



IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARSHAWN LEWIS	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 26, 2026
	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S CORRECTED ANSWERING BRIEF

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U.S. Const. amend. V14

NATURE AND STAGE OF THE PROCEEDINGS

On February 6, 2024, Mashawn Lewis was arrested for Possession of a Firearm by a Person Prohibited (“PFBPP”), Possession of Ammunition by a Person Prohibited (“PABPP”), and Receiving a Stolen Firearm. (A1 at D.I. 1).¹ Lewis filed a motion to dismiss on June 10, 2024, but the motion was deemed moot after a New Castle County Grand Jury indicted him on June 17, 2024 for the same offenses. (A1-2 at D.I. 7-8; A10-11).

On October 10, 2024, Lewis moved to suppress evidence. (A3 at D.I. 20). The State filed an opposition. (A4 at D.I. 24). On December 2, 2024, the Superior Court denied Lewis’s motion.²

On April 4, 2025, Lewis moved to dismiss on speedy-trial grounds. (A5 at D.I. 38). After briefing and hearing argument at the April 24, 2025 pre-trial conference, the Superior Court denied Lewis’s motion. (A6 at D.I. 43-45; A12-20). At the same conference, the court discussed severance of the PFBPP and PABPP charges, and the State advised that it would enter a *nolle prosequi* on the Receiving a Stolen Firearm charge. (A20). The parties also anticipated stipulating that Lewis was a prohibited person. (A22-23). The court further asked whether *Erlinger v.*

¹ “D.I.” refers to Superior Court docket items from Case ID No. 2402003067, included in Appellant’s Appendix to his Opening Brief at A1-9.

² *State v. Lewis*, 2024 WL 4950149 (Del. Super. Ct. Dec. 2, 2024).

*United States*³ required a jury to determine whether Lewis’s prior conviction for Carrying a Concealed Deadly Weapon – Firearm (“CCDW-Firearm”) triggered the enhanced sentencing provision of 11 *Del. C.* § 1448(e)(1). (A23-25).⁴ Citing this Court’s decision in *Jackson v. State*,⁵ the State responded that it was the State’s position that *Erlinger* did not apply because Lewis only had one qualifying predicate offense. (A22-25). The court did not hear argument from the defense or rule on the issue at this time. (A25). Instead, the court told the State that it could stipulate “the way [it] want[ed] to stipulate [that Lewis was a person prohibited], while cautioning the State to “[b]e careful, because [the court] was not sure that *Jackson* says exactly what [the State] think[s] it says.” (A25).

³ 602 U.S. 821 (2024).

⁴ Section 1448(e)(1) provides as follows:

Notwithstanding any provision of this section or Code to the contrary, any person who is a prohibited person as described in this section and who knowingly possesses, purchases, owns or controls a firearm or destructive weapon while so prohibited shall receive a minimum sentence of: a. Three years at Level V, if the person has previously been convicted of a violent felony; b. Five years at Level V, if the person does so within 10 years of the date of conviction for any violent felony or the date of termination of all periods of incarceration or confinement imposed pursuant to said conviction, whichever is the later date; or c. Ten years at Level V, if the person has been convicted on 2 or more separate occasions of any violent felony.

11 *Del. C.* § 1448(e)(1).

⁵ *Jackson v. State*, 2025 WL 227682 (Del. Jan. 16, 2025).

A two-day jury trial commenced on April 28, 2025. (A6-7 at D.I. 49). Before trial, the State entered a *nolle prosequi* on the Receiving a Stolen Firearm charge. (A6 at D.I. 46). The parties stipulated that Lewis was prohibited from possessing a firearm and ammunition on or about February 5, 2024 and February 6, 2024 and that he was “present in and did not leave New Castle County” during the dates of February 4, 2024 through February 6, 2024. (A182; A245). The jury found Lewis guilty of PFBPP and not guilty of PABPP. (A241-42). The Superior Court ordered a pre-sentence investigation. (A242-43).

At a May 5, 2025 office conference, the State moved to revoke Lewis’s bail under 11 *Del. C.* § 2104(f)(2), arguing he was subject to sentencing under Section 1448(e)(1)b. (A7 at D.I. 54). Lewis opposed the motion, contending that *Erlinger* required a jury finding on the facts necessary to trigger Section 1448(e)(1)b’s enhanced penalties. (*Id.*). The Superior Court ordered the parties to submit letter memoranda. (*Id.*).

In its May 9, 2025 submission, the State argued that *Erlinger* was distinguishable because Section 1448(e)(1) only requires a single prior violent felony conviction to enhance Lewis’s minimum mandatory sentence and that the United States Supreme Court’s decision in *Almendarez-Torres v. United States*,⁶ permits a sentencing judge to find the fact of a prior conviction. (B1). Because

⁶ 523 U.S. 224 (1998).

Section 1448(e)(1) does not require an “occasions” determination, the State asserted that the court could determine that Lewis had a prior violent felony conviction for CCDW-Firearm, subjecting him to a minimum mandatory sentence, and thus his bail must be revoked pursuant to Section 2104.⁷ (*Id.*).

Lewis responded on May 16, 2025, stating that “[b]ecause [he] had a prior conviction for [CCDW-Firearm] in June 2023, a violent felony, he [was] subject to punishment under 11 *Del. C.* § 1448(e)(1)b.” (A246). While he appeared to concede that the sentencing judge may determine what crime and with what elements he was convicted of for sentencing under Section 1448(e)(1)a, he nevertheless argued that *Erlinger* requires a jury finding as to the date of the prior conviction to trigger Section 1448(e)(1)b. (A248-51, 270-71). Citing this Court’s decision in *Ortiz v. State*,⁸ the State replied that Lewis’s prior CCDW-Firearm conviction independently subjected him to at least the three-year mandatory sentence under Section 1448(e)(1)a, making bail revocation proper regardless of whether Section 1448(e)(1)b applied. (A253-56). The State attached certified copies of Lewis’s indictment for CCDW-Firearm, his plea agreement and truth-in-sentencing form,

⁷ See 11 *Del. C.* § 4201(c)(1) (providing that CCDW (Firearm Offense) is a violent felony).

⁸ 2025 WL 2718502 (Del. Sept. 23, 2025).

and the Superior Court’s corrected sentence order in that case to its reply. (A257-69).

On May 29, 2025, the Superior Court held that the exception in *Almendarez-Torres*, which *Erlinger* left standing, permits the court to find the fact of a prior conviction.⁹ Based on certified copies of Lewis’s indictment, plea agreement, in which he pled guilty to CCDW-Firearm, the truth-in-sentencing guilty plea form, and the Superior Court’s corrected sentence order, the court found that Lewis had been convicted of CCDW-Firearm.¹⁰ Because that offense is a violent felony under Section 4201(c)(1), Lewis was subject to a minimum-mandatory sentence under Section 1448(e)(1), and the court revoked his bail.¹¹ The court reserved the question whether the three-year minimum mandatory sentence in Section 1448(e)(1)a or the five-year minimum mandatory sentence in Section 1448(e)(1)b applied and directed the State to advise whether it intended to seek sentencing under subsection (b).¹²

On June 18, 2025, the State informed the Superior Court that it intended to seek sentencing under Section 1448(e)(1)b. (B6). The State argued that evidence

⁹ *State v. Lewis*, 2025 WL 1531489, at *3 (Del. Super. Ct. May 29, 2025) (noting that “[t]he parties do not appear to be in disagreement about the law, at least insofar as to whether the Court can determine the fact of Lewis’ prior conviction”).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

of Lewis’s December 19, 2022 violent felony conviction for CCDW-Firearm did not need to be presented to a jury because, unlike in *Erlinger*, the court only needed to find that Lewis has one prior conviction. (*Id.*). The State argued that the date of Lewis’s December 19, 2022 CCDW-Firearm conviction was established by the *Shepard v. United States*¹³ documents already reviewed by the court and fell within the ten-year period. (*Id.*). Lewis responded that under *Erlinger*, a judge may determine only “what crime [and] with what elements the defendant was convicted of,” not whether his conviction occurred within ten years of the crime for which they are to be sentenced. (A270-71).

On June 27, 2025, the Superior Court rejected Lewis’s arguments and granted the State’s request to sentence Lewis pursuant to Section 1448(e)(1)b.¹⁴ The court held that, consistent with *Almendarez-Torres* and *Erlinger*, it may look to the date of Lewis’s conviction.¹⁵ The court also found that it was not necessary to do even that in Lewis’s case because the indictment alleged that Lewis committed the CCDW-Firearm offense on or about February 3, 2022 and thus contained the charge for which Lewis pled guilty.¹⁶ According to the court, “[o]bviously, if Lewis

¹³ *Shepard v. United States*, 544 U.S. 13 (2005).

¹⁴ *State v. Lewis*, 2025 WL 1780556, at *3 (Del. Super. Ct. June 27, 2025).

¹⁵ *Id.*

¹⁶ *Id.*

committed the crime within 10 years, he was convicted of that crime within 10 years also.”¹⁷ The court noted that “[i]n looking at the indictment to determine whether Lewis qualifies for sentencing under 11 *Del. C.* § 1448(e)(1)(b), the [c]ourt has not engaged in any factfinding resembling the ‘occasions’ determination that *Erlinger* requires be made by a jury,” or “strayed beyond the very document that contains the elements of the offense.”¹⁸

At sentencing on December 19, 2025, the State requested that Lewis be sentenced for PFBPP, pursuant to Section 1448(e)(1)b, to 15 years at Level V, suspended after the minimum five year mandatory sentence. (A279). Lewis requested the minimum five year mandatory sentence and asked that his related violations of probation be discharged without additional incarceration. (A279-80). As to Lewis’s violations of probation, the State requested that Lewis be sentenced to two years of additional unsuspended Level V time. (A280-83). After hearing from Lewis (A284-86), the Superior Court sentenced him to 15 years of incarceration, suspended after six years for decreasing levels of supervision. (Ex. A to Opening Br.; A286-88). The court explained that it imposed six years of

¹⁷ *Id.*

¹⁸ *Id.* The court noted that “[a] different result might obtain if the [c]ourt were required to determine if a defendant’s conviction under 11 *Del. C.* § 1448 occurred within 10 years of the ‘date of termination of all periods of incarceration or confinement imposed pursuant to said conviction’ under § 1448(e)(1)(b).” *Id.* at *3 n.17.

unsuspended time on the PFBPP conviction because it was discharging Lewis's violations of probation without imposing additional incarceration. (A286-88).

Lewis has appealed. This is the State's answering brief.

SUMMARY OF ARGUMENT

I. DENIED. The Superior Court did not err when it sentenced Lewis for PFBPP pursuant to 11 *Del. C.* § 1448(e)(1)b. Lewis has not established any violation of the Fifth and Sixth Amendments to the United States Constitution. Lewis was not entitled to have a jury determine whether he had a predicate offense that subjected him to the five-year minimum-mandatory sentence under Section 1448(e)(1)b. As this Court recognized in *Ortiz*,¹⁹ the Superior Court was permitted under the “narrow exception” set forth in *Almendarez-Torres*²⁰ to find that the fact of Lewis’s single prior conviction for CCDW-Firearm enhanced his PFBPP sentence under Section 1448(e)(1). The judge also was permitted under *Almendarez-Torres* to find the date of Lewis’s CCDW-Firearm conviction. The date of conviction is a matter of certified court records and, as *Erlinger*²¹ recognized, was an essential part of the fact of Lewis’s prior conviction because a judge cannot identify a previous conviction without noting the date of conviction. Finally, even if the Superior Court erred, any error was harmless beyond a reasonable doubt.

¹⁹ 2025 WL 2718502.

²⁰ 523 U.S. 224.

²¹ 602 U.S. 821.

STATEMENT OF FACTS

On February 6, 2024, Crime Gun Intelligence Center Investigator Anthony Lerro of the Wilmington Police Department (“WPD”), along with other WPD members, responded to 203 North Poplar Street in Wilmington as part of an investigation. (A43-44, A54-55). The building contained separate apartments on the upper and lower floors. (A47, A55). After observing Lewis exit the second-floor apartment, enter a parked vehicle, and prepare to leave, Lerro took him into custody and collected his cell phone.²² (A43-51). The encounter was captured on Lerro’s body-worn camera. (A45-47).

After Lewis was detained, WPD Investigator Leonard Moses responded to the rear of the building and observed an open second-floor window through which he could see a person inside the upstairs apartment.²³ (A54-55, A65-67). Moses also observed a tan-colored handgun lying in the grass below the window. (A54-55, A65-67; *see also* A45, A49-51). Moses collected the firearm, which appeared to have been tossed there.²⁴ (A55-59; *see also* A47-51). Moses’ body-worn camera captured his discovery of the firearm. (A60, A64-66).

²² Lewis did not reside at 203 North Poplar Street. (A49). Another individual also exited the building and entered the vehicle with Lewis. (A48-49).

²³ Pursuant to a search warrant, Lerro later searched the second-floor apartment and found at least one person inside. (A52, A67).

²⁴ Lerro and Moses both testified that the firearm could have been tossed from the open second-floor window. (A50-51, A70-71).

The firearm was a tan-colored “Shadow Systems SMR 920” 9-mm semi-automatic handgun, loaded with one round of 9-mm ammunition in the chamber, and additional 9-mm rounds in the magazine. (A59-60, A74-75). The firearm was “unique,” featuring a threaded barrel capable of accepting a silencer and multiple aftermarket attachments, including sight and light attachments. (A58-64, A68-70). The firearm was operable, but no fingerprints were recovered from the firearm.²⁵ (A77-81).

DNA testing was conducted on swabs taken from the firearm’s grip, magazine, slide, and trigger/ammunition cartridge. (A133-41). The grip sample was a mixed profile of two individuals but yielded an insufficient sample for comparison. (A136-38). Because the magazine sample was a mixed profile of at least three people, the analyst was unable to form any conclusions. (A138-39). The slide swab yielded an insufficient sample for comparison. (A139-40). Finally, the trigger/cartridge sample did not produce a DNA profile. (A140). The DNA analyst concluded that multiple individuals had touched the firearm, but he was unable to identify any specific individual or conclusively exclude Lewis. (A140-41).

Investigators used Cellebrite technology to extract data from Lewis’s phone. (A146-49, A166). The extraction contained a screen recording of a video call

²⁵ The State’s firearm examiner acknowledged that some replica firearms resemble authentic firearms but are not legal firearms because they cannot fire. (A82).

created on February 5, 2024 between Lewis and an unknown individual. (A160-81). During the call, Lewis is seen holding a tan firearm with sight and light attachments, a black slide safety, and threaded barrel, similar to the firearm recovered from the rear yard of 203 North Poplar Street. (A166-81). The video and screenshots were admitted at trial without objection (A164, A169), permitting the jury to compare the firearm displayed by Lewis during the call with the firearm recovered by police.²⁶

The parties stipulated that “during the dates of February 4th, 2024, through February 6th, 2024, [Lewis] was present in and did not leave New Castle County, Delaware.” (A182). The parties also stipulated that “on or about February 5th, 2024, and February 6th, 2024, [Lewis] was prohibited by Delaware law from possessing a firearm ... [and] from possessing ammunition.” (A182).

²⁶ Lewis initially objected to the video’s admission on authentication grounds. After *voir dire* and argument, the Superior Court found the Cellebrite extraction data and related evidence sufficient to support a finding that the video was what the State claimed it to be and overruled the objection. (A85-86, A88-110, A111-19).

ARGUMENT

I. THE SUPERIOR COURT DID NOT ERR WHEN IT FOUND THAT LEWIS HAD A PRIOR VIOLENT FELONY CONVICTION THAT OCCURRED WITHIN THE PREVIOUS TEN YEARS AND THUS SENTENCED HIM FOR PFBPP UNDER SECTION 1448(e)(1)b.

Question Presented

Whether Lewis’s sentence under 11 *Del. C.* § 1448(e)(1)b violated *Erlinger* because the sentencing judge, not a jury, found that Lewis’s prior violent felony conviction for CCDW-Firearm occurred within the past ten years.

Standard and Scope of Review

Questions of law are reviewed *de novo*.²⁷

Merits of the Argument

Lewis contends that “[t]he trial court committed structural error when it failed to submit to the jury the question of whether he had committed an offense within a specific time frame when that fact enhanced his sentence [for the PFBPP charge pursuant to Section 1448(e)(1)b] by exposing him to a minimum mandatory [5-year] term of incarceration.” (Opening Br. 5-16). As the Superior Court found, it appears that Lewis conceded below that the trial judge may find “the fact” of his prior violent felony conviction and thus sentence him for PFBPP to a minimum mandatory three-

²⁷ *Fountain v. State*, 2014 WL 4102069, at *1 (Del. Aug. 19, 2014).

year sentence under Section 1448(e)(1)a.²⁸ (See A246-51, A270-71). However, he asserts that his Fifth and Sixth Amendment rights were violated when the trial court also found that his prior violent felony conviction occurred within ten years of his current PFBPP offense, subjecting him to the enhanced minimum mandatory five-year term of incarceration under Section 1448(e)(1)b. (Opening Br. 5-16). Citing *Erlinger*, *Apprendi v. New Jersey*,²⁹ and *Alleyne v. United States*,³⁰ Lewis contends that he was entitled to have a jury determine whether his prior violent felony conviction occurred within ten years of his current PFBPP offense because that finding “required more than a determination of ‘what elements’ and ‘what crime’ Lewis had committed.” (*Id.*). Lewis’s arguments are unavailing.

A. The Judge’s Findings Did Not Violate the Fifth and Sixth Amendments.

1. The Prior Conviction Exception

Lewis has not established any constitutional violation. The Sixth Amendment to the United States Constitution guarantees the right to a jury “[i]n all criminal prosecutions,” while the Fifth Amendment entitles criminal defendants to “due process of law.”³¹ The United States Supreme Court has read those rights in

²⁸ See *Lewis*, 2025 WL 1531489, at *3; *Lewis*, 2025 WL 1780556, at *2.

²⁹ 530 U.S. 466 (2000).

³⁰ 570 U.S. 99 (2013).

³¹ U.S. Const. Amends. V, VI.

conjunction in finding that, as a general matter, “[j]uries must find any facts that increase either the statutory maximum or minimum” beyond a reasonable doubt.³²

In *Apprendi*, the Supreme Court found that a New Jersey hate crime enhancement was unconstitutional where it allowed a judge to impose a higher sentencing range upon the judge’s finding by a preponderance of the evidence that the defendant’s purpose was to intimidate the victim based on a particular characteristic.³³ The Court held that because it increased the sentencing range, the issue of the defendant’s purpose needed to be proven to and determined by a jury.³⁴

In *Almendarez-Torres*, however, the United States Supreme Court recognized an important exception to this general rule: the Constitution does not prevent a judge from increasing the minimum or maximum sentence to which a defendant is subject based upon the judge’s factual finding that a defendant has a prior conviction.³⁵ There, a federal law forbade noncitizens who had once been deported from returning to the United States without special permission and authorized a prison term of up to two years for violating the law.³⁶ The law was accompanied by a sentencing

³² *Alleyne*, 570 U.S. at 113 n.2; see *Mathis v. United States*, 579 U.S. 500, 511 (2016); *Blakely v. Washington*, 542 U.S. 296, 301 (2004); *Apprendi*, 530 U.S. at 476, 490.

³³ *Apprendi*, 530 U.S. at 490-97.

³⁴ *Id.*

³⁵ *Almendarez-Torres*, 523 U.S. at 246.

³⁶ *Id.* at 226.

enhancement authorizing a prison term of up to twenty years for any noncitizens violating the law “if the initial ‘deportation was subsequent to a conviction for commission of an aggravated felony.’”³⁷ The Court found that the sentencing enhancement was not an element of the crime and thus did not need to be listed in an indictment and the State did not have to prove beyond a reasonable doubt that it applied.³⁸ The Court reasoned that recidivism “is a traditional, if not the most traditional, basis for a sentencing court’s increasing an offender’s sentence.”³⁹ The Court reiterated its prior determination that a fact does not become an element of a crime requiring proof beyond a reasonable doubt merely because the fact affects the severity of punishment.⁴⁰

Since *Almendarez-Torres*, the United States Supreme Court has repeatedly confirmed that “the fact of a prior conviction” does not need to be submitted to a jury and proven beyond a reasonable doubt, even when it increases the penalty for a crime beyond the statutory maximum or minimum that would otherwise apply. In *Apprendi*, the Supreme Court determined that it “need not revisit” *Almendarez-*

³⁷ *Id.* (quoting 8 U.S.C. § 1326).

³⁸ *Id.* at 235, 239-40.

³⁹ *Id.* at 243.

⁴⁰ *Id.* at 243-44.

Torres, characterizing it as “a narrow exception to the general rule.”⁴¹ Likewise, in *Blakely v. Washington*,⁴² *United States v. Booker*,⁴³ and *Alleyne*,⁴⁴ the Court reiterated that any fact enhancing the applicable sentencing range, other than a prior conviction, must be submitted to a jury.

In *Erlinger*, the United States Supreme Court expressly upheld *Almendarez-Torres*’ longstanding “exception” to the jury-trial rule, reaffirming that judges may, “consistent with the Sixth Amendment ... determine what crime, with what elements, the defendant was convicted of.”⁴⁵ In *Erlinger*, the petitioner was charged with being a felon in possession of a firearm, which ordinarily carried a sentence of zero to ten years’ imprisonment.⁴⁶ The government sought an enhanced sentence under the federal Armed Career Criminal Act (“ACCA”), which provided a minimum mandatory sentence of fifteen years’ to life imprisonment if the offender had three prior violent felony or serious drug offenses that were “committed on

⁴¹ *Apprendi*, 530 U.S. at 489-90 (holding that the Sixth Amendment requires that “[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”) (emphasis added).

⁴² *Blakely*, 542 U.S. at 301.

⁴³ *United States v. Booker*, 543 U.S. 220, 244 (2005).

⁴⁴ *Alleyne*, 570 U.S. at 111-12 & n.1.

⁴⁵ *Erlinger*, 602 U.S. at 838.

⁴⁶ *Id.* at 825, 834.

occasions different from one another.”⁴⁷ The government argued that Erlinger’s three prior convictions, stemming from a series of burglaries that he committed “within a span of days,” satisfied this requirement.⁴⁸ Erlinger argued that his prior burglaries were committed during a single criminal episode and that a jury was required to determine whether they were committed on separate occasions as ACCA requires.⁴⁹ The trial court rejected Erlinger’s argument and sentenced him under ACCA.⁵⁰

The Supreme Court vacated Erlinger’s sentence, holding that the Fifth and Sixth Amendments require a jury to determine beyond a reasonable doubt whether past offenses were committed on separate occasions.⁵¹ The Court explained that the “separate occasions” inquiry is a fact-intensive one involving factors such as timing, location, and whether the offenses were “similar or intertwined” or shared “a common scheme or purpose” and could require a “qualitative assessment about ‘the character and relationship’ of the offenses.”⁵²

⁴⁷ *Id.* (cleaned up).

⁴⁸ *Id.* at 826-27.

⁴⁹ *Id.* at 827.

⁵⁰ *Id.*

⁵¹ *Id.* at 825, 835, 839-40 (reiterating that a sentencing court may not determine “‘what the defendant ... actually d[id],’ or the ‘means’ or ‘manner’ in which he committed his [prior] offense in order to increase the punishment to which he might be exposed”).

⁵² *Id.* at 834-41 (citing *Wooden v. United States*, 595 U.S. 360 (2022)).

Yet the Court emphasized the narrowness of its ruling. While recognizing that Erlinger “was entitled to have a jury resolve ACCA’s occasions inquiry unanimously and beyond a reasonable doubt, [it] decide[d] no more than that.”⁵³ And while acknowledging that *Almendarez-Torres* has endured much criticism, the Court expressly declined to revisit that decision.⁵⁴ Indeed, the Court reaffirmed that sentencing judges may rely on *Shepard* documents—“judicial records, plea agreements, and colloquies between a judge and the defendant,”⁵⁵ to “determin[e] the fact of a prior conviction and the then-existing elements of that offense.”⁵⁶ More specifically, the Court noted that “[t]o determine what legal elements attached to [Erlinger’s] decades-old offenses, the court might have needed to consult *Shepard* documents to ascertain the jurisdiction in which they occurred and the date on which they happened. But the court had no need or authority to go any further.”⁵⁷

2. No Constitutional Violation

Central to this appeal is Lewis’s contention that his Fifth and Sixth Amendment rights were violated because the trial judge’s finding that his prior conviction occurred within ten years of his current PFBPP offense required more

⁵³ *Id.* at 835.

⁵⁴ *See id.* at 837-39.

⁵⁵ *Id.* at 839-40 (citing *Shepard*, 544 U.S. at 20-21).

⁵⁶ *Id.* at 839.

⁵⁷ *Id.* at 840 (cleaned up).

than determining “what elements” and “what crime” he was convicted of. (Opening Br. 7). But Lewis is wrong.

The Superior Court’s ruling is consistent with *Erlinger* and *Almendarez-Torres*. As this Court recently noted, *Erlinger* “held that a unanimous jury must determine beyond a reasonable doubt whether a defendant’s prior *offenses* were committed on *separate occasions* before his sentence can be enhanced under the [ACCA].”⁵⁸ But *Erlinger* also reaffirmed *Almendarez-Torres*, recognizing that a judge may still “undertake the job of finding the fact of a prior conviction – and that job alone.”⁵⁹ That is all the Superior Court did here.

The Superior Court properly did no more than determine “what crime, with what elements” Lewis was convicted of in order to find that the fact of Lewis’s prior violent felony conviction on December 19, 2022 enhanced his PFBPP sentence. The enhancement relied on the fact of only *one* prior violent felony conviction and the *date of that conviction*. The court did not decide whether multiple offenses occurred on separate occasions, nor did it determine “what the defendant ... actually d[id],’ or the ‘means’ or ‘manner’ in which he committed his [prior] offense.”⁶⁰ Because

⁵⁸ *Smith v. State*, 2025 WL 2048977, at *1 (Del. July 21, 2025) (emphasis added) (citing *Erlinger*, 602 U.S. at 825).

⁵⁹ *Erlinger*, 602 U.S. at 837.

⁶⁰ *Id.* at 839-40.

the court's findings fell within the prior-conviction exception permitted by *Almendarez-Torres*, *Erlinger* was not violated.

Regarding the sentencing judge's finding of the fact that Lewis had a single prior violent felony conviction, Lewis appears to concede, as he did below (see A246-51, A270-71), that such a finding is permitted by *Almendarez-Torres*.⁶¹ To the extent he now claims otherwise, that argument is foreclosed by this Court's decision in *Ortiz*.⁶²

In *Ortiz*, this Court held that the Superior Court may find the fact of a prior conviction under *Almendarez-Torres* to enhance a sentence.⁶³ Ortiz argued that his enhanced sentence for possession with intent to deliver ("PWID") was illegal under *Erlinger* because the Superior Court, rather than a jury, determined that he had a prior New York drug conviction that subjected him to enhanced sentencing under 16 Del. C. § 4763(a)(3).⁶⁴ Citing *Almendarez-Torres*, this Court disagreed, holding that the Superior Court "did no more than determine what crime, with what elements Ortiz was convicted of in order to find that the fact of Ortiz's prior conviction enhanced his PWID sentence."⁶⁵

⁶¹ See *Lewis*, 2025 WL 1531489, at *3; *Lewis*, 2025 WL 1780556, at *2.

⁶² *Ortiz*, 2025 WL 2718502.

⁶³ *Id.* at *1-2.

⁶⁴ *Id.*

⁶⁵ *Id.* at *2.

Moreover, decisions from other jurisdictions support the Superior Court’s ruling. Since *Erlinger*, several state courts have rejected similar arguments that the date of a prior conviction must be submitted to a jury.⁶⁶ For example, in *State v. Calvert*,⁶⁷ the Kansas Supreme Court held that the dates of the defendant’s prior theft convictions fell under the *Apprendi* exception for facts of prior convictions, and thus the defendant did not have a Sixth Amendment right under *Erlinger* to have a jury decide whether the defendant had two or more theft convictions within the preceding five years.⁶⁸ The court distinguished *Erlinger* because the inquiry did not involve how the prior offenses were committed, the defendant’s motivation for them, particulars of the crimes themselves, or how the convictions were obtained; it only required a mechanical or mathematical calculation from court records.⁶⁹ The court concluded that the sentencing court could rely on court records to establish both the dates of prior convictions and the statutes violated by defendants at the time they were convicted.⁷⁰

⁶⁶ See *State v. Calvert*, 583 P.3d 169, 173-74 (Kan. 2025); *Denson v. State*, 401 So.3d 633, 633-34 (Fla. Dist. Ct. App. 2025); *People v. Young*, 254 N.Y.S.3d 91, 96 (N.Y. App. Div. May 7, 2026); *People v. Jackson*, 225 N.Y.S.3d 903, 910 (N.Y. Sup. Ct. 2025); *People v. Holman*, 2025 WL 3754132, at *7-8 (Ill. App. Ct. Dec. 29, 2025); *People v. Coopwood*, 2025 WL 2556740, at *3-4 (Ill. App. Ct. Sept. 5, 2025).

⁶⁷ *Calvert*, 583 P.3d 169.

⁶⁸ *Id.* at 172-74.

⁶⁹ *Id.*

⁷⁰ *Id.*

Similarly, in *Denson v. State*,⁷¹ the Florida District Court of Appeal held that a defendant had no right to a jury determination of his prison-release date because that date was part of the prior record of conviction.⁷² In *People v. Young*,⁷³ the New York Appellate Division held that a tolling determination extending a ten-year lookback period for periods of incarceration involved “rote arithmetic” based on certified records and thus remains a ministerial, objective calculation for the court, not a question for the jury.⁷⁴

In *People v. Holman*,⁷⁵ the Illinois Appellate Court similarly rejected the proposition that *Erlinger* requires the date of a prior conviction to be submitted to a jury. The court considered the application of an extended-term sentence pursuant to a statutory provision, which permitted the imposition of an extended-term sentence

⁷¹ *Denson*, 401 So.3d 633.

⁷² *Id.* at 633-34.

⁷³ *Young*, 254 N.Y.S.3d 91.

⁷⁴ *Id.* at 96. New York’s persistent felony offender statute requires that, for enhanced sentencing, a prior violent felony conviction must have occurred within 10 years of the current conviction, which period is “tolled” during periods of incarceration. See *id.* at 92; see also *Jackson*, 225 N.Y.S.3d at 421 (“The facts necessary to determine tolling under the New York State persistent violent felony sentencing scheme continue to fall within the *Almendarez-Torres* exception.”); *People v. Vickers*, 239 N.Y.S.3d 494, 497-98 (N.Y. Sup. Ct. 2025) (“firmly agree[ing] with other New York trial courts that the dates of defendant’s prior convictions and the sentences imposed as well as the rote task of mathematical calculations required for tolling can be determined by a judge beyond a reasonable doubt”).

⁷⁵ *Holman*, 2025 WL 3754132, at *7-8.

when the defendant had been “convicted of the same, similar, or greater class of felony within the last 10 years, excluding time spent in custody.”⁷⁶ The court held that the date of defendant’s prior conviction does not need to be submitted to a jury under *Erlinger*.⁷⁷ The court concluded that *Erlinger* was distinguishable because the ten-year inquiry was a much simpler inquiry than that required under the ACCA and that it could be readily discernible from public records or the presentence investigation.⁷⁸ Moreover, the court found that the *Erlinger* “made it clear” that its decision did not overturn or narrow the holdings in *Almendarez-Torres* or *Apprendi*.⁷⁹ The court also noted that the statute at issue had repeatedly been held constitutional under *Apprendi*.⁸⁰ Finally, the court concluded that the date of defendant’s release from custody is not a fact that must be submitted to a jury but is “intrinsic to the conviction” and can be properly determined by the court.⁸¹

These decisions confirm that objective numerical facts drawn from certified records and simple calculations based on them, are not the kinds of “facts”

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

implicating the jury-trial right – they instead fall squarely within the fact of prior conviction exception.

In arguing to the contrary, Lewis nevertheless contends that the Superior Court improperly found the date of his prior violent felony conviction. (Opening Br. 7-11). He argues that *Erlinger* rejected the proposition “that a judge may in addition to finding the elements of a charge also find the date on which those elements occurred.” (*Id.* 9). Lewis also contends that the date of his prior CCDW-Firearm violent felony does not constitute a “fact of a prior conviction” and does not, therefore, qualify under the *Almendarez-Torres* exception. (*Id.* 10). Lewis further claims that *Almendarez-Torres* is disfavored, *Almendarez-Torres*’ holding is limited to its facts, and that this case is distinguishable because he went to trial rather than pleading guilty. (*Id.* 11-12). But as discussed next, Lewis’s arguments are unavailing.

First, Lewis misreads *Erlinger* as holding that the Court may not find the date of the prior conviction. (See Opening Br. 9). *Erlinger* did not prohibit a judge from finding the date of a prior conviction. Rather, the Supreme Court rejected the broader proposition suggested by *amicus curiae* – that permitting a court to find a crime and its elements under *Almendarez-Torres*, including, implicitly, the date and jurisdiction would “make the occasions inquiry so straightforward that sending it to

a jury would be pointlessly inefficient.”⁸² Notably, *Erlinger* explicitly reaffirmed that a sentencing judge may still conduct the narrow *Almendarez-Torres* inquiry, including consulting *Shepard* documents for the limited purpose of determining the fact of a prior conviction, the elements of the offense, the jurisdiction, and the date on which it occurred.⁸³ The Court simply clarified that a judge may not use that inquiry to “decide what the defendant actually did, or the means or manner in which he committed his offense.”⁸⁴

Second, Lewis’s attempt to distinguish *Almendarez-Torres* also fails. Lewis contends that *Almendarez-Torres*’ “status as good law must be tempered due to the ‘significant criticism’ with which it has been assailed,” “the case is ‘at best an exceptional practice’ from ‘historic practice,’” and “it is long overdue being overruled with the majority in *Erlinger* lamenting that ‘no one ... [had] asked [them] to revisit *Almendarez-Torres*,’” (see Opening Br. 8). Yet, as this Court recently recognized in *Ortiz*, *Almendarez-Torres*’ “narrow” prior-conviction exception remains good law.⁸⁵ *Erlinger* likewise made clear that its decision did not affect the

⁸² *Erlinger*, 602 U.S. at 839 (cleaned up).

⁸³ *Id.*

⁸⁴ *Id.* at 839-40 (cleaned up).

⁸⁵ *Ortiz*, 2025 WL 2718502, at *1.

viability of *Almendarez-Torres*.⁸⁶ Because *Almendarez-Torres* remains controlling Supreme Court authority, the Superior Court did not err by relying on it to find the fact of Lewis’s prior violent felony conviction.⁸⁷

Lewis’s argument that *Almendarez-Torres* is limited to its facts is unavailing. Although the defendant in *Almendarez-Torres* did not challenge the accuracy of his prior convictions, the United States Supreme Court’s subsequent decisions affirming *Almendarez-Torres*’ exception have not limited *Almendarez-Torres* to cases where a defendant admits prior convictions on the record.⁸⁸ Rather, *Apprendi* and its progeny, including *Erlinger*, continue to recognize that *all* prior convictions – not

⁸⁶ See *Erlinger*, 602 U.S. at 838 (“[N]o one in this case has asked us to revisit *Almendarez-Torres*. Nor is there need to do so today.”); see also *Lairy v. United States*, 142 F.4th 907, 914 & n.4 (7th Cir. 2025) (recognizing that “the Supreme Court has questioned this exception, but [that] it still remains good law”); *United States v. Florence*, 163 F.4th 1017, 1023-25 & n.1 (6th Cir. 2026) (holding that “*Erlinger* did not overrule *Almendarez-Torres*” and that “[d]espite criticism, ... *Almendarez-Torres*, and the narrow rule for which it stands, remains the law of the land,” and acknowledging that “[t]he few circuits to consider a challenge to *Almendarez-Torres* since *Erlinger* have expressly held that the latter did not disturb the narrow exception carved out in the former”).

⁸⁷ See *United States v. Pacheco-Zepeda*, 234 F.3d 411, 414-15 (9th Cir. 2000) (noting that “speculation does not permit [the court] to ignore controlling Supreme Court authority”); see also *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (directing that lower courts should “leav[e] to this Court the prerogative of overruling its own decisions”) (internal quotation omitted).

⁸⁸ See *Pacheco-Zepeda*, 234 F.3d at 414-15.

just those admitted on the record – are exempt from the general jury-finding requirement.⁸⁹

Lewis is also wrong that “*Almendarez-Torres* cannot possibly be authority for sentencing judges to make findings as to the dates of a prior conviction because the recidivist sentencing provision at issue in *Almendarez-Torres* did not require – and the sentencing judge did not make – findings as to that date [of a prior conviction].” (Opening Br. 10). The United States Supreme Court has not limited *Almendarez-Torres*’ holding to cases where a defendant has admitted his prior convictions during a guilty plea.⁹⁰ And, multiple courts have also held that *Almendarez-Torres* is not limited to its facts, and have applied it to defendants who, like Lewis, were convicted at trial rather than by guilty plea.⁹¹

Third, and related to the previous point, the date of a prior conviction is a fact that has already been established in proceedings where the defendant has been

⁸⁹ See *id.*; see *infra* note 90.

⁹⁰ See *United States v. Beng-Salazar*, 452 F.3d 1088, 1091 (9th Cir. 2006) (rejecting argument that *Almendarez-Torres* was limited to cases where a defendant has admitted his prior convictions during a guilty plea); *State v. Sandoval*, 89 P.3d 92, 93-94 (N.M. Ct. App. 2004) (same); *State v. Ivory*, 41 P.3d 781, 783 (Kan. 2002) (citing *Pacheco-Zepeda*, 234 F.3d at 414-15) (“[N]owhere does *Apprendi* limit *Almendarez-Torres* to cases where a defendant admits prior aggravated felony convictions on the record.”)).

⁹¹ See, e.g., *United States v. Mateo-Mendez*, 2001 WL 710647, at *1 (9th Cir. 2001) (applying *Almendarez-Torres* to defendant who was convicted at trial); see *supra* note 90.

afforded an array of constitutional protections. Although the United States Supreme Court has never defined the scope of “the fact of a prior conviction,”⁹² the reason it is excepted from the general rule is that it “recognize[s] facts that have already ‘been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.’”⁹³ In ACCA cases, the Supreme Court has allowed sentencing courts to “consult a limited class of documents”⁹⁴ that are “conclusive records made or used in adjudicating guilt,”⁹⁵ such as indictments, jury instructions, a bench-judge’s formal rulings of law and findings of fact, plea agreements, and plea colloquy transcripts.⁹⁶ That inquiry, however, was limited only to finding the elements a jury “necessarily” had to find to convict a defendant (“or what he necessarily admitted”).⁹⁷

⁹² See *Garrus v. Sec’y of Penn. Dep’t of Corr.*, 694 F.3d 394, 404-05 (3d Cir. 2012) (noting there is “a broad spectrum of reasonable applications” of the *Apprendi* prior conviction exception); *Wilson v. Knowles*, 638 F.3d 1213, 1215 (9th Cir. 2011) (“Courts may reasonably disagree about some of the precise boundaries of the exception.”).

⁹³ *Garrus*, 694 F.3d at 405 (quoting *Jones v. United States*, 526 U.S. 227, 249 (1999)).

⁹⁴ *Descamps v. United States*, 570 U.S. 254, 257 (2013).

⁹⁵ *Shepard*, 544 U.S. at 20-21.

⁹⁶ *Id.* at 26; see also *Mathis*, 579 U.S. at 505; *Taylor v. United States*, 495 U.S. 575 (1990). Those records are commonly referred to as *Shepard* documents.

⁹⁷ *Mathis*, 579 U.S. at 513, 515-16.

Also central to the findings in the *Shepard* document cases is the idea that a court may rely on certain information in those documents because the court is limited to only that information that has been previously found in accordance with a defendant’s Sixth Amendment right to a jury trial, or that has been explicitly admitted to by the defendant.⁹⁸ But a judge may not “go beyond identifying the crime of conviction to explore *the manner* in which the defendant committed that offense.”⁹⁹

Fourth, although in *Erlinger*, Justice Gorsuch held that a State could not rely on *Shepard* documents to establish whether prior offenses were “committed on occasions different from one another” under the ACCA,¹⁰⁰ the Justice clarified that “a sentencing judge may use the information he gleans from *Shepard* documents for the ‘limited function’ of determining the fact of a prior conviction and the then-existing elements of that offense,” but “[he] may not use information in *Shepard* documents to decide ‘what the defendant . . . actually d[id],’ or the ‘means’ or ‘manner’ in which he committed his offense in order to increase the punishment to

⁹⁸ See *Descamps*, 570 U.S. at 269-70 (discussing the limits of what information a court may glean from *Shepard* documents).

⁹⁹ *Mathis*, 579 U.S. at 511 (emphasis added).

¹⁰⁰ See *Erlinger*, 602 U.S. at 840 (noting the court had no authority to use the *Shepard* documents to “assume for itself the responsibility of deciding whether Mr. Erlinger’s past offenses differed enough in time, location, character, and purpose to have transpired on different occasions”).

which he might be exposed.”¹⁰¹ He also noted that a judge could use *Shepard* documents “to ascertain the jurisdiction in which [crimes] occurred and the date on which they happened.”¹⁰² Thus, *Erlinger* specifically acknowledged the legitimacy of the *Almendarez-Torres* exception allowing sentencing judges to use the fact of a prior conviction in imposing sentence and that an offense’s date and jurisdiction are inherent in the fact of a prior conviction.¹⁰³

Fifth, the conceptual difference between a “date”—a particular point in time—versus an “occasion” permits a judge to find the fact (and date) of a conviction without exceeding *Almendarez-Torres*. In *Wooden*,¹⁰⁴ the United States Supreme Court explained the distinction between a “separate occasions” inquiry and the objective determination of a conviction’s date.¹⁰⁵ There, the Supreme Court rejected the proposition that an “occasion” under the ACCA happens “at a particular point in

¹⁰¹ *Id.* at 839-40 (citations omitted).

¹⁰² *Id.* at 840.

¹⁰³ *See id.* at 839-40.

¹⁰⁴ *Wooden*, 595 U.S. at 366-68.

¹⁰⁵ *See also State v. Herndon*, 2025 WL 487149, at *13 (Wash. Ct. App. Feb. 13, 2025) (noting that *Erlinger* “is limited to resolving ACCA’s occasions inquiry” and *Almendarez-Torres* continues to allow a judge to determine “the fact of a conviction”); *United States v. Martin*, 2024 WL 5102858, at *2 (3d Cir. Dec. 13, 2024) (noting that *Erlinger*’s holding is “expressly limited” to the ACCA’s “occasions inquiry” and that it did not change *Apprendi*’s and *Almendarez-Torres*’ applications).

time.”¹⁰⁶ In doing so, the Court pointed to colloquial understandings of an “occasion,” discussing how a typical person would understand the term to encompass more than just a particular point in time and using the example of a wedding.¹⁰⁷ The Court concluded that the government’s reading of each temporally distinct offense as its own occasion collapsed two distinct requirements: three prior felonies and separate occasions.¹⁰⁸ In other words, the Supreme Court held that the idea of “temporally distinct” prior offenses is distinct from the separate “occasions” analysis. That distinction permits a judge to determine the date of a conviction without exceeding *Almendarez-Torres*.

In sum, judges may still conduct the “narrow inquir[ies]” necessary to ascertain the legal elements the government has to prove to secure a conviction, including the jurisdiction and the dates relevant to the conviction.¹⁰⁹ And in so doing, a judge may consider appropriate certified court documents.¹¹⁰ Thus, post-*Erlinger*, this Court can still rely upon certified documents the State provides to establish the date of the commission and adjudication or sentencing of each prior

¹⁰⁶ *Wooden*, 595 U.S. at 366-67. Wooden had been sentenced as a career criminal under the ACCA based on ten prior burglary convictions, the commission of which had all occurred on the same night. *See id.* at 362-63.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 368-69.

¹⁰⁹ *See Erlinger*, 602 U.S. at 839.

¹¹⁰ *See Shepard*, 544 U.S. at 20-21.

offense, as well as the jurisdiction of any such crime. A jury need not make those determinations.

Applying those principles here, Section 1448(e)(1)b requires no analysis into what Lewis actually did or how he committed his prior CCDW-Firearm offense. The judge only needed to determine whether Lewis had a *single* prior violent felony conviction and the *date of that conviction*. The *Shepard* documents showed Lewis's prior Delaware conviction for CCDW-Firearm, a violent felony, on a particular date. (See A258-69). There was nothing to controvert. At most, a jury would have been asked to compare dates and determine whether Lewis had one CCDW-Firearm conviction within the preceding ten years. That is not the sort of "fact-laden" determination that the Supreme Court considered in *Erlinger*. It is instead the kind of sentencing elements question the Supreme Court recognized was outside the scope of the *Apprendi* requirement for jury fact-finding.

Finally, the Superior Court did not need to determine whether Lewis's PFBPP offense occurred within ten years of the "date of termination of all periods of incarceration or confinement" imposed for his prior violent felony conviction.¹¹¹ Section 1448(e)(1)b applies based on the later of the conviction date or the termination date.¹¹² Because Lewis's CCDW-Firearm conviction occurred less than

¹¹¹ See 11 Del. C. § 1448(e)(1)b.

¹¹² See *id.*

ten years before the PFBPP offense, the enhancement applied without any termination-date finding. In any event, *Erlinger* does not require a jury trial to have determined the “date of termination” relating to Lewis’s CCDW-Firearm conviction because, like the date of conviction, the date that a defendant entered or was discharged from a correctional facility to serve a constitutionally obtained sentence relates to the prior court record and not to the manner in which the underlying offense was committed.¹¹³

B. Any Error Was Harmless Beyond A Reasonable Doubt.

Lewis contends that the Superior Court’s failure to submit the date of his prior CCDW-Firearm conviction to a jury was structural error not subject to harmless-error review. (Opening Br. 11-16). He is mistaken. Even if the Superior Court erred by finding the fact of the date of Lewis’s prior CCDW-Firearm conviction, any error was harmless beyond a reasonable doubt.¹¹⁴

¹¹³ See *People v. Berry*, 2025 WL 1538012, at *6 (N.Y. Sup. Ct. May 28, 2025).

¹¹⁴ The State notes that over 200 defendants have filed motions alleging *Erlinger* violations in the Superior Court. The State is litigating four of these motions as “bellwether cases” before the Honorable Paul R. Wallace in *State v. Clay Deputy* (Criminal ID No. 2110001695), *State v. Troy E. Gee* (Criminal ID No. 1511001714), *State v. Orin L. Turner* (Criminal ID No. 0609012387A), and *State v. David R. Wright* (Criminal ID No. 0802023870). The State has taken the firm position in these cases that *Erlinger* does not apply retroactively, while the bellwether defendants have argued otherwise. Following oral argument in the bellwether cases on August 22, 2025, the Superior Court ordered briefing by the parties on the issue of whether and how the harmless-error doctrine applies. The State has argued that the doctrine applies and has provided the Superior Court with a proposed framework

Under harmless-error review, “the defendant has the initial burden of demonstrating error, and then the State has the burden to demonstrate that any error was harmless beyond a reasonable doubt.”¹¹⁵ “Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded as harmless error.”¹¹⁶

Sixth and Fourteenth Amendment violations are generally subject to harmless-error analysis.¹¹⁷ “Errors that ‘infringe upon the jury’s factfinding role’ are generally ‘subject to harmless-error analysis.’”¹¹⁸ “This analysis is also applicable when there is a ‘[f]ailure to submit a sentencing factor to the jury.’”¹¹⁹

Erlinger did not hold otherwise. The majority did not discuss harmless-error’s applicability, but both Chief Justice Roberts’ concurring opinion and Justice Kavanaugh’s dissent stated the doctrine would apply. The Chief Justice recognized the right of “hav[ing] a jury determine beyond a reasonable doubt whether . . .

regarding a non-exhaustive list of factors to be used in assessing harmless error. The bellwether cases are presently under advisement.

¹¹⁵ *Hansley v. State*, 104 A.3d 833, 837 (Del. 2014) (cleaned up).

¹¹⁶ *Burroughs v. State*, 988 A.2d 445, 449 (Del. 2010) (cleaned up).

¹¹⁷ *See Satterwhite v. Texas*, 486 U.S. 249 (1988).

¹¹⁸ *United States v. Butler*, 122 F.4th 584, 589 (5th Cir. 2024) (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999)).

¹¹⁹ *Id.* (citing *Washington v. Recuenco*, 548 U.S. 212, 222 (2006)).

predicate offenses were committed on different occasions” under the ACCA but noted that “violations of that right are subject to harmless error review.”¹²⁰

Justice Kavanaugh went further in his analysis and determined that “[t]he harmless error rule will likely ameliorate some of the short-term problems that today’s decision otherwise would cause.”¹²¹ He found that “[i]n most (if not all) cases, the fact that a judge rather than a jury applied ACCA’s different-occasions requirement will be harmless.”¹²² He noted that “in cases like this where undisputed facts establish that the defendant’s prior crimes occurred a day or more apart, it will usually be evident beyond a reasonable doubt that the failure to submit the different-occasions question to the jury had no effect on the defendant’s sentence.”¹²³ In sum, *Erlinger* does not preclude, and even encourages the application of, harmless-error review.

Although it does not appear that this Court has yet addressed the issue, other courts reviewing the issue have found that harmless error analysis is applicable to *Erlinger* claims.¹²⁴ That approach is consistent with settled law because an *Erlinger*

¹²⁰ *Erlinger*, 602 U.S. at 850 (Roberts, C.J. concurring).

¹²¹ *Id.* at 859 (Kavanaugh, J. dissenting).

¹²² *Id.* (emphasis added).

¹²³ *Id.* at 860.

¹²⁴ See *State v. Carlton*, 349 A.3d 1284, 1286 (N.J. 2026); *United States v. Rivers*, 134 F.4th 1292, 1305 (11th Cir. 2025); *United States v. Stevons*, 2025 WL 1682309, at *1 (4th Cir. June 16, 2025); *United States v. Curry*, 125 F.4th 733, 739 (5th Cir.

violation, while constitutional, is not structural.¹²⁵ The United States Supreme Court has “repeatedly recognized that the commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal.”¹²⁶ Rather, “most constitutional errors can be harmless.”¹²⁷ “[T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one.”¹²⁸

Structural errors are limited to a narrow class of defects affecting the framework of trial, such as: (1) “total deprivation of the right to counsel;” (2) the absence of “an impartial judge;” (3) the “unlawful exclusion of members of the defendant’s race from a grand jury;” (4) the “improper interference with the right to self-representation at trial;” (5) the “unlawful infringement upon the right to a public

2025), *cert. denied*, 145 S. Ct. 2862 (U.S. 2025); *United States v. Lewis*, 2025 WL 1825955, at *6 (6th Cir. July 2, 2025); *United States v. Johnson*, 114 F.4th 913, 917 (7th Cir. 2024); *United States v. Xavior-Smith*, 136 F.4th 1136, 1137 (8th Cir. 2025), *cert. denied*, 146 S. Ct. 831 (2025); *United States v. Shavers*, 2025 WL 1721793, at *2 (11th Cir. June 20, 2025), *cert. denied*, 146 S. Ct. 243 (2025); *see also United States v. Trahan*, 111 F.4th 185, 197-98 (1st Cir. 2024), *cert. denied*, 145 S. Ct. 1206 (2025).

¹²⁵ *See, e.g., Delaware v. Van Arsdall*, 475 U.S. 673, 677-78, 684 (1986) (rejecting state court’s “per se error” rule for violations of the Sixth Amendment’s Confrontation Clause such that “the actual prejudicial impact of such an error is not examined” and instead requiring application of the harmless error standard) (cleaned up).

¹²⁶ *Recuenco*, 548 U.S. at 218.

¹²⁷ *Id.*

¹²⁸ *Van Arsdall*, 475 U.S. at 681.

trial;” and (6) a “defective reasonable doubt instruction.”¹²⁹ A failure to submit a single element or sentencing factor to the jury is different.

In *Neder v. United States*,¹³⁰ the United States Supreme Court held that failure to instruct the jury on one element of an offense “differs markedly from the constitutional violations [it] ha[s] found to defy harmless-error review” and is subject to harmless-error review because it does not “vitiate[] *all* the jury’s findings.”¹³¹ In *Recuenco*, the Supreme Court extended *Neder*’s reasoning to sentencing factors, holding that “[f]ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error.”¹³² Consistent with the foregoing analysis, courts have rejected the argument that an *Erlinger* error is structural and evades harmless-error review.¹³³

Nor does *Sullivan v. Louisiana*¹³⁴ require a different result. That case involved the burden of proof itself and a defective reasonable-doubt instruction, not the failure

¹²⁹ *Brice v. State*, 815 A.2d 314, 324-25, 326 & n.12 (Del. 2003), *overruled on other grounds by Rauf v. State*, 145 A.3d 430 (Del. 2016); *see also United States v. Marcus*, 560 U.S. 258, 263 (2010) (cleaned up).

¹³⁰ *Neder*, 527 U.S. 1.

¹³¹ *Id.* at 8, 10-11 (citing *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (involving defective reasonable doubt jury instruction)) (emphasis in original).

¹³² *Recuenco*, 548 U.S. at 215-16, 220, 222.

¹³³ *See, e.g., Rivers*, 134 F.4th at 1305-06; *United States v. Campbell*, 122 F.4th 624, 630-31 (6th Cir. 2024).

¹³⁴ *Sullivan*, 508 U.S. 275.

to submit a discrete element or sentencing factor to the jury.¹³⁵ The alleged error here did not destabilize the entire trial or undermine all of the jury's findings.¹³⁶

Decisions regarding *Apprendi* and its progeny also support harmless-error review. The United States Supreme Court and Third Circuit have determined that the harmless-error doctrine applies to *Apprendi* errors. In *Recuenco*, the United States Supreme Court acknowledged that a constitutional violation of *Apprendi* and its related decision, *Blakely*, had occurred based on the failure of the jury to decide beyond a reasonable doubt whether an element existed for sentence enhancement.¹³⁷ However, the United States Supreme Court applied *Neder* and *Apprendi* by treating sentencing factors the same as elements of the offense, and it vacated the Washington Supreme Court's determination that the error evaded harmless-error review.¹³⁸

In *Mitchell v. Esparza*,¹³⁹ the United States Supreme Court likewise held that failure to submit one statutory element to the jury in a non-capital case is subject to

¹³⁵ *Id.* at 278, 281-82 (citing *In re Winship*, 397 U.S. 358, 364 (1970)).

¹³⁶ *Rivers*, 134 F.4th at 1306.

¹³⁷ *See Recuenco*, 548 U.S. at 216 (citing *Apprendi*, *supra*, and *Blakely*, 542 U.S. 296).

¹³⁸ *See id.* at 220-22.

¹³⁹ *Mitchell v. Esparza*, 540 U.S. 12 (2003).

harmless-error review and is not equivalent to a defective reasonable doubt instruction vitiating all of the jury's findings.¹⁴⁰

The Third Circuit has also held that *Apprendi* errors are subject to harmless-error review.¹⁴¹ Where the jury was not instructed on an element of the offense and the defendant's sentence was enhanced based on a judicial finding of that element, the Third Circuit has concluded that the omission amounts to a trial error with a resulting sentencing error.¹⁴² For a trial error, the Third Circuit reviews the entire record (not just the record related to sentencing) to determine whether "it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error."¹⁴³ Accordingly, based on the foregoing precedent involving *Apprendi* errors, the harmless-error doctrine applies.

Finally, this Court's decision in *Rauf v. State*¹⁴⁴ and the United States Supreme Court's decision in *Hurst v. Florida*,¹⁴⁵ do not alter that conclusion. *Rauf* did not address harmless-error and *Hurst* did not reach the issue.¹⁴⁶ *Rauf* and *Hurst* are also

¹⁴⁰ *Id.* at 15-16, 19.

¹⁴¹ *United States v. Vazquez*, 271 F.3d 93, 103 (3d Cir. 2001).

¹⁴² *United States v. Johnson*, 899 F.3d 191, 198-99 (3d Cir. 2018) (discussing *Alleyne* error); *Vazquez*, 271 F.3d at 100-03.

¹⁴³ *United States v. Lewis*, 802 F.3d 449, 456 (3d Cir. 2015) (cleaned up).

¹⁴⁴ *Rauf*, 145 A.3d 430.

¹⁴⁵ *Hurst v. Florida*, 577 U.S. 92 (2016).

¹⁴⁶ *Rauf*, 145 A.3d at 436, 469; *Hurst*, 577 U.S. at 102.

distinguishable because they involved capital sentencing and “death is different.”¹⁴⁷ These cases required jury findings before imposition of the death penalty; they do not govern a noncapital sentencing enhancement based on a prior conviction.¹⁴⁸

Accordingly, even assuming an *Erlinger* violation occurred here, any error was harmless beyond a reasonable doubt. Certified records of Lewis’s indictment for CCDW-Firearm, his plea agreement and truth-in-sentencing form, and the corrected sentencing order in Case No. 220200146, attached to the State’s submissions below, showed that Lewis was indicted by a Superior Court grand jury on April 11, 2022 and that he pled guilty to the offense on December 19, 2022. (A258-69). The indictment clearly alleged that Lewis committed CCDW with a firearm “on or about the 3rd day of February 2022,” and, in pleading guilty to that count, it was probable that Lewis admitted the date of that offense as an essential fact. (A259). Lewis does not appear to dispute the existence or date of the offense here, which was clearly within ten years of his PFBPP offense, nor does he seemingly dispute that CCDW-Firearm is a violent felony. (See A246-51, A270-71). A reasonable jury presented with the same certified records would have found beyond a reasonable doubt that Lewis had a prior violent felony conviction within ten years of his PFBPP offense.

¹⁴⁷ *Hurst*, 577 U.S. 92; *Rauf*, 145 A.3d at 436, 469.

¹⁴⁸ *Hurst*, 577 U.S. 92; *Rauf*, 145 A.3d at 436, 469.

Any error also caused no prejudice. As discussed, Lewis appeared to concede below that the Superior Court could have found the fact that he had a prior violent felony conviction, which subjected him to a sentencing range of three to fifteen years.¹⁴⁹ (See A246-51). The court sentenced Lewis to fifteen years at Level V, suspended after six years. (Ex. A to Opening Br.; A286-88). Because the sentence imposed fell within the range authorized by the undisputed prior violent felony conviction, any error concerning whether the three-year or five-year mandatory minimum applied was harmless beyond a reasonable doubt.

¹⁴⁹ See *Lewis*, 2025 WL 1531489, at *3; *Lewis*, 2025 WL 1780556, at *2.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

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Dated: June 29, 2026

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARSHAWN LEWIS	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 26, 2026
	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

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AND TYPE-VOLUME LIMITATION**

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DATE: June 29, 2026