No. 23-7783

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH JAMES CONKLING,
Petitioner,

v.

STATE OF KANSAS,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of the State of Kansas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether a district court's use, for the purpose of determining a criminal defendant's length of post-release supervision, of the defendant's sworn statement as to his age, given during a plea colloquy in which the defendant waived his right to a jury trial and pled no contest, violates the rules of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004).

LIST OF PARTIES

All parties to these proceedings are listed in the caption of the case.

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OPINIONS BELOW

The published opinion of the Kansas Court of Appeals affirming the Petitioner's sentence, Pet. App. B, is reported at *State v. Conkling*, 540 P.3d 414 (Kan. App. 2023).

STATEMENT OF JURISDICTION

The Kansas Court of Appeals decided this case on December 15, 2023, and the Kansas Supreme Court denied review on March 28, 2024. Pet. App. A. The Petitioner filed his Petition for Writ of Certiorari on June 17, 2024. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment: The Sixth Amendment to the United States Constitution provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ." U.S. Const. amend. VI.

Fourteenth Amendment: The Fourteenth Amendment to the United States Constitution provides, in pertinent part, ". . . nor shall any State deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV.

Kan. Stat. Ann. § 22-3717(d)(1)(G)(i): Except as provided in subsection (v), persons sentenced to imprisonment for a sexually violent crime committed on or after July 1, 2006, when the offender was 18 years of age or older, and who are released from prison, shall be released to a mandatory period of postrelease supervision for the duration of the person's natural life.

STATEMENT OF THE CASE

In a Kansas district court, the Petitioner pled no contest to, and was found guilty of, one count of rape and one count of aggravated indecent liberties with a child. For these crimes, he was sentence to 226 months in prison, to be followed by lifetime post-release supervision. Pet. App. B (Slip op.) at 1-2. The lifetime post-release supervision period was imposed pursuant to K.S.A. 22-3717(d)(1)(G)(i) which requires it for any defendant who commits a sexually violent crime who is over the age of 18.

The Petitioner's age was not alleged in the complaint, nor did the prosecutor state his age when providing the district court with a factual basis to support the pleas. Pet. App. C at 11; Pet. App. D (Tr. of Plea Hearing) at 11-12. However, in documents filed with the district court, the Petitioner admitted that he was 41 years old. Pet. App. C, at 1. Further, at the plea hearing, while under oath, the Petitioner verbally told the judge that he was 41 years old. Pet. App. D (Tr. of Plea Hearing) at 3. That the Petitioner is 41 years old has never been disputed.

Nevertheless, the Petitioner appealed the imposition of lifetime post-release supervision on the grounds that it was based on improper judicial factfinding regarding his age, in violation of *Apprendi v. New Jersey,* 530 U.S. 466 (2000). The Kansas Court of Appeals disagreed, finding that because the Petitioner admitted to his age, there was no improper factfinding by the district court judge in violation of *Apprendi*. Pet. App. B (Slip op.) 5-6. In reaching its decision, the Court of Appeals relied on this Court's language

in *Blakely v. Washington*, 542 U.S. 296 (2004), that a sentencing judge can consider "facts reflected in the jury verdict or admitted by the defendant." Pet. App. B (Slip op.) 4.

Petitioner then sought review by the Kansas Supreme Court, which was denied. He then filed a Petition for Writ of Certiorari in this Court.

ARGUMENT

This Court's review is unwarranted in this case because the purported judicial fact finding was actually the result of an admission by the Petitioner, both in court filings and under oath in open court, in a plea proceeding wherein the Petitioner affirmatively waived his right to a jury trial. This was entirely consistent with this Court's ruling in *Blakely v. Washington*, 542 U.S. 296 (2004).

Even if one could find error in the state court finding that the Petitioner was over the age of 18 at the time he committed his crimes, subjecting him to lifetime post-release supervision, that error would unquestionably be harmless under *Neder v. United States*, 527 U.S. 1 (1999). The Petitioner's age was uncontested below and was supported by overwhelming evidence. It is, in fact, the rare kind of fact that is essentially uncontestable.

1. In the state trial court, the Petitioner admitted in his Petition to Enter a Plea Agreement and in open court, under oath, that he was over the

age of 18, and also waived his right to a jury trial. Under *Blakely v. Washington*, the state trial court's use of this admission in determining the length of post-release supervision was proper. This case does not present an important question of Constitutional law that requires this Court's attention.

Contrary to the Petitioner's assertion, this case does not present an important constitutional question. Rather, it presents a rather ordinary circumstance where a criminal defendant entered into a plea agreement wherein he waived jury trial and admitted, under oath, to all of the facts necessary to support the sentence imposed by the trial judge. The state trial proceedings and appellate court rulings were entirely consistent with this Court's precedent set forth in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004).

In *Apprendi,* this Court held, "Other than the fact of a prior conviction, 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. 530 U.S. at 490. Later, in *Blakely*, the Court observed that "[w]hen a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding." 542 U.S. at 310. The Court went on, "If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty." *Id.*

Here, the Petitioner admitted in his "Petition to Enter Plea Agreement," which he signed and filed in the district court, that he was "41 years of age." Pet. App. C. at 1. At the subsequent plea hearing before the district court judge, the Petitioner was sworn in. Pet. App. D (Tr. of Plea Hearing) at 3. After swearing to tell the truth, the Petitioner stated that he was 41 years old. Pet. App. D (Tr. of Plea Hearing) at 3. He was advised of his right to a jury trial, and he waived that right. Pet. App. D (Tr. of Plea Hearing) at 4-5. After a thorough plea colloquy with the judge, the Petitioner pled no contest to one count of rape and one count of aggravated indecent liberties with a child. Pet. App. D (Tr. of Plea Hearing) at 11. Accordingly, the court found him guilty of both crimes. Pet. App. D (Tr. of Plea Hearing) at 13.

Thus, the Petitioner waived his right to a jury trial, and he stipulated through his admissions, that he was over the age of 18. Therefore, the district court's acknowledgment that Petitioner was over 18 for purposes of determining the length of post-release supervision did not violate *Apprendi* and *Blakely*. Rather, it was entirely consistent those decisions.

The Petitioner's suggestion that *Hurst v. Florida*, 577 U.S. 92 (2016), somehow renders the Kansas Court of Appeal's rather straightforward application of *Blakely* erroneous, is misplaced. *Hurst* was a capital case in which the aggravating circumstances supporting a death sentence were found by a judge following a jury trial where the jury merely made a sentencing

recommendation. 577 U.S. at 94. Among the arguments made by the State of Florida on appeal to this Court was that during the trial, the defendant's counsel admitted to the existence of one or more aggravating circumstances, relying on language in *Blakely* that a judge may impose sentence based on facts reflected in the jury verdict "*or admitted by the defendant*." *Hurst*, 577 U.S. at 100 (citing *Blakely*, 542 U.S. at 303). The Court rejected Florida's argument because the language Florida relied on was taken out of context—the Court noted that *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." *Hurst*, 577 U.S. at 100 Since there was no waiver of jury trial in *Hurst*, *Blakely* was inapplicable.

But here, there is a waiver of jury trial. Pet. App. D (Tr. of Plea Hearing) at 4-5. While the actual affirmative waiver appears two pages later in the transcript after the Petitioner admitted his age, the State of Kansas submits that one must look to the entirety of the proceeding, rather than artificially parsing it out. After all, this proceeding started with a written Petition to Enter Plea Agreement, that was filed with the district court, in which the Petitioner acknowledged that he was aware of his rights and that he understood that by entering a plea of guilty or no contest, that he was waiving his right to a jury trial. Pet. App. C, at 3, para. 7 and 8. The Petitioner then stood in front of the district court judge and engaged in a lengthy plea colloquy which began with the Petitioner swearing an oath to

tell the truth, and in which he answered several factual questions that included his age, and he affirmatively waived his trial rights, to include a trial by jury, before finally pleading no contest. Pet. App. D, at 2-11. The preparatory questions asked by the judge were necessary parts of the waiver. Their purpose was to ensure that the Petitioner had the intellect, maturity, education, language skills, and overall understanding of the consequences to enter a valid plea. The Petitioner's answers, given under oath, were part of the waiver of his trial rights, not independent factfinding.

Thus, this case is so factually and procedurally different from the circumstances of *Hurst,* as to render *Hurst* inapposite. The portion of *Hurst* the Petitioner relies on was predicated on the absence of a jury trial waiver. But there is a jury trial waiver in this case. The Kansas Court of Appeals' decision here clearly fits within the ambit of *Blakely*, as described by the *Hurst* Court—"applying *Apprendi* to facts admitted in a guilty plea, in which the defendant necessarily waived his right to a jury trial." *Hurst*, 577 U.S. at 100 (citing *Blakely*, 542 U.S. at 310-12).

In sum, the Kansas Court of Appeals' decision here is consistent with this Court's precedent. There is no constitutional error or question in this case that demands this Court's attention. Certiorari should be denied.

2. **Under *Neder v. United States*, the failure to present an element of a crime to a jury can be harmless if the element was uncontested and supported by overwhelming evidence. Given that the Petitioner did not contest his age and, in fact, admitted it under oath, any error of judicial factfinding is harmless.**

Even if there were some merit to the Petitioner's contention that improper judicial factfinding occurred, this case nevertheless does not demand the Court's attention because, under this Court's precedents, the purported error here was harmless beyond a reasonable doubt. What the Petitioner complains of is analogous to the omission of an element of a crime from consideration by a jury. *Washington v. Recuenco*, 548 U.S. 212, 218-22 (2006). In *Recuenco*, 548 U.S. at 220-22, this Court held that an *Apprendi* error is subject to the same harmless error analysis set forth in *Neder v. United States*, 527 U.S. 1 (1999). In *Neder*, the Court held, "where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence," such an omission is harmless.

Here, there is no doubt that the Petitioner is over the age of 18. This fact was not contested below. Indeed, the Petitioner admitted to it—clearly and repeatedly. He stated both in writing and verbally while under oath, that he was 41 years old. And his admissions amount to overwhelming evidence. Moreover, the Petitioner's age, at least to the extent that he is over the age of 18, is indisputable. It is an objective, measurable fact that is not capable of being refuted.

So, even if the district court here erred in some fashion by relying on the Petitioner's admissions as to his age, that error is most certainly harmless. Therefore, the constitutional issue the Petitioner attempts to raise before the Court is illusory. This case simply does not warrant further review by this Court.

CONCLUSION

A Writ of Certiorari is not warranted in this matter and should be denied.

Respectfully submitted,

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