No.

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT ANTHONY ZACCARO,

Petitioner,

v.

STATE OF FLORIDA

Respondent.

On Petition for a Writ of Certiorari
to the Fifth District Court of Appeals, State of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether there are any exceptions to a Defendant's right to a jury determination of any fact which raises his minimum or maximum sentence?

PARTIES TO THE PROCEEDING

Parties to the proceeding include Robert Anthony Zaccaro (Appellant/Petitioner), Dane K. Chase, Esquire (Appellant/Petitioner's Counsel), and Ashley Moody, Esquire (Attorney General, State of Florida).

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OPINION BELOW

The decision of the Fifth District Court of Appeal, State of Florida, *infra*, is attached as Appendix A.

JURISDICTION

The Judgment of the Fifth District Court of Appeal was entered on September 3, 2024. That decision was not final until the time to file a motion for rehearing/issuance of a written opinion under Fla. R. App. P. 9.330 and/or 9.331 expired. A Motion for Issuance of a Written Opinion was timely filed and denied on October 8, 2024. This Court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

> 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 in 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.

U.S. Const. amend. V.

> 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.

U.S. Const. amend. VI.

STATEMENT OF FACTS

Mr. Zaccaro was charged by Second Amended Information on December 5, 2022, in Seminole County, Florida, with burglary with an assault, kidnapping, carjacking, robbery, and tampering with a witness. The State also filed a Notice that it intended to seek sentencing as a Habitual Felony Offender ("HFO") under § 775.084(1)(a), Fla. Stat. To subject a defendant to sentencing as an HFO, "the state must provide record evidence of the date of the current felony offense, the date of the conviction of the last prior felony, and the date the defendant was released from any prison term or supervision imposed for the last conviction." *Cameron v. State*, 807 So. 2d 746, 747 (Fla. 4th DCA 2002) (citing, § 775.084(3)(a)(3), Fla. Stat. (1999); *Boyd v. State*, 776 So.2d 317, 318 (Fla. 4th DCA 2001)). The state also filed a separate Notice that it was electing to prosecute Mr. Zaccaro as a Prison Releasee Reoffender ("PRR") under § 775.082, Fla. Stat. Like the HFO, to subject a defendant to sentencing as a PRR "the trial court must find that the instant offense was committed within a certain period of time [3 years] from the date of the defendant's last release from prison." *Calloway v. State*, 914 So. 2d 12, 14 (Fla. 2d DCA 2005).

Mr. Zaccaro ultimately proceeded to trial where he was found guilty of each charge brought in the Second Amended Information. The jury instructions utilized by the court did not require the jury to find Mr. Zaccaro committed his offenses on a specific date or dates, and the jury's verdict did not reflect a finding as to the date or

dates that Mr. Zaccaro committed any of the offenses he was convicted of, or of any prior offense, nor of his release date from custody on any prior offense.

A sentencing hearing was then held during which the court sentenced Mr. Zaccaro to life imprisonment as a PRR for the offenses of burglary with an assault and kidnapping, to life imprisonment as an HFO with a 30 year mandatory minimum as a PRR for the offense of carjacking, to 30 years imprisonment as an HFO with a 15 year mandatory minimum as a PRR for the offense of robbery, and to life imprisonment as an HFO for the offense of tampering with a witness.

On appeal, Mr. Zaccaro argued that under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), his HFO and PRR sentences are illegal because the facts necessary to the imposition of those sentences were not charged in the Information, nor found by a jury. During the pendency of Mr. Zaccaro's appeal, *Erlinger v. United States*, 602 U.S. 821, 144 S. Ct. 1840, 219 L. Ed. 2d 451 (2024) was decided, and he submitted the case to the court as supplemental authority. Nonetheless, the Fifth District Court of Appeal affirmed Mr. Zaccaro's sentence without a written opinion.

This Petition follows.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW TO ESTABLISH THAT THERE ARE NO EXCEPTIONS TO A DEFENDANT'S RIGHT TO HAVE A JURY DETERMINE ANY FACT WHICH RAISES HIS MINIMUM OR MAXIMUM SENTENCE.

At issue in this Petition is whether there are any exceptions to a Defendant's right to a jury determination of any fact which raises his minimum or maximum sentence. Based upon this Court's well reasoned decision in *Erlinger v. United States*, 602 U.S. 821, 144 S. Ct. 1840, 219 L. Ed. 2d 451 (2024), this Court should establish there are none – including no exception for purportedly "harmless error."

In *Erlinger*, this Court recognized that under the Fifth and Sixth Amendments to the United States Constitution, and as explained in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), any fact, other than a prior conviction, which increases a defendant's minimum or maximum sentencing exposure must be found by a jury, with a narrow prior conviction exception under *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998) permitting judges to find only the fact of a prior conviction, and precluding them from finding anything beyond "what crime, with what elements, the defendant was convicted of." *Erlinger*, 602 U.S. at 838, 144 S. Ct. at 1853–54 (citations omitted). Nonetheless, courts have also concluded that an exception exists for so called "harmless error." *See*, *e.g.*, *United States v. Campbell*, No. 22-5567, 2024 WL 4864338, at *4 (6th Cir. Nov. 22, 2024); *United States v. Trahan*, 111 F.4th 185, 198 (1st Cir. 2024). However, *Erlinger* makes clear that neither of these exceptions

comport with the Constitution, and thus the time has come to establish that no exceptions exist to the rule that any fact which raises a defendant's minimum or maximum sentence must be found by a jury.

More specifically, in *Erlinger*, this Court recognized that the Founding Fathers placed paramount importance on the right to a jury trial, as American citizens "have no other fortification ... against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hounds." *Erlinger*, 602 U.S. at 829, 144 S. Ct. at 1848 (citing, Letter from Clarendon to W. Pym (Jan. 27, 1766), in 1 Papers of John Adams 169 (R. Taylor ed. 1977)). To that end, "the Fifth and Sixth Amendments sought to ensure that a judge's power to punish would 'deriv[e] wholly' from, and remain always 'control[led]' by, the jury and its verdict." *Erlinger*, 602 U.S. at 831, 144 S. Ct. at1849 (quoting, *Blakely v. Washington*, 542 U.S. 296, 306, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)). "These principles represent not 'procedural formalit[ies]' but 'fundamental reservation[s] of power' to the American people." *Erlinger*, 602 U.S. at 832, 144 S. Ct. at1850 (quoting, *Blakely*, 542 U.S., at 305–306, 124 S.Ct. 2531). "By requiring a unanimous jury to find every fact essential to an offender's punishment, those amendments similarly seek to constrain the Judicial Branch, ensuring that the punishments courts issue are not the result of a judicial 'inquisition' but are premised on laws adopted by the people's elected representatives and facts found by members of the community." *Erlinger*, 602 U.S. at 832, 144 S. Ct. at 1850 (citing, *Blakely*, 542 U.S., at 307, 124 S.Ct. 2531;

United States v. Haymond, 588 U.S. 634, 640-41, 139 S. Ct. 2369, 204 L. Ed. 2d 897 (2019)). Accordingly, the Constitution requires that "virtually any fact that increases the prescribed range of penalties to which a criminal defendant is exposed must be resolved by a unanimous jury beyond a reasonable doubt (or freely admitted in a guilty plea)." *Erlinger*, 602 U.S. at 834, 144 S. Ct. at 1851 (citations omitted)(cleaned up). Simply put, "[j]udges may not assume the jury's factfinding function for themselves, let alone purport to perform it using a mere preponderance-of-the-evidence standard." *Erlinger*, 602 U.S. at 834, 144 S. Ct. at 1851.

Importantly, "[t]here is no efficiency exception to the Fifth and Sixth Amendments." *Erlinger*, 602 U.S. at 842, 144 S. Ct. at 1856. "In a free society respectful of the individual, 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 overwhelmin[g]' the evidence may seem to a judge." *Id*. (quoting, *Rose v. Clark*, 478 U.S. 570, 578, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986)).

Mr. Zaccaro submits that if there is truly no efficiency exception to the Fifth and Sixth Amendments, then there can be <u>no exception</u> to a defendant's right to have a jury determine every fact which raises his minimum or maximum sentence. Allowing a sentencing judge any exception to do so "would be to allow a sentencing court to do exactly what the Fifth and Sixth Amendments forbid." *Erlinger*, 602 U.S. at 840, 144 S. Ct. at 1855. So to would be permitting a panel of judges to hold another judge's violation of the rule to be harmless. In either instance the judiciary is

substituting its judgment for that of a jury. Nowhere in the Fifth or Sixth Amendment does it state that the rights provided therein are to be afforded unless the failure to observe them would be harmless in the eyes of a government official. Simply put, "[t]o sanction that practice would be to allow a sentencing court to do exactly what the Fifth and Sixth Amendments forbid." *Erlinger*, 602 U.S. at 840, 144 S. Ct. at 1855. Accordingly, Mr. Zaccaro submits that the time has come to establish what *Erlinger* implies: There are no exceptions to a defendant's right to a jury determination of any fact which raises his minimum or maximum sentence.

Furthermore, Mr. Zaccaro's case is the ideal vehicle for establishing the foregoing, as based on *Apprendi*, *Alleyne*, and *Erlinger*, the only way the Fifth District Court of Appeal could have upheld Mr. Zaccaro's HFO and PRR sentences in the absence of a jury finding of every fact necessary to the operation of those sentencing statutes was to find that an exception to the rule applied. Accordingly, Mr. Zaccaro's case provides this Court with the opportunity to establish that there are no exceptions to a defendant's right to have a jury determine any fact which raises his minimum or maximum sentence.

Consequently, for the reasons set forth above, this Court should grant Mr. Zaccaro's Petition, and establish that there are no exceptions to a defendant's right to a jury determination of any fact which raises his minimum or maximum sentence, vacate his sentences, and remand his case for a new sentencing hearing.

CONCLUSION

For the reasons stated above, this Court should grant Mr. Zaccaro's Petition, and establish that there are no exceptions to a defendant's right to a jury determination of any fact which raises his minimum or maximum sentence, vacate his sentences, and remand his case for a new sentencing hearing.

Respectfully Submitted,

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APPENDIX A

FIFTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Case No. 5D2023-0872
LT Case No. 2016-CF-2747-A

ROBERT ANTHONY ZACCARO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Seminole County.
William S. Orth, Judge.

Dane K. Chase, of Chase Law Florida, P.A., Saint Petersburg, for Appellant.

Ashley Moody, Attorney General, Tallahassee and Tabitha Mills, Assistant Attorney General, Daytona Beach, for Appellee.

September 3, 2024

PER CURIAM.

AFFIRMED.

LAMBERT, KILBANE, and MACIVER, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

APPENDIX B

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

Robert Anthony Zaccaro,

Appellant(s),

v.

State of Florida,

Appellee(s).

Case No.: 5D2023-0872
L.T. No.: 2016-CF-2747-A

Date: October 8, 2024

BY ORDER OF THE COURT:

ORDERED that Appellant's Motion for Issuance of Written Opinion, filed September 13, 2024, is denied.

I hereby certify that the foregoing is
(a true copy of) the original Court order.

5D2023-0872 10/8/2024
SANDRA B. WILLIAMS, CLERK

Panel: Judges Lambert, Kilbane, MacIver

cc:

Criminal Appeals DAB Attorney General
Dane K. Chase
Tabitha Marcela Mills