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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

WARD LAWRENCE KENYON,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D2023-0313

[January 9, 2025]

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Indian River County; Nicole P. Menz, Judge; L.T. Case No. 312018CF000135A.

Carol Stafford Haughwout, Public Defender, and Gary Lee Caldwell, Assistant Public Defender, West Palm Beach, for appellant.

Ashley Moody, Attorney General, Tallahassee, and Deborah Koenig, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Affirmed.

GROSS, LEVINE and KUNTZ, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, 110 SOUTH TAMARIND AVENUE, WEST PALM BEACH, FL 33401

February 19, 2025

WARD L. KENYON, Appellant(s) v. STATE OF FLORIDA, Appellee(s).	**CASE NO. - 4D2023-0313** L.T. No. - 312018CF000135A

BY ORDER OF THE COURT:

ORDERED that Appellant's January 23, 2025 motion for rehearing and issuance of written opinion is denied.

Served:
Attorney General-W.P.B.
Gary Lee Caldwell
Shannon M. Henne-Eighmie
Deborah Gail Koenig
Palm Beach Public Defender

KEH

I HEREBY CERTIFY that the foregoing is a true copy of the court's order.

LONN WEISSBLUM, Clerk
Fourth District Court of Appeal
4D2023-0313 February 19, 2025

VII. SECTION 790.23 IS FACIALLY UNCONSTITUTIONAL AS A VIOLATION OF THE RIGHT TO BE ARMS UNDER THE FEDERAL CONSTITUTION.

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." Amend. II, U.S. Const.

Appellant acknowledges that section 790.23 has been held not to violate the Second Amendment by Florida courts *See Nelson v. State*, 195 So. 2d 853 (Fla. 1967), and *Edenfield v. State*, No. 1D22-290, 2023 WL 3734459 (Fla. 1st DCA May 31, 2022) (rejecting argument that statute is facially unconstitutional under *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022)), *rev. denied* SC2023-1106, 2023 WL 8710101 (Fla. Dec. 18, 2023).

Nelson was decided in 1967, long before the emergence of a new standard for Second Amendment cases. *See New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022). Further, this Court should not agree with *Edenfield* because it is contrary to *Bruen*. As noted in *Edenfield*, the Supreme Court presently has before it the case of *United States v. Rahimi*, no. 22-915, which involves a somewhat similar issue. The question before the Court is

whether the Second Amendment bars a statute that criminalizes possession of a firearm by a person subject to domestic-violence restraining orders. The Court heard oral argument on November 7, 2023.

Bruen abandoned the two-part approach to Second Amendment cases that lower courts had adopted, and set out a new standard under which the government "must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation":

> Today, we decline to adopt that two-part approach. In keeping with [*District of Columbia v. Heller*, 554 U.S. 570 (2008)], we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, 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. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command." *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50, n. 10, 81 S.Ct. 997, 6 L.Ed.2d 105 (1961).

Bruen, 597 U.S. at 17. The Court later reiterated this standard:

> … . When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively

> protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Id. at 24 (internal quotation marks and citation omitted).

In this case, the prosecution proceeded under the provision of section 790.23(1)(a) making it "unlawful for any person to own or to have in his or her care, custody, possession, or control any firearm" if that person has been convicted "of a felony in the courts of this state."

This provision impinges on conduct protected by the Second Amendment. Historically, the right to "keep" arms was "a common way of referring to possessing arms, for militiamen and everyone else." *Heller*, 554 U.S. at 583 (emphasis in original). This right refers to the right to be "armed and ready for offensive or defensive action in a case of conflict with another person." *Id.* at 584.

A blanket prohibition on the class of convicted felons from possessing firearms invokes the Second Amendment.

Adopting the approach taken in First Amendment cases, the Court wrote in *Bruen* that the government has the burden to prove

the constitutionality of the infringement on the right at issue. *Id.* 597 U.S. at 24–25 (analogizing burden to state's heavy burden to prove constitutionality of restrictions on freedom of speech). In such circumstances, "the government must generally point to historical evidence about the reach of the First Amendment protections." *Id.* at 24–25 (emphasis in original).

Here, there is no ratification-era tradition or historical support for a legislative power to permanently dispossess convicted felons of firearms. Justice Barrett previously highlighted the lack of a historical record while sitting on the Seventh Circuit Court of Appeals:

> The best historical support for a legislative power to permanently dispossess all felons would be founding-era laws explicitly imposing - or explicitly authorizing the legislature to impose - such a ban. But at least thus far, scholars have not been able to identify any such laws. The only evidence coming remotely close lies in proposals made in the New Hampshire, Massachusetts, and Pennsylvania ratifying conventions. In recommending that protection for the right to arms be added to the Constitution, each of these proposals included limiting language arguably tied to criminality.

Kanter v. Barr, 919 F.3d 437, 454 (7th Cir. 2019), *abrogated by Bruen* (Barrett J., dissenting) (emphasis added).

Section 790.23, Florida Statutes, dates back only to 1955.

Bearing in mind that *Bruen* overturned New York's carry law from 1911, this statute's existence since 1955 gives no support to its constitutionality. If anything, this enactment some 110 years after Florida became a state shows that such a prohibition is not a part of Florida or the nation's historical tradition of firearms regulation. Similarly, the federal prohibition on felons possessing firearms, which Appellant asserts is unconstitutional, appears first in the Gun Control Act of 1968. See 18 U.S.C. § 922(g)(1). This, too, does not evince an enactment-era historical tradition of such a regulation.

While the government has the burden of proving that the prohibition on felons possessing firearms is a part of the historical tradition of firearms regulation in this country, it is readily apparent that such proof is not available. There exists little to no evidence of a blanket, lifelong prohibition in the relevant historical record; much less is there evidence of an enduring, enactment-era historical tradition of such a regulation. Consequently, the statute cannot survive the test outlined by the Supreme Court in *Bruen*. Hence the conviction for possession of a firearm by a convicted felon should be reversed with instructions to discharge Appellant.

V. THE COURT ERRED IN IMPOSING AN HABITUAL OFFENDER SENTENCE BECAUSE THE FACTUAL PREDICATE WAS NOT PLEAD IN THE INFORMATION, WAS NOT ADMITTED IN THE PLEA, AND WAS NOT FOUND BY A JURY.

Appellant's 30-year habitual offender sentence is illegal because the factual predicate was not admitted by Appellant and it was not found by a jury as required by 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.

At the time of this filing, there is a case pending for certiorari review in the United States Supreme Court involving a similar issue in the case of *Erlinger v United States*, No. 23-370 (Nov. 20, 2023) (order granting petition for review). That case involves the Armed Career Criminal Act (ACCA), which calls for enhanced sentencing for a defendant who has at least "three previous convictions … for a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. 924(e)(1).

On October 23, 2023, the Solicitor General filed a brief in response to the petition, stating: "the government now acknowledges that the Constitution requires the government to charge and a jury to find beyond a reasonable doubt (or a defendant

to admit) that ACCA predicates were committed on occasions different from one another." *Id.* at page 8 (emphasis added).[1]

The habitual offender statute requires that the prosecution prove facts beyond the mere fact of prior convictions—it must also prove that the crime occurred within a specific time period with respect to the crime at sentencing, and that the defendant "has not received a pardon for any felony or other qualified offense that is necessary for" habitual offender sentencing. *See* § 775.084(1)(a) and (3)(a) Fla. Stat. Further, the statute provides that the state may prove these facts only by the preponderance of the evidence, and that the factual findings are to be made by the judge rather an a jury. § 775.084(3).

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.

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[1] The brief is available on the Supreme Court website: https://www.supremecourt.gov/DocketPDF/23/23-370/285305/20231017172808600_23-370%20Erlinger%20v.%20USA.pdf

I, §§ 9, 16, 22, Fla. Const.; Amend. VI, XIV, U.S. Const.

In this case, the court stated at sentencing: "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." R 1781-82. Nonetheless, the predicate facts were not admitted in Appellant's plea and were found 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.

Judicial fact-finding that goes "beyond merely identifying a prior conviction" implicates the Sixth Amendment. *Descamps v. United States*, 570 U.S. 254, 269 (2013) ("only a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction"). A sentencing judge "can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, Appellant was convicted of." *Mathis v. United States,* 579 U.S. 500, 511–12 (2016) (emphasis added).

The only fact that is arguably excepted from this Sixth Amendment requirement is "the simple fact of a prior conviction." *Mathis*, 579 U.S. at 511. The court went beyond finding the simple fact that Appellant had been convicted of certain crimes. It made

findings as to when he was convicted and as to when he was released from prison.

Appellant acknowledges that Florida courts have rejected similar arguments based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Alleyne v. United States*, 570 U.S. 99 (2013). *See, e.g.*, *Chapa v. State*, 159 So. 3d 361 (Fla. 4th DCA 2015). But no reported Florida appellate decision has addressed *Descamps* and *Mathis*, which sharply limit the fact-finding power of the sentencing court.

Under the Supremacy Clause, this Court is bound by the decisions of the United States Supreme Court in *Descamps* and *Mathis*.

Moreover, the enhancement issue was not plead in the information. A sentencing enhancement based on unplead facts violates the Due Process and Notice Clauses of the state and federal constitutions, as conceded by the Solicitor General's brief in *Erlinger*. I, § 9, Fla. Const.; Amends. V, XIV, U.S. Const.

Further, new proceedings for a jury determination of the habitual offender facts would be barred by the Due Process, Notice and Double Jeopardy Clauses of the state and federal constitutions.

I, § 9, Fla. Const.; Amends. V, XIV, U.S. Const. *But see Gaymon v. State*, 288 So. 3d 1087 (Fla. 2020) (holding that proper remedy for harmful error resulting from court, not jury, finding fact of dangerousness was to remand for jury to make determination of dangerousness).

In sum, the sentence is contrary to the state and federal constitutions. To conduct new habitual offender proceedings would violate the Double Jeopardy Clauses of the state and federal constitutions. *But see Gaymon*.

In this case, Appellant initially entered a plea of not guilty. "The plea of not guilty puts in issue every material element of the crime charged in the information." *Licata v. State,* 88 So. 621, 622 (Fla. 1921). His no contest plea to the charge of possession of a firearm by a convicted felon did not constitute an admission of the facts necessary for habitual offender sentencing.

Accordingly, the state had the burden to prove the predicate facts by habitualization to a jury beyond a reasonable doubt. Further, the predicate facts for the sentencing enhancement were not alleged in the charging document so that the sentencing enhancement is contrary to the Jury, Notice and Due Process

Clauses of the state and federal constitutions. As the Solicitor General conceded in its brief in *Erlinger*, facts necessary for a sentencing enhancement must be alleged in the charging document and must be found by a jury beyond a reasonable doubt.

Appellant raised this issue in his motion to correct sentence. R 1922-27. The court denied the motion without explanation. R 2580. The court erred under the foregoing authorities and the habitual offender sentence should be reversed.