No. 23-7783

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

REPLY BRIEF IN SUPPORT OF 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?

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INTRODUCTION

In its Brief in Opposition, the respondent contends that this Court should deny certiorari on the ground that this case does not present constitutional error. In the alternative, the respondent argues that certiorari is unwarranted because presumed constitutional error is harmless. Mr. Conkling now replies to the respondent's arguments. And, in doing so, he draws this Court's attention to a recent Kansas Supreme Court opinion that has bearing on his petition's claim of error.

ARGUMENT

1. A recently decided Kansas Supreme Court opinion warrants a summary remand for reconsideration of this case's claim of error.

Since Mr. Conkling filed his petition for writ of certiorari, the Kansas Supreme Court has published an opinion, *State v. Nunez*, __ Kan. __, 554 P.3d 656 (2024), that has direct bearing on Mr. Conkling's claim of error. Although the respondent opted not to address *Nunez* in its briefing, Mr. Conkling feels compelled to bring the opinion to this Court's attention. *Nunez* shows that Kansas courts are themselves split on the Question Presented. At a minimum, this Court should grant a writ of certiorari, summarily vacate the Kansas Court of Appeals' judgment, and remand with directions to reconsider in light of the Kansas Supreme Court's decision in *Nunez*.

In *Nunez*, the Kansas Supreme Court recognized that an accused has a Sixth Amendment right to jury fact-finding on the matter of his or her age when that fact is used to increase the duration of a postrelease supervision sentence from a term of months to a term of life. Thus, it held that *Apprendi* error occurs when a defendant takes his or her case to trial, a jury is not instructed in such a way that it can make an age finding, and a defendant's purported age is later cited as a basis for imposing a lifetime postrelease sentence. *Nunez*, 554 P.3d at 660.

Nunez is distinguishable from the case at bar, in that it was resolved by trial rather than plea. But *Nunez's* analysis is difficult, perhaps impossible, to reconcile with the Kansas Court of Appeals' rationale for affirming Mr. Conkling's term of lifetime postrelease supervision. In *Nunez*, the Kansas Supreme Court declared:

> [B]efore a sentencing court may rely on a defense admission to increase the defendant's sentence, that admission must have been preceded by a knowing and voluntary waiver of the defendant's jury trial right.
>
> *Nunez*, 554 P.3d at 659.

As best as can be told from its briefing, the respondent agrees that Mr. Conkling's admission of age was not preceded by a waiver of his right to a jury trial on the specific fact-finding that permitted his sentencing judge to impose a

lifetime postrelease sentence. So, applying *Nunez* as precedent, the Kansas Court of Appeals was wrong to hold that Mr. Conkling's unpled age admissions could lawfully increase his exposure to punishment.

To be clear, Mr. Conkling is not dissuading this Court from granting certiorari of his case. This case still presents an excellent opportunity to better define and protect the jury trial right at the heart of American democracy. But, if this Court were disinclined to fully grant a writ of certiorari on the merits, Mr. Conkling would respectfully request that this Court summarily reverse the Kansas Court of Appeals' judgment and remand for reconsideration of his *Apprendi* claim in light of *Nunez's* recent precedent.

2. The respondent does not contend that Mr. Conkling ever waived his right to a jury trial on the specific age finding that a judge relied upon to increase his sentence.

In its Brief in Opposition, the respondent makes much of the fact that Mr. Conkling waived his right to a jury trial during a plea hearing. But the respondent has carefully avoided assertion that Mr. Conkling waived his right to a jury trial on the *specific age finding* that his sentencing judge relied upon to increase his postrelease supervision sentence from a term of 60-months to a term of life. Br. in Opp. at 4-8. The respondent is right not to have advanced this latter argument, as it would have contradicted the facts of this case.

Before Mr. Conkling pled no contest to two criminal charges, state prosecutors *explicitly* told him that his pleas would result in a postrelease supervision sentence not exceeding 36 months. Pet. App. C (plea contract). And the judge who accepted Mr. Conkling's pleas did not correct the prosecutors on this point. Pet. App. D (Tr. of Plea Hearing) at 6-7. Because Mr. Conkling was informed that his pleas would result in a maximum possible postrelease sentence of just 36-months, those pleas cannot be construed as a waiver of the right to a jury trial on the fact-finding necessary to support the imposition of a *lifetime* postrelease supervision sentence. See *Brady v. United States*, 397 U.S. 742, 748 (1970) ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.")

The respondent, essentially, contends that an accused who has pled guilty or no contest to some elements of a criminal charge has only a qualified right to a jury trial (at most) on other findings that further increase his or her exposure to punishment. Br. in Opp. at 4-8. This is in stark contrast to *Apprendi,* which views sentence enhancement factors as "the functional equivalent of an element of a greater offense." *Apprendi v. New Jersey*, 530 U.S. 466, 494, n. 19 (2000). Because Mr. Conkling did not waive his right to a jury trial on the "functional element" of an offense carrying a lifetime postrelease supervision sentence, his sentencing

judge violated the Sixth Amendment by ordering that term of supervision.

3. The respondent's harmless error arguments are unpersuasive.

In its Brief in Opposition, the respondent also contends that this Court should deny certiorari because any presumed constitutional error is harmless. Br. in Opp. at 9-10. But the Kansas Court of Appeals, having declined to acknowledge *Apprendi* error, never considered whether that error was harmless. *State v. Conkling*, 63 Kan. App. 2d 841, 844 (2023). If this Court agrees that the Kansas Court of Appeals' rationale for affirming Mr. Conkling's sentence violates *Apprendi*, it could (and probably should) remand to a lower court for further harmless error analysis.

The respondent's harmless error contention should not dissuade this Court from granting certiorari of this case as a means of better defining the Sixth Amendment right to a jury trial. Nor should it dissuade this Court from summarily remanding this case to the Kansas Court of Appeals for reconsideration of Mr. Conkling's claim of error in light of recent precedent. With this said, the respondent's harmless error argument is meritless.

According to the respondent, this case's *Apprendi* error is harmless because of overwhelming and uncontested evidence of Mr. Conkling's age. Br. in Opp. at 9. But the "overwhelming and uncontested" harmless error standard cited by the respondent only applies to trial cases in which a judge has inadvertently failed to

instruct the jury on each essential element of a criminal charge. *Neder v. United States*, 527 U.S. 1, 17 (1999); see also *Rose v. Clark*, 478 U.S. 570, 578 (1986) ("[H]armless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury.")

A criminal defendant "enjoys the right to hold the government to the burden of proving its case beyond a reasonable doubt to a unanimous jury of his peers regardless of how overwhelming the evidence may seem to a judge." *Erlinger v. United States*, 144 S.Ct. 1840, 1856 (2024) (internal quotation marks omitted). So, when an accused's case has been resolved by plea, and a sentencing judge later increases the accused's exposure to punishment through a judicial "aggravating factor" finding, this *Apprendi* error can't be harmless, unless the sentencing judge could have somehow enhanced the accused's sentence whilst still honoring his or her right to a jury trial. See *Washington v. Recuenco*, 548 U.S. 212, 218 (2006) (suggesting that *Apprendi* error couldn't be harmless if state law provided no mechanism for jury fact-finding).

In this case, counsel is unaware of any statutory procedure that the sentencing court could have invoked, following Mr. Conkling's plea hearing, to empanel a jury for the limited purpose of deciding Mr. Conkling's age at the time of his pled offenses. Had the sentencing court respected Mr. Conkling's Sixth Amendment rights, it simply could not have imposed a lifetime postrelease

sentence. Thus, this case's *Apprendi* error was not harmless.

CONCLUSION

Mr. Conkling respectfully asks this Court to grant a writ of certiorari of his case. In the alternative, he asks this Court to summarily vacate the Kansas Court of Appeals' judgment and remand his case for reconsideration of his *Apprendi* claim in light of the Kansas Supreme Court's recent *Nunez* decision.

Respectfully submitted,

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