard range sentences[6], the magistrate judge recommended dismissal saying,

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4 Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)

5 Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)

6 Cacoperdo v. Demosthenes, 37 F.3d 504 (9th Cir. 1994); Colon v. Hedgepeth, 2010 U.S.Dist. LEXIS 43125 (E.D.Cal. 2010)

"Petitioner was sentenced within the standard range for each conviction" and "not sentenced above the statutory maximum for each crime as set by the legislature". Appendix D, p.25-26. The court did not address any Washington distinctions, or acknowledge unanimous authority that sentencing under RCW 9.94A.589(1)(a) is above-standard-range.

The judge adopted the magistrate's recommendation, and also denied COA. Appendix C, p.6.

Grenning applied for COA from the Ninth Circuit, showing the district court error of conflating Washington's non-standard-range consecutive sentencing scheme with Oregon's strictly discretionary standard-range consecutive sentences, and supported it with U.S. Supreme Court and federal authorities. Appendix G, p.6-8. The court denied COA without explanation in a summary denial order. Appendix B.

Reconsideration and en banc review was denied by a similar summary denial order. Appendix A.

REASONS FOR GRANTING THE WRIT

The Court of Appeals panel's summary denial contravened this Court's precedent, denying COA on a stricter standard than prescribed by the Supreme Court's guidance.

Faced with overwhelming precedent for the right to notice of the elements of the offense so he could prepare a defense, the district court created a straw man: the court ignored all pleas for "notice before trial," recharacterizing Grenning's claim as a 'federal indictment clause' claim they knew could be knocked down.

The facts were undisputed: he went to trial accused of base offenses (no aggravating elements) on 6-08-2004; after trial the State charged the aggravators on 8-13-2004; Grenning was sentenced to the now aggravated offenses on 10-22-2004; at no point could he solicit more evidence to defend against aggravation, as trial was long over.

The merit of the claim was obvious on the face of these facts. The only way to deny COA was adopt wholesale the straw man: the 'indictment clause' claim Grenning never made.

Oregon v. Ice was to be a 'narrow exception' to the Blakely/Apprendi line of authority. United States v. Haymond, No. 17-1672 (June 26, 2019) at Slip op. 9, footnote 3. It was not an exception adopted to sanction all consecutive sentencing, but only consecutive sentencing that concerned standard-range discrete sentences, like Oregon's. Washington's are above-standard-range consecutive sentences, as declared by its own unanimous authorities and statutes. A critical distinction, this 'deserved encouragement to proceed further,' a relatively low threshold easily met by Grenning's claim.

Denying COA cast aside this Court's repeated rulings that aggravating elements which subject a defendant to greater punishment for an offense (no matter what the State labels them) must go before a jury. Nothing in the record refers to Grenning's consecutive sentences as standard range, and in fact critically claim each charge received above-standard-range sentencing. It subjected him to exponentially more punishment than permitted by statute.

This is precisely the harm Justice Scalia warned, "The jury's role is diminished when the length of a sentence is made to depend upon a fact removed from its determination." Oregon v. Ice, 555 U.S. 160, at 176 (dissent by Scalia, citing Apprendi v. New Jersey, 530 U.S. 466, at 482-83).

Denying COA imposed a higher bar than the 'encouragement to proceed further' established by this Court for its granting. How broadly Oregon v. Ice should be read is an important question which the Court of Appeals summarily dismissed.

For all these reasons, and those discussed more fully herein, certiorari should be granted.

I. Ceriorari should be granted because reasonable jurists could unquestionably debate the extraordinary rulings of the district court both on right to notice and right to a jury trial

This Court's precedent is clear: a COA involves only a threshold analysis and preserves full appellate review of potentially meritorious claims. Thus, "a prisoner seeking a COA need only demonstrate 'a substantial showing'" that the district court erred in denying relief. Miller-El v. Cockrell, 537 U.S. 322, 327, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003)(quoting Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000) and 28 U.S.C. § 2253

(c)(2)). This "threshold inquiry" is satisfied so long as reasonable jurists could either disagree with the district court's decision or "conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El, 537 U.S., at 327 and 336; Barefoot v. Estelle, 430 U.S. 880, 893, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983). A COA is not contingent upon proof "that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though jurists of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." Miller-El, at 338.

In sum, the touchstone is "the debatability of the underlying constitutional claim [or procedural issue], not the resolution of the debate." Id., at 342 and 348 (Justice Scalia concurring)(recognizing that a COA is required when the district court's denial of relief is not "undebatable").

Applying the standard in Barefoot v. Estelle, this Court reversed the Ninth Circuit's summary denial of COA where it "did not cite or analyze" a line of authorities that clearly demonstrated the issue "could be resolved in a different manner than the one followed by the District Court." Lozada v. Deeds, 498 U.S. 430, 432, 111 S.Ct. 860, 112 L.Ed.2d 956 (1991).

The Court of Appeal's summary denial of COA likewise failed to cite or analyze the numerous cases Grenning provided, both on the impropriety of using a straw man to dispose of valid issues, and the violation of the Sixth Amendment's right "to be informed of the nature and cause of the accusation" by judicial aggravation of his sentence on aggravating elements he was given notice of only after trial, depriving him of the ability to prepare a defense to them.

A. The panel improperly denied COA when no authority supported giving notice of criminal charge elements only after trial is over

1. Core Supreme Court rulings

Importance of the opportunity to present a defense through notice of what one must defend against is a cornerstone of this Court's historical rulings. "The Sixth Amendment guarantees the accused in all criminal prosecutions the right to...notice of the 'nature and cause of the accusation'...and to the 'assistance of counsel.'" Herring v. New York, 422 U.S. 853, 856-57, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975). "It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes denial of due process... a person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend." Jackson v. Virginia, 433 U.S. 307, 314, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). "[A]n accusation which lacks any particular facts which the law makes essential to the punishment is...no accusation within the requirements of the common law, and is no accusation in reason.'" Southern Union Co. v. United States, 567 U.S. 343, 132 S.Ct. 2344, 183 L.Ed.2d 318, 331 (2012)(quoting Blakely, 542 U.S. 296, at 301-02); United States v. Haymond, No. 17-1672 (June 26, 2019) at Slip op. 6. The notice before trial must "'contain an averment of every particular thing which enters into the punishment.'" Southern Union, 183 L.Ed.2d, at 331 (quoting Apprendi, 530 U.S. 466, at 510-11).

The right to offer the testimony of witnesses...is in plain terms the right to present a defense... This is a fundamental element of due process of law." Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). Notice "'enabled [the defendant] to determine the species of offense'

with which he was charged 'in order that he may prepare his defense accordingly...and that there may be no doubt as to the judgment which may be given, if the defendant be convicted.'" Alleyne v. United States, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314, 326 (2013)(quoting Apprendi's concern of the ability to understand consequences "from the invariable linkage of punishment with crime." 530 U.S., at 478).

Regardless of how the State chooses to inform the defendant, "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard at trial,...are among the constitutional rights of every accused in a criminal proceeding **in all courts, state or federal.**" Cole v. Arkansas, 333 U.S. 196, 201, 68 S.Ct. 514, 92 L.Ed. 644 (1948)(emphasis added).

2. Ninth Circuit was aware of 'Notice' authority even while it adopted the straw man of an 'indictment clause' claim in Grenning's case

The Ninth Circuit extensively reviewed Supreme Court notice holdings and said, "to satisfy the 6th Amendment, 'an information must state the elements of an offense charged with sufficient clarity to apprise a defendant of what he must be prepared to defend against.'" Gautt v. Lewis, 489 F.3d 993, 1002-03 (9th Cir. 2007)(citing Cole and Russell v. United States, 369 U.S. 749, 763-64, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962)). The Seventh Circuit wrote the holding of Cole applies "no matter how a state chooses to charge a criminal defendant". Bae v. Peters, 950 F.2d 469, 478 (7th Cir. 1991).

These rulings don't speak to the federal 'indictment clause' requirement, but the Sixth Amendment 'nature and cause' notice requirement so a defendant

can prepare a defense.

The elements required by notice in Apprendi and Southern Union are not circumvented by renaming them 'sentencing factors.' "[I]f the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact...the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime." Apprendi, 147 L.Ed.2d, at 462 (concurring opinion of Thomas and Scalia); Ring v. Arizona, 536 U.S. 584, 605, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This definition of elements applies "no matter how the state labels it". Ring, at 602; understood by Ninth Circuit in Webster v. Woodford, 369 F.3d 1062, 1068 (9th Cir. 2004).

RCW 9.94A.589 prohibits Grenning's sentence from exceeding 318 months for the 50 non-aggravated offenses of which he was charged and went to trial on. Post-trial notice of aggravating 'factors' stood to 'increase the punishment... upon a finding of some aggravating fact' (Ring, at 605), making them 'elements of the offense Grenning was entitled to notice of before trial.' Southern Union, 183 L.Ed.2d, at 333 (describing as error the belief there is a constitutionally significant difference between an "element" and a "sentencing factor").

3. Ninth Circuit cases applying Supreme Court's authority in cases like Grenning's

The Ninth Circuit consistently applied notice authorities to cases with fact patterns indistinguishable from Grenning's.

Mr. Guatt's sentence was increased from '10 to life' to '25 to life' on

the theory he "discharged the hadgun intentionally"; the prosecutor did not mention the aggravating element until closing arguments. Gautt v. Lewis, 489 F.3d at 1014-16 and 1002-03. The court ruled "if a defendant does not receive notice of a charge through a charging document **or some other means**, the conviction must be reversed." Id., at 1014 (emphasis added). Closing arguments "cannot itself serve as the requisite notice of the charged conduct, coming as it does after the defendant has settled on a defense strategy and put on his evidence." Id., at 1010 (emphasis in original).

Mr. Jordan's "life sentence was imposed in violation of Apprendi" when the government failed to allege a drug quantity greater than 50 grams, an allegation made after trial in a presentence report. United States v. Jordan, 291 F.3d 1091, 1093-94 (9th Cir. 2002). "[B]ecause Jordan had no notice...quantity would be an issue at trial" the court applied Apprendi's notice requirements and said it was only speculation "[w]hat evidence might have been proffered by Jordan in a defensive effort to minimize [if he'd been] properly charged the quantity involved in the offense". Id., at 1096-97.

A similar issue affected Mr. Hunt's ability to defend when he was never given notice he would be subjected to "heightened sentencing provisions for drug type." United States v. Hunt, 656 F.3d 906, 912 (9th Cir. 2011). The court said it's possible Hunt "could have presented expert testimony to counter the opinions of [the detective]", or "cross-examined...civilian and government witnesses", or even "decided to testify to tell his side of the story" if he'd known the claim was 'cocaine' and not a 'controlled substance.' Id., at 916.

In a case echoing the frustration of Grenning's lawyer at not being able to raise defenses for lack of notice, Mr. Sheppard's "prosecutor 'ambushed' the defense with a new theory of culpability after the evidence was already in,

after both sides had rested, and after the jury instructions were settled." Sheppard v. Rees, 909 F.2d 1234, 1237 (9th Cir. 1989). "This new theory [felony murder predicated on robbery] was neither subject to adversarial testing, nor defined in advance of the proceeding". Id. Citing to Cole v. Arkansas, the court ruled:

> Defense counsel would have added an evidentiary dimension to his defense designed to meet the felony-murder theory had he known at the outset what he was up against.
> . . .
> The defendant had no opportunity to present his own evidence on felony-murder to refute that of the prosecution.
> . . .
> Moreover, the right to counsel is directly implicated. That right is next to meaningless unless counsel knows and has a satisfactory opportunity to respond to charges against which he or she must defend.

Sheppard, 909 F.2d at 1237.

When Grenning's lawyer told the court, "there would have been additional pieces of evidence that I likely would have introduced [at trial]", his frustration is the same as Sheppard's attorney. Kawamura was never notified by any means before trial he would have to defend against how egregious crimes were compared to other cases (thus affecting whether a standard range sentence was too lenient). It cuts to the core of Justice Black's concern that "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." Cole, 333 U.S., at 201.

Justice Thomas reaffirmed this core principle when he wrote the factors

allowing greater sentence "conclusively indicates that the fact is an element of a distinct and aggravated crime." Alleyne v. United States, 570 U.S. ___, 133 S.Ct. 2151, 186 L.Ed.2d 314, 329 (2013)(joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan). "[E]very fact that was a basis for imposing or increasing punishment" Justice Thomas wrote on the history of the rule "must be charged..."enabl[ing the defendant] to determine the species of the offense' with which he was charged 'in order that he may prepare his defense accordingly...and that there may be no doubt as to the judgment which should be given, if the defendant be convicted.'" Alleyne, 186 L.Ed.2d, at 325-26 (quoting Archbold, Pleading and Evidence in Criminal Cases 52 (5th Am. ed. 1846)).[7]

Greater doubt could not be sowed by the State withholding the aggravating elements until after trial. Grenning's presumptive 318 month statutorily prescribed sentence (on the notice of charges he went to trial upon), ballooned to a de facto life sentence of 116 years, an increase created solely by post-trial allegation of aggravating elements.

4. Court of Appeals panel decision to deny COA despite district court's ruling being clearly debatable by jurists of reason

The Ninth Circuit's summary denial order for Certificate of Appealability doesn't explain the rationale, however the presumption is denial followed the same basis as the district court. Lozada v. Deeds, 498 U.S. 430, at 432 (district court's analysis "presumably the basis for the Court of Appeals' [one-sentence order] to deny Certificate of Appealability").

7 While Alleyne uses the term "indictment," it's clear the intent is the Sixth Amendment 'notice' principle, "to be informed of the nature and cause of the accusation".

The district court denied COA after reframing Grenning's 'notice' claim into an 'indictment clause' claim, and proceeded to knock down their straw man.

Straw man arguments have met with frequent disdain by justices of this Court. For example, Justice Scalia's concern the dissent argued a straw man by insisting the "Baker line of cases...cannot change the interpretation of § 2a(c)" when the court "never said that those cases changed the meaning." Branch v. Smith, 538 U.S. 254, 280-81, 123 S.Ct. 1429, 155 L.Ed.2d 407 (2003).

Or when Justice Goldberg wrote a straw man was constructed by racharacterizing an argument as "a property owner's right to choose his social or business associates," when "the claim asserted [concerns] public establishments and does not infringe upon the right of property owners or personal associational interests." Bell v. Maryland, 378 U.S. 226, 312, 84 S.Ct. 1814, 12 L.Ed.2d 822 (1964)(concurring opinion).

Justice Stevens wrote "[t]he majority thereby is able to attack a straw man, since by focusing on the words 'arising under' it avoids the question of how Ringer can have 'any claim to recover arising under' the Act when he cannot submit any claim for medical benefits because he cannot afford the operation." Heckler v. Ringer, 466 U.S. 602, 631 FN9, 104 S.Ct. 2013, 80 L.Ed.2d 622 (1984) (opinion concurring in part).

The district court did to Grenning what Justices Stevens, Goldberg, and Scalia criticized, in that it knew state defendants had no right to receive notice of aggravators in the charging document, even though Grenning never made such a demand.

Both district and circuit courts saw through similar attempts. Hanna v. Price, 245 Fed.Appx. 583, 545-46 (6th Cir. 2007)("straw man argument" where "the state court did not discuss the claim actually made by Hanna, [resulting]

in an unreasonable application of the due process principles"); U.S. v. Mitchell, 2007 U.S.Dist. LEXIS 37865 (E.D.Penn. May 24, 2007)("The government's myopic reading of Mitchell's claim" () "is a classic strawman argument, however; it defeats a position Mitchell never took.").

Grenning made the straw man error clear in his application for COA. Appendix G, p.6-7. By subscribing to the straw man in denying COA, the Court of Appeals held Grenning to an incorrect standard for COA. The court made the extraordinary move to deny the Sixth Amendment right to "be informed of the nature and cause of the accusation"—in spite of voluminous contrasting Supreme and circuit court precedent—by adopting a position Grenning never made: that the aggravating elements had to be in the charging document.

All Grenning asked was they come before trial so he could prepare a defense. Reasonable jurists would have rejected the false recharacterization of Grenning's claim, and disagreed with the decision.

He more than met the threshold of a "substantial showing of the denial of a constitutional right".[8]

Seven current members of this Court—Justices Thomas, Ginsburg, Roberts, Gorsuch, Breyer, Sotomayor, and Kagan—have stood firmly for the right to notice before trial of elements entering into the punishment.[9] Grenning requests certiorari so these members may assert a straw man cannot be used to deny COA upon a right Cole v. Arkansas, supra, referred to as more "clearly established" than all others.

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8 28 U.S.C. § 2253(c)(2); Miller-El v. Cockrell, 537 U.S. 322, at 327.

9 Alleyne, 186 L.Ed.2d 314, 326 (Justice Thomas, Ginsburg, Breyer, Sotomayor, and Kagan); Southern Union, 183 L.Ed.2d 318,331 (Justices Sotomayor, Roberts, Thomas, Ginsburg, and Kagan); Blakely, 542 U.S. 296, 301-02 (Justices Thomas and Ginsburg); Haymond, at Slip op. 6 (Justices Gorsuch, Ginsburg, Sotomayor, and Kagan).

B. The panel improperly denied COA where the threshold of 'deserves encouragement to proceed further' was clearly met in that Oregon v. Ice shouldn't apply to above-standard-range sentences

A succinct understanding of this issue: two modes of consecutive sentencing appear relevant here, (1) a purely discretionary operation based on judicially found factors where each discrete sentence is within the standard range, and (2) a non-discretionary operation where a court must first statutorily find a sentence above the standard range is warranted, and each discrete sentence is defined as above-standard-range as a result of aggravating elements. Oregon v. Ice[3] applies to the former, but not the latter.

Seven current justices of this Court—Thomas, Ginsburg, Roberts, Kagan, Sotomayor, Breyer, and Gorsuch—have written or joined opinions upholding the right to jury trial on aggravating elements (no matter what the State labels them) that subject a defendant to a greater penalty.[10] The Court appears to support that Oregon v. Ice is a "narrow exception" for when the discrete sentences are standard range.

Did the Court of Appeals apply a higher standard to deny COA, when this critical distinction 'deserves encouragement to proceed further' on appeal?

1. Core Supreme Court rulings

The Supreme Court recognizes the Sixth Amendment's jury trial right as preserving the jury's historic role as a bulwark between the State and the

10 United States v. Haymond, Slip op. 6-7 (Justices Gorsuch, Ginsburg, Sotomayor, and Kagan); Alleyne, 186 L.Ed.2d 314, 321 (Justices Thomas, Ginsburg, Breyer, Sotomayor, and Kagan); Southern Union, 183 L.Ed.2d 318, 326 (Justices Sotomayor, Roberts, Thomas, Ginsburg, and Kagan); Cunningham v. California, 549 U.S. 270, 292-93, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007)(Justices Ginsburg and Thomas); Blakely, 542 U.S. 296, 303-04 (Justices Thomas and Ginsburg); Apprendi, 147 L.Ed.2d 435, 446 (Justices Thomas and Ginsburg).

accused. "[A]ny fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 147 L.Ed.2d 435, 446; Ring v. Arizona, 536 U.S. 584, 600, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." Apprendi, 147 L.Ed.2d, at 455.

"[T]he 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely v. Washington, 542 U.S., at 301.

Apprendi's 'animating principle' is "the 'preservation of the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense.'" Southern Union, 183 L.Ed.2d, at 327 (quoting Oregon v. Ice, 555 U.S., at 168). When an aggravating fact subjects a defendant to a higher range of punishment it "conclusively indicates that the fact is an element of a distinct and aggravated crime. It must, therefore, be submitted to the jury and found beyond a reasonable doubt." Alleyne, 186 L.Ed.2d, at 329 (joined by Ginsburg, Breyer, Sotomayor, and Kagan).

This leaves the question, did the aggravators in Grenning's case merely trigger a consecutive sentencing option like in Oregon v. Ice, or did they subject him to a higher range of punishment on each offense?

Unambiguous evidence supports the latter.

2. Evidence of sentence above the standard range

Washington's RCW 9.94A.589(1)(a) and 9.94A.535 don't trigger discretionary consecutive sentencing of standard range sentences, and are not analogous to Oregon's scheme. Eugene Ice faced consecutive sentencing of standard range sentences, where each discrete sentence had an unelevated range prescribed. Grenning's range for each discrete sentence went from a maximum of 123 months, to 318 months, using Washington's unique Offender Score and Sentencing Grid calculations (the multiplicity of charges increases the standard range for each). RCW 9.94A.525 and 9.94A.510. Aggravating elements then allow a judge to increase the sentence above the already elevated standard range further, either by giving more time to each offense, or running them consecutively. RCW 9.94A.589(1)(a) and 9.94A.535.

Proof Grenning's were not "standard range" consecutive sentences is spelled out in Washington's own unanimous body of case law:

A consecutive sentence under RCW 9.94A.589(1)(a) is 'outside the standard range' "even if the sentence for each individual conviction is within the standard sentencing range." State v. Gonzales Flores, 164 Wn.2d 1, 19 HN10, 186 P.3d 1038 (2008). The provisions of subsection .589(1)(a) "allow the imposition of an exceptional sentence when there are 'substantial and compelling reasons justifying' a **sentence outside the standard range.**" State v. Modest, 88 Wn.App. 239, 252, 944 P.2d 417 (1997)(emphasis added; case referring to former codification of same statute). RCW 9.94A.589(1)(a) imposes "exceptional sentence[s]" and "An 'exceptional sentence' is a sentence imposed **outside the standard range.** RCW 9.94A.535." In re Pers. Restraint of McWilliams, 182 Wn.2d 213, 215 FN1, 340 P.3d 223 (2014)(emphasis added). Hilyard and his attorney made a plea agreement "to a **sentence outside the**

standard range by stipulating that the sentences for each count **would run consecutively**...current offenses will normally run concurrently but consecutive sentences may be imposed under the exceptional sentence provisions." State v. Hilyard, 63 Wn.App. 413, 417, 819 P.2d 809 (1991)(emphasis added). The court imposed a consecutive sentence under subsection .589(1)(a) "on the drug charge in this case, and **therefore outside the standard range.**" State v. Pharris, 120 Wn.App. 661, 666-67, 86 P.3d 815 (2004)(emphasis added).

Washington has a discretionary consecutive sentencing scheme like Oregon's in subsection .589(3). "Under these circumstances [RCW 9.94A.589(3)], a sentencing court has total discretion in deciding whether a current sentence will run concurrently with, or consecutively to, a felony sentence previously imposed." State v. Jones, 137 Wn.App. 119, 125, 151 P.3d 1056 (2007). "Consecutive sentences imposed under RCW 9.94A.589(3) are one of two prescribed punishments; they are not exceptional sentences outside the standard range and, thus, do not trigger the concerns in Apprendi and Blakely. Compare RCW 9.94A.589(1)(a); RCW 9.94A.535." Id (indicating §(1)(a) sentences do trigger Apprendi/Blakely protections because they are outside standard range).

Washington's .589(1)(a) is not the discretionary consecutive sentencing that extended down centuries into the common law; that process is contained only in §(3) or §(1)(b) of RCW 9.94A.589.

3. Interplay with Oregon v. Ice

Whether to read Oregon v. Ice as broadly referring to all consecutive sentences, or only consecutive sentences understood to be discrete standard range sentences, is one this Court has alluded to, but not definitively

answered. Justice Gorsuch recently clarified that Oregon v. Ice's exemption to the Apprendi/Blakely jury trial right is a "narrow exception[]". United States v. Haymond, No. 17-1672 (June 26, 2019) at Slip op. 9, footnote 3 (joined by Ginsburg, Sotomayor, and Kagan; Breyer wrote concurring opinion).

Justice Gorsuch echoed Justice Stevens' concern in Apprendi, "[T]he relevant inquiry is one not of form, but of effect—does the required [judicial] finding expose the defendant to a greater punishment than that authorized by the jury's verdict?" Haymond, at Slip op. 8.

The late Justice Scalia warned of precisely this form/effect relationship, "The decision to impose consecutive sentences alters the single consequence most important to convicted noncapital defendants: their date of release from prison. For many defendants, the difference between consecutive and concurrent sentences is more important than a jury verdict of innocence on any single count: Two consecutive 10-year sentences are in most circumstances a more severe punishment than any number of concurrent 10-year sentences." Oregon v. Ice, 555 U.S. 160, 173 (dissent by Scalia, joined by Roberts, Souter, and Thomas).

Stark consequence of this warning is Grenning's case: already driven from 10 years to over 26 years by Washington's exclusive "felony points" sentencing scheme, judicial finding of additional aggravating factors permitted a "sentence outside the standard range" under RCW 9.94A.589(1)(a) to de facto life imprisonment. It is a sentencing consequence reminiscent of Justice Field's analogy, "The State may, indeed, make the drinking of one drop of liquor an offense to be punished by imprisonment, but it would be an unheard-of cruelty if it should count the drops in a single glass and make thereby a thousand offences, and thus extend the punishment for drinking the single glass

of liquor to an imprisonment of almost indefinite duration." Furman v. Georgia, 408 U.S. 238, 249, 92 S.Ct. 2726, 33 L.Ed.2d 348 (1972).[11]

The 'form' of Oregon v. Ice's 'narrow exception' was well intentioned to preserve "historical practice" of judicial discretion to impose sentences consecutively. 555 U.S., at 168. However this exception is predicated on the understanding the discrete sentences were effected as standard range: this Court distinguished Cunningham[12] because the judicial finding "implicates Apprendi's core concern: a legislative attempt to 'remove from the [province of the] jury' the determination of **facts that warrant punishment for a specific statutory offense.**" Oregon v. Ice, 555 U.S., at 170 (emphasis added). O.R.S. 137.123(1) has no language giving intent that it punishes a specific offense above the standard range. Id., at 165. The 'form' holds.

What happens when the sole intent is to give discrete charges above-standard-range sentences, such as in Washington's contrasting RCW 9.94A.589 (1)(a)? Does the sentence then implicate "the determination of facts that warrant punishment for a specific statutory offense"?

Not only are Washington's statutes and case law unequivocal this is the sole intent, every document in Grenning's case refers to above-standard-range sentencing:

> There are substantial and compelling reasons to impose an exceptional sentence above the standard range for each of the defendant's convictions.

Findings of Fact and Conclusions of Law Regarding Exceptional Sentence, Appendix F, p.18. In the same document the court repeatedly justified the

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11 Quoting dissent by Justice Fields in O'Neil v. State of Vermont, 144 U.S. 323, 340, 12 S.Ct. 693, 36 L.Ed. 450, 458-59 (1892).

12 Cunningham v. California, 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007)

sentence saying, "If the court imposed a sentence within the standard range [it] would result in a sentence that is clearly too lenient". Id., findings XV, XVI, XVII, XVIII, XX, XXI, and XXII. His Judgment and Sentence imposed an "Exceptional sentence...above the standard range for all counts." Appendix F, p.18. The State-filed request on 8-13-2004 was titled "Special Allegation of Aggravating Circumstances and Notice of State's Intent to Seek **Exceptional Sentence**" (emphasis added).

Everything in the record is about giving Grenning a sentence over the standard range permitted by the jury's verdict.

Oregon v. Ice's exception is read too broadly if applied to facts (such as in Grenning's case) "that warrant punishment for a specific statutory offense." 555 U.S., at 170. Oregon v. Ice never granted carte blanche to all consecutive sentencing. It concerned "the mode of proceeding chosen by Oregon and several of its sister states", none of which mentioned include Washington. 555 U.S., at 164.

The 'effect' was to give Mr. Grenning 116 years for each of his offenses, instead of the standard range.[13] Justice Gorsuch recognized this form/effect problem, noting "recent legislative innovations have raised harder questions" but that "a State [may not] evade this traditional restraint on judicial power by simply calling the process of finding new facts and imposing a new punishment a judicial 'sentencing enhancement.'" Haymond, at Slip op. 8 (see also Slip op. 12, "Apprendi, Blakely, and Alleyne...have repeatedly rejected efforts to dodge the demands of the Fifth and Sixth Amendments by the simple expedient

13 "Where multiple current offenses are involved, an exceptional sentence may be accomplished either by lengthening the concurrent sentences or by imposing consecutive sentences. No distinction is made in the Sentencing Reform Act." State v. Washington, 135 Wn.App. 42, 53, 143 P.3d 606 (2006)(addressing RCW 9.94A.535 and .589(1)(a)).

or relabeling a criminal prosecution a 'sentencing enhancement.'").

Washington's labeling of their system also "exemplifies the 'Framers' fears that the jury right could be lost not only by gross denial, but by erosion.'" Id., at Slip op. 16 (quoting Apprendi, 530 U.S., at 483).

Erosion is Washington using Oregon v. Ice to sanction all consecutive sentencing schemes, including those that remove from the province of the jury "the determination of facts that warrant punishment for a specific statutory offense." Oregon v. Ice, 555 U.S., at 170. This is not a 'narrow exception.'

4. Cases applying Oregon v. Ice

Courts have found what Washington noted is the distinction between sentencing under §(1)(a) and all other consecutive schemes in RCW 9.94A.589. Mr. Palmer was convicted of 'serious violent offenses' (murder, kidnapping, 1st degree rape), requiring sentencing under §(1)(b); the court found Oregon v. Ice allowed consecutive sentencing because §(1)(b) was distinct and "unlike sentences exceeding the statutory maximum". Palmer v. Fraker, 2010 U.S.Dist. LEXIS 44983 (W.D.Wa. 2010). See also Stein v. Frakes, 2010 U.S.Dist. LEXIS 33137 (W.D.Wa. 2010)(same, as his discrete sentences were defined as just over the "middle of the standard range"); Nguyen v. Uttecht, 2017 U.S.Dist. LEXIS 182856 (W.D.Wa. 2017)(3 counts of 1st degree assault meant sentencing under §(1)(b), discrete sentences being "near the low end of the standard range for each crime").

Ohio has also faced challenges over distinctions between their state law and Oregon's, and district courts adopted broad readings of Oregon v. Ice. In Mittower v. Warden, "The Foster court [held] that the trial court had 'full

discretion' to impose consecutive prison terms without making findings or giving reasons for its decision." 2011 U.S.Dist. LEXIS 154787 (S.D.Ohio Oct. 18, 2011). In Silvey v. Williams, he argued "Ice does not apply because, unlike the State of Oregon, Ohio has no 'common-law right for a trial to impose consecutive sentences.'" but the court noted the distinguishment that judges had "the discretion and inherent authority to determine whether a prison sentence **within the statutory range** shall run consecutively or concurrently." 2012 U.S.Dist. LEXIS 44720 (N.D.Ohio Mar. 30, 2012)(emphasis added).

A similar challenge in Minnesota was "that under Minnesota law, consecutive sentences represent a 'departure from the guidelines,' and therefore consecutive sentences can be imposed only when certain 'aggravating factors' have been proven." Young v. Roy, 2013 U.S.Dist. LEXIS 171714 (D.Min. Feb. 22, 2013). The court ruled against him, again choosing a broad interpretation of Oregon v. Ice that deferred to the state's case law rather than reach the issue of whether Oregon's and Minnesota's sentencing schemes were fatally different.

In all these cases, potentially valid distinctions between Oregon's scheme and other states' definitions of 'standard-range'/'above-standard-range' provide impetus to ask whether the scope of Oregon v. Ice is a broad or narrow exception? So far courts have painted over challenges with broad brush strokes, that appear inopposite to the narrow application of Oregon v. Ice. This Court held in contrast "a sentence exceeding the 'standard' range in Washington's sentencing system" but did not go so far as to analyze whether Washington's consecutive sentencing scheme was 'above standard range' compared to "Oregon's choice" to "find certain facts before imposing consecutive" sentences. Oregon v. Ice, 555 U.S., at 167 and 164.

Oregon's system is consecutive standard range sentences. Washington

defines its as above-standard-range consecutive sentencing. Oregon v. Ice's "narrow exception" is not applicable in Washington.

5. Court of Appeals panel decision to deny COA despite district court's ruling being clearly debatable by jurists of reason

Again, in the absence of a reasoned explanation, the presumption is the Court of Appeals denied COA on the same basis as the district court. Lozada, 498 U.S., at 432.

Despite all statutes, case law, and record indicating Grenning's discrete consecutive sentences were "above the standard range" for each conviction (because §(1)(a) sentencing is to aggravate 'punishment for a specific statutory offense'), the district court decided they were standard range sentences. It broadly equated Washington's markedly distinguishable sentencing scheme to Oregon's.

These important distinctions more than met the threshold of "adequate to deserve encouragement to proceed further." Miller-El, 537 U.S., at 327 and 336. "That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable." Buck v. Davis, 580 U.S. ___, 137 S.Ct. ___, 197 L.Ed.2d 1, 17 (2017).

A court may ultimately determine defendants don't have a right to jury trial on factors used to effect sentences above the standard range for discrete consecutive crimes—that Oregon v. Ice was intended to more broadly dispose with the historical role juries played in determining facts that affect punishment. Yet the current posture of Supreme Court precedent gives encouragement to reasonable jurists to disagree. Especially where several Washington

district courts already found a different consecutive sentencing scheme in Washington was "unlike sentences exceeding the statutory maximum". Fraker (section 4, above). Ones that do so exceed the maximum are sufficiently distinct to raise reasonable jurists' concerns about the jury's role, deserving encouragement to proceed further.

The Court of Appeals sanctioned a departure on COA from the accepted and usual course of judicial proceedings that calls for the exercise of this Court's supervisory power. The scope of Oregon v. Ice's exception to the jury role when consecutive sentences specifically effect above-standard-range aggravation is also an important question that should be settled by this Court, resolving schemes challenged in Washington, Minnesota, and Ohio.

Grenning's case presents extraordinary grounds not only for the abdication of appellate role by lower courts over important questions, but also because of the extreme penalty exacted on a young, first-time, nonhomicide offender: a life sentence of 116 years. Consecutive sentences indeed became a much more severe punishment than any number of concurrent ones, as Justice Scalia warned. Oregon v. Ice, 555 U.S., at 174 (dissent by Scalia).

"[T]hose who wrote our Constitution considered the right to trial by jury 'the heart and lungs, the mainspring and the center wheel' of our liberties, without which 'the body must die; the watch must run down; the government must become arbitrary.'" Haymond, at Slip op. 5 (quoting 1 Papers of John Adams 169 (R. Taylor ed. 1977)). Grenning requests certiorari so this Court can define, (or instruct the Ninth Circuit to consider), the appropriate scope of Oregon v. Ice and protect the right to jury trial on aggravating-element sentencing schemes that erode and strip juries of the "historic role as a bulwark between the State and the accused". Southern Union, 183 L.Ed.2d at 327.

CONCLUSION

For all the foregoing reasons, Mr. Grenning's case is extraordinary. Reasonable jurists could conclude he received no notice of the nature and cause of the aggravating elements before trial so he could prepare a defense, and that the district court's use of a straw man to alter and then dismiss his claim is repugnant to the facts and actual claim made by Grenning.

So too could they conclude the scope of Oregon v. Ice does not sanction excising juries from the fundamental Constitutional role of finding facts that trigger a sentence repeatedly described by record, statute, and case law as 'above the standard range for each offense.' This means a COA should have been issued to preserve full appellate review of potentially meritorious claims.

The petition for writ of certiorari should be granted.

Respectfully submitted this 14 day of October, 2019.

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