Colorado Supreme Court
2 East 14th Avenue
Denver, Colorado 80203

DATE FILED
January 22, 2025 7:42 PM
FILING ID: 9F60D44D7DDAA
CASE NUMBER: 2024SA272

Original Proceeding
District Court, Mesa County
The Honorable Matthew D. Barrett
Case No. 23 CR 289

**IN RE**

**THE PEOPLE OF THE STATE OF COLORADO,**

Petitioner-Plaintiff,

v.

**ANDREW GREGG,**

Respondent-Defendant.

▲ COURT USE ONLY ▲

Case Number: 24 SA 272

Johanna G. Coats, Reg. No. 43251
Special Deputy District Attorney

Jeff M. Van der Veer, Reg. No. 43837
Special Deputy District Attorney

Daniel P. Rubenstein, District Attorney

125 N Spruce Street, Suite 210
Grand Junction, Colorado 81502
970.244.1730

jgc@denverda.org
jeff.vanderveer@denverda.org

# REPLY BRIEF

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all applicable requirements of C.A.R. 21, 28(g), and 32, including the formatting requirements set forth in those rules. The brief contains 5,676 words.

*s/ Jeff M. Van der Veer*
Jeff M. Van der Veer
Special Deputy District Attorney

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Statutes**

**Constitutional Provisions**



**Session Laws**



**Legislative Authorities**

## ARGUMENT

The parties (and the amici curiae) agree on two things: section 18-1.3-803 contemplates that a judge will make habitual criminal findings, whereas *Erlinger* requires a jury to perform that job (or at least part of it). The disagreement arises over how to handle that procedural tension. The solution, according to Gregg and most of the amici, is for this Court to toss the entire habitual criminal act in the bin. This would be of no concern, according to Gregg, because he has determined that the habitual act doesn't reflect "modern policy objectives." (Def.'s Br. at 5.)

That extreme proposal isn't the answer. Colorado has had habitual sentencing on its books *for almost a century*. And while those statutes have been tweaked and revised over the years, the core purpose of the legislation has always been the same: to "punish[] more severely those individuals who show a propensity toward repeated criminal conduct." *E.g.*, *Wells-Yates v. People*, 2019 CO 90M, ¶ 1 (internal quotations omitted). There are straightforward ways for this Court to preserve the habitual criminal act—and that enduring legislative objective—while simultaneously providing defendants with the procedure that the constitution requires.

After recognizing that the habitual criminal act and *Erlinger* can coexist, this Court should also recognize that Gregg's double jeopardy rights will not be offended if the trial court empanels a jury to decide his habitual charges for the first time.

### A. *Erlinger* doesn't void the legislature's habitual sentencing scheme.

*Erlinger* recognizes a constitutional right to have a jury decide certain habitual sentencing questions. But Gregg (and several amici) aren't interested in vindicating that right. Instead, their objective is different: they argue that *Erlinger* dooms the habitual criminal sentencing scheme as a whole.

The principles of statutory interpretation don't support that outcome. In fact, there are multiple ways this Court can maintain the fundamental purpose of the General Assembly's habitual criminal act while fulfilling *Erlinger*'s directive.

#### *i. The history of the habitual criminal act*

The General Assembly adopted its first habitual sentencing scheme in 1929. *See O'Day v. People*, 166 P.2d 789, 790–91 (Colo. 1946). The law was amended and relocated over the decades that followed, but the structure remained the same: it has always included a section listing enhanced punishments, and it has always included a separate section establishing procedural rules. *See* Ch. 85, secs. 1–5,

1929 Colo. Sess. Laws 309–12; Ch. 114, secs. 1–7, 1945 Colo. Sess. Laws 310–11; §§ 39-13-1 to -3, C.R.S. (1953); §§ 16-13-101 to -103, C.R.S. (1973); §§ 18-1.3-801 to -803, C.R.S. (2002).

From the start, the act identified the jury as the factfinder. *See* Ch. 85, sec. 4, 1929 Colo. Sess. Laws 311; Ch. 114, sec. 3, 1945 Colo. Sess. Laws 311; § 39-13-3, C.R.S. (1953); § 16-13-103(1), C.R.S. (1973). But in 1995, that changed. The General Assembly passed a bill titled, "Concerning Procedural Criminal Laws," which was described on the Senate floor as the "regular omnibus procedural bill" that is "run every year to clean up some of the [criminal] statutes." 2d Reading on H.B. 1140 before the S., 60th Gen. Assemb., 1st Sess. (Apr. 19, 1995); Ch. 129, secs. 1–17, 1995 Colo. Sess. Laws 462–69.

The legislation had seventeen sections—one of which changed the habitual factfinder from judge to jury. Ch. 129, secs. 1–17, 1995 Colo. Sess. Laws 462–69. Alongside this revision were amendments that, for example, recognized photocopying costs could be recovered from a convicted defendant; changed the public nuisance statute to reflect that the drinking age had been raised to 21; and authorized the parole board to enter contracts with private labs for urine testing. *Id.*

During committee hearings, District Attorney Dave Thomas explained the amendment. He noted that, in habitual trials, the "only issues that face … the decisionmaker, whether it's a judge or a jury, [are] the identity of the defendant and whether or not the charges were separately brought and tried." Hearing on H.B. 1140 before the S. Judiciary Comm., 60th Gen. Assemb., 1st Sess. (Apr. 11, 1995). He went on to explain that judges were "abundantly able to answer" that latter inquiry—which could get confusing for juries when, for example, a defendant's predicate felonies had been "combined for the purpose of sentencing," even though those felonies "may in fact constitute separate offenses." *Id.*

Mr. Thomas ultimately described the process as a "technical decision" that is "really not based on the facts of a case or anything else," but rather on the "prior criminal history, which is what [judges] do in every case where they impose sentences." *Id.*

Ray Slaughter, from CDAC, likewise described the habitual determination as a "ministerial act" based on pen packs, mittimuses, and fingerprints. *Id.* (Those comments were echoed by Senator Mares, who said the amendment "makes sense" because "it's further ministerial stuff.") Mr. Slaughter testified that the

habitual inquiry was "nothing like the controversy that surrounds the death penalty situation," and stated, "[t]his is far more ministerial." *Id.*

While the amendment was considered an improvement to the procedure, there is nothing suggesting that the General Assembly viewed the change as a fundamental necessity to preserve the continued viability of a sentencing scheme that had functioned with a jury for the previous sixty-six years. And that's not surprising, because the core purpose of the habitual criminal act has never been about the identity of the factfinder. Rather, that's a procedural aspect of broader legislation that is born from an unmistakable legislative intent—one that this Court has repeatedly recognized:

> Our General Assembly long ago adopted the Habitual Criminal Act for the purpose of punishing more severely those individuals who show a propensity toward repeated criminal conduct.

*Wells-Yates*, 2019 CO 90M, ¶ 1 (internal quotations omitted); *People v. District Court*, 711 P.2d 666, 670 (Colo. 1985) (describing the "overriding purpose" of the act as "punish[ing] more severely those individuals who show a propensity toward repeated criminal conduct"); *People v. District Court*, 559 P.2d 235, 236 (Colo. 1977) ("[T]he obvious purpose of the [habitual criminal act] … is to punish repeat offenders.").

With this legislative history and purpose in mind, there are multiple ways to enforce *Erlinger* without taking the drastic step of eliminating habitual sentencing.

*ii. Section 18-1.3-803 and* Erlinger *can coexist.*

As explained in the petition, section 18-1.3-803 can be harmonized with *Erlinger* by having a jury make the constitutionally-required habitual determinations and, if the jury finds those facts beyond a reasonable doubt, having the judge perform a secondary review of the evidence under the statute.

Gregg insists that the "plain and unambiguous statutory language" of section 18-1.3-803 requires juries to be "eliminate[d] … from taking part in the criminal habitual phase of trial." (Def.'s Br. at 17.) It's unclear why: the text of the procedural statute says nothing about juries, one way or the other. Granted, subsection (4) provides that, in a habitual hearing, the "trial judge … shall determine … whether the defendant has been convicted as alleged." § 18-1.3-803(4). As Gregg points out, the word "shall" indicates a legislative directive. (Def.'s Br. at 18.) But the People's proposed reading would fulfill that command (giving defendants the procedure they're due under the statute) while also fulfilling *Erlinger* (giving defendants the procedure they're due under the constitution).

This result is consistent with interpretive techniques that apply when a party challenges the constitutionality of a statute. For example, statutes are "presumed to be constitutional; the challenging party bears the burden of proving its unconstitutionality beyond a reasonable doubt." *Dean v. People*, 2016 CO 14, ¶ 8. This high bar applies because "declaring a statute unconstitutional is one of the gravest duties impressed upon the courts." *People v. Graves*, 2016 CO 15, ¶ 9 (internal quotations omitted). Importantly, "if a challenged statute is capable of several constructions, one of which is constitutional, the constitutional construction must be adopted." *People v. Schoondermark*, 699 P.2d 411, 415 (Colo. 1985).[1]

Certainly, when the General Assembly enacted a provision identifying the judge as factfinder for habitual determinations, courts plausibly read the provision to replace juries with judges. This reading also comported with common sense: at that time, the legislature would have had no reason to require or expect duplicative

[1] Defendant and amici repeatedly try to bolster their argument by noting that the habitual statute must be "strictly construed in favor of the defendant." (Def.'s Br. at 12, 17, 18; CCDB Br. at 7–8; ACLU Br. at 19.) But they're not really proposing a *strict* construction; they're asking the Court to lean towards an *unconstitutional* construction. That's never been an interpretive rule. *See Schoondermark*, 699 P.2d at 415.

factfinding. Since its adoption in 1995, the amendment has therefore been read as requiring a bench trial *instead of* a jury trial.

But, unlike the New York statute that explicitly bars a jury finding in habitual proceedings, nothing in Colorado's statute prevents that outcome. *Compare* N.Y. Crim. Proc. Law § 400.15(7) ("A [habitual] hearing … must be before the court *without jury*." (emphasis added)) *with* § 18-1.3-803(4) (providing that "the trial judge … shall determine … whether the defendant has been convicted as alleged"). Therefore, the simplest means of interpreting section 18-1.3-803 alongside *Erlinger* is to dispel the (unwritten) presumption that foreclosed jury findings. That method upholds the statutory language and maintains the ultimate legislative goal of the habitual criminal act. *See District Court*, 711 P.2d at 670 ("Because legislative intent is the polestar of statutory construction, a statute should be given that construction which will permit, if at all feasible, the accomplishment of the statutory objective."); *cf. Meyer v. Lamm*, 846 P.2d 862, 876 (Colo. 1993) (recognizing that courts must assume the "legislative body intends the statutes it adopts to be compatible with constitutional standards"). Notably, a defendant would only benefit from the more rigorous process this solution provides.

There's also a second plausible construction that would be consistent with *Erlinger*. The provision never states that *all elements* of a habitual count must be found by the judge. Rather, the judicial factfinding provision in subsection (4) states only that the trial judge "shall determine … whether the defendant has been *convicted* as alleged." § 18-1.3-803(4) (emphasis added). Courts have, in the past, read this to include every aspect of a habitual finding, including the element that previous convictions be "separately brought and tried." But that conclusion isn't mandated by the plain language of the statute.

This Court could therefore read the judicial factfinding provision as applying only to the single *Blakely*-exempt fact of whether the defendant has been *convicted* as alleged, and as silent on the factfinder for the remaining elements. In that scenario, the procedural gap would be filled by *Erlinger* and the constitution, which require a jury to make the rest of the determinations. *See* U.S. Const. amends. V, VI; Colo. Const. art. 2, § 23 ("The right of trial by jury shall remain inviolate in criminal cases….").

These solutions are similar to this Court's approach to a potentially unconstitutional statute in *Lopez v. People*, 113 P.3d 713 (Colo. 2005). That case addressed the impact of *Apprendi* and *Blakely* on Colorado's aggravated sentencing

statute, which allowed judges to sentence defendants outside the presumptive range if *the judge* found aggravating circumstances. *Id.* at 729 (citing § 18-1.3-401(6), C.R.S.). This Court didn't simply deem the aggravated sentencing statute unconstitutional because it provided for judicial factfinding. Rather, it held that the statute was constitutional when "properly applied" to allow a judge to find aggravating circumstances where those facts were either *Blakely*-compliant (facts that had been found by a jury) or *Blakely*-exempt (the fact of a prior conviction). The Court further observed that any fact could become *Blakely*-compliant because the "jury [could] be asked by interrogatory to determine facts potentially needed for aggravated sentencing"—even though the sentencing statute explicitly provided that the judge would be the factfinder. *See id.* at 716.[2]

[2] Other jurisdictions interpreted their sentencing statutes in a similar way, allowing courts to empanel juries to accommodate *Apprendi*. *E.g.*, *State v. Schofield*, 895 A.2d 927, 937–38 (Me. 2005) (holding that, "[a]lthough state law does not specifically provide for a jury trial on sentencing facts, our recognition of such a procedure is well within our inherent judicial power," and that the procedure "best preserves the Legislature's intent to provide greater punishment for those who commit the most heinous offenses"); *State v. Chauvin*, 723 N.W.2d 20, 24 (Minn. 2006) (holding that the "the district court had the inherent judicial authority to impanel a sentencing jury" where "the judicial factfinding portion of the Minnesota Sentencing Guidelines was unconstitutional under *Blakely*,"); *Aragon v. Wilkinson*, 97 P.3d 886, 891 (Ariz. App. 2004) ("[A]lthough the statutory sentencing scheme does not currently provide for convening a jury trial during the sentencing phase of a non-capital case, nothing in our rules or statutes prohibits the court from doing

Either construction outlined above would allow the Court to fulfill *Erlinger* while maintaining section 18-1.3-803 as written, and ensure that habitual defendants are afforded both statutory and constitutional protections.

*iii. If the judicial factfinding provision is unconstitutional, then severance applies.*

If this Court finds that the judicial factfinding provision of section 18-1.3-803 is unconstitutional, the remedy wouldn't be to abolish the entire habitual sentencing scheme. Rather, any offending provisions of section 18-1.3-803—of which there are few—can easily be severed while maintaining a completely functional statute that accomplishes the General Assembly's unmistakable goal of punishing recidivism.

When part of a statute is unconstitutional, courts must "strive to keep as much of the legislature's work intact as possible, as a 'ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'" *People v. Tate*, 2015 CO 42, ¶¶ 6, 47 (quoting *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006)). With that in mind,

---

so."); *cf. Galindez v. State*, 955 So.2d 517, 527 (Fla. 2007) (Cantero, J., concurring) ("To remedy the violations of *Apprendi* and *Blakely*, we would be entirely justified in adopting a procedure for the empaneling of new juries on resentencing. Nor would we be the first court to do so.").

> the normal rule is that partial, rather than facial, invalidation is the required course, such that a statute may be declared invalid to the extent that it reaches too far, but otherwise left intact.

*Ayotte*, 546 U.S. at 329 (internal quotations omitted); *see also* § 2-4-204, C.R.S.

When employing this remedy, courts are guided by legislative intent—but in a very particular way: "The core consideration of legislative intent is determining what the enacting legislature would have done if it had known that this eventuality [i.e., the finding of unconstitutionality] would happen." *Tate*, 2015 CO 42, ¶ 47; *United States v. Booker*, 543 U.S. 220, 246 (2005) ("We seek to determine what [the legislature] would have intended in light of the Court's constitutional holding." (internal citations omitted)).

Gregg and amici offer two reasons why targeted severance should give way to wholesale invalidation. First, they contend that it's what the General Assembly would have wanted. Second, they suggest that, logistically, any attempt to excise the unconstitutional portions of section 18-1.3-801 would leave an "unadministrable" statute.

The legislative intent debate really isn't close. Perhaps anticipating that, Gregg and an amicus try to shift the goalposts. They suggest that this Court cannot possibly 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." (Def.'s Br. at 27; *see also* CCDB Br. at 12 (suggesting that, if the court consults "the spirit of the 1995 legislature," then "bringing back juries" would "directly undo that legislature's reform—jury elimination—out of professed fidelity to that legislature's will").)

But that's not the inquiry. Again, when evaluating the severance remedy, the Court must "determin[e] what the enacting legislature *would have done if it had known that [the Court's finding of unconstitutionality] would happen*." *Tate*, 2015 CO 42, ¶ 47 (emphasis added); *People v. Montour*, 157 P.3d 489, 502 (Colo. 2007) ("We seek to determine what the General Assembly would have intended *in light of our constitutional holding*." (emphasis added)). So, if the 1995 legislature knew that the constitution required a jury to make habitual findings, would it have wanted the remainder of the habitual criminal act to survive? Or would it have preferred to scrap the entire habitual sentencing scheme—essentially taking the position of judicial findings or bust? *See Ayotte*, 546 U.S. at 330 ("Would the legislature have preferred what is left of its statute to no statute at all?").

The answer is clear. Again, the "overriding purpose" of the habitual criminal act has always been to "punish more severely those individuals who show

a propensity toward repeated criminal conduct." *E.g.*, *District Court*, 711 P.2d at 670. When the 1995 legislature changed factfinders, they thought they were shifting what was described as a "ministerial act." There is absolutely nothing to suggest that, if the General Assembly had known this change was unconstitutional, they would have wanted the entire concept of increased punishments for recidivist offenders—in place since 1929—to disappear.

Next, amici argue that severance isn't an option because "striking the unconstitutional language leaves [the habitual criminal act] 'so riddled with omissions that it cannot be salvaged as a meaningful legislative enactment.'" (*See* OSPB Br. at 10 (quoting *Montour*, 157 P.3d at 502); (CCDB Br. at 10).)

The task of severing language from a statute is far more practical than amici suggest. This Court "may sever and strike any portion of a statute which [it] hold[s] to be unconstitutional." *Rodriguez v. Schutt*, 914 P.2d 921, 929 (Colo. 1996). Also, the Court is "not required to strike an entire sentence or separate section or subsection as unconstitutional; words or phrases may be severed." *Montour*, 157 P.3d at 502.

Amici's concerns about the practical application of severance are largely manufactured. (Amicus OSPD, for example, offers a somewhat clumsy statutory

revision in its brief.) (OSPD Br. at 10–12.) In reality, section 18-1.3-803 outlines a detailed procedure for habitual trials—one that would largely survive a thoughtful edit. And the resulting gap as to the identity of the factfinder would be filled by *Erlinger* and the constitution. *See* U.S. Const. amends. V, VI; Colo. Const. art. 2, § 23.

First off, section 18-1.3-803's directives go well beyond the identity of the factfinder. It provides, for example,

- that a prosecutor must file an information or indictment giving notice of each alleged conviction;
- that a defendant must either admit or deny the existence of those alleged convictions;
- that, if the jury convicts on the substantive charges, the court must conduct a separate hearing to determine whether the defendant has been convicted as alleged;
- that evidence of former convictions introduced for impeachment purposes in the substantive trial can only be considered for credibility;
- that the prosecutor must prove the prior convictions beyond a reasonable doubt; and

- that the prosecutor may file habitual counts after the substantive trial but before sentencing in certain circumstances.

*See* § 18-1.3-803. Only one aspect of this procedural statute—the designation of the judge as factfinder—is potentially on the chopping block. And, obviously, the substantive sentencing provisions in section 18-1.3-801—setting forth the different punishments for repeat offenders—would remain completely untouched.

The least invasive form of severance is to strike only two statutory phrases that assign *factfinding responsibility* to the judge.[3] Excising them leaves a completely functional statute.[4]

Subsection (4) is the most explicit; it provides that the judge "shall determine by separate hearing and verdict whether the defendant has been

---

[3] A proposed version of section 18-1.3-803, post-severance, is included as an Appendix.

[4] Amicus OSPD's edits are heavy-handed. For example, they strike subsection (1)'s reference to the "court … conduct[ing] a separate sentencing hearing." (OSPD Br. at 10.) Why? If the jury is the factfinder, it's still the court who "conduct[s]" the hearing. In fact, this same language existed *when juries were the factfinder*. *See District Court*, 711 P.2d at 670 (quoting § 16-13-103(1), C.R.S.). They also sever the two portions that refer to judges "try[ing]" the habitual counts. *See* § 18-1.3-803(4)(b), (6). But that term has a "variety of definitions"—one of which is to "conduct the trial of." *Nixon v. United States*, 506 U.S. 224, 229–30 (1993). If the Court is concerned, however, those phrases can be removed without undermining the statute. (*See* App'x (in italics).)

convicted as alleged." That can be easily removed— and that edit doesn't mean that "the remainder of the habitual-criminal law is unadministrable." (CCDB Br. at 10.) Rather, *Erlinger* makes it abundantly clear that, as a matter of constitutional law, a defendant has a right to jury findings on certain habitual criminal issues. So, the severed statutory line would have a ready-made substitute, in the form of *Erlinger* and the constitution. U.S. Const. amends. V, VI; Colo. Const. art. 2, § 23.

Removing a portion of subsection 5(b) doesn't pose an issue, either. It explains that, if the defendant testifies in the substantive trial and he admits his prior felonies, the *trial judge* can consider that admission only as to credibility during the habitual phase. But that provision can be removed without any procedural impact, because subsection 5(b) merely duplicates controlling case law. *See People v. Chavez*, 621 P.2d 1362, 1367 (Colo. 1981) (holding that, as a matter of constitutional law, evidence of prior convictions used to impeach a defendant during trial can be considered only for credibility in a habitual phase).

Even if the Court is hesitant to use this targeted version of severance, the alternative wouldn't be to get rid of the entire act. Rather, the Court could sever section 18-1.3-803, while retaining the substantive sentencing statute in -801 (and the evidentiary provisions of -802). Courts could then provide a habitual defendant

with a procedure consistent with his constitutional rights. Given *Erlinger*'s directives, this wouldn't be difficult.

Notably, just last month, an appellate court in New Jersey read a habitual statute as allowing for jury findings to accommodate *Erlinger*, even though the statute required judicial findings. *See State v. Carlton*, -- A.3d ----, 2024 WL 5240952, **16–24 (N.J. Super. Ct. App. Div. Dec. 19, 2024). In reaching that conclusion, the court applied many of the concepts discussed above, and reasoned that

> it seems implausible the Legislature would prefer to have a large number of recidivist offenders avoid the prospect of enhanced punishment when all that is needed to remedy the *Erlinger* infirmity is to interpret [the habitual statute] to allow a jury to make objective and straightforward factual findings.
>
> Articulated another way, defendant is entitled to have a jury decide his eligibility for a persistent offender extended term of imprisonment. He is not entitled to escape the consequences of his criminal history. Allowing the persistent offender statutory framework to "perish" … would needlessly extend a windfall to defendant and a host of other recidivist offenders at the expense of public safety. That, we are not prepared to do.

*Id.* at *23.[5]

The same logic applies here. In the event this Court determines that the judicial factfinding provisions of section 18-1.3-803 are unconstitutional, that shouldn't create an opportunity for the wholesale sentencing reform that Gregg and amici desire. Rather, severance provides an easy remedy that would maintain the animating principle of habitual sentencing, which has been around since 1929.

### B. Double Jeopardy does not protect Gregg from facing trial on the habitual enhancement for the first time.

In *Bullington v. Missouri*, the U.S. Supreme Court held that the Double Jeopardy Clause applied to a capital sentencing proceeding requiring a jury determination. 451 U.S. 430, 446 (1981). In *Arizona v. Rumsey*, the court then

[5] Likewise, courts applied severance to modify sentencing statutes following *Apprendi*. *E.g.*, *Smylie v. State*, 823 N.E.2d 679, 685–86 (Ind. 2005) (recognizing that the approach most "faithful to the large objectives of the General Assembly's [sentencing] decisions" was to keep the "present [statutory] arrangement of fixed presumptive terms, modified to require jury findings on facts in aggravation"); *State v. Bell*, 931 A.2d 198 (Conn. 2007) ("The question, therefore, is whether the legislature would have adopted the statute without the requirement that *the court* make the requisite public interest finding. Given the overwhelming evidence … that the legislature's intent was to keep those violent, persistent offenders … off the streets for an extended period … we conclude that the remaining portion of the statute can operate independently and effectively to achieve that intent.").

extended the rationale of *Bullington* to capital sentencing determinations by a judge. 467 U.S. 203, 209–12 (1984).

But in *Monge v. California*, the court rejected an attempt to apply these holdings to non-capital sentencing proceedings, explaining that *Bullington* and *Rumsey* "established a 'narrow exception' to the general rule that double jeopardy principles have no application in the sentencing context." 524 U.S. 721, 730 (1998). The court continued,

> Even assuming … that the [habitual sentencing proceeding] has the 'hallmarks' of a trial that we identified in *Bullington*, a critical component of our reasoning in that case was the capital sentencing context. … Because the death penalty is unique in both its severity and its finality, we have recognized an acute need for reliability in capital sentencing proceedings.
>
> That need for reliability accords with one of the central concerns animating the constitutional prohibition against double jeopardy.

*Id.* at 731–32 (internal quotations and citations omitted).

In 2015, this Court applied the reasoning of *Monge* to find that the Double Jeopardy Clause of the Colorado Constitution does not apply to habitual sentencing proceedings. *See People v. Porter*, 2015 CO 34, ¶ 29 ("We are persuaded by the

Supreme Court's reasoning that double jeopardy concerns are not implicated in noncapital sentencing proceedings.").

Gregg acknowledges that *Monge* is controlling as to federal constitutional law. But he asks this Court to overturn its own precedent and reinterpret Colorado's Double Jeopardy Clause as diverging from the federal constitution.

In support of this argument, Gregg claims that *Monge* has been substantially undermined by *Apprendi*, and that it no longer has persuasive force. But in *Porter*, this Court considered and rejected that exact argument. This Court observed that "[s]ome debate exists as to the effect of *Apprendi* … on *Monge*," and that, "[i]n *Apprendi*, the Court largely adopted the *Monge* dissent's position." *Porter*, 2015 CO 34, ¶ 17 n.4 (citing *United States v. Blanton*, 476 F.3d 767, 772 (9th Cir. 2007)). Nonetheless, this Court concluded, "*Monge* remains good law." *Id.* (internal quotations omitted).

But, for purposes of this case, the question is academic. Whether or not the Double Jeopardy Clause applies, the outcome would be the same.

Gregg argues that double jeopardy would entitle him to have both the substantive charges and the habitual charges presented to the same jury. He claims the Court found that entitlement in *People v. Quintana* and *People v. Mason*.

Gregg misreads both cases. In *Quintana*, this Court held that Colorado's habitual sentencing was subject to the Double Jeopardy Clause. 634 P.2d 413, 418 (Colo. 1981). The Court observed that the then-existing statute required that both the substantive phase and the habitual phase be conducted "before the same jury in one continuous proceeding. Jeopardy attached, therefore, upon the impaneling and swearing of the jury for the first phase of the trial." *Id.*; *see also People v. Mason*, 643 P.2d 745, 748 (Colo. 1982) (relying on *Quintana* to hold that jeopardy attached when the jury was sworn in for the substantive phase).

In *Porter*, this Court overturned *Quintana* and *Mason*. 2015 CO 34, ¶ 3. But even if the Court took the defendant's invitation to reconsider *Porter*, it would not follow that double jeopardy attaches for the habitual phase when the jury is empaneled in the substantive phase. That aspect of *Quintana* was based on the then-existing statute, which required that the substantive phase and the habitual phase be joined into "one, continuous proceeding." 634 P.2d at 418. There is no such requirement in the current statute, even as modified by *Erlinger*.

Gregg cites no authority for the proposition that the Double Jeopardy Clause entitles him to the same jury for both the substantive phase and the habitual phase. And the reason for that is simple: no such authority exists. The U.S. Supreme

Court has recognized that, "although the habitual criminal issue may be combined with the trial of the felony charge, it is a distinct issue, and it may appropriately be the subject of separate determination." *Oyler v. Boles*, 368 U.S. 448, 452 (1962) (internal quotations omitted). And, as noted in the petition, Gregg's argument has widely been rejected in other jurisdictions. (Pet. at 11-12 n.3 (collecting cases); AG Br. at 17–18 (collecting additional cases).)

Gregg's proposed rule would not advance the purpose of the Double Jeopardy Clause: to prevent the State, "with all its resources and power," from "mak[ing] repeated attempts to convict an individual for an alleged offense." *Green v. United States*, 355 U.S. 184, 187 (1957).

The guaranty against double jeopardy guards against three abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980). Jeopardy attaches when the jury is sworn in, rather than when it reaches final judgment—a principle sometimes characterized as "a defendant's valued right to have his trial completed by a particular tribunal." *Wade v. Hunter*, 336 U.S. 684, 689 (1949). This is intended to prevent a fourth abuse: "a prosecutor or judge … subjecting a

defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict." *Green*, 355 U.S. at 188.

None of those concerns are implicated by a bifurcated trial with two different juries. To the contrary, a defendant can only benefit from having a different jury consider the evidence in the habitual phase. That is particularly true where evidence of the defendant's prior convictions is introduced in the substantive phase, for impeachment purposes. *See People v. Saunders*, 853 P.2d 1093, 1101 (Cal. 1993).

To find that double jeopardy requires the same jury for both determinations—resulting in a bar to the habitual phase, even when the People have not had the opportunity to present a case for habitual enhancement—would arbitrarily frustrate "society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws." *Arizona v. Washington*, 434 U.S. 497, 509 (1978). Here, the People do not seek a second bite of the apple, but rather "one, and only one, opportunity to require an accused to stand trial." *Id.* at 505.

## CONCLUSION

For these reasons, the Court should reverse the district court's order and remand this case for Gregg's habitual criminal hearing.

Date: January 22, 2025

Respectfully submitted,

DANIEL P. RUBENSTEIN
District Attorney

*s/ Johanna G. Coats*
JOHANNA G. COATS
Special Deputy District Attorney

JEFF M. VAN DER VEER
Special Deputy District Attorney

## CERTIFICATE OF SERVICE

I certify that on January 22, 2025, I electronically filed the attached Reply Brief through the Colorado Courts E-Filing system, which will send notification to all persons registered in this case.

*s/Dianne L. Johnson*