SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED November 1, 2024 10:52 AM FILING ID: B71B2DCAF7F37 CASE NUMBER: 2024SA272
Original Proceeding District Court, Mesa County The Honorable Matthew D. Barrett Case No. 23CR289	
In Re: THE PEOPLE OF THE STATE OF COLORADO, Petitioner, **v.** ANDREW BURGESS GREGG, Respondent.	▲ **COURT USE ONLY** ▲
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BRIEF OF AMICI CURIAE COLORADO ATTORNEY GENERAL'S OFFICE AND COLORADO DISTRICT ATTORNEYS' COUNCIL IN SUPPORT OF PETITIONER

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

☒The brief contains 4,244 words, less than the words allowed per C.A.R. 29(d). A motion for leave to file this amicus brief has been filed contemporaneously, as required by C.A.R. 29(a) and (b).

/s Brian M. Lanni _____
Signature of attorney or party

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IDENTITY OF AMICI CURIAE

The Office of the Attorney General ("OAG") represents and defends the legal interests of the State and the People of Colorado. Colo. Const. art. IV, § 1; § 24-31-101, C.R.S. (2024).

The Colorado District Attorneys' Council ("CDAC") is a statutorily authorized statewide organization comprised of Colorado's elected district attorneys. *See, e.g.*, § 20-1-111(4), C.R.S. (2024). The mission of CDAC is to promote, foster, and encourage the effective administration of criminal justice throughout Colorado.

INTEREST OF AMICI CURIAE

Amici curiae OAG and CDAC have a significant interest in defending the rule of law, providing justice for victims of crime, and ensuring the fair treatment of people in the criminal justice system. And they have a particular interest in this matter given that no Colorado appellate court has yet addressed in a published opinion the impact of *Erlinger v. United States*, 602 U.S. 821 (2024), on habitual criminal proceedings. The resolution of this novel question is a matter

of statewide concern, as it will impact a number of cases at both the trial and appellate levels and alleviate confusion and disparity in the lower courts over how to properly apply *Erlinger*. Further, this Court, in its Order to Show Cause dated October 18, 2024, invited the OAG and CDAC to file an amicus brief in this matter.

The OAG, with CDAC, submit this amicus brief to explain how *Erlinger* should impact habitual criminal proceedings in Colorado going forward, and why it does not violate double jeopardy to impanel a new jury solely for a habitual criminal sentencing proceeding.

SUMMARY OF THE ARGUMENT

Colorado's habitual criminal sentence-enhancing statute provides that, after a jury has rendered a guilty verdict on a substantive offense, the trial court must determine whether the defendant's prior convictions were based on charges arising out of separate and distinct criminal episodes. The Supreme Court's decision in *Erlinger* requires that a jury, rather than a judge, make that determination.

Although Colorado's habitual statute requires a determination by the trial court, it does not prohibit a jury from also making the requisite determination. To comply with both *Erlinger* and the habitual statute, a trial court can retain the jury impaneled for the substantive trial, or impanel a new one, to determine whether the prior convictions were separate and distinct, and then the trial court can make its own determination.

Impaneling a new jury for a habitual sentencing proceeding does not violate double jeopardy. The United States Supreme Court has long held that habitual sentencing statutes do not charge an offense and therefore do not implicate double jeopardy principles. The Court was not asked to revisit, and did not revisit, that question in *Erlinger*. It mentioned double jeopardy only in rejecting an argument that the Double Jeopardy Clause should permit broad judicial fact-finding about a defendant's prior offenses. Here, the trial court misread that portion of the Supreme Court's decision as overruling years of long-standing precedent.

STANDARD OF REVIEW

This case presents questions of law that are reviewed de novo. *See Whiteaker v. People*, 2024 CO 25, ¶ 9 (double jeopardy violations reviewed de novo); *McCoy v. People*, 2019 CO 44, ¶ 37 (issues of statutory interpretation reviewed de novo); *Gallegos v. Colorado Ground Water Comm'n*, 147 P.3d 20, 28 (Colo. 2006) (trial court's interpretation of case law reviewed de novo).

This issue is preserved. *See* Pet., Ex. A.

ARGUMENT

I. *Erlinger* requires a jury determination for habitual adjudications.

In *Erlinger*, the Supreme Court held that any fact that increases a defendant's exposure to punishment must be proved to a jury beyond a reasonable doubt, with one exception—the fact of a prior conviction. 602 U.S. at 830. Reviewing a federal recidivist sentencing statute, the Court concluded that the question of whether a defendant's prior convictions occurred on "different occasions" does not fall within that exception. *Id.* at 838. Rather, the prior conviction exception permits a

judge to "do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." *Id.* (citation omitted).

Colorado's habitual statute, like the federal statute at issue in *Erlinger*, enhances a defendant's sentence upon proof of prior convictions that were "based upon charges separately brought and tried, and arising out of separate and distinct criminal episodes," in Colorado or in any other state. § 18-1.3-801(1)(b)(I), C.R.S. (2024).

Amici agree with Petitioner that, under *Erlinger*, the question of whether a defendant's prior convictions were "based upon charges . . . arising out of separate and distinct criminal episodes," § 18-1.3-801(1)(b)(I), is a question that generally must be determined by a jury beyond a reasonable doubt because it requires more than a determination of "what crime, with what elements, the defendant was convicted of." *Erlinger*, 602 U.S. at 838.[1]

[1] *Erlinger* did not foreclose other means of sustaining habitual adjudications. For example, a defendant may waive his jury right and consent to judicial fact-finding or stipulate that his convictions arose from separate and distinct episodes.

A. *Erlinger* and Colorado's habitual statute can be applied harmoniously.

The statute that governs the procedure for habitual sentencing proceedings directs a trial court, after a verdict on the substantive charges, to hold a separate hearing and to determine itself whether the defendant was "convicted as alleged." § 18-1.3-803(4), C.R.S. (2024). But the statute does not irreconcilably conflict with *Erlinger* because nothing in the statute prohibits a jury from making that same determination. After a verdict of guilty in a trial on the substantive charges, a trial court could retain the already-impaneled jury, or impanel a new one, and have that jury determine whether the defendant has been previously convicted as alleged beyond a reasonable doubt. If the jury so finds, then the court could make its own determination. This procedure would both satisfy the constitutional requirement set forth in *Erlinger* and comply with Colorado's statute.

The fact that the habitual statute is silent as to the involvement of a jury does not mean it prohibits this approach.[2] *Cf., e.g.*, *Kalady v. State*, 462 N.E.2d 1299, 1306 (Ind. 1984) (holding that Indiana's habitual criminal statute—which provided that "the jury shall reconvene for the sentencing hearing"—did not preclude "a different jury from determining the habitual offender charge" (citing IND. CODE § 35-50-2-8)); *State v. McMillan*, 409 N.E.2d 612, 617 (Ind. 1980) (noting that the "statute is silent on th[e] point" of whether a different jury could determine the charge in reaching the same conclusion as *Kalady*); *Hankerson v. State*, 723 N.W.2d 232, 236 (Minn. 2006) (sentencing statute that required a "judge" to provide written reasons for a departure from the presumptive sentencing range did not "prohibit[] a court from imposing a sentence based on facts found by a jury" or from

[2] Contrast Colorado's statute with New York's. *See* N.Y. Crim. Proc. Law § 400.15 ("A hearing pursuant to this section must be before the court without jury."); *People v. Lopez*, 216 N.Y.S.3d 518, 528-29 (Sup. Ct., N.Y. Cty. 2024) (relying on this language in determining that the court could not create a new type of bifurcated jury trial that is expressly prohibited by New York law in order to comply with *Erlinger*).

"impanel[ing] a sentencing jury . . . and to use the jury's findings to impose . . . an aggravated sentence").

Indeed, although our general felony sentencing statute directs a trial court to determine the existence of aggravating facts, *see* § 18-1.3-401(6), C.R.S. (2024), this Court has sanctioned the practice of first putting that determination to a jury in order to comply with constitutional requirements. *See Lopez v. People*, 113 P.3d 713, 716 (Colo. 2005) (holding that a "jury can be asked by interrogatory to determine facts potentially needed for aggravated sentencing"); *Molnar v. Law*, 776 P.2d 1156, 1158 (Colo. App. 1989) ("[T]he submission of special issues of fact lies within the sound discretion of the trial court."); *see also Vega v. People*, 893 P.2d 107, 116 (Colo. 1995) (noting that, where a "statute does not require notice and an opportunity for a hearing on the existence of sentence enhancing factors, Colorado has engrafted these procedural protections onto sentence enhancing statutes").

Likewise, the notion of a trial judge conducting a subsequent or secondary review of a jury's determination is not foreign to Colorado

law. *See, e.g.,* Crim. P. 29(c) (permitting a trial court to override a jury's guilty verdict and enter judgment of acquittal if it finds in its own review that the evidence was insufficient). If anything, an independent determination by the trial court in habitual proceedings would provide an additional step to alleviate concerns of prejudice flowing from the jury hearing evidence of prior crimes or having heard the trial on the substantive offense(s). *See, e.g., Erlinger*, 602 U.S. at 847 (discussing this concern); *People ex rel. Faulk v. District Court*, 673 P.2d 998, 1002 (Colo. 1983) (same); *People v. Saunders*, 853 P.2d 1093, 1101 (Cal. 1993) ("In most instances, a defendant is benefitted by having a new jury determine the truth of alleged prior convictions, because the new jury will not have heard the evidence supporting the defendant's conviction of the current charges.").[3]

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[3] While defendants often raise arguments of prejudice based on a jury hearing about prior convictions, *see, e.g.*, *People v. Kembel*, 2023 CO 5, ¶¶ 7-8, 41, 49; *Linnebur v. People*, 2020 CO 79M, ¶ 54 (Marquez, J., dissenting), *abrogated in part by People v. Crabtree*, 2024 CO 40M, ¶ 54; *People v. Fullerton*, 525 P.2d 1166, 1167 (Colo. 1974), Amici do not intend to suggest that there is any constitutional problem with a jury hearing such evidence in either a unitary or bifurcated proceeding, *see,*

This approach would also effectuate the legislature's intent. True, in 1995, the legislature amended the habitual statute, as part of a bill concerning procedural criminal laws, to require court findings rather than jury findings. *People v. Porter*, 2015 CO 34, ¶ 15; *see* 1995 Colo. Sess. Laws 467-68, ch. 129, sec. 14.[4] But that amendment did not alter the "overriding purpose" of the habitual criminal statute—to "punish more severely those individuals who show a propensity toward repeated criminal conduct." *People v. District Court*, 711 P.2d 666, 670 (Colo. 1985). Indeed, the amendment left untouched the substantive habitual criminal statute itself and only modified the procedures governing habitual criminal trials. *See* 1995 Colo. Sess. Laws 467-68, ch. 129, sec. 14.

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e.g., *Faulk*, 673 P.2d at 1002-03; *Dorton v. State*, 419 N.E.2d 1289, 1297 (Ind. 1981); *State v. Sapiel*, 432 A.2d 1262, 1270-71 (Me. 1981) (the use of the same jury for both the substantive and habitual-criminal phases of the trial "did not deprive the Defendant of his right to a fair trial").

[4] At the time, the habitual criminal procedural statute was housed in section 16-13-103, C.R.S. (1994).

Accordingly, given the language of the statute, this Court's prior practice of allowing factual inquiries to be sent to the jury in order to comply with constitutional requirements, and the legislative intent behind the habitual criminal statute, this Court should conclude that *Erlinger*'s jury trial requirement can be satisfied consistently with section 18-1.3-803.

But even if *Erlinger* and the habitual criminal procedural statute cannot be read harmoniously, a remedy of sending habitual counts to the jury in order to comply with *Erlinger* and facilitate habitual criminal prosecutions is the option "that best reflects legislative intent" and keeps intact "as much of the legislature's work . . . as possible." *See People v. Tate*, 2015 CO 42, ¶¶ 4, 47 (addressing the proper remedy for a mandatory life without parole sentencing scheme for juvenile offenders that was rendered unconstitutional as applied by a United States Supreme Court opinion). "The core consideration of legislative intent is determining what the enacting legislature would have done if it had known that this eventuality would happen." *Id.* at ¶ 47.

Here, given that the statute at issue is procedural in nature, that the legislative intent is to punish more severely those who engage in recidivist conduct, and that the statute previously required a jury determination, it is reasonable to assume that the legislature, had it known of *Erlinger*, would have maintained a jury trial requirement for habitual criminal offenses in order to provide a constitutionally-compliant statute. *See Tate*, ¶ 48 (concluding that a life with parole sentence was "likely in keeping with legislative intent" given, in part, that the legislature had previously allowed that sentence); *State v. Boehl*, 726 N.W.2d 831, 840-42 (Minn. Ct. App. 2007) (pointing to the "legislature's clear intent that offenders receive enhanced sentences when appropriate," as gleaned from "recently enacted statutes and from legislative history," to support the conclusion the trial court could "exercise[] its inherent judicial authority to impanel a resentencing jury" where the sentencing scheme conflicted with constitutional mandates).

Moreover, the current habitual criminal procedural statute is substantially similar to the pre-1995 version. *Compare* § 16-13-103,

C.R.S. (1994), *with* § 18-1.3-803, C.R.S. (2024). Thus, the procedural change back to a jury would not be completely foreign nor would it disturb more of the law than necessary. *See, e.g.*, *Tate*, ¶¶ 40-46 (discussing doctrines of severability and revival); *Dallman v. Ritter*, 225 P.3d 610, 638 (Colo. 2010) ("[W]e strike as little of the law as possible"); § 2-4-204, C.R.S. (2024) (if part of a statute is found to be unconstitutional, the remaining provisions are valid unless they are "essentially and inseparably connected" with the void provisions or cannot be severed without rendering the remaining language "incomplete and . . . incapable of being executed in accordance with the legislative intent").

Nor would such an approach be unprecedented. Not only did this Court craft a constitutionally-compliant sentencing scheme in *Tate*, *see Tate*, ¶ 64 (Rice, C.J., concurring in part and dissenting in part) (noting and criticizing this fact), but other jurisdictions have also saved sentencing provisions by, for instance, severing the requirement that extraordinarily aggravating circumstances be decided by the trial court, allowing them instead to be tried to the jury in order to comply with the

United States Supreme Court's decisions in *Blakely v. Washington*, 542 U.S. 296 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *See, e.g. State v. Bell*, 931 A.2d 198, 235-26 (Conn. 2007); *Smylie v. State*, 823 N.E.2d 679, 685-86 (Ind. 2005); *but see Lopez*, 216 N.Y.S.3d at 528-32 (declining to use the court's "inherent authority" to create a bifurcated jury trial that was expressly prohibited by New York law).

II. Impaneling a separate jury for a habitual trial does not violate double jeopardy.

In *Erlinger*, amicus arguing in support of the trial court judgment pointed out that the federal Double Jeopardy Clause "permits a judge to ask whether the government has charged a defendant for the same crime a second time." 602 U.S. at 844. Thus, amicus argued, "it must be that a judge can also look into the defendant's past conduct to increase his sentence." *Id.* The Supreme Court rejected this argument as follows:

> But that, too, does not follow. 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. *See, e.g.*, *Green v. United States*, 355 U.S. 184, 188 (1957). The 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. (emphasis in original).

Here, the trial court, relying on the paragraph above, ruled that it would violate double jeopardy to impanel a new jury to make habitual sentencing determinations after it had discharged the jury that had rendered a guilty verdict at the trial on the substantive offenses. The trial court's reliance on this part of *Erlinger* was misplaced.

A. Double jeopardy does not apply to habitual sentencing proceedings.

As Petitioner aptly conveys, the United States Supreme Court has consistently and clearly held that habitual sentencing proceedings do not place the defendant in jeopardy for an "offense." *Monge v. California,* 524 U.S. 721, 728 (1998); *Witte v. U.S.*, 515 U.S. 389, 400 (1995); *Parke v. Raley*, 506 U.S. 20, 27 (1992); *Graham v. West Virginia*, 224 U.S. 616, 629 (1912). And because the Double Jeopardy Clause protects against multiple prosecutions *for the same offense*, habitual

sentencing proceedings do not implicate it. *Monge*, 524 U.S. at 728; *Raley*, 506 U.S. at 27; *see also Schiro v. Farley*, 510 U.S. 222, 230 (1994) ("Where . . . there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended.") (citation and internal quotations omitted).

This Court has held the same with respect to the Double Jeopardy Clause in the Colorado Constitution, which, like the federal one, turns on the use of the word "offense." *See Porter*, ¶¶ 26-29 (state Double Jeopardy Clause does not apply to habitual proceeding because enhancing a penalty based on prior convictions does not put the defendant in jeopardy for an "offense," nor does it punish the defendant a second time for a previous offense). Indeed, this Court has identified no constitutional concern with impaneling a new jury to determine facts essential to sentencing. *See People v. Montour*, 157 P.3d 489, 506 (Colo. 2007) (leaving substantive murder conviction intact and remanding for a new sentencing hearing before a new jury in a death penalty case after finding prior penalty procedure unconstitutional); *see also Mountjoy v. People*, 2018 CO 92M, ¶ 28 n. 4 (*Blakely* requires only that

"a fact was determined by a jury, not . . . *that it was the same jury who rendered the conviction*." (emphasis added)); § 18-1.3-1201(7)(b), C.R.S. (2024) (recognizing that a sentencing-only jury may be impaneled in the death penalty context in certain circumstances).

And other states have similarly rejected double jeopardy challenges in situations where new juries were impaneled for sentencing proceedings. *See, e.g.*, *Hankerson*, 723 N.W.2d at 236-40; *Aragon v. Wilkinson ex rel. County of Maricopa*, 97 P.3d 886, 891 (Ariz. App. 2004); *Saunders*, 853 P.2d at 1099-1102; *McMillan*, 409 N.E.2d at 618; *cf., e.g.*, *State v. Schofield*, 895 A.2d 927, 937-38 (Me. 2005) (finding that a sentencing-specific jury could be used on remand based on the court's inherent judicial power even though "[t]here is presently no [statutory] procedure for empaneling a jury to decide sentencing facts"); *Powell v. Quarterman*, 536 F.3d 325, 334 (5th Cir. 2008) (noting that "no clearly established law by the Supreme Court" requires "the same jury to determine guilt and punishment"); *United States v. Henry*, 282 F.3d 242, 253 (3rd Cir. 2002) (holding that a jury can be convened for the sole purpose of deciding facts that will determine the sentence

following *Apprendi* error at trial). And Minnesota even explicitly allows a court by statute to bifurcate the proceedings and impanel a "resentencing jury" where a unitary trial would include evidence inadmissible on the substantive charge and result in unfair prejudice to the defendant. MINN. STAT. § 244.10, subd. 5 (2009).

Thus, the Double Jeopardy Clause's inapplicability to sentencing proceedings generally and habitual criminal proceedings specifically is well established.

B. The Supreme Court in *Erlinger* did not hold otherwise.

In rejecting amicus's argument, the Supreme Court in *Erlinger* was not, in this one paragraph, overruling a century of its precedent without explanation.

First, amicus's argument had nothing to do with the propriety of impaneling a new jury for a recidivist sentencing proceeding. Again, amicus's argument was that if a judge can make the legal determination of whether a defendant has already been placed in jeopardy for an offense—which to some extent requires a factual inquiry

into prior proceedings—then a judge should similarly be able to "look into the defendant's past conduct" to make the determination necessary to increase his sentence. *Erlinger*, 602 U.S. at 844-45. It would make no sense for the Supreme Court, in rejecting that analogy, to also announce a sea change in the law by inconspicuously holding for the first time that recidivist sentencing statutes do, in fact, charge a new "offense" and therefore implicate double jeopardy. Put differently, if the Supreme Court here meant what the trial court understood it to mean, then its rejection of amicus's argument, and the manner in which it did so, was nonsensical.[5]

Second, rather than include any indication that it was overruling a line of cases tracing back to at least 1912, the Supreme Court cited only to *Green v. United States*, 355 U.S. 184 (1957), which had nothing to do with habitual sentencing proceedings. Rather, *Green* held that

[5] Tellingly, none of the concurring or dissenting opinions in *Erlinger* appear to have understood the case as extending double jeopardy protections to habitual criminal sentencing proceedings. *See* 602 at 849-50 (Roberts, C.J., concurring), 850-51 (Thomas, J., concurring), 851-71 (Kavanaugh, J., dissenting), 871-98 (Jackson, J., dissenting).

double jeopardy prohibits the retrial of an offense for which a defendant has been implicitly acquitted through conviction of a lesser-included offense. *Id.* at 188. But, here, the habitual criminal counts have never been presented to a jury nor has Defendant been acquitted of them. *See State ex rel. Neely v. Sherrill In and For County of Pima*, 815 P.2d 396, 401 (Ariz. 1991) (rejecting argument that use of a different jury to try a prior conviction allegation violated double jeopardy where a defendant absconded before or during a criminal trial and the prior conviction allegation was never heard by the first jury: "The State is not attempting to take two bites of the apple by trying twice to prove defendants' prior convictions. In each case, it simply requests the proceeding to which it is entitled—*a* trial in which it would have *one* chance to prove the prior convictions.") (emphasis in original).

Third, the Supreme Court in this paragraph of *Erlinger* was rejecting amicus's argument on the grounds that amicus's analogy was flawed. Whereas both a double jeopardy inquiry and an increase in sentencing exposure implicate constitutional rights, the genesis of those rights is different. *See Erlinger*, 602 U.S. at 845 (contrasting the

Double Jeopardy Clause with the jury trial right of the Fifth and Sixth Amendments). Moreover, a court's inquiry to determine in the first instance whether a double jeopardy violation has occurred, even if it examines aspects of the facts, *see United States v. Cooper*, 886 F.3d 146, 153 & n.4 (D.C. Cir. 2018) (discussing multifactor test and collecting cases), is different in purpose and scope than the factual inquiry made by the jury for purposes of subjecting a defendant to increased punishment. *See Erlinger*, 602 U.S. at 845 (noting, for instance, that the jury inquiry occurs "at a different stage of the proceedings"). In other words, the Supreme Court was rejecting the argument that the framework surrounding a trial court's double jeopardy inquiry provided the applicable framework to evaluate the "separate occasions" inquiry at issue in *Erlinger*. It was not concluding that double jeopardy considerations now applied to habitual criminal sentencing proceedings.

Fourth, *Erlinger*'s discussion of double jeopardy, which occurred in one paragraph of the opinion, was dicta as it was not language that was necessary to the Supreme Court's holding. *See People v. Stellabotte*, 2018 CO 66, ¶ 28. Indeed, the Supreme Court was not called upon to

examine a double jeopardy question in *Erlinger*; rather, the question it faced was "whether a judge may decide that a defendant's past offenses were committed on separate occasions under a preponderance-of-the-evidence standard, or whether the Fifth and Sixth Amendments require a unanimous jury to make that determination beyond a reasonable doubt." 602 U.S. at 825.

Given the above, this part of the *Erlinger* opinion, even if read in isolation and without its surrounding context, does not support the trial court's conclusion that impaneling a jury for a habitual sentencing proceeding would violate double jeopardy. Again, a habitual sentencing proceeding does not put the defendant in jeopardy for any offense. *E.g.*, *Monge*, 524 U.S. at 728; *Raley*, 506 U.S. at 27. Thus, it cannot be said that a defendant facing a habitual sentencing proceeding "has already faced trial on the charged crime," *Erlinger*, 602 U.S. at 844, because there is no charged crime, *see Porter*, ¶ 26 (the habitual statute describes "a status rather than a substantive offense") (quoting *Faulk*, 673 P.2d at 1000); *see also People v. Monge*, 941 P.2d 1121, 1129 (Cal. 1997) ("The [habitual criminality phase of a] trial is not a prosecution of

an additional criminal offense ... rather it is merely a determination, for purposes of punishment, of the defendant's status[.]") (emphasis in original), *aff'd sub nom. Monge*, 524 U.S. 721.

Accordingly, the trial court's order finding that it could not impanel a new jury for a habitual criminal trial based on double jeopardy concerns was erroneous.

CONCLUSION

The reasoning and holding of *Erlinger* makes clear that a jury determination is now required for habitual criminal adjudications. But such a finding can be applied consistently with Colorado's habitual criminal procedural statute and, even if it cannot, the appropriate remedy is still to send such counts to a jury in order to comply with constitutional mandates. Moreover, *Erlinger* did not overrule the well-established precedent that double jeopardy concerns do not apply to habitual criminal sentencing proceedings.

As such, this Court should (1) reverse the trial court's order finding that impaneling a new jury to try the habitual criminal counts

would violate double jeopardy, and (2) remand the case for the habitual criminal proceeding to occur.

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CERTIFICIATE OF SERVICE

This is to certify that on November 1, 2024, I electronically filed the attached **Brief of Amici Curiae Colorado Attorney General's Office and Colorado District Attorneys' Council in Support of Petitioner** through the Colorado Courts E-Filing system, which will send notification to all persons registered in this case.

/s Brian M. Lanni