No. _____

In the Supreme Court of the United States

STEVEN PITTS,

Petitioner,

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.

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth Amendment right to a jury trial applies to factual findings regarding the length of a defendant's prior incarceration and the date of discharge from custody, where such findings are necessary to enhance the range of permissible punishment.

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PETITION FOR A WRIT OF CERTIORARI

Steven Pitts respectfully petitions for a writ of certiorari to review the judgment of the Appellate Division, Supreme Court of New York, First Judicial Department.

OPINIONS BELOW

The opinion of the Appellate Division, Supreme Court of New York, First Judicial Department, App. la, is published at 227 A.D.3d 421. The opinion of the New York Court of Appeals denying leave to appeal, App. 4a, is published at 43 N.Y.3d 965. The relevant proceedings and order from the trial court are unpublished.

JURISDICTION

The judgment of the Appellate Division was entered on May 2, 2024. App. 1a-3a. On April 15, 2025, the New York Court of Appeals denied leave to appeal. App.4a. On July 9, 2025, Justice Sotomayor extended the time for filing a petition for a writ of certiorari to and including August 13, 2025. *See* Application No. 25A34. This Court has subject-matter jurisdiction under 28 U.S.C. § 1257(a).

As this petition draws into question the constitutionality of state statutes, 28 U.S.C. § 2403(b) may be applicable and the Attorney General of the State of New York has been served with this petition. *See* Sup. Ct. Rule 29(4)(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution declares: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . ."

N.Y. Penal Law § 70.04(1) states:

> (a) A second violent felony offender is a person who stands convicted of a violent felony offense . . . after having previously been subjected to a predicate violent felony conviction as defined in paragraph (b) of this subdivision.
>
> (b) For the purpose of determining whether a prior conviction is a predicate violent felony conviction the following criteria shall apply: . . .
>
> (ii) Sentence upon such prior conviction must have been imposed before commission of the present felony; . .
>
> (iv) Except as provided in subparagraph (v) of this paragraph, sentence must have been imposed not more than ten [10] years before commission of the felony of which the defendant presently stands convicted;
>
> (v) In calculating the ten year period under subparagraph (iv), any period of time during which the person was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony shall be excluded and such ten year period shall be extended by a period or periods equal to the time served under such incarceration . . .

N.Y. Criminal Procedure Law § 400.15(7)(a) states that "[a] hearing pursuant to this section must be before the court without jury."

STATEMENT OF THE CASE

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 Sixth Amendment right to a jury trial applies to the length of a defendant's prior incarceration and the date of his discharge from government custody, where such facts are necessary to enhance the permissible sentencing range. That important question is squarely implicated here.

2. Under New York's recidivist-sentencing laws, the minimum and/or maximum sentencing ranges increase where a defendant has a qualifying predicate felony conviction. *See* N.Y. Penal Law § 70.02 *et seq*. A predicate felony conviction cannot justify a recidivist-based enhancement unless the prior sentence was imposed within 10 years of the present offense's commission. *See* N.Y. Penal Law § 70.04(1)(b)(iv)-(v),(3) (second-violent-felony offender; minimum range increases based on qualifying predicate), 70.06(1)(b)(iv)-(v),(3),(4) (second-felony offender; same), 70.08(1)(b)(iv)-(v),(3) (persistent-violent-felony offender; both the minimum and maximum change based on qualifying predicate). Any time the defendant was "incarcerated for any reason" tolls the 10-year-look-back period, thus allowing otherwise stale predicate convictions to justify a sentencing

enhancement. *E.g.*, Penal Law § 70.04(1)(b)(iv)-(v); *see generally People v. Hernandez*, ___ N.E.3d ___, 2025 WL 515364 (N.Y. Ct. App. Feb. 18, 2025).

Accordingly, where a predicate conviction is beyond 10 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).

3. Here, a jury in a New York County Supreme Court trial convicted Petitioner, in 2022, of a second-degree assault committed on November 2, 2020. In turn, the State alleged that Petitioner was a second-violent-felony offender under New York Penal Law § 70.04 based upon a December 1, 2009 felony conviction. App. 25a. As the prior conviction was beyond 10 years of the present offense's commission, the State alleged, to bring the predicate within the 10-year-look-back period, that Mr. Pitts was incarcerated for over 1,000 days between the prior conviction's sentencing date and the present offense's commission. *Id.*

Mr. Pitts objected to the tolling calculation, stating that the prior conviction was "beyond the ten year statute." *See* App. 31a-34a, 38a-

39a. As New York Criminal Procedure Law § 400.15(7)(a) bars a jury trial on the tolling issue, the sentencing judge, not a jury, found that Petitioner was a predicate felony offender based on the 2009 conviction. App. 34a, 38a-39a. That finding elevated the minimum sentence from one day in jail (minimum for a first-D-violent-felony offender convicted of second-degree assault) to five years in prison (minimum for a second-violent felony offender). N.Y. Penal Law § 60.05(5), 65.00, 70.00(4), 70.02, 70.04. The court sentenced Mr. Pitts to five years in prison. *See* N.Y. Penal Law § 70.04(3)(c).[1]

4. In 2023, before perfecting his direct appeal, Mr. Pitts moved to vacate his sentence under New York Criminal Procedure Law § 440.20, pressing that his sentence was "unauthorized, illegally imposed or otherwise invalid as a matter of law," *id.* § 440.20(1), because his Sixth Amendment right to a jury trial was violated. App. 5a-22a. 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. App. 15a-16a. The factual tolling inquiry was not covered by the "fact-of-a-prior-conviction" exception to the jury right articulated by *Almendarez–Torres v. United States*, 523 U.S. 224

[1] The maximum prison sentence for both a first- and a second-violent-felony offender is seven years. Penal Law § 70.02(3)(c), 70.04(3).

(1998). Tolling, Petitioner argued, involves the defendant's location *after* the prior conviction, not the fact of prior conviction itself. App. 18a-19a.

The State raised no procedural objections and argued that *Almendarez-Torres*' fact-of-prior-conviction exception covered tolling. App. 51a-53a. Tolling "'is not the type of determination which is sufficiently divorced from fact-finding as to a prior conviction to bring it with reach of *Apprendi*'s general rule[.'] . . . This is because facts like these are 'open, notorious and on a secure record, and are the types of records that may be judicially noticed.' As such, fact finding establishing the period of incarceration 'involves no exercise of discretionary judgment by the court, and relate[s] neither to the manner and circumstances of the commission of the crime, nor to the character and background of the defendant,' the type of judicial fact-finding that concerned the *Apprendi* court. . . . Rather, this fact finding is more akin to a ministerial act, based on official court and corrections records, of determining when a conviction occurred." App. 52a-53a. (quoting *People v. Miles*, 5 Misc.3d 271 (Sup. Ct. N.Y. Cty. 2004); other citation omitted).

The court denied the motion, exclusively on the merits, issuing a conclusory order "adopt[ing] the reasoning in the [State's] response to this motion." App. 55a. A Justice of the Appellate Division First

Department granted Petitioner permission to appeal that motion order and that appeal was consolidated with the direct appeal.

5. Petitioner renewed his Sixth Amendment argument before the Appellate Division. App. 56a-61a. The State answered that "*Apprendi* concerns are implicated when a judge makes findings of a subtler variety, generally about the nature and circumstances of a crime." App. 66a.

6. The Appellate Division found, in a conclusory single-sentence decision, that Petitioner's jury-right argument was "without merit," citing to *Almendarez-Torres*. *See* 227 A.D.3d 421 (1st Dept. 2024); App. 3a.

7. Petitioner sought discretionary leave to appeal to the New York Court of Appeals, arguing that *Erlinger v. United States*, 602 U.S. 821 (2024), which came down after the Appellate Division's May 2024 decision, confirmed that a jury must decide tolling. App. 68a-73a, 79a-81a. 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"); App. 69a. Applying *Erlinger*, Petitioner

pressed that tolling is beyond the "fact of prior conviction" since a tolling determination requires more than an identification of the prior crime's elements. App. 68a-72a.

A Judge of the New York Court of Appeals denied leave to appeal on April 15, 2025. 43 N.Y.3d 965; App. 4a. Justice Sotomayor granted Petitioner an extension of time to file this petition to August 13, 2025.

REASONS FOR GRANTING THE WRIT

A. The question presented has produced a deep divide amongst our nation's courts.

1. The Sixth Amendment's guarantee of the right to trial by jury is unequivocal: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]" U.S. Const. amend. VI. Consistent with the Amendment's clear command, this Court has confirmed that the jury right is not limited to so-called "guilt-related" determinations. Instead, this Court, in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and its progeny, has enforced a "bright-line rule: Except for a prior conviction, '*any fact* that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Cunningham v. California*, 549 U.S. 270, 288-89 (2007) (emphasis added) (quoting *Apprendi*, 530 U.S. at 490); *Alleyne v. United States*, 570 U.S. 99 (2013) (applying *Apprendi* to facts that enhance the statutory minimum). "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." *United States v. Booker*, 543 U.S. 220, 231 (2005) (quoting *Ring v. Arizona*, 536 U.S. 584, 602 (2002)).

But the ghost of *Almendarez-Torres*, 523 U.S. 224 (1998), won't go away. There, this Court, applying a pre-*Apprendi* doctrine that focused on legislative intent, held that the "fact of a prior conviction" is beyond the jury right's scope. *Id.* (analyzing 8 U.S.C. § 1326(b)(2), which elevates the maximum sentence from two to 20 years if a deported individual unlawfully returns to the United States after an initial "deportation [that] was subsequent to a conviction for [an] aggravated felony"). Congress, this Court held, "intend[ed]" the existence of the prior aggravated felony to be a "sentencing factor" and not a "separate crime," thus defeating a pre-*Apprendi* jury claim. *Id.* at 228-35.

Apprendi squarely rejected the doctrine underlying *Almendarez-Torres*, holding that "it does not matter whether the required finding is characterized as one of intent or of motive, because '[l]abels do not afford an acceptable answer.' That point applies as well to the constitutionally novel and elusive distinction between 'elements' and 'sentencing factors.' Despite what appears to us the clear 'elemental' nature of the factor here, the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than

that authorized by the jury's guilty verdict?" 530 U.S. at 494 (citations omitted).

In dictum (the prior-conviction issue was not presented there), this Court retained the "fact-of-a-prior-conviction" exception: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury[.]" *Id.* at 489. While this Court recognized that "it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested," it has yet to overrule that 1998 decision. *Id.* at 489-90; *Erlinger*, 602 U.S. at 838 (exception "persists as a 'narrow exception'").

After *Apprendi*, this Court had not, for more than two decades, directly confronted the "scope of the 'prior conviction' exception." *See Kesses v. Mendoza-Powers*, 574 F.3d 675, 676 (9th Cir. 2009). That changed with *Erlinger v. United States*, 602 U.S. 821 (2024). There, this Court addressed whether the jury right applied to the question of whether prior offenses occurred on "occasions different from one another" under the Armed Career Criminal Act. 18 U.S.C. § 922(g). *Erlinger* comprehensively held that 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, 838

(2024) (quoting *Mathis v. United States*, 579 U.S. 500, 510, 511-12 (2016)).[2] "'No more' is allowed." *Id.* at 839 (quoting *Mathis*, 579 U.S. at 511). The fact-of-prior-conviction exception is not so broad as to permit a judge to find "any fact related to a defendant's past offenses[.]" *Id.* at 837.

Applying the narrow *Almendarez-Torres* exception, this Court held that "this case is as nearly on all fours with *Apprendi* and *Alleyne* as any we might imagine." *Id.* at 835. "*Almendarez-Torres* does nothing to save the sentence in this case. To determine whether [the] prior convictions triggered ACAA'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." *Id.* at 838-39.

While *Erlinger* clearly held that the fact-of-a-prior-conviction exception is not, as the Third Circuit had previously put it, a "panacea"

[2] Citing, in fn.2, *Pereida v. Wilkinson*, 592 U.S. 224, 238 (2021) (exception is "unusual and 'arguable'"), *United States v. Haymond*, 588 U.S. 634, 644, n.3 (2019) (plurality opinion) (exception is "narrow"), *Descamps v. United States*, 570 U.S. 254, 269 (2013) (Sixth Amendment concerns "counsel against" allowing a judge to make findings about a prior conviction beyond "merely identifying a prior conviction"), *Cunningham v. California*, 549 U.S. 270, 282 (2007), *Shepard v. United States*, 544 U.S. 13, 24 (2005) (plurality opinion) (same), *United States v. Booker*, 543 U.S. 220, 244 (2005) (same), *Blakely v. Washington*, 542 U.S. 296, 301 (2004), and *Apprendi*, 530 U.S. at 490.

that covers any recidivism-related finding,[3] it did not explicitly "address divisions in the lower courts regarding the necessity of jury trial . . . for various other ancillary facts about a prior conviction that may be specified by recidivist enhancement provisions. For example, . . . that the defendant's charged offense was committed while under supervision for the prior conviction, or . . . the length and recency of incarceration for the prior offense." Wayne R. LaFave, 6 Crim. Proc. § 26.4(i) (4th ed.) (footnotes omitted).

2. As for the "length and recency of incarceration for the prior offense," *id.*, federal courts are divided on whether allowing a judge to make such sentence-enhancing findings violates *Apprendi*. The First Step Act of 2018 (FSA) requires an enhanced mandatory minimum sentence for certain narcotics offenses where the defendant has a prior "serious drug felony" conviction. 21 U.S.C. § 841(b)(1)(A) (mandatory minimum increases from 10 years to 15 years if the defendant was previously convicted of a "serious drug felony;" mandatory minimum increases to 25 years if the defendant has two such convictions); 21 U.S.C. § 841(b)(1)(B) (minimum increases from five to ten years based upon prior "serious drug felony" conviction). In turn, 21 U.S.C. § 802(58) defines a "serious drug felony" as one "described in section 924(e)(2) of

[3] *Garrus v. Penn. Dept. of Corrections*, 694 F.3d 394, 406 (3d Cir. 2012) ("Despite the Commonwealth's attempts to paint it as such, *Almendarez-Torres* is not a panacea allowing recidivism-related judicial factfinding[.]").

[T]itle 18 for which . . . the offender served a term of imprisonment of more than 12 months" and his "release from any term of imprisonment was within 15 years of the commencement of the instant offense." And 21 U.S.C. § 851(c)(1) leaves the determination of whether the defendant has a qualifying predicate offense to a judge, not a jury: "The *court* shall hold a hearing to determine any issues raised by the [defendant's] response which would except the person from increased punishment" (emphasis added); *see also United States v. Fields*, 53 F.4th 1027, 1041 (6th Cir. 2022) (§ 851(c)(1) requires a District Court to make the time-served and release-date findings).

The Third Circuit has recently held, agreeing with the position of the United States Government across multiple recent Administrations, that the jury right applies to the time-served and release-date questions under 21 U.S.C. § 841(b)(1)(A) & (B). *United States v. Guyton*, ___ F.4th ____, 2025 WL 2014930, at *11 (3d Cir. July 18, 2025). "Those two facts were necessary for the [prior] conviction to constitute a 'serious drug

felony.' But the jury was not asked to find them. That was plain error under *Apprendi* and *Alleyne*, which the Government concedes." *Id.*[4]

The Sixth Circuit has suggested agreement with the Third Circuit in dictum. *See United States v. Fields*, 53 F.4th 1027, 1037-38 (6th Cir. 2022) (finding the *Apprendi* argument "persuasive" but declining to "definitively decide this constitutional issue" because the district court had submitted the duration and recency questions to the jury), *affg. in part*, 435 F.Supp.3d 761, 765 (E.D. Kentucky 2020).

The District Courts, on the other hand, are divided on whether FSA's time-served and release-date elements must be found by a jury. One such court has held that the jury right does not apply to the time-served and release-date questions because the fact-of-prior-conviction exception "may include antecedent findings and issues, requiring recourse to a limited set of evidence probative to those findings and issues, without running afoul of the Sixth Amendment. In making this inquiry, courts cannot . . . impose 'an artificially narrow reading of the

[4] This concession is consistent with a six-year-old Department of Justice policy. *United States v. Delpriore*, 662 F.Supp.3d 1021, 1026 (D. Alaska 2023) ("On June 3, 2019, the Executive Office for United States Attorneys issued a memorandum regarding the First Step Act and specifically stated that the two additional factual predicates should be sent to the jury: 'In the second phase, the jury should be issued a special verdict form asking it to find, beyond a reasonable doubt, two facts for each 'serious drug felony' predicate: (1) that the defendant served more than 12 months in prison for the predicate conviction; and (2) that he was released from serving any term of imprisonment for that offense within 15 years of the commencement of the underlying drug-trafficking offense (identified in the special verdict form by count number).'").

'fact of a prior conviction' exception' that 'extend[s] to only a grudging acknowledgment that a defendant once had been convicted.' . . . Certain 'subsidiary findings' are part of 'the fact of prior conviction'[.]" *United States v. Lee*, 2021 WL 640028, at *6 (E.D.N.C. Feb. 18, 2021) (quoting *United States v. Thompson*, 421 F.3d 278, 282, 284 n.4 (4th Cir. 2005) and *United States v. Smith*, 451 F.3d 209, 224 (4th Cir. 2006)), *affd. United States v. Lee*, 100 F.4th 484, 489 (4th Cir. 2024) (finding any error harmless after the government conceded *Apprendi* error); *accord United States v. Fitch*, 2022 WL 1165000, at *2 (N.D. Ind. Apr. 19, 2022) ("while the First Step Act enlarged the inquiry into facts surrounding a prior conviction, those facts fall under the umbrella of 'fact[s] of a prior conviction'") (citing *Thompson*, 421 F.3d at 282).

On the other hand, *United States v. Delpriore*, 662 F.Supp.3d 1021, 1026 (D. Alaska 2023), held that the FSA's time-served and date-of-release elements "[b]y definition" "fall outside the narrow 'fact of conviction.'" *Id.* at 1026 (quoting *Fields*, 435 F.Supp.3d at 764). "While the fact that a defendant was convicted of a crime can, as a general rule, be clearly determined through court records, there are potentially many factual disputes regarding the length and time of incarceration. For example, was a defendant . . . at a residential reentry facility or on house arrest? And if the defendant [was] serving sentences for both a serious drug felony and another crime, there could be factual disputes as to the

length of the applicable term of imprisonment and when that term ended. Resolving these types of disputes could well require a qualitative analysis by a fact finder." *Id.* at 1028.

The *Fields* District Court went the same way: "*Alleyne* requires that the jury make findings about the length of Fields's prior imprisonment and the fifteen-year release window. These post-conviction facts extend beyond the limited *Almendarez-Torres* recidivism exception because they are not merely 'fact[s] of a prior conviction'; they instead relate to the manner and duration of Fields's sentence service and the dates of release. These post-conviction factual criteria, which raise the sentencing floor and/or ceiling, are for the jury alone to evaluate." 435 F.Supp.3d at 765 (citations omitted).

Uncertainty therefore remains in the FSA landscape. "To date, no Supreme Court authority has addressed whether the *Almendarez-Torres* recidivism exception applies in a post-FSA world, where defendants may contest, factually and legally, whether a prior conviction qualifies as a 'serious drug felony.'" *Delpriore*, 662 F.Supp.3d at 1025-26.

3. Courts have similarly split on whether a jury must decide prior time served in the tolling context under New York Penal Law § 70.04 et seq. In *People v. Bell*, 940 N.E.2d 913 (2010), and *People v. Porto*, 942 N.E.2d 283 (2010), the defendants contended, before New York's highest

court, that the jury right applied to the factual tolling question. Appellant Bell's Brief, 2010 WL 5596773, *33-34; Appellant Porto's Brief, 2010 WL 5596787, at *39. In conclusory fashion, the Court of Appeals rejected that argument on the merits. *Bell*, 940 N.E.2d 913; *Porto*, 942 N.E.2d at 289.

A year before *Bell* and *Porto*, the Second Circuit held that it is not "clearly established" that the jury right applies to the precise tolling question presented here: the duration of one's prior incarceration under New York Penal Law Article 70's recidivism enhancement. *Washington v. Graham*, 355 Fed.Appx. 543 (2d Cir. 2009).

Joining the chorus after *Erlinger*, numerous New York courts have held, in response to a "flurry of [post-*Erlinger*] litigation," *People v. Winston*, 2025 WL 2265605, *4 (Columbia Co. Ct. Aug. 5, 2025), that the jury right does not cover tolling because tolling is sufficiently connected to a prior sentence and determined by objective—and purportedly trustworthy—government records. *See*, *e.g.*, *People v. Rivera*, 85 Misc.3d 1032, 1037 (Sup. Ct. Kings County 2024). Several of these courts hold that the New York Court of Appeals' decisions in *Bell* and/or *Porto* control the issue *E.g.*, *People v. Taylor*, 86 Misc.3d 263, 278-79 (Sup. Ct. Nassau Cty. 2024).

New York courts have also cabined *Erlinger* to its facts, finding that *Erlinger* only covers findings that, like the ACAA's separate-

occasions inquiry, bear on the "the *manne*r in which the instant or underlying offense was committed." *People v. Berry*, 2025 WL 1538012, *5 (Sup. Ct. Queens Cty. 2025). *Erlinger* did not, the theory goes, "expand[ ] the *Apprendi* doctrine to include facts which are part of the mechanical operation of the criminal justice system such as the date[s] [defendant had] been incarcerated (or was released from custody)." *Id.* at *5.

Some New York courts have, however, enforced the Sixth Amendment's clear command post *Erlinger*. For instance, *People v. Lopez*, 85 Misc.3d 171, 183-84 (Sup. Ct. New York County 2024) and *People v. Banks*, 85 Misc.3d 423 (Sup. Ct. New York County 2024) stress straightforward reasoning: under *Erlinger*, the "fact of a prior conviction" means only the fact of a prior conviction itself, not facts arising *after* the prior conviction, such as the duration of a served sentence or release date. *Lopez*, 85 Misc.3d at 18082; *Banks*, 85 Misc.3d at 429-32. "*Erlinger* dictates that tolling determinations . . . must be made by a jury, not a judge. . . . [T]he language employed by the Supreme Court in *Erlinger*, to wit: 'may do no more,' 'over and over,' 'downright tedium,' can only be interpreted to once-and-for-all expressly forbid even the incremental expansion of *Almendarez-Torres*. To read *Erlinger* otherwise is to ignore it." *People v. Winston,* 2025 WL 2265605, *5 (Columbia Cty. Ct. Aug. 5, 2025).

New York trial courts are thus not only internally split, but the New York Court of Appeals' decisions in *Bell* and *Porto* (jury right does not apply) split with the Third Circuit's recent decision in *Guyton*, ___F.4th __, 2025 WL 2014930, *11 (3d Cir. July 18, 2025) (jury right applies to time-served and release-date determinations under the FSA), creating a divide between a state court of last resort and a federal circuit court. Sup. Ct. Rule 10(a). The jurisprudential divide on whether a jury must decide prior time served for a predicate conviction is substantial.

3. Appellate courts are also divided on whether a jury must decide a defendant's sentencing status at the time of the present offense. That factual question is closely related to tolling since both bear on the status of a defendant's previously served sentence at a particular point in time.

Numerous lower courts have held that the jury right does not cover the status of a defendant's sentence at the time of the present offense because that factual question is related to a recidivism analysis. *See State v. Fagan*, 905 A.2d 1101, 1117-21 (Conn. 2006) (whether defendant had, at the time of the present offense, been lawfully released on bond following an arrest); *State v. Jones,* 149 P.3d 636, 640-41 (Wash. 2006) (whether defendant was under community supervision at the time of the offense); *Ryle v. State*, 842 N.E.2d 320, 324-25 (Ind. 2005) (whether defendant was on probation during commission of offense); *State v. Allen,* 706 N.W.2d 40, 47 (Minn. 2005) (same); *United States v.*

Corchado, 427 F.3d 815, 820 (10th Cir. 2005) ("probation status" under Former U.S.S.G. § 4A1.1(d)); *United States v. Williams,* 410 F.3d 397, 402 (7th Cir. 2005) (same).

Other courts have, consistent with *Erlinger*, interpreted the fact-of-a-prior-conviction exception narrowly, finding that sentencing status at the time of a prior offense is beyond the *Almendarez-Torres* exception. *See United States v. Perez*, 86 F.4th 1311, 1318-20 (11th Cir. 2023) (18 U.S.C. § 3147's enhancement for "an offense committed while released" on pending charges triggers *Apprendi*); *accord Butler v. Curry*, 528 F.3d 624, 646 (9th Cir. 2008) ("that an individual was sentenced to a term of probation at the time of a prior conviction—a fact that may be reflected in conviction documents of the kind approved by *Shepard*—is not sufficient to prove that he was on probation at the time of the current crime. That determination . . . can only be made by drawing inferences from the prior conviction documents and by considering facts and circumstances that occurred after the prior conviction."). While the Ninth Circuit has held, on de novo review, that *Apprendi* covers this factual question, it has nonetheless recognized the split in authority and held that a contrary finding does not constitute an unreasonable application of clearly established law under 28 U.S.C. § 2254(d)(1) ("AEDPA"). *Kessee v. Mendoza-Powers*, 574 F.3d 675, 678-79 (9th Cir. 2009).

4. The battle over the scope of the fact-of-a-prior-conviction exception is divisive. If one throws a dart at a map of the United States, it's anyone's guess whether it will land on a jurisdiction that honors the jury right. And different governments are pursuing distinct litigation postures, with the federal government recognizing that the *Almendarez-Torres* exception is limited to the fact of prior conviction,[5] and state governments taking, as here, a different tack. This Court's intervention is necessary to ensure that the Sixth Amendment's right to trial by jury no longer hinges on geographical chance or the prosecutor's employer.

B. The question presented is important. The time to resolve it is now.

The jury right is fundamental, the "'heart and lungs' of liberty." *Erlinger*, 602 U.S. at 829-30 (quoting Letter from Clarendon to W. Pym (Jan. 27, 1766), in 1 Papers of John Adams 169 (R. Taylor ed. 1977)). While this Court has never expanded the fact-of-a-prior-conviction exception to any facts relating to recidivism—and recently rejected that precise theory in *Erlinger*—numerous courts have, as shown above, watered the Sixth Amendment down in that precise manner. Every day that this Court does not intervene is another day that the Sixth Amendment is violated.

[5] *Guyton*, ___ F.4th ____, 2025 WL 2014930, at *11 (government conceded that *Apprendi* covers the time-served issue).

The constitutionality of state and federal statutes hangs in the balance. *See* N.Y. Penal Law § 70.04 *et seq*. & N.Y. Crim. Proc. Law § 400.15(7)(a) (requiring a judge to determine tolling); 21 U.S.C. § 841(b)(1)(A), 841(b)(1)(B), 802(58) & 851(c)(1) (collectively requiring a judge to determine the time-served and release-date issues under the First Step Act's sentencing scheme). The stakes are high as statutes require judges, not juries, to find the length of prior incarceration and/or release dates. That procedure deprives Americans of the right to have a jury determine a factual question hinging on the questionable accuracy of (often old) records maintained by government bureaucracies and courts. *Erlinger*, 602 U.S. at 841-42 & 835 n.1 (*Shepard* documents are error prone and often contain "material gaps").

In theory, lower courts could spend the next few decades considering whether to overrule prior case law given *Erlinger*'s clear holding that the *Almendarez-Torres* exception only applies to the fact of prior conviction and "no more." 602 U.S. at 835-40. Perhaps the split will shrink over decades (if courts correctly interpret *Erlinger*); perhaps it won't (if they don't). *Compare People v. Wiley*, 570 P.3d 436, 445 (Cal. 2025) (overruling, in light of *Erlinger*, prior California decisions holding that the jury right did not apply to whether the "convictions were of increasing seriousness and whether [defendant] had performed unsatisfactorily on probation") *with State v. Frieday*, 565 P.3d 139, 155

(Wash. App. 2025) ("*Erlinger* should be limited to the ACCA and does not overrule existing Washington precedent."). But the Constitution demands protection of fundamental liberty now, not a gamble on a decades-long litigation spree. A wait-and-see approach is no solace to those defendants who, while the dust settles for decades, continue to suffer deprivations of their fundamental right. And waiting for additional 21st Century percolation of the question presented, instead of protecting the jury right now, would do violence to the framers' intent to powerfully protect the jury right as early as the Bill of Rights' ratification centuries ago.

C. This case is an excellent vehicle for assessing the scope of the jury right.

This case is an excellent vehicle for reviewing the merits question presented as there are no impediments to review. It is uncontested that the factual tolling finding is necessary to enhance the minimum sentencing range to five years. *Alleyne*, 570 U.S. at 112 ("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*); N.Y. Penal Law § 60.05(5), 65.00, 70.00(4), 70.02, 70.04. And the state court decided this claim exclusively on the merits, so thorny waiver, retroactivity, AEDPA-deference, and harmless-error arguments—common defenses from the State in *Apprendi* litigation—won't prevent this Court from reaching the question presented. *E.g.*, *Lee*,

100 F.4th at 489 (finding any error harmless after government conceded *Apprendi* error); *Hernandez*, __ N.E.3d __, 2025 WL 515364, at *3 (waiver). This may be one of the few post-*Erlinger* cases where the *Apprendi* merits issue is not clouded by a parade of non-merits defenses. This Court should take advantage of this clean record to decide the important and outcome-determinative question presented.

D. Petitioner's Sixth Amendment claim is meritorious.

The state courts' merits decision was indefensible before *Erlinger*, and even more so after. The duration of a defendant's prior incarceration is beyond the fact of prior conviction. As *Mathis* declared eight years before the Appellate Division decision here, a judge "can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." 579 U.S. 500, 511-12 (2016). "[A]llowing a sentencing judge to go any further would raise serious Sixth Amendment concerns." *Id.*

Erlinger then squarely confirmed that the fact-of-a-prior-conviction exception is sharply limited to the predicate conviction's elements, jurisdiction, and date, not any-and-all facts "related to a defendant's past offenses." 602 U.S. at 835-40. The narrow exception covers "no more"—a limit this Court has confirmed "over and over" to the point of "downright tedium." *Id.* at 838-40 (quoting *Mathis*, 579 U.S. at 510-11).

Here, tolling, that is, a defendant's location in prison *after* the prior sentence's imposition, is not the "fact of a prior conviction" as it goes beyond the prior conviction's elements, date, or jurisdiction. *Erlinger*, 602 U.S. at 835-39. As a tolling finding requires the fact-finder "to do more than identify" the "previous convictions and the legal elements required to sustain them," *Almendarez-Torres* is inapplicable. *Id.* at 838-39. It's no wonder, therefore, that the United States government has found the State (and state courts') position here so dubious that it has conceded that *Apprendi* covers the time-served and release-date questions. *Guyton*, 2025 WL 2014930, at *11 (3d Cir. July 18, 2025).

It's irrelevant that the judicial/prison records supporting tolling may be reliable or that the tolling issue is seemingly "straightforward." *Erlinger* made crystal clear that courts cannot dispense with the jury right because the government's allegations seem reliable and are supported by purportedly "objective" government records. 602 U.S. at 839, 842 (although the factual issue in *Erlinger*—whether the prior convictions occurred on separate "occasions"—will often be "straightforward" and indisputable, "none of that means a judge rather than a jury should make the call. There is no efficiency exception to the Fifth and Sixth Amendments. In [our] free society[,] [we] enjoy[ ] the right to hold the government to the burden of proving its case beyond a

reasonable doubt to a unanimous jury of [our] peers 'regardless of how overwhelmin[g]' the evidence may seem to a judge.") (quoting *Rose v. Clark*, 478 U.S. 570, 578 (1986)); *Erlinger*, 602 U.S. at 835 n.1 (reliability is irrelevant to the Sixth Amendment analysis; it is not "too much to ask the government to prove its case (as it concedes it must) with reliable evidence before seeking enhanced punishments under a statute like ACCA when the 'practical realit[y]' for defendants like Mr. Erlinger is exposure to an additional decade (or more) in prison"); *id.* at 849.

What this Court made clear two decades ago in *Crawford v. Washington*, 541 U.S. 36, 61-62 (2004), is even clearer today: courts cannot "dispens[e] with jury trial because a defendant [seems] obviously guilty. This is not what the Sixth Amendment prescribes." 541 U.S. 36, 61-62 (2004). And at an even more basic level, the idea that a free people should defer to the accuracy of a government bureaucracy's paper/computer records is, beyond lacking common sense, a reflection of the "trust-your-government" view that the Sixth Amendment repudiates. *See*, *e.g.*, *Erlinger*, 602 U.S. at 829-30.

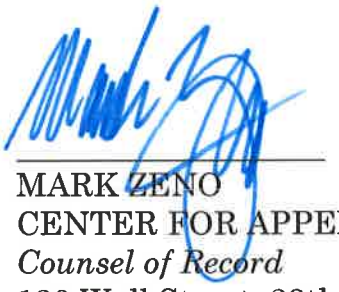
Given the modern expansion of the penal law—more crimes, more convictions, more sentencing enhancements—the jury right certainly does impose efficiency costs on governments that drastically surpass those imposed at the time of the founding. *See generally* Justice Gorsuch & Janie Nitze, *Over Ruled: The Human Toll of Too Much Law* (2024).

But courts cannot dilute the Sixth Amendment in order to prop up a modern mass-conviction regime that did not exist at the founding. *E.g.*, *NYSRPA v. Bruen*, 597 U.S. 1 (2022). Just as the "Constitution does not grant" the judiciary the power to "rewrite the Constitution to create new rights" based on a judge's "own moral or policy views," *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 340 (2022) (Kavanaugh, J., concurring), it does not permit the judiciary to limit constitutionally protected liberty to advance modern political goals, even in pursuit of "public safety" or other lofty interests. *See*, *e.g.*, *Bruen*, 597 U.S. at 17 n.3. Instead, the state and federal governments must pursue their political aims within the confines of the Sixth Amendment. The State failed to do that here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX

FILED: APPELLATE DIVISION - 1ST DEPT 05/02/2024 10:39 AM 2023-04854
NYSCEF DOC. NO. 12 RECEIVED NYSCEF: 05/02/2024

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,

Ind. No. 1614/20
Case Nos. 2022-01617
2023-04854

-against-

STEVEN PITTS,
Defendant-Appellant.

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

State of New York
Court of Appeals

BEFORE: HON. ROWAN D. WILSON, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

ORDER DENYING LEAVE

STEVEN PITTS, Appellant.

Appellant having applied for leave to appeal to this Court pursuant to Criminal Procedure Law § 460.20 from an order in the above-captioned case;*

UPON the papers filed and due deliberation, it is

ORDERED that the application is denied.

Dated: APR 15 2025

Chief Judge

*Description of Order: Order of the Appellate Division, First Department, entered May 2, 2024, (1) modifying a judgment of the Supreme Court, New York County, rendered March 28, 2022, and as modified, affirming the judgment, and (2) affirming an order of the same court entered on or about September 12, 2023.

FILED: APPELLATE DIVISION - 1ST DEPT 11/27/2023 12:30 PM 2023-04854
NYSCEF DOC. NO. 6 RECEIVED NYSCEF: 11/27/2023

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY : CRIMINAL TERM

- ----------x

THE PEOPLE OF THE STATE OF NEW YORK :

Respondent, : Notice of Motion to Set Aside Sentence

-against- : (CPL § 440.20)

STEVEN PITTS, aka STEVEN P. PITTS, :

Ind. No. 1614/2020

Defendant. :

- ----------x

PLEASE TAKE NOTICE that upon the affirmation of Mark W. Zeno, Esq., the memorandum of law, the exhibits, and all prior proceedings, defendant Steven P. Pitts will move this Court, at the Courthouse, 100 Centre Street, New York, New York, 10013, on May 8, 2023, for an order, pursuant to CPL § 440.20, vacating the sentence of a five-year determinate prison term (with five years' postrelease supervision) in the above-captioned case and ordering a new sentencing hearing (Pickholz, J., at trial and sentencing).

DATED: New York, New York
April 18, 2023

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To: Clerk
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New York, NY 10013

Hon. Alvin L. Bragg, Jr.
New York District Attorney
One Hogan Place
New York, NY 10013
(by email to: appealsmtns@dany.nyc.gov)

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY : CRIMINAL TERM

- ----------x

THE PEOPLE OF THE STATE OF NEW YORK	:	
Respondent,	:	Affirmation in Support
-against-	:	
STEVEN PITTS, aka STEVEN P. PITTS	:	Ind. No. 1614/2020
Defendant.	:	

- ----------x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Mark W. Zeno, an attorney duly admitted to practice in the Courts of this State, hereby affirms under the penalties of perjury that the following statements are true, except for those made on information and belief, which he believes to be true:

1. I am associated with the Center for Appellate Litigation, assigned by the Appellate Division, First Department on March 28, 2022, to represent Mr. Pitts on his appeal from a judgment of this Court, rendered January 27, 2022, convicting him of one count of assault in the second degree (Penal Law § 120.05(12)) and one count of assault in the third degree (Penal Law § 120.00(1)), and sentencing him to a five-year prison term with five years' postrelease supervision).

2. Mr. Pitts' direct appeal has not been perfected.

3. No prior request for the relief requested here has been made.

Factual Background

4. Mr. Pitts was arrested on November 2, 2020, in the 72nd Street 1/2/3 Subway Station after he was alleged to have assaulted complainant Barry Segal on a southbound express train. An indictment later charged Mr. Pitts with two counts of assault. The first count charged assault in the second degree for intentionally causing physical injury to another person who was sixty-five years of age or older while being more than ten years younger than such person, in violation of Penal Law § 120.05(12), a class-D violent felony. The second count charged assault in the third degree for intentionally causing physical injury to another person in violation of Penal Law § 120.00(1), a class-A misdemeanor.

5. A jury convicted Mr. Pitts of both counts.

6. The prosecution alleged that Mr. Pitts should be sentenced as a second violent felony offender because he had previously been convicted of assault in the second degree on December 1, 2009, in Kings County (exhibit A, Statement of Predicate Violent Felony Conviction).

7. The minimum sentence for a person convicted of a class-D violent felony is two years. Penal Law § 70.02(3)(c). The minimum sentence for a person who is a second violent felony offender and is convicted of a class-D violent felony is five years. Penal Law § 70.04(3)(c).

8. To justify a second-violent-felony-offender sentence, the prosecution had to prove that the current November 2, 2020 offense was committed within ten years of the December 1, 2009 sentence. Penal Law § 70.04(1)(b). To make this necessary "tolling" showing, the prosecution had to establish that Mr. Pitts was, during that approximately 11-year period, incarcerated for at least 336 days (3989 days - 3653 days).

9. The prosecution alleged that Mr. Pitts was incarcerated for 1066 days during that period (June 15, 2010 to May 16, 2013).

10. CPL § 400.15(7) and 400.16(2) collectively require that a judge, not a jury, decide the tolling question. Thus, a jury never decided the factual question of how many days Mr. Pitts was in prison between the 2009 conviction and the commission of the present offense in 2020.

11. At the sentencing proceeding, Mr. Pitts personally objected to the tolling calculation, but not on the grounds raised in this motion (exhibit B, transcript of March 28, 2022 sentencing, at 5-8, 12-13).

12. The court found Mr. Pitts to be a second violent felony offender (id. at 13). It imposed the minimum sentence, a five-year determinate prison term with five years' postrelease supervision (id. at 15). The court did not impose a sentence on the third-degree assault conviction.

13. Mr. Pitts now moves to vacate his sentence on the grounds that his

constitutional right to have a jury decide facts necessary to enhance his sentence beyond the sentence justified by the jury's verdict was violated. *Apprendi v. New Jersey*, 530 U.S. 466 (2000); U.S. Const. amend. 6; N.Y. Const. Art. I § 2; *see also* Memorandum of Law (annexed).

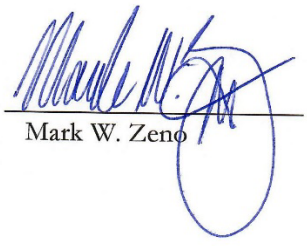
14. This motion implicates the constitutionality of CPL § 400.15(7) and 400.16(2), which require the tolling question to be decided by a judge. Thus, the undersigned has notified the Attorney General of this challenge by serving a copy of this motion, and a notice of constitutional challenge, by email and by United States Postal Service Mail, upon the following addresses on April 18, 2023:

> Office of the Attorney General, Solicitor General Department of Law, The Capitol, Albany, New York 12224
>
> Nikki Kowalski, Deputy Solicitor General for Criminal Matters at nikki.kowalski@ag.ny.gov.

See exhibit C; CPLR § 1012(3)(b); Executive Law § 71(1).

15. Should the People dispute any facts in this motion, the Court should order a hearing to resolve any dispute. CPL § 440.40(5).

DATED: April 18, 2022
New York, New York



Mark W. Zeno

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY : CRIMINAL TERM

- ----------x

THE PEOPLE OF THE STATE OF NEW YORK :

Respondent, :

-against- :

STEVEN PITTS, aka STEVEN P. PITTS : Ind. No. 1614/2020

Defendant. :

- ----------x

MEMORANDUM OF LAW

STATEMENT OF JURISDICTION

Mr. Pitts is currently incarcerated under a November 2, 2020 judgment of this Court (Ind. No. 1614/2020). This Court has jurisdiction to review this claim under CPL § 440.20(1) because Mr. Pitts claims the State violated his right to have a jury decide the tolling issue, thus rendering his sentence "unauthorized, illegally imposed or otherwise invalid as a matter of law." CPL § 440.20(1); *Blakely v. Washington*, 542 U.S. 296, 305 (2004) (because a judge, not a jury, determined facts that enhanced the statutory maximum beyond the sentence authorized by the jury verdict, "the State's sentencing procedure did not comply with the Sixth Amendment" and "petitioner's sentence is invalid").

ARGUMENT

A. The *Apprendi* Rule.

The right to a jury is fundamental. *Ramos v. Louisiana*, 140 S.Ct. 1390 (2020); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); U.S. Const. amend. 6; N.Y. Const. Art. I § 2. *United States v. Haymond*, 139 S.Ct. 2369, 2375 (2019) ("Together with the right to vote, those who wrote our Constitution considered the right to trial by jury 'the heart and lungs, the mainspring and the center wheel' of our liberties, without which 'the body must die; the watch must run down; the government must become arbitrary.' Just as the right to vote sought to preserve the people's authority over their government's executive and legislative functions, the right to a jury trial sought to preserve the people's authority over its judicial functions."); *United States v. Booker*, 543 U.S. 220, 238-39 (2005) (the framers "understood the threat of 'judicial despotism' that could arise from 'arbitrary punishments upon arbitrary convictions' without the benefit of a jury in criminal cases") (quoting Papers of John Adams 169 (R. Taylor ed. 1977)).

To protect the jury right, the framers guaranteed—and the Supreme Court has repeatedly enforced—a "bright-line" rule. *Blakely*, 542 U.S. at 308. The jury right extends to findings that increase the punishment imposed following a criminal conviction. Under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny, "[i]f 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." *Booker*, 543 U.S. at 231 (quoting *Ring v. Arizona*, 536 U.S. 584, 602 (2002)); *Alleyne v. United States*, 570 U.S. 99, 107-08 (2013) ("[A] fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed."); *Cunningham v. California*, 549 U.S. 270, 290 (2007) ("If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied."); *Blakely*, 542 U.S. at 308 (the framers did not "trust government to mark out the role of the jury" and thus did not leave the "definition of the scope of jury power up to judges' intuitive sense of how far is *too far*").

For *Apprendi* jury-right purposes, there is no distinction between "elements" and "sentencing factors." *Apprendi*, 530 U.S. at 494. The "relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* Labeling a finding a "'sentence enhancement' . . . does not provide a principled basis for treating [facts] differently." *Id.* at 476; *see also Haymond*, 139 S.Ct. at 2379 ("Our precedents . . . have repeatedly rejected efforts to dodge the demands of the . . . Sixth Amendment[ ] by the simple expedient of relabeling a criminal prosecution a 'sentencing enhancement.' Calling part of a criminal prosecution a 'sentence modification' imposed at a

'postjudgment sentence-administration proceeding' can fare no better. As this Court [i.e., the Supreme Court] has repeatedly explained, any 'increase in a defendant's authorized punishment contingent on the finding of a fact' requires a jury and proof beyond a reasonable doubt "no matter" what the government chooses to call the exercise.'"). There is no constitutional distinction, as far as the jury right goes, between "facts concerning the offense" and "facts concerning the offender." *Cunningham*, 549 U.S. at 291 n.14.

The *Apprendi* rule applies to any fact necessary to enhance the statutory minimum beyond that authorized by the jury's verdict. *Alleyne v. United States*, 570 U.S. 99 (2013). A violation of these jury guarantees not "only infringe[s] the rights of the accused; it also divest[s] the 'people at large—the men and women who make up the jury of a defendant's peers—of their constitutional authority to set the metes and bounds of judicially administered criminal punishment." *Haymond*, 139 S.Ct. at 2378-79.

That recognizing this jury right will require a more time-consuming process provides no grounds for finding it not constitutionally required. Juries are meant to ensure fairness, not efficiency. *Haymond*, 139 S.Ct. at 2384. ("[T]he jury system isn't designed to promote efficiency but to protect liberty. In what now seems a prescient passage, Blackstone warned that the true threat to trial by jury would come less from 'open attacks,' which 'none will be so hardy as to make,' as from subtle 'machinations, which may sap and undermine i[t] by introducing new and arbitrary methods. . . .

[D]elays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters.")

B. Mr. Pitts was subjected to an enhanced sentence in violation of *Apprendi*.

Mr. Pitts was convicted of assault in the second degree, a class-D violent felony. The People sought to enhance his sentence by having him adjudicated a second violent felony offender. The minimum sentence for a person convicted of a class-D violent felony is two years. Penal Law § 70.02(3)(c). The minimum sentence for a person who is a second violent felony offender and is convicted of a class-D violent felony is five years. Penal Law § 70.04(3)(c). The prosecution alleged that Mr. Pitts was a second violent felony offender because he had previously been convicted of assault in the second degree on December 1, 2009, in Kings County (exhibit A, Statement of Predicate Violent Felony Conviction). To justify a second-violent-felony-offender sentence, the prosecution had to establish that the current November 2, 2020 offense was committed within ten years of the December 1, 2009 sentence. Penal Law § 70.04(1)(b).

Because more than ten years elapsed between those dates, the prosecution was required to show tolling. To make this necessary "tolling" showing, the prosecution had to establish that Mr. Pitts was, during that approximately 11-year period, incarcerated for at least 336 days. The prosecution alleged that Mr. Pitts was incarcerated for 1066 days during that period (June 15, 2010 to May 16, 2013).

Mr. Pitts had a Sixth Amendment and Article I § 2 right to have a jury decide whether he had been incarcerated for the requisite number of days between his 2009 assault conviction and the commission of this 2020 offense. That "tolling" fact was "necessary to support a sentence [drastically] exceeding the maximum [and minimum] authorized by the . . . jury verdict." *Booker*, 543 U.S. at 244; *compare* Penal Law § 70.02(3)(b) (authorizing a determinate sentence for a first-violent felony offender of 2 years to 7 years in prison) *with* Penal Law § 70.04(3)(c) (authorizing a determinate sentence for a person found to be a second violent felony offender of 5 years to 7 years).

"That should be the end of the matter." *Blakely*, 542 U.S. at 313. Section 400.15(7)(a) of the Criminal Procedure Law, which barred a jury trial to resolve this tolling question here, is unconstitutional. *See also* CPL § 400.16(2) (incorporating by reference CPL § 400.15(7)(a), which states that "a hearing pursuant to this section must be before the court without jury."). Although the label used to describe the tolling question is irrelevant, *Apprendi*, 530 U.S. at 476; *Cunningham*, 549 U.S. at 291 n.14, the tolling question presented a classic question of historical fact within the jury's domain. To find tolling, the factfinder had to determine whether Mr. Pitts was in state custody for a particular number of days. This was a question of fact that, under the Constitution, had to be resolved by the jury.

Apprendi suggested in dicta that, under *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), there is a "fact of a prior conviction" exception to the jury right (530 U.S. at 487-90). Whether such an exception exists has been a controversial topic.[1] But it is not a question that needs to be resolved here, because Mr. Pitts' jury right did not turn solely on whether he had a prior conviction. This exception only covers the question of identity (whether the defendant is the same person who committed the prior conviction) and the nature and facts of the prior conviction itself. *Almendarez-Torres*, 523 U.S. at 226-27 (analyzing a statute that required that the defendant have a prior "conviction for commission of an aggravated felony" and holding that this fact was not an "element of the present crime" and thus did not have to be pled in the indictment).

Cunningham reinforces the point. There, the Supreme Court rejected the suggestion that the *Apprendi* rule only covers facts concerning the offense but not, like tolling, "facts concerning the offender." 549 U.S. at 291 n.14. As *Cunningham* held, "'[*a*]*ny* fact

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[1] *Apprendi* did not involve the "fact of a prior conviction." Any suggestion in *Apprendi* that such an exception satisfies the *Apprendi* standard is dictum. *See Apprendi*, 530 U.S. at 489-90 ("Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, Apprendi does not contest the decision's validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset."); *Alleyne*, 570 U.S. at 112 n.1 ("In *Almendarez-Torres v. United States,* we recognized a narrow exception to this general rule for the fact of a prior conviction. Because the parties do not contest that decision's vitality, we do not revisit it for purposes of our decision today.").

that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Id.* (quoting *Apprendi*, 530 U.S. at 490; emphasis in original). Here, the tolling question—a "fact concerning the offender"—triggered the jury right. *Id.*[2]

To the extent *Almendarez-Torres* created a fact-of-conviction exception, it was just that, and nothing more. *Apprendi*, 530 U.S. at 487 (describing the exception as "narrow" and an "exceptional departure" from the general rule). The Supreme Court did not create an exception for incarceration-related facts. *See Garrus v. Penn. Dept. of Corrections*, 694 F.3d 394, 406 (3d Cir. 2012) ("Despite the Commonwealth's attempts to paint it as such, *Almendarez-Torres* is not a panacea allowing recidivism-related judicial factfinding[.]"); *United States v. Fields*, 53 F.4th 1027, 1037-38 (6th Cir. 2022) (dictum) (in discussing whether jury right applied to incarceration-related facts, describing the Supreme Court's repeated descriptions of *Almendarez-Torres's* exception as 'narrow' and limited to the 'fact of conviction'"); *United States v. Fields*, 435 F.Supp.3d 761, 764 (E.D. Ky. 2020) (because the factual predicates of a 'serious drug felony' (more than one year of imprisonment and release within fifteen years)

[2]There is no difference between rejecting the jury right here and doing so in other contexts where the right unquestionably applies. For example, under federal law, it is a felony, punishable by up to four years in prison, for a noncitizen to fail to depart within 90 days of a final order of removal. 8 U.S.C. § 1253(a). No one would suggest that Congress could mandate that a judge determine whether the defendant was in a particular location (the United States) for a certain amount of time (90 days). And yet, that is precisely the theory underlying the unconstitutional sentencing procedure here.

effectively fix the mandatory minimum/maximum sentence for certain . . . offenses, they are 'elements' to which constitutional protections apply. Those empirical issues, which rise or fall based on events occurring only after the conviction, by definition are beyond the 'fact' of conviction (the narrow *Almendarez-Torres* harbor)") (citing *Alleyne*, 570 U.S. at 108).

A person's location at a particular place at a given moment in time—the factual question here—is not the "fact of a prior conviction." Determining whether Mr. Pitts was the same person who committed the prior 2009 offense was entirely independent from the tolling issue. *See* Patrick A. Woods, *Assessing Time Served*, 15 Cardozo Pub. L. Pol'y & Ethics J. 1, 67-69 (2017) ("[I]f the prior conviction-related question is not . . . necessarily decided by the fact of the prior conviction itself . . . or one that can be resolved by reference to the formal court documents generating that conviction . . . it is outside of the *Almendarez-Torres* exception. . . . The length of time actually served by a defendant for his prior conviction cannot be discerned from either the fact of the conviction or the formal court documents generating the conviction. . . . [T]he factual question of how long an offender served for a prior sentence is precisely the kind of fact, not subjected to prior procedural protections, that *Apprendi* and its progeny requires be . . . submitted to a jury if it is to be used to increase an offender's statutory range at sentencing.").

There is no exception to the jury entitlement rule for facts that are seemingly reliable.[3] The Supreme Court has rejected the contention that courts can "dispens[e] with jury trial because a defendant [seems] obviously guilty. This is not what the Sixth Amendment prescribes." *Crawford v. Washington*, 541 U.S. 36, 61-62 (2004). Instead of conditioning the jury right on the apparent trustworthiness of the government's allegations (here, unsworn allegations in a pleading document filed by a prosecutor who lacks personal knowledge), the Supreme Court has repeatedly held that the jury must determine "any fact" that enhances the statutory maximum/minimum regardless of its "label." *E.g., Haymond*, 139 S.Ct. 2369, 2381 (2019); *Alleyne*, 570 U.S. 99, 103, 106 (2013).

Although the Court of Appeals' decision in *People v. Rosen*, 96 N.Y.2d 329, 334-35 (2001), rejected an *Apprendi* challenge to a sentencing statute, its holding supports Mr.

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[3]DOCCS's record-keeping practices are not so reliable that its records of the dates of an individual's incarceration are immune from error. Mistakes, omissions, and typographical errors occur, even in an efficient and professional bureaucracy. *See* United States Dep't of Justice, Use and Management of Criminal History Record Information: A Comprehensive Report, 2001 Update, p. 38 (2001), available at https://bjs.ojp.gov/content/pub/pdf/umchri01.pdf ("In the view of most experts, inadequacies in the accuracy and completeness of criminal history records is the single most serious deficiency affecting the Nation's criminal history record information systems."); *see also People v. Dokes*, 79 N.Y.2d 656, 661 n.4 (1992) ("A 1991 report of the State Comptroller notes that errors in DCJS records are common: 'The Division does not maintain a complete, accurate and secure criminal history database to serve its users. Because of this, judges, prosecut[o]rs and law enforcement personnel cannot rely on criminal history data to carry out their respective functions. Thus, community security may be jeopardized and criminal defendants may be constitutionally harmed.'") (quoting Office of St. Comp., Performance Audit Report 89–S–16, DCJS: Criminal Records, at MS–2).

Pitts' argument here. *Rosen* and the cases that followed "upheld" the discretionary "persistent felony offender statute." *See also People v. Prindle*, 29 N.Y.3d 463 (2017), *People v. Rivera*, 5 N.Y.3d 61, 67-68 (2005). *Rosen* addressed a distinct question: when the prosecution seeks discretionary-persistent sentencing under Penal Law § 70.10 (not at issue here), must a jury determine whether a life-capped sentence would serve the "public interest." Penal Law § 70.10(2) ("[W]hen it is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest, the court, in lieu of imposing [a determinate] sentence of imprisonment . . . may impose [a life-capped sentence with a minimum of 15 years.]"). *Rosen* and the cases that followed hold that *Apprendi* does not apply to the "public interest" finding under § 70.10(2) because that finding does not elevate the maximum or minimum sentence. *Rivera*, 5 N.Y.3d at 67-68.

Rivera recognized that any factfinding—beyond the existence of a prior conviction—that increased a sentence was different. *Id.* at 67. ("We could have decided *Rosen* differently by reading the statutes to require judicial factfinding as to the defendant's character and criminal acts before he became eligible for a persistent felony offender sentence. If we had construed the statutes to require the court to find additional facts about the defendant before imposing a recidivism sentence, the statutes would violate *Apprendi*. But we did not read the law that way."). In contrast

to the discretionary-persistent-sentencing procedure, here, a tolling finding was necessary to enhance the mandatory minimum sentence from two years to five years. *Compare* Penal Law § 70.02(3)(c) (two years), *with* § 70.04(3)(c) (five years). Because the Penal Law requires a finding of additional facts about the defendant before the longer minimum sentence is triggered, the statute violates *Apprendi*.

In sum, this Court must apply the basic rule guaranteed by the Bill of Rights: Because the factual determination at issue led to an increase in the statutory minimum punishment, Mr. Pitts was entitled to have that determination made by a jury. Because that did not happen—indeed the Criminal Procedure Law forbid it from happening—the sentence was unconstitutional and invalid.

CONCLUSION

This Court should vacate the sentence and order a new sentencing hearing where a jury will decide the tolling question. Judiciary Law § 2b(3) ("A court . . . has power . . . to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it."); *People v. Wrotten*, 14 N.Y.3d 33,

37 (2009) ("[C]ourts may fashion necessary procedures consistent with constitutional, statutory, and decisional law."); *People v. Suazo*, 32 N.Y.3d 491 (2018) (finding a statute barring the jury right unconstitutional and ordering a jury trial).

Dated: April 18, 2023

Respectfully submitted,

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Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 62

THE PEOPLE OF THE STATE OF NEW YORK -against- STEVEN PITTS, Defendant.	STATEMENT OF PREDICATE VIOLENT FELONY CONVICTION PURSUANT TO CRIMINAL PROCEDURE LAW SECTION 400.15 AND PENAL LAW SECTION 70.04 RELATING TO INDICTMENT NO. 01614/2020

The above-named defendant has previously been subjected to one or more predicate felony convictions as defined in Penal Law §70.04(1)(b), to wit:

On October 20, 2009, in the Supreme Court of New York, in the County of Kings, the defendant was convicted of Assault in the Second Degree, Penal Law §PL 120.05(3), a violent felony as that term is defined in Penal Law §70.02(1). Sentence upon that conviction was imposed on December 1, 2009.

The ten-year period referred to in Penal Law §70.06(1)(b)(v) is extended by defendant's incarceration at New York State Department of Corrections and Community Supervision from June 15, 2010 to May 16, 2013.

Dated: New York, New York
December 23, 2020

Carolina Nevin
Assistant District Attorney

Exhibit B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TERM: PART 66
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THE PEOPLE OF THE STATE OF NEW YORK : Indictment No.

-against- : 1614/2020

STEVEN PITTS,

Defendant. :

----------X

100 Centre Street
New York, N.Y. 10013
March 28, 2022

H O N O R A B L E: RUTH PICKHOLZ,

Justice.

A P P E A R A N C E S:

FOR THE PEOPLE:

ALVIN BRAGG, ESQ.
DISTRICT ATTORNEY
NEW YORK COUNTY
BY: MENA BESHAY, ESQ.

FOR THE DEFENDANT:

BY: RALPH CHERCHIAN, ESQ.

SUE-LYNN IRVING
SENIOR COURT REPORTER

THE CLERK: Calendar number two, indictment number 1614 of '20, Steven Pitts.

MR. CHERCHIAN: Good afternoon.

Ralph Cherchian for Mr. Pitts.

MR. BESHAY: Mena, M-e-n-a, Beshay, B-e-s-h-a-y for the People.

Good afternoon, everyone.

Good afternoon, your Honor.

THE COURT: Good afternoon.

And I see Mr. Pitts.

Good afternoon, Mr. Pitts.

THE DEFENDANT: Good afternoon, your Honor.

THE COURT: This is on for sentence.

MR. CHERCHIAN: That's correct. But, your Honor, first there is a issue of the predicate statement. It's on for that hearing first.

THE COURT: Okay. Let's do it.

MR. CHERCHIAN: Okay.

It's the People's obligation. The People's burden.

THE COURT: I know.

People.

MR. BESHAY: One moment, Judge.

For the record, Judge, I'm standing in for the

assign on this case, ADA Trueheart, who is seconded call for part on another case right know. I have been fully informed about what's going on here.

I will at this time file and serve a copy of the decision, which ADA Trueheart has received from our appeals bureau, who looked into the claims made by defendant in which he stated that he is not a predicate felon because he has an appeal pending in his prior conviction.

The decision, which I handed up and provided to defense counsel today, shows that that was dismissed as time barred. And nothing on the record indicates any leave to reargue or refile.

The District Court did not grant leave to appeal to the Second Circuit and denied it for appeal to the Second Circuit, stating, "That any appeal would not be taken in good faith."

I believe at this time, Judge, this is sufficient to prove that defendant not only has no pending appeal. And also, Judge, we do assert that even if defendant is pending appeal, he is still a predicate felon under the law.

THE COURT: Excuse me, your lawyer.

MR. CHERCHIAN: Your Honor, I'm fully familiar with the case and the People's position. I'm going to ask your Honor to hear from my client because --

THE COURT: No. I am going to hear from his

lawyer. This is a legal issue. Okay.

MR. CHERCHIAN: Well, there might be a difficulty for me to advance the legal aspects of my client's position, because it may very well be that I am wrong and he is thinking out of the box and expanding it. My understanding is --

THE COURT: All right. I will let him speak but I want to hear legal argument from you.

MR. CHERCHIAN: Yes, your Honor, after my client speaks.

THE COURT: All right. Go head.

THE DEFENDANT: Your Honor, I filed and I can show, this is the case People versus Steven Pitts. I filed a habeas corpus. There was a habeas corpus proceeding. There was a ruling given to me by the federal magistrate. I have a leave to resubmit in a timely manner.

I was supposed to be notified. I have been here and incarcerated for 18 months. I got the first notification sometime in late 2019. I missed the second notification. It's likely it's been to my mailing address, which is at 40 Ann Street.

As you can see here, I had the case pulled up. It says habeas corpus proceeding. And it does says, leave to dismiss, is dismissed time barred because I submitted it early. This is what was told to me in the federal habeas

corpus proceeding. That's why I got a leave to resubmit in a timely manner.

That was part of the federal magistrate's ruling. She told me, also, I don't have to submit any other exhibits. I followed all of those procedures. All I would have to do is when they notify me to resubmit within 30 days resubmit the documentation, which is the actual motion papers. That's what was told to me.

Also, if you want to know about legal argument. With respect to the Penal Law 70.06(4), I have that as well. Any information ten years prior to a conviction. My conviction happened in 2009. This subsequent second arrest happened in 2020. It's past the ten year statute.

Now, mind you, Carolina Nevin, the ADA originally used Penal Law 70.06(5). That's been repealed. So four would take precedent with respect to predicate felony status.

I could pull that up right now, if you will like to see it, for argument purpose.

I will just find that Penal Law. Because I had it printed.

THE COURT: While you are looking, your lawyer will just talk.

Go ahead.

MR. CHERCHIAN: Your Honor, I need to note,

because your Honor has the Special Information alleging a prior felony conviction, that there is clearly set out a tolling. It says here in the third paragraph, the ten year period is extended by defendant's incarceration at New York State Department of Corrections, so.

It's true the time. But what's missing is the three years tolling. I am just bringing this up. I don't want to be arguing against my client. I don't think it's fair for me to be put in this position. But as an officer of the Court, I have to let your Honor know everything I know, right?

THE COURT: Of course.

You want to respond.

THE DEFENDANT: Your Honor, I'm highlighting subdivision five of the Penal Law. The Penal Law clearly states, In calculating the ten year period under subparagraph five -- under subparagraph four, any period time during which the person was --

THE COURT: Hold it for a minute.

Joanne can't hear anything.

You can't hear, Joanne.

Can you call her. She is not hearing anything.

THE DEFENDANT: Subdivision five, in calculating the ten year period under subparagraph four, Any period of time which the person was incarcerated for any reason

between the time.

THE COURT: Okay.

THE DEFENDANT: Okay. The ten year period, it says clearly here, shall be excluded. And the only time that should be calculated and be extended is by the period equal to the time served under such incarceration.

Now, May 10th, she said the time period starts when I'm no longer incarcerated. I was no longer incarcerated 2014. If the time period is not ten years, because that's excluded, and it's only the amount of time served on the current -- on that timeframe. I served three years. So that would be between '14 and '17. She would not be in -- in between the statutes. It wouldn't apply.

It clearly states it right here. This is Penal Law -- this is from McKinney's New York Consolidated Laws annotated.

Also, if you see I highlighted -- if you wish I'll pass it to you -- subdivision four states that, anything after ten years from the first -- commission of the first felony it shouldn't be tolled. All of this is under -- and Penal Law 70.06 is defined as sentence of imprisonment for second felony offender.

So this is the sentencing stage. I would only -- I wouldn't be considered a predicate. I'll just be considered a second felony offender.

MR. BESHAY: Judge, if your Honor would like me to respond. The People simply assert that based on the simple fact that defendant has a conviction, as stated in the statement predicate violent felony, which was handed to the Court and defense counsel, for assault in the second degree in Kings County on December 1, 2009, and was incarcerated from the dates June 15, 2010 to May 16, 2013. That period tolling makes him a predicate felon on the date that the instant matter was brought to court and ultimately brought to trial.

I believe that the written decision that the People handed up to the Court shows that there is no appeal pending, and simply that defendant does not agree with the math that the People are asserting here, that his own attorney believes is correct. And that I believe the Court believes is correct.

So I see no further issue to resolve here, Judge.

THE COURT: I think I've heard enough.

I am finding him to be a predicate. And he can appeal that.

Okay. So let's go on to sentencing.

People wish to be heard?

Have you had the probation report?

MR. BESHAY: Yes, Judge.

THE COURT: Counsel, do you have the probation

report?

MR. CHERCHIAN: Your Honor, I received it on the last date, when we could not proceed. And I mailed a copy of the probation report -- I'm not even sure I'm allowed to do that but I did anyway -- via certified mail to my client. He received it. We have conferred over it literally paragraph by paragraph in preparation for this sentencing procedure.

THE COURT: Okay.

People.

MR. BESHAY: Judge, the People would recommend that the defendant be sentenced today to the minimum as a predicate felon, which is five years prison and five years post-release supervision with a full and final order -- full and final order of protection for the victim in this case, which I am prepared to hand up to the Court.

THE COURT: Is Joanne hearing all this?

JOANNE: Yes. I'm here.

THE COURT: Okay.

Defense.

MR. CHERCHIAN: Your Honor, on behalf of my client, I'm absolutely in conformity with the People's position that five years incarceration for this case is more than adequate. And I would note, your Honor, that --

THE COURT: Can you sit down.

MR. CHERCHIAN: I would note, your Honor, that --

THE COURT: Okay.

Go ahead.

MR. CHERCHIAN: So, yes, your Honor, I would concur with the People's position that five years incarceration is more than sufficient for this case. I would also note, your Honor, that the defendant before you is a completely different individual than the person who was convicted of these offenses.

During the interim, all my dealings with Mr. Pitts has been more or less calm. There is an intellectual back and forth between the two of us. He certainly, as your Honor may remember the arrest videos, the body cams at the time of the incident.

Mr. Pitts is no longer like that. I think in addition to everything else, and the way he comported himself before your Honor at this trial, does indicate that the minimum sentence of five years, if your Honor were to impose that sentence, would be more than sufficient to insure in the society's requirements because of the sentencing. Thank you.

Now, Mr. Pitts has some items that need to be addressed with the probation report. And perhaps your Honor would need a copy of it. Because it's essentially going to go page by page.

THE COURT: I have it.

MR. CHERCHIAN: Okay. Then we are good to go.

Can my client be heard now?

THE COURT: Can't you do it, counsel. He is not representing himself. You've went through the probation report.

MR. CHERCHIAN: Well, there is one clear glaring inaccuracy. They misspelled my name. And then other than that, I think in the probation report there is a lot of extraneous information involving my client's residential status in New York City, whether he lives in a shelter or not, which is really irrelevant with respect to the requirements for sentencing. Obviously, a person who does not have a resident should not be punished more and kept in jail because of that fact. And I am sure your Honor understands that.

So, with respect to contesting the probation report, I have nothing further to add.

THE COURT: Well, do you want me to send it back to probation to correct it? I don't know what you are asking me.

THE DEFENDANT: I do.

MR. CHERCHIAN: Well, your Honor, the only glaring inconsistency is spelling of my last name. I don't think we have to send it back for that.

THE COURT: How do you spell his last name?

MR. CHERCHIAN: My last name.

THE COURT: I don't think that's that important.

MR. CHERCHIAN: Right.

THE COURT: Yeah.

MR. CHERCHIAN: But that is an inconsistency. I think they added and I or omitted one.

THE CLERK: There is a note on the file from the clerk saying that he needs to be arraigned as a predicate. He was never arraigned.

THE COURT: You can arraign him. He is objecting to it but I'm going to find him a predicate.

THE CLERK: Mr. Pitts, the District Attorney's Office has filed a statement alleging that you have been previously convicted of a felony. The statement sets forth the date and place of the felony conviction. Have you had an opportunity to read that statement?

THE DEFENDANT: Yes.

THE CLERK: The statement reads as follows. On October the 20th, 2009, in the Supreme Court of New York, the County of Kings, the defendant was convicted of assault in the second degree, Penal Law 120.05(3), a violent felony as that term is defined in Penal Law 70.02(1). Sentence upon that conviction was imposed on December 1st, 2009.

The ten year period referred to in the Penal Law

70.06(1)(b)(v) is extended by the defendant's incarceration at New York State Department of Corrections and Community Supervision from June 15th of 2010 to May 16th of 2013.

Now, Mr. Pitts, are you the person named in that statement?

THE DEFENDANT: I am.

THE CLERK: Is this statement in fact true and accurate?

THE DEFENDANT: It's also true and accurate under the Penal Law. I stated subdivision four and five. So, 2009 and 2013 -- I mean.

THE COURT: You have made that record.

THE DEFENDANT: It's beyond the ten year statute.

THE COURT: I hear you. You have made the record. It would be an appealable issue.

But I find him to be a predicate.

THE CLERK: Okay.

THE COURT: Now, do you want to say anything more on sentence?

THE DEFENDANT: Yeah.

THE COURT: Counsel, Mr. Cherchian.

MR. CHERCHIAN: Your Honor, if your Honor heard what I said, that's more than sufficient. I don't need to repeat it. Thank you.

THE COURT: Well, the People are asking for the

minimum and you are, obviously, not objecting to that.

MR. CHERCHIAN: No. And I would actually argue that that's a very appropriate sentence.

THE COURT: Well, it's the minimum, Mr. Pitts. I know you are looking at your lawyer. That's the minimum --

Mr. Pitts, do you want to say anything further before I sentence you?

THE DEFENDANT: Yes, your Honor. With respect to PSI report --

THE COURT: Yes.

THE DEFENDANT: -- page seven of ten. There was never any mention of the defendant's culpability with respect to 730. So I ask you to just not include any -- not consider anything with respect --

THE COURT: I'm not considering that.

THE DEFENDANT: With the mental health history.

THE COURT: I'm not considering that.

THE DEFENDANT: Also, the criminal record, we did a Sandoval. And as you can see, if you look at that, all the information from the Sandoval you discredited --

THE COURT: Yeah. But I discredited that for the trial. That doesn't mean it can't go into the probation report.

THE DEFENDANT: Okay.

THE COURT: It's not -- excuse me.

It's not precluded for the probation report, okay.

THE DEFENDANT: I ask you not to consider my 2000 -- well, my 1992 felony convictions because those are Youth Offender adjudicated.

THE COURT: Okay.

THE DEFENDANT: And all of the other charges are pretty much controlled substance, marijuana charges that are also from --

THE COURT: I'm only considering this case that I tried you on.

THE DEFENDANT: All right.

THE COURT: Obviously, this was a very troubling case. The facts were an unprovoked attack on a subway of a person who was just coming back from work. And he was injured. And he was credible. And you were found guilty. So, the People are asking for the minimum. And I will go along with that, five years.

Is there post release on this?

MR. BESHAY: Yes, Judge. The People are asking for five years post-release supervision.

THE COURT: Five post-release supervision.

MR. BESHAY: As well as a full and final order of protection.

THE COURT: Yes. I have the order of protection.

Obviously, these two people were strangers to each

other.

MR. BESHAY: I understand, Judge.

THE COURT: But based on the complainant's -- the fact that he does travel the subways I will issue an order of protection.

MR. BESHAY: Thank you, Judge.

THE COURT: And I know that there are mandatory surcharges. Do you wish me to enter judgment on that?

MR. CHERCHIAN: Your Honor, could you defer it until the defendant has left incarceration. I would make the argument that it's an equal protection issue here.

THE COURT: Okay. If you want me to defer, you have to make a -- I will enter judgment. But if you are deferring sentence, I need a motion on that.

MR. CHERCHIAN: Very good.

THE COURT: So enter your motion in writing.

THE DEFENDANT: Your Honor, I'd ask for civil judgment, please.

MR. CHERCHIAN: Okay.

THE DEFENDANT: Civil judgment and waive the surcharges.

MR. CHERCHIAN: So, he wants the judgment entered. I agree with that.

THE COURT: I will enter judgment.

MR. CHERCHIAN: Okay.

Now, your Honor, I have two other matters very briefly. If I may rise, I'm sorry.

THE COURT: Why? It's hard to hear you when you are standing up.

MR. CHERCHIAN: All right, your Honor. So I have two things. First of all, I have a request that the defendant be adjudicated a poor person. And I have a order for your Honor granting defendant's poor person relief on appeal.

I should note two things. First of all, my client is indeed indigent. Secondly, he has asked me and told me to file a notice of appeal. So those are covered. And, your Honor, I need one for the clerk and one for the file.

THE COURT: Granted. Granted.

MR. CHERCHIAN: Thank you.

Now, your Honor, just to make things a little bit quicker, I have a notice of appeal with today's date, et cetera. I'm giving a courtesy copy to my client.

THE COURT: Okay.

MR. CHERCHIAN: I am serving the People.

THE COURT: Okay.

MR. CHERCHIAN: And the original goes with the court file.

(Handing.)

THE COURT: Do I have to sign anything?

Okay.

And give the clerk his notice of appeal.

(Handing.)

Okay. All signed.

Everything you've asked for I have granted.

MR. CHERCHIAN: Thank you, Judge.

THE COURT: Okay. Thank you.

*****

Certified to be a true and accurate transcript.

Sue-Lynn Irving
Sue-Lynn Irving
Senior Court Reporter

Exhibit C

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY : CRIMINAL TERM

- ----------x

THE PEOPLE OF THE STATE OF NEW YORK :

Respondent, : Notice of Constitutional Challenge to a Statute

-against- :

STEVEN P. PITTS, : Ind. No. 1614/2020

Defendant. :

- ----------x

TAKE NOTICE that the CPL § 440.20 motion in the above-captioned case implicates the constitutionality of CPL § 400.15(7) and 400.16(2), which denies a defendant the right to have a jury decide facts that enhance the statutory minimum and maximum sentence beyond the sentence authorized by the jury's verdict. A copy of defendant's motion and appendix, filed on April 22, 2022, is attached to this notice. CPLR § 1012(b); Executive Law § 71.

Dated: New York, New York
April 17, 2023

From:
Jenay Nurse Guilford
Attorney for Defendant-Appellant
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TO:
Office of the Attorney General
Solicitor General - Department of Law
The Capitol
Albany, New York 12224

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 66

THE PEOPLE OF THE STATE OF NEW YORK -against- Steven Pitts, Defendant.	PEOPLE'S RESPONSE TO DEFENDANT'S MOTION TO SET ASIDE SENTENCE UNDER CPL § 440.20 Docket No. 01614/2020

ANDREW TRUEHEART, an attorney admitted to practice before the Courts of this State, affirms under penalty of perjury that:

1. I am an Assistant District Attorney in the New York County District Attorney's Office and am assigned to the prosecution of the above-captioned case. I submit this affidavit and memorandum of law in response to defendant's motion to set aside his sentence under CPL § 440.20 on the grounds that the sentencing procedure under CPL § 400.15(7) and 400.16(2) violate his Sixth Amendment rights. The Court should DENY defendant's motion because sentence enhancements based on prior convictions are a recognized exception to the general Sixth Amendment rule that a fact which enhances a sentence beyond a statutory maximum must be submitted to a jury, and the tolling calculation for periods of incarceration is not the type of determination sufficiently divorced from fact-finding about a prior conviction so as to fall under the general Sixth Amendment rule.

2. This affirmation is made upon information and belief, the sources of which are the court records, and the files maintained by the District Attorney's Office.

FACTUAL BASIS

3. On October 20, 2009, in the Supreme Court of New York, King's County, defendant was convicted of Assault in the Second Degree, PL § 120.05(3), a violent felony. A sentence of six months imprisonment and five years probation was imposed for this conviction on December 1, 2009. Defendant was resentenced to four years prison and three years post-release supervision on a violation of probation in connection with this conviction on June 2, 2010.

4. In connection with the forementioned sentence, defendant was incarcerated in a New York State Department of Corrections and Community Supervision facility from June 15, 2010, to May 16, 2013.

5. On November 2, 2020, defendant was arrested inside the 72nd Street subway station after punching Barry Segal, a 71 year old man, in the face twice while riding on a downtown train.

6. On November 3, 2020, defendant was arraigned in Criminal Court under docket number CR-020367-20NY charging defendant with Assault in the Second Degree, PL § 120.05(12), for his conduct on the day before.

7. On November 6, 2020, after hearing evidence concerning defendant's actions on November 2, 2020, the grand jury indicted defendant on charges of Assault in the

Second Degree, PL § 120.05(12), and Assault in the Third Degree, PL § 120.00(1); under indictment number 01614/2020.

8. On January 27, 2022, following a trial, a jury convicted defendant of one count of Assault in the Second Degree, PL § 120.05 (12), a violent felony; and one count of Assault in the Third Degree, PL § 120.00(1); for his conduct on November 2, 2020.

9. Under PL § 70.04(1)(a), a second violent felony offender is a person who stands convicted of a violent felony offense…after having previously been subjected to a predicate violent felony conviction as defined in PL § 70.04(1)(b).

10. Under PL § 70.04(1)(b), a predicate violent felony conviction is one that is for a violent felony offense; "sentence upon which must have been imposed before the commission of the present felony[;]" and, except as provided in PL § 70.04(1)(b)(v), the sentence "must have been imposed not more than ten years before commission of the felony for which defendant is presently convicted." PL § 70.04(1)(b)(i-iv).

11. Under PL § 70.04(1)(b)(v), "any period of time during which defendant was incarcerated for any reason between the commission of the previous felony and the commission of the present felony" is excluded from the ten-year period mentioned above.

12. Under CPL §§ 400.15(4) and (7), the determination of whether a defendant is a second violent felony offender, including whether there is tolling for a period of incarceration, is made by the Court without a jury.

13. For a convicted individual without a prior felony conviction, the allowable range for a sentence of imprisonment on an Assault in the Second Degree conviction under PL § 120.05(12) is two to seven years. PL § 70.02(3)(c).

14. For a second violent felony offender, the allowable range for a sentence of imprisonment on an Assault in the Second-Degree conviction under PL § 120.05(12) is five to seven years. PL § 70.04(3)(c).

15. On March 28, 2022, the Court found defendant to be a second violent felony offender under PL § 70.04(1)(b) based on defendant's 2009 conviction for Assault in the Second Degree, PL § 120.05(3), and defendant's incarceration from June 15, 2010, to May 16, 2013. The Court then sentenced defendant to five years prison and five years post-release supervision upon his January 27, 2022, conviction at trial for Assault in the Second Degree, PL § 120.05(12). During this proceeding, defendant raised objections to the tolling calculation on other grounds unrelated to the challenges he raises here.

16. Defendant now asks this Court to vacate his sentence because he claims that the Sixth Amendment requires a jury to make the determination that his previous periods of incarceration make him a second violent felony offender.[1] Defendant's argument lacks merit because sentence enhancements based on prior convictions are a recognized exception to the general Sixth Amendment rule that a fact which enhances a sentence beyond a statutory maximum must be submitted to a jury, and the tolling calculation for

[1] Defendant's five year sentence of imprisonment still falls within the maximum sentence range allowable for an individual without a previous conviction convicted of Assault in the Second Degree, PL §120.05(12). Defendant's sentence of five years post-release supervision exceeds the maximum sentence range under those circumstances.

periods of incarceration are not the type of determination sufficiently divorced from fact-finding about a prior conviction so as to fall under the general Sixth Amendment rule.

MEMORANDUM OF LAW

Under the Sixth Amendment right to a trial by jury, "*[o]ther than the fact of a prior conviction,* any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)(emphasis added). In specifically exempting the fact of a prior conviction from this general rule, the Court recognized that "recidivism… is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence[,]" and that "the certainty that procedural safeguards attached to any 'fact' of prior conviction" mitigates "the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range." *Id.* at 488 (citing *Jones v. United States*, 526 U.S. 227 (1999)).

Here, defendant's sentence was imposed in accordance with PL § 70.04 which authorizes enhanced sentences for persons "convicted of a violent felony offense … after having been subjected to a predicate violent felony conviction." PL § 70.04(1)(a). Because PL § 70.04 subjects defendant to an enhanced sentence solely on the basis of his prior conviction, it falls within the exception to the general Sixth Amendment rule recognized in *Apprendi*. In fact, New York Courts have repeatedly upheld this sentencing

structure against *Apprendi* challenges. *see People v. Toogood*, 19 A.D.3d 278, 278 (1st Dept. 2005) (upholding the constitutionality of defendant's sentence as a persistent felony offender under PL § 70.08, which uses the same criteria, enumerated in PL § 70.04(b), to define predicate felony convictions as PL § 70.04); *People v. Boyer*, 15 AD.3d 192, 193 (1st Dept. 2005), rev'd on other grounds, 6 N.Y.3d 427 (2006); *People v. Bonilla*, 15 A.D.3d 234, 235 (1st Dept. 2005).

Faced with clear jurisprudence upholding the constitutionality of defendant's sentence based on his prior conviction, defendant argues that his sentence is unconstitutional because it required the judge to find additional facts about his prior convictions, namely that he was incarcerated from June 15, 2010, to May 16, 2013.

However, determining a defendant's period of incarceration "is not the type of determination which is sufficiently divorced from fact-finding as to a prior conviction to bring it within reach of *Apprendi*'s general rule requiring … a jury's finding beyond a reasonable doubt." *People v. Miles*, 5 Misc. 3d 271, 284 (Sup. Ct., N.Y. Co. 2004). This is because facts like these are "open, notorious and on a secure record, and are the types of records that may be judicially noticed." *People v. Cephas*, 2003 N.Y. Slip Op. 51068(U) at n.11 (Sup. Ct., N.Y. Co. 2003), aff'd 26 A.D.3d 259 (1st Dept.), lv. denied, 7 N.Y.3d 753 (2006). As such, fact finding establishing the period of incarceration "involves no exercise of discretionary judgment by the court, and relate neither to the manner and circumstances of the commission of the crime, nor to the character and background of the defendant[,]" the type of judicial fact-finding that concerned the *Apprendi* court

when reaching their holding. *People v. Miles*, 5 Misc 3d at 757-58; *see Apprendi,* 530 US. 466 at 496. Rather , this fact finding is more akin to the ministerial act, based on official court and corrections records, of determining when a conviction occurred - fact finding that clearly does not run afoul of *Apprendi*. Because the determination of a defendant's period of incarceration is not divorced from fact-finding about a prior conviction, the sentencing structure under which the defendant was sentenced does not violate the Sixth Amendment.

CONCLUSION

Wherefore, it is respectfully requested that the defendant's motion should be **DENIED**.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

-against-

Steven Pitts,

Defendant.

PEOPLE'S RESPONSE TO DEFENDANT'S MOTION TO SET ASIDE SENTENCE UNDER CPL § 440.20

DOCKET NO. 01614/2020

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Supreme Court
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State of New York

Part 66 - New York County

The People of the State of New York

INDICTMENT: 1614-20

-against-

MOTION FOR CPL §440.20

Steven Pitts

CALENDAR DATE: July 12, 2023

Defendant

ORDERED that upon the papers submitted, this motion is hereby

GRANTED _____

*DENIED ✓

*The Court adopts the reasoning in the NY County District Attorney's response to this motion. (see attached)

Date: 9/12/2023 Hon. R. P.

HON. RUTH PICKHOLZ

To be argued by Mark W. Zeno
(10 minutes oral argument requested)

Appellate Division - First Department

State of New York

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

STEVEN PITTS,

Defendant-Appellant.

ACNS: 2022-01617
2023-04854

NY Ind. 1614/2020

DEFENDANT-APPELLANT'S BRIEF

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November 28, 2023

The People's evidence did not contradict Mr. Pitts' story. Again, there were no cameras on the train to document the alleged incident (TR2 59). Samsuddin's testimony and body-camera footage supports Mr. Pitts' testimony that he encountered the police at the 72nd Street station (TR2 50-51, 57). Mr. Pitts' testimony that he previously encountered complainant and was verbally accosted by him suggests that complainant had motive to accuse Mr. Pitts of attacking him. The only evidence that challenged Mr. Pitts' account was complainant's testimony. In other words, this was a case of "he said versus he said" (TR2 88). Weighed against complainants uncorroborated story, Mr. Pitts' testimony raised reasonable doubt of his guilt.

The court's verdict finding Mr. Pitts guilty of assault was against the weight of the evidence because complainant's testimony was the only evidence implicating Mr. Pitts and Mr. Pitts offered a plausible version of events that established his innocence. For the reasons stated, Mr. Pitts' conviction should be vacated and the charges dismissed.

Point V

The sentence violated the Sixth Amendment and must be set aside because the court, and not a jury, decided that Mr. Pitts sentence should be enhanced because he'd been convicted in the preceding ten years of a violent felony.

Under Penal Law § 70.04(1)(b)(iv), a predicate conviction cannot justify a second-violent-felony-offender sentence unless the predicate sentence was imposed within ten years of the present offense's commission. *See also* Penal Law § 70.04(2).

Under Penal Law Article 70's "tolling" provisions, the "period of time during which the person was incarcerated" tolls the 10-year-look-back period. *Id.* Under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), Mr. Pitts had a constitutional right to have a jury decide the factual "tolling" question-that is, the length of the "period of time during which [he] was incarcerated." Penal Law § 70.04(1)(b)(v). Because that question was resolved by the court and not the jury, that adjudication and subsequent sentence was unlawful and must be vacated. Had Mr. Pitts been sentenced as a first felony offender, the minimum sentence would have been two years, not five. Penal Law § 120.05, § 70.02(3)(c), § 70.04(3)(c).

The right to a jury is fundamental. *Ramos v. Louisiana*, 590 U.S.-, 140 S.Ct. 1390 (2020). To protect the jury right, the framers guaranteed—and the Supreme Court has repeatedly enforced—a "bright-line" rule. *Blakely v. Washington*, 542 U.S. 296, 308 (2004). The jury right extends to findings that increase the punishment imposed following a criminal conviction. Under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny, "[i]f 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." *United States v. Booker*, 543 U.S. 220, 231 (2005) (*quoting Ring v. Arizona*, 536 U.S. 584, 602 (2002)); *Alleyne v. United States*, 570 U.S. 99, 107-08 (2013) ("[A] fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise

legally prescribed"); *Cunningham v. California*, 549 U.S. 270, 290 (2007) ("If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied."); *Blakely*, 542 U.S. at 308 (the framers did not "trust government to mark out the role of the jury" and thus did not leave the "definition of the scope of jury power up to judges' intuitive sense of how far is too far").

For *Apprendi* jury-right purposes, there is no distinction between "elements" and "sentencing factors." *Apprendi*, 530 U.S. at 494. The "relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* Labeling a finding a "'sentence enhancement' . . . does not provide a principled basis for treating [facts] differently." *Id.* at 476; *see also Haymond*, 139 S.Ct. at 2379 ("Our precedents . . . have repeatedly rejected efforts to dodge the demands of the . . . Sixth Amendment[ ] by the simple expedient of relabeling a criminal prosecution a 'sentencing enhancement.' Calling part of a criminal prosecution a 'sentence modification' imposed at a 'postjudgment sentence-administration proceeding' can fare no better. As this Court [i.e., the Supreme Court] has repeatedly explained, any 'increase in a defendant's authorized punishment contingent on the finding of a fact' requires a jury and proof beyond a reasonable doubt "no matter" what the government chooses to call the exercise.'"). There is no constitutional distinction, as far as the jury right goes,

between "facts concerning the offense" and "facts concerning the offender." *Cunningham*, 549 U.S. at 291 n.14.

The *Apprendi* rule applies to any fact necessary to enhance the statutory minimum beyond that authorized by the jury's verdict. *Alleyne v. United States*, 570 U.S. 99 (2013). A violation of these jury guarantees not "only infringe[s] the rights of the accused; it also divest[s] the 'people at large—the men and women who make up the jury of a defendant's peers—of their constitutional authority to set the metes and bounds of judicially administered criminal punishment." *Haymond*, 139 S.Ct. at 2378-79.

That recognizing this jury right will require a more time-consuming process provides no grounds for finding it not constitutionally required. Juries are meant to ensure fairness, not efficiency. *Haymond*, 139 S.Ct. at 2384. ("[T]he jury system isn't designed to promote efficiency but to protect liberty. In what now seems a prescient passage, Blackstone warned that the true threat to trial by jury would come less from 'open attacks,' which 'none will be so hardy as to make,' as from subtle 'machinations, which may sap and undermine i[t] by introducing new and arbitrary methods. . . . [D]elays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters.")

Mr. Pitts was subjected to an enhanced sentence in violation of *Apprendi*. Mr. Pitts was convicted of assault in the second degree, a class-D violent felony. The

People sought to enhance his sentence by having him adjudicated a second violent felony offender. The minimum sentence for a person convicted of a class-D violent felony is two years. Penal Law § 70.02(3)(c). The minimum sentence for a person who is a second violent felony offender and is convicted of a class-D violent felony is five years. Penal Law § 70.04(3)(c). The prosecution alleged that Mr. Pitts was a second violent felony offender because he had previously been convicted of assault in the second degree on December 1, 2009, in Kings County (exhibit A, Statement of Predicate Violent Felony Conviction). To justify a second-violent-felony- offender sentence, the prosecution had to establish that the current November 2, 2020 offense was committed within ten years of the December 1, 2009 sentence. Penal Law § 70.04(1)(b).

Because more than ten years elapsed between those dates, the prosecution was required to show tolling. To make this necessary "tolling" showing, the prosecution had to establish that Mr. Pitts was, during that approximately 11-year period, incarcerated for at least 336 days. The prosecution alleged that Mr. Pitts was incarcerated for 1066 days during that period (June 15, 2010 to May 16, 2013).

Mr. Pitts had a Sixth Amendment and Article I § 2 right to have a jury decide whether he had been incarcerated for the requisite number of days between his 2009 assault conviction and the commission of this 2020 offense. That "tolling" fact was "necessary to support a sentence [drastically] exceeding the maximum [and minimum]

authorized by the . . . jury verdict." *Booker*, 543 U.S. at 244; compare Penal Law § 70.02(3)(b) (authorizing a determinate sentence for a first-violent felony offender of 2 years to 7 years in prison) with Penal Law § 70.04(3)(c) (authorizing a determinate sentence for a person found to be a second violent felony offender of 5 years to 7 years).

"That should be the end of the matter." Blakely, 542 U.S. at 313. Section 400.15(7)(a) of the Criminal Procedure Law, which barred a jury trial to resolve this tolling question here, is unconstitutional. *See also* CPL § 400.16(2) (incorporating by reference CPL § 400.15(7)(a), which states that "a hearing pursuant to this section must be before the court without jury."). Although the label used to describe the tolling question is irrelevant, *Apprendi*, 530 U.S. at 476; *Cunningham*, 549 U.S. at 291 n.14, the tolling question presented a classic question of historical fact within the jury's domain. To find tolling, the factfinder had to determine whether Mr. Pitts was in state custody for a particular number of days. This was a question of fact that, under the Constitution, had to be resolved by the jury.

Point VI

Because assault in the third degree is a lesser included offense of assault in the second degree, the jury's verdict convicting Mr. Pitts of assault in the third degree—upon which sentence was never imposed—should be dismissed.

Mr. Pitts was indicted for assault in the second degree under Penal Law § 120.05(12) and assault in the third degree. Penal Law § 120.00(1). Assault in the

To be argued by
ANNA NOTCHICK
(10 MINUTES REQUESTED)

New York Supreme Court

Appellate Division - First Department

Ind. No. 1614/2020
Appellate Case Nos. 2022-01617,
2023-04854

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

STEVEN PITTS,

Defendant-Appellant.

On Appeal from the Supreme Court of the State of New York, New York County

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[defendant] to have an interest in the outcome of the trial" (DB at 40). Put simply, in making this argument, defendant ignores the portion of the court's instruction that specifically noted that the jurors should consider whether any witness was "interested in the outcome of the trial for *one side or the other*" (T: 108) (emphasis added). Because it is hard to imagine a world where the defendant would be an interested witness for the People, the court's instructions clearly allowed for the jury to consider the People's witnesses—i.e., Segal and Samsuddin—to be interested as well.

Contrary to defendant's claims that he was prejudiced by the allegedly improper interested witness charge (DB at 41), the evidence of his guilt was overwhelming and the jury rightly rejected his testimony. This is not a case of simple "he-said-he-said" as defendant contends (DB at 41). This is, instead, a case where the latter he-said's story is contradicted by video proof. The jury would have rejected defendant's testimony regardless of the interested witness charge.

In short, the court's interested witness charge was entirely proper.

POINT V

DEFENDANT'S CLAIM THAT THE SIXTH AMENDMENT REQUIRED A JURY, NOT THE COURT, TO DECIDE WHETHER HE WAS IN FACT INCARCERATED BETWEEN JUNE 15, 2010, AND MAY 16, 2013, IS MERITLESS (Answering DB, Point V).

Under Penal Law § 70.04, a defendant who stands convicted of a violent felony offense after having previously been convicted of such an offense may be sentenced as a second violent felony offender if he was sentenced on the prior conviction within ten

years of committing the instant crime. Importantly, in calculating whether ten years elapsed between sentencing on the prior conviction and the commission of the instant offense, "any period of time during which the person was incarcerated for any reason … shall be excluded" (Penal Law § 70.04[1][b][v]). The ten-year clock is thus "tolled" for the period of time that the defendant was incarcerated.

The crime in this case occurred on November 2, 2020. Before trial, the People filed a predicate felony statement alleging that just over eleven years earlier, on October 20, 2009, defendant was convicted of second-degree assault (Penal Law § 120.05[3]) and was incarcerated for that offense for just under three years from June 15, 2010, to May 16, 2013. At sentencing, defendant admitted that by 2014 he had been released after serving three years in prison. Accordingly, Justice Pickholz sentenced defendant as a second violent felony offender.

On appeal, defendant does not deny that he is a second violent felony offender under New York law. But, citing *Apprendi v. New Jersey*, 530. U.S. 466 (2000), and its progeny, defendant claims that the Sixth Amendment required a jury to determine whether he had in fact been incarcerated between June 15, 2010, and May 16, 2013, so as to bring his 2009 conviction within the ten-year "lookback" window. That claim is meritless.

Indeed, this Court has already rejected that very claim. Specifically, in *People v. Caldwell*, the defendant claimed that, under *Apprendi*, he was entitled to have a jury find the dates of his incarceration for his prior violent felony convictions in order to

determine whether those convictions fell within the ten-year lookback period.[12] This Court held that the defendant's "challenge to the constitutionality of his persistent violent felony offender adjudication [was] without merit." *Caldwell*, 74 A.D.3d 676, 676 (1st Dept. 2010). Other courts have likewise rejected *Apprendi* challenges to the tolling determinations. *See People v. Washington*, 26 A.D.3d 400 (2d Dept. 2006), *federal habeas petition denied*, *Washington v. Graham*, 2007 WL 3197335, at *5-6 (E.D.N.Y. Oct. 26, 2007), *aff'd*, 355 F. Appx. 543 (2d Cir. 2009).

There is no reason for this Court to reach a different conclusion in this case. The determination of the period of time during which defendant was incarcerated involves no question of discretion, and does not implicate the Due Process concerns at issue in *Apprendi*. *Cf. Apprendi*, 530 U.S. at 487-488. Calculating the extension of a ten-year period from the date of defendant's commission of his new offense based on periods of incarceration is nothing more than a "ministerial act" requiring the court to reference official court and corrections records, both of which possess "substantial trustworthiness." *People v. Miles*, 5 Misc. 3d 271, 283 (Sup. Ct. N.Y. County 2004). The date of a prior conviction and subsequent terms of imprisonment are matters that can be determined with a high degree of reliability by examination of public records, and are facts of the conviction itself. *See id.* at 283-84. Indeed, as one court noted, such records concerning the duration of a defendant's past sentences and the time actually

[12] The People's brief in *Caldwell* will be provided to this Court upon request.

served are "open, notorious and on a secure record," and are of the types of records that may be judicially noticed, even at a jury trial. *People v. Cephas*, 2003 N.Y. Slip Op. 51068U, n. 11 (Sup Ct. N.Y. County 2003), *aff'd.* 26 A.D.3d 259 (1st Dept. 2006).

In contrast, *Apprendi* concerns are implicated when a judge makes findings involving facts of a subtler variety, generally about the nature and circumstances of a crime. For example, in *Apprendi*, the judge made a finding about whether a crime was motivated by racial bias, 530 U.S. at 470-71. And, in *Blakely*, the Supreme Court held that the maximum sentence could not be enhanced upon a judicial finding of "deliberate cruelty." 542 U.S. 296, 313-14 (2004); *see also Cunningham v. California*, 549 U.S. 270 (2007) (holding unconstitutional a California statute allowing an elevated sentenced based on a judicial finding of aggravating factors regarding the crime); *Ring v. Arizona*, 536 U.S. 584 (2002) (holding that a jury must find aggravating circumstances requiring capital punishment). Plainly, the date of a prior conviction and a defendant's incarceration time do not resemble these critical factors regarding the severity of the crime for which a defendant faces sentencing.

More fundamentally, in this particular case, there was no factual dispute that a jury needed to resolve. Of course, the role of a jury is fact-finding. At the sentencing proceeding, defendant admitted that he was the individual named in the predicate felony statement and that the statement was "true and accurate" (S: 13). Defendant never disputed that he was incarcerated for three years between his 2009 conviction and his arrest in 2020. In fact, he admitted that he "served three years" and "was no longer

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June 25, 2024

Hon. Rowan D. Wilson
Chief Judge of the Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207

Re: People v. Pitts (Steven)
CLA 2024-00520

Dear Chief Judge Wilson:

Appellant, Steven Pitts, seeks this Court's review of his conviction and sentence.

Summary of the leave-worthy issue

While this appeal presents a number of issues warranting review (*see* page 6, *post*), one is particularly urgent in light of the Supreme Court's decision last week in *Erlinger v. United States*, -U.S.-, 2024 WL 3074427 (June 21, 2024):

> whether NY's recidivist sentencing statutes, which require judges rather than juries to calculate the factual tolling period exclusion for time spent incarcerated between convictions to determine whether a prior conviction occurred within the ten-year period preceding the current offense, violates a defendant's Sixth Amendment right to a jury trial.

New York's recidivist sentencing statutes impose enhanced punishments for persons previously convicted of felonies only when sentence was imposed on the prior felony or felonies not more than ten years before the commission of the present

felony.[1] The running of the ten-year period is tolled while the person was incarcerated for any reason. *E.g.*, Penal Law § 70.04(1)(b)(v). Where the prosecution seeks to use a prior conviction when sentence was imposed more than ten years before the commission of the present felony, the tolling determination "must" be made "before the court without a jury." CPL § 400.15(7)(a); *see also* parallel provisions in CPL § 400.16(2); & CPL §400.21(7)(a).

Here, the prosecution contended that Mr. Pitts was a second violent felony offender on the basis of a prior felony conviction where sentence was imposed more than ten years prior to the commission of the current offense (*See* exhibit A, Statement of Prior Violent Felony Conviction). The prosecution contended that the ten-year period was tolled while Mr. Pitts was incarcearted, reducing the period between the prior sentence and the commission of the current offense to less than ten years (*id., see also* exhibit B, transcript of sentencing at p. 8). The court found that Mr. Pitts was a second violent felony offender and sentenced him accordingly (exhibit B at 15).

Apprendi v. New Jersey held that the Sixth Amendment right to a jury trial extends to determining any fact—other than the fact of a prior conviction—that increases the range of penalties that may be imposed. 530 U.S. 466 (2000). *Erlinger* held, as addressed more fully below, that there is no exception to the jury-trial requirement for sentence enhancements for facts that may be determined from official court or department of corrections' records. *Erlinger*, -U.S.-, _, 2024 WL 3074427, at *8. The resolution of any factual question beyond the existence of a prior conviction itself requires a jury trial, a point the Supreme Court has made, "'over and over' to the point of 'downright tedium.'" *Erlinger*, -U.S.-, _, 2024 WL 3074427, at *9.

Under *Erlinger* the tolling determination must be made by a jury and not a judge. Because this rule impacts every recidivist sentence where the prior sentence was imposed more than ten years before the commission of the current offense and the defendant did not expressly concede tolling, this issue is of urgent statewide importance.

[1]Penal Law § 70.04(1)(b) (second violent felony offender) § 70.06(1)(b) (second felony offender); § 70.08(1)(b) (persistent violent felony offender); § 70.70(1)(b)(second felony drug offender); § 70.70(1)(c) & *People v. Yusuf*, 19 N.Y.3d 314 (2012)(second felony drug offender whose prior violent felony conviction was a violent felony).

The facts of this appeal

Mr. Pitts was convicted of assault in the second degree, a violent felony offense, that occurred on November 2, 2020. The prosecution filed a statement of predicate violent felony conviction, alleging that Mr. Pitts had previously been convicted of assault in the second degree, a violent felony, on December 1, 2009 (exhibit A). Because the period between the imposition of sentence on the prior conviction and the commission of the current offense was 336 days more than ten years, the prosecution alleged that the ten-year period was tolled for 1066 days between June 15, 2010 and May 16, 2013.

At sentencing, Mr. Pitts personally objected to the tolling calculation, but not on the grounds that it violated his right to a jury trial (exhibit B, at 5-8, 12-13). When asked by the court whether the predicate statement, including the tolling allegation, was true and accurate, Mr. Pitts stated, "It's beyond the ten year statute" (*id.* at 13). The court told Mr. Pitts he'd "made the record," found him to be a second violent felony offender, and sentenced him as a second violent felony offender (*id.*, at 13, 15).

Mr. Pitts challenged the tolling determination in a CPL § 440.20 motion. He argued, as he does here, that New York's procedure for assigning the tolling determination to a judge rather than a jury violated his Sixth Amendment right to have a jury decide facts necessary to enhance his sentence beyond the sentence justified by the jury's verdict (exhibit C, Affirmation in Support at p. 1-2, ¶ 13, Memorandum of Law).

The prosecution opposed, arguing that the Penal Law and Criminal Procedure Law provisions assigning the task of determining tolling to a judge were "not the type of determination which is sufficiently divorced from fact-finding as to a prior conviction to bring it within the reach of *Apprendi's* general rule requiring ... a jury's finding beyond a reasonable doubt" (exhibit D, Respondent's opposition to CPL § 440.20 motion at p. 6).

The court denied the motion, ruling, "The Court adopts the reasoning in the NY County District Attorney's response to this motion" (exhibit E).

The Appellate Division granted leave to appeal the denial of the CPL § 440.20 motion. In a consolidated appeal, the Appellate Division affirmed Mr. Pitts' conviction and the denial of the motion to set aside the sentence. The court found that Mr. Pitt's "challenge to the constitutionality of his second violent felony offender

adjudication [wa]s 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])."

Analysis of the leaveworthy issue

Because the Sixth Amendment requires that any factual determination that enhances a defendant's sentence range—other than the fact of a prior conviction—must be made by a jury and not a judge, the Criminal Procedure Law's allocation of tolling determinations to a judge violates the Sixth Amendment.

A defendant has a Sixth Amendment right to have factual questions necessary to determine whether a recidivist sentencing enhancement applies decided by a jury and not a judge:

> 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). *Erlinger*, -U.S.-, _, 2024 WL 3074427, at *8, *quoting Apprendi v. New Jersey*, 530 U.S., 466, 490 (2000).

The only exception to this rule is the "narrow" one identified in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998): "a judge may do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." *Erlinger*, -U.S.-, _, 2024 WL 3074427, at *10, *quoting Mathis v. United States*, 579 U.S. 500, 511-12 (2016).

The prosecution argued below that a defendant has no right to have a jury calculate the amount of time tolled between two dates, because it is "nothing more than a 'ministerial act' requiring the court to reference official court and corrections records, both of which possess substantial trustworthiness," and "can be determined with a high degree of reliability by examination of public records, and are facts of the conviction itself (Respondent's Appellate Division Brief at 49, *citing People v. Miles*, 5 Misc.3d 271, 283 (Sup. Ct., NY Cty. 2004).

Erlinger found otherwise. There is no exception to the jury-trial requirement for facts that may be determined from official court or department of corrections' records. *See Erlinger*, -U.S.-, _, 2024 WL 3074427, at *8. Erlinger pleaded guilty to being a felon in possession of a firearm. At sentencing, the judge found him eligible for an enhanced sentence under the Armed Career Criminal Act, which increased the penalty from a maximum sentence of ten years to a mandatory minimum of 15 years

because he'd previously been convicted of three or more qualifying convictions committed on different occasions. Erlinger argued that the question of whether he committed the offenses—burglaries committed over the course of several days—on different occasions required a jury to decide.

In *Erlinger*, the government conceded on appeal that the factual determination of whether the prior offenses were committed on different occasions had to be made by a jury. -U.S.-, _, 2024 WL 3074427, at *8 ("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," *quoting Apprendi*, 530 U.S., at 490). The Supreme Court appointed counsel as amicus to argue the contrary position. Amicus argued that judges may look to and rely on what are called *Shepard* documents in the federal criminal legal system, which are documents that include judicial records, plea agreements, and colloquies between a judge and the defendant to make factual determinations without violating defendant's right to a jury trial. The Supreme Court disagreed. The fact that public records may be used to prove facts relevant to sentence does not expand the *Almendarez-Torres* exception. A judge may use information from those documents solely to determine the fact of a prior conviction and the then-existing elements of that offense. "No more is allowed." *Erlinger*, -U.S.-, _, 2024 WL 3074427, at *10.

The Sixth Amendment has no "efficiency exception." *Id.* at 11. Government-supplied documents are prone to error. *Id.* The risk of error is particularly severe when it comes to documents that have not been subjected to adversarial testing. "As a matter of fair notice alone, old recorded details, prone to error, sometimes untested, often inessential, and the consequences of which a defendant may not have appreciated at the time, 'should not come back to haunt [him] many years down the road by triggering a lengthy mandatory sentence.'" *Id.* That the inquiry may be straightforward "does not mean that a judge rather than a jury should make the call," no matter "how overwhelming" the evidence may seem. *Id.*

The tolling determination must be made by a jury and not a judge. Tolling does not qualify under the *Almendarez-Torres* exception because tolling is not "the fact of conviction," i.e., what the "crime, with what elements, the defendant was convicted of." *Erlinger*, -U.S.-, _, 2024 WL 3074427, at *10, *quoting Mathis v. United States*, 579 U.S. 500, 511-12 (2016). Tolling is a factual determination that must be made by a jury.

No procedural impediments

This appeal presents an appropriate vehicle for resolving this important question. Because Mr. Pitts did not waive this claim at sentencing, a CPL § 440.20 motion was an appropriate method to challenge the court's power to make the tolling determination. *People v. Jurgins*, 26 N.Y.3d 607, 611, & n.1 (2015) (holding that a defendant can raise an unpreserved challenge to the sentence in a CPL § 440.20 so long as it has not been specifically waived). More, because the prosecution did not oppose Mr. Pitt's motion on the grounds that a CPL § 440.20 motion was not the correct procedural vehicle for raising the jury-trial claim, and the court's denial of the motion was limited to the grounds raised in the prosecution's response, any challenge on that ground in this Court would be without jurisdiction. *People v. Francis*, 34 N.Y.3d 464, 469 (2020)(explaining that the *LaFontaine* rule limiting appellate jurisdiction to those issues decided adversely to appellant in the trial court is a "jurisdictional restriction on the appellate court's scope of review")

* * *

While there may have been room, before *Erlinger*, to argue that a judge could make the factual determination of whether a period has been tolled consistent with the Sixth Amendment, *Erlinger* has resolved that question. New York's recidivist sentencing procedure requiring the tolling question to be resolved by a judge violates the Sixth Amendment. But even if this Court were to ultimately conclude that it does not, this issue is in urgent need of review, calling into question the legality of every recidivist sentencing where the defendant's prior conviction occurred more than ten years before the commission of the offense for which the defendant is being sentenced.

In addition to the sentencing challenge, Mr. Pitts case presents the following additional leaveworthy issues as demonstrated in his Appellate Division briefs:

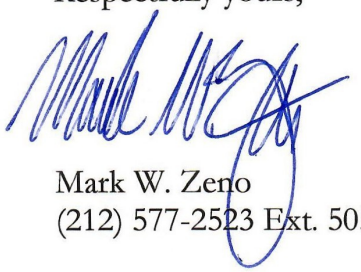
1. Whether counsel was ineffective in violation of the Sixth Amendment and New York State constitution for failing to secure Mr. Pitts his right to testify in the grand jury because there was no evidence that the failure was a strategic decision by counsel and Mr. Pitts was prejudiced by that failure.

2. Whether, by failing to conduct even a minimal inquiry into Mr. Pitts' repeated requests for new counsel throughout pretrial proceedings, the court infringed Mr. Pitts' Sixth Amendment and New York State constitutional rights.

3. Whether the court's interested-witness instruction undermined the presumption of innocence by identifying Mr. Pitts as the only person with an interest in the outcome of the case, an interest that could provide him with a motive to testify falsely.

For the foregoing reasons, and for the reasons stated in the briefs submitted to the Appellate Division, Your Honor should grant leave to appeal. We would welcome the opportunity to address these issues at a leave conference.

Respectfully yours,



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cc: Hon. Alvin L. Bragg, Jr.
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APPENDIX F

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ALVIN L. BRAGG, JR.
DISTRICT ATTORNEY

July 23, 2024

Honorable Rowan D. Wilson
Chief Judge of the Court of Appeals
New York Court of Appeals
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Albany, New York 12207-1095

Re: *People v. Steven Pitts*
N.Y. Co. Ind. No. 1614/2020
CLA-2024-00520

Dear Chief Judge Wilson:

I submit this letter in opposition to defendant's application for leave to appeal. Defendant urges that in light of *Erlinger v. United States*, __ S.Ct. __; 2024 U.S. LEXIS 2715 (June 21, 2024), this Court should review whether New York State's recidivist sentencing statutes, which require a judge rather than a jury "to calculate the factual tolling period exclusion for time spent incarcerated between convictions to determine whether a prior conviction occurred within the ten-year period preceding the current offense, violate[ ] a defendant's Sixth Amendment right to a jury trial" (Defendant's 06.25.2024 Letter: 1). Even assuming *arguendo* that this is a question that this Court wishes to answer, defendant's case does not present the proper vehicle for review. Here, defendant's prior violent felony conviction was just about a year beyond the 10-year look-back period for deeming it a predicate offense. And, defendant admitted in open court the three years of incarceration that tolled the 10-year look-back period and brought his prior conviction well within the requirements for deeming it a predicate offense for recidivist sentencing purposes. Defendant's admission obviates any possibility of a Sixth Amendment violation or, at the very least, renders any such error harmless.

The facts of this case can be recounted succinctly. On November 2, 2020, defendant, a 45-year-old man, spat on Barry Segal, a 71-year-old anesthesiologist, on an express downtown "3" train traveling between 96th and 72nd Streets in Manhattan, and soon afterward punched Segal in the face with a closed fist. A jury found him guilty of

both Assault in the Second Degree (Penal Law § 120.05[12]) and Assault in the Third Degree (Penal Law § 120.00[1]).

Prior to sentencing, the People alleged in a statement of predicate violent felony conviction (*see* CPL 400.15[2]) that defendant had been convicted of second-degree assault in 2009 and sentenced on that conviction on December 1, 2009. They further alleged that the 10-year look-back period for that prior conviction (*see* Penal Law § 70.04[1][b][iv]) was extended by defendant's incarceration from June 15, 2010, to May 16, 2013. At sentencing on March 28, 2022, defendant spoke for himself in apparently misconstruing the "tolling" aspect of Penal Law § 70.04 and claiming that the time between his sentence on the 2009 conviction and the commission of the current crime was longer than 10 years (*see* S: 6-7; *see also*, S: 4, 6).[1] But defendant admitted both that he had been convicted in 2009 (S: 5) and that he had "served three years" in prison (S: 7). Defendant's attorney, while not joining defendant's misconstruction of tolling (*see* S: 4, 6), also conceded that the period of incarceration included in the People's statement was "true" (S: 6). Neither defendant nor his attorney suggested that the question of tolling needed to be submitted to a jury. The court adjudicated defendant a second violent felony offender and sentenced him to five years' incarceration, to be followed by five years of post-release supervision. Defendant filed a notice of appeal to the Appellate Division, First Department.

On April 18, 2023, defendant also filed a CPL 440.20 motion in Supreme Court to vacate his sentence on the ground that he had the right to have a jury, not a judge, decide the tolling question. The People argued in response that the facts of a prior conviction were a recognized exception to the ruling in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny, that any fact—other than "the fact of a prior conviction"—that increases a defendant's minimum or maximum sentence must, under the Sixth Amendment, be submitted to a jury and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490; *see Alleyne v. United States*, 570 U.S. 99, 111-12 (2013). On September 12, 2023, the court denied defendant's motion and "adopt[ed] the reasoning in the NY County District Attorney's response." A justice of the Appellate Division granted defendant leave to appeal that ruling and consolidated that appeal with defendant's direct appeal.

On his consolidated appeal to the Appellate Division, defendant argued, in relevant part, that the Sixth Amendment required a jury, rather than a judge, to find that he was incarcerated between June 15, 2010, and May 1, 2013, in order for his 2009

[1] Parenthetical references to "S" refer to the sentencing proceeding.

conviction to qualify him for enhanced sentencing. On May 2, 2024, the Appellate Division unanimously affirmed defendant's conviction of second-degree assault and sentence, holding that defendant's "challenge to the constitutionality of his second violent felony offender adjudication [wa]s without merit." *People v. Pitts*, 208 N.Y.S.3d 187, 188 (2024).[2]

The following month, in *Erlinger*, the Supreme Court held that a sentencing court's authorization to determine the "fact of a prior conviction" did not extend so far as to allow a judge to determine whether a federal defendant's past offenses were committed on "separate occasions" in order to trigger an enhanced sentence under the Armed Career Criminal Act. *Erlinger*, __ S.Ct. __; 2024 U.S. LEXIS 2715, **22-23. Critically, *Erlinger* reaffirmed that there is no Sixth Amendment violation when the defendant admits the facts that otherwise would need to be proven to the jury. *See Erlinger*, __ S.Ct. __; 2024 U.S. LEXIS 2715, **___; *accord United States v. Peña*, 58 F.4th 613, 622 (2nd Cir. 2023) ("*Apprendi* is not violated when the relevant fact is admitted by the defendant."). A defendant may admit facts for *Apprendi* purposes in various ways, including through his own statements in open court, *see United States v. Henry*, 417 F.3d 493, 495 (5th Cir. 2005). Moreover, those admissions may be made at sentencing. *See United States v. Stafford*, 258 F.3d 465, 475-76 (6th Cir. 2001); *United States v. Cardenas-Diaz*, 166 Fed. Appx. 958, 960 (9th Cir. 2006); *United States v. Stone*, 140 Fed. Appx. 223, 225 (11th Cir. 2005). It is also well settled that violations of the Sixth Amendment's jury requirements are subject to harmless-error review. *People v. Kozlowski*, 11 N.Y.3d 233, 250 (2008) (internal citations omitted) (citing *Washington v. Recuenco*, 548 U.S. 212, 218 [2006]).

Applying these principles, there was no Sixth Amendment jury violation in this case. Defendant insists that this Court needs to address whether the CPL requirement that tolling determinations be made "before the court without a jury" runs afoul of *Erlinger*'s requirement that a jury determine any sentencing facts beyond the existence of a prior conviction and its elements. But here, the question of whether the judge or a jury should make the determination of whether a defendant was incarcerated for a period of time that extends the 10-year look-back period for predicate sentencing was rendered moot by defendant's admission of the very fact at issue: the three years he spent incarcerated between his prior conviction and his commission of the current

[2] Upon the agreement of both the defense and the People, the Appellate Division also vacated defendant's third-degree assault conviction as an inclusory concurrent count of the second-degree assault conviction.

crime. That admission further renders any possible Sixth Amendment violation harmless, just as in *Kozlowski*, where this Court, without reaching the substantive issue of whether *Apprendi* was violated, held that because the defendant had admitted the relevant sentencing facts during his trial testimony, any violation was harmless. *Id.; see also, Recuenco*, 548 U.S. at 218-19, 222 ("[f]ailure to submit a sentencing factor to the jury … is not a structural error" and is thus subject to harmless-error analysis"). Indeed, defendant here has never suggested any error in the ultimate determination that his prior conviction was properly deemed a predicate offense for recidivist sentencing. This case then, is simply not the correct vehicle for determining the contours of *Erlinger* and its ramifications, if any, on New York sentencing laws

Further, for the reasons stated in the People's brief in the Appellate Division, none of the other allegedly leaveworthy issues warrant further review.

In sum, leave to appeal should be denied.

Respectfully,

_____
Anna Notchick
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July 29, 2024

Hon. Rowan D. Wilson
Chief Judge of the Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207

Re: People v. Pitts (Steven)
CLA 2024-00520

Your Honor:

On June 25, 2024, appellant Steven Pitts submitted an additional submission asking this Court to grant leave to review his assault conviction. Mr. Pitts asks permission, pursuant to Court Rule §500.20(d), to submit this reply, for the reasons discussed below.

Mr. Pitts argued in his additional submission, among other things, that, in light of the Supreme Court's recent decision in *Erlinger v. United States*. -U.S.-, 144 S.Ct. 1840 (2024), NY's recidivist sentencing statutes requiring tolling calculations to be made by a judge, rather than a jury, violate a defendant's Sixth Amendment right to a jury trial. The People responded on July 23, 2024, opposing Mr. Pitts' application..

On July 25, 2024, in *People v. Anthony Lopez* (NY Ind. 75738/2023), Justice Daniel P. Conviser, upon concession of the New York County District Attorney's Office, found New York's statutory recidivist sentencing provisions that require tolling determinations to be made by a judge rather than a jury violate the Sixth Amendment (a copy of the decision is attached as Exhibit A). Although the parties agreed that New York's procedural mechanisms violated the Sixth Amendment, they disagreed as to the remedy. Justice Conviser found that, because New York's statutes do not allow for tolling calculations to be made by juries, the court was required to

sentence the defendant—who might otherwise have been a persistent felony offender—as a first felony offender.

Justice Conviser's decision in *Lopez*—finding New York's recidivist tolling provisions unconstitutional—demonstrates the urgent need for clarification from this Court.

Respondent is wrong that this appeal does not present an appropriate vehicle to address this question. The New York Court system will likely soon be flooded with challenges by defendants whose recidivist sentences relied on allegations by the People that the ten-year look back period was tolled by periods of incarceration. The courts need precise rules for resolving these coming challenges, which will come on a variety of different factual records, including pre-sentence and post-sentence applications, those where there was an express admission to tolling, those where there was an admission by the lawyer but not the client, those where there was no express admission to the tolling period, and those where the tolling calculation presented a close question, and those where it did not. This appeal presents the Court with an opportunity to address these questions at a time when answers are urgently needed.

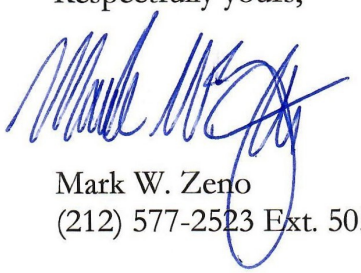
Here, contrary to respondent's assertion, Mr. Pitts did not concede tolling. He objected to the conclusion that he could be sentenced as a second violent felony offender due to tolling. Mr. Pitts personally stated: "My conviction happened in 2009. This subsequent second arrest happened in 2020. It's past the ten year statute" (Sentence Transcript at p. 5). It was his lawyer that appeared to concede tolling: "the ten year period is extended by defendant's incarceration at New York State Department of Corrections... I don't want to be arguing against my client.... But as an officer of the Court, I have to let your Honor know everything I know, right[?]" (*id.* at 6). Of course, the jury trial right is personal to defendants. It may not be waived by counsel. *People v. Page*, 88 N.Y.2d 1 (1996). That Mr. Pitts stated that he had "served three years" was not an admission that the period was tolled and he was subject to sentencing as a second violent felony offender. The period of incarceration he seemed to admit— "between '14 and '17" (*id.* at 7)—was not the period alleged in the Statement of Predicate Violent Felony Conviction, which was from June 15, 2010 to May 16, 2013.

Respondent is also wrong that any error here would necessarily be harmless. In *Erlinger*, it was Justice Kavanaugh, in *dissent*, that would have found any error harmless. The question of whether an error like this one—denying a defendant his right to have a jury determine tolling—could be found harmless is reason to grant leave, not deny it. Again, the courts will need guidance in resolving these issues.

* * *

For the foregoing reasons, and for the reasons stated in the briefs submitted to the Appellate Division, Your Honor should grant leave to appeal. We would welcome the opportunity to address these issues at a leave conference.

Respectfully yours,



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