No.

IN THE SUPREME COURT OF THE UNITED STATES

PIERRE LAMAAR MCEWEN, 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?

PARTIES TO THE PROCEEDING BELOW

In the court whose judgment is sought be reviewed, the parties were:

Pierre Lamaar McEwen

State of Florida

RELATED PROCEEDINGS

Nineteenth Judicial Circuit of Florida:

State v. McEwen, 312019CF000977A (June 25, 2024)

Fourth District Court of Appeal of Florida:

McEwen v. State, 4D2024–2983 (December 11, 2025)

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Pierre Lamaar McEwen 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 and the denial of rehearing, issuance of written opinion and stay of mandate are reported as *McEwen v. State*, 426 So. 3d 520 (Fla. 4th DCA 2025). They are reprinted in the appendix. 1a, 2a.

JURISDICTION

The petition seeks review of the decision of Florida's Fourth District Court of Appeal affirming Petitioner's convictions and sentences without written opinion on December 11, 2025, 1a, for which a timely motion for rehearing, issuance of written opinion and stay of mandate was denied on January 15, 2026. 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.

STATEMENT OF THE CASE

In 2019, Petitioner Pierre Lamaar McEwen was charged by second amended information in Florida's Nineteenth Judicial Circuit with possession of a firearm or ammunition by a convicted felon under section 790.23, Florida Statutes, and with grand theft. The charging document did not allege that Petitioner was an habitual offender. In 2024, the prosecutor filed an unsworn notice of intent to seek imposition of an habitual offender sentence under section 775.084, Florida Statutes.

Thereafter Petitioner entered a no contest plea to both charges. He signed a plea form said he could be sentenced "up to 30 years if sentenced as a habitual felony offender." R 251. It did not indicate any issue was reserved for appeal. At the plea hearing, he made no admission or denial as to qualifying as an habitual offender or to any fact qualifying him as an habitual offender. The defense reserved no issue for appeal.

At sentencing, the prosecution presented to the judge evidence that Petitioner had two felony convictions in Ohio: carrying a concealed weapon in 2011, and burglary in 2012; and that he was released from prison in Ohio in April 2013, and had not been

pardoned for those convictions. R 391-93.

The judge found the state had proved Petitioner was an habitual offender. R 399-400.

The court sentenced Petitioner as an habitual offender to 30 years in prison for the felon-in-possession charge with a concurrent ten year HFO term for grand theft of a firearm. R 454.

Petitioner appealed his conviction and sentence. While his appeal was pending, he filed a rule 3.800(b)(2) motion to correct sentence arguing that Florida's habitual offender statute, and his sentence under it, were unconstitutional under the Notice, Due Process and Jury Clauses of the state and federal constitutions and under *Erlinger v. United States*, 602 U.S. 821 (2024). Art. I, §§ 9, 16, 22, Fla. Const.; Amend. V, VI, XIV, U.S. Const. R 463-78.

(Under Florida law, rule 3.800(b) is a proper vehicle for raising such a claim after sentencing. *See Jackson v. State*, 983 So. 2d 562, 572–73 (Fla. 2008) (stating claims that may be raised via rule 3.800(b) include "that a sentencing statute was unconstitutional"); *Hollingsworth v. State*, 293 So. 3d 1049, 1051 (Fla. 4th DCA 2020) (summarizing case law).)

The trial court took no action on the motion within 60 days, R

479, so that the motion was deemed denied by operation of rule 3.800(b)(2).

Petitioner then filed his brief in the appellate court again arguing that the habitual offender statute and his sentence were unconstitutional on the same grounds. 3a–19a, 24a–34a. He also argued that his conviction under section 790.23 should be vacated because the statute is facially unconstitutional under the Second Amendment. 20a-23a, 35a–38a.

As to Second Amendment issue, he said that, although the issue had not been raised in the trial court, it could be raised on direct appeal under Florida's fundamental error doctrine. (Under Florida law, the facial unconstitutionality of a statute may be raised for the first time on appeal. *See Westerheide v. State*, 831 So. 2d 93, 105 (Fla. 2002)).

As already noted, the Fourth District affirmed the conviction and sentence without a written opinion, and denied Petitioner's motion for rehearing, issuance of written opinion and stay of mandate.

REASONS FOR GRANTING THE PETITION

I. 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 of at least two prior convictions and sentences, the date of the 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 and third degree felonies, and had that effect in this case, raising the maximum sentence from 15 years to the 30 year sentence imposed on Petitioner for the felon-in-possession charge and from 5 years to 10 years for the grand theft charge. §§ 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 and whether the Ohio convictions were for crimes qualifying him as an habitual offender in Florida.

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 charging document 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 unconstitutional statute provided the basis for Petitioner's sentences, the sentences cannot stand.

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

The prosecution alleged that Petitioner "did own or have in his care, custody, possession, or control any firearm or ammunition, after that person had been convicted of a felony in the courts of this state or found guilty of an offense that is a felony in another state,

territory, or country and which was punishable by imprisonment for a term exceeding 1 year, in violation of Florida Statute 790.23." R 24.

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]

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

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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 December 5, 20204).

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*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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