No.

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH J. CONKLING, Petitioner

v.

STATE OF KANSAS, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE KANSAS COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does this Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004) establish an "unpled but admitted facts" exception to the rule set forth in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), wherein this Court interpreted the Sixth Amendment as requiring a state government to prove any fact that increases the permissible penalty for a crime (other than the fact of a prior conviction) to a jury beyond a reasonable doubt?

LIST OF PARTIES

The parties to this case are as stated in the caption, Joseph J. Conkling, petitioner, and the State of Kansas, respondent. In the courts below, the petitioner was referred to as appellant-defendant and the respondent was referred to as appellee-plaintiff.

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In the District Court of Bourbon County, Joseph J. Conkling pled no contest to charges of rape and aggravated indecent liberties with a child. The District Court later imposed a 226-month prison sentence, to be followed by a term of lifetime postrelease supervision. On appeal, Mr. Conkling argued that the District Court violated his Sixth Amendment rights by increasing his postrelease supervision sentence from a term of 60-months to a term of life on the basis of a judicial finding that he was over the age of 18 at the time of his conviction offenses. The Kansas Court of Appeals affirmed Mr. Conkling's postrelease supervision sentence in a published opinion. *Kansas v. Conkling*, 540 P.3d 414 (Kan. App. 2023). The Kansas Supreme Court later denied review by order dated March 28, 2024.

STATEMENT OF JURISDICTION

The Kansas Supreme Court is the court of last resort in Kansas. That court declined to review Mr. Conkling's claim that the District Court violated his Sixth Amendment rights by increasing his postrelease sentence on the basis of judicial fact-finding. Thus, this Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution states the following in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .

Section 1 of the Fourteenth Amendment to the United States Constitution states the following in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

K.S.A. 2021 Supp. 22-37179(d)(1)(G)(i) provides the following in relevant part:

> [P]ersons sentenced to imprisonment for a sexually violent crime committed … when the offender was 18 years of age or older … shall be released to a mandatory period of postrelease supervision for the duration of the person's natural life.

K.S.A. 2021 Supp. 22-37179(d)(1)(G)(ii) provides the following in relevant part:

> Persons sentenced to imprisonment for a sexually violent crime committed … when the offender was under 18 years of age … shall be released to a mandatory period of postrelease supervision for 60 months …

STATEMENT OF THE CASE

In October of 2021, the State of Kansas charged Joseph J. Conkling with 98 felony sex offenses. Mr. Conkling subsequently entered into a plea agreement whereby he would plead no contest to just two charges: rape and aggravated indecent liberties with a child. The written agreement expressly anticipated that Mr. Conkling would receive a lengthy prison sentence to be followed by a postrelease supervision term of just 36 months. It included no reference to a potential term of lifetime postrelease supervision. See Appendix C (plea contract).

At a November 29, 2022, plea hearing, Mr. Conkling stated, under oath, that he was 41 years-old and that he understood the potential penalties of the crimes to which he intended to plead no contest. See Appendix D (transcript of November 29, 2022, plea hearing "Plea Tr."). These amended charges included no allegation of Mr. Conkling's age or any indication that the charges carried a mandatory lifetime postrelease sentence. See Appendix C (amended information). At no point during the plea hearing did the District Court suggest that Mr. Conkling was pleading to offenses carrying mandatory lifetime postrelease sentences. Plea Tr., generally. And, after Mr. Conkling pled no contest, the State provided a factual basis for those pleas that made no mention of Mr. Conkling's age. Plea Tr. at 11-12.

At a February 6, 2023, sentencing hearing, the District Court asserted, for the first time, that Mr. Conkling's convictions carried a mandatory lifetime postrelease sentence. See Appendix E (transcript of February 6, 2023, sentencing hearing "Sentencing Tr."). The District Court then imposed a 226-month prison sentence (which was anticipated by Mr. Conkling's plea agreement) to be followed by a term of lifetime postrelease supervision (a punishment that was not anticipated by Mr. Conkling's plea agreement). Sentencing Tr. at 14. After sentencing, Mr. Conkling filed a notice of appeal.

On appeal, Mr. Conkling asserted that the District Court had violated his Sixth Amendment rights by increasing his postrelease supervision sentence on the basis of a judicial finding that he was over the age of 18 at the time of his crimes of conviction. Mr. Conkling's argument invoked the "*Apprendi* rule," —*i.e.*, the constitutional rule that requires any fact (other than the fact of a prior conviction) to be submitted to a jury and proven beyond a reasonable doubt before it may be used to increase the permissive punishment for a crime.

In response to Mr. Conkling's argument, the Kansas Court of Appeals tacitly conceded that Mr. Conkling's no contest pleas did not serve to waive his right to a jury trial on an age finding that was used to increase his mandatory postrelease supervision sentence from a term of 60-months to a term of life. Appendix B, slip op. at 1, 3-6. However, the Court of Appeals noted that Mr.

Conkling had admitted his age: (1) in an application for appointed counsel; (2) in colloquy to the District Court to establish that his no contest pleas were knowing and voluntary; and (3) while registering as a sex offender for his recent crimes of conviction. Appendix B, slip op. at 5. The Court of Appeals also asserted that this Court carved out an "admitted facts" exception to the *Apprendi* rule in *Blakely v. Washington*, 542 U.S. 296 (2004). Appendix B, slip op. at 4. Putting two and two together, the Court of Appeals ultimately held that Mr. Conkling's admissions absolved the government of its duty to prove a penalty-enhancing fact to a jury beyond a reasonable doubt. Appendix B, slip op. at 1, 6. Essentially, the Court of Appeals held that a criminal defendant has no Sixth Amendment right to a jury trial on a particular factual matter whenever he or she has admitted—but not necessarily pled—that fact.[1]

Mr. Conkling filed a timely petition for discretionary review with the Kansas Supreme Court. This petition specifically argued that the Kansas Court of Appeals' interpretation of *Blakely* was incorrect and squarely at odds with the United States Supreme Court's application of the *Apprendi* rule in *Hurst v. Florida*,

[1] The Kansas Court of Appeals' holding in this case is no one-off. Over the past several years, the Court of Appeals has consistently maintained that unpled admissions may deprive an accused of his or her Sixth Amendment right to a jury trial. *See e.g.*, *Kansas v. Cook*, No. 119,715, 2019 WL 3756188, at *2 (Kan. App. 2019) (unpublished opinion); *Kansas v. Schmeal*, No. 121,221, 2020 WL 3885631, at *9 (Kan. App. 2020) (unpublished opinion). In one case, the Court of Appeals went so far as to rule that an accused had forfeited his right to a jury trial by admitting a penalty-enhancing fact to a therapist. *Kansas v. Haynes*, No. 120,533, 2020 WL 741458, at * 8 (Kan. App. 2020).

577 U.S. 92 (2016). The Kansas Supreme Court, however, denied review without comment. Appendix A.

REASONS FOR GRANTING THE WRIT

The Kansas Judiciary believes that an accused may surrender his or her constitutional right to a jury trial through a mere admission that is unaccompanied by a waiver. This is quite extraordinary. Unlike a guilty plea (which serves as a waiver of an accused's right to a jury trial), a mere admission needn't be contemplated, knowing, or voluntary. Can it really be that an accused may inadvertently surrender the most sacred of all constitutional rights? If our country is to remain protected from arbitrary and partisan enforcement of the law, the answer to this question must be: "No." This Court should review this case to nip a constitutionally intolerable practice in the bud.

1. This Court Should Grant Certiorari to Settle an Important Matter of Constitutional Law.

In *Apprendi v. New Jersey*, this Court interpreted the Sixth Amendment of the United States Constitution and held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). With the possible exception of prior conviction findings, this Court's *Apprendi* decision doesn't set forth any exceptions to the preceding proclamation of law. *Apprendi*, 530 U.S. at 489.

Several years following its publication of *Apprendi*, this Court decided *Blakely v. Washington*, 542 U.S. 296 (2004). Although *Blakely* was decided to *expand* the *Apprendi* rule's application to cases resolved by plea, the Kansas Court of Appeals now contends that *Blakely*, in fact, established an "admitted facts" exception to the *Apprendi* rule. *Kansas v. Conkling*, 540 P.3d 414, Syl. ¶ 2 (Kan. App. 2023). This purported exception derives from an isolated sentence within *Blakely*, wherein Justice Antonin Scalia observed that a judge may enhance a sentence on the basis of "facts reflected in the jury verdict or admitted by the defendant." *Conkling*, 540 P.3d at 416 *quoting Blakely*, 542 U.S. at 303.

If Justice Scalia truly was endeavoring to diminish *Apprendi's* protections, he was exceptionally coy in doing so. In context, it seems obvious that Justice Scalia used the word "admitted" in the preceding quotation to refer to facts that are admitted as part of a guilty plea. This was, in fact, later clarified in the *Blakely* opinion, when Justice Scalia noted: "***If appropriate waivers are procured***, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty." *Blakely*, 542 U.S. at 310 (emphasis added). Unfortunately, this clarification of the law was not quite explicit enough for the Kansas Court of Appeals.

A decade following this Court's publication of *Blakely*, this Court decided *Hurst v. Florida*, 577 U.S. 92 (2016). There, this Court considered a capital sentencing procedure that permitted death sentences on the basis of judicial aggravating circumstance findings. *Hurst*, 577 U.S. at 95-96. After concluding that this sentencing scheme violated the *Apprendi* rule, this Court next considered whether a purported admission attributed to the defendant permitted the imposition of the death penalty in his particular case. *Hurst*, 577 U.S. at 98-100. Specifically, Florida prosecutors asserted that the defendant's attorney had admitted/conceded the existence of a death-permitting aggravating circumstance during trial and thereby surrendered his client's Sixth Amendment right to a jury trial on that specific factual finding. To advance this argument, prosecutors relied upon *the exact same* quotation from *Blakely* that the Kansas Court of Appeals now relies upon in support of its contention that there is an "unpled but admitted facts" exception to the *Apprendi* rule. *Hurst*, 577 U.S. at 100.

The *Hurst* Court responded to Florida's novel argument as follows:

> *Blakely* [ ] was a decision applying *Apprendi* to facts admitted in a guilty plea, in which the defendant necessarily waived his right to a jury trial. Florida has not explained how Hurst's alleged admissions accomplished a similar waiver.
>
> *Hurst*, 577 U.S. at 100 (internal citation omitted).

This rejection of Florida's legal argument may technically qualify as dicta, since this Court also determined, as a factual matter, that the *Hurst* defendant never actually made the "admission" attributed to him by prosecutors. *Hurst*, 577 U.S. at 100-01. By granting review of this case, this Court could explicitly hold what it seemed to convey in *Hurst*—there is no "unpled but admitted facts" exception to the *Apprendi* rule.

Review of this case would also allow this Court to clear up analytic misconceptions caused by *Blakely's* imprecise language.[2] Technically speaking, it isn't the admission within a guilty plea that absolves the government of its duty to prove a criminal charge to a jury beyond a reasonable doubt. Rather, it is the plea's waiver of constitutional rights. A defendant willing to plead no contest may certainly waive his or her right to a jury trial without ever admitting guilt. This case presents an opportunity for this Court to clarify that an admission of guilt ought not to be treated as the functional equivalent of a waiver of the right to a jury trial. See *North Carolina v. Alford*, 400 U.S. 25, 37 (1970) ("[W]hile most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of a prison sentence").

[2] *Blakely's* "admitted facts" phraseology has carried over into many of this Court's subsequent opinions that define the current contours of the *Apprendi* rule. *See e.g.*, *United States v. Booker*, 543 U.S. 220, 244 (2005); *Haymond*, 588 U.S. __, 139 S.Ct. 2369, 2377 (2019).

2. This Court Should Grant Certiorari to Resolve a Split of Authority Between State Appellate Courts.

Some states beside Kansas currently recognize a "facts admitted by the defendant" exception to the *Apprendi* rule. See e.g., *Hobbs v. Indiana*, 206 N.E.3d. 419, 429 (Ind. Ct. App. 2023). But those that do appear to conceptualize "admitted facts" as facts that have been admitted as part of a guilty plea. *Colorado v. Kirby*, __ P.3d __, 2024 WL 851590, at *10-11 (Colo. App. 2024). So, these states are simply using imprecise language in the same manner that this Court did in *Blakely*.

The Kansas Judiciary seems to be unique in thinking that an unpled admission may deprive an accused of his or her Sixth Amendment right to a jury trial. The idea that an accused may unwittingly surrender his or her right to a jury trial is counterintuitive. And, for that likely reason, most state appellate courts don't seem to have directly confronted the issue. But the Minnesota and Colorado Supreme Courts have explicitly held—contrary to what is now held in Kansas—that an accused cannot surrender his or her Sixth Amendment rights through an admission that is unaccompanied by a jury trial waiver. *Minnesota v. Dettman*, 719 N.W.2d 644, 655 (Minn. 2006); *Colorado v. Isaacks*, 133 P.3d 1190, 1195 (2006). By granting review of this case, this Court may resolve this split of authority.

CONCLUSION

The Sixth Amendment right to a jury trial must be either waived or honored. If any contrary rule infected our legal system, it could have disastrous, long-term societal consequences. *See United States v. Haymond*, 588 U.S. __, 139 S.Ct. 2369, 2384 (2019) ("[L]ittle inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters"). This Court should, therefore, grant certiorari to clarify that there is no "unpled but admitted facts" exception to the *Apprendi* rule.

Respectfully submitted,

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