

IN THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

24-5941
NO.

FILED
AUG 15 2024
OFFICE OF THE CLERK SUPREME COURT, U.S.

In re SANTOS CUEVAS,

Res OR8c S071013

Petitioner,

vs.

COREY FHUERE Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME [REDACTED]

COURT OF OREGON

-Corrected Petition for filing, per letter of Sept. 5, 2024-

SANTOS CUEVAS
2605 STATE STREET
SALEM, OREGON 97301

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I QUESTIONS PRESENTED

This case involves two sentencing guidelines rules. One rule directs trial courts to count a defendant's convictions at the time of sentencing in calculating the defendant's criminal history. OAR 213-004-0006(2). The other rule limits the length of a consecutive sentence that a trial court can impose. OAR 213-012-0020(2).

"After the trial court determined the sentence on defendant's first conviction, it counted that conviction as part of his criminal history in determining the presumptive sentence for defendant's second conviction. Including the first conviction as part of defendant's criminal history increased his criminal history score and, for that reason, resulted in a higher presumptive sentence for the second conviction. The court followed the same course in determining the presumptive sentences for the remainder of defendant's convictions."

"On appeal, the Court of Appeals concluded that both rules increased defendant's sentence based on facts that, under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), a jury must find beyond a reasonable doubt. *State v. Cuevas*, 263 Or.App. 94, 114, 326 P.3d 1242 (2014). Although the Court of Appeals concluded that the trial court should have submitted those facts to the jury, it held that the failure to do so was harmless error. *Id.* On review, we hold that the two sentencing guidelines rules do not implicate *Apprendi* and affirm the Court of Appeals decision on that ground."

"We affirm the Court of Appeals decision and the trial court's judgment on that ground.

The decision of the Court of Appeals and the judgment of the circuit court are affirmed."

State of Oregon v. Santos Cuevas, 358 Or 147, 361 P.3d 581 (Or. 2015) Supreme Court Ruling.

In this case Supreme Court of Oregon denying consideration of Habeas Corpus review of a trial court's trial judge's omission to poll the jury and no jury poll record available impacts its very own holding affirmation of the Appellate court and the trial court judgment. And impacted petitioner's constitutional rights to a jury concurrence and for higher degrees of offenses penalties that are beyond the max of the lesser degree under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

At initial post-conviction collateral review the unavailable jury poll should have been raised, under federal law, and federal law has yet to determine that a post-conviction court has the judicial power to render a judgment contrary to the state's highest court that involves a published opinion on a jury trial federal constitutional right.

Holdings of Courts' of opinion- and the same court denying consideration of State Habeas Corpus Petition Writ to correct the error cannot be presumed to be correct it's holdings under state law lacked standard of proof requirement of Federal law are only voidable by this court not by any post-conviction court.

1.) May a defendant raise and challenge an Extradition and arrest when a Federal district court of extraditing state does not appoint counsel on state petition for writ of habeas corpus prejudice grounds for lack of governor's warrant and challenge his convictions?

2.) Should an initial post-conviction appointed counsel raise the defaulted claim of no jury record-no jury poll discrimination to challenge the court of opinions holding, and did pro se representation under state law prejudice the petitioner under federal law and at second post-conviction and should the court have denied habeas corpus review after it ordered parties filings?

3.) On miscarriage of justice mis-statement claim defaulted at post-conviction and direct appeal on a Court policy- failed to secure a jury record, no jury poll, no jury record-should jury discrimination Sixth Amendment protection claim been raised at post-conviction pro se representation violation and direct appellate counsel representation violation of right to counsel and effective counsel to challenge the holdings of the court of opinions unreasonableness?

4. If so did the post-conviction court err granting Summary of Judgement under an escape clause standard instead of a cause and prejudice standard?

List of Parties

All parties are listed at cover of this petition by title form

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Constitutional and Statutory Provisions Involved

Fifth Amendment, 6th Amendment, 8th Amendment, and 14th Amendment to the United States Constitution

Rule 11 of United States Supreme Court and 28 U. S. C. §2101(e).

Statutes and Rules

Sentencing statutes Ors.137.123 (1-5)

OAR 213-004-0006(2). OAR 213-012-0020(2). or evil sought to be prevented."

ORS 163.375, ORS 163.427 ORS 163.425, ORS 163.375(1)(a), (2)

ORS 163.415(1)(a), (2), tORS 163.427(1)(a)(B), (2).

Writ of Habeas Corpus statutes and Post- conviction

ORS.138.530 1(a) - ORS.138.560

ORS 138.510(3) , ORS 138.550(3)

Ch. 34 Writ of State habeas Corpus ORS 34.340

ORS 34.370

IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR CERTIORARI

Opinions Below

The opinion of the highest state court to review merits do appear at Appendix to the petition and is reported at 361 P.3d 581,584 (Or. 2015)

The opinion of the court of appeals does appear at appendix to the petition and is reported at 326 P.3d 1242, 263 Or.App. 94 (Or. App. 2014)

Jurisdiction

Article III of the United States Constitution The judicial power given to Article III courts extends to

all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority—

The trial of all crimes, -----shall be by jury----

This Petition is timely filed, The Oregon Supreme Court denying Consideration of Petition for Writ of Habeas Corpus on May 30, 2024
(extension was allowed for rule compliance)

United States Constitution Jurisdiction: Article 4 of the United States Constitution sec, 4 pertinently provides; The United States shall guarantee to every state in this Union a Republic Form of Government and shall protect each of them against invasion--- imprisonment with no jury participation to vote and no jury polling.

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)
Appellate court found Federal jury trial right violation harmless under state law is a controversial matter of confusion to the state of Oregon and was not over-ruled or reversed by the Supreme Court of Oregon.

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Statement of the Case

Ramos v. Louisiana, 140 S.Ct. 1390, 206 L. Ed. 2d 583 (2020) did not permit jury discrimination.

In this case there is no jury voting procedure, no jury poll available, and the presumption of judicial bias is and discrimination is stronger.

This petition is not just about a reviewing court's harmless error determinations that concern factual issues part of the same acts or not. This case is about a defendants Federal constitutional jury trial right to a standard of 'proof beyond a reasonable doubt. On April 26, 2024 the Oregon Judicial Department clerk required the defendant to file a response no later than April 30, 2024 giving only 4 days, instead of the statutorily requirement of 14 days pursuant to ch. 34 of Oregon Rev. Statutes and the neglect and failure on part of the defendant of any action response is clear on the record.

On the same day the Supreme court Justice Granted waiver of fee (waiver filed on 4-16-2024) see ORS 34.370 (once a court allows a writ of habeas corpus, it should be issued without delay, and no other action may be taken on the petition.) simultaneously and declared 'Denying the Petition for Writ of Habeas Corpus' dismissing claims without any review, and is at Appendix 'A'

Proposed rule of law

Bird v. Maass, 104 Or.App. 271, 800 P.2d 792 (Or. App. 1990)

Once a writ is issued, the defendant must obey it by filing a return and, after the return is filed, the court must [104 Or.App. 274] resume its scrutiny. ORS 34.490; ORS 34.580. The plaintiff has the right to file a replication that disputes any facts in the return or that alleges new facts. ORS 34.670. By agreement of the parties, the petition may serve as the replication. Gage v. Maass, *supra*, 306 Or. at 202, 759 P.2d 1049; State ex rel. Sorensen v. Baird, *supra*, 201 Or. at 247, 269 P.2d 535. The return and replication are the pleadings. After the pleadings have been filed, the case may be set for hearing, if there are any disputed fact questions. ORS 34.670.

Petitioner brings this case of first impression.

Ramos v. Louisiana, 140 S.Ct. 1390, 206 L. Ed. 2d 583 (2020) did not permit jury discrimination in that every juror must be allowed to count each vote towards a conviction or acquittal.

The Supreme court published it's concession of error, "We agree with defendant that the question whether his convictions arose out of the same or separate criminal episodes is a factual issue. We also agree that the jury did not decide that factual issue in finding that he was guilty of the charged offenses." State v. Cuevas, 358 Or 147, 361 P.3d 581 (Or. 2015)

Second, each time the trial court passed sentence on a count representing a separate criminal episode, the court considered that count to be part of defendant's criminal history for the purpose of the remaining counts.)

State v. Cuevas, 326 P.3d 1242, 263 Or.App. 94 (Or. App. 2014) (similarly the trial court counted three of the rape convictions as part of defendant's criminal history for purposes of calculating his guidelines sentence on one of the sodomy convictions. see State v. Yashin, 112 P.3d 331,332, 199 Or. App. 511 (Or. 2005

The compromised of joinder of offenses in a single indictment or separate indictments sentenced on the same day and description of the nature of the crime precludes any possible application of Apprendi, suprasee See State v. Bucholz, 317 Or. 309, 314, 855 P.2d 1100 (1993) ("Nothing in the wording of the criminal history rule excludes consideration of the conviction for a separately occurring crime merely because the two separate crimes are sentenced on the same day and in the same session of court."). also State v. Reinke, 354 Or 98, 309 P3d 1059 (Or. 2013) Overall in Oregon Judicial implicit findings may vary from a misdemeanor to a life sentence, . See State v. Reinke, 354 Or 98, 309 P3d 1059 (Or. 2013) See ORS 161.725(1)(b) (authorizing the imposition of that sentence) Reinke, supra The conviction warranted a 10 year sentence and added 30 yrs. Based on a judge's finding that the crime was a dangerous offense.

Federal law jury trial right Sixth Amendment requires that required findings must be applied with 'proof beyond a reasonable doubt' standard, and the holdings of jury trial issues of the courts of published opinions in this case did not involve that procedural safeguard-pronounced of all convictions is a misstatement of law. And the concession of error supports it.

Petitioner's state petition for Writ of Habeas Corpus where the Supreme Court of Oregon denied consideration, he complains was a miscarriage of justice on no jury voting holdings of the same Supreme court affirming his trial convictions on non-jury findings which are required jury findings no matter the improper purpose for the findings and that improper purpose is the sentence enhancement to each count because the court extended the prior conviction sentence enhancement to all indicted counts of convictions of a single proceeding.

Petitioner challenged his convictions with Apprendi error at his initial postconviction proceeding and no jury poll issue was not raised, his apprendi, supra claim is later discussed in this petition. Petitioner raised claims of proof that there is no jury record with his apprendi claims and 'no governors warrant' is an illegal extradition from the state of Texas. And for which State of Texas, when asked for appointment of counsel denied counsel, and is a claim in the denied habeas corpus writ.

The holdings of the courts of opinion-Supreme Court are voidable under Federal law.
Denying ^{re:} Consideration of Habeas Corpus is at Appendix 'B'

Petitioner was convicted of three counts of first-degree sodomy, ORS 163.405, one count of second-degree sodomy, ORS 163.395, five counts of first-degree sexual abuse, ORS 163.427, and one count of second-degree rape, ORS 163.365.

Petitioner here seeks to over-rule every holding on each of five errors published by both the Court of Appeals and the Supreme Court of Oregon, his interests to the procedural safeguards provided by the Sixth Amendment anti-jury discrimination allowing the jury to vote and jury poll record is a requirement and that his pronounced convictions for each error are constitutionally void under this court's jurisprudence.

Of jurisprudence matter state invasion and can be extended subject of this certiorari that this court considers binding jurisdiction under RULE 11. Certiorari to a United States Court of Appeals Before Judgment now pending Santos Cuevas v Corey Fhuere Docket no.24-5815 originating case no. 6:24-cv-01443-MC United States court of appeals Pending , before judgment is entered in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court. See 28 U. S. C. §2101(e). And this case is just that.

nonetheless has leeway to challenge each of the United States District Court's holding that the petitioner has not shown a denial of a constitutional right under the united states constitution is error of law in light of the evidence that exhibits to the contrary.

And that evidence is a statement of trial court administrator of Malheuer County

Marilee Aldred April 31,2021 and states the following-

- “Malheur County Court does not get a jury verdict form from each juror.”
- “ ---[A]t the time the verdict was read you or your attorney could have requested to poll the jurors, but that did not happen this case” (Letter of April 30, 2021 Mari lee Aldred)

This court need not reach the Apprendi claims of issue, however petitioner places the burden on the defendant to show a set of case law of Oregon that honors the Apprendi rule. And the defendant will not be able to do that, there is no Apprendi rule. The Oregon cases cited and this case preclude any possibility of Apprendi rule existence and operational as Oregon law. Petitioner complained that separate legislative rule of law or initiatives are defined to constitute first degree and second degree of the crimes charged, and that Due process required a jury concurrence under Apprendi supra on a prosecution fact of ‘forcible compulsion’ and not the age basis of consent for which he complained were wrongly applied among the judicial findings of crime of violence lacked a rational connection to the provisions of convictions. The jury did not agree concurrence on any single theory of forcible compulsion because his trial judge did not require a voting procedure, and that the post-conviction denials were a miscarriage of justice.

Unlike Apprendi supra, and Schad v. Arizona, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991) and unlike Ramos v. Louisiana, 140 S.Ct. 1390, 206 L. Ed. 2d 583 (2020 here in this case there is no jury record for his Jury trial right discrimination

claim defaulted and complained of in his State petition for Writ of Habeas Corpus, denied consideration.

Petitioner also complains that Texas and Oklahoma, both states required a Governor's warrant and was not produced and Texas denied counsel when he requested counsel on that ground.

Also, that the statements made at trial on a Saturday denied him a fair trial and has leeway to challenge each error affirmed.

This court should appoint counsel of the Sixth Amendment guarantee to present the prejudice to this court for the State of Oregon judiciary interference with Denying Consideration of State Habeas Corpus review of miscarriage of justice claims No jury poll record of any kind due to trial Judge made rule of Malheur County Court, Vale, Oregon statement of Mari lee Aldred Trial court Administrator that-

"Malheur County Court does not get a jury verdict form from each juror."

"---[A]t the time the verdict was read you or your attorney could have requested to poll the jurors, but that did not happen this case" (Letter of April 30, 2021 Mari lee Aldred)

Unless and until this Court allows review, the petitioner will remain in prison serving a sentence with no jury record, no jury poll, exclusion of his jury was a bias motive on the part of the judge and counsel' failure to object was a miscarriage of

justice attributable to the state of Oregon. See Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972)

The court of last resort the Supreme Court Denying Consideration of State Habeas Corpus on the same day the Order also granted the Waiver of Fees waiver filed on was the final miscarriage of justice of court ruling for which the petitioner was a party in the affirmances of the Supreme Court, denying consideration was miscarriage of justice.

Post convictions Apprendi claims were denied, counsel was not appointed at both proceedings' separate judgements.

Second and successive post-conviction courts in Oregon do not apply a cause and prejudice standard.

And Post-conviction courts do not have the authority to reverse Supreme Court decision in this case of published opinion-presumption of correctness of the Appellate court harmless error opinion and Supreme Court affirmation.

Miller v. Baldwin, 176 Or.App. 500, 506–08, 32 P.3d 234 (2001) (adequacy of post-conviction counsel may not be challenged in a later post-conviction proceeding).

Holdings were challenge by petitioner on the ground that no jury record, and no jury polling render judgements voidable under the clearly established laws of this Court, and voidable by this court.

Claiming Apprendi error on no jury votes record and no jury polling, on convictions of Oregon state law sexual offenses of higher degrees of penalty and for plain error, have been denied numerous of times including with the U.S. District court in the span of three years.

Dismissals by two post-conviction courts on procedural grounds, Initial post-conviction court the Judgement of dismissal of Apprendi claim and Illegal Extradition claim and wrongly applied provisions-omission of the elements of forcible compulsion, was based on procedural grounds-counsel's affidavit of meritless petition and not amendable.

Sixth Amendment Right to court Appointment of Attorney Representation of Apprendi Claims Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), On Post-Conviction and below Federal standards on Direct Appeal

Denying Court Appointed Attorney at two separate Courts on post-conviction Proceeding Prejudicial Impact-Apprendi claims Sufficient Grounds for Substantial Denial of Federal Protected Jury Concurrence Right of Due Process in the degrees of offenses First Degree and second-degree convictions sexual allegations with no jury record and no jury polling was an injustice.

Second post-conviction court denied claims on procedural grounds and denied counsel. Claims under Apprendi, motions to Strike or excise laws that increases sentence on baseless ground, Motion on Ex-post facto law and Motion on Jury verdict were denied and court appointed attorney was denied.

Petitioner presented his claims pro se at both post-conviction proceedings approximately an hour of pro se representation at hearings for each proceeding.

"The harmless-error rule of Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, applies to a jury instruction that omits an element of an offense" Neder v. United States, 527 U.S. 1, 15 (1999).

The No jury votes No jury polling Apprendi claim was defaulted by trial attorney, defaulted by direct appeal attorney defaulted, defaulted direct appeal attorney for Amicus Brief, defaulted by attorney of initial post-conviction collateral review, defaulted by that post-conviction Appellate attorney, defaulted by second post-conviction attorney and defaulted by second-postconviction appellate attorney, attorney error on courts of opinion is attributable to the state of Oregon precluding retrial, see Oregon v. Kennedy, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982)

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

The Defendant of State Habeas Corpus Would have to rely on Supreme Court holding and Affirmance Reliance Interest supported by the Supreme Court Denying Consideration, and the only post-conviction counsel raised is a Martinez v Ryan rule to be applied to determine prejudice and would not raise claims, withdrew from case.

Ineffective assistance of counsel claims are at stake-trial counsel, and extending Martinez v Ryan rule to direct appeal attorneys hangs in the balance including the Supreme Court's denial of petitioner's motion to dismiss that created more judicial strain and judicial bias including to that of the imposing a sentence without a jury's participation to vote and polling.

In Oregon v Ice this Court granted the States of Oregon's petition Writ of Certiorari, Oregon's position privileged the Office of Public Defense Services to protect the judgments of this Court and legally estopped by the position advanced throughout this case. Oregon abandoned the interest that it once shared with the court in Oregon v Ice supra currently denies effective assistance of counsel and -the interference in this case affirming the appellate court decision with that both the direct appeal and the Amicus brief attorney advances defeats the interest and the 'outcome determinations' for Strickland v Washington ineffective assistance of attorney claims impacting petitioner's post-conviction ability to correct constitutional error and the Judiciary.) Oregon v Ice decision was decided before the petitioner's conviction.

The jury never conducted their duty of voting and for polling.

Oregon Appellate Court harmless review holding of a Federal Violation of Apprendi v New Jersey harmless error under the laws of Oregon, is a miscarriage of Justice under Chapman v. State of California, 87 S.Ct. 824, 17 L.Ed.2d 705, 386 U.S. 18, 24 A.L.R.3d 1065 (1967) State of Oregon v. Cuevas, 358 Or 147, 361 P.3d 581 (Or. 2015)

The Supreme Court affirmed. Ice nor Apprendi converts consecutive rule as the sentence enhancer- multiple convictions constituting separate counts.

Colloquy Double Jeopardy Objections and Sentencing Guidelines

Attorney Susan Gerber “-[I]s that reconstitution my client’s criminal history and enhancing him up on the gridline violates double jeopardy in that he’s being tried twice for the same crime” trial tr. 781 citing Russell v United States 369 U.S. 749, 8 L Ed 2d 240, 82 Sct. 1038 (1962)

This case the State’s construction of sentencing and that does not reference a required jury record the petitioner argued at post-conviction was not permissible and is a departure from the Oregon v Ice decision and conflicts from the Apprendi rule victim initiative of Oregon law requires ‘forcible compulsion’ submitted to the jury concerns the higher penalty crimes of first degree and second-degree crimes. And with double jeopardy protection, to over-rule an Oregon case that the Supreme Court avowed on applying two different provisions on the same acts of ‘forcible compulsion’ also applying third degree sexual acts based on the age of the victim denies due process and does call into question the Due Process rule of Apprendi to prevent double jeopardy and allowing a jury to consider lesser-included offenses.

The claims if not review continue a miscarriage of justice.

According to the petitioner Oregon v Ice allows errors impermissible default for claims on Fifth Amendment findings that the grand jurors did not make-inferred from crimes of violence, no mention of force, under Apprendi the jury cannot disregard. See Sentencing Statute Oregon v. Ice, 129 S.Ct. 711, 172 L. Ed. 2d 517, 555 U.S. 160 (2009)

Oregon Proposal of Law exhibited in the Amicus Brief (pg.2) The Oregon Felony Sentencing Guidelines provide increasing sentencing ranges based, in part, on the defendant's criminal history. A trial court may include an offense sentenced in the same proceeding when calculating the defendant criminal history for another offense only upon a factual finding that the first offense occurred during a separate criminal episode. (separate act) That finding exposes the defendant to greater punishment for the second offense than would be allowed based on the jury's verdict so he is entitled to have it made by a jury.

Victim Harm findings under Oregon v Ice Conflicts with Apprendi requirement

"The harmless-error rule of Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, applies to a jury instruction that omits an element of an offense"
Neder v. United States, 527 U.S. 1, 15 (1999).

The jury submitted no verdict forms to the Judge and no jury polling was ever conducted, and is required for the conviction for Apprendi Due process under state basis and procedure on higher degree penalty crimes.

Judicial findings "the defendant took advantage of his step-children instead of protecting them".

Tr tr 774 caused "harm to the victim of each count" trl tr. 774

Post-conviction hearing tr p.110 petitioner objected to the restitution of state agency conducted interviews of \$500 assessment fee to each count, Apprendi claim

Defendant's counsel: I object, we ---going off the rails here..

Petitioner pro se : "I object right back Apprendi applies", I object- "apprendi applies" p 110 pcr tr.

Petitioner does not agree with the appointed direct appeal attorney and Amicus attorney does not rely in their representation.

Petitioner's Apprendi Due Process claim for purposes applying to the degree of offenses prosecution and Restitution Fees

[J]ust as much as grand [120 S. Ct. 2369] larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime. Similarly, if the legislature, rather than creating grades of crimes, has provided for setting the punishment of a crime based on some fact -- such as a fine that is proportional to the

value of stolen goods -- that fact is also an element. No multi-factor parsing of statutes, of the sort that we have attempted since McMillan, is necessary. One need only look to the kind, *degree*, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element. *Apprendi v New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)

State law Available for Apprendi purposes, required Jury Concurrence and is Lacking

“First, we conclude that the “subjected to forcible compulsion” element of both first-degree rape and first-degree sexual abuse is properly categorized as conduct that constitutes a material element of those crimes. *State v. Nelson*, 241 Or.App. 681, 251 P.3d 240 (Or. App. 2011)

Second, we conclude that the “subjected to forcible compulsion” element of first-degree rape and first-degree sexual abuse “necessarily requires a culpable mental state” because it directly “concerns the substance or quality of the crime[s]—the harm or evil sought to be prevented.”

The words used by the legislature in ORS 163.375 and ORS 163.427 to describe those crimes cement our conclusion. The requirement that a defendant have subjected a victim to forcible compulsion is the specific additional element *that elevates* nonconsensual sexual intercourse from a Class C felony, ORS 163.425, to a Class A felony, ORS 163.375(1)(a), (2); and *that elevates nonconsensual sexual contact* from

a Class A misdemeanor, ORS 163.415(1)(a), (2), to a Class B felony, ORS 163.427(1)(a)(B), (2). Those statutory distinctions embody a legislative choice to impose a greater punishment when a defendant goes beyond subjecting the victim to nonconsensual sexual intercourse or sexual contact by subjecting the victim to forcible compulsion. Thus, the act of subjecting a victim to forcible compulsion is a "harm or evil" that the legislature specifically sought to prevent in enacting ORS 163.375 and ORS 163.427. *Id* at 251 P.3d 243 Nelson *supra*

Apprendi in conflict with Oregon v Ice forecloses errors of construction amendments that ice allows

Judicial findings of crimes of violence is a constructive amendment and forcible compulsion is a due process requirement and a question for the jury, plain error claim against direct appeal attorney. See State v. Capote, 266 Or App 212, 337 P3d 858 (Or. App. 2014) Although defendant failed to preserve that assignment, we conclude that the trial court committed plain error by failing to properly instruct the jury on forcible compulsion, and we exercise our discretion to correct the error. We reverse and remand with respect to that conviction. Or. App. 2014 Capote, *supra*

Apprendi in conflict with , Apprendi Prevents Judicial Constructive Amendments and Double Jeopardy Protection Aid of Jurisdiction is Necessary (In Crotsley, the

defendant threatened a 14-year old girl with a knife and forced her to engage in sexual acts. 308 Or. at 275, 779 P.2d 600. The defendant was charged with first-degree rape and first-degree sodomy because he used forcible compulsion. Id. The defendant also was charged with third-degree rape and third-degree sodomy because his victim was less than 16 years of age. Id. State v. Crotsley, 308 Or. 272, 278, 779 P.2d 600 (1989)

The fifth Amendment protection applies from re-prosecution

Post-convictions courts of Oregon do not and cannot appoint effective assistance attorney.

Post-conviction courts do not apply a prejudice standard of review. And second-successive post-conviction courts do not apply a cause and prejudice review when requiring defendants to show grounds for relief that were defaulted at trial, direct appeal or initial-post-conviction collateral review.

Miscarriage of Justice on Legal Innocence Claims at initial both Post-convictions courts

NO Jury votes No jury polling was by the interference of the Judge's rule and failure of counsel to object under Apprendi since First Degree is a higher penalty crime and second-degree sexual

offense conviction is a higher penalty crime than that of the lesser-included offenses denied due Process, petitioner is innocent. Apprendi requires a twelve-unanimous verdict to each of ten counts. Apprendi applies to prevent double jeopardy petitioner is at risk:(In Crotsley, the defendant threatened a 14-year old girl with a knife and forced her to engage in sexual acts. 308 Or. at 275, 779 P.2d 600. The defendant was charged with first-degree rape and first-degree sodomy because he used forcible compulsion. Id. The defendant also was charged with third-degree rape and third-degree sodomy because his victim was less than 16 years of age. Id. State v. Crotsley, 308 Or. 272, 278, 779 P.2d 600 (1989)

Omission of an element for Apprendi purposes in the gradation of offenses First degree and second-degree sexual offenses is an important interest for all parties and should, an element of forcible compulsion' denies the Apprendi rule.

We have applied the miscarriage of justice exception to overcome various procedural defaults. These include "successive [569 U.S. 393]" petitions asserting previously rejected claims, see Kuhlmann v. Wilson, 477 U.S. 436, 454, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986) (plurality opinion), "abusive" petitions asserting in a second petition claims [133 S.Ct. 1932]

that could have been raised in a first petition, see McCleskey v. Zant, 499 U.S. 467, 494-495, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991),

Sentencing Manual of Oregon Economical Principles Should Be Retained

Oregon contrary decisions and to retain jurisdiction of the correct jurisprudence is necessary aidable for this Court. See pertinently, "For purposes of classifying an offender's criminal history, a 'conviction' * * * should be considered to have occurred upon the pronouncement of sentence in open court. This is a convention established only to provide continuity in the application of these rules with respect to convictions from other proceedings against the offender." See Oregon Sentencing Guidelines Implementation Manual 50-51 (1989) (emphasis supplied).

In 1992, the Criminal Justice Council (Council) issued a supplement to the commentary, which contained a specific "advisory" concerning "currents as priors."

The Council advised:

"Upon conviction, do offenses charged in the same accusatory instrument count towards an offender's criminal history? Staff Advice: No. The legislative record on this issue from the House Judiciary

Subcommittee on Crime and Corrections (June 20, 1989) is clear, as is the Council's original intent. See the commentary on pages 50-51 of the 1989 Guidelines Implementation Manual concerning OAR 253-04-006(1), Criminal History Scale. The reference to 'current crime or crimes of conviction' is intended to prohibit consideration of convictions arising from the current proceeding in the calculation of an offender's criminal history."

The impact of actuality of this case, continuing controversy that the pronounced

convictions and the sentencing and the Apprendi issues and two post-conviction courts failure to appoint counsel and reading and escape clause into the post-conviction statutes, failure to apply a cause and prejudice review, the appellate and Supreme Court opinions sentencing rules and without an economical principle and no jury voted, no jury polling cannot be presumed to be correct. Innocence claim.

Inferences in favor to the non-moving party showing prejudice was error, Summary of Judgement granted to the defendant was error and should have been reviewed by the Appellate court, review was denied.

Petitioner was entitled to defeating the summary of judgement under a cause and prejudice standard and is lacking in Oregon post-conviction proceedings, Eklof v Steward 360 Or 717,730 385 P3d 14074,1082 2016

"The bar is not, however, unqualified." Id. The Supreme Court has recognized "a miscarriage-of-justice exception" in circumstances necessary to "correct[] a fundamentally unjust incarceration." Id. (internal quotation marks omitted). The miscarriage-of-justice exception applies only "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray v. Carrier, 477 U.S. 478, 496 (1986).

Oregon cannot have it both ways on reliance interests, either it retains the sentencing rules in Oregon v Ice supra or concede constitutional error with the lack of any jury voting procedure. For Oregon rule of lenity applies with the economical principles that were not the reliance interest for the state's petition for review to the Supreme

Court in this case. Chapman v. United States, 500 U.S. 453 (1991) (statute must be ambiguous for rule of lenity to apply).

[T]he 'impact of actuality' which was necessary to make it a justiciable case or controversy. see Benton v. Maryland, 395 U.S. 784, 23 L.Ed.2d 707, 89 S.Ct. 2056 (1969)

Conclusion

Petition for Writ of Certiorari Should be granted allow State of Oregon to respond to Habeas Corpus, Reversal of convictions are necessary, and this court can decide this case beyond the reversal to find an economical sentencing principle for Oregon on which state habeas was not allowed for consideration and bind jurisdiction under rule 11 of this court's rules on matter of public importance pending district court case for the correction of Sixth Amendment error , And the Apprendi rule is worth saving to operate in Oregon and strike down laws that preclude the consecutive sentence precedent and Due Process rule.

Petition for Writ of Certiorari should be allowed and in need of a necessary party to participate, the prison warden to acknowledge impact of prison population and that the prisoner is in his custody without a jury voting procedure, no jury records, no jury polling.

Unless and until this Court allows review, the petitioner will remain in prison serving a sentence not based and lacking a jury record, exclusion of his jury was a bias motive on the part of the judge discrimination to the jury.

And Double Jeopardy Protection and reverse restitution fees and attorney fees.

PETITION FOR WRIT OF CERTIORARI TO OREGON SUPREME COURT - SANTOS CUEVAS SID#11207100

IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR CERTIORARI

Certificate of Compliance

As required by Supreme court Rule 33.1 (h), I certify that the petitioner for a writ of certiorari contains 4,777 words, excluding the parts of the petitioner that are exempted by Supreme Court rule 33.1 (d)

I Santos Cuevas here declare to be true and to the best of my knowledge,

on this the 21st Day of month of October the year 2024

