No.

IN THE SUPREME COURT OF THE UNITED STATES

WARD L. KENYON, PETITIONER,

v.

STATE OF FLORIDA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a recidivism statute is unconstitutional under the Due Process and Jury Clauses if it authorizes a sentencing enhancement based on nonjury findings of facts not alleged in the charging document upon proof by a preponderance of the evidence?

2. Whether a statute imposing on all convicted felons a lifetime ban on possession of a firearm or ammunition violates the Second Amendment?

RELATED PROCEEDINGS

The proceeding listed below is directly related to the above-captioned case in this Court: *Kenyon v. State*, No. 4D2023-0313, 2025 WL 52222 (Fla. 4th DCA Jan. 9, 2025).

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Ward L. Kenyon respectfully petitions for a writ of certiorari to review the judgment of the Fourth District Court of Appeal of Florida in this case.

OPINION BELOW

The decision of Florida's Fourth District Court of Appeal has not been reported in Southern Reporter. It is reported on Westlaw as *Kenyon v. State*, No. 4D2023-0313, 2025 WL 52222 (Fla. 4th DCA Jan. 9, 2025). It is reprinted in the appendix. 1a.

JURISDICTION

Florida's Fourth District Court of Appeal affirmed Petitioner's convictions and sentences without written opinion on January 9, 2025. 1a. The court denied Petitioner's motion for rehearing, written opinion and certification to the state supreme court on February 19, 2025. 2a.

The Florida Supreme Court is "a court of limited jurisdiction," *Mallet v. State*, 280 So. 3d 1091, 1092 (Fla. 2019) (citation omitted), Specifically, it has no jurisdiction to review district court of appeal decisions entered without written opinion. *Jackson v. State*, 926 So. 2d 1262, 1266 (Fla. 2006). Hence, Petitioner could not seek review in that court. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY, AND RULES PROVISIONS

The Second Amendment

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

The Sixth Amendment

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an

impartial jury … ."

The Fourteenth Amendment

Section 1

… . 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.

U.S. Const. Amend. XIV.

Section 790.23, Florida Statutes

(1) It is unlawful for any person to own or to have in his or her care, custody, possession, or control any firearm, ammunition, or electric weapon or device, or to carry a concealed weapon, including a tear gas gun or chemical weapon or device, if that person has been:

(a) Convicted of a felony in the courts of this state;

…

(3) Except as otherwise provided in subsection (4), any person who violates this section commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

§ 790.23, Fla. Stat.

Section 775.082, Florida Statutes

(3) A person who has been convicted of any other designated felony [other than a capital felony] may be punished as follows:

…

(d) For a felony of the second degree, by a term of imprisonment not exceeding 15 years.

§ 775.082, Fla. Stat.

Section 775.084, Florida Statutes

(1) As used in this act:

(a) "Habitual felony offender" means a defendant for whom the court may impose an extended term of imprisonment, as provided in paragraph (4)(a), if it finds that:

1. The defendant has previously been convicted of any combination of two or more felonies in this state or other qualified offenses.

2. The felony for which the defendant is to be sentenced was committed:

…

b. Within 5 years of the date of the conviction of the defendant's last prior felony or other qualified offense, or within 5 years of the defendant's release from a prison sentence, probation, community control, control release, conditional release, parole or court-ordered or lawfully imposed supervision or other sentence that is imposed as a result of a prior conviction for a felony or other qualified offense, whichever is later.

3. The felony for which the defendant is to be sentenced, and one of the two prior felony convictions, is not a violation of s. 893.13 relating to the purchase or the possession of a controlled substance.

4. The defendant has not received a pardon for any felony or other qualified offense that is necessary for the operation of this paragraph.

5. A conviction of a felony or other qualified offense necessary to the operation of this paragraph has not been set aside in any postconviction proceeding.

…

(3)(a) In a separate proceeding, the court shall determine if the defendant is a habitual felony offender or a habitual violent felony offender. The procedure shall be as follows:

1. The court shall obtain and consider a presentence investigation prior to the imposition of a sentence as a habitual felony offender or a habitual violent felony offender.

2. Written notice shall be served on the defendant and the defendant's attorney a sufficient time prior to the entry of a plea or prior to the imposition of sentence in order to allow the preparation of a submission on behalf of the defendant.

3. Except as provided in subparagraph 1., all evidence presented shall be presented in open court with full rights of confrontation, cross-examination, and representation by counsel.

4. Each of the findings required as the basis for such sentence shall be found to exist by a preponderance of the evidence and shall be appealable to the extent normally applicable to similar findings.

… .

6. For an offense committed on or after October 1, 1995, if the state attorney pursues a habitual felony offender sanction or a habitual violent felony offender sanction against the defendant and the court, in a separate proceeding pursuant to this paragraph, determines that the defendant meets the criteria under subsection (1) for imposing such sanction, the court

must sentence the defendant as a habitual felony offender or a habitual violent felony offender, subject to imprisonment pursuant to this section unless the court finds that such sentence is not necessary for the protection of the public. … .

…

(4)(a) The court, in conformity with the procedure established in paragraph (3)(a), may sentence the habitual felony offender as follows:

…

2. In the case of a felony of the second degree, for a term of years not exceeding 30.

(5) In order to be counted as a prior felony for purposes of sentencing under this section, the felony must have resulted in a conviction sentenced separately prior to the current offense and sentenced separately from any other felony conviction that is to be counted as a prior felony.

§ 775.084, Fla. Stat.

Florida Criminal Rule 3.800

RULE 3.800. CORRECTION, REDUCTION, AND MODIFICATION OF SENTENCES

…

(b) Motion to Correct Sentencing Error.

…

(2) Motion Pending Appeal. If an appeal is pending, a defendant or the state may file in the trial court a motion to correct a sentencing error. The motion may be filed by appellate counsel and must be served before the party's first brief is served. … .

Fla. R. Crim. P. 3800.

STATEMENT OF THE CASE

In 2017, several police officers entered a bar in Sebastian, Florida and spoke with Petitioner Ward L. Kenyon. As they walked with him from the building, a struggle arose, and, resulting in his arrest.

After several years of proceedings in the Nineteenth Judicial Circuit of Florida, the prosecutor filed its third amended information in 2022 alleging various crimes including attempted second degree murder of a law enforcement officer and possession of a firearm or ammunition by a convicted felon. R 753–54.

The firearm charge alleged that Petitioner "did unlawfully own or have care, custody, or actual or constructive possession or control of any firearm(s) or ammunition, after being convicted of a felony in the courts of this state, and did actually possess one or more firearm(s), in violation of Florida Statute 790.23 and 775.087." R 753-54.

Proceeding pro se, Petitioner entered a no contest plea to the firearm charge reserving his right to appeal the denial of his motions to suppress and his motion to dismiss based on statute of limitation grounds. R 1742–65. (The other charges remained

pending, and Petitioner was later convicted of the bulk of them at a later jury trial.)

At sentencing, Petitioner was represented by counsel. At the hearing, without defense objection, the prosecution presented evidence that Petitioner has been convicted in 2011 on a felony charge of fleeing or eluding a law enforcement officer, in 2012 on another felony charge of fleeing, and in 2015 on a felony charge of aggravated assault with a deadly weapon. R 1778–79. Based on this evidence, defense counsel said Petitioner appeared to be eligible for an habitual felony offender sentence. R 1781.

The court found Petitioner to be an habitual felony offender and imposed an enhanced habitual offender sentence of 30 years in prison — twice the normal statutory maximum for the crime. R 1822.

Petitioner appealed his conviction and sentence to Florida's Fourth District Court of Appeal which affirmed without written opinion, 1a, and denied Petitioner's motion for rehearing, written opinion and certification to the state supreme court. 2a. Petitioner now seeks certiorari review of his conviction and sentence.

Arguments below as to the constitutionality of Florida's felon-in-possession statute

Petitioner argued on appeal that section 790.23, Florida Statutes, and his conviction under it, violate the Second Amendment. Initial brief, 3a–7a.

Although the issue had not been raised in the trial court, he contended that it could be raised on direct appeal under Florida's fundamental error doctrine. Under that doctrine, a defendant may for the first time on appeal challenge the facial unconstitutionality of a statute. *See Edenfield v. State*, 379 So. 3d 5, 7 n.1 (Fla. 1st DCA 2023) ("The facial constitutional challenge to section 790.23(1)(a) was not made in the trial court. Nonetheless, we can consider this unpreserved issue because 'a conviction for the violation of a facially invalid statute would constitute fundamental error.' *Westerheide v. State*, 831 So. 2d 93, 105 (Fla. 2002) (quoting *Trushin v. State*, 425 So. 2d 1126, 1129 (Fla. 1982)); *see also Davis v. Gilchrist Cnty. Sheriff's Off.*, 280 So. 3d 524, 531 (Fla. 1st DCA 2019)."). 3a.

Arguments below as to sentencing issues

Before filing his initial appellate brief, Petitioner moved to

correct his sentence under Florida Criminal Rule 3.800. *See Hollingsworth v. State*, 293 So. 3d 1049, 1051 (Fla. 4th DCA 2020). ("The trial court was wrong in its criticism of appellant's attorney for filing a motion pursuant to rule 3.800(b)(2). This was the proper method to raise the issue of an *Apprendi* violation. *See State v. Fleming*, 61 So. 3d 399 (Fla. 2011) (*Apprendi* claim raised in a rule 3.800(b)(2) motion). In *Bean v. State*, 264 So. 3d 947 (Fla. 4th DCA 2019), we reviewed the appeal of a denial of a rule 3.800(b)(2) motion, in which the defendant argued that the court's assessment of points for victim injury violated *Apprendi* and *Alleyne*. Thus, counsel here properly raised the issue by way of Rule 3.800(b)(2)."). *See also State v. Johnson*, 616 So. 2d 1, 3-4 (Fla. 1993) (rejecting State's argument that the defendant was "prohibited from challenging the constitutionality of [then-existing provisions of habitual felony offender statute] for the first time on appeal because the issue does not constitute fundamental error").

Florida's habitual felony offender statute and Petitioner's sentence under it.

Among other things, Petitioner contended in his second amended rule 3.800 motion that Florida's habitual felony offender

statute, and his sentence under it, was unconstitutional:

> Because the statute provides for the court (and not a jury) to make the necessary findings, and to do so upon proof by the preponderance of the evidence rather than beyond a reasonable doubt, the habitual offender sentence on its face violates the Due Process and Jury Clauses of the state and federal constitutions. Art. I, §§ 9, 16, 22, Fla. Const.; Amend. VI, XIV, U.S. Const.
>
> In this case, this Court stated: "I do find that the State has met the minimum requirements. I do find that Mr. Kenyon is eligible to receive a habitual felony offender sentence." Sentencing hearing transcript pages 13-14 (appellate record pages 1781-82).3 Nonetheless, the predicate facts were not made by a jury. Hence, use of this Court's findings to enhance the sentence is contrary to the Due Process and Jury Clauses of the state and federal constitutions.

R 1924–25.

> The prosecution filed a response in which it argued:
>
> E. The defendant alleges habitual sentence illegal due factual predicate not being determined by a jury and that the enhancement was not plead in the charging document.
>
> Florida law allows the predicate for a habitual sentence to be established before a judge. In Gordon v. State, 787 So.2d 892 (4th DCA 2001) the court stated the defendant, convicted of delivery of cocaine, did not have right to have a jury determine that he had the requisite predicate convictions necessarily to impose a habitual felony offender sentence, given that defendant's four-year sentence was below the statutory maximum, and thus, Apprendi had no application, and, in any event, findings required under the habitual felony offender statute fell within Apprendi's "recidivism" exception. Gordon at 893.

> In Cruz v. State, 189 So.3d 822 (4th DCA 2015), the com1 reaffirmed the rulings in Apprendi and Alleyne that the existence of prior convictions (such as in habitual offender predicates) is not a fact that must be submitted to a jury.
>
> There is no requirement under Florida law that habitual offender law or its predicates be included in a charging document. In this case, the defendant was given notice of habitual offender sanctions before he entered a plea. A transcription of the 4/13/22 hearing shows that a notice to seek enhanced penalties was served personally to the Defendant in court. Before he was handed the notice the defendant stated he wished to represent himself and a Faretta inquiry was made. (See Attached "C" Pg.7). The record shows the Defendant was served a notice to seek enhanced penalties prior to his entry of a plea to Count 3, Possession of Firearm or Ammunition by a Convicted Felon, which occurred on December 13, 2022.

R 1957–58.

The court entered an order denying the motion without stating grounds for its ruling. R 2580.

After the trial court denied the motion to correct sentence, Petitioner filed his initial brief in the court of appeal, again arguing that the habitual offender statute and his sentence under it violated the Jury and Due Process Clauses of the state and federal constitutions. 8a–13a.

Respondent argued in its answer brief that there was a recidivism exception to the Sixth Amendment under *Apprendi v.*

New Jersey, 530 U.S. 466 (2000), and *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Answer brief, 33–37. It also argued that any error was harmless. *Id.* at 37–40.

Petitioner responded that the *Almendarez-Torres* exception was contrary to *Erlinger v. United States*, 602 U.S. 821 (2024), which was decided after the initial brief was filed. Answer brief, 20–21. He reiterated that the error could not be harmless because the habitual felony offender statute itself is unconstitutional, and, without statutory authorization, the habitual offender sentence must be reversed. Reply brief, 22–23.

As already noted, the Fourth District affirmed the conviction and sentence without a written opinion.

REASONS FOR GRANTING THE PETITION

I. FLORIDA'S BROAD FELON-IN-POSSESSION STATUTE VIOLATES THE SECOND AMENDMENT.

The prosecution alleged in the third amended information that Petitioner "did unlawfully own or have care, custody, or actual or constructive possession or control of any firearm(s) or ammunition, after being convicted of a felony in the courts of this state, and did actually possess one or more firearm(s), in violation of Florida Statute 790.23 and 775.087." R 753-54.

Section 790.23 operates as a life-long ban on possession of a firearm or ammunition by convicted felons regardless of why the firearm is possessed or how remote the felony conviction may be.

In *District of Columbia v. Heller*, 554 U.S. 570 (2008)], the Court wrote that at the time of the Founding the right to keep arms was "a common way of referring to possessing arms, for militiamen *and everyone else*." *Id.* at 583 (emphasis in original). The right to "bear arms" refers to carrying a weapon for the purpose of being armed and ready for offensive or defensive action in a case of conflict with another person. *Id.* at 584.

In *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1

(2022), the Court wrote that, to justify a regulation on the right to bear arms, "the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* at 17. The Court emphasized this rule by repeating it at page 24 of *Bruen*.

The Court shed light on the rules's application in *United States v. Rahimi*, 602 U.S. 680 (2024).

In *Rahimi*, the Court noted the historical evolution of surety laws allowing for the limitation of a persons' right to bear arms based on an individualized determination that the person presented a physical threat to a person seeking the surety. *Id.* at 695–97. It also noted the parallel development of "going armed" laws" forbidding arming oneself "to the Terror of the people." *Id.* at 697.

Based on these developments, the Court wrote: "Taken together, the surety and going armed laws confirm what common sense suggests: When *an individual poses a clear threat of physical violence to another*, the threatening individual may be disarmed." *Id.* at 698 (emphasis added).

Rahimi involved a statute providing that a person could be

deprived of the right to possess a firearm based on an individualized judicial determination that he or she presented a "a credible threat to the physical safety" of a specific person. *Id.* at 688–89. The Court determined that the law's "prohibition on the possession of firearms by those found by a court to present a threat to others fits neatly within the tradition the surety and going armed laws represent." *Id.* at 688.

Unlike the narrow statute in *Rahimi* with its individualized determination of dangerousness, section 790.23(1) has broad application, covering almost 10% of the adult population of Florida. In 2023, the Census Bureau put the total population of Florida at 22.6 million (an estimated 5% growth since 2020), of which 19.4% was under the age of 18, for a total adult population of over 18 million in 2023.[1] As of 2020, there were an estimated 1.6 million non-incarcerated convicted felons in Florida.[2]

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[1] https://www.census.gov/quickfacts/fact/table/FL/PST045223 (last visited December 5, 2024).

[2] ABC News, "Florida convicted felons allowed to vote for 1st time in presidential election after completing sentences" (Oct. 25, 2020). https://abcnews.go.com/Politics/convicted-florida-felons-allowed-vote-1st-time-presidential/story?id=73822173 (last visited

And unlike the statute in *Rahimi*, the Florida statute imposes a lifetime ban on possession of a firearm.

The statute could not be judicially rewritten by a Florida court to produce an entirely different statute that comported with the Second Amendment. *See Westphal v. City of St. Petersburg*, 194 So. 3d 311, 313–14 (Fla. 2016) ("The judiciary, however, is without power to rewrite a plainly written statute, *even if it is to avoid an unconstitutional result*.") (emphasis added).

Florida's broad statute does not comport with the historical restrictions on the right to bear arms allowed by the Second Amendment. The Court should grant review to determine whether section 790.23(1) is constitutionally viable in light of *Rahimi*.

II. FLORIDA'S HABITUAL FELONY OFFENDER STATUTE IS UNCONSTITUTIONAL.

Florida's Habitual Felony Offender statute provides for enhanced punishments when the judge, at a nonjury proceeding, determines, by a preponderance of the evidence, a variety of facts regarding the defendant's prior criminal record including the dates or at least two prior convictions and sentences, the date of the

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December 5, 20204).

defendant's release from incarceration, and whether the defendant has been pardoned for those prior convictions. § 775.084(1)(a), (3)(a), (4)(a), and (5), Fla. Stat. The statute doubles the statutory maximum sentence for second degree felonies, and had that effect in this case, raising the maximum sentence from 15 years to the 30 year sentence imposed on Petitioner. §§ 790.23(3), 775.082(3)(d), 775.084(4)(a)2, Fla. Stat.

This statutory procedure and Petitioner's resulting sentence are unconstitutional under the Jury and Due Process Clauses. U.S. Const. amend. VI, XIV.

Despite the general rule forbidding a sentence enhancement based on judicial fact-finding, the Court held in the 5-4 decision of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), that a court may enhance a sentence based on a judge's finding of a prior conviction authorizing the enhancement.

The Court cast doubt on the correctness and viability of *Almendarez-Torres* in *Erlinger v. United States*, 602 U.S. 821 (2024):

> Almost immediately …, the decision came under scrutiny. *Jones*, 526 U.S., at 249, n. 10. The Court has since described *Almendarez-Torres* as "at best an exceptional departure" from "historic practice." *Apprendi*, 530 U.S., at 487. That decision, we have said, parted ways from the

"uniform course of decision during the entire history of our jurisprudence." *Id.*, at 490. It was "arguabl[y] … incorrec[t]." *Id.*, at 489. And it amounted to an "unusual … exception to the Sixth Amendment rule in criminal cases that 'any fact that increases the penalty for a crime' must be proved to a jury." *Pereida v. Wilkinson*, 592 U.S. 224, 238 (2021) (quoting *Apprendi*, 530 U.S., at 490).

In separate opinions, a number of Justices have criticized *Almendarez-Torres* further yet, and Justice THOMAS, whose vote was essential to the majority in that case, has called for it to be overruled. See, *e.g.*, *Mathis v. United States*, 579 U.S. 500 (2016) (THOMAS, J., concurring); *Descamps v. United States*, 570 U.S. 254, 280 (2013) (THOMAS, J., concurring in judgment); *Shepard v. United States*, 544 U.S. 13, 27 (2005) (THOMAS, J., concurring in part and concurring in judgment); see also *Jones*, 526 U.S., at 252–253 (Stevens, J., concurring); *Monge v. California*, 524 U.S. 721 (1998) (Scalia, J., joined by Souter and Ginsburg, JJ., dissenting).

Still, no one in this case has asked us to revisit *Almendarez-Torres*. Nor is there need to do so today. In the years since that decision, this Court has expressly delimited its reach. It persists as a "narrow exception" permitting judges to find only "the fact of a prior conviction." *Alleyne*, 570 U.S., at 111, n. 1. Under that exception, a judge may "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 511–512. We have reiterated this limit on the scope of *Almendarez-Torres* "over and over," to the point of "downright tedium." 579 U.S., at 510, 519. And so understood, *Almendarez-Torres* does nothing to save the sentence in this case. To determine whether Mr. Erlinger's prior convictions triggered ACCA's enhanced penalties, the district court had to do more than identify his previous convictions and the legal elements required to sustain them. It had to find that those offenses

> occurred on at least three separate occasions. And, in doing so, the court did more than *Almendarez-Torres* allows.

Erlinger, 602 U.S. at 837–39 (footnote omitted).

For the reasons set out in *Erlinger*, the time has come to push *Almendarez-Torres* overboard. There is no reason to allow governments to continue to impose enhanced sentences based on unconstitutional procedures such as Florida's Habitual Felony Offender law.

Further, regardless of whether *Almendarez-Torres*'s day has come, the Florida law and procedure are plainly unconstitutional under *Erlinger* and should not be allowed to stand. Here, the court went beyond finding the simple fact that Petitioner had been convicted of certain crimes. It made the additional fact findings required by the statute, including when he was convicted.

Moreover, *Erlinger* states that the Sixth Amendment works with the Due Process Clause, which enforces "the 'ancient rule' that the government must prove to a jury every one of its charges beyond a reasonable doubt." *Id.* at 830-31.

These two provisions have worked together "[f]rom the start," and require that: "Should an 'indictment or "accusation … lack any

particular fact which the laws ma[d]e essential to the punishment," it was treated as "no accusation" at all.' *Haymond*, 588 U.S., at 642 (quoting 1 J. Bishop, Criminal Procedure § 87, p. 55 (2d ed. 1872) (some alterations omitted))." *Id.* at 831 (emphasis added).

Hence, such facts must be alleged in the information under the Due Process Clause.

Erlinger noted the government's agreement that "[V]irtually 'any fact' that ' "increase[s] 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). Judges may not assume the jury's factfinding function for themselves, let alone purport to perform it using a mere preponderance-of-the-evidence standard." *Id.* at 834 (internal citations omitted).

In the present case, contrary to *Erlinger*, *id.* at 830-31, the second amended information did not allege the "particular fact[s] which the laws ma[d]e essential to the punishment" as an habitual offender. The prosecution did not submit those facts to a jury, and there was no jury finding of them beyond a reasonable doubt.

Both the statute and the Petitioner's sentence under it amount

to a wholesale denial of Petitioner's rights as spelled out in *Erlinger*. Since the statute provides the basis for Petitioner's sentence, the sentences cannot stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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