

No. 20-8182

IN THE  
SUPREME COURT OF THE UNITED STATES

GILBERT SANCHEZ  
(Your Name)

PETITIONER

**ORIGINAL**

vs.

THE STATE OF TEXAS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

FILED  
MAY 14 2021  
OFFICE OF THE CLERK  
SUPREME COURT, U.S.

TEXAS Court of Criminal Appeals  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

GILBERT SANCHEZ  
(Your Name)

CLEMENTS UNIT 9601 SPUR 591  
(Address)

Amareillo, Tx 79107  
(City, State, Zip Code)

(806) 381-7080  
(Phone Number)

## **QUESTIONS PRESENTED**

### **QUESTION NUMBER ONE**

**The trial court judge in this case states unequivocally that she misdirected the jury as to the law in this case that changed Petitioner's sentencing range from that of 2 to 20 years to 5 to 99 years, or life. Petitioner was sentenced to 65 years in prison when in fact he was only legally eligible to be sentenced under a second-degree felony of 2 to 20 years. Does this not constitute egregious harm?**

### **QUESTION NUMBER TWO**

**When a trial counsel admits that he was ineffective by failing to object to a jury charge and admits the same during a habeas corpus evidentiary hearing. How can the Court of Criminal Appeals ignore this fact?**

### **QUESTION NUMBER THREE**

**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 charged offense?**

## **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:

## **RELATED CASES**

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to review the trial court's original granting of a new  
trial with attached application brief in support.**

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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 is unpublished.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 \_\_\_\_\_ 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.

## **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 2/29/2021. A copy of that decision appears at Appendix 4.

A timely petition for rehearing was thereafter denied 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. § 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 nature 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 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. Despite the trial courts admission, Petitioner’s conviction was still upheld.

Further, in Petitioner’s state application for writ of habeas corpus presented by attorney Ruben Morales of El Paso, Texas. In this writ, Petitioner alleged a due process violation, a violation of his right to trial 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.” Despite trial counsel’s admission, Petitioner’s conviction was still upheld.

Petitioner was further 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. Despite these facts, Petitioner’s conviction was still upheld.

## **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, the trial court in this case unequivocally stated that she misdirected the jury on the law of the case, yet the Court of Criminal Appeals ignores this admission and denies relief.

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, Petitioner’s trial counsel admits that he failed to notice the missing element that would have capped

Petitioner's conviction as a second-degree felony (2-20 years), instead, Petitioner was sentenced under a first-degree felony and sentenced to 65 years in prison, yet the Court of Criminal Appeals ignores this admission and denies 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, *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").

## **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, despite Petitioner's exhaustive efforts in post-conviction remedies, ignores not only their own precedent case law, but this Court's case law as well and denies relief.

### **QUESTION NUMBER ONE**

**The trial court judge in this case states unequivocally that she misdirected the jury as to the law in this case which changed Petitioner's sentencing range from that of 2 to 20 years to 5 to 99 years, or life. Petitioner was sentenced to 65 years in prison when in fact he was only legally eligible to be sentenced under a second-degree felony of 2 to 20 years. Does this not constitute**

## **egregious harm?**

A fundamental miscarriage of justice is taking place in the instant case and yet the lower court's with the power to correct this grave error continue to ignore Petitioner's claim. This Court has the inherent supervisory power to correct Petitioner's sentence. The facts of this claim are as follows: FACTS: 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. This should have ended Petitioner's legal claim that the jury was misdirected as to the law of the case as admitted by the trial court judge. However, the State appealed. On appeal, the State conceded that the indictment failed to allege a key element of aggravated sexual assault. The State 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 harm, and reversed the trial court's new trial order.

This presents two questions for this Court to decide. First is the fact that the trial court judge admits that she misdirected the jury as to the law of the case, which will be demonstrated next. And further, when Petitioner was only legally eligible to receive a sentence as a second-degree felony of 2 to 20 years and instead was sentenced under a first-degree felony of 65 years, how is that not considered egregious harm? It is not only egregious harm it is a violation of due process.

The relevant portion of the indictment alleged that defendant: Did then and there intentionally

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. Under Texas Penal Code Section 22.021 (a)(2)(A)(ii), the aggravated sexual assault statute, requires a showing that death would be imminently inflicted to elevate the offense to aggravated sexual assault. 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 imminently inflicted on any person.

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. The trial court judge stated she was bothered by the omission of the word “imminent” in the charge because “that language...is the only way 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 that she had misdirected the jury. The trial court further noted that the absence of the aggravating factor would change the applicable punishment range. It stated that this omitted element was “a requirement to find aggravation, and it’s important

because the aggravation changes the punishment range,": 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.

Regardless if this error is considered a charging error or an abuse of discretion, the core fact remains that the trial court's words cannot be misconstrued, she states unequivocally that she misdirected the jury on the law in this case and this Court should grant certiorari and review Petitioner's claim.

## **QUESTION NUMBER TWO**

**When a trial counsel admits that he was ineffective by failing to object to a jury charge and admits the same during a habeas corpus evidentiary hearing. How can the Court of Criminal Appeals ignore this fact?**

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."

Again, just as the trial court admits she misdirected the jury as to the law of the case, trial counsel

admits to his own ineffectiveness yet the Texas Court of Criminal Appeals denies relief.

How is it possible, 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 a first-degree felony when in fact he was only charged with a second-degree felony.

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 2 to 20 years in prison. Petitioner was sentenced to 65 years in prison.

Under 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" a "probability sufficient to undermine the confidence in the outcome."

Based on the fact of the trial court's willingness to grant a new trial, and trial counsel's failure to object to the charge, there is sufficient reason to believe the outcome of Petitioner's trial could have been different. Petitioner has more than satisfied both prongs of Strickland and is entitled to relief based on ineffective assistance of his trial counsel.

## QUESTION NUMBER THREE

**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 charged offense?**

This Court states that: "The Fourteenth Amendment right to due process and the Sixth Amendment right to a 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." *In re Winship*, 397 U.S. 358 (1970); *Apprendi v New Jersey*, 530 U.S. 466, 477 (2000). 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 jury 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 deprived Petitioner of his Sixth Amendment right to a jury determination under *In re Winship* and *Apprendi* stated above, and therefore, accordingly amount to a due process violation under the Fourteenth Amendment.

The Texas Court of Criminal Appeals 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 *In re Winship*; *Apprendi v New Jersey*; *United States v Booker*; *Blakely v Washington*.

Certiorari should be granted and reviewed by this Honorable Court.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Gilbert Sanchez".

**Gilbert Sanchez**

Dated this 14<sup>th</sup> day of May, 2021.