No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

STEVEN PITTS,

Applicant,

v.

STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari
to the Appellate Division First Judicial
Department of the Supreme Court of the State of
New York.

APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR WRIT OF CERTIORARI

Mark Zeno
Counsel of Record
Center For Appellate Litigation
120 Wall Street, 28th Floor
New York, New York 10005
(212) 577-2523, ext. 505
mzeno@cfal.org

July 3, 2025

APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR WRIT OF CERTIORARI

TO: Justice Sonia Sotomayor, Circuit Justice for the United States Court of Appeals for the Second Circuit:

Applicant Steven Pitts respectfully requests an extension of thirty (30) days in which to file his petition for a writ of certiorari, challenging the New York Appellate Division First Judicial Department's decision, 227 A.D.3d 421 (1st Dept. 2024), *lv. to appeal denied without opinion*, 43 N.Y.3d 965 (N.Y. Ct. App April 15, 2025), a copy of which is attached here in the Appendix. This Court has jurisdiction to review the federal Sixth Amendment question presented under 28 U.S.C. § 1257(a); U.S. Const. amend. VI.

In support of this application, Applicant provides the following information:

1. This petition arises out of a criminal conviction in New York State court. The question presented is whether, under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Erlinger v. United States*, 602 U.S. 821 (2024), the purported fact-of-prior-conviction exception to the jury right applies to determination of the length of a defendant's prior incarceration and the date of his discharge from government custody. That important question is squarely implicated here.

2. Under New York sentencing laws, a predicate felony conviction cannot justify a recidivist-based enhancement of the sentencing range unless that prior sentence was imposed within 10 years of the present offense's commission. *See* Penal Law § 70.04(b)(iv)-(v) (second-violent-felony offender), 70.06(b)(iv)-(v) (second-felony offender), 70.08(b)(iv)-(v) (persistent-violent-felony offender). But

any time that the defendant was "incarcerated for any reason" tolls the 10-year-look-back period, thus allowing otherwise stale predicate convictions to justify an enhancement in the range. *Id.*

3. Where a predicate conviction is beyond 10 calendar years of the present offense's commission, the defendant's prior incarceratory history ("tolling") is an essential "ingredient" of a sentencing-range enhancement. *See Alleyne v. United States*, 570 U.S. 99, 112 (2013) ("A fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense" that must go to a jury under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and its progeny).

4. Here, a jury in a New York County Supreme Court trial convicted Applicant Steven Pitts of a second-degree assault committed on November 2, 2020. In turn, the State alleged that Applicant was a second-violent-felony offender based upon a December 1, 2009 felony conviction.

5. This predicate conviction was more than 10 years before the present offense's commission. So, the State alleged that Mr. Pitts was, after his prior 2009 conviction, incarcerated for over 1,000 days. As New York Criminal Procedure Law 400.15(7)(a) bars a jury trial on the tolling issue, a judge found that Applicant was a predicate felony offender. That finding elevated the minimum sentence from probation (the minimum for a first-felony offender convicted of a D-violent felony) to five years (the minimum for a second-violent felony offender). Penal Law § 65.00, 70.02, 70.04. The court sentenced Mr. Pitts to six years in prison, one year below

the seven-year maximum sentence. *See* Penal Law § 70.04.[1]

6. In 2023, Mr. Pitts moved to vacate his sentence under New York Criminal Procedure Law 440.20. He pressed that, since the factual tolling issue was necessary to enhance the minimum sentencing range, a jury had to determine that factual issue under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny. *United States v. Booker*, 543 U.S. 220 (2005) (under *Apprendi*, "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt") (quotation marks omitted); *Alleyne*, 570 U.S. 99 (extending *Apprendi* to any facts that alter the minimum range).

7. Mr. Pitts contended that the factual tolling inquiry was not covered by the "fact of prior conviction" exception to the jury right articulated by *Almendarez–Torres v. United States*, 523 U.S. 224 (1998). Tolling, he argued, involves the defendant's location *after* the prior conviction, and can be entirely unrelated to the prior conviction, not the fact of prior conviction itself.

8. The State raised no procedural objections and merely argued that *Almendarez-Torres*' fact-of-prior-conviction exception covered tolling.

9. The court denied the motion, exclusively on the merits, agreeing with the State's position in a conclusory order.

10. Applicant renewed his argument before the Appellate Division and

[1] The maximum sentence for both a first and a second- violent-felony offender is seven years. Penal Law § 70.02, 70.04.

again the State raised no procedural bars. The Appellate Division also rejected the argument on the merits, citing to *Almendarez–Torres*. 227 A.D.3d 421 (1st Dept. 2024).

11. Applicant sought discretionary leave to appeal to the New York Court of Appeals, arguing that *Erlinger v. United States*, 602 U.S. 821 (June 2024), which came down after the Appellate Division's May 2024 decision, confirmed that a jury must decide tolling. As *Erlinger* held, the "narrow" fact-of-prior-conviction exception only allows a judge to find "what crime, with what elements, the defendant was convicted of"—a "limit" this Court has "reiterated" "'over and over,' to the point of 'downright tedium.'" 602 U.S. 821, 836-47 (2024) (citations omitted); *id.* at 837 (rejecting the theory that the "exception permits a judge to find perhaps any fact related to a defendant's past offenses").

12. Applying *Erlinger*, Applicant pressed that the tolling issue is beyond the "fact of prior conviction" since it does not bear on the nature of the prior conviction but instead bears on the defendant's location *after* the prior conviction occurred.

13. A Judge of the New York Court of Appeals denied leave to appeal on April 15, 2025, 43 N.Y.3d 965, rendering this petition for a writ of certiorari due July 14, 2025. Granting this extension would make it due on August 13, 2025.

14. This case is a serious candidate for certiorari review. It raises a critical question arising after *Erlinger*: whether the limited fact-of-prior-conviction exception to the jury right applies to facts relating to the defendant's history of

incarceration and release from government custody.

15. This question implicates the constitutionality of New York statutes, which bar a jury right on tolling, N.Y. C.P.L. 400.15(7)(a), as well as the procedures underlying federal statutes that focus on the duration of prior incarceration and release. *See United States v. Fields*, 53 F.4th 1027, 1037-38 (6th Cir. 2022) (stating, in dictum, that facts underlying the First Step Act sentencing scheme—whether "the offender served a term of imprisonment of more than 12 months [for the prior offense]" and "the offender's release from any term of imprisonment was within 15 years of the commencement of the instant offense" (21 U.S.C § 802(58))—are beyond the *Almendarez-Torres* exception).

16. The scope of the prior-conviction exception has split our nation's courts. Some courts have, as *Erlinger* demands, taken a narrow view of the exception, finding that it only covers the *nature* of the prior conviction itself, that is, its elements, date, and jurisdiction. *People v. Lopez*, 85 Misc.3d 171, 183-84 (Sup. Ct. New York County 2024); *People v. Banks*, 218 N.Y.S.3d 519, 529-30 (Sup. Ct. New York County 2024). These courts have found that tolling is beyond the fact of prior conviction and must be decided by a jury.

17. Other courts have interpreted *Almendarez-Torres* to create an exception for recidivism-related findings such as the length of a previously served sentence or the date of discharge—precisely the approach *Erlinger* rejected. *See*, *e.g.*, *People v. Rivera*, 85 Misc.3d 1032, 1037 (Sup. Ct. Kings County [N.Y.] 2024) (tolling); *State v. Fagan*, 905 A.2d 1101, 1117-21 (Conn. 2006) (whether defendant

had been lawfully released on bond at the time of the offense's commission); *United States v. Corchado*, 427 F.3d 815, 819-20 (10th Cir. 2005) (whether defendant committed the prior crime while on probation or parole).

18. Resolution of this issue is critical to the fair—and constitutionally compliant—administration of our penal laws. The jury right is fundamental, the only right to be listed three times in our Constitution. U.S. Const. Amends. VI, VII; U.S. Const. Art. III § 2. And the constitutionality of state statutes hangs in the balance. *See* N.Y. C.P.L. 400.15(7)(a) (jury must decide all recidivism-enhancement-related facts).

19. This case also implicates the integrity of this Court's precedents. *Erlinger* was crystal clear: the scope of the prior-conviction exception is "narrow," limited to the prior conviction's elements—a point this Court has repeated "over and over" to the "point of downright tedium." 602 U.S. at 836-47. Instead of embracing *Erlinger*, lower courts have run away from it, misinterpreting it to establish nothing more than that the particular statute at issue in *Erlinger* required a jury trial. *See*, *e.g.*, *Rivera*, 85 Misc.3d at 1037-38 ("The [*Erlinger*] decision is very much grounded in the type of the facts necessary to the Occasions Clause inquiry [under the Armed Career Criminal Act], this being the core difference between the Occasions Clause determination and the seemingly simple determination of whether a prior conviction existed at all.").

20. But *Erlinger* held exactly the opposite, confirming a rule that stretches far beyond the particular facts of that case. 602 U.S. at 837-39 (the prior-conviction

exception only allows a court to find "what crime, with what elements, the defendant was convicted of"—a "limit" this Court has "reiterated" "'over and over,' to the point of 'downright tedium.'") (citations omitted). This Court should grant certiorari to confirm that simple constitutional reality.

21. This case is an excellent vehicle for resolving the question presented—in fact, this Court is unlikely to see a cleaner record presenting this merits issue. The state courts denied this constitutional claim exclusively on the merits and the State went all in on the merits before the post-conviction trial-level court and the Appellate Division. The issue is teed up beautifully and the Sixth Amendment issue is outcome determinative.

22. The undersigned's current case load justifies this request for a 30-day extension of time. Undersigned counsel, a supervising attorney and the Legal Director at the Center for Appellate Litigation, an appellate public defender in New York City, has been assigned to numerous appeals of felony convictions and must, in the upcoming months, file briefs and/or post-conviction motions in those matters in the Appellate Division First Department and New York trial courts, including appeals of a second-degree murder conviction where the client is serving an 18-year-to-life sentence in *People v. Alexandros Lorentzos* (NY County Indictment 4439/15, a second-degree burglary conviction where the client is serving a 16-year-to-life sentence in *People v. Edward Goldfaden* (NY County Indictment 728/18), and a first-degree robbery conviction where the client is serving an eleven-year sentence in *People v. Lonnie Williams* (NY Indictment 3638/18). And as a supervisor at the

Center for Appellate Litigation, my supervisory obligations are extensive as I have been reviewing, and must continue to review, numerous filings for submission to the New York Courts.

23. The time requested is necessary to ensure that Applicant can carefully craft a petition for a writ of certiorari in this matter.

Respectfully Submitted,

Mark Zeno
Counsel of Record
Center For Appellate Litigation
120 Wall Street, 28th Floor
New York, New York 10005
(212) 577-2523, ext. 505
mzeno@cfal.org

APPENDIX

OPINION OF THE NEW YORK APPELLATE DIVISION UNDER REVIEW

Supreme Court of the State of New York
Appellate Division, First Judicial Department

Webber, J.P., Oing, Rodriguez, Higgitt, Michael, JJ.

2195- 2195A	THE PEOPLE OF THE STATE OF NEW YORK, Respondent, -against- STEVEN PITTS, Defendant-Appellant.	Ind. No. 1614/20 Case Nos. 2022-01617 2023-04854

Jenay Nurse Guilford, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

Alvin L. Bragg, Jr., District Attorney, New York (Anna Notchick of counsel), for respondent.

Judgment, Supreme Court, New York County (Melissa C. Jackson, J., at requests for new counsel; Ruth Pickholz, J., at jury trial and sentencing), rendered March 28, 2022, convicting defendant of assault in the second degree and assault in the third degree, and sentencing him, as a second violent felony offender, to a term of five years and time served, respectively, unanimously modified, on the law, to the extent of vacating the conviction of assault in the third degree and dismissing that count, and otherwise affirmed. Order, same court (Pickholz, J.), entered on or about September 12, 2023, which denied defendant's CPL 440.20 motion to set aside the sentence, unanimously affirmed.

The verdict convicting defendant of second-degree assault was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the jury's credibility determinations. The victim, who was 71 years

old, testified that defendant, who was 45 years old, spat on him and punched him in the face while they were in the subway and caused him physical injuries (Penal Law § 120.05[12]). The victim's testimony was corroborated by the testimony of the responding police officer, who observed the victim bleeding, and photographs of the injuries.

The court providently exercised its discretion in denying defendant's requests for substitution of counsel. Defendant's general expressions of dissatisfaction with counsel did not constitute "specific factual allegations of serious complaints" that triggered the court's duty to make a "minimal inquiry" (*People v Porto*, 16 NY3d 93, 100 [2010] [internal quotation marks omitted]). Although the court initially denied defendant's application without inquiry, the court later permitted defendant to voice his concerns (*see People v Nelson*, 7 NY3d 883, 884 [2006]). Defendant's contention that counsel failed to raise certain arguments on a pretrial motion did not provide good cause to relieve counsel (*see People v Ventura*, 167 AD3d 401, 401 [1st Dept 2018], *lv denied* 32 NY3d 1210 [2019]).

Defendant's ineffective assistance of counsel claim is unreviewable on direct appeal because it involves matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claim may not be addressed on appeal. To the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

Defendant's challenge to the court's interested witness charge is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject

it on the merits (*see People v Blake*, 39 AD3d 402, 403 [1st Dept 2007], *lv denied* 9 NY3d 873 [2007]).

Defendant's challenge to the constitutionality of his second violent felony offender adjudication is without merit (*see Almendarez-Torres v United States*, 523 US 224 [1998]; *People v Leon*, 10 NY3d 122, 126 [2008], *cert denied* 554 US 926 [2008]).

As the People concede, defendant's conviction of assault in the third degree should be vacated as an inclusory concurrent count of assault in the second degree (*see* CPL 300.40[3][b]; *People v Zelazny*, 197 AD3d 1052 [1st Dept 2021], *lv denied* 37 NY3d 1100 [2021]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: May 2, 2024

Susanna Molina Rojas
Clerk of the Court