



PRACTICE ADVISORY: Predicate Sentencing Advocacy After *Erlinger v United States*

On June 21, 2024, the Supreme Court of the United States reaffirmed in *Erlinger v United States*, 144 S Ct 1840 (2024), that individuals subjected to sentencing enhancements are entitled under the Fifth, Sixth, and Fourteenth Amendments to a jury determination based on proof beyond a reasonable doubt of **any** fact, other than the fact of a prior conviction, being used to enhance their sentence. The factual question in *Erlinger* was whether predicate convictions were committed on separate occasions for federal sentencing purposes, but the ruling has important implications for New York State's predicate felony sentencing scheme.

In instances where the prosecution must demonstrate tolling to satisfy the predicate statute's "10-year period," a jury must determine the facts surrounding those allegations beyond a reasonable doubt (see e.g. *People v Lopez*, 85 Misc3d 171 [Sup Ct, NY County 2024]). In *Lopez*, the successful challenge on *Erlinger* grounds defeated the prosecution's request for the imposition of persistent violent offender status and resulted in a first felony offender sentence.

To preserve the *Erlinger* challenge, attorneys representing clients subject to predicate felony sentencing should object on *Erlinger* grounds because the statute, as written, does not provide for a jury to make factual findings that the offense falls within the requisite "10-year period" (tolling) and/or that the predicate statutes' "sequentiality" provisions have been met. Counsel should also explicitly rely upon the Fifth, Sixth, and Fourteenth Amendments. Counsel could also argue that post-*Erlinger*, even the fact of a prior conviction must be found by a jury beyond a reasonable doubt (see *Erlinger*, 144 S Ct at 1853-1854, 1856-1857 [calling into question that exception, recognized in *Almendarez-Torres v United States*, 523 US 224 (1998)]; see also *People v Perry*, 85 Misc3d 982 [Sup Ct, Queens County 2024] [casting doubt on the continued viability of the *Almendarez-Torres* exception]; but see *People v Frazier*, 85 Misc3d 482 [Sup Ct, Queens County 2024]). **NOTE: A failure to preserve the *Erlinger* issue in the trial court may waive consideration of the issue on direct appeal** (see *People v Hernandez*, 2025 WL 515364 [2025]; *People v Lopez-Nunez*, 2025 WL 1603448 [4th Dept 2025]).

These arguments apply to predicate felony determinations under Penal Law § 70.04 (second violent felony offender), § 70.06 (second felony offender), § 70.08 (persistent violent felony offender), § 70.10 (persistent felony offender), § 70.07 (second child sexual assault felony offender), and are implicated in eligibility determinations pursuant to § 60.12 (domestic violence authorized dispositions), § 70.70 (felony drug offender other than class A-1), § 70.71 (class A felony drug offender), and § 70.80 (felony sex offense).

Additional Practice Tips:

- There is no statutory or “inherent” authority that would permit a New York court to empanel a jury to make sentencing factual findings. It would be for the Legislature to enact a constitutional sentencing scheme, and since the current scheme is unconstitutional, the court must impose a first felony offender sentence.
- Courts cannot empanel juries for the sole purpose of determining tolling issues (see *People v Banks*, 85 Misc3d 423 [Sup Ct, NY County 2024]).
- Whenever tolling is a factor in the analysis, the court cannot enhance the client’s sentence without empaneling a jury, and since juries cannot be empaneled in New York for this purpose, counsel should object to any enhanced sentence based on tolling of the 10-year lookback period (see *People v Parsons*, 2025 WL 1571863 [Sup Ct, Bronx County 2025] [*Erlinger* requires adjudication of any tolling issues by a jury, and since the court cannot craft a “constitutional jury procedure” that would allow the tolling issues to be heard by a jury, the client cannot be sentenced as a persistent felony offender]; see also *People v Gardner*, 224 NYS3d 321 [Sup Ct, Queens County 2024]; *People v Oaks*, 230 NYS3d 908 [Sup Ct, Erie County 2025]; *Perry*, 85 Misc3d at 992; but see *People v Rivera*, 85 Misc3d 1032 [Sup Ct, NY County 2024]; *People v Lawton*, 2025 WL 1601220 [Sup Ct, Kings County 2025]).
- If your client waives a jury trial in favor of a bench trial, argue that your client has not waived adjudication of *Erlinger* issues by a jury (see *People v Sabater*, 225 NYS3d 563 [Sup Ct, New York County 2024] [*Erlinger* challenge not waived by previously submitting to a bench trial]; but see *Rivera*, 85 Misc3d at 1035 [client waived his *Erlinger* claim by waiving a jury trial]).
- **DO NOT** concede allegations in the predicate felony statement.
- **DO** raise any factual issues presented by the statement.
- **If no factual issues exist**, the statement should still be controverted in general terms, and the right to jury trial asserted. Note that *Erlinger*’s holding did not turn on the existence of a factual dispute (see *Erlinger*, 144 S Ct at 1856 [noting there is “no efficiency exception to the Fifth and Sixth Amendments,” and that even in “straightforward” predicate determinations, a “jury should make the call”]).
- **If these objections are overruled**, counsel should, in the alternative, request a jury trial to determine any applicable factual issue such as tolling or the dates of the convictions to determine their sequence.
- These arguments should be raised in **all trial cases** and **all cases** where the client has entered a **non-negotiated guilty plea** to the top count of the indictment.
- In the context of a **negotiated plea**, these arguments are less viable because the judge may just include the waiver of jury at sentence in the rights being forfeited during the plea allocution.

The Statewide Appellate Support Center is available to consult on individual cases and support efforts to lodge appropriate objections in each case. To arrange a consult please fill out a consultation form: <https://nysils.questionpro.com/SASCIntake> or email: SASC@ils.ny.gov.

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Appendix: Notable Decisions Applying *Erlinger*

***People v Lopez-Nunez* | 2025 WL 1603448 | June 6, 2025**

APPEAL WAIVER | OVERBROAD | *ERLINGER* CLAIMS UNPRESERVED | AFFIRMED

Appellant appealed from a Monroe County Supreme Court judgment convicting him of attempted second-degree CPW. The Fourth Department affirmed but struck down the appeal waiver (Schiano, J.) as overly broad. The oral and written waivers mischaracterized the nature of the rights being forfeited, portraying the waiver as an absolute bar to taking an appeal and as extinguishing not only the attendant rights to counsel and poor person relief, but also to all postconviction relief. Appellant's *Erlinger* claims were not preserved where he admitted his prior convictions and did not dispute the periods of incarceration at sentencing. Appellant also failed to preserve his challenge under CPL 400.15 § (2) to the prosecution's predicate felony statement which did not list the names of the correctional facilities where he was imprisoned. Monroe County Public Defender (Guy A. Talia, of counsel) represented Lopez-Nunez.

[People v Lopez-Nunez \(2025 NY Slip Op 03451\)](#)

[Oral Argument](#)

***People v Lawton* | 2025 WL 1601220 | May 16, 2025**

ERLINGER | PREDICATE FELON SENTENCING | NOT A NEW CONSTITUTIONAL RULE | DENIED

Lawton moved to be sentenced as a first violent felony offender, arguing that CPL § 400.15(7)(a) is an unconstitutional sentencing scheme as *Erlinger* requires that a jury determine predicate felon status and any associated tolling periods under Penal Law § 70.04(1)(b)(v). Kings County Supreme Court denied the motion. *Erlinger* did not create a new constitutional rule and maintained the exception carved out by *Almendarez-Torres v United States*, 523 US 224 (1998). While acknowledging that a criminal court lacks statutory authority to empanel a jury to determine tolling periods, the court nonetheless determined that *Erlinger* does not require tolling questions to be resolved by a jury as this is not the type of "fact-laden task" contemplated by the decision. The court also argued that *Erlinger*'s holding "appeared" to be limited to the narrow set of facts presented in that case, and New York's predicate felon sentencing scheme has been upheld as constitutional by the Court of Appeals.

[People v Lawton \(2025 NY Slip Op 50910\(U\)\)](#)

***People v Hernandez* | 2025 WL 515364 | February 18, 2025**

PVFO | EXTENSION OF 10-YEAR LOOKBACK | *ERLINGER* PRESERVATION | AFFIRMED | DISSENT

Appellant appealed from a First Department order affirming the conviction and the predicate sentencing designation and sentence. The Court of Appeals (Garcia, J.) affirmed. Appellant was properly sentenced as a persistent violent felony offender where the 10-year lookback period set forth in Penal Law § 70.04 occurs between *sentencing* on the prior felony and the *commission* of the present felony, and that period is "extended" by any period of incarceration between *commission* of the prior felony and *commission* of the present felony. Thus, appellant's presentence incarceration time on a prior felony conviction did extend the 10-year period, and appellant's predicate sentencing designation was proper. Appellant's *Erlinger* argument that the recidivist sentencing

regime is unconstitutional was not preserved. Judge Rivera, in a dissent joined by Chief Judge Wilson, would have reversed, vacated the persistent violent felony offender sentence, and remanded for resentencing. The dissenters criticized the majority for failing to interpret the statute holistically, ignoring that the tolling period should only be applied to the time within the 10-year period—between the date of sentencing on the prior felony and the date of commission of the current felony. The majority’s “interpretation of the enhanced sentencing framework is unfair and raises serious constitutional concerns” where people who cannot afford bail may be punished more severely than those who can. [People v Hernandez \(2025 NY Slip Op 00904\)](#)
[Oral Argument](#)

***People v Oaks* | 2025 WL 680012 | January 31, 2025**

ERLINGER | SENTENCING ENHANCEMENT | JURY DETERMINATION REQUIRED

The prosecution filed a CPL § 400.16 statement to have Oaks designated a persistent felony offender pursuant to PL § 70.08. The Erie County Supreme Court declined to make such a finding. *Erlinger* set forth a clear constitutional imperative that such determinations are of a magnitude that invoke the fundamental constitutional protections of due process and a right to a trial by an impartial jury. *Erlinger* applied to prohibit the court from engaging in the fact finding (tolling) that would be necessary to qualify a prior violent felony conviction as a predicate for purposes of the persistent violent felony offender analysis; at the same time, however, *Erlinger* did *not* prohibit the court from determining whether a predicate violent felony conviction rendered Oaks a second violent felony offender where tolling would not apply, since the prior conviction, on its face, falls within the requisite ten-year period. Robert D. Steinhouse represented Oaks.

[People v Oaks \(2025 NY Slip Op 25052\)](#)

***People v Parsons* | 2025 WL 1571863 | January 16, 2025**

ERLINGER | PERSISTENT FELONY OFFENDER SENTENCING | GRANTED

Parsons argued that he could not be sentenced as a persistent violent offender under two separate indictments based on the prosecution’s proposed negotiated sentence of 18-to-life, as the court, rather than a jury, would be required to adjudicate five separate periods of tolling pursuant to CPL § 400.15. Bronx County Supreme Court, applying *Erlinger v United States*, 602 US 821 (2024), held that Parsons was entitled to adjudication of any tolling issues by a jury, and since the court could not craft a “constitutional jury procedure” that would allow the tolling issues to be heard by a jury without a preceding trial, tolling could not be applied to the instant matter. Thus, should he enter guilty pleas, Parsons could be sentenced as a first violent felony offender on the indictment for the first incident and as a second violent felony offender on the indictment for the second incident. The court rejected the prosecution’s argument that *Erlinger* does not upset New York’s sentencing scheme, citing the limited applicability of *Almendarez-Torres v United States*, 523 US 224 (1998) to instances where the court is adjudicating the fact of the prior conviction alone rather than any associated tolling periods. *Erlinger* requires that the prosecution prove the alleged periods of incarceration beyond a reasonable doubt before a jury. In the instant matter, the factual determination required introduction of official business records from three places of imprisonment, spanning nearly 20 years. As such, the fact-finding function in the instant case exceeded questions of what crimes were

committed and triggered the fact-finding procedure outlined in *Erlinger*. The Bronx Defenders (Daniel Kay, of counsel) represented Parsons.

[People v Parsons \(2025 NY Slip Op 50894\(U\)\)](#)

***People v Rodney* | 2024 WL 4942709 | December 2, 2024**

ERLINGER | NOT RETROACTIVE | RESENTENCING DENIED

Rodney filed a *pro se* CPL § 440.20 motion seeking to vacate, on *Erlinger* grounds, his 2017 sentence as a second felony drug offender previously convicted of a violent felony. New York County Supreme Court denied the motion, holding that, although the tolling determination would currently need to be made by a jury, *Erlinger* created a “new rule” that was not retroactive under federal or state standards. The United States Supreme Court’s previous *Apprendi* jurisprudence involved sentencing enhancements based on judge-found facts pertaining to the manner of or circumstances surrounding the crime, such as whether it was committed with racial bias. *Erlinger*’s requirement that juries must decide recidivist sentencing questions imposed a new obligation and was not dictated by precedent existing at the time Rodney’s conviction became final. Also, as *Erlinger* did not implicate the reliable determination of guilt or innocence, it should not be retroactively applied under state law standards.

[People v Rodney \(2024 NY Slip Op 24304\)](#)

***People v Gardner* | 2024 WL 4863790 | November 21, 2024**

ERLINGER | TOLLING DETERMINATION REQUIRES JURY | FIRST FELONY OFFENDER STATUS GRANTED

Gardner filed a *pro se* CPL § 440.20 motion seeking to vacate his sentence of 7 years’ imprisonment and 5 years’ PRS for a second-degree CPW conviction on the grounds that he was improperly arraigned as a second-felony offender. After counsel was assigned on the motion, the U.S. Supreme Court decided *Erlinger*, and Gardner, through counsel, amended the motion to include an *Erlinger* claim that he must be resentenced as a first felony offender. Queens County Supreme Court granted the motion and directed that Gardner must be resentenced as a first felony offender. More than 10 years had elapsed between his prior conviction and his arrest in the instant case. Agreeing with [People v Banks](#) and [People v Lopez](#), the court held that *Erlinger* dictates that the necessary tolling determination must be made by a jury; CPL § 400.15[7][a] prohibits the empaneling of the jury for this purpose; and Judiciary Law § 2-b[3] does not give a court authority to empanel a jury for fact-finding relevant to predicate sentencing, which would contravene CPL § 400.15[7]. Randall Unger represented Gardner.

[People v Gardner \(2024 NY Slip Op 24294\)](#)

***People v Perry* | 2024 WL 4847596 | November 20, 2024**

ERLINGER | TOLLING DETERMINATION REQUIRES JURY

Perry was charged in a 17-count indictment, including five violent felonies, and had two violent felony convictions more than 10 years prior. Before trial, the parties litigated whether he could be sentenced as a persistent violent felony offender. Adopting the reasoning of [People v Banks](#), the court held that *Erlinger* requires a jury, not a judge, to make factual findings relevant to tolling for purposes of recidivist sentencing. While Judiciary Law § 2-b[3] “allows courts to make incremental changes to existing forms of proceeding,” “[w]holesale changes are more problematic.” Nor does that statute allow

judges to devise new proceedings expressly prohibited by CPL § 400.17[7][a]. The court noted the extremely narrow nature of the *Almendarez-Torres* exception that allows judges to find the *fact* of a prior conviction itself, which may be justified by the presence of due process protections surrounding a conviction not present in judicial fact-finding related to tolling. However, the court also cited extensive authority, including *Erlinger*, casting doubt on the viability of the *Almendarez-Torres* exception itself. Without legislative action, if Perry is convicted, the court held that it must sentence him without regard to convictions beyond the 10-year look-back period, noting that persistent felony offender sentencing would not require any tolling determination. Matthew Mobilia represented Perry.

[People v Perry \(2024 NY Slip Op 24293\)](#)

***People v Sabater* | 2024 WL 5205412 | November 20, 2024**

ERLINGER APPLIES TO RESENTENCING ON 2019 CONVICTION | RESENTENCING GRANTED

In 2019, Sabater was convicted of second-degree assault and sentenced as a persistent violent felony offender to 18 years-to-life imprisonment. After *Erlinger*, Sabater filed a CPL § 440.20 motion to vacate the sentence, arguing that the 2019 predicate felony statement was facially insufficient because it failed to allege the required tolling periods to bring Sabater's *first* alleged predicate violent felony within the 10-year lookback period. New York County Supreme Court granted the motion, on consent, and ordered resentencing. The prosecution then filed an amended predicate statement alleging the requisite tolling for both prior convictions. While *Erlinger* is not retroactive, it applies to Sabater's case, since it is now in a pre-judgment posture, and Sabater therefore cannot be sentenced as a persistent violent felony offender by a judge alone. The court rejected the prosecution's argument that Sabater had waived any *Erlinger* challenge by previously submitting to a bench trial: "even assuming that a knowing jury trial waiver can be retrospectively deemed to encompass additional factual determinations involving the particular circumstances of the crime for which guilt was being assessed, surely defendant's waiver could not 'knowingly, intelligently and voluntarily'...extend to facts about other, past offenses or, even more particularly, the incarceration that stemmed from them." Sabater can now be sentenced as either a second violent felony offender—based on his prior admissions to allegations in the initial predicate statement that brought the *second* conviction within the 10-year lookback period—or as a persistent felony offender, a determination that does not require judicial fact-finding related to tolling and falls "squarely within the *Almendarez-Torres* exception." The court reserved decision on 2FO versus PFO until after the persistent felony offender hearing. Center for Appellate Litigation (Alexandra Mitter, of counsel) represented Sabater.

[People v Sabater \(2024 NY Slip Op 24321\)](#)

***People v Rivera* | 2024 WL 4596717 | October 28, 2024**

ERLINGER | TOLLING AND WAIVER OF JURY TRIAL | SENTENCED AS PVFO

Rivera was convicted, after a bench trial, of several violent felonies. The defense opposed sentencing as a persistent violent felony offender (PVFO) based on two prior convictions for violent felonies that occurred in 1992 and 1994, respectively, arguing under *Erlinger* that a jury must make findings of fact related to tolling. New York County Supreme Court held that *Erlinger* does not apply to New York's tolling provision, reading *Erlinger's* as an "extremely narrow" holding merely applying the *Apprendi* / *Alleyne* rule to the "Occasions

Clause” in the federal Armed Career Criminal Act (ACCA). The court distinguished the factual questions at issue: ACCA requires a fact finder to determine “what happened during those prior offenses,” while tolling only involves doing arithmetic regarding “street time” versus incarceration. “There is simply no logical reason to delegate these clerical [tolling] functions to a jury, and *Erlinger* does not require it, even if it can be read to leave the question open.” Supreme Court alternatively held that by waiving his right to a jury trial before *Erlinger* was decided, Rivera necessarily waived any alleged right to a jury determination regarding tolling, concluding that the sentencing enhancement was an element of the offense encompassed by the jury waiver, and there can be no claim of surprise where *Erlinger* merely applied settled law to an ACCA provision. Supreme Court further held that Rivera’s prior adjudication as a PVFO in 2009 is binding on the court, despite the Appellate Division’s vacatur of that conviction, since the PVFO designation was not challenged in that appeal. Rivera was sentenced as a PVFO.

[People v Rivera \(2024 NY Slip Op 24278\)](#)

***People v Frazier* | 2024 WL 4522272 | October 17, 2024**

ERLINGER | JURY NOT REQUIRED WHERE NO TOLLING INVOLVED | 2FO SENTENCE APPROPRIATE

Frazier was charged with second-degree CPW and related counts, and the prosecution offered a plea to attempted second-degree CPW with a sentence of five years’ imprisonment. Indicating his desire to take the plea offer, Frazier nevertheless challenged the offered sentence under *Erlinger*, as it would require second-felony-offender adjudication based on a non-jury finding that he had a prior conviction for attempted second-degree burglary in 2019. Reviewing recent New York case law following *Erlinger*, New York County Supreme Court denied the motion, ruling that *Erlinger* does not apply, since Frazier conceded that he had four prior felony convictions (the earliest from 2017) and there was no tolling issue presented.

[People v Frazier \(2024 NY Slip Op 24268\)](#)

***People v McKinley* | 2024 WL 4455635 | October 10, 2024**

ERLINGER | JURY NOT REQUIRED WHERE NO TOLLING INVOLVED | 2FO SENTENCE APPROPRIATE

McKinley was convicted after a jury trial of first- and second-degree assault based on an offense that occurred in March 2022. The prosecution asked that he be sentenced as a second-felony offender based on a prior second-degree assault conviction, for which he was sentenced in April 2012 (9 years, 11 months before the instant offense). Kings County Supreme Court denied the defense’s Sixth Amendment challenge-under *Erlinger*, which requested that McKinley be sentenced as a first felony offender. The court determined that tolling was not an issue where the instant offense was committed less than 10 years after sentencing on the prior offense, invoking the exception under *Almendarez-Torres v United States*, 523 US 224 [1998].

[People v McKinley \(2024 NY Slip Op 24257\)](#)

***People v Banks* | 2024 WL 4128665 | September 6, 2024**

ERLINGER | PVFO STATUTE UNCONSTITUTIONAL | LEAVE TO REFILE PREDICATE STATEMENT

After Banks was convicted in New York County Supreme court of several violent sexual felonies, the prosecution requested sentencing as a persistent violent felony offender based on two prior felony convictions from 1984 and 1991. The prosecution argued that

the statute's 10-year look-back period was extended by four intervening periods of state and local incarceration. Under *Erlinger*, facts concerning the tolling effect of Banks' prior incarceration must be found by a jury, not a judge, before he could be subjected to enhanced sentencing. Accordingly, the Court held that CPL § 400.15(7)(a) is unconstitutional under the Sixth Amendment as applied to Banks. The court also lacked inherent authority to impanel a jury for sentencing. Not only does CPL § 400.15 require predicate determinations to be made by a judge, but it would infringe on the legislative function for judges to fashion policies and procedures concerning jury predicate determinations. Banks will be sentenced as a first felony offender, unless the prosecution submits a request for persistent felony offender status, as Supreme Court determined that the same constitutional problems with factual determinations regarding tolling would bar sentencing as a second violent felony offender. Susan Calvello represented Banks. [People v Banks \(2024 NY Slip Op 24241\)](#)

***U.S. v Johnson* | 2024 WL 3868568 | August 20, 2024**

ERLINGER | ACCA | JURY DETERMINATION REQUIRED

The appellant appealed from a Southern District of Indiana judgment convicting him of possession of a firearm as a convicted felon and sentencing him as a career offender under the ACCA. The Seventh Circuit reversed and remitted. The appellant had been previously convicted of three counts of robbery under Indiana law—a violent felony under the ACCA. He argued that he did not qualify as a career offender because he committed two of those robberies on the same occasion. Relying on the Seventh Circuit's precedent, the district court rejected that contention, concluded that the robberies were committed on different occasions, and sentenced him as a career offender. In light of *Erlinger*, the district court was required to send the different-occasions question to the jury.

[U.S. v Johnson \(No. 23-2338\)](#)

***People v Lopez* | 2024 WL 3575008 | July 26, 2024**

ERLINGER | SENTENCING ENHANCEMENT | JURY DETERMINATION REQUIRED

In a case of first impression following SCOTUS' decision in *Erlinger*, New York County Supreme Court held that: (1) tolling determinations under New York's persistent violent felony offender sentencing statute must be proven beyond a reasonable doubt and found by a unanimous jury; (2) such a procedure is explicitly prohibited by New York law; and (3) courts are not authorized to create an entirely new procedure for bifurcated jury trials. Thus, the court could not sentence Lopez as a persistent violent felony offender or second violent felony offender. James Phillips and James Magee represented Lopez.

[People v Lopez \(2024 NY Slip Op 24207\)](#)

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