No. 24–6146

IN THE SUPREME COURT OF THE UNITED STATES

JARVIS PARKER, PETITIONER

v.

STATE OF FLORIDA, RESPONDENT.

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

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

Florida's habitual felony offender statute, and petitioner's sentence under it, are unconstitutional.

A. Respondent says (Br. In Op. 5–6) Florida law did not allow a defendant to raise his issue via a post-sentencing motion under Florida Criminal Rule 3.800(b)(2) .

The Fourth District could not have found Petitioner's claim defaulted because it has specifically held, based on its own and state supreme court precedents, that rule 3.800(b)(2) is a proper

vehicle for preserving such claims:

> 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).

Hollingsworth v. State, 293 So. 3d 1049, 1051 (Fla. 4th DCA 2020). S*ee also Arrowood v. State*, 843 So. 2d 940 (Fla. 1st DCA 2003) (finding defendant properly filed a 3.800(b)(2) motion to raise his *Apprendi* claim).

Regardless, respondent does not dispute that one may raise the facial constitutionality of a statute for the first time on appeal under Florida's "fundamental error" rule. In *State v. Johnson*, 616 So. 2d 1 (Fla. 1993), the defendant contended for the first time on appeal that amendments to the habitual offender statute violated the state constitution's single subject rule for legislative enactments. The supreme court rejected the state's argument that the defendant was "prohibited from challenging the constitutionality of chapter 89–280's amendments for the first time on appeal

because the issue does not constitute fundamental error," and held the amendment violated the state constitution. *Id.* at 3–4. Hence, the Fourth District has written that a defendant may challenge the constitutionality of a sentencing statute for the first time on appeal even without filing a motion to correct the sentence under rule 3.800(b): "the supreme court in *Brannon v. State,* 850 So. 2d 452, 453 (Fla. 2003), recognized that the application of fundamental error arising out of the facial unconstitutionality of a sentencing statute, as here, can be utilized to circumvent the 3.800(b) process by considering the illegal sentence on appeal." *Mincey v. State*, 889 So. 2d 211, 212 (Fla. 4th DCA 2004).

B. On the merits, respondent mainly relies (Br. in Op. 10–11) on *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

This reliance ignores the question of whether *Almendarez-Torres* continues to be good law. Respondent offers no argument justifying the continued viability of that decision.

Respondent also asserts (Br. in Op. 12–13) that any error was harmless. Basically, its argument is that the record was sufficient such that a jury could have found that Petitioner qualified for habitual felony offender sentencing.

This argument ignores the fact that, if the statute is unconstitutional, there is no basis in Florida law for the enhanced punishment imposed by the trial court. A sentence cannot be imposed without a basis in law. *See Johnson*, 616 So. 2d at 5 (holding habitual offender statute was invalid at the time of sentencing and remanding "for resentencing in accordance with the valid laws in effect at the time of Johnson's sentencing").

Moreover, the prosecution's amended information in this case alleged the elements necessary to support a sentencing enhancement for discharging a firearm and causing bodily injury, but it did not allege any element of the habitual felony offender statute. R 116–17. Any possible distinction between a sentencing factor and an element of the crime is illusory: "we have treated sentencing factors, like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt." *Washington v. Recuenco*, 548 U.S. 212, 220 (2006). As the Court wrote in *Erlinger v. United States*, 602 U.S. 821 (2024), the Jury and Due Process Clauses "require the government to include in its criminal charges all the facts and circumstances which constitute the offence," and an "indictment or 'accusation … lack[ing] any particular fact which

the laws ma[d]e essential to the punishment" should be treated as "no accusation' at all." *Id.* at 831 (internal citations and quotation marks omitted).

"Conviction upon a charge not made would be sheer denial of due process." *Thornhill v. Alabama*, 310 U.S. 88, 96 (1940) (internal citations and quotation marks omitted). *See also Cole v. Arkansas*, 333 U.S. 196, 201 (1948) ("It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.").

This case is not like *Recuenco*, where the prosecution alleged the sentence-enhancing fact that Recuenco committed the crime with a firearm, *id.*, 548 U.S. at 215, or *Neder v. United States*, 527 U.S. 1, 6 (1999), where the indictment alleged materiality, *id.* at 6, but the enhancing fact was not submitted to the jury. Here, the necessary facts were not alleged. Sentencing Petitioner for an enhanced crime that has not been alleged cannot be harmless error under *Thornhill* and *Cole*.

Florida's statute imposing a ban on possession of a firearm by convicted felons violates the Second Amendment.

A. Respondent says the issue was not preserved below so that there is an independent and adequate law ground for the state court decision.

This contention is contrary to Florida law. In *Edenfield v. State*, 379 So. 3d 5 (Fla. 1st DCA 2022), the court wrote, citing long-settled state supreme court precedents:

> 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).

Id. at 7 n.1.

B. Section 790.23(1)(a), Florida Statutes imposes a lifetime ban on possession of a firearm by anyone convicted of a felony. Contrary to respondent's suggestion (Br. in Op. 14–15), the statute is unconstitutional in all its applications. Petitioner does not deny that Florida could write a statute that conformed to the Second Amendment. Likewise, New York could have written a statute

conforming to the Second Amendment instead of the broad restriction on the right to bear arms that was struck down in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022).

The Florida statute imposes a lifetime ban on all felons with no exceptions, and for judges to rewrite the statute to conform to the Second Amendment would be impossible — it not for the courts to determine in the first instance who should or should not enjoy the full protections of the Second Amendment.

C. Petitioner cannot agree with respondent's assertions (Br. in Op. 15–17) that such a statute conforms to the historical background to the Second Amendment.

It is inarguably the case that the "first federal statute disqualifying felons from possessing firearms was not enacted until 1938." *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010). And as respondent admits, Florida's ban (Br. in Op. 14) was not enacted until 1955. Justice Barrett 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) (Barrett J., dissenting), *abrogated by Bruen*, 597 U.S. at 18–19.

D. Petitioner focusses on the statement in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill …." *Id.* at 626–27. But this dicta in *Heller* is not dispositive. That case did not involve anything about convicted felons.

Similarly, respondent's reliance on the reference to "law-abiding, responsible citizens" in *Bruen*, *id.* at 26, is beside the point here — *Bruen* did not purport to draw a line as to who is excluded from the protections of the Second Amendment. "Our holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun." *Id.* at 72 (Alito, J., concurring).

Bruen held unconstitutional a New York law presuming that persons did not have the right to possess a firearm, and providing that they could enjoy the full protections of the Second Amendment only if they satisfied a state agent of their need to possess a firearm. The law violated the right of the people to bear arms by purporting to limit the right only to persons deemed fit by the state.

Florida has carved out an exception to the right to bear arms that applies to almost 10% of the state's adult population, and this without a firm basis in the historical tradition of firearm regulation at the time of the Second Amendment's ratification or, for that matter, of the Fourteenth Amendment's. The Court should accept jurisdiction to put an end to this unconstitutional infringement on the Second Amendment.

The reasoning of *Williams v. Florida* has been rejected, and the case should be overruled.

A. As in the other points, respondent says (Br. in Op. 8) that Petitioner failed to preserve this issue for appeal so that there is no basis for certiorari review. It does not dispute, however, that the waiver of a trial by a panel comprised of a less-than-lawful number of jurors is invalid unless personally made by the defendant.

Compare Blair v. State, 698 So. 2d 1210, 1217 (Fla. 1997) (finding defendant's agreement to verdict by five-member jury valid because it was made in a colloquy with the court "including a personal on-the-record waiver sufficient to pass muster under the federal and state constitutions," and his decision was made "toward the end of his trial, after having ample time to analyze the jury and assess the prosecution's case against him. He affirmatively chose to proceed with a reduced jury as opposed to a continuance or starting with another jury.") to *Wallace v. State*, 722 So. 2d 913 (Fla. 2d DCA 1998) (reversing on grounds of fundamental error where defendant was tried by five-member jury and judge did not inform the defendant of his right to six-person jury).

B. Despite some hunt-and-peck efforts in that direction (Brief in Op. 22–25), respondent does not seriously dispute that "a mountain of evidence suggests that, both at the time of the Amendment's adoption and for most of our Nation's history, the right to a trial by jury for serious criminal offenses *meant* a trial before 12 members of the community — nothing less." *Khorrami v. Arizona*, 598 U.S. — (2022) (Gorsuch, J., dissenting from denial of certiorari). To enforce the Sixth Amendment as understood at the

time of its ratification requires trial by a jury of twelve.

C. Perhaps without intending to do so, respondent highlights a central problem with *Williams v. Florida*, 399 U.S. 78 (1970). *Williams* rejected the historical background of the Sixth Amendment and turned again to social science research as to comparative merits of six and twelve member juries. No more than eight years later, the Court noted that, *Williams* notwithstanding, social science shows that twelve-member juries are considerably more accurate than six-member juries. *See Ballew v. Georgia*, 435 U.S. 223, 234–39 (1978). Respondent now sets out (Br. in Op. 28–29) its own catalog of social science by "some scholars," detailing studies which, it says, supports *Williams*.

Hence the problem: it makes little sense for the meaning of the constitution to fluctuate in the uncertain winds of social science research untethered from the firm historical context at the time of ratification. To rescue the Sixth Amendment from such a fate, the Court should grant review to restore the Sixth Amendment to its historical form of a jury of twelve.

D. Respondent also raises a makeweight argument that the Court should allow Florida's continuing violation of the Sixth

Amendment because it would cost it too much to conform to the right to a jury of twelve. Well, it is Florida that decided at the dawn of the Jim Crow era to undo the right to a jury of twelve, and it must inevitably pay the price for its commitment to the continuation of this practice.

In making this argument, respondent admits (Br. in Op. 32) that there are 5000 appeals pending in Florida — in virtually all of those cases the defendant has been deprived of the foundational right to a twelve-member jury.

CONCLUSION

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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