

# One Minute Brief

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NUMBER: 2025-06

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DATE: July 15, 2025

TOPIC: Sentencing

**ISSUE: Consistent with the Sixth Amendment and *Apprendi v. New Jersey*, what facts about prior convictions can be used as aggravating factors without submitting them to a jury?**

Under the Sixth Amendment as interpreted by *Apprendi v. New Jersey* (2000) 530 U.S. 466, 483, all facts that may increase a defendant's sentence must be found true by a jury beyond a reasonable doubt, **except** for the fact of a prior conviction. (See also *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 246–247.)

California sentencing rules are in line with *Apprendi*. Most felonies are punishable by a sentencing "triad"—a lower, middle, and upper term. Since 2022, the court must impose the middle term, unless circumstances in aggravation justify the upper term. Circumstances in aggravation must be either stipulated to by the defendant or found true beyond a reasonable doubt by a jury (or judge in a court trial). (Pen. Code, § 1170, subd. (b)(1)–(2).) Notwithstanding this, "the court may consider the defendant's prior convictions in determining sentencing based on a certified record of conviction without submitting the prior convictions to a jury." (Pen. Code, § 1170, subd. (b)(3).)

Even so, courts had interpreted the prior-conviction exception to encompass other related issues determined by examining the facts of the conviction, such as whether convictions are "numerous or of increasing seriousness" (Cal. Rules of Court, rule 4.421(b)(2); *People v. Black* (2007) 41 Cal.4th 799, 819–820; *People v. Quiles* (2009) 177 Cal.App.4th 612, 622), or whether a defendant performed satisfactorily on probation (Cal. Rules of Court, rule 4.421(b)(5); *People v. Towne* (2008) 44 Cal.4th 63, 82).

The California Supreme Court, relying on authority from the United States Supreme Court, has now held that this additional factfinding is impermissible under the prior-conviction exception.

In *Erlinger v. United States* (2024) 602 U.S. 821, the issue was whether determining that prior convictions occurred on "separate occasions" fell within the prior-conviction exception, and could therefore be conducted by a judge alone. The high court held it did not. The Court clearly stated that the prior-conviction exception is limited solely to "determining the fact of a prior conviction and the

then-existing elements of that offense." (*Id.* at p. 839.) Determining whether convictions were for offenses committed on separate occasions required additional factfinding, which had to be done by a jury. (*Id.* at p. 838.)

On June 26, 2025, the California Supreme Court applied *Erlinger* in *People v. Wiley* (June 26, 2025, S283326) \_\_\_ Cal.5th \_\_\_. There, the trial court had aggravated Wiley's sentence by referencing the increasing seriousness of his convictions, as well as his prior poor performance on probation. The Court held this was impermissible under *Erlinger* because it involved factfinding beyond the bare fact of conviction. In so doing, the Court overruled its own prior decisions in *People v. Towne, supra*, 44 Cal.4th 63 and *People v. Black, supra*, 41 Cal.4th 799, and disapproved several Court of Appeal decisions to the extent they were inconsistent with *Erlinger*: *People v. Morgan* (2024) 103 Cal.App.5th 488; *People v. Wiley* (2023) 97 Cal.App.5th 676; *People v. Pantaleon* (2023) 89 Cal.App.5th 932; and *People v. Ross* (2022) 86 Cal.App.5th 1346.

**BOTTOM LINE** - The exception under *Apprendi* allowing prior convictions to be used as circumstances in aggravation is limited to the **fact of the conviction** and the **then-existing elements** of the offense. It does not include related facts about a prior conviction, such as the increasing seriousness of the offenses. Subdivision (b)(3) of Penal Code section 1170 is also so limited. All other circumstances in aggravation must be submitted to the jury or admitted by a defendant.

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