No.

IN THE SUPREME COURT OF THE UNITED STATES

CHRISTOPHER TAVARIS DEAN, PETITIONER

v.

STATE OF FLORIDA, RESPONDENT.

On Petition for a Writ of Certiorari to
the Florida Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Florida enhances the sentences for certain offenses—making the statutory maximum sentence also the statutory minimum sentence—if the defendant is a "Prison Releasee Reoffender," that is, if the defendant commits the offense while serving a sentence in a state prison (or similar facility) or within three years of release from a state prison (or similar facility).

Florida juries don't decide whether defendants are Prison Releasee Reoffenders: judges do. Florida courts say this falls under the prior-record exception to *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The question presented is:

Whether a sentencing court violates the Sixth Amendment's Jury Clause when it rather than the jury finds that the defendant committed the offense within three years of his release from a state prison and on that basis imposes the enhanced sentence?

RELATED PROCEEDINGS

The proceedings listed below are directly related to the above-captioned case in this Court.

Dean v. State, 337 So. 3d 349 (Fla. 4th DCA 2022), *rev. denied*, 2022 WL 2981215 (Fla. July 28, 2022).

Dean v. State, 294 So. 3d 350 (Fla. 4th DCA 2020).

Dean v. State, 230 So. 3d 420 (Fla. 2017).

Dean v. State, 199 So. 3d 932 (Fla. 4th DCA 2016).

Dean v. State, 193 So. 3d 1108 (Fla. 4th DCA 2016).

Dean v. State, 124 So. 3d 997 (Fla. 4th DCA 2013).

Dean v. State, 82 So. 3d 851, 851 (Fla. 4th DCA 2011).

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PETITION FOR A WRIT OF CERTIORARI

Christopher Tavaris Dean respectfully petitions for a writ of certiorari to review the judgment of the Florida Supreme Court.

OPINION BELOW

The opinion of Florida's Fourth District Court of Appeal is reported as *Dean v. State*, 337 So. 3d 349 (Fla. 4th DCA 2022), *rev. denied*, 2022 WL 2981215 (Fla. July 28, 2022), and is reprinted in the appendix. A81-84. The Florida Supreme Court's order denying review is also reprinted in the appendix. A85-86.

JURISDICTION

Florida's Fourth District Court of Appeal affirmed Dean's sentences on April 13, 2022. A81-84. The Florida Supreme Court denied review July 28, 2022. A85-86. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment of the United States Constitution provides: "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."

Section 1 of the Fourteenth Amendment of the United States Constitution provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law…."

Florida's Prison Releasee Reoffender statute, section 775.082(9)(a)-(d), Florida Statutes (2004), provides:

> (9)(a)1. "Prison releasee reoffender" means any defendant who commits, or attempts to commit:
>
> a. Treason;
> b. Murder;
> c. Manslaughter;
> d. Sexual battery;
> e. Carjacking;
> f. Home-invasion robbery;
> g. Robbery;
> h. Arson;

i. Kidnapping;
j. Aggravated assault with a deadly weapon;
k. Aggravated battery;
l. Aggravated stalking;
m. Aircraft piracy;
n. Unlawful throwing, placing, or discharging of a destructive device or bomb;
o. Any felony that involves the use or threat of physical force or violence against an individual;
p. Armed burglary;
q. Burglary of a dwelling or burglary of an occupied structure; or
r. Any felony violation of s. 790.07, s. 800.04, s. 827.03, or s. 827.071;

within 3 years after being released from a state correctional facility operated by the Department of Corrections or a private vendor or within 3 years after being released from a correctional institution of another state, the District of Columbia, the United States, any possession or territory of the United States, or any foreign jurisdiction, following incarceration for an offense for which the sentence is punishable by more than 1 year in this state.

2. "Prison releasee reoffender" also means any defendant who commits or attempts to commit any offense listed in sub-subparagraphs (a)1.a.-r. while the defendant was serving a prison sentence or on escape status from a state correctional facility operated by the Department of Corrections or a private vendor or while the defendant was on escape status from a correctional institution of another state, the District of Columbia, the United States, any possession or territory of the United States, or any foreign jurisdiction, following incarceration for an offense for which the sentence is punishable by more than 1 year in this state.

3. If the state attorney determines that a defendant is a prison releasee reoffender as defined in subparagraph 1., the state attorney may seek to have the court sentence the defendant as a prison releasee reoffender. Upon proof from the state attorney that establishes by a preponderance of the evidence that a defendant is a prison releasee reoffender as defined in this section, such defendant is not eligible for sentencing under the sentencing guidelines and must be sentenced as follows:

a. For a felony punishable by life, by a term of imprisonment for life;

b. For a felony of the first degree, by a term of imprisonment of 30

years;

c. For a felony of the second degree, by a term of imprisonment of 15 years; and

d. For a felony of the third degree, by a term of imprisonment of 5 years.

(b) A person sentenced under paragraph (a) shall be released only by expiration of sentence and shall not be eligible for parole, control release, or any form of early release. Any person sentenced under paragraph (a) must serve 100 percent of the court-imposed sentence.

(c) Nothing in this subsection shall prevent a court from imposing a greater sentence of incarceration as authorized by law, pursuant to s. 775.084 or any other provision of law.

(d)1. It is the intent of the Legislature that offenders previously released from prison who meet the criteria in paragraph (a) be punished to the fullest extent of the law and as provided in this subsection, unless the state attorney determines that extenuating circumstances exist which preclude the just prosecution of the offender, including whether the victim recommends that the offender not be sentenced as provided in this subsection.

2. For every case in which the offender meets the criteria in paragraph (a) and does not receive the mandatory minimum prison sentence, the state attorney must explain the sentencing deviation in writing and place such explanation in the case file maintained by the state attorney. On an annual basis, each state attorney shall submit copies of deviation memoranda regarding offenses committed on or after the effective date of this subsection, to the president of the Florida Prosecuting Attorneys Association, Inc. The association must maintain such information, and make such information available to the public upon request, for at least a 10-year period.

STATEMENT OF THE CASE

Petitioner Christopher Dean and his friend Eric Flint committed a daytime burglary of an apartment. The victim of the burglary, Gregory Marlow, returned while Dean and Flint were leaving: Flint on foot, Dean by car. Marlow got in his car and followed Dean. A61.

On Interstate 95, Marlow chased Dean at high speed. Dean pulled over, and Flint, who had jumped the fence that separated the apartment complex from the interstate, ran towards Dean's car. A61-62.

He didn't make it. Marlow mowed him down. As one 911 caller described it: "[Marlow] went down the break down lane and that's where this guy was walking and he nailed him. I mean he threw the guy 100 feet." A62.

Flint was dead.

Marlow fled the scene.

Florida charged Dean with burglary of a dwelling and second-degree felony murder. Second-degree felony murder occurs when someone is killed in the course of an enumerated felony (like burglary) by a person other than a participant in the felony. § 782.04(3), Fla. Stat. (2004). (Here, for example, Flint was killed by Marlow, who was not a participant in the enumerated felony.)

Burglary of a dwelling is punishable by up to fifteen years in state prison. §§ 775.082(3)(c), 810.02(3)(a), Fla. Stat. (2004). Second-degree felony murder is punishable by a term of years up to life imprisonment. §§ 775.082(3)(b), 782.04(3), Fla. Stat. (2004). But if a defendant is a "Prison Releasee Reoffender" (PRR), then the statutory maximum sentence becomes the mandatory minimum sentence. §

775.082(9)(a)3., Fla. Stat. (2004).

A Prison Releasee Reoffender is a defendant who commits an enumerated offense

- within 3 years after being released from a state correctional facility operated by the Department of Corrections or a private vendor or within 3 years after being released from a correctional institution of another state, the District of Columbia, the United States, any possession or territory of the United States, or any foreign jurisdiction, following incarceration for an offense for which the sentence is punishable by more than 1 year in this state, § 775.082(9)(a)1., Fla. Stat. (2004), or

- while the defendant was serving a prison sentence or on escape status from a state correctional facility operated by the Department of Corrections or a private vendor or while the defendant was on escape status from a correctional institution of another state, the District of Columbia, the United States, any possession or territory of the United States, or any foreign jurisdiction, following incarceration for an offense for which the sentence is punishable by more than 1 year in this state. § 775.082(9)(a)2., Fla. Stat. (2004).

Burglary of a dwelling and second-degree felony murder are enumerated offenses. § 775.082(9)(a)1.b.&q., Fla. Stat. (2004). Thus, the PRR sentence for burglary of a dwelling is fifteen years in prison with no possibility of early release, and the PRR sentence for second-degree felony murder is life imprisonment with no possibility of release (that is, life—and death—in prison). § 775.082(9)(a)3.a.&c., Fla. Stat. (2004).

The State sought PRR sentencing. It claimed that Dean was released within three years of his offenses from a state correctional facility operated by Florida's Department of Corrections.

Dean's jury did not determine whether he was released from a state correctional facility within three years of his offenses. A1-19. Over Dean's Sixth

Amendment objection, the trial court made that finding, relying on state prison records and other evidence. A25-48. And given that finding, the trial court had no choice in the sentence: it imposed the mandatory PRR sentences of fifteen years for burglary, and life imprisonment for second-degree felony murder. A20-24, 48.

Dean appealed and argued that his PRR sentences violated the Sixth Amendment because his jury did not find that he was released from a state correctional facility within three years of his offenses. A65-79. Florida's Fourth District Court of Appeal affirmed, and the Florida Supreme Court denied review. A81-86.

REASONS FOR GRANTING THE PETITION

I. THERE IS A SPLIT OF AUTHORITY OVER WHETHER RELEASE STATUS AT THE TIME OF THE OFFENSE IS AN ELEMENT THAT MUST BE PROVED TO A JURY BEYOND A REASONABLE DOUBT

Florida courts hold that the Sixth Amendment permits a sentencing court to find that a defendant is a Prison Releasee Reoffender, a finding that requires the court to impose the statutory maximum sentence and with no provision for early release. The courts have ruled that a defendant's release status at the time of the offense falls under the prior-record exception to *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Simmons v. State*, 332 So. 3d 1129, 1131-32 (Fla. 5th DCA 2022); *Tobler v. State*, 239 So. 3d 796, 796 (Fla. 5th DCA 2018); *Chapa v. State*, 159 So. 3d 361, 362 (Fla. 4th DCA 2015); *Williams v. State*, 143 So. 3d 423, 424 (Fla. 1st DCA 2014); *Lopez v. State*, 135 So. 3d 539, 540 (Fla. 2d DCA 2014).

But there is a split of authority over whether a defendant's release status falls within the prior-record exception. The courts of California, Colorado, Washington, Connecticut, and Indiana have ruled in line with Florida that the prior-record exception applies. *See People v. Towne*, 44 Cal. 4th 63, 70-71, 186 P.3d 10, 12-13 (2008) ("We conclude the aggravating circumstance that a defendant served a prior prison term or was on probation or parole at the time the crime was committed may be determined by a judge and need not be decided by a jury."); *People v. Montoya*, 141 P. 3d 916, 923 (Co. App. 2006) (holding that a defendant's parole or probationary status "is a necessary component of the conviction" and therefore falls within the fact-of-a-prior-conviction exception); *State v. Jones*, 159 Wash. 2d 231, 234, 149 P.3d 636, 637 (2006) ("[B]ecause community custody is

directly related to and follows from the fact of a prior conviction and because the attendant factual determinations involve nothing more than a review of the nature of the defendant's criminal history and the defendant's offender characteristics, such a determination is properly made by the sentencing judge."); *State v. Fagan*, 280 Conn. 69, 94, 905 A.2d 1101, 1117 (2006) (holding that whether the defendant committed the offense while on bond "involved a legal determination, not a factual one, and that, accordingly, he was not entitled to a jury trial on the issue of his status."); *Ryle v. State*, 842 N.E.2d 320, 325 (Ind. 2005) (holding that whether defendant committed offense while on probation fell under prior-record exception because the trial court relied on judicial records to make that finding).

The courts of Arizona, Tennessee, North Carolina, Oregon, and the Ninth Circuit have ruled the other way: release status is not encompassed within the prior-record exception. *State v. Large*, 321 P.3d 439, 443-44 (Ariz. Ct. App. 2014); *State v. Gross*, 31 P. 3d 815, 819 (Az. App. 2001) (holding that whether the defendant was on parole at the time of the offense must be found by the jury); *State v. Wright*, 2008 WL 4170033 (Tenn. Crim. App. 2008) (probation status); *State v. Wissink*, 617 S.E.2d 319, 325 (N.C. Ct. App. 2005) (holding that although a "defendant's probationary status is analogous to and not far-removed from the fact of a prior conviction," the fact of the defendant's probationary status "did not have the procedural safeguards of a jury trial and proof beyond a reasonable doubt recognized in *Apprendi* as providing the necessary protection for defendants at sentencing."); *State v. Perez*, 102 P.3d 705, 709 (Or. Ct. App. 2004), *rev'd on other*

grounds, 340 Or. 310, 131 P.3d 168 (2006) (holding that prior-record exception applies to "bare fact of a prior conviction-even those related thereto" but that "the allegation that defendant was on probation or parole when he committed the offenses of conviction has not been proved to a jury beyond a reasonable doubt, so the same 'procedural safeguards' had not attached to that 'fact' when he was sentenced."); *Estrella v. Ollison*, 668 F.3d 593, 598 (9th Cir. 2011) (holding that parole status does not fall within prior-record exception because original sentencing documents will not necessarily reflect that status). *See generally* Wayne R. LaFave et al., *Criminal Procedure*, 6 Crim. Proc. § 26.4(i) n.248 (4th ed.) (noting the split of authority on this issue).

This Court should grant Dean's petition for certiorari to resolve this split of authority.

II. FLORIDA'S DECISIONS CONFLICT WITH THIS COURT'S INTERPRETATION OF THE SIXTH AMENDMENT IN *APPRENDI* AND ITS PROGENY AND THOSE CASES' LIMITED PRIOR-RECORD EXCEPTION

The decisions of Florida courts (and the courts of California, Colorado, Washington, Connecticut, and Indiana) unmoor the prior-record exception from its constitutional anchor. This Court recognized in *Apprendi* that the fact of a prior conviction presents a unique exception to the Sixth Amendment's requirement that all facts determining the defendant's maximum sentence must be submitted to a jury because a defendant's prior conviction could not have been entered unless he previously enjoyed the right to have a jury find beyond a reasonable doubt the facts constituting the elements of his prior offense. *See Apprendi*, 530 U.S. at 496

"([T]here is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof."). Courts depart from this logic when they expand the prior-record exception to include facts that the defendant has never enjoyed the right to have a jury find beyond a reasonable doubt, such as whether and when a defendant was released from a state prison or similar facility. Because Dean has never enjoyed the right to have a jury determine beyond a reasonable doubt whether he committed the offense for which he was sentenced within three years of his release from a state prison or similar facility, his enhanced sentence based on that fact violates his Sixth Amendment right to a jury trial.

This Court has limited the prior-record exception in its caselaw interpreting Congress's Armed Career Criminal Act, 18 U.S.C. § 924(e). *See, e.g., (in chronological order) Taylor v. United States*, 495 U.S. 575, 590-91 (1990); *Shepard v. United States*, 544 U.S. 13, 24 (2005), *Descamps v. United States*, 570 US. 254, 269 (2013); *Mathis v. United States*, 579 U.S. 500, 510 (2016). In that context, criminal defendants have repeatedly called on this Court to determine which facts about a defendant's criminal history a sentencing court may consider without violating his Sixth Amendment right to a jury trial.

This Court drew a crucial distinction between "the fact of a prior conviction" and "a fact about a prior conviction" in *Shepard v. United States*, 544 U.S. 24, 25

(2005). In sum, the former does not include the latter. *Shepard*, 544 U.S. at 25. Shepard asserted at his sentencing hearing that his prior Massachusetts conviction for burglary did not count as an ACCA predicate offense because Massachusetts' definition of burglary included unlawful entries into places such as boats and cars, and thus swept more broadly than the generic burglary identified as a predicate offense by Congress in the ACCA. *Id.* at 16-17. Because the elements of Shepard's Massachusetts burglary offense did not match the elements of generic burglary, the sentencing court properly refused to count the prior conviction. *Id.* The government appealed the sentencing court's decision to the First Circuit Court of Appeals, where it argued that the sentencing court could look at police reports to determine whether Shepard's conviction was based on an act consistent with generic burglary. *Id.* at 17-18. The First Circuit agreed with the government and reversed the sentencing court. *Id.* at 18. This Court disagreed.

This Court reasoned that, while *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), arguably allows sentencing courts to consider "the record of conviction," it does not authorize sentencing courts to dig into other facts relating to a prior conviction. *Id.* at 24-26.[1] This Court drew the crucial distinction: "While the

[1] Justice Thomas, who concurred in this Court's judgment in *Shepard*, departed from the Court in this section of the opinion because it did not go far enough. *Shepard v. United States*, 544 U.S. 24, 26-28 (2005) (Thomas, J., concurring in part and concurring in the judgment). Justice Thomas wrote separately to express his view that (1) *Apprendi* had "eroded" the prior-conviction exception in its entirety, (2) the Court had wrongly decided *Almendarez-Torres*, and (3) as a majority of the Court would later agree, the prior-conviction fact-finding proposed by the government in *Shepard* gave rise "to constitutional error, not doubt." *Id.* at 26–28.

disputed fact here can be described as a *fact about a prior conviction,* it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute." *Id.* (emphasis added). This Court recognized the risk of constitutional error presented by allowing a sentencing court to look into facts apart from those that were essential to the prior conviction.

Eight years after *Shepard*, this Court corrected another Court of Appeal, this time the Ninth Circuit, after that court broadly construed the prior-conviction exception as a license for judicial factfinding. *Descamps v. United States*, 570 U.S. 254 (2013). The Ninth Circuit had held that a sentencing court deciding whether to count a prior conviction for burglary under a California statute that defined the crime to include even lawful entries could review plea colloquies and other documents to determine what the defendant actually did and count the conviction if the defendant "*could have been* convicted" of generic burglary. *Descamps*, 570 U.S. at 268 (emphasis in original). On review, this Court tersely described the problem with the Ninth Circuit's decision, "Yet again, the Ninth Circuit's ruling flouts our reasoning—here, by extending judicial factfinding beyond the recognition of a prior conviction." *Id.* at 270. This Court explained that its categorical approach to identifying predicate convictions under the ACCA "merely assists the sentencing court in identifying the defendant's crime of conviction, as we have held the Sixth Amendment permits." *Id.* at 269. Any other finding "would (at the least) raise serious Sixth Amendment concerns if it went beyond merely identifying a prior

conviction." *Id.*

This Court in *Descamps* clearly delineated the constitutional limits of the prior-record exception. A sentencing court cannot dig into non-elemental facts surrounding a conviction, because it is only the facts that a defendant had the right to have a jury find in a prior proceeding that a sentencing court may use to enhance his sentence without violating his Sixth Amendment right to a jury trial: "And there's the constitutional rub. The Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances." *Descamps*, 570 U.S. at 269-70. This Court in *Descamps* was of course considering whether a sentencing court could look into the extra-elemental details of the defendant's conduct on which a prior conviction is based. But this Court's observations about the logical limits of the fact-of-a-prior-conviction exception nonetheless describe the only reasonable constitutional rationale for the exception: the only facts that are excepted from the rule in *Apprendi* are those to which the defendant's Sixth Amendment right has already attached. This includes the elements of the defendant's prior offense because the defendant already enjoyed the right to have a jury find those facts beyond a reasonable doubt.

In essence, there is no exception to the Sixth Amendment. The sole reason that the fact of a prior conviction is "excepted" from the rule in *Apprendi* is because the Sixth Amendment previously applied to the elements that made the conviction

constitutionally permissible in the first place. As this Court observed in *Mathis*, a sentencing judge "can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." *Mathis*, 579 U.S. at 511-12. *See also* Eric C. Tung, *Does the Prior Conviction Exception Apply to A Criminal Defendant's Supervised Release Status?*, 76 U. Chi. L. Rev. 1323, 1345 (2009) ("The fact of supervised release status is not reflected in the jury verdict or an earlier verdict and cannot be used as an enhancement beyond the maximum."). The decisions of the courts of Florida, California, Colorado, Washington, Connecticut, and Indiana plainly hold that a sentencing judge *can* do more.

The analysis that flows from the only constitutional rationale underlying the prior-record exception leads to the conclusion that Dean's sentences violate the Sixth Amendment. Whether Deane was released from a state prison or similar facility within three years of his offenses was not an element of the offenses he was convicted or any of his prior offenses. And Dean was denied the right to have his jury determine whether he was released from a state prison or similar facility within three years of his offenses before the trial court enhanced his sentence based on those facts.

If Dean's sentences are allowed to stand, they will be based on a factual question that was withheld from a jury of his peers. The Sixth and Fourteenth Amendments guarantee Dean the right to submit the question of whether he was released from a state prison or similar facility with three years of his offenses to a

jury at least once. This Court should grant his petition for a writ of certiorari.

CONCLUSION

Because Dean has never enjoyed the right to have a jury determine beyond a reasonable doubt whether he was released from a state prison or similar facility within three years of his offenses, this Court should grant his petition for a writ of certiorari.

Respectfully submitted,

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