SUPREME COURT, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Ave. Denver, Colorado 80203	DATE FILED December 18, 2024 12:00 PM FILING ID: 4E9DD73E47B0C 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.	σ COURT USE ONLY σ
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AMENDED ANSWER BRIEF OF RESPONDENT-DEFENDANT

CERTIFICATE OF COMPLIANCE

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

This brief complies with the applicable word limit set forth in C.A.R. 28(g).

It contains 9,494 words.

This brief complies with the standard of review requirement set forth in C.A.R. 28(b).

In response to each issue raised, the Respondent must provide under a separate heading before the discussion of the issue, a statement indicating whether respondent agrees with petitioner's statements concerning the standard of review and preservation for appeal and, if not, why not.

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

Britta Kruse

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INTRODUCTION

The primary dispute is whether this Court, rather than the legislature, should undertake the task of rewriting section 18-1.3-803, C.R.S., to make it conform to constitutional requirements. Respondent-Defendant Gregg emphatically submits that the task of rewriting the statute belongs to the General Assembly so that the guiding legislative intent is that of the current legislature, not the counterfactual intent of a legislature from decades ago. This Court can and should affirm the district court's ruling on these grounds, and if not, then on the grounds that double jeopardy prohibits empaneling a new jury under the circumstances of Gregg's case.

STATEMENT OF THE CASE

As relevant here, Gregg was charged with three felonies: two counts of aggravated robbery and attempt to influence a public servant. The jury acquitted him of both counts of aggravated robbery and convicted him of robbery as a lesser-included offense of one count.[1] The jury also convicted Gregg of attempt to influence a public servant.[2]

Robbery and attempt to influence a public servant are both class 4 felonies. §§ 18-4-301(2), C.R.S.; 18-8-306, C.R.S. The presumptive sentencing range for a class 4

[1] Respondent-Defendant Exhibit 1–Verdicts. The Petition's reference to an aggravated robbery conviction is erroneous.
[2] *Id.*

felony is two to six years. § 18-1.3-401(1)(V.5)(A), C.R.S. However, Gregg was also charged with four habitual criminal counts per section 18-1.3-801, C.R.S.,[3] thereby increasing his sentencing exposure to a mandatory prison sentence of twenty-four years for each conviction, § 18-1.3-801(2)(a)(I)(A), based on factual findings that were required to be made by "the judge who presided at trial" or a "replacement judge," § 18-1.3-803(1), (4), C.R.S.

Before the habitual criminal phase of trial occurred but after Gregg's jury was discharged and released, the United States Supreme Court issued its decision in *Erlinger v. United States*, which holds that the constitution's jury trial rights require a unanimous jury finding beyond a reasonable doubt concerning the "fact-laden task" of whether a defendant's prior convictions occurred on "separate occasions" for purposes of a federal recidivist sentencing statute, the Armed Career Criminal Act ("ACCA"), 602 U.S. 821, 830-31 (2024) (interpreting 18 U.S.C. § 924(e)(1)). Notably, the Supreme Court held this question does not fall within the so-called "prior conviction exception," reiterating the scope of that exception is exceedingly narrow. *Id.* at 837.

Based on *Erlinger*, Gregg moved to dismiss his habitual criminal counts because a judge cannot make the finding of whether the alleged prior convictions satisfied an analogous element of Colorado's habitual criminal statute, the jury had already been

[3] Respondent-Defendant Exhibit 2–Amended Complaint.

discharged, and the prohibition on double jeopardy barred empaneling a new jury to try the habitual criminal counts.[4] The People (Petitioner herein) agreed that *Erlinger*'s impact on Colorado's habitual criminal statute was that, "[f]rom now on, a jury must decide an essential element of that charge—namely, whether the prior convictions were based on 'charges separately brought and tried, and arising out of separate and distinct criminal episodes.'"[5]

Petitioner argued, however, that nothing prevented the judge from determining the identification question of whether the defendant and the person with the prior convictions were one and the same while still allowing the jury to decide whether those convictions were based on charges separately brought and tried and arising out of separate and distinct criminal episodes.[6] Petitioner further stated:

> Admittedly, an *Erlinger*-compliant procedure will be unusual (involving jury instructions that require some careful thought). But there is no constitutional or statutory reason why such a procedure would be impossible.[7]

[4] Petitioner's Exhibit B.
[5] Petitioner's Exhibit C, ¶ 1 (quoting § 18-1.3-801(1)(b)(I), -(1.5), -(2)(a)(I)). Petitioner's Exhibit A, p.7; *see also* Respondent-Defendant Exhibit 3–People's Motion to Continue, ¶ 3.
[6] *Id.* ¶ 3.
[7] *Id.* ¶ 4.

As Petitioner saw it, if the current statute "allows a replacement judge to hear the habitual criminal sentencing phase if the trial judge is unable," then it also did not preclude the use of a "replacement jury."[8]

Alternatively, Petitioner argued that if the "procedural" habitual criminal statute does not allow habitual criminal charges to be determined in a constitutional manner because it requires a judge to make all the requisite findings, then the trial "court must void the procedural statute as unconstitutional, leaving the trial court "free to employ any sentencing procedure that complies with the constitution."[9] Therefore, consistent with *Erlinger*, the court "could have the jury determine some (or indeed all) of the elements of a habitual charge" required under the "substantive statute."[10]

The trial court viewed "the actual controversy between the parties" as "relatively narrow"—could it "empanel a separate jury to make factual findings and render a verdict on the habitual criminal counts after a jury has rendered verdicts on Defendant's substantive counts?"[11] Relying on *Erlinger*, the court's answer was no.[12] The court acknowledged that this Court had previously held that double jeopardy does not apply

[8] *Id.* ¶¶ 6-7.
[9] *Id.*
[10] *Id.*
[11] Petitioner's Exhibit A, p.8.
[12] *Id.* at 9 (quoting *Erlinger*, 602 U.S. at 824).

to habitual criminal proceedings, but that holding was based an anachronistic analysis.[13] Thus, the court concluded that *Erlinger*'s rationale and language concerning application of double jeopardy to habitual criminal proceedings meant double jeopardy precluded the court from empaneling a second jury.[14] Accordingly, the habitual criminal charges against Gregg were dismissed.

Thereafter, Petitioner requested, and was granted, review from this Court pursuant to C.A.R. 21.

SUMMARY OF THE ARGUMENT

After *Erlinger*, the parties and amici all agree that section 18-1.3-803 is facially unconstitutional insofar as it currently requires all findings supporting a mandatory enhanced sentence under Colorado's habitual criminal sentencing scheme to be made by a judge alone. This Court can and should affirm the district court's ruling on alternative grounds that the statute is unambiguous and the task of rewriting it belongs to the legislature so that its modern policy objectives can be implemented.

If this Court disagrees, then it should affirm the trial court's ruling on the grounds underlying the court's order, which is that double jeopardy prohibits empaneling a new jury under the circumstances of Gregg's case. A habitual criminal

[13] *Id.* (citing *People v. Porter*, 2015 CO 34, ¶¶ 13-15).
[14] *Id.*

trial carries all of the "hallmarks of a trial on guilt or innocence" and should be afforded the same double jeopardy protections. To the extent the Supreme Court and this Court have held otherwise in the past, the reasoning underlying those decisions is no longer applicable and this Court should depart from them as a matter of state constitutional law.

ARGUMENT

I. THE TRIAL COURT'S ORDER DISMISSING THE HABITUAL CRIMINAL CHARGES SHOULD BE AFFIRMED ON GROUNDS THAT DISMISSAL WAS THE ONLY SOLUTION AVAILABLE BECAUSE SECTION 18-1.3-803, C.R.S., IS FACIALLY UNCONSTITUTIONAL AND THE LEGISLATURE SHOULD BE THE ONE TO DECIDE HOW BEST TO RESTRUCTURE THE STATUTE WITHIN THE OVERALL HABITUAL CRIMINAL FRAMEWORK TO ACHIEVE ITS POLICY GOALS.

A. Standard of Review and Preservation

The issues presented in the Petition are questions of law subject to de novo review. *See People v. Graves*, 2016 CO 15, ¶ 9 ("The constitutionality of a statute is a question of law subject to de novo review."); *Hickerson v. Vessels*, 2014 CO 2, ¶ 10 (recognizing de novo review applies to questions of law concerning "the application and construction of statutes" and "the separation of powers doctrine").

Gregg moved for, and was granted, dismissal of his habitual criminal charges on double jeopardy grounds, but on appeal, "a party may defend" the trial court's ruling "on any ground supported by the record, whether relied upon or even considered by the trial court." *People v. Aarness*, 150 P.3d 1271, 1277 (Colo. 2006); *e.g.*, *People v. Dyer*,

2019 COA 161, ¶ 39 (holding it was proper to review an issue first raised by the appellee in its answer brief because "an appellate court may affirm a lower court's decision on any ground supported by the record, whether relied upon or even considered by the trial court").

B. Relevant Law

1. Constitutional Framework

"The right to trial by jury in criminal cases is a pillar of the Bill of Rights and a core ingredient of the American scheme of justice." *Caswell v. People*, 2023 CO 50, ¶ 2. This right is guaranteed to Coloradans by the Sixth and Fourteenth Amendments to the United States Constitution and Article II, Sections 16 and 23 of the Colorado Constitution. The "companion right" to the jury trial right is the due process right to have the government "prove to a jury every one of its charges beyond a reasonable doubt," *Erlinger*, 602 U.S. at 830-31; *Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000), which is guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article II, Section 25 of the Colorado Constitution.

Together, these rights "place[ ] the jury at the heart" of our criminal legal system by functioning as essential "checks on governmental power." *Erlinger*, 602 U.S. at 831-32. On the one hand, they "mitigate the risk of prosecutorial overreach and misconduct" by the Executive Branch by requiring a unanimous finding beyond a reasonable doubt by members of the community. *Id.* at 832. On the other hand, they

"ensure that a judge's power to punish" is derived "'wholly from,' and remain[s] always 'controlled' by, the jury and its verdict." *Id.* at 831 (quoting *Blakely v. Washington*, 542 U.S. 296, 306 (2004) (cleaned up)).

"There is no efficiency exception" to these rights. *Erlinger*, 602 U.S. at 842. They apply irrespective of how overwhelming the government's evidence is or how "straightforward" a factual inquiry may be. *Id.*; *cf. United States v. Gaudin*, 515 U.S. 506, 514 (1995) ("[T]he jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence."). In short, what these rights guarantee is "no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Blakely*, 542 U.S. at 305-06.

In recognition of the "surpassing importance" of these rights, the United States Supreme Court created a bright-line rule that—except for "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"—thereby eliminating "[a]ny possible distinction between" what a legislature defines as an "element" of an offense and a so-called "sentencing factor." *Apprendi*, 530 U.S. at 476-78, 490; *see Cunningham v. California*, 549 U.S. 270, 291 (2007) ("Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to

punishment are reserved for determination by the judge…is the *very* inquiry *Apprendi*'s 'bright-line rule' was designed to exclude." (emphasis in original)).

Driven by the "need to give intelligible content to the right of jury trial," *Blakely*, 542 U.S. at 305, the *Apprendi* rule has become "firmly entrenched" in the Supreme Court's jurisprudence, *Erlinger*, 602 U.S. at 833. This fact is borne out by the rule's consistent application across a variety of contexts. *See Mathis v. United States*, 579 U.S. 500, 510 (2016) (collecting cases). The Supreme Court's most recent *Apprendi* decision, *Erlinger*, applied the rule to facts subjecting a person to dramatically enhanced recidivist punishment. *Erlinger*, 602 U.S. at 835.

The only exceptions to the *Apprendi* rule are what this Court refers to as either "*Blakely*-compliant" or "*Blakely*-exempt" facts. *See Mountjoy v. People*, 430 P.3d 389, 393 (Colo. 2018); *Lopez v. People*, 113 P.3d 713, 723 (Colo. 2005). *Blakely*-complaint facts include facts found by a jury beyond a reasonable doubt, admitted by the defendant, or found by a judge "after the defendant stipulates to judicial fact-finding for sentencing purposes." *Mountjoy*, 430 P.3d at 393. The only *Blakely*-exempt fact is the fact of a prior conviction. *Id.* at 393 n.2.

This so-called "prior conviction exception" is rooted in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), a split decision by the Supreme Court that came under sharp criticism shortly afterward. *Erlinger*, 602 U.S. at 837 (citing *Jones v. United States*,

526 U.S. 227, 249 n.10 (1999)). The Supreme Court has since described the exception as representing "'at best an exceptional departure' from historic practice," leading the Court to carefully "delimit[ ] its reach." *Id.* (quoting *Apprendi*, 530 U.S. at 487); *see Lopez*, 113 P.3d at 723 n.9.

Specifically, the prior conviction exception only persists insofar as it allows judges to find "'the fact *of* a prior conviction,'" *Mountjoy*, 430 P.3d at 393 n.2 (emphasis in original) (quoting *Blakely*, 542 U.S. at 302), meaning a judge may "do no more" than "determine what crime, with what elements" makes up the prior conviction, *Erlinger*, 602 U.S. at 838 (citing *Mathis*, 579 U.S. at 511-12). To conduct this inquiry, the judge may consult "a restricted set of materials" such as judicial records and plea paperwork, which are often referred to as "*Shepard*" documents based on the Supreme Court's case *Shepard v. United States*, 544 U.S. 13 (2005). *Erlinger*, 602 U.S. at 838.

Shepard documents may be consulted for the strictly "'limited function' of determining the fact of a prior conviction and the then-existing elements of that offense." *Id.* at 839 (quoting *Descamps v. United States*, 570 U.S. 254, 260 (2013)). Hence, a proper use of *Shepard* documents is to discover the jurisdiction and date of a prior offense because determining such facts is necessary in order "to ascertain what legal elements the government had to prove to secure a conviction in that place at that time." *Id.*

By contrast, the judge is prohibited from exploring these documents to determine "the manner in which the defendant committed" the offense. *Mathis*, 579 U.S. at 511; *Erlinger*, 602 U.S. at 838 (describing its efforts to reiterate the limited scope of the prior conviction exception as reaching "the point of 'downright tedium'" (quoting *Mathis*, 579 U.S. at 510)). Accordingly, any fact finding beyond a determination of the crime of conviction, to the extent that is possible based solely on its statutory elements, falls outside of the prior conviction exception and is subject to a jury finding beyond a reasonable doubt.

2. Statutory Evolution

Colorado's mandatory habitual criminal sentencing scheme is presently set forth in Article 1.3 of Title 18.[15] Section 18-1.3-801 contains provisions concerning eligibility of predicate and triggering offenses as well as the applicable sentencing scheme. Sections 18-1.3-802 and -803 contain the provisions governing how habitual criminal proceedings shall be conducted. The upshot of these provisions is that courts are required to impose lengthy custodial sentences of up to life in prison for convictions of certain new offenses based on a judge's finding that the defendant has the requisite history of recidivism.

[15] Prior to 2002, the habitual criminal statutes were located in Article 13 of Title 16.

Yet, "[i]t is no light thing to double and treble the maximum sentence of the criminal law, to say nothing of relegating" a person to a life in prison based on an offense that would not otherwise merit such a sentence standing alone. *Smalley v. People*, 183 P.2d 558, 603 (Colo. 1947). The notion that a person can be punished more severely for a new crime based on the existence of past convictions for which the person was already punished is "drastically in derogation of the common law and hence by ancient and applicable rule" these statutes "must be strictly construed." *Id.* (citing *O'Day v. People*, 155 P.2d 789 (Colo. 1946)).

Due to the "serious consequences that follow habitual criminal adjudications," safeguards have been implemented to protect defendants charged under the habitual criminal statute. *People v. Cooper*, 104 P.3d 307, 312 (Colo. App. 2004); *see Gorostieta v. People*, 2022 CO 41, ¶ 42 (Boatright, J., concurring) (describing the rules surrounding habitual criminal sentencing as "additional procedural safeguards that were developed by the legislature to ensure that the severe penalty accompanying a habitual offender sentence is, in fact, warranted"). Hence, criminal defendants in Colorado historically have had the right to a jury finding of proof beyond a reasonable doubt in the context of habitual criminal sentencing just as they have in the context of capital sentencing. *Compare* § 16-13-103(4), C.R.S. (1981) (providing that the jury empaneled to try the substantive offense shall also determine whether the defendant has been convicted of

the prior offenses as alleged), *with* § 16-11-103(1)(a), C.R.S. (1979) (outlining the right to a jury trial in capital sentencing proceedings).

Indeed, the constitutional evolution of capital sentencing has repeatedly affected the statutory framework for habitual criminal sentencing in Colorado. For example, when the Supreme Court held that a new jury could be empaneled for a second capital sentencing hearing after the first jury failed to reach a unanimous verdict regarding the death penalty, *Poland v. Arizona*, 476 U.S. 147 (1986), Colorado's General Assembly amended the habitual criminal statute the very next session to allow a second habitual criminal jury to be empaneled if the first jury was unable to reach a unanimous verdict, Ch. 115, Sec. 8, § 16-13-103(4), 1987 Colo. Sess. Laws. at 605-06.

After the Supreme Court held that a jury finding was not required for facts exposing a defendant to the death penalty, *Walton v. Arizona*, 497 U.S. 639 (1990), the General Assembly amended the statutes pertaining to both capital and habitual criminal sentencing in 1995 with the express and sole purpose of replacing juries with judges as the only factfinder, Ch. 244, sec. 1, § 16-11-103, 1995 Colo. Sess. Laws 1290-93 (creating the three-judge panel system for capital sentencing); Ch. 129, sec. 14, § 16-13-103(4), 1995 Colo. Sess. Laws 467-68 (striking "jury" and substituting "judge" throughout). *See Woldt v. People*, 64 P.3d 256, 258 (Colo. 2003).

Just twelve years later, the Supreme Court reversed itself in *Ring v. Arizona* and restored juries to the role of factfinder in capital sentencing proceedings, 536 U.S. 584, 609 (2002). This time, the legislature responded by immediately amending Colorado's capital sentencing statute to eliminate the three-judge-panel system. Ch. 1, sec. 1, § 16-11-103, 2002 Colo. Sess. Laws, Third Extraordinary Session 1-15; *Woldt*, 64 P.3d at 259. However, the legislature did not amend the habitual criminal statute, perhaps relying on the language in *Apprendi* referencing the continued existence of the prior conviction exception and presuming it subsumed all findings under the statute. *See People v. Nunn*, 148 P.3d 222, 226-27 (Colo. App. 2006). Therefore, although the statute is still titled, "Verdict of Jury," the statutory language from 1995 designating judges as the sole factfinders for habitual criminal sentencing remains in effect today.

3. Statutory Framework

The "big" habitual criminal provision provides as follows, in pertinent part:

> [E]very person convicted in this state of any felony, who has been three times previously convicted, upon charges separately brought and tried, and arising out of separate and distinct criminal episodes, either in this state or elsewhere, of a felony or, under the laws of any other state, the United States, or any territory subject to the jurisdiction of the United States, of a crime which, if committed within this state, would be a felony, shall be adjudged an habitual criminal….

§ 18-1.3-801(2)(a)(I). Thus, to obtain the aggravated sentence under this provision, the prosecution is required to prove, and the trial judge is required to find, the following facts beyond a reasonable doubt per section 18-1.3-803(4)(b):

FACTS	REFERENCE
Identity of defendant as person previously convicted	§ 18-1.3-801(2)(a)(I)
Predicate convictions qualify/are not disqualified	§ 18-1.3-801(2)(a)(I), (2)(b), (2)(c), (3), (5)
Predicate convictions arise from separate and distinct criminal episodes	§ 18-1.3-801(2)(a)(I)
Predicate convictions were separately brought	§ 18-1.3-801(2)(a)(I)
Predicate convictions were separately tried	§ 18-1.3-801(2)(a)(I)
Out-of-state predicate convictions are felonies or would have been felonies if committed in Colorado	§ 18-1.3-801(2)(a)(I)

If such findings are made, then the judge must impose a prison sentence of four times the maximum of the presumptive range for the class or level of felony of the triggering offense(s), or a mandatory prison sentence of sixty-four years if the triggering offense constitutes a level 1 drug felony. § 18-1.3-801(2)(a)(I)(A)-(B).

C. Analysis

Petitioner and its Amici concede the plain language of section 18-1.3-803 requires what the constitution forbids—a judge to make all factual findings concerning whether a defendant shall be subjected to enhanced punishment as a habitual criminal. They nevertheless argue there "is nothing irreconcilable" about the statute and the constitution because there is nothing in the statute that prohibits a jury from making the same determination as the judge. Petition, p.7; Amici Brief, p.6. Both suggest this Court should simply interpret the statute's purported "silence" as permission to enact a new procedure whereby a jury would determine whether the defendant was previously convicted as alleged, and then the judge would "carry out a secondary review of the same evidence" and either "confirm" or "reject" the jury's verdict. *Id.*

On the contrary, there is nothing "silent" about the legislature's intent to preclude juries from playing a role in the habitual criminal phase of trial, which is clearly reflected in the unambiguous statutory language the legislature selected. Given that actual legislative intent is both clear and contrary to their proposal, Amici offer counterfactual speculation concerning the decades-old intent of a past legislature as their support. Respectfully, this Court should decline Petitioner and Amici's invitation to engage in judicial legislating that undermines the current General Assembly's efforts

to effectuate modern habitual criminal sentencing policy with full knowledge of the constitutional implications.

1. Section 18-1.3-803, which unambiguously reflects the legislature's expressed intent to eliminate juries from the habitual criminal phase of trial, is facially unconstitutional.

Habitual criminal punishment is "drastically in derogation of the common law," *Smalley*, 183 P.2d at 603, so section 18-1.3-803 must be "strictly construed" with no assumptions "indulged." *De Gesualdo v. People*, 364 P.2d 374, 378 (Colo. 1961); *Cooper*, 104 P.3d at 312. Here, the legislature unambiguously expressed its intent to eliminate juries from taking part in the habitual criminal phase of trial done through the plain and unambiguous statutory language it selected.

Notably, the legislature did not choose a term like "factfinder," which would be inclusive of a judge and jury, and it did not even choose the word "court," which some have argued is broad enough to encompass a jury, *see United States v. Haymond*, 588 U.S. 634, 657 (2019) (discussing the government's attempt to "assure" the Court that re-empaneling the jury "would be consistent with the statute's terms" because "court" can "be construed as embracing not only judges but also juries"). Instead, it chose the word "judge," which it uses ten times throughout the statute—in contrast to the term "court," used once—and even specifies that a "replacement judge" is suitable should the "trial" judge "who presided" over the substantive phase of trial die, resign, become

incapacitated, or be disqualified. § 18-1.3-803(1), (4)(b), (5)(b), (6). What's more, the legislature chose mandatory language, stating the "trial judge" (or a "replacement judge") "*shall* determine by separate hearing and verdict whether the defendant has been convicted as alleged." § 18-1.3-803(4) (emphasis added); *see generally Martinez v. People*, 2024 CO 6M, ¶ 17 (recognizing the word "shall" evidences legislative intent to make a statutory provision "mandatory").

Assuming *arguendo* the statute admits of the slightest ambiguity—*and* setting aside that ambiguous statutory language is "to be strictly construed in favor of" the defendant per the rule of lenity and because it is in derogation of common law, *People v. Hale*, 654 P.2d 849, 850 (Colo. 1982); *De Gesualdo*, 364 P.2d at 378 —any "ambiguity" evaporates upon even a cursory review of the legislative history. Indeed, the session law for the 1995 bill is a consummate visual aid depicting the General Assembly's intent to preclude jury involvement. Ch. 129, sec. 14, § 16-13-103(4), 1995 Colo. Sess. Laws 467.[16]

The legislature's intent was clearly expressed when the bill's language was initially presented too. Speaking for the bill's sponsors, prosecutors from Amicus CDAC explained the purpose of the bill was to change the "decisionmaker" for habitual criminal determination to judges. *Hearing on H.B. 1044 Before the Senate Judiciary Committee*,

[16] Respondent-Defendant Exhibit 4–Session Law Excerpt.

60th Legis. 1st Reg. Sess. (April 11, 1995).[17] As they explained it, juries were "completely confused" about the statutory elements—especially "separate criminal occurrences"—whereas judges are well suited to make the determination and do so in every other situation. *Id.* When asked about alternatives like improving jury instructions or other procedures, CDAC's representative admitted they did not discuss alternatives or take any suggestions.[18] *Id.*

In short, the General Assembly "meant what it clearly said": judges are to be the sole fact finders for facts necessary to enhance punishment pursuant to Colorado's habitual criminal scheme. *Marcellot v. Exempla*, 2012 COA 200, ¶ 15 (observing courts give "full effect to the words chosen, as we presume that the General Assembly meant what it clearly said"). Because is it equally clear that such a procedure violates the jury trial rights guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article II, Sections 16, 23, and 25 of the Colorado Constitution,

[17] *See generally Hunsaker v. People*, 2015 CO 46, ¶ 24 (recognizing a sponsor's words regarding the purpose of a bill "can be powerful evidence of legislative intent").

[18] Evidently, no members of the defense bar had reviewed the relevant language before it was introduced because CDAC said it "forgot" to include it in the original bill, so it appeared for the first time as an amendment after the bill had already been introduced to the House Judiciary Committee. *Hearing on H.B. 1044 Before the Senate Judiciary Committee* (April 11, 1995); *Senate Judiciary Committee Summary re: H.B. 95-1044* (April 10 [sic], 1995).

it therefore follows that section 18-1.3-803 is facially unconstitutional beyond a reasonable doubt.

2. The contours of habitual criminal sentencing post-*Erlinger* should be guided by the modern intent of Colorado's current legislature, not counterfactual speculation concerning the decades-old intent of a past legislature.

The separation of powers doctrine is expressly written into the Colorado Constitution and provides that the executive, legislative, and judicial department each shall exercise only its own powers. Colo. Const. art. III ("Distribution of Powers"); *People v. Wiedemer*, 852 P.2d 424, 436 (Colo. 1993) ("The doctrine of separation of powers is well recognized in this state and is constitutionally based."). Although the Federal Constitution is not so explicit, the Supreme Court has implied as much from the constitution's distribution of powers to "three distinct and separate departments." *O'Donoghue v. United States*, 289 U.S. 516, 530 (1933).

The judiciary is empowered to interpret the law pursuant to Article III, Section 1 of the United States Constitution and Article VI, section 1, of the Colorado Constitution. *See City of Boerne v. Flores*, 521 U.S. 507, 532 (1997); *Bd. of Cnty. Comm'rs v. Vail Assocs., Inc.*, 19 P.3d 1263, 1272 (Colo. 2001) ("The judiciary is the final arbiter of what the laws and the constitutions provide."). The fact that courts presume the constitutionality of legislative enactments is rooted in the doctrine of separation of

powers, *Rocky Mountain Gun Owners v. Polis*, 2020 CO 66, ¶ 30, but for the same reason it is for courts to "ultimately decide a statute's constitutionality." *Woldt*, 64 P.3d at 266.

In discharging this judicial function, courts afford the language of statutes "their ordinary and common meaning" and "ascertain and give effect to [legislative] intent." *Vail Assocs., Inc.*, 19 P.3d at 1273. Courts also "avoid constructions that would defeat an obvious purpose of a statute when that purpose is shown clearly on the statute's face." *Wiedemer*, 852 P.2d at 428. Finally, courts "will not judicially legislate by reading a statute to accomplish something the plain language does not suggest, warrant or mandate." *Scoggins v. Unigard Ins. Co.*, 869 P.2d 202, 205 (Colo. 1994); *Garcia v. Dist. Court*, 403 P.2d 215, 217 (Colo. 1965) (disdaining to engage in "rather obvious 'judicial legislation"' by giving a statutory word its opposite meaning); *Indus. Comm'n v. Carpenter*, 76 P.2d 418, 419 (Colo. 1938) ("The courts are not allowed to indulge in judicial legislation.").

Petitioner has devised the following new procedure for this Court to enact within section 18-1.3-803:

(1) Original or new jury makes the "constitutionally required" habitual criminal determinations.

(2) If jury finds the "*Erlinger* facts" are proven, then judge carries out a "secondary review" of the "same evidence" and either confirms the habitual criminal sentence or rejects the jury's findings.

Petition, p.7. Amici have devised substantially the same procedure whereby the judge would conduct a secondary review of the jury's finding and make an "independent determination" under the habitual criminal statute. Amici Brief, p.6, 8-9. Neither provide any further details about how this new procedure would operate in practice.

Petitioner offers no support for its proposal, but Amici suggest that support can be found in precedent from this Court and elsewhere. Amici misjudge the strength of this support, however. For a start, Amici's reliance on *Lopez*, 113 P.3d at 716, is misplaced. In *Lopez*, this Court declined to invalidate Colorado's discretionary aggravated sentencing provision, section 18-1.3-401(6), C.R.S., because it could be applied constitutionally "depending on the circumstances of a particular case." 113 P.3d at 728-29. Indeed, it upheld the defendant's aggravated sentence because it was supported by at least one *Blakely*-exempt fact. *Id.* at 731. In other words, unlike the circumstances of the present case, in *Lopez* the statute was not facially unconstitutional because it was constitutional as applied to the particular defendant. *See generally People v. Montour*, 157 P.3d 489, 499 (Colo. 2007) ("A statute is facially unconstitutional only if no conceivable set of circumstances exist under which it may be applied in a constitutionally permissible manner.").

In dicta, this Court suggested a jury could be asked to determine sentencing facts by interrogatory, which Amici assert is sufficiently analogous to warrant the judicial

legislating it now advocates. *Lopez*, 113 P.3d at 716. This Court's primary reaction, however, was to acknowledge the legislature's prerogative to "enact a statute that responds to" the constitutional concerns that would arise under other applications of the statute by "adopting a statute that does not place the trial court into the position of finding facts in order to aggravate sentences." *Id.*; *see generally Allman v. People*, 2019 CO 78, ¶30 ("Prescribing punishments is the prerogative of the legislature.").

Amici's reliance on *Vega v. People*, 893 P.2d 107 (Colo. 1995), is likewise misplaced. *Vega* is a due process case holding that defendants were not entitled to assert an affirmative defense to special offender charges because, applying *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), special offender was not an element but rather a mere sentence enhancer. 893 P.2d at 114-17. Of course, *McMillan* predated *Apprendi* and later was expressly overruled by the Supreme Court in *Alleyne v. United States*, 570 U.S. 112 (2013). *See Haymond*, 588 U.S. at 644-45. Ultimately, this Court was able to sidestep the lurking jury-trial-right question altogether in *Vega* because the jury was instructed that it had to find the elements of the applicable special offender provision beyond a reasonable doubt. 893 P.2d at 116.

Finally, relying on cases where courts in other jurisdictions have interpreted ambiguity in their statutes in order to conform those statutes to various constitutional requirements does little to advance Amici's position here because Colorado's statutory

language is different and the expressed intent of Colorado's General Assembly in our statutory language admits of no ambiguity. For example, a court interpreting the existing statutory word "jury" as including either an original jury or a newly empaneled jury is arguably reasonable. *See Kalady v. State*, 462 N.E.2d 1299, 1306 (Ind. 1984). However, interpreting the words "judge," "trial judge," and "replacement judge" to mean "jury" when the legislature expressly struck all references to the word "jury" from the statute and substituted in the word "judge" in each instance is not.[19] *See Garcia*, 403 P.2d at 217 (observing to "interpret the word 'exclusive' to mean 'concurrent'" smacks of improper judicial legislating).

If anything, Colorado's statute is most similar to the one Amici cite from New York, which New York courts have held is not capable of a constitutional construction after *Erlinger* because it unambiguously provides that the habitual criminal hearing "must be before the court without jury." N.Y. Crim. Proc. Law § 400.15(7)(a); *People v. Banks*, 218 N.Y.S.3d 519, 528-531 (N.Y. Sup. Ct. Sept. 6, 2024) ("[T]o the extent that the contrary statute has been rendered unconstitutional under *Erlinger*, the statutory prohibition is perhaps the least of our concerns. More fundamentally perturbing is that the People's proposal—just go ahead and hold a jury trial—leaves countless questions unanswered, calling for the court to make a slew of policy decisions properly left to the

[19] Respondent-Defendant Exhibit 4.

Legislature."); *People v. Lopez*, 216 N.Y.S.3d 518, 528-32 (N.Y. Sup. Ct. July 26, 2024) ("In this court's view, if such a new bifurcated jury trial is to be created for the purpose of lawfully imposing life sentences on [habitual] offenders, it must be created by the Legislature.").

The words "judge," "trial judge," and "replacement judge" are just as unambiguous regarding an intent to exclude juries, if not more so, as using the word "court" in conjunction with "without the jury." Thus, the fact that New York's courts have declined to stretch their inherent authority so far as to create a new procedure for recidivist sentencing because it would necessarily involve courts making myriad policy choices along the way undermines Petitioner and Amici's assurances to this Court that adopting its ill-defined proposal is an appropriate solution. *See id.*; *see also Erlinger*, 602 U.S. at 871 (Kavanaugh, J., dissenting) (outlining a variety of policy choices facing state legislatures in modifying their recidivist sentencing laws).

To be sure, this Court has exclusive constitutional authority to promulgate procedural rules governing criminal cases. Colo. Const. art. VI, § 21; *see Wiedemer*, 852 P.2d at 436. Yet, the right to a jury is as much a matter of substantive rights as it is procedural rights if not more. *See Erlinger*, 602 U.S. at 830-31 (emphasizing the importance of the substantive due process right to a jury and how its principles represent more than mere "procedural formalities"). Additionally, policy and procedure

plainly "overlap" when it comes to Colorado's habitual criminal sentencing scheme. *People v. McKenna*, 585 P.2d 275, 277 (Colo. 1978); *People v. Diaz*, 985 P.2d 83, 87 (Colo. App. 1999).

As Amici assert, the basic policy behind Colorado's habitual criminal scheme is to "punish recidivist conduct more severely." Amici Brief, p.13. That policy is clearly expressed in the provisions contained in section 18-1.3-801, which have changed substantially over the years. *See generally Wells-Yates*, 2019 CO 90M (describing evolving standards concerning recidivist punishment reflected in numerous legislative amendments). The procedural component designed to effectuate legislative policy is contained primarily in section 18-1.3-803. Yet, the fact that the procedural and substantive components of the habitual criminal scheme are not commingled within the same statute does not mean there are no policy implications of rewriting section 18-1.3-803. By asking this Court to unilaterally adopt a new procedure for how habitual criminal findings are made as a matter of substantive due process, Amici are necessarily asking this Court, or the trial courts who will be left to fill in all the practical blanks, to weigh in on matters that are best left to the legislative process, or, at a minimum, the formal rule-making process of a rules committee that allows for notice and public comment.

According to Amici, however, this Court only needs to channel legislative intent to safely navigate the policy implications of creating a new procedure for habitual criminal sentencing. Of course, Amici are not suggesting this Court be guided by the actual legislative intent of the 1995 legislature because requiring a jury finding is undisputedly the exact opposite of what the legislature intended. Instead, Amici describe legislative intent as a determination of what the 1995 legislature "*would have* done *if* it had known" the statute eventually would be declared unconstitutional. Amici Brief, p.13 (quoting *People v. Tate*, 2015 CO 42, ¶ 47 (emphasis added)). In other words, Amici ask this Court to ask itself: what would a legislature from thirty years in the past think should be done if, thirty years later, it turned out that its ideas about the role of the jury were fundamentally at odds with a "pillar of the Bill of Rights and a core ingredient of the American scheme of justice"? *Caswell*, ¶ 2.

Gregg submits that the level of speculation required by such an abstract, counterfactual thought experiment can hardly be preferable to this Court simply allowing the current legislature and all the various stakeholders to put their actual knowledge of what the constitution requires to use in crafting a coherent habitual criminal scheme that best reflects contemporary policy.[20] *See* 2 Normal J. Singer,

[20] The policy to be served by Colorado's habitual criminal scheme is continually evolving, which can only be viewed as a positive thing considering the original policy behind enacting Colorado's habitual criminal scheme emerged directly from the

Sutherland Statutory Construction § 44:1 (8th ed. 2024) (observing "unlike other areas of construction," the question of legislative intent in the area of severability "often is counterfactual, as at the time of enactment, legislatures usually assume their laws are valid," meaning "intent in this area can be even more abstract than in others, leaving the judiciary to speculate explicitly about putative intent").

II. THE TRIAL COURT'S ORDER DISMISSING THE HABITUAL CRIMINAL CHARGES SHOULD BE AFFIRMED ON GROUNDS THAT DISMISSAL IS REQUIRED BECAUSE EMPANELING A NEW JURY IS PROHIBITED BY DOUBLE JEOPARDY PURSUANT TO THE STATE AND FEDERAL CONSTITUTIONS.

A. Standard of Review and Preservation

Whether jeopardy attached to Gregg's habitual criminal charges when the jury was sworn at the guilt/innocence phase of trial is a question of law reviewed de novo. *People v. Porter*, 2015 CO 34, ¶ 8. This issue is preserved.[21]

B. Legal Framework

The Double Jeopardy Clauses of the United States and Colorado Constitutions protect against successive prosecutions for the same offense after acquittal or conviction and for multiple punishments for the same offense. U.S. Const. amends. V, XIV; Colo. Const. art. II, § 18. *Brown v. Ohio*, 432 U.S. 161, 165 (1977); *People v. Leske*,

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disgraceful, discredited eugenics movement. Yale Law School, *Amicus Brief Offers History of Habitual Criminal Laws and their Origins* (April 1, 2024).

[21] Petition Exhibits A, B.

957 P.2d 1030, 1035 n.5 (Colo. 1998). Double jeopardy may also bar a second trial for the same offense even though the first trial was "discontinued without a verdict" in recognition of the "valued right" to have one's trial "completed by a particular tribunal." *Wade v. Hunter*, 336 U.S. 684, 688 (1949). Retrial in such circumstances is only permitted if the defendant consents or "when particular circumstances manifest a necessity for so doing." *Id.* at 689-90.

Finally, this Court has interpreted Colorado's Double Jeopardy Clause more expansively than the Supreme Court's construction of its federal counterpart. *People v. Serravo*, 823 P.2d 128, 141 (Colo. 1992). Under the Colorado Constitution, retrial is prohibited "whenever the first trial results in a final judgment favorable to the defendant," including when the court dismisses a criminal charge after jeopardy has attached. *Id.* at 142. Jeopardy attaches to criminal charges in a jury trial when the jury is sworn. *Jeffrey v. Dist. Court*, 626 P.2d 631, 636 (citing *Crist v. Bretz*, 437 U.S. 28 (1978)).

Double Jeopardy's application to sentencing proceedings was not recognized until the Supreme Court applied it to capital sentencing hearings in *Bullington v. Missouri*, 451 U.S. 430, 438-39 (1981). The Supreme Court observed that the procedure that results in a defendant's sentence at a capital sentencing hearing "differs significantly" from other sentencing hearings where the Court refused to extend double jeopardy protections. *Id.* In outlining these differences, the Supreme Court recognized that in

capital sentencing hearings, the jury is not given "unbounded discretion to select an appropriate punishment from a wide range authorized by statute," but is presented with a "choice between two alternatives and standards to guide the making of that choice"; the prosecution has "the burden of establishing certain facts beyond a reasonable doubt" to obtain a death sentence rather than simply recommending an appropriate punishment; and capital sentencing hearings are accompanied by hearings that resemble pretrial hearings. *Id.* In short, the Supreme Court recognized that capital sentencing proceedings "have all of the hallmarks of a trial on guilt or innocence," and thus double jeopardy principles should apply just the same *Id.* at 439.

Four months later, this Court considered whether *Bullington*'s rationale applied to habitual criminal sentencing. *People v. Quintana*, 634 P.2d 413 (Colo. 1981), *overruled by People v. Porter*, 2015 CO 34. This Court held that double jeopardy protections applied there too because, at that time, Colorado's habitual criminal statute required notice of the charges by separate counts in the information and indictment, a formal arraignment, the standard of proof beyond a reasonable doubt, and the "bifurcated trial and separate verdict provisions" manifested a "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 419-20.

The Supreme Court was not presented with the question of whether double jeopardy applied to habitual criminal sentencing until nearly two decades later at an arguably inauspicious time, 1998, right before *Apprendi*'s ascendence. That year the Supreme Court decided two cases: *Almendarez-Torres*, *supra*, and *Monge v. California*, 524 U.S. 721 (1998). Both cases were a five-to-four split with the same four dissenters in each.

In *Almendarez-Torres*, the majority held that due process and the right to a jury trial did not require recidivism to be treated as an element of a charged offense in part because recidivism was a traditional factor for sentencing courts to consider. 523 U.S. at 243. However, the dissent advocated for a different conceptual framework whereby "the Constitution requires a fact which substantially increases the maximum permissible punishment for a crime to be treated as an element of that crime." *Id.* at 248 (Scalia, J., dissenting). Of course, this dissent became the foundation of the Supreme Court's *Apprendi* decision just two years later, and its framework continues to be applied consistently to this day.

In *Monge*, the majority held that double jeopardy did not apply to non-capital sentencing proceedings like California's controversial "three-strikes" law. 524 U.S. at 734. Even though California provided the same procedural safeguards to protect people facing "dramatic increases in their sentences" that in *Bullington* the Court had identified

as the "hallmarks of a trial on guilt or innocence," 451 U.S. at 439, the Supreme Court characterized them in the context of enhanced recidivist sentencing as merely a "matter of legislative grace, not constitutional command." *Monge*, 524 U.S. at 733-34. Concerned the tail might wag the dog, the Supreme Court reasoned that its holding avoided creating "disincentives" whereby states would only strip away these important protections if, having supplied them, they unwittingly transformed habitual criminal sentencing into a stage at which double jeopardy applied. *Id.* at 734. The Court also noted the nature and consequences of capital sentencing proceedings were too qualitatively different for the Court to extend *Bullington*'s "narrow exception" to recidivist sentencing proceedings. *Id.* at 730, 734.

As in *Almendarez-Torres*, the dissent again faulted the majority's analysis for overlooking the important role of the jury in deciding facts that are essential to enhanced punishment. The dissent agreed that double jeopardy should not apply to ordinary noncapital sentencing hearing, but this was no mere sentencing hearing because fact finding was a condition precedent to imposing the harsher sentence. *Monge*, 524 U.S. at 740-741 (Scalia, J., dissenting). As such, the extra years of defendant's sentence based on additional facts decided at sentencing were "attributable to conviction of a new crime." *Id.* at 741. Thus, if factual findings are insufficient to sustain the "enhancement," as was true in *Monge*, then the defendant has been "functionally

acquitted," and a second chance to prove the enhancement facts "would violate the very core of the double jeopardy prohibition." *Id.*

Although *Apprendi*'s framework had already become entrenched by the time the issue reached this Court again in 2015, this Court considered *Monge*'s analysis dispositive on the issue of whether double jeopardy applied to Colorado's habitual criminal sentencing proceedings. *Porter*, ¶¶ 26-28. In the time since *Quintana* was decided, the legislature had also replaced juries with judges as the factfinder for the habitual criminal phase of trial. *Id.* at ¶¶ 13-15. This Court therefore overruled *Quintana* and held that double jeopardy did not apply under either the state or federal constitutions. *Id.* at ¶ 29.

Most recently in *Erlinger*, the Supreme Court addressed the interplay between the Court's jury trial rights' jurisprudence and double jeopardy. 602 U.S. at 844-45. Amicus had argued to the Court that judges should be allowed to make factual findings about a prior offense beyond its elements using the analogy of a judge "ask[ing] whether the government has charged a defendant for the same crime a second time" for double jeopardy purposes. *Id.*

Rejecting this argument, the Supreme Court observed 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." *Id.* (emphasis in original). The constitution's jury trial rights then offer "complementary protections at a different stage

of the proceedings by ensuring that, once a jury *is* lawfully empaneled, the government must prove beyond a reasonable doubt to a unanimous jury the facts necessary to sustain the punishment it seeks." *Id.* (emphasis in original).

C. Analysis

The reasoning underlying the Supreme Court's decision not to apply double jeopardy protection to recidivist enhanced sentencing proceedings is trapped in a bygone era from before the Court recognized "[v]irtually 'any fact' that 'increase[s] the prescribed range of penalties to which a criminal defendant is exposed' must be resolved by a unanimous jury beyond a reasonable doubt (or freely admitted in a guilty plea)," *Erlinger*, 602 U.S. at 834 (quoting *Apprendi*, 530 U.S. at 490). To the extent that *Monge* has not already been expressly overruled, its days are numbered by only the time it will take this issue to reach the Supreme Court again after *Erlinger*. This Court's reasoning in *Porter* therefore remains at risk too until the inevitable occurs. Gregg urges this Court to consider his case as the opportunity to restore the jury to the heart of habitual criminal proceedings in Colorado as required by the United States and Colorado Constitution. U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 18, 23, 25.

1. Double jeopardy protections under the federal constitution bar empaneling a new jury.

From *Apprendi* through *Erlinger*, the Supreme Court has transformed noncapital sentencing hearings like our habitual criminal phase, where factual findings are

necessary to warrant an enhanced sentence beyond a statutory maximum, to the point where it now carries all the "hallmarks of [a] trial on guilt or innocence," and therefore it should be entitled to the same double jeopardy protection. *Bullington*, 451 U.S. at 439. The following requirements apply to Colorado's bifurcated habitual criminal phase by statute, as a matter of constitutional law, or both:

- Notice of charges by separate counts and with specificity as to the date and place of the convictions in the same information or indictment seeking the increased penalties. § 18-1.3-803(2).

- An arraignment at which defendants are required to admit or deny that they have been previously convicted as alleged and—like a refusal to plead guilty or not guilty to substantive charges—a refusal to admit or deny will be treated as a denial and an admission has the effect of a guilty plea. § 18-1.3-803(3), (6); *see* § 16-7-208, C.R.S.

- At the habitual criminal trial, the prosecution carries the burden of proof as to every element of the habitual criminal charges. § 18-1.3-803(4)(b).

- The beyond a reasonable doubt standard applies to the quantum of evidence required to determine whether the defendant has been previously convicted as alleged. § 18-1.3-803(4)(b).

- If the defendant testifies in defense of the substantive charges and denies he has been previously convicted as charged in the habitual criminal counts, the prosecution may only present evidence of his prior

convictions on rebuttal for purposes of impeaching his credibility and subject to the rules governing admission of evidence at criminal trials. § 18-1.3-803(5)(a).

- If the defendant testifies in defense of the substantive charges, initially denies he has been previously convicted as charged in the habitual criminal counts but then admits it, that admission may only be used for purposes of assessing the defendant's credibility, as it would at a criminal trial. § 18-1.3-803(5)(b).

- Akin to a *corpus delicti* rule for criminal charges, a defendant's admissions concerning habitual criminal charges are not sufficient to satisfy the prosecution's burden of proof; rather, the prosecution "shall be required" to meet its burden beyond a reasonable doubt "by evidence independent of the defendant's testimony." § 18-1.3-803(5)(b).

- All fact finding concerning the elements of the prior conviction must be made by a unanimous jury except for the "simple fact of a prior conviction." *Mathis*, 579 U.S. at 511; *Erlinger*, 602 U.S. at 834-35.

- If the binary question of whether the defendant has been previously convicted as alleged is answered in the affirmative, the judges' sentencing authority is prescribed by statute. § 18-1.3-801.

Concerning the hallmark of jury fact finding, the parties and all amici agree that a unanimous jury finding beyond a reasonable doubt is required for the element

concerning whether the convictions arose out of separate and distinct criminal episodes. Previously, Petitioner also conceded that other elements should be found by a jury based on guidance from Amicus the Attorney General.[22] Petitioner even suggested a jury could find "all" of the required "elements of a habitual charge."[23]

Indeed, it is likely that other elements of the habitual criminal statute do not fall within the prior conviction exception and will require jury findings too, such as identity, *cf. Caswell*, ¶ 90 (Gabriel, J., dissenting) (describing the element of identity as "a critical factual finding"); *e.g.*, *Cooper*, 104 P.3d at 312; and whether a particular offense is eligible as a predicate conviction, *see* § 18-1.3-801(5) (disqualifying certain prior convictions for escape "with an underlying factual basis that satisfies the elements of unauthorized absence" or attempted unauthorized absence); *People v. Kadell*, 2017 COA 124, ¶¶ 26-28 (reversing habitual criminal conviction where government failed to prove defendant's old drug conviction still would have been a felony in Colorado, which required proof

[22] Petitioner's Exhibit C, ¶ 1; *see* Petitioner's Exhibit A, p.7; Respondent-Defendant Exhibit 3, ¶ 3.
[23] Petitioner's Exhibit C, ¶ 5.

that the underlying facts of the prior conviction "involved six or more [marijuana] plants").[24]

Furthermore, not only do habitual criminal trials carry all of the hallmarks of a trial on guilt or innocence, but the severe sentencing consequences of being adjudicated a habitual criminal should not be overlooked. Life in prison the currently the maximum statutory sentence available and habitual sentencing appears to be the only context where a judge is mandated to impose a literal life-in-prison sentence based on factual findings not required to be made by a jury (or waived by defendants themselves). *See* § 18-1.3-801. Although Gregg has not been charged under this "super" habitual criminal provision, he faced a potential sentence of forty-eight years under the provision charged in this case. At his age, a sentence of that length is likely to be a virtual life sentence.

For all of these reasons, this Court should conclude that double jeopardy protections apply to charges under Colorado's habitual criminal statute. If so, jeopardy attached to Gregg's habitual criminal charges when the jury was sworn during the

[24] A division of the Colorado Court of Appeals recently confronted a similar situation in the context of an analogous habitual criminal proceeding where the elements of the underlying out-of-state conviction did not necessarily qualify under Colorado law because its statute only required the victim to be below the age of sixteen, whereas Colorado law required the victim to be below the age of fifteen. *People v. Barber*, 2024 WL 4233825 (Colo. App. Sept. 19, 2024) (unpublished).

guilt/innocence phase of his trial, *see Jeffrey*, 626 P.2d at 636, and terminated without a verdict on his habitual criminal charges because the jury was prematurely dismissed, thereby denying him of his "valued right" to have those charges "completed by a particular tribunal." *Wade*, 336 U.S. at 688. There is no manifest necessity for empaneling a new jury for the habitual criminal trial and Gregg objects to such a proceeding. *See id.* at 689-90. Empaneling a new jury for a habitual criminal trial would therefore violate double jeopardy. U.S. Const. amends. V, XIV.

Petitioner argues that, even if double jeopardy protections applied, Gregg would not be entitled to have the substantive and habitual criminal counts tried before the same jury. Yet, all of the cases it relies on for support predate *Erlinger* and most of them even predate *Apprendi*. Petition, p.11-12. For example, Petitioner relies on *Schiro v. Farley*, 510 U.S. 222 (1994), which relies on the same flawed analysis as in *Monge*. *See id.* at 231-32. Petitioner also relies on *People v. Saunders*, 853 P.2d 1093 (Cal. 1993), which was a four-to-two split court, but as the dissent in that case noted, the majority simply ignored the Supreme Court's recognition in *Wade* that double jeopardy protects an "interest in having the entire case tried before one tribunal," which was "defeated in the present case." *Id.* at 1104 (Mosk, J., dissenting).

Gregg acknowledges that this Court cannot decline to follow binding United States Supreme Court precedent, but if it does not affirm the district court's order on

the grounds set forth in Part I, *supra*, it can still reconcile its holding in *Porter* to reflect that *Monge* has been abrogated by *Erlinger*. In the same way that judicial fact finding necessary for imposition of an enhanced sentence violates a defendant's Fifth and Sixth Amendment jury trial rights, fact finding by a second empaneled jury and a judge as Petitioner advocates after jeopardy has already attached and terminated on the habitual criminal charges violates a defendant's Fifth Amendment rights under the Double Jeopardy Clause. *Cf. Erlinger*, 602 U.S. at 844-45.

2. Double jeopardy protections of the state constitution bar empaneling a new jury.

Even if *Monge* remains binding as a matter of federal law, this Court can and should reconsider its holding in *Porter*. This Court relied on *Monge*'s reasoning to hold that double jeopardy does not apply to habitual criminal charges in Colorado, but that reasoning no longer supports this Court's holding because it no longer accords with the Supreme Court's recognition of the jury's essential fact-finding role in the context of enhanced sentencing proceedings based on recidivism as forewarned by the dissent in *Monge* itself. 524 U.S. at 740-41 (Scalia, J., dissenting).

Other courts have recognized the limitations of *Monge*'s reasoning or diverged from it in other ways since *Apprendi*, including Texas's highest appellate court for criminal cases. *See Ex Parte Watkins*, 73 S.W.3d 264, 270-72 (Tx. Crim. App. 2002) (observing the "reach of *Monge* was significantly curtailed by a sharply divided Court in

Apprendi two years later" where the "Court distanced itself from *Monge*" and holding that *Monge* does not apply to other facts that increase a sentence); *State v. Atwood,* 16 S.W.3d 192, 194 (Tex. App. 2000) (holding *Monge* only permitted a retrial if the punishment issue was a legitimate sentence enhancement issue and not an element of the offense); *see also United States v. Blanton*, 476 F.3d 767, 772 (9th Cir. 2007) (observing *Monge's* analysis of double jeopardy in the sentencing context was undertaken before the Court's decision in *Apprendi*); *United States v. Gurley*, 860 F. Supp. 2d 95, 115-16 (D. Mass. 2012) (denying the government's request to have a different factfinder decide the issue of drug quantity at sentencing on double jeopardy grounds after the jury answered an interrogatory regarding such quantity in the negative).

Given *Monge*'s precarious status, there is now a valid basis for this Court to interpret the Colorado Constitution differently than the federal constitution and hold that Article II, Section 18 applies to Colorado's habitual criminal sentencing scheme. Indeed, the language of our Double Jeopardy Clause is different, *compare* U.S. Const. amend. V, *with* Colo. Const. art. II, § 18, and this Court has previously interpreted it to be more expansive than the Supreme Court's construction of its federal counterpart, as described above. *See Serravo*, 823 P.2d at 141.

If this Court reconsiders *Porter* and holds that double jeopardy protections attached to Gregg's habitual criminal charges when his jury was sworn at the

guilt/innocence phase of his trial, then it should also conclude that the district court correctly ruled that double jeopardy barred empaneling a new jury to try the habitual criminal charges under Article II, Section 18, either because jeopardy terminated when the sworn jury was discharged, *see Wade*, 336 U.S. at 688, or because the habitual charges have already been dismissed, *see Serravo*, 823 P.2d at 141-42; *see also Quintana*, 634 P.2d at 420.

CONCLUSION

Gregg respectfully asks this Court to discharge the rule to show cause.

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CERTIFICATE OF SERVICE

I certify that on December 18, 2024, a copy of this Answer Brief was electronically served through Colorado Courts E-Filing on all counsel of record.

Britta Kowel