Colorado Supreme Court 2 East 14th Avenue Denver, Colorado 80203	DATE FILED October 9, 2024 12:43 PM FILING ID: 3C5B8202759B3 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 ▲
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 jcg@denverda.org jeff.vanderveer@denverda.org	Case Number:
PETITION FOR ORDER TO SHOW CAUSE PURSUANT TO C.A.R. 21	

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 3,624 words.

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

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INTRODUCTION

In this case, a jury convicted the defendant of aggravated robbery. The defendant was then set for a habitual criminal hearing. In the meantime, the United States Supreme Court issued *Erlinger v. United States*, 144 S. Ct. 1840 (2024). Based on that opinion, the trial court ruled that empaneling a second jury to decide the habitual inquiry would violate the defendant's double jeopardy rights.

Granting this C.A.R. 21 petition would allow this Court to address two important issues:

First, there's a preliminary question that will affect criminal proceedings throughout the state: can trial courts continue to employ the statutory habitual procedure (which requires a judicial determination) while simultaneously complying with *Erlinger* (which requires a jury determination)?

Second, does *Erlinger* overrule federal and state cases holding that double jeopardy does not apply to habitual sentencing determinations?

PRELIMINARY RULE 21 MATTERS

Underlying proceeding. This petition arises from Mesa County District Court case number 23 CR 289, captioned *People v. Gregg*. The defendant, Andrew Gregg,

was charged with (and convicted of) aggravated robbery, attempt to influence a public servant, and false reporting.

Ruling complained of and relief sought. The People challenge the trial court's order granting Gregg's motion to dismiss his habitual criminal counts. (*See* Ex. A.) This petition asks the Court to reverse that ruling.

Reasons why no other adequate remedy is available. While relief under Rule 21 is "an extraordinary remedy," this Court will exercise its discretionary jurisdiction when "an appellate remedy would be inadequate, a party may suffer irreparable harm, or a petition raises an issue of first impression that has significant public importance." *People v. Seymour*, 2023 CO 53, ¶ 16 (citations omitted).

This case falls squarely in that third category. *Erlinger* recently announced that, where the prosecution seeks to enhance a defendant's sentence based on habitual criminality, the defendant has a constitutional right to have a jury decide whether his prior offenses occurred on separate occasions. 144 S. Ct. at 1852. On the other hand, Colorado's habitual criminal statute assigns fact-finding responsibility to the court. § 18-1.3-803(4), C.R.S. (2023) ("If the defendant denies that he or she has been previously convicted … the trial judge … shall determine by

separate hearing and verdict whether the defendant has been convicted as alleged.").

The interaction between *Erlinger* and the habitual statute has become an issue in trial courts throughout Colorado. In some cases, the defense has argued that there's an irreconcilable conflict between the two, and that Colorado's habitual statute should be struck down entirely. As explained below, the People believe that *Erlinger* and the statute are entirely compatible.

This case provides a quick and decisive vehicle for resolving this dispute: given the question presented, this Court will first have to evaluate whether a jury can make habitual findings consistent with Colorado's habitual statute. If it can (as the People contend), then the court can address the issue of whether empaneling a *different* jury for the habitual proceeding would violate double jeopardy.

By answering the first inquiry now, the Court will provide immediate guidance for all habitual hearings across the state—rather than wasting judicial resources by forcing trial judges to reach their own (inconsistent) conclusions, trials and sentencings to occur, appeals to proceed, and then waiting for a petition for certiorari to be filed. *See People v. Rainey*, 2021 CO 53, ¶ 12 (electing to exercise discretionary jurisdiction where "waiting to act would foster uncertainty and do a

disservice to our district courts and the court of appeals"); *Brown v. Long Romero*, 2021 CO 67, ¶ 14 (granting a Rule 21 petition in light of "the considerable number" of cases that involved the issue, which made it "highly likely to recur and, therefore, in need of resolution"). The court can circumvent this lengthy and costly process by granting this petition now.

ISSUES PRESENTED

1. How should trial courts resolve the interaction between Colorado's habitual sentencing statute and *Erlinger?*
2. Does the Double Jeopardy Clause bar a trial court from empaneling a second jury to determine a defendant's habitual status?

STATEMENT OF THE CASE

The conviction. On April 16, 2024, a jury convicted defendant Andrew Gregg of two felonies (aggravated robbery and attempt to influence a public servant) and one misdemeanor (false reporting). The People had also charged Gregg with habitual criminal counts based on four prior robbery convictions.

The Erlinger *opinion.* After the jury convicted Gregg, but before his habitual criminal hearing, the United States Supreme Court issued *Erlinger*. The opinion

addressed the contours of defendant's constitutional right to a jury trial in the context of habitual sentencing determinations:

- The Court reiterated two principles—namely, (1) that "'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," and (2) that a "narrow exception" to this rule allows a sentencing judge (not a jury) to find "only the fact of a prior conviction." *Erlinger*, 144 S. Ct. at 1851 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)), 1853–54 (quoting *Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013)).
- Based on these principles, the Court held that, for purposes of a federal recidivist sentencing statute, a defendant has a constitutional right to have a jury determine whether his prior offenses were committed on separate occasions. *Id.* at 1854.

The motion to dismiss. After *Erlinger* was issued, Gregg filed a motion to dismiss his habitual counts. The motion began with the uncontroversial point that, consistent with *Erlinger*, Gregg was entitled to have a jury determine whether his four prior felonies had arisen out of "separate and distinct criminal episodes" for

purposes of Colorado's habitual criminal statute, section 18-1.3-801, C.R.S. (2023). (Ex. B, ¶¶ 10–14.)

Gregg then pointed out that the jury that decided his substantive crimes had long been released. He argued that, under *Erlinger*, the Double Jeopardy Clause of the Fifth Amendment barred the trial court from empaneling a second jury to make the requisite habitual findings. (*Id.* ¶¶ 15–16.) Based on this logic, Gregg asked the trial court to dismiss his habitual counts.

The trial court obliged (despite the People's objections). (*See* Exs. A, C.) In its written order, the court adopted Gregg's reasoning—ruling that, after *Erlinger*, the Double Jeopardy Clause applies to habitual criminal proceedings. (*See* Ex. A.)

DISCUSSION

This case raises two pressing questions about habitual sentencing procedure after *Erlinger*.

A. *Erlinger* can be applied consistent with Colorado's statutory habitual sentencing procedure.

First, this court should recognize that *Erlinger* and Colorado's habitual statute can coexist in harmony. Again,

- *Erlinger* states that a jury must determine any fact that increases the penalty beyond the statutory maximum, other than the fact of a prior

conviction. 144 S. Ct. at 1856–57. So, in Colorado, a defendant facing habitual counts has a constitutional right to have a jury determine whether his prior convictions "ar[ose] out of separate and distinct criminal episodes." § 18-1.3-801(2)(a)(I).

- Our habitual statute, however, states that a judge "shall determine … whether the defendant has been convicted as alleged." § 18-1.3-803(4).

There is nothing irreconcilable about these two directives because there's nothing in *Erlinger* or the statute that prevents trial courts from satisfying both requirements. *See, e.g.*, *People v. Hoehl*, 568 P.2d 484, 486 (Colo. 1977) ("[W]here a statute may be interpreted several ways, one of which is constitutional, the constitutional interpretation should be adopted."). In other words, the jury can make the constitutionally-required habitual determinations; if they find those facts beyond a reasonable doubt, the judge can then carry out a secondary review of the same evidence and either confirm the habitual sentence or reject the jury's findings.[1]

[1] Obviously, if the jury found that the *Erlinger* facts had not been proven, that would spell the end of the habitual proceeding.

This procedure would both uphold a defendant's constitutional right to a jury trial and carry out the General Assembly's statutory directive. That's what should have happened in this case.

B. There would be no double jeopardy issue if a second jury determines a sentencing question.

As explained above, the trial court could have complied with both *Erlinger* and Colorado's habitual criminal statute by having a jury determine the habitual issues. So why didn't it? The court found that empaneling a *different* jury for the habitual phase would be a double jeopardy violation.

But empaneling a second jury in this scenario would not even implicate (let alone violate) the defendant's double jeopardy rights.

Before explaining why double jeopardy doesn't apply here, it's important to remember what the Double Jeopardy Clause prevents—namely, "punish[ing] a person for the same offense twice." *People v. Porter*, 2015 CO 34, ¶ 9 (citing U.S. Const. amend. V; Colo. Const. art. 2, § 18). This constitutional guaranty guards against two evils:

- a second prosecution for the same offense after acquittal or conviction, and
- multiple punishments for the same offense.

Id. (citing *Brown v. Ohio*, 432 U.S. 161, 165 (1977)).

The situation in this case—having one jury decide the substantive criminal charge, while another makes habitual sentencing findings—doesn't raise either concern.

i. The Double Jeopardy Clause does not apply to habitual criminal determinations.

The United States Supreme Court has repeatedly affirmed that double jeopardy does not apply to habitual sentencing proceedings, "because the determinations at issue do not place a defendant in jeopardy for an 'offense.'" *Monge v. California*, 524 U.S. 721, 728 (1998); *see also Graham v. West Virginia*, 224 U.S. 616, 629 (1912) (holding that double jeopardy does not prevent a defendant from facing a habitual charge before a jury months after conviction on the substantive offense, because the habitual inquiry "does not relate to the commission of the offense, but goes to the punishment only, and therefore it may be subsequently decided"); *Parke v. Raley*, 506 U.S. 20, 27 (1992) ("We have said before that a charge under a recidivism statute does not state a separate offense, but goes to punishment only. And we have repeatedly upheld recidivism statutes against contentions that they violate constitutional strictures dealing with double jeopardy…." (internal citations omitted)); *Almendarez-Torres v. United States*, 523

U.S. 224, 247 (1998) ("[T]he sentencing-related circumstances of recidivism are not part of the definition of the offense for double jeopardy purposes.").

This Court has adopted these same principles when interpreting the Colorado constitution. *See 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."); *People ex rel. Faulk v. Dist. Court*, 673 P.2d 998, 1000 (Colo. 1983) ("[T]he habitual-criminal statute describes a status rather than a substantive offense.").

The Double Jeopardy Clause simply does not apply to habitual sentencing proceedings, and the trial court erred in holding otherwise.

ii. Even if the Double Jeopardy Clause did apply, jeopardy would not attach until the habitual phase.

And even if the Double Jeopardy Clause *did* apply to habitual sentencing determinations, the defendant would not be entitled to have both his substantive convictions and his habitual enhancement be decided by the same jury.[2]

[2] Ironically, defendants have commonly argued that there's a constitutional problem with using the same jury for both proceedings, on the theory that the jury's habitual determination is prejudiced by the evidence presented at trial. *See, e.g.*, *People ex rel. Faulk*, 673 P.2d at 1003.

Appellate courts from around the country have rejected that very premise.[3]

As the California Supreme Court explained,

> If defendant were correct that the double jeopardy clause required that the same jury that determines a defendant's guilt also must determine the truth of any alleged prior convictions, the various states would be prohibited from requiring that the truth of alleged prior convictions be determined by a new jury following discharge of the jury that returned a guilty verdict on the current charges. But such a system would not contravene any principle embodied in the double jeopardy clause. *That guarantee is designed to prevent an accused from being placed at risk more than once on a single charge; it is not concerned with whether,*

[3] *See State ex rel. Neely v. Sherrill*, 815 P.2d 396, 400–01 (Ariz. 1991) ("Although we agree that Arizona criminal defendants are guaranteed protection from double jeopardy in sentence enhancement proceedings, we do not believe that those principles are implicated simply because the trial of the prior conviction allegation is set to a jury different from the one that has just convicted the defendant on the current felony charge."); *Sevier v. Commonwealth*, 434 S.W.3d 443, 464 n.57 (Ky. 2014) ("[D]efendants are not entitled to have the same petit jury determine guilt and recommend punishment."); *Denton v. State*, 496 N.E.2d 576, 581 (Ind. 1986) ("While in the usual habitual offender determination the same jury hears both the felony charge and the recidivist charge in a bifurcated proceeding, we have previously held that it is permissible for a different jury than the one who heard the case on the underlying felony charge to determine a defendant's habitual offender status."); *Stinchfield v. State*, 238 P.3d 858, 2008 WL 6113400 (Nev. 2008) (unpublished) (rejecting the notion a defendant's double jeopardy rights were violated when one jury decided his guilt, and a second jury decided sentencing issues); *cf. Harris v. French*, 182 F.3d 907, 1999 WL 496941 (4th Cir. 1999) (unpublished) (reviewing a defendant's argument challenging the trial court's "empaneling of a new jury to serve in the sentencing phase of the trial," and noting, "we are confident in concluding that the sentencing proceeding did not amount to a successive proceeding implicating the Double Jeopardy Clause").

> *in a bifurcated trial, a single jury or multiple juries are utilized*.

People v. Saunders, 853 P.2d 1093, 1101 (Cal. 1993) (emphasis added) (internal citations omitted).

In the same vein, the United States Supreme Court has refused "to treat the sentencing phase of a single prosecution as a successive prosecution for purposes of the Double Jeopardy Clause," because its "prior decisions are inconsistent with the argument that a first sentencing proceeding can amount to a successive prosecution." *Schiro v. Farley*, 510 U.S. 222, 230 (1994) ("If a second sentencing proceeding ordinarily does not violate the Double Jeopardy Clause, we fail to see how an initial sentencing proceeding could do so.").

iii. The trial court misread Erlinger.

So, given this straightforward guidance, where did the trial court go wrong? It mistakenly tethered its analysis to a single paragraph from *Erlinger*. But, as explained below, that opinion's brief discussion of double jeopardy has no bearing on the issues raised here.

In *Erlinger*, the Supreme Court addressed an issue that had nothing to do with double jeopardy: whether an element common to recidivist sentencing schemes—namely, that the defendant's prior offenses were committed on separate

occasions—must be determined by a jury. 144 S. Ct. at 1846. In arguing that a court could make such findings without offending the constitutional right to a jury trial, an amicus argued that there were "common-law traditions authoriz[ing] judges at sentencing to find all manner of facts about an offender's past crimes." *Id.* at 1856–57. As an example, the amicus pointed out that judges (not juries) determine whether a pending charge subjects a defendant to double jeopardy. *Id.* at 1857. The amicus argued that, in that scenario, judges effectively make a factual determination about the defendant's past conduct—so judges should be allowed to do the same in habitual proceedings. *Id.*

The court flatly rejected that analogy, stating, "[t]he 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.* at 1858. In other words, the Court was pointing out that a judge must make the double jeopardy ruling because a jury, by definition, can't. In contrast, the Court continued, "[t]he Fifth and Sixth Amendments' jury trial rights provide a defendant with entirely 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.*

In this case, the trial court concluded that the quoted language overruled federal and state case law recognizing that double jeopardy protections don't apply to habitual sentencing proceedings.[4] The court further found that the defendant would be placed in double jeopardy if the habitual determination were not made by the same jury that entered the substantive conviction.

The People respectfully disagree with both conclusions.

The language of *Erlinger* does no more than acknowledge the unremarkable principle that Double Jeopardy "prohibit[s] a judge from even *empaneling* a jury when the defendant has already faced trial on the charged crime." 144 S. Ct. at 1848. But, as repeatedly explained by the Supreme Court, a defendant who faces habitual charges is not charged with a new crime, but rather a sentencing

[4] The trial court also found encouragement for this reading in two Colorado cases: *People v. Mason*, 643 P.2d 745, 754–55 (Colo. 1982) and *People v. Wolff*, 137 P.2d 693, 695–96 (Colo. 1943). *Mason* relied on *People v. Quintana*, 634 P.2d 745 (Colo. 1981) for the notion that double jeopardy applies to habitual sentencing proceedings. But the Colorado Supreme Court explicitly overruled *Quintana* in *Porter*, 2015 CO 34, ¶ 3. And *Wolff* did not address double jeopardy at all; its holding was based on the then-existing habitual statute, which required a unitary jury proceeding. Neither *Mason* nor *Wolff* is controlling law, or even relevant, in interpreting *Erlinger*.

enhancement. *See Monge*, 524 U.S. at 728 ("Historically, we have found double jeopardy protections inapplicable to sentencing proceedings, because the determinations at issue do not place a defendant in jeopardy for an 'offense.'" (internal citation omitted)); *Porter*, 2015 CO 34, ¶ 26 (holding the Double Jeopardy Clause "turn[s] on the use of the word 'offense,'" but that "enhancing a penalty based on prior convictions does not put the defendant in jeopardy for an 'offense'"). Accordingly, *Erlinger* does nothing to challenge the principle that double jeopardy does not apply to habitual proceedings.

If the Supreme Court had intended to overrule its unequivocal precedent on double jeopardy, it would have stated this intention explicitly. *See, e.g.*, *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 266–68 (2022) (identifying factors the court must address before departing from the doctrine of stare decisis). The context makes clear that the Court intended only to reject the amicus's strained theory that, because judges can make double jeopardy determinations, they can also make fact-intensive habitual sentencing determinations. There is absolutely no merit to the notion that this one paragraph in *Erlinger* was intended to recalibrate (and dramatically extend) the scope of the Double Jeopardy Clause.

And even if double jeopardy protections did apply to a habitual determination, jeopardy would not attach before the habitual phase ever took place. The Supreme Court has observed that "the determination of whether one is a[] habitual criminal is essentially independent of the determination of guilt on the underlying substantive offense." *Oyler v. Boles*, 368 U.S. 448, 452 (1962). Thus, "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." *Id.*; *see also Graham*, 224 U.S. at 629 (holding that double jeopardy does not prevent a defendant from facing a habitual charge before a jury, months after conviction on the triggering offense).

A habitual proceeding occurring for the first time does not subject the defendant to either a second trial for the same offense or to multiple punishments for the same offense. Accordingly, empaneling a different jury to make the habitual determination does not place the defendant in jeopardy a second time.

CONCLUSION

This Court should issue a rule to show cause and reverse the trial court's order.

Date: October 9, 2024

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

LIST OF SUPPORTING DOCUMENTS

CERTIFICATE OF SERVICE

I certify that on October 9, 2024, I electronically filed the attached Petition for Order to Show Cause Pursuant to C.A.R. 21 through the Colorado Courts E-Filing system, which will send notification to all persons registered in this case.

s/Dianne L. Johnson