No. 19-7120

IN THE

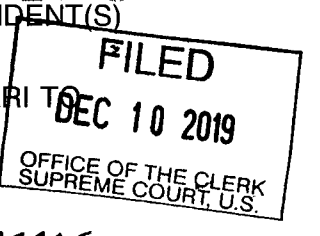
SUPREME COURT OF THE UNITED STATES

GILBERT SANCHEZ — PETITIONER
(Your Name)

vs.

THE STATE OF TEXAS — RESPONDENT(S)

ORIGINAL



ON PETITION FOR A WRIT OF CERTIORARI TO

TEXAS COURT OF CRIMINAL APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

GILBERT SANCHEZ #1712910
(Your Name)

CLEMENTS UNIT 9601 SPUR 591
(Address)

AMARILLO, TEXAS 79107
(City, State, Zip Code)

(806) 381-7080
(Phone Number)

QUESTIONS PRESENTED

1. Is the Fourteenth Amendment of the United States Constitution violated when the Texas Court of Criminal Appeals denies an Applicant habeas relief based on a manner that is not authorized by the Texas Constitution?

2. Was Petitioner denied due process of law; the right to trial by jury and effective assistance of counsel when he was convicted and sentenced for a charge that was neither alleged in the indictment nor presented to the jury for consideration. See *De Jonge v State of Oregon,* 299 U.S. 353 (1937); *Cole v State of Arkansas,* 333 U.S. 196, 201, 202 (1948); *Dunn v United States,* 442 U.S. 100, 106 (1979); *Jackson v Virginia,* 443 U.S. 307, 314 (1979).

3. Was Petitioner's right to a jury trial satisfied when the appellate court retried his case on appeal under different instructions and on a different theory than was ever presented to the jury? See *McCormick v United States,* 500 U.S. 257, 270 n. 8 (1991); *Wooley v State,* 273 S.W. 3d 260, 271 (Tex.Crim.App.2008).

4. Does the Fifth and Fourteenth Amendments to the United States Constitution allow a conviction to stand without a jury finding of guilt beyond a reasonable doubt to each and every essential element of the offense? See *In re Winship,* 397 U.S. 358 (1970); *Apprendi v New Jersey,* 530 U.S. 466, 477 (2000); *United States v Booker,* 543 u.S. 220 (2005); *Blakely v Washington,* 542 U.S. 296 (2004).

5. Was Petitioner denied the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution when trial counsel failed to object to the jury charge and admits the same during the habeas corpus evidentiary hearing?

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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TABLE OF AUTHORITIES CITED

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STATE CASES

SUPREME COURT CASES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[✓] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

The opinion of the TEXAS COURT OF CRIMINAL APPEALS court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[✓] For cases from **state courts**:

The date on which the highest state court decided my case was 2/8/2017. A copy of that decision appears at Appendix A.

[ ] A timely petition for rehearing was thereafter denied on the following date: 9/26/2019, and a copy of the order denying rehearing appears at Appendix B.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

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

STATEMENT OF THE CASE

Petitioner, Gilbert Sanchez was charged by indictment with sexual assault. Although the indictment was titled aggravated sexual assault, it did not contain the elements required to prove aggravated sexual assault. Specifically, the indictment did not allege that the complainant was placed in fear that death would be ***imminently*** inflicted on her. Under Texas Penal Code Section 22.021 (a)(2)(A)(ii), to commit aggravated sexual assault a person must commit a sexual act and, "by act or words place the victim in fear that death will be imminently inflicted on any person."

Under Texas law, sexual assault is a second-degree felony punishable by two to twenty years in prison. Texas Penal Code §§ 22.011; 12.33. Aggravated Sexual Assault is a first-degree felony punishable by five to ninety-nine years, or life in prison. Texas Penal Code §§ 22.021; 12.32.

Trial was had on the allegations contained in the indictment. The jury charge was submitted to the jury with only the elements contained in the indictment. Petitioner pled not guilty and was tried before a jury. The jury convicted Petitioner and assessed his punishment at sixty-five years in prison.

On April 21, 2011, Petitioner timely filed a timely Notice of Appeal and a Motion for New Trial. The trial court granted Petitioner a new trial. It held that by submitting a first-degree felony charge to the jury when in fact, Petitioner was only charged with a second-degree felony, it had misdirected the jury regarding the law and, it allowed Petitioner to be sentenced incorrectly. The State appealed the trial court's granting of a new trial. (Petitioner also filed an appeal which was abated pending the outcome of the State's appeal). In its appeal, the State argued that the trial court abused its discretion

in granting a new trial because petitioner was not egregiously harmed by the error. Per the State, the error was simply a charging error and because Petitioner did not object to the error, he was only entitled to relief if he could show egregious harm from the error. The State argued absent a showing of egregious harm, a new trial was not appropriate. The Eighth Court agreed and on October 17, 2012, it reversed the trial court's order granting a new trial and it reinstated Petitioner's conviction. State v Sanchez, 393 S.W. 3d 978 (Tex.App.-El Paso 2012, pet. ref'd). Petitioner then filed a petition for discretionary review to the Texas Court of Criminal Appeals which was refused with out written order on April 11, 2013. Petitioner then filed a petition for writ of certiorari to this court which was denied on October 7, 2013. (Sanchez v State, 134 S.Ct. 221 (2013).

On October 21, 2013, Petitioner's original appeal was reinstated. On June 20, 2014, the Eighth Court again affirmed Petitioner's conviction. Sanchez v State, 2014 WL2810479 (Tex.App.-El Paso 2014). A motion for rehearing was timely filed and denied on July 23, 2014. On December 17, 2015, Petitioner's petition for discretionary review of the Eighth Court's second opinion was again refused by the Texas Court of Criminal Appeals.

Petitioner then filed a State Application for writ of habeas corpus. This application was presented by attorney Ruben Morales of El Paso, Texas. In his writ, Petitioner alleged a due process violation, a violation of his right to trial by jury under Apprendi and, a denial of effective assistance of counsel. At Petitioner's writ hearing, it was stipulated by both parties that if called, trial counsel would testify to the following: "A basic part of representing any criminal defendant is reviewing the charging instrument; in the case of Mr. Sanchez, that would be the indictment. In this case, although I did review the indictment, I did not notice that the indictment did not allege the elements of imminence required to elevate the offense to a first-degree felony. Had I noticed the missing element, I would

have used that to limit the range of punishment in this case to that of a second-degree felony. My failure to do so or attempt to do so was not a strategic decision; my failure to make any other objections relevant to the issue of the missing element was not a strategic decision."

REASONS FOR GRANTING THE PETITION

The Texas Court of Criminal Appeals has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power. Specifically, as exposed in ***Ex parte Dawson***, 509 S.W. 3d 294 (Tex.Crim.App. 2016), the Texas Court of Criminal Appeals is not following the Texas Constitution which requires a quorum or en banc decision to grant or deny relief.

The Texas Court of Criminal Appeals has decided an important question of federal law in a way that conflicts with relevant decisions of this court. Specifically, ***De Jonge v State of Oregon***, 299 U.S. 353 (1937); ***Cole v State of Arkansas***, 333 U.S. 196, 201,202 (1948); ***Dunn v United States***, 442 U.S. 100, 106 (1979); ***Jackson v Virginia***, 443 U.S. 307, 314 (1979)("All basically holding that to uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process:" "It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process").

The Texas Court of Criminal Appeals has decided an important question of federal law in a way that conflicts with relevant decisions of this court. Specifically, ***McCormick v United States,*** 500 U.S. 257, 270 n. 8 (1991)("When a defendant is convicted on a charge that was neither alleged in an indictment nor presented to the jury, as the defendant is then not given sufficient notice as to the specific charge. "It is as much a violation of due process to send an accused to prison following

conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made").

The Texas Court of Criminal Appeals has decided an important question of federal law in a way that conflicts with relevant decisions of this Court. Specifically, ***In re Winship,*** 397 U.S. 358 (1970); ***Apprendi v New Jersey***, 530 U.S. 466, 477 (2000); ***United States v Booker***, 543 U.S. 220 (2005); ***Blakely v Washington***, 542 U.S. 296 (2004)("All holding a conviction may not stand without a jury finding of guilt beyond a reasonable doubt to each and every essential element of the offense charged").

The Texas Court of Criminal Appeals has decided an important question of federal law in a way that conflicts with relevant decisions of this Court. Specifically, ***Strickland v Washington,*** 106 S.Ct. 2052 (1984), stating that trial counsel was not ineffective when trial counsel stated that he failed to notice the defect in the indictment prior to Petitioner being convicted and sentenced for an uncharged offense.

ARGUMENTS & AUTHORITIES

The Texas Court of Criminal Appeals decision to deny relief in this case is not only erroneous, their denial is in direct conflict with historical, landmark decisions of this Court. Because this Court's supervisory powers to resolve disagreements among lower courts about specific legal questions, and the importance to the general public of the issue, certiorari should be granted as the Texas Court of Criminal appeals ignored this Court's relevant case law.

QUESTION NUMBER ONE

Is the Fourteenth Amendment of the United States Constitution violated when the Texas

The Texas Constitution governs the manner in which the Texas Court of Criminal Appeals must convene to decide its cases. It mandates that a quorum of judges should decide whether habeas relief should be granted/denied----either a panel of three judges or by the en banc court. See Texas Constitution, Article V, Section 4.

However, as exposed in ***Ex parte Dawson,*** 509 S.W. 3d 294 (Tex.Crim.App. 2016), the Texas Court of Criminal Appeals' internal administrative procedures effectively act as a standing order permitting an individual judge to act as a proxy for a quorum of the judges of the court on the basis of a pre-vote on a category of cases that were never actually seen by any judge other than the proxy judge. **(Ex parte Dawson is included as an appendix for this Court's review).**

As this Court is aware, many court decisions are made granting or denying relief based on a 5-4 vote. The Texas Court of Criminal Appeals internal practice of allowing a single judge acting as a proxy for the entire court removes the majority rules vote which is the accepted and usual course of action. There is no doubt that the Court of Criminal Appeals present actions violate the plain text of the Texas Constitution. However, in addition, Petitioner would request that this Court find that it also violates the United States Constitution's guarantee of due process and equal protection of law.

Certiorari should be granted on this claim.

QUESTION NUMBER TWO

QUESTION NUMBER THREE

Was Petitioner denied due process of law; the right to trial by jury and effective assistance of counsel when he was convicted and sentenced for a charge that was neither alleged in the indictment nor presented to the jury for consideration?

Was Petitioner's right to a jury trial satisfied when the appellate court retried his case on appeal under different instructions and on a different theory than was ever presented to the jury?

For the sake of brevity, because the issues these two claims present are intertwined, Petitioner will argue these two claims together.

Petitioner was denied due process, the right to trial by jury and effective assistance of counsel because he was convicted and sentenced for a charge that was neither alleged in the indictment nor presented to the jury for consideration.

Petitioner was charged in a one count indictment. The indictment listed the offense as aggravated sexual assault. However, the indictment failed to allege the elements necessary to elevate the offense from sexual assault to aggravated sexual assault. Consequently, the indictment only alleged a sexual assault.

The stated defect was brought to the trial court's attention in a motion for new trial and it granted Petitioner a new trial. The State appealed. On appeal, the State conceded that the indictment failed to allege a key element of aggravated sexual assault. However, it argued that the deficiencies in the pleadings and the charge should be evaluated as charge error. It further argued that since Petitioner failed to object to the charge error, the issue should be evaluated under the guise of egregious harm. The Eighth Court of Appeals agreed, found no egregious error, and reversed the trial court's new trial order.

Petitioner would argue that under the due process clause of the Fourteenth Amendment, a defendant may not be convicted of a charge that was neither alleged in an indictment nor presented to the jury. In addition, under ***Apprendi v New Jersey***, supra, the Fourteenth Amendment right to due

defendant may not be convicted of a charge that was neither alleged in an indictment nor presented to the jury. In addition, under ***Apprendi v New Jersey***, supra, the Fourteenth Amendment right to due process and the Sixth Amendment right to trial by jury, taken together, entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.

The facts of this case show that Petitioner was charged in a one count indictment. The indictment was titled Aggravated Sexual Assault. The relevant portion of the indictment alleged that defendant:

Did then and there intentionally and knowingly cause the penetration of the female organ of complainant by means of the sexual organ of Gilbert Sanchez without the consent of complainant, by the use of physical force and violence, And the said defendant did then and there by acts and words place complainant in fear that death, would be inflicted on complainant.

While the indictment set out all the elements of sexual assault, it did not contain all the elements necessary to charge aggravated sexual assault. Sexual 22.021(a)(2)(A)(ii) of the Texas Penal Code, the aggravated sexual assault statute, requires a showing that death would be *imminently* inflicted to elevate the offense to aggravated sexual assault. Texas Penal Code §22.021(a)(2)(A)(ii). The indictment in this case, failed to allege that death would be imminently inflicted. The State has always conceded that imminence is a required element of aggravated sexual assault and, that this element was not contained in the indictment or the jury charge.

A sexual assault may be elevated to an aggravated sexual assault in many ways. See Texas penal Code §22.021. Relevant to the offense as indicted in this case, a person commits an aggravated sexual assault if the person commits a sexual assault and "by acts or words places the victim in fear that...death...will be <u>imminently</u> inflicted on any person." See Texas Penal Code

§22.021(a)(2)(A)(ii)(emphasis added). **The State acknowledges that the indictment failed to include the word "imminently." State's Reply Brief at 14** (emphasis added).

See also ***State v Sanchez***, 393 S.W. 3d 798, 801 (Tex.App.-El Paso, pet. ref'd)(On appeal, the State concedes that the trial court erroneously omitted from the jury charge the aggravating element that the complainant feared her death was imminent, thereby misdirecting the jury about the law.) and; ***Sanchez v State***, 2014 WL 2810479, *2 (Tex.App.-El Paso, 2014)(The State concedes that failure to include an imminence component as part of the aggravating element was error, but argues that the court of appeals state that Petitioner suffered no resultant egregious harm governs under the law of the case).

At the motion for new trial hearing, the trial court expressed its concern that based on the indictment, Petitioner could only be convicted of sexual assault. It was bothered by the omission of the word "imminent" in the charge because "that language...is the only way that you can be convicted of an aggravated sexual assault as opposed to just sexual assault". The trial court concluded that the charge was incorrect and misdirected the jury. The trial court further noted that the absence of the aggravating factor would change the applicable punishment range. Id. It stated that this omitted element was "a requirement to find aggravation, and it's important because the aggravation changes the punishment range," and "if that's defective, then you have a different punishment range." The trial court then reiterated "the charge was wrong." Based on its concern with the legality of Petitioner's conviction and sentence, the trial court granted Petitioner a new trial. Id.

Despite conceding the absence of a key element necessary to convict a person of aggravated sexual assault, the State insisted and, the Eighth Court of Appeals agreed, that because a jury could have found imminence based on the evidence presented, the conviction and sentence were not infirm.

The Eight Court of Appeals has never addressed the impropriety of convicting and sentencing a person for something he was not charged with instead framing the issue as a question of un-objected to charge error requiring egregious harm before reversal will follow.

At Petitioner's 11.07 writ hearing, this issue was once again brought before the trial court. It was stipulated by the parties that trial counsel failed to noitice the missing "imminence" element and for that reason, he did not make any objections. His decision was not strategic. After hearing the arguments of counsel, the trial court was concerned that Petitioner was asking the court to grant him a new punishment hearing. It stated that it had given Petitioner a new trial because it believed it had made an error that required a new trial. "I don't like doing that, but granting a motion for new trial was based on an error that I considered mine. And I own that error, that was the basis." Writ transcript from July 21, 2016, p. 31. However, it was concerned that Petitioner was only requesting a new punishment hearing. Even though it had erred, the trial court did not think it was fair to the State that it be stuck with a second-degree conviction. "To say that what you get now is just new punishment; you're stuck with an indictment, is not, I don't think, what justice requires or what I would have done, had it been raised at any time prior to all of the trial being done." Writ transcript from July 21, 2016, p. 31.

The trial court submitted findings of fact to the Texas Court of Criminal Appeals recommending that Petitioner's writ be denied. The Texas Court of Criminal Appeals denied relief, without written opinion, based on those findings. In those findings, the trial court found that the indictment alleged a first-degree sexual assault because it only omitted the "imminently" element needed for aggravation. It found since the indictment was titled aggravated sexual assault and the indictment contained language that showed the State's intent to charge aggravated sexual assault, Petitioner was

charged with aggravated sexual assault. Trial Court findings of Fact, Conclusions of Law and Order to the Trial Court Clerk. #97-103. But see ***Thomason v State***, 892 S.W. 2d 8, 11 (Tex.Crim.App. 1994)(If the indictment facially alleges a complete offense, the State is committed to the theory of prosecution alleged in the indictment even if it intended a different offense.). It further found that everyone knew the State intended to charge aggravated sexual assault, everyone proceeded to try the case as an aggravated sexual assault, there was sufficient evidence of the missing element and, no objection was made to the missing element. Id. Findings #107-118.

Petitioner would argue to this Court that this is a clear due process violation based upon a conviction for which a charge was never made. Petitioner's conviction for aggravated sexual assault when the indictment against him only charged sexual assault, offends basic principles of due process. See ***De Jonge v State of Oregon***, 299 U.S. 353 (1937)(Conviction upon a charge not made would be sheer denial of due process). The TCCA's decision to deny relief is in direct conflict with this Court's case.

In ***Adames v State***, the TCCA's succinctly explained the Constitutional deficiencies faced by Petitioner here when it wrote: "The McCormick/Dunn/Cole rule applies...when a defendant is convicted on a charge that was neither alleged in an indictment nor presented to the jury, as the defendant is then not given sufficient notice as to the specific charge. ***Adames v State***, 353 S.W. 3d 854, 859-860 Tex.Crim.App. 2011).

In ***Cole v State of Arkansas***, this Court held that: "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." ***Cole v State of Arkansas***, 333 U.S. 196, 201-202 (1948). This Court was critical of the Arkansas appellate court for affirming Cole's conviction based

on a theory of law not charged:

That court has not affirmed these convictions on the basis of the trial Applicant's were afforded. The convictions were for a violation of §2. Applicants urged in the State Supreme Court that the evidence was insufficient to support their conviction in violation of §2. They also raised serious objections to the validity of that section under the Fourteenth Amendment to the Federal Constitution. None of their contentions were passed upon by the State Supreme Court. It affirmed their conviction as though they had been tried and convicted of a violation of §1 when in truth they had been tried and convicted only of a violation of a single offense charged in §2, an offense which is distinctly and substantially different from the offense charged in §1. To conform to due process of law, Applicant's were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as thge issues were determined in the trial court.

We are constrained to hold that the Applicant's have been denied safeguards guaranteed by due process of law—safeguards essential to liberty in a government dedicated to justice under the law. **Cole v State of Arkansas,** 333 U.S. 196, 201-202 (1948).

In this case, Petitioner was never charged with aggravated sexual assault. The trial court's jury charge simply tracked the indictment. The State conceded that the indictment only charged Petitioner with sexual assault, an offense that carries a possible sentence of 2 to 20 years in prison. Yet, Petitioner was convicted and sentenced for aggravated sexual assault, an offense that carries a possible sentence of 5 to 99 years or life in prison. Such a result is a clear due process violation under the Fifth and Fourteenth Amendment of the United States Constitution. See Dunn v United States, 442 U.S. 100, 106 (1979)("To uphold a conviction on a charge that was neither alleged in the indictment nor presented to a jury at trial offends the most basic notions of due process. Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused."); ***Jackson v Virginia***, 443 U.S. 307, 314 (1979)("It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process."); ***McCormick v United States***, 500 U.S. 257, 270 n. 8 (1991)("This Court has never held that the right to a trial is satisfied when an appellate court retries a case on appeal under

different instructions and on a different theory than was ever presented to the jury. Appellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury.") and; ***Wooley v State,*** 273 S.W. 3d 260, 271 (Tex.Crim.App.2008)(Appellate's due process rights were violated when the court of appeals affirmed his conviction under a theory not submitted to the jury). Petitioner was charged with and tried for a second-degree felony. Petitioner's conviction and sentence are for a first-degree felony. Consequently, Petitioner's due process rights have been violated and he is entitled to relief because the TCCA's denial is in direct conflict with the decisions cited above made by this Court.

This Court's case of ***Apprendi v New Jersey*** lends additional support to Petitioner's argument that his conviction and sentence is constitutionally infirm. In Apprendi, this Court stated: "The Fourteenth Amendment right to due process and the Sixth Amendment right to trial by jury, taken together, entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." ***Apprendi v New Jersey***, 530 U.S. 466, 467 (2000). Under ***Apprendi***, facts that increase the prescribed range of penalties to which a criminal defendant is exposed are elements of the crime. Id. At 490.

In this case, the element of imminence was an aggravating factor that exposed Petitioner to first-degree felony punishment instead of second-degree felony punishment. This element was not charged in the indictment and it was not submitted to the jury. Therefore, the jury did not find this element beyond a reasonable doubt as required by Apprendi and the TCCA's should have granted relief. In our society devoted to the rule of law, the difference between violating or not violating a criminal statute cannot be shrugged aside as a minor detail as the trial/habeas court; eighth court of appeals; and; court of criminal appeals wish to do and have succeeded to do in the handling of this

constitutional error. The TCCA's decision to deny relief is in direct conflict with this Court's decisions and therefore, certiorari should be granted concerning this constitutional due process violation. **(Petitioner's ineffective assistance of counsel claim will be question number five).**

QUESTION NUMBER FOUR

Does the Fifth and Fourteenth Amendments to the United States Constitution allow a conviction to stand without a jury finding of guilt beyond a reasonable doubt to each and every essential element of the offense?

This Court states that: "The Fourteenth Amendment right to due process and the Sixth Amendment right to trial by jury, taken together, entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." ***Apprendi v New Jersey***, 530 U.S. 466, 477 (2000); ***In re Winship,*** 397 U.S. 358 (1970); With the above stated case law in mind, in this case, Petitioner was entitled to a jury determination on every element of aggravated sexual assault beyond a reasonable doubt. Petitioner's trial court's charge omitted the critical elements ***imminently inflicted*** on the complainant. That is to say that the aggravating element of aggravated sexual assault, placing the victim in fear of death must be coupled with the time sequence of imminently inflicted. See Texas Penal Code, Section 22.021(a)(2)(ii). This error deprives petitioner of his Sixth Amendment right to a jury determination, under ***Apprendi*** and ***In re Winship*** above, and accordingly amounts to a due process violation under the Fourteenth Amendment, due process clause.

The issue at hand goes to the core of our system of jurisprudence. Despite the trial court's original granting a new trial based on the missing element and the trial court's comments that it felt the jury

was misdirected as to the law, the Eighth Court of Appeals; the Texas Court of Criminal Appeals; are of the opinion that the jury is not required to find an essential element of the offense beyond a reasonable doubt in order to sustain petitioner's conviction of aggravated sexual assault. The court's opinions offend the due process cause. Whether under the Almanza egregious error standard or under an abuse of discretion standard, due process under the Fifth and Fourteenth Amendments to the Constitution of the United States may not tolerate conviction without a jury finding of guilt beyond a reasonable doubt to each and every essential element of the offense.

The jury in Petitioner's case, through charge error, did not find Petitioner guilty beyond a reasonable doubt of placing the victim in fear of imminent infliction of serious bodily injury or death. Petitioner was convicted of a first-degree felony. Without such a finding, it is not a first-degree felony, it is a second-degree felony. The jury determines this, and the Sixth Amendment mandates it. Petitioner was sentenced to 65 aggravated years in prison, meaning he will not become eligible for parole until he has served 30 flat calendar years. The maximum sentence Petitioner could have been sentenced to under a second-degree felony is 2 to 20 years, meaning if even given the maximum of 20 years he would have to serve 10 years flat before becoming eligible for parole. Yet, the Court of Appeals; and the Texas Court of Criminal Appeals state that Petitioner has not suffered egregious harm. There can be no clearer definition of egregious harm then the sentence Petitioner received when the jury did not find every element of the offense. Petitioner was denied due process and reversal is required.

The State court's decision that a jury is not required to find an essential element of Petitioner's offense beyond a reasonable doubt is in direct conflict with this Court's decisions in ***Apprendi v New Jersey; In re Winship; United States v Booker; Blakely v Washington.***

Certiorari should be granted in this case with such a flagrant disregard to this Court's decisions in the cases cited herein.

QUESTION NUMBER FIVE

Was Petitioner denied the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution when trial counsel failed to object to the jury charge and admits the same during the habeas corpus evidentiary hearing?

During Petitioner's writ hearing, it was stipulated by both parties that if called, trial counsel, Daniel Mena, would testify to the following: "A basic part of representing any criminal defendant is reviewing the charging instrument; in the case of Mr. Sanchez, that would be the indictment. In this case, although I did review the indictment, I did not notice that the indictment did not allege the elements of imminence required to elevate the offense to a first-degree felony. Had I noticed the missing element, I would have used that to limit the range of punishment in this case to that of a second-degree felony. My failure to do so or attempt to do so was not a strategic decision; my failure to make any other objections relevant to the issue of the missing element was not a strategic decision." **(Writ transcript from July 21, 2016, p. 6-7).**

Ineffective assistance of counsel is determined by the standards set forth in this Court's landmark case of ***Strickland v Washington,*** 106 S.Ct. 2052 (1984). ***Strickland*** requires a two-step analysis. First, the reviewing court must decide whether trial counsel's performance failed to constitute reasonably effective assistance. If the attorney's performance did fall below the accepted standard, the court must then decide whether there is a "reasonable probability that the result of the trial would have been different," but for counsel's deficient performance. ***Strickland*** defines a "reasonable

probability" as "probability sufficient to undermine the confidence in the outcome."

How is it possible, in this case, when trial counsel acknowledges that he failed to notice the defect in the indictment prior to Petitioner being convicted and sentenced for an uncharged offense; Further acknowledges that had he noticed the defect he would have objected to Petitioner being sentenced for first-degree felony when in fact he was only charged with a second-degree felony. Additionally, if the trial court had overruled his objection, which was unlikely given the trial court's ruling at the motion for new trial, then trial counsel would have insisted that the charge of the court contain the correct law and language regarding the fear that death would be "imminently" inflicted. How do the State court's not find trial counsel ineffective when he in fact admits that he was?

As a direct result of counsel's failure to recognize the deficiency in the charge, he allowed Petitioner to be tried, convicted and sentenced for a first degree felony when in fact, he was not charged with a first degree felony. Had trial counsel objected in a timely manner, Petitioner could not have been sentenced to more than 20 years in prison. Petitioner was sentenced to 65 years in prison. Based on these facts, it is clear that Petitioner has satisfied both prongs of ***Strickland*** and Petitioner is entitled to have his case reversed based upon ineffective assistance of counsel.

The State court's decision to deny relief based on the set of facts above, is in direct conflict of this Court's decision in ***Strickland v Washington, supra.***

Certiorari should be granted on this question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Gilbert Sanchez

Gilbert Sanchez

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