SUPREME COURT STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	DATE FILED December 13, 2024 5:40 PM FILING ID: 5A7E5074CB813 CASE NUMBER: 2024SA272
Original Proceeding, District Court, Mesa County, 2023CR289	
In Re: Plaintiff: The People of the State of Colorado, v. Defendant: Andrew Burgess Gregg.	▲ **COURT USE ONLY** ▲
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DISTRICT COURT'S RESPONSE TO THE PETITION FOR RULE TO SHOW CAUSE UNDER C.A.R. 21

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28(g) and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

- The brief complies with the word limit in C.A.R. 28(g)(1).
    - It contains 4,432 words.
- The brief complies with the content and form requirements in C.A.R. 28.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements in of C.A.R. 28(g) and C.A.R. 32.

/ s/ Talia Kraemer

Talia Kraemer

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The Mesa County District Court ("District Court") submits this response to the Court's Order and Rule to Show Cause and respectfully asks the Court to discharge the rule.

ISSUES PRESENTED FOR REVIEW

1. Below, the prosecution charged the defendant with substantive offenses and habitual criminal counts under C.R.S. § 18-1.3-801, *et seq*. The substantive offenses were tried to a jury, which convicted the defendant on multiple charges. The District Court discharged the jury without the prosecution presenting evidence on the habitual criminal counts. Once the jury was discharged, did the Double Jeopardy Clause bar the District Court from empaneling a new jury to render a verdict on the habitual criminal counts?
2. Can the sentencing procedure required by Colorado's habitual criminal statute, C.R.S. § 18-1.3-803, be applied consistently with the U.S. Supreme Court's decision in *Erlinger v. United States*, 602 U.S. 821 (2024)?

JURISDICTION

The District Court agrees that this Court has jurisdiction.

STATEMENT OF THE CASE

Colorado law creates enhanced punishments for persons adjudged "habitual criminals" based on prior criminal convictions involving "charges separately brought and tried, and arising out of separate and distinct criminal episodes." *See* C.R.S. § 18-1.3-801(1)(b)(I), (1.5), (2)(a)(I). As relevant here, the habitual criminal statute details the following procedure for determining whether a person qualifies as a habitual criminal:

> If the allegation of previous convictions of other felony offenses is included in an indictment or information and if a verdict of guilty of the substantive offense with which the defendant is charged is returned, the court shall conduct a separate sentencing hearing to determine whether or not the defendant has suffered such previous felony convictions.

Id. § 18-1.3-803(1). The hearing "shall be conducted by the judge who presided at trial," *id.*, and "the trial judge . . . shall determine by separate hearing and verdict whether the defendant has been convicted as alleged," *id.* § 18-1.3-803(4). The current statute is silent on whether a jury may be involved in the hearing on prior convictions, whereas

prior versions of the statute required the issue to be tried to a jury. *See generally id.* § 18-1.3-803; *cf. People v. Mason*, 643 P.2d 745, 754 (Colo. 1982) (describing prior iteration of habitual criminal statute, pursuant to which the prior convictions were tried to "the jury impaneled to try the substantive offense" (quoting C.R.S. § 16-13-103 (1973)).

In these proceedings, Andrew Gregg was charged with multiple substantive offenses, as well as habitual criminal counts. *See* Pet. Ex. A at 1. On April 16, 2024, a jury convicted Mr. Gregg of two felonies and one misdemeanor offense. *Id.* In accordance with the statute, the District Court discharged the jury before holding a hearing on the habitual criminal counts. *Id.* at 8.

However, after the jury was discharged, but before the habitual criminal hearing was held, the U.S. Supreme Court issued its decision in *Erlinger v. United States*, 602 U.S. 821 (2024). *Erlinger* considered the federal Armed Career Criminal Act, which imposes enhanced prison terms on certain defendants who previously committed three qualifying offenses on separate occasions. *Id.* at 825. *Erlinger* addressed whether a judge may decide if prior offenses were committed on separate

occasions, or whether that issue must be submitted to a jury. *Id.* Relying on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny, the Court held that the Fifth and Sixth Amendments of the U.S. Constitution afford defendants the right to have the "separate occasions" inquiry submitted to a jury and proved by the prosecution beyond a reasonable doubt. *Erlinger*, 602 U.S. at 832-35.[1]

In light of *Erlinger*, Mr. Gregg moved for dismissal of the habitual criminal counts. *See* Pet. Ex. B. He argued that under *Erlinger*, he was entitled to have a jury determine whether his prior convictions "[arose] out of separate and distinct criminal episodes." *Id.* at 4. Because the jury was discharged without considering the habitual criminal counts, Mr. Gregg urged their dismissal. He also asserted that double jeopardy principles prevented the District Court from empaneling a new jury to make the requisite findings. *Id.*

The People opposed dismissal. *See* Pet. Ex. C. They agreed with Mr. Gregg that *Erlinger* applies to Colorado's habitual criminal statute,

[1] *Erlinger* clarified that the Sixth Amendment allows a trial court to do no more "than determine what crime, with what elements, the defendant was convicted of." 602 U.S. at 838 (citation omitted).

such that the question of whether prior convictions were based on "charges separately brought and tried, and arising out of separate and distinct criminal episodes" must be tried to a jury. *Id.* at 1 (quoting C.R.S. § 18-1.3-801). But they disagreed that the habitual criminal counts must be considered by the same jury that rendered a verdict on the substantive charges. *Id.* Though they cited no supporting legal authority, the People maintained that it is constitutionally permissible for a "replacement jury" to make the requisite habitual criminal findings. *Id.* at 3. They also argued that empaneling a jury to make those findings could be done consistently with the procedural requirements of section 18-1.3-803, which is silent as to jury involvement. *Id.* at 1-2.

The District Court granted the motion to dismiss the habitual criminal counts, concluding that the Double Jeopardy Clause barred it from empaneling a new jury. Pet. Ex. A at 10-11. In so doing, it relied on the principles enunciated in *Erlinger*, as well as this Court's decision in *Mason*, 643 P.2d at 745. *Id.* at 7, 9-10.

In *Mason*, the trial court discharged the jury that rendered a verdict on the defendant's substantive offense before the jury considered the habitual criminal counts, even though at the time the habitual criminal statute required those counts to be decided by a jury. 643 P.2d at 750, 753-54. Instead, the trial court made its own findings on habitual criminality, based on the defendant's trial testimony, and adjudged the defendant a habitual criminal. *Id.* at 750. On review, this Court held that the trial court's habitual criminal sentence was invalid because it violated the statute. *Id.* at 754. The Court further concluded that double jeopardy barred retrial on the habitual criminal counts. *Id.* at 755. It analogized the trial court's discharge of the jury without a verdict on the habitual criminal counts to "an improper termination of the defendant's trial," which "deprived the defendant of his valued right to a jury verdict on the prior conviction counts by that particular jury impaneled and sworn to try the case." *Id.*

In granting Mr. Gregg's motion to dismiss, the District Court observed that the posture of Mr. Gregg's case was "nearly identical to *Mason*," in that "the trial court erred by not submitting the habitual

criminal counts to the jury who rendered verdicts on the defendant's substantive charge." Pet. Ex. A at 9. It accordingly held that the habitual criminal counts could not now be tried to a new jury. *Id.* at 10. Because the District Court concluded that double jeopardy barred empaneling a new jury, it did not reach the broader question of whether the procedures required by Colorado's habitual criminal statute could be reconciled with *Erlinger*. *Id.* at 8-9.

SUMMARY OF ARGUMENT

The District Court correctly concluded that, as in *Mason*, the premature discharge of the jury before the jury considered Mr. Gregg's habitual counts was akin to an unnecessary *sua sponte* declaration of a mistrial, and thus empaneling a new jury would deprive Mr. Gregg of his "valued right to a jury verdict on the prior conviction counts by that particular jury impaneled and sworn to try the case." *Mason*, 643 P.2d at 755. *Erlinger* undermines the rationale of post-*Mason* decisions holding that the Double Jeopardy Clause does not apply to habitual criminal proceedings, and thus those cases are no longer persuasive authority. Finally, the District Court disagrees with the People's

argument that double jeopardy principles did not, at a minimum, prevent the District Court from empaneling a new jury because a hearing on the habitual counts had not yet been held. Such a rule would be in tension with this Court's prior ruling in *Mason* and would negate the defendant's right to have his case concluded by a particular tribunal once those proceedings commence.

Below, the District Court did not render a ruling on how to reconcile Colorado's habitual criminal statute with *Erlinger*. Accordingly, if this Court finds it necessary to reach that question, the District Court respectfully proposes that this Court remand for the District Court to assess the issue in the first instance on the facts of this case.

ARGUMENT

I. The Double Jeopardy Clause prevents trial courts from convening a new jury to decide a defendant's habitual criminal charges when the jury that issued a verdict on the substantive offenses has already been discharged.

A. Standard of review and preservation.

Application of the Double Jeopardy Clause is a question of law, which this Court reviews de novo. *People v. Cortes-Gonzalez*, 506 P.3d

835, 842 (Colo. 2022). The District Court agrees this question was preserved. *See* Pet. Exs. A-C.

B. The Double Jeopardy Clause prevented the District Court from empaneling a second jury, because double jeopardy principles apply to habitual criminality proceedings.

The District Court rightly concluded that *Mason*'s reasoning governs this case, and, accordingly, double jeopardy barred empaneling a new jury. As in *Mason*, the trial court here discharged the jury after it had rendered a verdict on the substantive charge but before it reached the habitual criminal counts. In both cases, the discharge was premature—in *Mason*, because it contravened statutory requirements, 643 P.2d at 754; here, because it is now understood that Mr. Gregg has a constitutional right for the habitual criminal counts to be decided by the jury, *see generally Erlinger*, 602 U.S. at 832-35, 838.

As this Court explained in *Mason*, a jury's premature discharge before considering habitual criminality "closely resembles" a court's "sua sponte declaration of a mistrial." 643 P.2d at 755 (citing *United States v. Jorn*, 400 U.S. 470 (1971)). When a trial court declares a mistrial *sua sponte* and there is no "manifest necessity" to do so, retrial

to a new jury is barred by double jeopardy. *Mason*, 643 P.2d at 755 (citing *Jorn*, 400 U.S. 470). Prematurely ending the proceedings "deprive[s] [the defendant] of his valued right to have his trial completed by a particular tribunal." *Mason*, 643 P.2d at 755 (citing *Jorn*, 400 U.S. at 484). And when the defendant is deprived of that right without adequate justification, double jeopardy prohibits empaneling a new jury to continue the proceedings. *Mason*, 643 P.2d at 755; *see also Erlinger*, 602 U.S. at 845 ("The Double Jeopardy Clause protects a defendant by prohibiting a judge from even *empaneling* a jury when the defendant has already faced trial on the charged crime.").

The District Court here made a legal error in not submitting the habitual criminal charges to the jury (albeit an error made apparent only once *Erlinger* was decided). It thus could not empanel a second jury without violating the Double Jeopardy Clause. *Mason*, 643 P.2d at 755.

The People argue that *Mason* is not controlling authority, because *Mason* relied in part on *People v. Quintana*, 634 P.2d 413 (Colo. 1981), which in turn was overruled by *People v. Porter*, 348 P.3d 922 (Colo.

2015).[2] Pet. at 14. But as the District Court recognized, *Erlinger* undermined *Porter*'s holding and instead supports both *Quintana* and *Mason*'s continued vitality. Pet. Ex. A at 10.

In *Quintana*, the trial court dismissed one habitual criminal count after finding that the defendant had not been adequately advised of his rights before pleading guilty to the prior crime, and directed a verdict for the defendant on the remaining habitual criminal counts after concluding that the defendant's present substantive offense did not qualify for a habitual criminal enhancer. 634 P.2d at 414-15. On review, this Court held that the trial court erred in both rulings. *Id.* at 416-18. It then considered whether the defendant could be retried on the habitual criminal counts consistent with double jeopardy. *Id.* at 418.

In assessing whether double jeopardy principles applied, this Court observed that the habitual criminal proceedings required by the

[2] *Mason* relied on *Quintana* for the proposition that "habitual criminal charges, in contrast to an ordinary sentencing hearing, must be conducted 'in accordance with the same procedural and constitutional safeguards traditionally associated with a trial on guilt or innocence,' including the constitutional protection against double jeopardy." 643 P.2d at 754 (quoting *Quintana*, 634 P.2d at 419).

statute in place at that time differed from typical sentencing proceedings, because the procedural safeguards and statutory requirements involved—including the requirements of proof beyond a reasonable doubt and a separate jury verdict—showed "legislative intent to require that an adjudication of habitual criminality be made only in accordance with the same procedural and constitutional safeguards traditionally associated with a trial on guilt or innocence." *Id.* at 419. In light of this, the Court concluded that "the constitutional protection against double jeopardy applies to a defendant prosecuted as a[] habitual criminal." *Id.* Its analysis relied on the U.S. Supreme Court's decision in *Bullington v. Missouri*, 451 U.S. 430 (1981), which held that double jeopardy barred reconsideration of the death penalty during retrial where the defendant was originally sentenced by a jury to life in prison, "[b]ecause the sentencing proceeding at [the] first trial was like the trial on the question of guilt or innocence." *See Quintana*, 634 P.2d at 419 (quoting *Bullington*, 451 U.S. at 446); *see also Porter*, 348 P.3d at 924-25 (describing the Court's reasoning in *Quintana*).

This Court overruled *Quintana* in *Porter*, which reconsidered whether "double jeopardy bar[s] a new habitual criminal sentencing hearing when the trial court erroneously dismisses the habitual counts before the prosecution presents any evidence as to those counts." 348 P.3d at 923. In *Porter*, this Court identified two intervening changes that justified rejecting *Quintana*.

First, *Quintana*'s holding "relied heavily on the statutory scheme," which at the time had required habitual criminal proceedings to include "safeguards traditionally associated with a trial on guilt or innocence." *Id.* at 925 (quoting *Quintana*, 634 P.2d at 419). But in the interim, Colorado's statute changed, and habitual criminal counts were now to be tried to the court rather than to a jury. *Porter*, 348 P.3d at 925.

Second, after *Quintana*, the U.S. Supreme Court issued *Monge v. California,* 524 U.S. 721 (1998), which held that the Double Jeopardy Clause does not extend to noncapital sentencing proceedings. This Court in *Porter* noted that in *Monge*, the U.S. Supreme Court "explained . . . that any trial-like attributes present in noncapital sentencing proceedings are 'a matter of legislative grace, not

constitutional command,'" and "if it were to extend double jeopardy protections to noncapital sentencing hearings, it 'might create disincentives that would diminish these important procedural protections.'" *Porter*, 348 P.3d at 926 (quoting *Monge*, 524 U.S. at 734). This Court further found persuasive *Monge*'s statements that enhancing a sentence does not put a defendant in jeopardy for an "offense" and that a noncapital sentencing decision is not analogous to an acquittal of any more severe sentence that could be imposed. *Porter*, 348 P.3d at 928 (quoting *Monge*, 524 U.S. at 728-29).[3] Persuaded by *Monge*, this Court held that "Colorado double jeopardy law does not apply to noncapital sentencing proceedings." *Porter*, 348 P.3d at 929.

Both of the intervening changes relied on in *Porter* have now been altered by *Erlinger*.[4] First, regardless of what Colorado's habitual

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[3] *Monge* also heavily emphasized the unique stakes of capital sentencing proceedings, though it explained that "[t]he holding of *Bullington* turn[ed] on *both* the trial-like proceedings at issue and the severity of the penalty at stake." *Monge*, 524 U.S. at 733.

[4] The District Court agrees that *Erlinger* did not directly decide the question posed here: whether Double Jeopardy bars empaneling a new jury for habitual criminal counts after discharge of the jury that considered the substantive offense. But *Erlinger*'s rationale, concluding

criminal statute requires, certain elements of the habitual criminal counts must now be submitted to a jury and proved beyond a reasonable doubt. *See Erlinger*, 602 U.S. at 832-35. Thus, *Quintana*'s conclusion that the presence of "safeguards traditionally associated with a trial on guilt or innocence" at the habitual criminal phase supports applying double jeopardy principles to those proceedings is once again sound. 634 P.2d at 419. Second, much of *Monge*'s reasoning no longer applies to habitual criminal proceedings. The "trial-like attributes" of habitual criminal proceedings are now understood to in fact be a matter of "constitutional command," so *Monge*'s concern about disincentivizing states from providing such procedures no longer applies. *Cf. Monge*, 524 U.S. at 734. And because certain facts supporting a habitual criminal finding must, as a constitutional guarantee, be proved by the prosecution to the jury beyond a reasonable doubt, the jury's verdict concluding that a defendant does not meet the habitual criminal

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that the Fifth and Sixth Amendments require certain habitual criminal findings to be submitted to the jury and proven beyond a reasonable doubt, strongly supports the District Court's conclusion that Double Jeopardy principles apply to habitual criminal proceedings.

requirements now closely resembles a traditional "acquittal"; i.e., "a decision to the effect that the government has failed to prove its case." *Id.* at 730-31.[5]

As a result, *Erlinger* strongly calls into doubt the prior rule, urged again here by the People, that "[t]he Double Jeopardy Clause simply

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[5] In *Porter*, this Court recognized that "debate exists as to the effect of *Apprendi* . . . on *Monge*," as "[i]n *Apprendi*, the Court largely adopted the *Monge* dissent's position." 348 P.3d at 926 n.4. But the Court noted that *Apprendi* discussed *Monge* "without questioning its continued viability and exempted 'the fact of a prior conviction' from its holding." *Id.* (citing *Apprendi*, 530 U.S. at 490). *Porter* also noted the U.S. Supreme Court's reliance on *Monge* in *Dretke v. Haley*, 541 U.S. 386 (2004), in which the Court cited *Monge* in support of the proposition that the Court's precedents had never required proof beyond a reasonable doubt of "prior conviction used to support recidivist enhancement." 541 U.S. at 395; *see Porter*, 348 P.3d at 926 n.4. *Porter* thus concluded that *Monge* remained good law. *Porter*, 348 P.3d at 926 n.4.

Erlinger now makes clear, however, that *Apprendi does* require certain habitual criminal findings to be made by a jury. 602 U.S. at 822. And notably, *Erlinger*'s sole citation to *Monge* was to its dissent, for the dissent's critique of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). 602 U.S. at 838. *Almendarez-Torres*—which was also relied on in *Monge*—held that a judge, rather than a jury, may find the fact of a prior conviction, thereby triggering an enhanced sentence. *Monge*, 524 U.S. at 729. *Erlinger* described *Almendarez-Torres* as "at best an exceptional departure from historic practice . . . [that] was arguably incorrect." 602 U.S. at 837. All told, *Erlinger* provides substantial reason to question *Monge*.

does not apply to habitual sentencing proceedings." Pet. at 10. *Cf. State v. Allen*, 431 P.3d 117, 123, 125 (Wash. 2018) (observing that "*Monge* was decided before *Apprendi* and subsequent cases in which the constitutional limits of which facts may be designated as sentencing factors for Sixth Amendment purposes were clearly set forth," and "discern[ing] no principled basis" for holding that double jeopardy protections do not apply to aggravating circumstances that are constitutionally required to be proved to a jury beyond a reasonable doubt). Instead, *Erlinger* supports *Quintana*'s reasoning and, in turn, *Mason*'s double jeopardy holding. The District Court rightly found *Mason* instructive here.

C. Double jeopardy bars empaneling a second jury even if the habitual criminal phase has not yet begun.

Notwithstanding *Mason*, the People next argue that even if double jeopardy principles apply to habitual criminal proceedings, jeopardy would not attach until the habitual criminal phase of the proceedings began, such that the District Court could have empaneled a second jury (and, so the argument would go, double jeopardy would not be implicated until after that second, habitual jury was empaneled). Pet.

at 8-9. In support, they cite *Graham v. West Virginia*, 224 U.S. 616 (1912), in which the U.S. Supreme Court approved of a state law providing for a defendant's previous convictions to be raised to the court and tried before a newly empaneled jury after the defendant was already convicted and sentenced on a substantive offense. But *Graham* is distinguishable. In *Graham*, the defendant pled guilty to the substantive charge, and his prior convictions were not raised to the court until several months later. Thus, unlike in this case, *Graham* did not confront a situation in which a trial court discharged a jury prematurely before it could consider habitual counts charged in the same proceeding. 224 U.S. at 620-21. As a result, *Graham* did not resemble an erroneously declared mistrial, as in *Mason*, or implicate the defendant's right to have his proceedings completed before the jury already trying his case.[6]

[6] Similarly, none of the other cases from the U.S. Supreme Court or this Court relied on by the People or their Amici involved facts where a court empaneled a second jury after discharging the first jury that decided the defendant's substantive charges. *See Schiro v. Farley*, 510 U.S. 222, 231 (1994) (no double jeopardy violation where the court "simply conducted a single sentencing hearing in the course of a single

The People and their Amici also identify a series of decisions from other jurisdictions in which courts have permitted a new or different jury to be empaneled for sentencing. *See* Pet. at 11; Br. of Amici Curiae Colorado Att'y General's Office and Colorado District Att'ys' Council in Supp. of Pet'r at 17. Several of those decisions presented meaningfully different facts from those here. *See State ex rel. Neely v. Sherrill*, 815 P.2d 396, 400-01 (Ariz. 1991) (allowing a new jury to be empaneled for sentencing after the first jury was discharged, where defendants absconded during trial and it was necessary to postpone sentencing until defendants were recovered to prevent prejudice to the state's case); *Sevier v. Commonwealth*, 434 S.W.3d 443, 464 n.57 (Ky. 2014) (finding

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prosecution"); *Oyler v. Boles*, 368 U.S. 448, 452 (1962) (due process does not require the state to notify a defendant before trial on the substantive charge that it will raise prior convictions if defendant is convicted); *Mountjoy v. People*, 430 P.3d 389, 391 (Colo. 2018) (finding it permissible for trial court to aggravate sentencing based on facts necessarily found by the jury beyond a reasonable doubt in connection with at least one of the substantive charges at issue); *People v. Montour*, 157 P.3d 489, 492 (Colo. 2007) (holding that statute unconstitutionally linked a defendant's guilty plea to automatic waiver of the defendant's right to a sentencing jury in death penalty proceedings, and, in light of the defendant's guilty plea, remanding for a new sentencing hearing before a jury unless the defendant specifically waived that right).

no error where a jury of *thirteen* individuals mistakenly deliberated on the substantive charges but then one of the thirteen was dismissed as an alternate prior to the sentencing phase); *Aragon v. Wilkinson ex rel. Cnty. of Maricopa*, 97 P.3d 886, 891 (Ariz. App. 2004) (empaneling a jury for sentencing after the defendant pled guilty to the substantive charge); *see also State v. McMillan*, 409 N.E.2d 612, 618 (Ind. 1980) (permitting a new jury to reconsider solely the habitual criminal counts after the first jury hung in the habitual criminal phase, in keeping with the general rule that double jeopardy does not bar retrial following a hung jury). As to the others, the District Court recognizes but respectfully disagrees with those decisions.

Relatedly, the People argue that applying the Double Jeopardy Clause here would not serve either of the Clause's purposes, because empaneling a second jury would neither subject Mr. Gregg to a second prosecution for the same offense after acquittal or conviction nor subject him to multiple punishments for the same offense. Pet. at 8-9. But the Double Jeopardy Clause's protections are not so narrow, as evidenced by the rule, which this Court previously recognized, that double

jeopardy bars retrial when a trial court declares a mistrial without manifest necessity for doing so. *See Mason*, 643 P.2d at 755; *see also Jorn*, 400 U.S. 470. Indeed, in a jury trial, jeopardy attaches as soon as the jury is sworn in and does not depend on the quantity of evidence the jury has considered. *See Crist v. Bretz*, 437 U.S. 28 (1978). Rather, double jeopardy principles protect a defendant's "valued right to have his trial completed by a particular tribunal" and ward off the risk that the state may prematurely seek to terminate a trial when it fears it is unlikely to obtain a conviction with the empaneled jury. *Jorn*, 400 U.S. at 484; *Green v. United States*, 355 U.S. 184, 188 (1957). Those interests support applying the Double Jeopardy Clause here.

II. If this Court concludes that Double Jeopardy does not bar empaneling a new jury, the case should be remanded for the District Court to address whether Colorado's habitual criminal statute can be applied consistently with *Erlinger*.

The People's Petition also asks this Court to decide whether the habitual criminal statute's procedural requirements can be applied consistently with *Erlinger*. Pet. at 1. The District Court did not reach this question because it concluded that, regardless of what the statute

permits, double jeopardy prevented it from empaneling a new jury. If this Court disagrees, the District Court respectfully proposes that the Court remand for the District Court to consider that issue on the facts of this case in the first instance. Remand is consistent with this Court's instruction that a trial court should have had the opportunity to consider and decide all evidence and arguments before C.A.R. 21 relief is awarded. *Cf. Panos Inv. Co. v. Dist. Ct.*, 662 P.2d 180, 181-82 (Colo. 1983) ("The orderly administration of justice requires that parties first present all evidence and arguments to the trial court. Simply stated, the supreme court will not consider issues and evidence presented for the first time in original proceedings.").

The District Court further notes that while it did not reach the issue in this case, it recently issued a decision addressing the intersection of *Erlinger* and Colorado's habitual criminal statute in a separate matter, also involving Mr. Gregg. In that case, the District Court held that Colorado's habitual criminal statute is not facially unconstitutional in light of *Erlinger*. The District Court's ruling in that matter is attached for reference as Exhibit 1.

CONCLUSION

The District Court respectfully requests that this Court discharge the Order and Rule to Show Cause.

Respectfully submitted this 13th day of December, 2024.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 13th day of December, 2024, a true and correct copy of this **DISTRICT COURT'S RESPONSE TO THE PETITION FOR RULE TO SHOW CAUSE UNDER C.A.R. 21** was e-filed and served via Colorado Court's E-Filing to all counsel and parties of record.

s/ Carmen Van Pelt