No.

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

JARVIS PARKER,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D2023-0688

[July 18, 2024]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Bernard I. Bober, Judge; L.T. Case No. 21-9340 CF10A.

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

Ashley Moody, Attorney General, Tallahassee, and Sorraya M. Solages-Jones, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Affirmed.

CIKLIN, LEVINE and CONNER, 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

September 11, 2024

JARVIS PARKER, Appellant(s) v. STATE OF FLORIDA, Appellee(s).	**CASE NO. - 4D2023-0688** L.T. No. - 21-009340CF10A

BY ORDER OF THE COURT:

ORDERED that Appellant's July 31, 2024 motion for rehearing, written opinion, and certification is denied.

Served:
Attorney General-W.P.B.
Gary Lee Caldwell
Palm Beach Public Defender
Sorraya M Solages-Jones

KR

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

Lonn Weissblum
4D2023-0688 September 11, 2024

LONN WEISSBLUM, Clerk
Fourth District Court of Appeal
4D2023-0688 September 11, 2024

IV. 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 the statute has been held not to violate the Second Amendment. *See Nelson* and *Edenfield*.

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).

Section 790.23(1)(a) makes 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 statute 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). It 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 this class of convicted felons from possessing firearms for any potentially lawful purposes, such as self-defense, invokes the Second Amendment. Individual self-defense is "the central component" of the Second Amendment right." *Id.* at 29.

Adopting, the approach taken in First Amendment cases, the Court wrote that the government has the burden to prove the constitutionality of the infringement on the right at issue. *Bruen*, 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, here there is no ratification-era tradition or historical support for a legislative power to permanently dispossess all 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, section 790.23(1)(a) 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.

Because the record does not show that Appellant would have received the same sentence on the other charges, they sentences for counts I and II should be reversed and remanded for resentencing

under *Ewing* and *Theophile*.

V. THE COURT ABUSED ITS DISCRETION IN DENYING A CONTINUANCE SO THAT THE DEFENSE COULD PRESENT THE TESTIMONY OF DET. CLARKE.

The denial of the requested continuance

The probable cause affidavit shows Det. Clarke was the first detective involved in the case. R 33. Also at the suppression hearing, Det. Smith said Clarke had received an untruthful statement from CS. T 438. At trial, CS testified that she made a sworn statement to Clarke at the hospital. T 560–61. Det. Smith took over the case from Clarke the next day. T 590–91, 607.

Before jury selection, defense counsel moved for a continuance in order to obtain witnesses, saying she did not have trial subpoenas out. T 54. The court directed the state not to call off any witnesses that it had subpoenaed. T 54. The prosecutor said the defense should subpoena whoever it needed because the state had not subpoenaed every witness. T 55.

In the ensuing discussion, defense counsel said former Det. Stanley and Det. Clarke had received CS's first statement. T 60–61. The state said the statement was on a body camera, and defense counsel said she had had the body cam videos transcribed and

VI. APPELLANT'S CONVICTIONS AND SENTENCES SHOULD BE REVERSED BECAUSE HE WAS CONVICTED BY A SIX-PERSON JURY IN VIOLATION OF THE DUE PROCESS AND JURY CLAUSES OF THE FEDERAL CONSTITUTION.

Florida allows trial by a jury of six in non-capital cases. Art. I, § 22, Fla. Const.; § 913.10, Fla. Stat. Accordingly, this case involved a trial by a jury of six rather than twelve members. Appellant contends that the Due Process, Privileges and Immunities, and Jury Clauses of the federal constitution requires a jury of twelve, so that fundamental error occurred because he was deprived of this right. Amend. VI, XIV, U.S. Const. He acknowledges contrary authority, as discussed below.

Williams v. Florida, 399 U.S. 78 (1970), held that state court juries as small as six were constitutionally permissible, despite the determination in *Thompson v. Utah,* 170 U.S. 343, 349–50 (1898), that the jury guaranteed by the Sixth Amendment consists "of twelve persons, neither more nor less."

Thompson held that the Sixth Amendment enshrined the right to a jury of twelve as provided at common law. *Id.* at 349–50. In addition to the authorities cited there, one may note that Blackstone stated that the right to a jury of twelve is even older,

and more firmly established than the unqualified right to counsel in criminal cases. 4 William Blackstone, *Commentaries on the Laws of England*, ch. 27 ("Of Trial and Conviction").[3] Blackstone traced the right back to ancient feudal right to "a tribunal composed of twelve good men and true," and wrote that "it is the most transcendent privilege which any subject can be enjoy or wish for, that he cannot be affected in his property, his liberty or his person, but by the unanimous consent of twelve of his neighbours and equals." 3 Blackstone, ch. 23 ("Of the Trial by Jury").[4]

Thus, at the time of the amendment's adoption, the essential elements of a jury included "twelve men, neither more nor less." *Patton v. United States*, 281 U.S. 276, 288 (1930).

Williams itself has now come into question in light of *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), which concluded that the Sixth Amendment's jury requirement encompasses what the term "meant at the Sixth Amendment's adoption." *Id.* at 1395. (Of course, the requirement that the jury be composed of men has been overturned

[3] Found at https://lonang.com/wp-content/download/Blackstone-CommentariesBk4.pdf

[4] Found at https://lonang.com/wp-content/download/Blackstone-CommentariesBk3.pdf

by a subsequent amendment – the Equal Protection Clause of the Fourteenth Amendment. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994).

In this case, Appellant did not receive a trial by a jury as the term was meant at the Sixth Amendment's adoption, or at the time of the Fourteenth Amendment's adoption for that matter, as he was not tried by a jury of twelve. The undersigned acknowledges that this Court has rejected this argument. *Guzman v. State*, 350 So. 3d 72 (Fla. 4th DCA 2022), *rev. denied* SC2022–1597 (Fla. June 6, 2023), *petition for cert. pending* No. 23–5173 (U.S.).

The error is fundamental and structural, as the conviction arose from a sheer denial of this fundamental right.

Waiver of the constitutional right of trial by the proper number of jurors must be made personally by the defendant. *See Blair v. State*, 698 So. 2d 1210, 1217 (Fla. 1997) (finding valid defendant's agreement to verdict by five-member jury valid when made "in a colloquy at issue here, including a personal on-the-record waiver," and 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."). Such was not the case here. A new trial should be ordered.

VII. APPELLANT'S HABITUAL OFFENDER SENTENCE IS ILLEGAL.

The court sentenced Appellant to concurrent 30-year habitual offender sentences for attempted second degree murder, shooting at or into an occupied vehicle, and possession of a firearm by a convicted felon, with a 25-year mandatory minimum. R 512–20.

During the pendency of this appeal, Appellant filed a motion to correct sentence on the ground that the habitual offender sentence violates the Jury and Due Process Clauses of the state and federal constitutions. *See* pages 1151–57 of the supplemental record (SR1) filed on December 5, 2023.

Appellant pointed out that the habitual offender statute requires that the state 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 Appellant "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 the factual findings are to be made by the judge rather an a jury. § 775.084(3).

Appellant argued that because the statute 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, the habitual offender sentence on its face violates the Due Process and Jury Clauses of the state and federal constitutions. Art. I, §§ 9, 16, 22, Fla. Const.; Amend. VI, XIV, U.S. Const.

In this case, the court made the statutory findings, but they were not made by a jury. Hence, use of these findings at sentencing 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 appellate 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*.

Appellant further notes that 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 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).

The Court granted review after receiving the Solicitor General's bring in response to the petition. The Solicitor General's brief states: "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).[5]

[5] The brief was filed on October 23, 2023 and is available on the Supreme Court website:

https://www.supremecourt.gov/DocketPDF/23/23–370/285305/20231017172808600_23–370%20Erlinger%20v.%20USA.pdf

Finally, because the enhancement issue was not submitted to the jury, new proceedings for a jury determination of the issue would be barred by the Double Jeopardy Clauses of the state and federal constitutions. *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).

Appellant's motion further pointed that the state did not present evidence at sentencing showing that Appellant has not been pardoned for any of the alleged qualifying convictions, and the Court did not make the findings required under the statute. *See* R 776–820 (sentencing transcript).

Accordingly, he argued, the sentence is contrary to Florida law and not supported by the evidence. To conduct new habitual offender proceedings would violate the Double Jeopardy Clauses of the state and federal constitutions. *But see Gaymon*.

Appellant acknowledges that *Eutsey v. State*, 383 So. 2d 219 (Fla. 1980), and *State v. Rucker,* 613 So. 2d 460, 462 (Fla. 1993), held that the burden is on the defendant to assert a pardon or set aside as an affirmative defense and, once the state has introduced

unrebutted evidence of prior convictions, the court may infer that there has been no pardon. Those cases were decided long before the constitutional revolution wrought by the Supreme Court after the turn of the century, beginning with *Apprendi*, and carrying through to *Descamps* and *Mathis* (and now *Erlinger*).

The plain language of the statute provides that a predicate fact for habitualization is the fact that the defendant has not been pardoned. § 775.084(1)(a), Fla. Stat. (providing that the court may impose a habitual offender sentence if "4. The defendant has not received a pardon for any felony or other qualified offense that is necessary for the operation of this paragraph"). Further, the statute also imposes as a predicate fact that "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."

The judiciary may not rewrite the statute to relieve the state from having to prove this predicate fact. Under the Separation of Power provisions of the state constitution and the Due Process Clauses of the state and federal constitutions, a court may not rewrite a statute, especially in a way to favors the prosecution. "We are not at liberty to add words to statutes that were not placed

there by the Legislature." *Hayes v. State*, 750 So. 2d 1, 4 (Fla. 1999). "We will not rewrite a … law to conform it to constitutional requirements." *United States v. Stevens*, 559 U.S. 460, 481 (2010) (internal citations and quotation marks omitted; ellipse in original).

"Constant competition between constable and quarry, regulator and regulated, can come as no surprise in our changing world. But neither should the proper role of the judiciary in that process—to apply, not amend, the work of the People's representatives." *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 90 (2017) (opinion of Gorsuch, J., for unanimous Court).

In this case, Appellant 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). Accordingly, the state had the burden to prove the sentencing fact 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 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.

CONCLUSION

For the foregoing reasons, the convictions and sentences should be reversed, or the Court should grant such other relief as may be appropriate.

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