No. 24-5460

IN THE

Supreme Court of the United States

TROY L. FIELDS,

Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

On Petition for a Writ of Certiorari to the Colorado Court of Appeals

REPLY BRIEF FOR PETITIONER

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Colorado concedes that the decision below violates the Sixth Amendment as interpreted in *Erlinger* v. *United States*, 144 S. Ct. 1840 (2024). The jury "did not . . . find that [Mr. Fields's] prior convictions arose out of 'separate and distinct criminal episodes.'" Opp. 1. Under *Erlinger*, that is wrong. As Colorado recognizes, "*Erlinger* requires a jury to determine every fact regarding a defendant's prior conviction . . . that is necessary to increase the defendant's exposure to habitual criminal punishment." *Id.* at 7. Thus, the state concedes, the decision below "conflicts with *Erlinger*." *Id.* at 8.

Even so, Colorado opposes a GVR because (i) there is supposedly "no reasonable probability that petitioner would ultimately prevail a remand," and (ii) prevailing on remand "would not practically impact his controlling sentence." Opp. 8. These arguments, however, misstate this Court's GVR standard; ignore the beyond-a-reasonable-doubt requirement for harmless errors, even assuming the harmless-error standard could apply here; and depend on facts that Colorado law deems irrelevant.

Ultimately, the state is trying to short-circuit the courts' consideration of complex, fact-specific questions that have not been adjudicated below. That effort fails. Because the decision below depends on a conceded error that may affect the ultimate outcome, a GVR is warranted. Alternatively, the Court should grant plenary review.

I. A GVR is proper because the decision below concededly conflicts with *Erlinger*.

A. The decision below rests on a faulty premise that may affect the outcome.

Though Colorado admits the decision below is legally wrong, it says a GVR is inappropriate because Mr. Fields has "no reasonable probability of success on remand." Opp. 1. This argument lacks merit.

The GVR standard is less strict than Colorado believes. "A GVR is appropriate when [1] 'intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and [2] where it appears that such a redetermination *may* determine the ultimate outcome' of the matter." *Wellons* v. *Hall*, 558 U.S. 220, 225 (2010) (per curiam) (quoting *Lawrence ex rel. Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam)) (emphasis added). In *Lawrence*, for example, the Court contrasted the GVR standard with the All Writs Act standard, explaining that "the standard that we apply in deciding whether to GVR is somewhat more liberal than the All Writs Act standard, under which relief is granted only upon a showing that a grant of certiorari and eventual reversal *are probable*." 516 U.S. at 168 (emphasis added). And in *Wellons*, the Court issued a GVR where it "kn[e]w that the Court of Appeals committed the same procedural error that we corrected in [an intervening case]," even though it "d[id] not know how the court would have ruled if it had the benefit of our [intervening] decision in that case." *Wellons*, 558 U.S. at 220.

The proper standard is met here. First, there is not just a "reasonable probability" that the decision below rests on a faulty premise, but a certainty. Colorado

concedes that the decision below "conflicts with *Erlinger*." Opp. 7–8. No more is required.

Second, a remand in light of *Erlinger* at least "may" affect "the ultimate outcome" here. Cf. *Lawrence*, 516 U.S. at 171–72. For one thing, if the error below is structural, it is dispositive. Colorado responds that one concurring and two dissenting Justices in *Erlinger* asserted that such errors can be harmless, see Opp. 9, but neither this Court, the Tenth Circuit, nor the Colorado appellate courts have so held. Petitioner should have the opportunity to argue below that the error in his case was "so intrinsically harmful as to require automatic reversal." See *Neder* v. *United States*, 527 U.S. 1, 7 (1999).

But even assuming the harmless-error standard governs, that is not grounds to deny a GVR. Again, what matters is whether the lower court's admitted error *may* affect the outcome. And an error can be harmless only "if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Id.* at 16. So a GVR is warranted if there is *any reasonable doubt* that Mr. Fields's prior convictions arose from distinct episodes. And this analysis can be "fact-intensive," which is why "this Court often leaves harmless-error questions to the Court of Appeals when the issue was not addressed below." *Erlinger*, 602 U.S. at 861 (Kavanaugh, J., dissenting); see also, *e.g.*, *McFadden* v. *United States*, 576 U.S. 186, 197 (2015) ("The Government contends that any error in the jury instructions was harmless . . . . Because the Court of Appeals did not address that issue, we remand for that court to consider it in the first instance.").

Colorado does not acknowledge the beyond-a-reasonable-doubt standard, much less try to meet it. See Opp. 9–10. The state first says Mr. Fields's offenses

were obviously distinct because they "varied by type of crime." *Id.* at 10. But the state's own cited cases show this is irrelevant. See *Jeffrey* v. *Dist. Ct.*, 626 P.2d 631, 640 (Colo. 1981) (trespass, conspiracy, and assault charges "arose from the same criminal episode"). Colorado next notes that the five convictions "were imposed over a span of years." Opp. 10. But two of them were imposed "within a span of days," see *id.*, and two more on the *same day*, see *id.* at 4; *cf.* Colo. Rev. Stat. § 18-1-202(7)(b)(I) (certain offenses "may be considered part of the same criminal episode" if committed "within a six-month period"). And the state says the offenses "arose in two different jurisdictions. Opp. 10. But the state's cases say only that "multiple offenses committed within a single jurisdiction must be joined in a single prosecution" *if* they arise from the same episode—not that offenses arising in multiple jurisdictions cannot "form part of a schematic whole." See *id.* at 10–11 (citations omitted); cf. Colo. Rev. Stat. § 18-1-202(7)(a) (allowing a single prosecution "[w]hen multiple crimes are based upon the same act or series of acts arising from the same criminal episode and are committed in several counties").

At bottom, the "same criminal episode" analysis under Colorado law "depends upon an analysis of the facts of the particular case." *Jeffrey*, 626 P.2d at 640. The state cannot cut off that analysis based on a single page of briefing that fails to acknowledge the beyond-a-reasonable-doubt requirement. Cf. *United States* v. *Barner*, No. 24-10163, 2024 WL 4839062, at *2 (11th Cir. Nov. 20, 2024) (per curiam) (holding *Erlinger* error was not harmless given unclear record). Because "the record does not establish that it is clear beyond a reasonable doubt that the jury would have found that each of" Mr. Fields's "predicate offenses were committed" during distinct criminal episodes, *id.*, the

Colorado courts should sort out these issues in the first instance. All that can be said for certain at this point "is that the sentencing court erred in taking that decision from a jury of [petitioner's] peers." *Erlinger*, 602 U.S. at 835.

B. The equities favor a GVR.

Colorado also contends that a GVR is inappropriate because prevailing on remand "would not practically impact" Mr. Fields's "controlling" sentence. Opp. 8. The state notes that Mr. Fields, "who is currently 56 years old," is serving a concurrent sentence of "life with the possibility of parole after 40 years." *Id.* at 11–12. In other words, Colorado implies that Mr. Fields will not be parole-eligible until age 91 (40 years after his sentence was imposed in 2019) and that he'll probably die before then.

Ghoulish actuarial assumptions aside, Colorado misstates its own sentencing scheme. Even *with* his current habitual-offender sentence, Mr. Fields will become parole-eligible in 2045, at age 76. See Colo. Dep't of Corr., *Offender Search*, https://www.doc.state.co.us/oss/ (last visited Jan. 7, 2025). That date will continue to move earlier as he receives additional earned time credits. And if Mr. Fields's habitual-offender sentence were vacated because of the constitutional error below, his parole eligibility would change further. See *Exec. Dir. of Colo. Dep't of Corr.* v. *Fetzer*, 396 P.3d 1108, 1112 (Colo. 2017) ("[W]e have never sanctioned a governing sentence methodology that would permit the calculation of an inmate's parole eligibility date solely on the basis of his longest concurrent sentence . . . . Rather, the composite governing sentence has always controlled[.]"). In other words, the other, supposedly "controlling" sentence is not a fixed target. In turn, this case is akin to *Ball* v. *United States*, where the Court explained that an invalid "second

conviction, even if it results in no greater sentence, is an impermissible punishment" because it "has potential adverse collateral consequences that may not be ignored," including "delay[ing] the defendant's eligibility for parole." 470 U.S. 856, 864–65 (1985).

Nor do any interests in "finality" or "closure," Opp. 11–12, justify denying relief here: "When a litigant is subject to the continuing coercive power of the Government in the form of imprisonment, our legal traditions reflect a certain solicitude for his rights, to which the important public interests in judicial efficiency and finality must occasionally be accommodated." See *Stutson* v. *United States*, 516 U.S. 193, 196 (1996) (per curiam) (holding that the equities warranted a GVR in part). The state cites no contrary precedent.

II. Alternatively, the Court should grant plenary review.

Colorado says plenary review is "ill-advised" because this case involves "a long-superseded statute" and "state courts are already considering *Erlinger*'s impact to their analogous recidivism statutes." Opp. 13. Neither argument weighs against plenary review. On the first, Colorado concedes that "the jury did not specifically find" that Mr. Fields's "convictions arose out of separate criminal episodes." *Id.* at 14. On the second, Colorado undercuts its position by chronicling how states are applying *Erlinger* inconsistently based on "state-specific nuances." *Id.* at 17. As the petition explained, *Apprendi* makes clear that the prior-conviction-exception "applies with equal force to state laws through the Fourteenth Amendment." Pet. 11; see *Apprendi* v. *New Jersey*, 530 U.S. 466, 476 (2000) ("The Fourteenth Amendment commands the same answer in this case involving a state statute."); cf. *Erlinger*, 602 U.S. at 858 n.2 (Kavanaugh, J., dissenting) (explaining that the "constitutional rule [announced in

Erlinger] will apply not only to federal cases, but also to state cases" and state laws with "recidivism enhancements that require judges to find whether the defendant committed prior crimes on different occasions").

CONCLUSION

The Court should grant the petition, vacate the decision below, and remand for further review in light of *Erlinger*. Alternatively, this Court should grant plenary review to consider *Erlinger*'s application to state-law recidivist schemes that mirror ACCA.

Respectfully submitted,

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