

People v Harnett

2024 NY Slip Op 34684(U)

September 25, 2024

Supreme Court, Bronx County

Docket Number: Indictment No. 71922/22

Judge: Ralph Fabrizio

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**SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY, PART 18**

-----X
THE PEOPLE OF THE STATE OF NEW YORK

**Final Decision and Order
Indictment No. 71922/22**

-against-

TIMOTHY HARNETT,

Defendant.

-----X

The issue addressed is whether Erlinger v. United States, 144 S. Ct. 1840 (2024) mandates a jury determine whether defendant must be sentenced as a second violent felony offender under Penal Law § 70.00, and particularly in connection with a general challenge to the tolling section of the second violent felony offender statement filed by the People. This Court holds, following review of its own files, published decisions, prior legal rulings, and oral and written arguments of counsel, the tolling challenge does not present a fact issue that must be decided by a jury.

Defendant stands convicted, following a jury trial, of Kidnapping in the First Degree, Rape in the First Degree, four counts of Criminal Sexual Act in the First Degree, and Attempted Sex Trafficking. The evidence the jury credited showed, in substance, that on April 29, 2022, defendant lured a vulnerable, drug-addicted woman, who was a sex worker, to an abandoned second floor room in a vacant house that had been severely damaged by fire. He locked her in the room and forced her to remove all her clothes. Defendant beat her repeatedly with a metal rod, on the day of the abduction and over the course of several days. He told her, in substance, he was doing so because he intended to make her work for him and he would be her pimp. Defendant had forcible, non-consensual anal intercourse with this victim on four separate dates while she was being held captive. The victim was often handcuffed to a radiator. On one day he also raped her vaginally. Bruised and battered, the woman managed to escape from the second-floor room and climb naked except for a blanket to a roof over a porch at the front of the house. Police officers rescued her after they were called to the scene by a passerby who saw the victim and heard her cries for help. DNA evidence showed defendant's DNA was consistent with DNA swabs gathered from the victim's vaginal and anal areas.

Jury selection commenced on June 24, 2024, three days after the United States Supreme Court announced its decision in Erlinger. The last juror was selected on July 1, 2024. The jury rendered its verdict on July 31, 2024. The case was adjourned for sentencing to September 9, 2024.

Late in the afternoon of Friday, September 6, 2024, the People served and filed an extensive pre-sentence memorandum. The People informed defendant they would be seeking to have him adjudicated a second violent felony offender based on a 2000 conviction, where a jury found him guilty of what the law at the time called Sodomy in the First Degree. The People did not include a second violent felony offender statement with these papers. The documentary evidence provided as exhibits to that submission include the December 14, 2000 sentencing minutes, and defendant's "rap sheet" listing information about his release date from prison and to post-release supervision. Although the Court heard an offer of proof about the underlying facts of the 2000 conviction during Sandoval discussions at this trial, the sentencing court's stark remarks from twenty four years ago paint a picture not only of a serious violent felony, but one strikingly similar to this case. In the prior case, defendant was charged with kidnapping, rape and what the law at the time called sodomy, and what is now called sexual abuse. The jury in that case found defendant not guilty of kidnapping and rape, but found him guilty of forcible anal intercourse. The victim was a fifteen-year-old girl. The judge told defendant the trial evidence showed, "you stalked her, you preyed on her, you pounced on her on the street that day and took her to a motel that day. You anally sodomized her and the only thing that made you stop was the fact that she defecated on you as you were inside her. You have shown no remorse and no responsibility." (Minutes dated December 14, 2000 at page 8). The judge sentenced defendant to eighteen years state prison. The judge did not pronounce any term of post release supervision that day.

Because the People had not provided the defendant with the mandatory ten-day notice required where they choose to submit a substantive pre-sentence memorandum, this Court advised the parties it would not proceed to sentence just three days later. On September 9, 2024, the original date set for sentencing, the parties appeared. The People served and filed their second felony offender statement in court. The statement notes defendant's prior violent felony conviction for Sodomy in the First Degree. It notes defendant was sentenced in that matter on December 14, 2000, to a period of incarceration of eighteen years. The "tolling" information listed in the hand-written second violent felony offender statement is curious. It alleges defendant was incarcerated, not at the time sentence was pronounced in that case, but beginning some six months later, on June 25, 2001 in "DOCCS Facility," and he remained in custody in the unnamed facility until September 28, 2018.

The crimes for which defendant stands convicted in this matter took place over a four day period beginning April 29, 2022. Thus, in order to satisfy the statutory requirement that defendant's 2000 conviction can be used for enhanced sentencing, that conviction must be less ten years prior to the commission of the crimes for which defendant faces sentencing in this matter. Since the sentence was imposed more than twenty-one years before defendant committed these crimes, a calculation of the period defendant was incarcerated following the that sentencing must take place, and in light of the allegations in the second felony offender statement in this matter. This is called a "tolling" calculation.

It was good the People filed the requisite statement that day. If there is a challenge to be made to any allegation in a second violent felony offender statement, the CPL provides a defendant can request a two day adjournment to challenge, or controvert, any part of the statement at a judicial proceeding. Of course, the legislature has always mandated the prosecution file such a statement; they have no discretion permitting them to forego filing one when a defendant is purported to be a second violent felony offender. CPL §400.15(2). Once the statement is filed, the CPL sets out the procedures to determine whether a defendant must be adjudicated a second violent felony offender. First, the court must conduct a “preliminary examination” of the defendant based on the information contained in the requisite second violent felony offender statement. In this case, this Court attempted to conduct this examination. Defendant admitted he read the statement. He admitted he was the Timothy Harnett named in the statement, and that his attorney stood beside him. However, when asked, repeatedly, whether he wished to controvert any of the allegations in the second violent felony offender statement, which included the “date place and time of [the] alleged predicate violent felony conviction,” and the “tolling provisions” contained in the statement, defendant refused to answer the questions. His reason was that he was not acting as his own attorney. His position was that it was up to his lawyer to controvert any allegation in the statement, other than his name.

Defense counsel acknowledged that day on the record there had been extensive post-conviction appellate and other collateral review of that 2000 conviction. This Court was already aware that defendant represented himself in a federal habeas corpus proceeding, as that information was imparted when this Court forced defendant to be brought into the courtroom and heard that he wished to waive his right to be present for all parts of the trial, except to testify in his own defense. Based on the September 9, 2022 record, including defendant’s refusal to speak with counsel about the predicate felony statement, counsel first moved for a 400.15 hearing, without specifying what issue would be determined. However, counsel later said they would be raising a challenge at the hearing based on Erlinger. This Court was of course aware of post-Erlinger decisions published by other judges. Defense counsel argued that, per Erlinger, “any fact that is being used [to] enhance Mr. Harnett’s sentence needs to be proven beyond a reasonable doubt to a jury . . . all the tolling would have to be proven beyond a reasonable doubt.” (Minutes dated September 9, 2024 at page 10).

The Court asked for briefing and the parties have done so. It now appears the only issue to be determined relates to the “tolling” as it is spelled out in the second violent felony offender statement. In counsel’s brief, submitted September 20, 2020, counsel asks this Court to follow People v. Lopez, 2024 N.Y. Misc. LEXIS 3207 at *29 - *32, July 26, 2024 (Sup. Ct. New York County). That case holds that all “tolling” challenges raised in this context presents a fact situation contemplated by Erlinger and must be determined by a jury. That case also holds that since CPL § 400.15 states it is a judge, and not a jury, who determines whether or not the People have sustained their burden that a defendant is subject to enhanced sentencing based on a “tolling” challenge, and beyond a reasonable doubt, there exists no legal authority for a judge to order a jury determine this, or any other perceived fact-based challenge raised by a

recidivist, where a finding is made that there is an Erlinger fact to be proven by the People. The People disagree and have filed a detailed memorandum of law.

The issue basically boils down to a variation on a Shakespearean theme: namely, whether there is now something rotten in the State of New York when it comes to determining any and every fact question in a challenge raised by a defendant to being adjudicated a second violent felony after Erlinger, and specifically where the sole challenge relates to a “tolling” calculation. This Court chooses to confine Erlinger to its facts, the issues framed by the parties in that case, and the narrow SCOTUS holding. In doing so, this Court finds the tolling calculations to be resolved in this case per the second violent felony offender statement are not jury questions.

The relevant definitions of what makes a person a second violent sentencing defender under the Penal Law are not in dispute. A defendant meets the requirements for receiving an enhanced sentence as a second violent felony offender where, in substance, the prior conviction is for a class A or violent felony, where a sentence in excess of one year was authorized for that crime, the sentence for that prior conviction was imposed before defendant committed the crime for which recidivist sentencing is sought (“sequencing”), and the sentence for the prior crime had to be imposed “not more than ten years before the commission of the felony of which the defendant presently stands convicted.” Penal Law § 70.04 (b)(i), (ii) and (iv). Where for example and as relevant to the second violent felony offender filed here, the prior sentence was imposed more than ten calendar years before the commission of the second felony, the legislature included a “tolling” provision in the statute, and provided detailed instructions on how to mathematically calculate that: “In calculating the ten year period . . . the period of time during which the person was incarcerated for any reason between the time of the commission of the previous felony and the time of the 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.” Penal Law § 70.04 (i)(b)(v). The People say this “period of time served” following only the 2020 conviction amounts to more than seventeen years. This Court still does not understand defendant’s specific “fact” challenge. If it involves the entire period, this Court questions how defendant himself can make any such challenge. But first, this Court will address counsel’s legal argument and its ruling about why this Court believes Erlinger does not mandate a jury “calculat[e] the” tolling period in this and perhaps most other cases.

A starting off point is Erlinger itself. The issue framed by the defendant in Erlinger was a fact challenge to “sequential” multiple predicate felony convictions. But it was not simple “sequencing” such that a Court would determine whether a conviction and sentence for a stand-alone crime took place before a conviction for a completely separate, later committed, stand-alone crime. The Justice Department did not concede that a jury trial was required due to a tolling question. The uncontested allegations were, “[a]s the government told it, within a span of days Mr. Erlinger burglarized a pizza shop, a sporting goods store, and two restaurants. . . . Because each of these burglaries occurred on different occasions, the government submitted, each could . . . serve as a [separate] predicate and collectively they could support an [enhanced] sentence.”

Erlinger 144 S. Ct. at 1847. Mr. Erlinger's factual challenge was not to a tolling requirement. "He maintained that his decades-old burglaries had not occurred on four separate occasions but during a single criminal episode, all of which meant he still lacked the three prior offenses" required for sentencing under the particular federal statute at issue in that case. Id. The government conceded that such a finding could "require an examination of a 'range' of facts, including whether the defendant's past offenses were 'committed close in time,' whether they were committed near to or far from one another, and whether the offenses were 'similar or intertwined' in purpose and character." Id. While the Court reiterated its past holding that "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 144 S.Ct. at 1851 (citing Apprendi v. New Jersey, 530 US 466, 490(2000)), the Court did not hold that every type of fact was subject to a determination only by a jury. The Court did not even enlarge or change existing Apprendi law. To the contrary, the majority recognized that "this case is as nearly on all fours as Apprendi." Erlinger, 144 S. Ct. at 1852. Thus, Erlinger held that a jury had to determine that type of complicated fact challenge, and that is exactly what had always been required by Apprendi. Neither Erlinger nor Apprendi involved addition or subtraction. This Court has not found a case where a challenge only to "tolling" has been considered an Apprendi-jury question in any United States Supreme Court ruling.

Moreover, this trial level Court believes it is bound by post-Apprendi decisions by New York Appellate Courts that hold Apprendi does not apply where there is a "tolling" dispute grounded on length of incarceration. In New York, our statutes allowing defendants to challenge tolling provisions in predicate statements, and leave that determination up to a judge, has its own body of case law. The People's failure to include tolling information in a predicate felony statement, where a defendant does not specifically "dispute that [their] incarceration was long enough [such] that the prior sentence was imposed within the 10-year limitation period," is not even error, let alone one of constitutional dimension. People v. Haynes, 70 AD3d 718, 719 (2nd Dept), lv. to appeal denied, 15 NY3d 751 (2010), writ of habeas corpus denied sub nom, Haynes v. New York, 2012 US Dist. LEXIS 181170, December 21, 2012 (EDNY). Notably, the federal habeas judge found the New York statute addressing challenges to such a predicate statement including tolling did not violate Apprendi's mandate that fact determinations in the Apprendi sense had to be decided by a jury, such that New York's CPL procedures were unconstitutional. Haynes, 2012 US Dist. LEXIS 181170 at *34 - *37 (numerous citations omitted).¹ See also People v. Kelly, 65 AD3d 886, 889-90 (1st Dept 2009).

Defendant does not challenge the constitutionality of our statute post-Erlinger. Although the People have a lengthy section in their memorandum of law based on potential constitutional challenge to the CPL and the need to serve the Attorney

¹ The Federal judge did no more when determining whether that defendant's sentence was a "miscarriage of justice" than look at the record, which showed "petitioner has been convicted ten times between the commission of the 1983 felony [at issue] and the time of the commission of the current felony. (NYS DCJS Repository Response, ECF NO. 10-3)." Haynes, 2012 US Dist. Lexis 181170 at * 39 - *40, fn. 13.

General, this Court does not have that issue before it. However, what it does have are decisions from the Court of Appeals holding that our predicate and persistent violent felony adjudication statutes are constitutional post-Appendi. See e.g. People v. Leon, 10 NY 3d 122, 126 (2008); see also People v. Prindle, 29 NY3d 463, 466-67 (2017). “Sequencing” in the Erlinger sense as an issue under New York statutes has not had time to percolate up the appellate ladder. The Court of Appeals has recognized the importance of “sequencing” in terms of commission of stand-alone crimes not involving common plans or schemes, in predicate sentencing situations. The Court held that a “court’s lack of authority to sentence a defendant as a predicate felon based on a conviction concededly out of sequence may be determined from the face of the appellate record, which necessarily contains both relevant dates. No resort to outside facts, documentation or foreign statutes is necessary.” People v. Samms, 95 NY2d 52, 57-58 (2000). And in that case, the Court ruled that had to happen and rejected the People’s argument that defendant Samms had not preserved the challenge that the predicate crime had not been committed before the crime for which he now had been convicted. The Court, recognizing the specific statute at issue and the definition of a “predicate felony conviction,” and in dismissing this preservation claim, recognized that “[n]othing short of a legislative amendment to Penal Law § 70.04 can transform an out-of-sequence conviction into an employable predicate.” Id.

Here, the challenge is not, nor could it ever be, a sequencing claim. It is a tolling challenge, a time calculation. As it turns out, and most significant to this Court, the Court of Appeals has previously ruled based on a direct and preserved legal argument claiming that a “tolling” challenge presents a “fact” question to be determined by a jury under Appendi. In People v. Bell, 68 AD3d 545, 545 (1st Dept. 2009), aff’d, 15 NY3d 395 (2010), cert. denied sub nom., Bell v. New York, 563 US 979 (2011), the First Department initially held that defendant Bell’s persistent felony offender adjudication made under the New York statutes was constitutional under Appendi. As the People point out, in the defense briefs to the Court of Appeals, defendant argued “a factual finding as to whether the ten-year limit has been tolled requires evidentiary proof far outside the judicial record and unmistakably resembles the factual findings under the Appendi rule.” (Brief and Appendix for Defendant-Appellant Bell, found at 2011 WL 5596773 (NY), dated May 28, 2010, at page *15). The Court of Appeals made no such ruling in its brief memorandum decision. Having so ruled, this Court is bound by that case.

To the extent the New York County District Attorney’s Office has conceded a “tolling” challenge requires a jury determination, which is this their right, and that two judges in Supreme Court, New York County agree the Manhattan DA is correct, this Court respectfully disagrees. As noted, the Bronx County District Attorney takes the opposite position in this case, and they make compelling legal and factual arguments. This Court also disagrees with the notion advanced by the defense that, to the extent a “tolling” calculation might be considered a jury question after Erlinger, courts cannot proceed to have a jury make that determination absent the still absent action of the legislature.

New York State has a long-standing public policy mandating enhanced sentencing for recidivists in felony cases. For example, a defendant who stands convicted of any violent felony and has a qualifying prior violent felony offender “must” be sentenced as a second violent felony offender. Penal Law § 70.04. Even where there is a concern about the legality of the original sentence pronounced, as happened and was already resolved as a matter of law in defendant’s 2000 sentencing, and a court is required to resentence a defendant for the same conviction, the Court of Appeals held, “[T]he rule that the original sentence date controls for purposes of a conviction’s qualification as a predicate felony conviction serves the public policy underlying the recidivist sentencing statutes. As we have previously observed, those laws are meant to enhance sentences for defendants who refuse to reform after receiving a valid conviction for a crime and hearing the court pronounce sentence (see People v. Morse, 62 NY2d 205, 222 (1984)). Under this rationale, a defendant who was sentenced for a prior conviction and then commits a new crime plainly deserves enhanced punishment for the new crime because the defendant remains unchastened after the court’s pronouncement of the sentence for the prior conviction.” People v. Boyer, 22 NY3d 15, 26 (2013).

What defendant seeks in citing Lopez is to have to have this Court agree “tolling determinations requires a jury and we cannot even empanel a jury absent legislative intervention.” In doing so, a ruling by this Court agreeing with this defense argument would be cited with approval for the proposition that all violent predicate sentencing determinations involving tolling should be put on hold pending legislative action, or not take place at all. Of course, this Court knows its own role is never to legislate. But agreeing with the defense claim is tantamount to having this judge ignore the Penal Law directives outright, pending some kind of legislative action to amend the Criminal Procedure Law and who knows what other statutes. In doing so, where there is a tolling claim, it would then proceed to adjudicate everyone in this scenario as a first felony offender. Practically speaking, in this case, for the kidnapping conviction, it makes no difference whether defendant is designated to be sentenced as a first offender or a violent predicate. Defendant faces a life sentence for kidnapping as punishment no matter what the designation. The difference is the enhanced sentencing mandated for a second violent felony offender in connection with the five separate sex crime convictions, as well as the violent felony conviction for attempted sex trafficking. To abandon that mandatory sentencing requirement of the Penal Law in this situation is a concern to this Court and, one might imagine, to others. Defendant appears to be the poster person for someone “unchastened” by his prior violent sex crimes conviction and significant sentence. Thus, while this Court agrees the preferable and best route would be for the legislature to act, and act quickly, if only to avoid chaos in the judicial branch, it also believes that not enforcing the Penal Law absent a directive from the legislature saying that is correct would be wrong. To this Court, this would be a place and a time to exercise inherent judicial power to enforce sentencing laws that remain unchanged.

Some might argue the executive and legislative branches’ inaction might signal some new unspoken criminal justice initiative to eliminate all predicate sentencing in

New York State where prior convictions, no matter what they are, are for crimes committed more than ten years before the new felony, and thereby passively eliminating tolling. That action would of course be the prerogative of the legislature and the governor. The inaction period is now pronounced. In Lopez, 2024 N.Y. Misc. LEXIS 3207 at *29 - *32, decided nearly two months ago on July 26, 2024, the judge implored the legislature to take action. Moreover, in People v. Banks, 2024 N.Y. Misc. LEXIS 5992 at * 14 - * 23. September 6, 2024 (Sup. Ct. New York County), a decision agreeing with Lopez, a different judge challenged the legislature to act “and fast.” Id. at *23. This Court is unaware of even a statement by a single member of the Executive or Legislative branches acknowledging an issue exists to be addressed through a potential new or amended statute. This Court does not hold that silence in this situation equals acquiescence with Lopez. Nonetheless, if this Court does sentence defendant as a second violent felony offender without a jury determination about tolling, as the People ask, it would immediately vacate this sentence sua sponte if any executive and legislative action signals a clear change in public policy. That is within this Court’s inherent power to correct its own record.

Legislative inaction in response to a request from judges does not, at this time, mean even here this Court could not have a jury empaneled in connection with enhanced sentencing in a manner suggested by Erlinger. This case, as well as in Lopez and Banks involve the potential of having to move into a factual “penalty” phase using a different jury than the one previously empaneled. It did not have to be that way in this case. Here, post-Erlinger, jurors were determined to be fair after challenges raised during the jury selection process to other prospective jurors. Those jurors were informed of the “reasonable doubt” standard and followed court instructions about the need to find “elements” of crimes that had to be proven beyond a reasonable doubt by the People. If someone asked for this jury to continue to determine an Erlinger fact, this Court believes they should have continued and would again follow an instruction that basically would tell the 12 to “do the math.” This Court agrees there would be a myriad of challenges when a new jury is empaneled for an “enhanced sentencing” fact determination. But that would not be impossible or even violative of other legislative policies in place in a related area. New York law recognized and provides guidance for a jury determination for our state’s ultimate enhanced sentencing. See CPL § 400.27. Even there, the legislature provided that a court could discharge the first jury and impanel another for a “sentencing proceeding . . . only in extraordinary circumstances and upon a showing of good cause.” CPL § 400.27 (2). This Court cannot envision a more “extraordinary” set of circumstances to empanel a jury in an actual Erlinger sequential fact situation, as an exercise of inherent judicial power.

Here, as discussed, this Court sees no reason to exercise inherent power to now empanel a jury in this “tolling” challenge scenario. This Court believes Erlinger does not eclipse Apprendi, or even slightly overshadow it. The Supreme Court did not create a rule that requires a “tolling” challenge made in the context of how long a defendant was incarcerated to be a jury question under our statutes. This case is a perfect example, in this Court’s view, of why that is correct.

There are a myriad of ways the People can satisfy their reasonable doubt burden. One way the People argue is that this Court can take judicial notice of its own files as a fact-finding in connection with a purported tolling challenge in this case. This Court has reviewed the Bronx Supreme Court, Criminal Term file in People v. Harnett, 4335/99, which is the case that led to defendant's previous violent felony conviction, after the People made that argument. Several things leap out. First, there is the Board of Examiners for Sex Offenders submission in connection with a mandatory SORA hearing. The submission is dated June 29, 2018. That document in our court file states the law and a "fact:" "the Court must make a final determination of the offender's risk level and designation at least 30 days for the offender's release, which is scheduled for 9/30/2018." There is a letter from defendant in that court file, sent from Green Haven Correctional Facility, in which he writes in his own hand, "On August 3, 2018 at 9:00 a.m. I have a court date for a sex offender registration risk level determination. I will not be attending the court date. I feel no need for my presence in court." There is a pro se notice of motion dated May 17, 2005 in which defendant noted the address to serve him is "Clinton Correctional Facility . . . Danemora, New York." The file has the sentencing and then resentencing dates noted.

This People would also not even have to submit certified corrections records to determine as a fact defendant was incarcerated on his 2000 predicate felony conviction far longer than the minimum time needed to find that conviction qualifies as a violent predicate conviction. LEXIS and WESTLAW is one avenue this Court posits to see what the challenge might be, and how the People could sustain their burden. As noted, there are a robust series of post-conviction proceedings where defendant conceded he was still incarcerated based on the 2000 sentence. One reported case, Harnett v. Tetreault, 2009 US Dist. LEXIS 83233, August 17, 2009 (NDNY), concerns defendant's application to proceed in forma pauperis on any new civil lawsuits. The problem was that defendant had already filed more than the law allowed represented by counsel. This decision cited a series of other filings defendant made between 2001 and 2009. The decision noted defendant conceded he was "an inmate at Upstate Correctional Facility in 2001, when he filed the first of two lawsuits which were determined frivolous." Tetreault, 2009 US Dist. LEXIS 83233 at *8 - *9. Lawsuits continued until the 2009 filing of this reported matter, and the District Court judge noted defendant admitted during this period he had been housed at Attica Correctional Facility and Clinton Correctional Facility. Id. at * 11 - * 12.

On May 10, 2010, defendant commenced an Article 78 action suing, among others, the Superintendent of the Upstate Correctional Facility. He alleged the four inmate disciplinary proceedings at that state prison facility, held between May 15, 2009 and February 25, 2010, violated due process. In a decision dated May 18, 2011, a court

dismissed this petition. Matter of Harnett v. Peck, 2011 N.Y. Misc. LEXIS 2535, May 11, 2011 (Sup Ct. Franklin County).²

Defendant returned to federal court and filed two requests for habeas corpus release. Of course, the very basis for seeking federal habeas relief for a New York State, or other state court conviction, requires a defendant to first allege they are still in custody “pursuant to the judgment of a State court,” and also state as a ground that this current custody is “in violation of the Constitution or laws or treaties of the United States.” 28 USC § 2254(a). Defendant did just that in his pro se pleadings. The first habeas petition defendant filed in this case was Matter of Harnett v. Conway, 2009 US Dist. LEXIS 115244, December 9, 2009 (SDNY). In that ruling, the judge actually granted defendant’s request for a stay of the habeas corpus proceeding based on defendant’s request, among others, for the state to produce discovery. The judge noted the procedural history to date in that case in terms of undisputed terms of incarceration. The ruling noted defendant was incarcerated based on his December 14, 2000 conviction in Bronx County, and had been sentenced to eighteen years. The decision further noted that in January 2007, defendant filed a motion to vacate his sentence pursuant to CPL 440.20, on the grounds the original sentence was illegal because it did not include a term of post-release supervision. The decision noted defendant was resentenced “on July 25, 2007 to 18 years in prison, consistent with the original sentence, to be followed by 5 years of post-release supervision. (Resp’t’s Decl. P 15.) In August 2007, the petitioner sought leave to appeal the re-sentencing to the Appellate Division. (Pet’r’s Affirmation P [*3] 9, Nov. 11, 2009; Resp’t’s Decl. 15.) A deputy clerk for the Appellate Division informed the petitioner that the Appellate Division needed a copy of the re-sentencing order. (Pet’r’s Affirmation P 11, Nov. 11, 2009.) The petitioner responded that he never obtained the re-sentencing records, either from the court or from his counsel. (Pet’r’s Affirmation P 12, Nov. 11, 2009.) The petitioner’s appeal of the ruling has been pending before the Appellate Division for over two years. (Pet’r’s Affirmation P 19, Nov. 11, 2009; Resp’t’s Decl. P 15.) In October 2007, the petitioner filed an initial petition for habeas corpus with this Court, and the Court subsequently directed the filing of an amended habeas petition explaining the grounds sought for relief.” Id. at *2 – * 3.

There are multiple other proceedings in various federal courts with reported rulings and they span many years. They are all part of the post-sentencing and/or

² Perhaps of interest to some in connection with the “refuse to reform/remains unchastened” public policy rationale behind mandatory recidivist sentencing, the Peck decision notes not only the violence defendant employed while incarcerated at that time, but also that one infraction concerned defendant’s masturbating in front of a female corrections officer. The court in this matter found “no constitutional and/or regulatory violation in the hearing officer’s mention of petitioner’s prison disciplinary record of lewd conduct and criminal conviction of a sex offense as factors in determining the level of dispositional penalties imposed following the Tier III Superintendent’s Hearing.” Peck, 2011 NY Misc. LEXIS 2535 at * 16.

resentencing claims defendant advanced and the People could pick and choose what they want to use. The most recent relevant decision to any purported “tolling” concern they might cite is the final ruling in Harnett v. Conway, 2014 US Dist. LEXIS 161456, November 17, 2014 (SDNY). This is the habeas petition against the warden commenced in 2007, and then amended in 2008. This 2014 decision again traces all of the litigation and the history of all post-conviction proceedings since the time of the original sentence. On November 17, 2014, nearly fourteen years after defendant was sentenced to an eighteen year prison sentence in Bronx County on a violent felony conviction, the United States District Court Judge denied defendant’s petition to be released from prison on that sentence.

This Court cites all of this to underscore why it holds that Erlinger does not require that every time a defendant mounts a generic “tolling” challenge in the course of a predicate felony adjudication proceeding, a jury question is presented. This Court could grant the People’s application to mark the 2019 indictment court file and give it to the jury to make the tolling findings about length of incarceration based on the many documents contained therein. That is not what this Court believes Erlinger requires a jury to do, even though the rules of evidence allow such a presentation. As noted, it is not even clear exactly what defendant does or even could challenge that would require a 400.15 determination in this matter as it relates to tolling that would present an Erlinger jury question. Defendant does not specifically claim his own incarceration stemming from his December 14, 2000 sentencing following that violent felony conviction was not long enough for any specific reason. He was sentenced to an eighteen year determinate sentence. That would usually mean he served eighteen years in prison with credit for time he was incarcerated pre-sentence on that matter and any jail time credit he received toward his set-in-law release date. According to the court file in the 2000 case, defendant was never released according to SORA/Bronx Supreme Court records alone, until September 2018, at the earliest. That is less than four years before committing the crimes for which he now stands convicted. Saying something akin to “I challenge the tolling part” is far too vague to be viewed as something controverting an allegation in a predicate felony statement that requires a jury to make a fact finding, or perhaps even a judge, that the People’s math is correct, beyond a reasonable doubt. Cf. People v. Konstantinides, 14 NY3d 1, 10 (2009). This is not shifting the burden of proof to the defendant; it is a common-sense recognition that where any jury fact determination is required in a predicate challenge, the People should be told what it is they have to prove and the jury should be informed exactly what they need to find, by a specific record of what is being controverted.

Finally, the People refer to remarks apparently made on the record by another New York County Supreme Court justice in which they say that jurist said, “courts are still permitted to make simple factual findings for periods of incarceration post-Erlinger.” (Brief for People dated September 20, 2024 at ¶ 35, referencing People v. Desmond Smith, Ind. No. 2755/2018, Sup Ct. NY County July 24, 2024). This Court has not seen those minutes. Thus, it has no idea whether that was a specific holding or just a general remark. Whatever it represented, this Court now rules in this decision what that judge is

purported to have says as this Court's reason for denying this defense request that it follow Lopez.

Accordingly, for all the reasons stated herein, this Court denies defense counsel's legal application to have a jury resolve the tolling calculations in this matter.

Dated: September 25, 2024
Bronx, New York

Ralph Fabrizio
Ralph Fabrizio, AJSC