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District Court, Mesa County The Honorable Matthew D. Barrett Case No. 2023CR289	
In Re **The People of the State of Colorado,** Petitioner-Plaintiff, v. **Andrew Gregg,** Respondent-Defendant.	▲COURT USE ONLY▲
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BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF COLORADO, SPERO JUSTICE CENTER, AND OFFICE OF ALTERNATE DEFENSE COUNSEL IN SUPPORT OF RESPONDENT

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Colorado Appellate Rules 29 and 32, including all formatting requirements set forth in those rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 29(d). It contains 4567 words, which is not more than the 4,750-word limit.

I understand that this brief may be stricken if it fails to comply with any of the requirements of the Rules.

s/ Emma Mclean-Riggs

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The ACLU is a nationwide, non-partisan, non-profit organization with almost 2 million members, dedicated to safeguarding the principles of civil liberties enshrined in the federal and state constitutions for all Americans. The ACLU of Colorado, with over 45,000 members and supporters, is a state affiliate of the ACLU. As the largest and oldest civil rights organization in the state, the ACLU of Colorado is committed to safeguarding the independent individual-liberty guarantees in the Colorado Constitution. Because it is dedicated to the constitutional rights and civil liberties of all Coloradans, the ACLU of Colorado has a unique interest in ensuring that the constitutional right to trial by jury and protection against double jeopardy are upheld.

Spero Justice Center (SJC) is a non-profit law office dedicated to curbing extreme and excessive sentencing practices in Colorado. SJC provides direct legal representation to individuals serving extreme sentences in Colorado. It also advocates for the systemic reform of ineffective and overly harsh sentencing policies.

The Office of Alternate Defense Counsel ("OADC") is a state agency dedicated to serving disadvantaged people in the criminal legal system where the Office of the State Public Defender has a conflict of interest. C.R.S. § 21-2-101.

Because prosecutors more frequently bring habitual counts against poor people than wealthy people, the Court's resolution of the issues in this matter will disproportionately impact the OADC's clients. As such, the OADC joins in this brief to urge the Court to reaffirm the importance of juries and the protections afforded by the Double Jeopardy Clauses of the Colorado and United States Constitutions.

SUMMARY OF THE ARGUMENT

A state may not ask a jury to convict a person of one crime and then ask a judge to sentence that person for another, more serious crime. The Fifth and Sixth Amendments guarantee the right to have a jury find any fact that increases exposure to punishment beyond a reasonable doubt. Habitual sentencing schemes that permit judges to find these facts, like Colorado's, are unconstitutional.

Colorado's habitual sentencing scheme has deprived people accused of these crimes of their right to factfinding by a jury, a violation with particular implications for accused people of color. Representative juries are a vital protection against racial bias. In fact, Black people in Colorado are disproportionately charged with and sentenced under habitual charges.

Like the constitutional right to a jury trial, the constitutional protection against double jeopardy applies to habitual charges. This rule is clear from the *Apprendi* test and from the history of habitual offender sentencing in Colorado, which used to require habitual counts to be proven before a jury in a bifurcated trial. Therefore, a second jury may not be empaneled in Mr. Gregg's case, and he may not be retried.

ARGUMENT

I. *APPRENDI* AND ITS PROGENCY LED INEXORABLY TO ERLINGER AND THE CONCLUSION THAT COLORADO'S HABITUAL OFFENDER STATUTE CONTAINS FACTUAL ELEMENTS THAT MUST BE PROVEN TO A JURY

"Much turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." *Jones v. United States*, 526 U.S. 227, 232 (1999). In 2000, *Apprendi v. New Jersey* recognized a functional approach to the distinction between elements and sentencing factors, which may be decided by a judge. *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Court was motivated by the concern that novel sentencing schemes attached significant punishment to factual determinations made by a judge, not a jury. By requiring a jury determination of purported sentencing factors that actually function as elements, the *Apprendi* decision led inexorably to the recent decision in *Erlinger v. United States,* 602 U.S. 821 (2024).

In *Apprendi*, the defendant was convicted of unlawful possession of a weapon, a second-degree offense, after shooting at the home of a Black family in his neighborhood. *Apprendi*, 530 U.S. at 491. However, he was sentenced as if he had committed a *first-degree* offense based on the judge's factual finding, by a

preponderance of the evidence, that he shot at the house with the intent to intimidate the victims based on their race. *Id.* The Supreme Court invalidated the sentence, holding that any fact increasing the penalty for an offense beyond the statutory maximum must be found by a jury and proved beyond a reasonable doubt. *Id.* at 491–92.

The Court distinguished "sentencing factors" that a judge can rely on in determining punishment from "elements," the facts essential to finding a person guilty of an offense. *Id.* at 494. To guard against the risk of a legislature undermining the jury-trial guarantee by creative labeling, the Court declared the distinction "is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* Any fact that increases a defendant's sentencing exposure is therefore "the functional equivalent of an *element* of a greater offense than the one covered by the jury's guilty verdict." *Id.* at 494, n.19 (emphasis added); *see also Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, *J.*, concurring) ("[A]ll facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.")

The Supreme Court reiterated this distinction in a series of decisions clarifying *Apprendi's* scope. In 2002, in *Ring v. Arizona*, the Court applied *Apprendi* in the capital sentencing context, striking down a death sentence that was based on a judge's finding of an "aggravating factor." *Ring*, 536 U.S. at 609 (majority opinion). In 2004, *Blakely v. Washington*, held that an aggravating factor in Washington's kidnapping statute could not be found by a judge even though the sentence remained below the statutory maximum. *Blakely v. Washington*, 542 U.S. 296, 303 (2004). The Court reiterated that the "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Id.* (emphasis omitted). The Court has continued to reiterate the *Apprendi* rule for the last twenty years. *See United States v. Booker*, 543 U.S. 220, 226–27 (2005) (facts elevating the sentencing range); *Cunningham v. California*, 549 U.S. 270, 275, 288–89 (2007) (facts triggering a mandatory upper term beyond what is otherwise permissible based on the jury's verdict); *United States v. O'Brien*, 560 U.S. 218, 235–36 (2010) (facts increasing a mandatory minimum sentence); *Southern Union Co. v. United States*, 567 U.S. 343, 352 (2012) (facts increasing criminal fines); *United States v. Haymond*, 588 U.S. 634, 650 (2019) (facts subjecting a person on supervised release to a new prison term with a mandatory minimum above that authorized by the original conviction).

In 2013, *Alleyne v. United States*, 570 U.S. 99 (2013), made the principal first articulated in *Apprendi* entirely clear. In *Alleyne*, the defendant was convicted of multiple federal crimes, including using or carrying a firearm in relation to a crime of violence, an offense with a five-year mandatory minimum. *Id.* at 103–04. At sentencing, the judge considered a question not presented to the jury—whether the defendant "brandished" a weapon. *Id.* at 104. The judge found in the affirmative, a conclusion that increased the mandatory minimum of the defendant's offense from five years to seven years. *Id.* The Supreme Court reversed, holding that the Sixth Amendment requires a jury to find any fact that increases not only a maximum sentence, but also any fact that increases a minimum sentence within the limits of a statutory maximum. *Id.* at 111–12. In so holding, the Court affirmed the rule announced in *Apprendi*: "It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Apprendi*, 530 U.S. at 490 (quotation omitted).

After *Alleyne*, there is no doubt that "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *Alleyne*, 570 U.S. at 103.[1] And there is no doubt that

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[1] The last vestige of the pre-*Apprendi* regime is *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which represents "at best an exceptional departure from . . .

the proper Sixth Amendment inquiry is whether "a fact is an element of the crime." *Id.* at 115. In other words, "[w]hen a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact *necessarily forms a constituent part of a new offense* and must be submitted to the jury." *Id.* at 115–16 (emphasis added).

As the State appropriately concedes, *Erlinger* confirms that *Apprendi* and *Alleyne* apply to the Colorado habitual offender statute. In *Erlinger*, the Supreme Court considered whether a defendant prosecuted under the Armed Career Criminal Act (ACCA), which increases both the minimum and maximum sentences faced by certain defendants, is entitled to a jury determination that past qualifying offenses were committed on "separate occasions." *Erlinger*, 602 U.S. at 825. Given the Supreme Court's longstanding *Apprendi* precedent, the United States confessed error on appeal, recognizing that the case was controlled by the Supreme Court's "consistent holdings that the Fifth and Sixth Amendments generally guarantee a defendant the right to have a unanimous jury find beyond a reasonable doubt any

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historic practice." *Apprendi*, 530 U.S. at 486; *Erlinger*, 602 U.S. at 850 (Thomas, *J.*, concurring) ("I continue to adhere to my view that we should revisit *Almendarez-Torres* and correct the 'error to which I succumbed' by joining that decision."). For now, *Almendarez-Torres* "persists as a narrow exception permitting judges to find only the fact of a prior conviction." *Erlinger*, 602 U.S. at 838 (majority opinion) (quotation omitted).

fact that increases his exposure to punishment." *Id.* at 828. Unsurprisingly, the Supreme Court agreed.

The Court explained that "this case is as nearly on all fours with *Apprendi* and *Alleyne* as any we might imagine." *Id.* at 835. Having previously acknowledged that the ACCA occasions inquiry is a fact-laden task that can involve questions of timing, location, and the character and relationship of past offenses, *Wooden v. United States*, 595 U.S. 360, 369 (2022), the Court simply applied the "firmly entrenched" principles of *Apprendi* and *Alleyne* to find that the ACCA occasions inquiry must be made by a jury. *Erlinger*, 602 U.S. at 833, 835.

Like ACCA, the habitual offender statute significantly increases a defendant's exposure to punishment. *See* § 18-1.3-801(2)(a)(I)(A)-(B). And like the ACCA occasions inquiry, the Colorado habitual offender inquiry is fact-laden, requiring, at the very least, findings that the predicate charges were separately brought, that they were separately tried, and that they arose out of separate and distinct criminal episodes. *See* § 18-1.3-801(2)(a)(I). Short of a knowing, voluntary, and intelligent admission in a guilty plea, the Fifth and Sixth Amendments require a unanimous jury to make these findings beyond a reasonable doubt.

II. COLORADO'S HABITUAL SENTENCING SCHEME DEPRIVES PEOPLE OF FACTFINDING BY A JURY, A CRUCIAL PROTECTION AGAINST RACIAL BIAS.

A. Colorado's Judicial Sentence Enhancement Scheme Has Undermined the Jury's Vital Role

The United States and Colorado Bill of Rights guarantee the right to a speedy and public trial by an impartial jury. U.S. Const. amend. VI; Colo. Const. art II, § 16. The jury trial right is no mere "procedural formality" — it is a "fundamental reservation of power" to the American people. *Blakely*, 542 U.S. at 305–06. An impartial jury guards against three primary evils; (1) prosecutorial overreach and arbitrary convictions, *Apprendi*, 530 U.S. at 477, (2) judicial overreach, by ensuring that sentences are solely "premised on laws adopted by the people's elected representatives and facts found by members of the community," *Erlinger*, 602 U.S. at 832, and (3) the punishment becoming "too far out of line with the crime." *United States v. Maybury,* 274 F.2d 899, 902 (2d Cir. 1960) (Friendly, *J.*). The jury is, in short, a "circuitbreaker in the State's machinery of justice." *Blakely*, 542 at 306.

In the last few decades, the Supreme Court has recognized that a jury cannot fulfill its Constitutional function if its factfinding authority is transferred to a judge under the guise of "sentence enhancements." The jury-trial guarantee was not the only constitutional protection at stake in *Apprendi*; elements must also be alleged in the charging document and proven beyond a reasonable doubt. *See Jones*, 526 U.S.

at 1215. But *Apprendi* and its progeny place special emphasis on the jury, a protection that must remain "at the heart of our criminal justice system." *Erlinger*, 502 U.S. at 831; *Apprendi*, 530 U.S. at 497 ("The . . . procedure challenged in this case is an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system."). Colorado's habitual sentencing scheme does exactly what *Apprendi* and its progeny forbid: undermined the sacrosanct role of the jury by depriving people of their right to a jury determination of any fact that permits the state to impose criminal sanctions. *See* 1995 Colo. Sess. Laws, ch. 129, sec. 14, § 16-13-103(4), C.R.S. (1995).

B. Juries Play a Vital Role in Checking Racial Bias in a Context Where There is a Severe Risk of Extreme Sentencing

The jury is "a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.'" *McClesky v. Kemp*, 481 U.S. 279, 310 (1987) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880). When the justice system functions correctly, juries are comprised of people with diverse backgrounds and experiences who reflect the "conscience of the community." *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968). And when the jury fairly reflects the conscience of the community, the jury system protects against unfair application of the criminal law.

Because of the jury's power to challenge or uphold racial hierarchy, the history of the Sixth Amendment is characterized by a struggle over laws and practices that systematically exclude prospective jurors on the basis of race. *See, e.g.*, *Batson v. Kentucky*, 479 U.S. 79 (1986); *Neal v. Delaware*, 103 U.S. 370 (1881). Non-representative juries have been used very effectively to uphold racial hierarchy and enable racist violence. In 1865 and 1866, for example, "all-white juries in Texas decided a total of 500 prosecutions of white defendants charged with killing African-Americans. All 500 were acquitted." *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 222 (2017) (citing James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 Yale L. J. 895, 916 (2004)).

By contrast, representative juries are so effective that opponents of racial equity have fought long and hard to make them less likely. When Louisiana sought to "establish the supremacy of the white race" at its 1898 constitutional convention, it undermined Black participation on juries by adopting a rule allowing 10-to-2 verdicts to convict in criminal trials. *Ramos v. Louisiana*, 290 U.S. 83, 88 (2020). While the most explicit forms of state-sponsored racial discrimination have been relegated to the dustbin of history, it was only four years ago that the Supreme Court invalidated Louisiana and Oregon's racially motivated non-unanimous jury verdicts in *Ramos*. And peremptory strikes are still used to prevent minority jury

participation. *See, e.g.*, *People v. Madrid*, 526 P.3d 185 (Colo. 2023) (affirming reversal of conviction due to *Batson* violation).

One of the most powerful protections against racial discrimination an accused person of color has is the representative jury; a protection that has been denied to people charged under Colorado's habitual sentencing statute. Colorado's habitual sentencing statute creates dizzying stakes. The Habitual Criminal Act provides for sentences from four times the maximum of the presumptive range for the charged offense to a mandatory sentence of sixty-four years if the charged offense is a level 1 drug felony. C.R.S. § 18-1.3-801(2)(a)(I)(A)-(B). In practice, these sentences often mean life in prison; a twenty-year sentence on a low-level felony is likely a life term for a person in their fifties, and a sixty-four-year sentence is likely a life term for all but young adults. The representative jury's role as bulwark against racial discrimination is all the more important as the risk for the accused person increases.

Indeed, habitual sentencing in Colorado has a disproportionate impact on Black people. Prosecutors' offices in places with a high percentage of Black residents are more likely to bring habitual charges. Of people currently serving habitual sentences, more than half were convicted in three Judicial Districts: the Fourth Judicial District (El Paso and Teller Counties), the Second Judicial District (City and County of Denver), and the Eighteenth Judicial District (Arapahoe,

Douglas, Elbert, and Lincoln Counties).[2] 78% of all Black Coloradans live in these Judicial Districts. Black people are also overrepresented among those serving habitual sentences; only about 16% of people incarcerated in the Department of Corrections are Black,[3] but approximately 31% of people serving habitual sentences are Black.[4]

Restoring the jury's proper role will likely make the imposition of habitual criminal enhancements less arbitrary and more just. The labor-intensive nature of a jury trial may encourage prosecutors to be judicious in how they charge this exceptionally harsh enhancement. *See Apprendi*, 530 U.S. at 489 (Scalia, *J.*, concurring) ("[T]he jury-trial guarantee . . . has never been efficient; but it has always been free."). Furthermore, criminal laws should "provide the kind of notice that will enable ordinary people to understand what conduct it prohibits;" the fairest way to resolve the fact-intensive habitual inquiry is to apply ordinary jurors' understanding of a criminal episode. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

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[2] This information was obtained from a Colorado Open Records Act request to the Department of Corrections regarding people serving habitual sentences.
[3] Department of Corrections. *Statistics*, Colo. Dep't of Corr., https://cdoc.colorado.gov/about/data-and-reports/statistics.
[4] *Supra*, note 2.

III. PROTECTIONS AGAINST DOUBLE JEOPARDY APPLY TO HABITUAL OFFENDER CHARGES.

The Fifth Amendment double jeopardy clause provides "entirely complementary protections" to the Sixth Amendment jury trial clause by "prohibiting a judge from even empaneling a jury when the defendant has already faced trial on the charged crime." *Erlinger*, 602 U.S. at 824; U.S. Const. amend. V; *see also* Colo. Const. art. II, § 18. Federal double jeopardy protections attach to habitual offense charges because the habitual findings are elements of the offense for purposes of the Fifth Amendment as well as the Sixth Amendment. And, as this Court has previously found, Colorado's broad double jeopardy protections also apply to habitual determinations that must be made by a jury.

A. The *Apprendi* Elements Test Applies to the Double Jeopardy Clause.

Relying primarily on *Monge v. California*, 524 U.S. 721 (1998), the State argues that the Supreme Court has "repeatedly affirmed that double jeopardy does not apply to habitual sentencing proceedings." Pet. at 9. But the State's position ignores that *Apprendi* and its progeny have critically undermined what remains of *Monge*, which is perhaps why the State finds support for its proposition only in pre-*Apprendi* cases. *See United States v. Blanton*, 476 F.3d 767 (9th Cir. 2007).

In *Monge*, the Supreme Court held that there is no double jeopardy protection in the non-capital sentencing context, reasoning that "the determinations at issue do

not place a defendant in jeopardy for an 'offense.'" *Monge*, 524 U.S. at 728. The 1998 decision "rejected an absolute rule that an enhancement constitutes an element of the offense any time that it increases the maximum sentence to which a defendant is exposed." *Id.* at 728–729. But the Supreme Court has since done the opposite, adopting a near-absolute rule that an enhancement constitutes an element of the offense any time it increases the maximum sentence to which a defendant is exposed.

Justice Scalia's *Monge* dissent outlines the principles that became law in *Apprendi*. The dissent reasoned that the Double Jeopardy clause prohibited a renewed attempt to obtain a sentence enhancement following a functional acquittal of the enhancement because the enhancement was an element of the offense. *Monge*, 524 U.S. at 737–41 (Scalia, *J.*, dissenting). The dissent also explained that traditional principles of Anglo-American law defined "elements" of an offense the same for all constitutional rights, including the right against double jeopardy, the right to trial by jury, and the right to proof beyond a reasonable doubt. *Id.* at 740. A plurality of Justices reiterated this principle in a later double jeopardy case, explaining: "We can think of no principled reason to distinguish, in this context, between what constitutes an offense for purposes of the Sixth Amendment's jury-trial guarantee and what constitutes an 'offence' for purposes of the Fifth Amendment's Double Jeopardy Clause." *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003) (plurality opinion).

This Court should confirm that the rule of *Apprendi* and *Alleyne* applies to the Fifth Amendment double jeopardy right as much as the Sixth Amendment jury trial right.

At least one state's high court has agreed. The Washington Supreme Court held that the Fifth Amendment prohibited retrial following acquittal of aggravating sentence enhancements at trial. *State v. Allen*, 431 P.3d 117 (Wash. 2018). The Court found "no logical or legal basis for holding that the elements of a crime for purposes of the Sixth Amendment's right to trial by jury are different from the elements of a crime for purposes of the Fifth Amendment's double jeopardy clause." *Allen*, ¶ 16.

In light of the long line of authority connecting *Apprendi*, *Alleyne*, and *Erlinger*, *Monge*'s holding is no longer good law. Today, Supreme Court precedent makes it clear: facts necessary to authorize a habitual criminal sentence are elements that must be found by a jury. Holding that no double jeopardy protections apply to habitual charges would allow the State to present habitual charges to one jury, and on receiving an unfavorable verdict, reempanel a second jury to try again. Such an outcome is offensive to the Fifth and Sixth Amendments, and this Court should not allow it.

B. The Double Jeopardy Clause Applied to Colorado's Habitual Offender Offenses When Those Offenses Were Decided by a Jury.

This Court should look to the history of Colorado's habitual offender scheme to determine whether double jeopardy protections apply to habitual charges put

before a jury. Historically, Colorado's habitual criminal statute required notice of habitual charges in the charging document, imposed a burden of proof of beyond a reasonable doubt, and required a jury to make the habitual offender findings in a bifurcated trial. *See* § 16-13-103(4), C.R.S. (1981). Under that statutory scheme, this Court correctly found that protections against double jeopardy applied to defendants prosecuted as habitual criminals and that jeopardy attached to the entire proceeding "upon the impaneling and swearing of the jury for the first phase of the trial." *People v. Quintana*, 634 P.2d 413, 418–19 (1981).

Because the *Quintana* rule depended in large part on the then-existing statute, this Court departed from the rule after the legislature removed the jury's role in the habitual offender determination in 1995. In *People v. Porter*, the Court reviewed the Colorado legislature's amendments and the *Monge* decision and concluded that the habitual proceeding was little more than a sentencing hearing. *People v. Porter*, 348 P.3d 922 (2015) (quoting *Ohio v. Johnson*, 467 U.S. 493, 498–99 (1984)).

This Court now has sound reason to depart from *Porter*. First, to the extent the *Monge* decision remains good law, it does not apply to *Apprendi* facts masquerading as sentencing enhancements. *See Blanton*, 476 F.3d at 767 (finding *Monge* inapplicable and holding that double jeopardy protections apply to the ACCA enhancement provision). Second, the role of the jury in a habitual offense

determination is a matter of constitutional right, not legislative grace. If this Court rules the habitual offender statute unconstitutional, the Colorado legislature could implement a constitutionally compliant habitual criminal statute. Under any constitutionally compliant habitual criminal statute, the double jeopardy protections of the United States and Colorado Constitutions will necessarily apply. *Quintana*, at 418–19.

C. The Double Jeopardy Clause Prohibits Retrial of Mr. Gregg's Habitual Charges.

In this case, jeopardy has attached, and the habitual counts have been dismissed. The proceeding has concluded, and Mr. Gregg is facing additional sanctions on the same offense. Therefore, a second jury may not be empaneled, and Mr. Gregg may not be retried. The governing law is clear, but to the extent that there is ambiguity, this Court should rely on the rule of lenity, which "has a critical role to play" in habitual offender cases. *Wooden*, 595 U.S. at 397 (Gorsuch, *J.*, concurring). When reasonable doubts over the application of a habitual offender statute arise, "they should be resolved in favor of liberty." *Id.*

The Colorado Constitution's protection against double jeopardy is broader than its federal counterpart, and longstanding Colorado precedent prohibits a retrial even when charges are erroneously dismissed. In *People v. Paulsen*, 601 P.2d 634 (1979), the defendant was acquitted on a drug charge when the trial court granted a

motion for judgment of acquittal. This Court declined to follow *United States v. Scott*, 437 U.S. 82, 98 (1978), where the United States Supreme Court held that the federal constitution does not preclude retrial where the trial court granted a motion to dismiss on a basis unrelated to factual guilt or innocence. Instead, this Court held that jeopardy attached when the jury was sworn and that retrial was precluded, even though the trial court erred as a matter of law when it granted the motion for judgment of acquittal. *Paulsen*, 601 P.2d. at 635-636. Even if the trial court erred in dismissing the habitual charges against Mr. Gregg, jeopardy has attached, and *Paulsen* prohibits retrial on those charges.

The State has been on notice for years that any fact aggravating the legally prescribed punishment must be submitted to the jury; *Apprendi* was decided more than twenty years ago, and its progeny have only underscored its central point. Under the old habitual offender scheme, this Court properly enforced the protection against double jeopardy where the trial court adjudicated and sentenced the defendant without submitting the habitual counts to the jury. *People v. Mason*, 643 P.2d 745 (Colo. 1982). Additionally, the Double Jeopardy Clause bars the government from proving facts unproven in the original proceedings that increase a sentence beyond the statutory maximum where an intervening change in the law prevented the State

from proving the enhancement. *United States v. Velasco-Heredia*, 319 F.3d 1080, 1086–87 (9th Cir. 2003).

CONCLUSION

Habitual offender statutes create some of the most high-stakes situations in the criminal legal system. People charged under these schemes face extremely long prison terms, disconnected from the severity of the triggering offense. In this context, all constitutional protections owed to accused people acquire a special importance. For too long, Colorado's habitual offender statute has deprived accused people of their right to have all facts that increase punishment proven to a representative jury beyond a reasonable doubt. In Mr. Gregg's case, this first violation risks spawning another: exposing him to Double Jeopardy by empaneling a second jury to determine the habitual charges after the first jury to hear his case had been discharged. This Court should uphold Mr. Gregg's Fifth and Sixth Amendment rights to a trial by representative jury on all facts that increase his punishment and decline the invitation to expose him to constitutionally impermissible Double Jeopardy. *Amici curiae* respectfully urge this Court to affirm the dismissal of the habitual counts against Mr. Gregg.

Respectfully submitted this 25th day of November, 2024.

s/ Emma Mclean-Riggs

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CERTIFICATE OF SERVICE

I certify that on November 25, 2024, I electronically filed a copy of the foregoing with the Clerk of the Court via the Colorado Courts E-Filing system, which will serve notification of such filing to all counsel of record.

s/ Emma Mclean-Riggs