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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

PIERRE LAMAAR MCEWEN,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D2024-1781

[December 11, 2025]

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Indian River County; Robert Meadows, Judge; L.T. Case No. 312019CF000977AXXXXX.

Daniel Eisinger, Public Defender, and Gary Lee Caldwell, Assistant Public Defender, West Palm Beach, for appellant.

James Uthmeier, Attorney General, Tallahassee, and Deborah Koenig, Senior Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Affirmed.

GERBER, LEVINE and KLINGENSMITH, 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

January 15, 2026

PIERRE LAMAAR MCEWEN, Appellant(s) v. STATE OF FLORIDA, Appellee(s).	**CASE NO. - 4D2024-1781** L.T. No. - 312019CF000977A

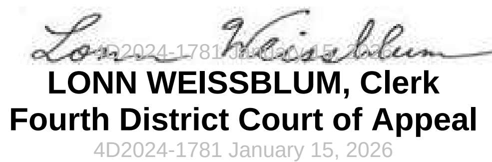
BY ORDER OF THE COURT:

ORDERED that Appellant's December 22, 2025 motion for rehearing, issuance of written opinion and stay of mandate is denied.

Served:
Crim App WPB Attorney General
Gary Lee Caldwell
Deborah Gail Koenig
Indian River Public Defender
Palm Beach Public Defender
Michelle Miele Rhodeback

KEH

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



LONN WEISSBLUM, Clerk
Fourth District Court of Appeal
4D2024-1781 January 15, 2026

ARGUMENT

I. THE HABITUAL OFFENDER SENTENCE IS UNCONSTITUTIONAL AND APPELLANT'S HABITUAL OFFENDER SENTENCES SHOULD BE VACATED.

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

Because it provides for the court to make the necessary findings, and to do so upon proof by the preponderance of the evidence rather than beyond a reasonable doubt, based on facts not alleged in the charging document, the habitual offender statute violates on its face and as applied here the Notice, Due Process and Jury Clauses of the state and federal constitutions, as does the

Defendant's resulting sentence. *See Erlinger v. United States*, 602 U.S. 821 (2024); *Weatherspoon v. State*, 214 So. 3d 578, 583–84 (Fla. 2017); *Bienaime v. State*, 213 So. 3d 927, 929 (Fla. 4th DCA 2017); Art. I, §§ 9, 16, 22, Fla. Const.; Amend. V, VI, XIV, U.S. Const.

In *Erlinger*, the Supreme Court addressed an enhanced sentence imposed under the Armed Career Criminal Act (ACCA), which provides 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). Using that statute, the trial court imposed an enhanced sentence based on its finding of the facts required by the statute.

On certiorari review, the Supreme Court ruled the sentence was unconstitutional. The Court wrote it has only allowed one exception to the constitutional requirement that a jury must find facts supporting a sentence enhancement, namely that *Almendarez–Torres v. United States*, 523 U.S. 224 (1998), "permitted a judge to undertake the job of finding the fact of a prior conviction—<u>and that job alone</u>." *Erlinger*, 602 U.S. at 837 (emphasis

added). *Erlinger* stressed that Justice Thomas "whose vote was essential to the majority in [*Almendarez-Torres*], has called for it to be overruled," indicating that *Almendarez-Torres* is no longer valid law. *Id.* at 837-38.

Hence, Appellant submits, *Almendarez-Torres* is no longer good law.

In fact, it appears that the Court did not overrule *Almendarez-Torres* only because "no one in this case has asked us to revisit *Almendarez-Torres*. Nor is there need to do so today." *Id.* at 838.

There was no need to overrule it, the Court wrote, because even under *Almendarez-Torres*, "a judge <u>may do no more</u>, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of. We have <u>reiterated this limit</u> on the scope of *Almendarez-Torres* <u>over and over, to the point of downright tedium</u>." *Erlinger*, at 838 (emphasis added; internal citations and quotation marks omitted).

At bar likewise, even if *Almandarez-Torres* remains good law, it is not dispositive here.

The Court noted 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 (internal citations omitted).

It wrote that these two provisions have worked together "[f]rom the start," and require that: "<u>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</u>.' *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).

"[F]acts legally essential to the punishment to be inflicted" are "elements of a crime." *Weatherspoon v. State*, 214 So. 3d 578, 583 (Fla. 2017).

Hence, they must be alleged in the information under the Due Process and Notice Clauses of the state and federal constitutions and rule 3.140(d)(1). *Id.* at 583–84. *See also Bienaime v. State*, 213 So. 3d 927, 929 (Fla. 4th DCA 2017) ("The state's failure to allege grounds for enhancement in the charging document cannot be cured by a jury's factual findings.").

Erlinger provides: "Virtually '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 831, the information did not allege the "particular fact[s] which the laws ma[d]e essential to the punishment" as an habitual offender. *See also Bienaime*.

Further, 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 present sentencing under it amount to a wholesale denial of the Defendant's rights as spelled out in *Erlinger* and the cases on which it relies.

In view of the foregoing, the habitual offender statute is unconstitutional and unenforceable. The courts are "without power to rewrite a plainly written statute, even if it is to avoid an unconstitutional result." *Westphal v. City of St. Petersburg*, 194 So. 3d 311, 313–14 (Fla. 2016). *See also Hayes v. State*, 750 So. 2d 1, 4 (Fla. 1999) (courts are "not at liberty to add words ... that were not

placed there by the Legislature.").

Doing so would violate the Legislature's power to enact laws under article III, section 1 of our constitution, which provides: "The legislative power of the state shall be vested in a legislature of the State of Florida."

Courts may not "rewrite a ... law to conform it to constitutional requirements, for doing so would constitute a serious invasion of the legislative domain, and sharply diminish [the Legislature's] incentive to draft a narrowly tailored law in the first place." *United States v. Stevens*, 559 U.S. 460, 481 (2010) (internal citations and quotation marks omitted).

As the statute is unconstitutional, there is no statutory authority for the habitual offender sentence imposed here. Accordingly, the sentences for should be vacated and Appellant should receive a new sentencing hearing under the Criminal Punishment Code.

Appellant acknowledges decisions rejecting somewhat 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). Such decisions are

based on erroneous readings of *Almendarez –Torres v. United States*, 523 U.S. 224 (1998). That case is no longer valid under *Erlinger*, and even if it were, it is limited to its facts and it does not authorize the unconstitutional procedure mandated by the habitual offender statute.

This issue is now before the supreme court in *Magneson v. State*, 386 So. 3d 147, 148 (Fla. 4th DCA 2024) (upholding HFO sentence pursuant to *Maye*), SC2024-0782 (June 28, 2024) ("The proceedings in this Court in the above case are hereby stayed pending disposition of *Maye v. State*, Case No. SC2023-1184."). Oral argument in the *Maye* case was on June 5, 2024, and both *Magneson* and *Maye* are still pending. (*Maye* is before the supreme court on review of *Maye v. State*, 368 So. 3d 531 (Fla. 6th DCA 2023) (upholding PRR sentence), *rev. granted*, No. SC2023-1184, 2024 WL 1796831 (Fla. Apr. 25, 2024) .

Even if the habitual offender statute itself survived *Erlinger*, there was still constitutional error as the enhancement issue was not submitted to a jury, neither the necessary predicate facts nor the habitual offender sentence were alleged in the information, and Appellant's plea did not admit to the predicate facts, so any new

proceeding for a jury determination of the issue would be barred by the Double Jeopardy Clauses of the state and federal constitutions. The facts supporting the enhancement are elements of the crime. *See Erlinger* and *Weatherspoon.*

II. THE HABITUAL OFFENDER SENTENCES IN THIS CASE WERE IMPOSED CONTRARY TO LAW.

In this case, the prosecution relied on two Ohio convictions as the predicate offenses for the habitual offender sentence it sought. It introduced documents purporting to show that Appellant was convicted and sentenced for carrying a concealed weapon in Ohio in 2011, and he was convicted and sentenced for two counts of burglary at one sentencing hearing in Ohio on July 9, 2012 (more than five years before the alleged date of the present offenses in October-November 2017), and that he was released from prison on April 26, 2013 (within five years of the alleged date of the present offenses). R 279-328. (By statute, the two burglary convictions constitute a single predicate conviction because they were sentenced at the same time. R 298; § 775.084(5), Fla. Stat.)

A. The sentences are illegal because based on the trial court's unconstitutional finding as to when Appellant was released from prison in Ohio.

The document purporting to show the date of release was in the form of documentation from the Ohio Department of Rehabilitation and Correction. R 315-25. Judicial fact-finding based on this documentation is unconstitutional under *Erlinger*. That case

specifically held that the Constitution requires determination as to the date of a predicate fact to be made by a jury upon proof beyond a reasonable doubt. Again, the habitual offender statute is unconstitutional as it authorizes judicial finding of the date of release based on non-court documentation.

Further, to repeat, as the statute is unconstitutional, there is no lawful basis for the sentencing enhancement, and the sentences in this case should be vacated and a non-HFO sentence must be imposed.

B. The Ohio conviction for carrying a concealed weapon was not a qualifying felony for HFO sentencing.

One of the two claimed predicate offenses was for carrying a concealed weapon as defined by Ohio law.

The prosecution presented documents to the effect that the Defendant was charged by indictment with aggravated burglary, theft of drugs, and carrying a concealed weapon in case B 1101557 of the Court of Common Pleas of Hamilton County, Ohio. R 280-81. The indictment alleged as to the concealed weapon count that he "knowingly carried or had, concealed on his person, or concealed ready at hand a handgun other than a dangerous ordnance and the

weapon involved is a firearm that is either loaded or with ammunition ready at hand." R 281. (Emphasis added.)

The prosecution also adduced documents showing that Ohio Revised Code section 2923.12(A) (2011) made it a crime to "knowingly carry or have, concealed on the person's person or concealed ready at hand" a "deadly weapon other than a handgun," or a "handgun other than a dangerous ordnance," or a "dangerous ordnance." R 332. Further, the Ohio statute exempted persons who had a concealed firearm license. R 332-36.

Prosecution exhibit 2 at sentencing contained documents showing that in Ohio case B 1101557 the Defendant entered a not guilty plea and waived trial by jury, and the case was then submitted to the court for a nonjury trial. R 282-83. The Ohio court entered an order stating:

> "And the Court having heard the evidence and arguments of Counsel, finds the Defendant
>
> is GUILTY of:
>
> **count 3: CARRYING CONCEALED WEAPONS, 2923-12A2/ORCN,F4**

R 282. It found him not guilty of the other two charges. R 283.

The court's finding of guilt did not specify that it found the

weapon was on the Defendant's person as opposed to being "ready at hand." It also did not specify that it found the Defendant guilty as charged. R 282.

Where, as here, the prosecution seeks to use an out-of-state conviction as a predicate offense for habitualization, it must show that the elements of the out-of-state offense are "substantially similar" to the elements of a Florida felony. *See Robinson v. State*, 692 So. 2d 883, 887-88 (Fla. 1997).

In *Robinson*, the trial court imposed an habitual offender sentence, and one of the qualifying felonies was a Georgia conviction under a statute provided that a person "commits the offense of robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another … [b]y sudden snatching." *Id.* at 887 (quoting Georgia statute) (emphasis added).

At the time of Robinson's sentencing, as now, theft was a misdemeanor in Florida, and, unlike now, there was no Florida felony of robbery by sudden snatching. Because the elements of the Georgia crime were not "substantially similar" to those of the Florida felony of robbery, the supreme court held that it could not

be used as a qualifying felony for habitualization. *Id*. at 888. *See also Howard v. State*, 245 So. 3d 962 (Fla. 1st DCA 2018) (finding that South Carolina crime of assault with intent to kill was not substantially similar to Florida aggravated assault for purposes of HVFO sentencing). *Cf*. *Montgomery v. State*, 183 So. 3d 1042 (Fla. 4th DCA 2015) (Pennsylvania statute under which defendant was convicted of rape by threat of forcible compulsion was not similar to Florida statute governing sexual battery, so that Pennsylvania conviction could not be used to determine if defendant qualified for sexual predator designation).

In the present case, the Ohio statute likewise does not match the Florida statute. "The supreme court has counseled that in making comparisons between out-of-state and Florida offenses, the statutory language <u>must be strictly construed in favor of the defendant</u>. *See Carpenter v. State,* 785 So.2d 1182, 1205 (Fla.2001)." *Hankins v. State*, 42 So. 3d 871, 873 (Fla. 2d DCA 2010) (emphasis added).

Under the Ohio statute, an unlicensed person can commit the crime by possessing a concealed weapon that is "ready at hand."

Under Ohio law, a weapon or ammunition may be "ready at

hand" <u>even if it is actually carried by someone else</u>. *See In re Wright*, 874 N.E.2d 850 (Ohio Ct. App. 2007) (holding that, for purposes of Ohio Code 2923.12, ammunition was "ready at hand" even though it was carried by defendant's companion).

The Ohio "ready at hand" element thus allows for conviction for conduct not forbidden by Florida's concealed firearm statute, section 790.01, Florida Statutes. Section 790.01 makes it a crime for a person to carry a concealed weapon or firearm "<u>on or about</u> his or her person."

Additionally, section 790.01 in its present form — the form at the time of the instant sentencing proceedings — differs markedly from the statute used for the Ohio concealed firearm statute. Under the Ohio law, it is a crime to carry a concealed firearm or have on "ready to hand" without a license. Under section 790.01, it is <u>not</u> a crime to carry a concealed firearm on or about one's person without a license so long as one satisfies criteria for receiving a license:

> (1) A person is authorized to carry a concealed weapon or concealed firearm, as that term is defined in s. 790.06(1), if he or she:
>
> (a) Is licensed under s. 790.06; <u>or</u>

> (b) Is not licensed under s. 790.06, but <u>otherwise satisfies the criteria for receiving and maintaining such a license under</u> s. 790.06(2)(a)-(f) and (i)-(n), (3), and (10).

> … .

> (3) Except as provided in subsection (5), a person who does not meet the criteria in subsection (1) and who carries a concealed firearm, as that term is defined in s. 790.001, on or about his or her person commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> (4) In any prosecution for a violation of subsection (2) or subsection (3), <u>the state bears the burden of proving</u>, as an element of the offense, both that a person is not licensed under s. 790.06 and <u>that he or she is ineligible to receive and maintain such a license under</u> the criteria listed in s. 790.06(2)(a)-(f) and (i)-(n), (3), and (10).

§ 790.01, Fla. Stat. (emphasis added).

Thus, the Ohio law criminalizes an act that is not a felony under Florida law as of the time of sentencing — carrying a concealed firearm without a license so long as one qualifies for a license. In deciding whether to apply the version of the Florida statute as it existed at the time of the out-of-state conviction or as it existed at the time of sentencing, one should choose the version more favorable to the defendant under the rule of strict construction of penal statutes in favor of the defendant.

In this regard, Appellant recognizes that in *Hankins v. State*,

42 So. 3d 871, 873 n.3 (Fla. 2d DCA 2010), the Second District looked to the version of the Florida version of the crime at the time of the crime rather than sentencing in applying the *Robinson* rule. It did so pursuant to prior Second District precedent. *Robinson* noted that that version of the statute was more favorable to the defendant than the version at the time of sentencing:

> The supreme court has counseled that in making comparisons between out-of-state and Florida offenses, the statutory language must be strictly construed in favor of the defendant. *See Carpenter v. State,* 785 So. 2d 1182, 1205 (Fla. 2001). Especially in light of the statutory requirement that we interpret criminal statutes strictly in favor of the defendant, § 775.021, we conclude that the out-of-state offense referred to in section 775.082(9)(a) must be interpreted to require that the elements of the out-of-state offense would be sufficient for a conviction under a Florida statute that is punishable as a felony.
>
> [2] This court has held that the version of the Florida statute to analyze is the version in effect when the out-of-state offense was committed. *See Knarich v. State,* 866 So. 2d 165, 170 (Fla. 2d DCA 2004).

Id. at 873 (emphasis added).

Here, the statute must also be construed in the version most favorable to Appellant, so that the version of section 790.01 in effect at the time of sentencing should apply.

Accordingly, the Ohio concealed firearm conviction was not a

qualifying offense for habitualization. As the prosecution advanced no alleged qualifying offense beside the two Ohio cases, and as one of them is not a qualifying offense, the Defendant's habitual offender sentences should be vacated and he should be resentenced pursuant to the Criminal Punishment Code.

III. THE CONVICTION FOR POSSESSION OF A FIREARM BY A CONVICTED FELON SHOULD BE REVERSED BECAUSE IT IS BASED ON A FACIALLY UNCONSTITUTIONAL STATUTE UNDER THE FLORIDA CONSTITUTION.

Section 790.23(1), Florida Statutes, criminalizes possession of a firearm by a convicted felon regardless of the manner of bearing. This statute is facially unconstitutional under Florida's Declaration of Rights, which provides that the right to bear arms "shall not be infringed, except that the manner of bearing arms may be regulated by law." Art. I, § 8(a), Fla. Const.

Conviction on a facially unconstitutional statute is fundamental error, and the issue may be raised for the first time on direct appeal because it does not turn on factual disputes:

> … . The State argues that the other due process claims have not been preserved for review by this Court because not raised below. While the constitutional application of a statute to a particular set of facts must be raised at the trial level,[16] a facial challenge to a statute's constitutional

IV. THE CONVICTION FOR POSSESSION OF A FIREARM BY A CONVICTED FELON SHOULD BE REVERSED BECAUSE IT IS BASED ON A FACIALLY UNCONSTITUTIONAL STATUTE UNDER 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." Amend. II, U.S. Const.

Appellant acknowledges that section 790.23 has been held not to violate the Second Amendment. *See Nelson* and *Edenfield*.

Notably, *Nelson* was decided in 1967, long before the emergence of a new standard for Second Amendment cases, and it has no bearing on the arguments raised here. Further, *Edenfield* because was decided before the Supreme Court clarified the Second Amendment 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 <u>individualized</u> determination that the person presented a physical threat <u>to an individual</u> 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.

"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 prosecution under 18 U.S.C. § 922(g)(8), which forbids possession of a firearm while under a domestic violence restraining order.

Under the statute, the prosecution must prove: (1) the restraining order was issued after notice and hearing, (2) the order contained a specific individualized prohibition that the defendant not threaten the intimate partner or a child of the defendant or the partner, and (3) either contained an individualized finding that the defendant "represents a credible threat to the physical safety" of his intimate partner or his or his partner's child, or an explicit prohibition on attempted use, or threatened use of "physical force" against those persons. *Rahimi*, 602 U.S. at 688.

At a state court hearing for a domestic violence restraining order, the judge found Rahimi had committed family violence, the violence was "likely to occur again" and Rahimi posed "a credible threat" to the "physical safety" of the petitioner and a member of

her family. *Id.* at 686–87. The judge issued a restraining order and suspended Rahimi's gun license for <u>two years</u>. *Id.* at 687. During this two year period, Rahimi committed other crimes of violence with a firearm. *Id.* at 687-88. After his arrest on those charges, law enforcement found firearms in his home along with a copy of the restraining order. He was then charged in federal court with possession of a firearm while subject to a domestic violence restraining order.

Rahimi challenged the statute on Second Amendment grounds.

Rejecting Rahimi's claim, the Supreme 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 (emphasis added).

Unlike the narrow statute in *Rahimi* with its <u>individualized</u> determination of dangerousness, section 790.23(1) has broad application, covering all persons convicted of a felony with no individualized determination. It deprives these persons of the right to possess firearms for use in self-defense anywhere — even in their

own homes — with no individualized determination of dangerousness to another person.

Further, unlike the temporary restraining order in *Rahimi*, it imposes a total lifetime ban.

This broad statute does not comport with the historical restrictions on the right to bear arms allowed by the Second Amendment under *Rahimi*. Hence, section 790.23(1) is unconstitutional.

Appellant submits that this Court should rule the statute unconstitutional, reverse the conviction for count 1, and remand with instructions to discharge Appellant.

Further, as stated in Point III, reversal of the conviction for count 1 requires reversal of the sentence for count 2. *See Holubek*.

ARGUMENT

I. THE HABITUAL OFFENDER SENTENCE IS UNCONSTITUTIONAL AND APPELLANT'S HABITUAL OFFENDER SENTENCES SHOULD BE VACATED.

Appellant's claim is properly before this Court.

Appellee says this issue is not subject to review by this Court because it was not raised at the time of sentencing. Appellee's arguments are directly contrary to rulings of this Court and our supreme court.

Rule 3.800(b)(2) is "the proper method to raise the issue of an *Apprendi* violation":

> 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).

In a footnote, Appellee acknowledges *Hollingsworth* and similar holdings that *Apprendi/Alleyne* challenges may be preserved by a rule 3.800(b)(2) motion. In effect, Appellee wants this Court to make

a new rule and apply it retroactively.

Regardless, a defendant may raise the constitutionality of a sentencing statute for the first time on appeal. 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.

Moreover, an as-applied challenge to a sentencing statute may be raised by a rule 3.800(b)(2) motion. *See Booker v. State*, 244 So. 3d 1151 (Fla. 1st DCA 2018) (holding trial court erred in denying motion to correct sentence that argued sentencing statute was unconstitutional as applied to him). *See also Scott v. State*, 50 Fla. Law Weekly D1246, 2025 WL 1598260 (Fla. 5th DCA June 6, 2025) (rejecting on the merits as-applied challenge to sentencing statute raised in 3.800(b)(2) motion). *Compare Chang v. State*, 50 Fla. L. Weekly D1073, D1080 n.4, 2025 WL 1386670 (Fla. 2d DCA May 14,

2025) (holding defendant could not raise as-applied challenge to sentence where he <u>did not</u> file rule 3.800(b) motion to correct).

Contrary to Appellee's argument seeking to reframe the issue, the question here is not a mere "procedural error" or "a sentencing misapprehension of fact," and Appellee's cases cited at AB 7–10 are beside the point. The issue here is that the statute under which Appellant was sentenced is unconstitutional.

In its efforts to reframe the issue, Appellee presents this Court with arguments about "gamesmanship" and "a reversible-error trap," but nothing in the record shows a devious plan in this case. Regardless, the present issue concerns not strategy but constitutional law. One could make these sorts of "gamesmanship" arguments about any issue that could be raised on a motion to correct under section 3.800(b) or on grounds of fundamental error. *Cf. White v. State*, 183 So. 3d 1168 (Fla. 4th DCA 2016) (holding that defendant may raise insufficiency of the evidence claim for the first time on post-trial motion, despite apparent unfairness of rule).

<u>Facts necessary to support the sentence must be plead in the charging document.</u>

Appellee seeks to draw a distinction between facts which must

be plead in the charging document and "facts relating to Appellant's status." AB 12. This distinction is a false one. It is well settled that the prosecution must allege facts relating to the defendant's status when they are part of the elements of the crime. For instance, in this very case the prosecution alleged, as it had to, Appellant had a prior felony conviction as to the felon-in-possession charge (count 1). R 24.

At bottom, Appellee would draw a distinction between "elements of the offense" and "sentencing factors." But that distinction 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 to the necessity of alleging such facts, 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.").

Appellee says prior convictions have already met the constitutional requirements, but if that were the case the prosecution would not have to allege any of various prior convictions that make up elements of crimes such as possession of a firearm by a convicted felon.

<u>Sentencing under an unconstitutional statute is not harmless error.</u>

Appellee argues the error is harmless because a jury would have found the necessary facts. AB 13–16. This argument ignores the nature of the claim.

Appellant's claim is that the sentence rests on an unconstitutional statute. Once the unconstitutional statute is removed, <u>there is no basis for the sentence</u>.

An unconstitutional statute is unenforceable, and without it there is no authorization for either a judge or a jury to make the statutory findings.

"The application of an unconstitutional statute constitutes fundamental error, whereas unconstitutional application of an otherwise constitutional statute does not."*Emiddio v. Florida Office of Fin. Regulation*, 147 So. 3d 587, 592 (Fla. 4th DCA 2014) (internal citations and quotation marks omitted).

Appellee cites *Jackson v. State*, Fla. L. Weekly D873, 2025 WL 1119094 (Fla. 4th DCA Apr. 16, 2025). But *Jackson* did not involve a claim that the sentencing statute itself was unconstitutional. Jackson's claim was a procedural one: he argued "the trial court must apply *Erlinger v. United States*, 602 U.S. 821, 144 S.Ct. 1840, 219 L.Ed.2d 451 (2024), in which the United States Supreme Court reiterated the principle that a jury, rather than a judge, must find beyond a reasonable doubt nearly all facts that lead to a sentencing enhancement. " *Id.* at D875–76.

The *Jackson* decision did not address the unconstitutionality of the statute on which Jackson's sentence rested, and did not hold that a court may impose a sentence on the basis of an

unconstitutional statute. Hence, it does not affect the present issue.

II. THE HABITUAL OFFENDER SENTENCES IN THIS CASE WERE IMPOSED CONTRARY TO LAW.

Appellant's claim is properly before this Court.

Appellee concedes that this issue may be raised under a rule 3.800(a) motion to correct. *See*, *e.g.*, *Bover v. State,* 797 So.2d 1246, 1247 (Fla.2001) ("[W]here the requisite predicate felonies essential to qualify a defendant for habitualization do not exist as a matter of law and that error is apparent from the face of the record, rule 3.800(a) can be used to correct the resulting habitual offender sentence."); *Battles v. State*, 349 So. 3d 515 (Fla. 2d DCA 2022).

Thus, *Mann v. State*, 824 So. 2d 330 (Fla. 3d DCA 2002), held a defendant who enters into a plea agreement resulting in an HVO or HFO sentence may later challenge the sentence by a rule 3.800(a) motion on the ground that it was based on a conviction for a non-qualifying offense:

> In *Bover v. State,* 797 So. 2d 1246 (Fla. 2001), the defendant entered a plea of no contest as a habitual offender. Subsequently, the defendant filed a motion to correct illegal sentence alleging that his predicate offenses did not satisfy the requirements of the habitual offender statute. *Id.* at 1248. The Florida Supreme Court stated that "[o]nly those defendants who meet the statutory criteria of the habitual offender statute qualify for sentencing as habitual offenders." *Id.* The court ruled that such a challenge can be brought by a motion to

> correct illegal sentence under Florida Rule of Criminal Procedure 3.800(a), so long as the error is apparent from the face of the record. *Id.* at 1248-49. Since the defendant did not actually qualify as a habitual offender, he was entitled to relief notwithstanding that the habitual offender adjudication had been imposed pursuant to a plea agreement.

Id. at 331–32.

Despite the foregoing, Appellee argues (AB 20) that Appellant could not raise his claim under rule 3.800(b). This argument is baseless. Contrary to Appellee's view, rule 3.800(a) is <u>narrower</u> than rule 3.800(b), <u>not broader</u>. *See Brooks v. State*, 969 So. 2d 238, 242–43 (Fla. 2007) (detailing narrow scope of rule 3.800(a) motions as compared to rule 3.800(b) and 3.850 motions).

"<u>[R]ule 3.800(b)(2) encompasses any claim that could be raised under rule 3.800(a)</u>." (emphasis added). *Jackson v. State*, 983 So. 2d 562, 573, 574 (Fla. 2008).

> <u>The Ohio concealed weapon statute is broader than Florida's concealed firearm statute so that Appellant's conviction under that statute is not a qualifying HFO offense.</u>

Appellee says the Ohio statute is similar to the Florida statute because under the Florida statute one may be convicted if the firearm is "on the person *or within such close proximity and in such*

a manner that it can be retrieved and used as easily and quickly as if carried on the person" under *Brunson v. State*, 211 So. 3d 96, 99 (Fla. 4th DCA 2017) (emphasis in *Brunson*).

Far from helping, Appellee, *Brunson*, points to another way in which the Ohio statute differs from the Florida Statute. In *Brunson*, this Court wrote that a defendant is not guilty of carrying a concealed firearm if the firearm is "securely encased," which "means in a glove compartment, whether or not locked; snapped in a holster; <u>in a gun case, whether or not locked</u>; in a zippered gun case; or in a closed box or container which requires a lid or cover to be opened for access." *Id.* at 99 (quoting sections 790.25(5) and 790.001(17), Florida Statutes) (emphasis added). (These provisions were in place at the time of the alleged 2017 crime at bar, and in fact have existed for decades.)

The Ohio statute is broader. It allows a conviction <u>even if the gun is in a gun case</u>. *See State v. Davis*, 849 N.E.2d 47, 48 (Ohio Ct. App. 2006), *affirmed* 875 N.E.2d 80 (Ohio 2007) (affirming conviction for carrying concealed weapon where handgun was in gun case).

In that case, the Court of Appeals wrote that the following

facts were stipulated:

> 1. The arresting officer saw a case saying “High point” on it in the Defendant’s vehicle.
>
> 2. The case was on the driver’s floor board.
>
> 3. The Defendant upon being questioned advised he had a handgun and there was a loaded magazine in the closed case.
>
> 4. The closed case contained a 380 high point semi-automatic handgun.
>
> 5. The firearm was not loaded and next to it was the loaded magazine.

Id. at 49.

The Court of Appeals noted that Ohio law provides that one may carry a concealed weapon other than a handgun in a closed case in a car, but that defense does not apply to a handgun concealed in a gun case. *Id.* at 50. Hence, it held the fact that the gun was in a gun case afforded him no defense. *Id.* at 50. (Ohio Ct. App. 2006).

So *Brunson* helps Appellee not at all. The Ohio statute is not substantially similar to Florida’s statute and it was not a predicate for Appellant’s HFO sentence.

IV. THE CONVICTION FOR POSSESSION OF A FIREARM BY A CONVICTED FELON SHOULD BE REVERSED BECAUSE IT IS BASED ON A FACIALLY UNCONSTITUTIONAL STATUTE UNDER THE SECOND AMENDMENT.

Appellant acknowledges that section 790.23 has been recently held by this Court not to violate the Second Amendment. *See Fleming v. State*, 50 Fla. Law Weekly D929, 2025 WL 1172339 (Fla. 4th DCA Apr. 23, 2025).

Fleming was based on what the panel identified as "[b]inding precedent from the United States Supreme Court." *Id.* at 930. The Supreme Court cases it cites, however, did not involve a challenge to a statute like section 790.23. At most, those cases contain dicta about the present issue. For instance, in *D.C. v. Heller*, 554 U.S. 570 (2008), the Court wrote only: "Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." This does <u>not</u> amount to binding precedent.

In fact, Justice Scalia wrote for the majority: "since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field." *Id.* at 635.

The Supreme Court has VACATED cases upholding felon-in-possession statutes for reconsideration under *Rahimi*

Most notably, the panel overlooked that the Supreme Court has vacated decisions upholding felon-in-possession statutes for reconsideration in light of *United States v. Rahimi*, 602 U.S. 680 (2024).

For instance, in *United States v. Dial*, No. 24-10732, 2024 WL 5103431 (11th Cir. Dec. 13, 2024), the Eleventh Circuit held upheld a felon-in-possession conviction against a Second Amendment challenge, writing:

> Derrick Dial appeals his conviction for possessing a firearm and ammunition as a felon, in violation of 18 U.S.C. § 922(g)(1). He challenges the constitutionality of the prohibition on felons possessing firearms and ammunition. After careful consideration, we affirm.

Id. at * 1. The Supreme Court vacated this decision and remanded for reconsideration in light of *Rahimi. Dial v. United States*, No. 24-6569 (U.S. May 19, 2025).

Likewise, in *United States v. Lindsey*, No. 23-2871, 2024 WL 2207445, at *1 (8th Cir. May 16, 2024), the Eighth Circuit rejected the defendant's argument that his felon-in-possession convicted violated the Second Amendment, and wrote:

> Precedent forecloses Lindsey's contentions. "The longstanding prohibition on possession of firearms by felons is constitutional." *United States v. Cunningham*, 70 F.4th 502, 506 (8th Cir. 2023); *see United States v. Jackson*, 69 F.4th 495, 502-06 (8th Cir. 2023) (explaining that § 922(g)(1) is consistent with the nation's history and tradition). And our cases rule out the "need for felony-by-felony litigation regarding the constitutionality of § 922(g)(1)." *Jackson*, 69 F.4th at 502; *Cunningham*, 70 F.4th at 506. Lindsey acknowledges as much. Accordingly, his facial and as-applied constitutional challenges to § 922(g)(1) fail.

Id. The Supreme Court <u>vacated</u> this decision and remanded for reconsideration in light of *Rahimi*. *Lindsey v. United States*, 145 S. Ct. 431 (2024). *See also*, *e.g.*, *Morrissette v. United States*, 145 S. Ct. 1468 (2025) (same, vacating Eleventh Circuit decision); *Garland v. Range*, 144 S. Ct. 2706 (2024) (same, vacating Third Circuit decision); *Canada v. United States*, 145 S. Ct. 432 (2024) (same, vacating Fourth Circuit decision); *Talbot v. United States*, 145 S. Ct. 430 (2024) (same, vacating Tenth Circuit decision).

<u>The Supreme Court would not have vacated these decisions if</u>

it thought the issue had already been decided in favor of such laws.

Thus, the Supreme Court decisions cited in *Fleming* simply do not decide the present issue.