No. 25-891

IN THE

Supreme Court of the United States

ANDREW BURGESS GREGG,

Petitioner,

v.

COLORADO,

Respondent.

On Petition for Writ of Certiorari to the Colorado Supreme Court

BRIEF IN OPPOSITION

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April 24, 2026

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

In *Monge v. California*, 524 U.S. 721 (1998), this Court held that the Double Jeopardy Clause does not apply to noncapital sentencing proceedings. Should this Court grant certiorari to address (and potentially overrule) that double jeopardy precedent in a case where the defendant's habitual sentencing proceeding has yet to take place?

PARTIES TO THE PROCEEDING

Petitioner Andrew Burgess Gregg was the respondent in the case below and the defendant in the trial court. Respondent State of Colorado was the petitioner in the case below and the plaintiff in the trial court.

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CONSTITUTIONAL PROVISIONS

The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT OF THE CASE

In 2024, a jury convicted Andrew Gregg of aggravated robbery. The prosecution had also charged Gregg with a sentencing enhancement under Colorado's Habitual Criminal Act. *See* Colo. Rev. Stat. §§ 18-1.3-801, -802, -803 (2024). Consistent with then-existing statutory procedure,[1] the trial court discharged the jury and set a hearing to resolve the pending habitual criminal counts. Those counts required the judge to determine whether Gregg was convicted of prior felonies that "ar[ose] out of separate and distinct episodes" and were "separately brought and tried." *See* Colo. Rev. Stat. §§ 18-1.3-801, -803 (2024).

Before that hearing took place, however, this Court issued *Erlinger v. United States*, 602 U.S. 821 (2024). That opinion recognized that, while a judge can find "the fact of a prior conviction," a defendant has a constitutional right to have a jury determine whether those predicate offenses took place on separate occasions. *Id.* at 838–40 (quoting *Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013)).

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[1] At the time Gregg was charged, the Act outlined a bifurcated procedure with different factfinders: first, the jury would determine the defendant's guilt on the substantive charges; then, if the jury returned a guilty verdict, the judge would conduct a sentencing hearing to decide the habitual criminal counts. *See* Colo. Rev. Stat. § 18-1.3-803 (2024).

With *Erlinger* hot off the press, Gregg filed a motion to dismiss his habitual counts. He argued, uncontroversially, that *Erlinger* confirmed his constitutional right to have a jury decide whether his prior convictions arose out of "separate and distinct criminal episodes." But Gregg didn't stop there: he also insisted that, because his original jury had been discharged, empaneling a new sentencing jury would violate his double jeopardy rights, even though no factfinder had ever addressed (let alone acquitted him of) those still-pending habitual sentencing counts.

The trial court agreed with Gregg, dismissed the habitual charges, and set the case for conventional sentencing. Meanwhile, the prosecution asked the Colorado Supreme Court to exercise its discretionary authority to immediately review the trial court's order. *See* Colo. R. App. P. 21. The prosecution argued that the Double Jeopardy Clause does not apply to noncapital sentencing hearings, citing *Monge v. California*, 524 U.S. 721 (1998).[2] The prosecution also explained that, even if the Double Jeopardy Clause were extended to

[2] In *Monge*, this Court acknowledged previous opinions applying the Double Jeopardy Clause to certain types of capital sentencing proceedings but refused to further expand the scope of the Clause to habitual sentencing proceedings. This Court explained that the capital sentencing cases "established a narrow exception to the general rule that double jeopardy principles have no application in the sentencing context." *Monge v. California*, 524 U.S. 730 (1998) (internal quotation marks omitted). The Court continued: "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 732 (internal quotation marks omitted).

that context, it would not prevent Gregg from being tried for the habitual counts for the *first* time.

The supreme court reversed the trial court's ruling. The bulk of the opinion was devoted to whether Colorado's Act—which designated the judge as the habitual factfinder—could operate within the constitutional limits outlined in *Erlinger*. Pet. App. 7a–13a. (The supreme court held that it could.)[3]

The opinion also explained that "the Double Jeopardy Clause does not bar a trial court from empaneling a second jury to determine a defendant's habitual criminal status." Pet. App. 19a. Gregg's petition insists (repeatedly) that the Colorado Supreme Court "relied exclusively on *Monge* in rejecting [Gregg's] double jeopardy claim." Pet. 9; *see also id.* at 2 ("Relying entirely on *Monge* * * *"), 9 ("relying expressly and only on *Monge*"), 10 ("The decision below * * * rests solely on the assumption that *Monge* remains good law."), 19 ("[T]he Colorado Supreme Court relied *only* on *Monge* in rejecting [Gregg's] double jeopardy claim * * *."), 21 ("[T]he decision below rests on *Monge* * * *."). Despite the petition's chorus, that's not exactly correct. The supreme court also recognized that double jeopardy "is implicated when jeopardy attaches at the first proceeding, that proceeding concludes, and the defendant is later exposed to a second proceeding (i.e., double jeopardy)." Pet. App. 18a. A trial involving habitual criminal counts in Colorado, however, is a single proceeding that's adjudicated in two phases: a trial on the substantive charge, and then, if there is a conviction, a trial on the habitual sentencing counts. *Id.* The supreme court

[3] As Gregg's petition acknowledges, that holding is not at issue here. Pet. 8 n.2.

explained that, since Gregg was still awaiting the first habitual adjudication in his first proceeding, there was no "second proceeding," and therefore "there is no double jeopardy concern." *Id.* (citing *People v. Hampton*, 876 P.2d 1236, 1241 (Colo. 1994)); *see also id.* at 19a ("Those habitual criminal counts remain pending, meaning they are part of a single, ongoing proceeding. Thus, there is no double jeopardy issue with empaneling a second jury to decide Gregg's habitual criminal counts.").

Accordingly, Gregg's habitual criminal charges were reinstated, and the case was remanded back to the trial court with instructions to hold a jury trial on those counts.[4]

Gregg has now filed a petition for certiorari. He urges this Court to overrule *Monge* and hold that the Double Jeopardy Clause applies to noncapital sentencing proceedings. His argument is this:

- *Monge* includes a brief section explaining, in response to Justice Scalia's dissenting opinion, that "facts that raise the penalty to which a defendant is subject are not 'element[s] of the offense' for purposes of the Fifth Amendment." *See* Pet. 2 (quoting *Monge*, 524 U.S. at 729).
- Two years after *Monge*, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), held that any facts that increase a defendant's sentencing exposure "*are* elements of an offense that must be tried to a

[4] After the case was remanded to the trial court, Gregg's habitual sentencing hearing was originally set for April 16, 2026. On April 1, however, Gregg filed (and the trial court granted) a motion to continue that proceeding to allow this Court to first rule on Gregg's petition. As of the filing of this brief, no factfinder—judge or jury—has ever weighed in on the habitual counts.

jury under the Sixth Amendment." Pet. 2 (citing *Apprendi*, 530 U.S. at 490).

- According to Gregg, these two conclusions are "irreconcilable." Pet. 2.
- Gregg believes this Court should overrule *Monge* and announce that the Fifth Amendment's double jeopardy protections apply to habitual sentencing proceedings. Pet. 3.

This Court has asked for a response to Gregg's petition. For the following reasons, that petition should be denied.

REASONS FOR DENYING THE PETITION

As an initial matter, Gregg overstates the tension between *Monge* and *Apprendi*. The *Apprendi* majority expressly rejected the notion that its ruling was inconsistent with *Monge*, describing the brief discussion from *Monge* that Gregg focuses on as not "part of reasoning essential to the Court's holding." *Apprendi*, 530 U.S. at 488 n.14 (internal quotation marks omitted).

Nor does *Sattazahn v. Pennsylvania* suggest any reconsideration of *Monge*, as Gregg's petition suggests. Pet. 3 (citing 537 U.S. 101, 111 (2003)). That opinion restated the well-established principle that the Double Jeopardy Clause applies to certain types of capital sentencing proceedings, using the framing and logic of *Apprendi*. *See Sattazahn*, 537 U.S. at 111–12. In doing so, however, this Court carefully limited the discussion to the capital sentencing context, consistent with *Monge*. *See id.*

But there's not much need to engage with Gregg's substantive argument, since his petition should be denied for a simple, straightforward reason: in Gregg's case, the debate over the proper scope of the Double

Jeopardy Clause is purely academic. Gregg is still waiting to have his *first* habitual sentencing hearing. Even if this Court were to extend double jeopardy protections to those proceedings, that ruling would not insulate him from facing jeopardy on his habitual charges for the first time.

For this Court to change the outcome of Gregg's case, it would need to go further than just overruling *Monge*. It would also have to announce *another* groundbreaking Fifth Amendment holding: that the Double Jeopardy Clause provides a defendant with the constitutional right to have *the same jury* decide both a substantive criminal offense and a habitual sentencing charge. But, as courts around the country uniformly agree, there is no legal (or logical) basis for that conclusion.

This Court should decline the opportunity to issue what would amount to an advisory opinion on the scope of the Fifth Amendment. The petition should be denied.

I. If this Court is considering reexamining *Monge*, this isn't the case for it.

A. There is no constitutional right to have the same jury decide substantive charges and habitual sentencing proceedings.

The petition gives this issue little attention. Pet. 19–21. Instead, it simply declares, "it is plain that empaneling a new jury to hear [Gregg's] case would place him twice in jeopardy for the same offense." Pet. 19. If that legal conclusion is plain, its origin remains a mystery: the petition doesn't identify a single case from any jurisdiction holding that the Double Jeopardy Clause requires a unitary jury proceeding for both

substantive criminal charges and habitual sentencing determinations.

Certainly, this Court has never even hinted that this is some sort of constitutional mandate. To the contrary, it has repeatedly approved of this type of bifurcated criminal trial—and recognized that the two inquiries (i.e., the substantive crime and the habitual findings) are independent determinations within a single proceeding:

> Even though an habitual criminal charge does not state a separate offense, the determination of whether one is an habitual criminal is "essentially independent" of the determination of guilt on the underlying substantive offense. 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."

Oyler v. Boles, 368 U.S. 448, 452 (1962) (quoting *Chandler v. Fretag*, 348 U.S. 3, 8 (1954) and *Graham v. West Virginia*, 224 U.S. 616, 625 (1912)). Indeed, this Court has expressed its "[t]olerance for a spectrum of state procedures dealing with [the] common problem of [habitual offenders]"—and also acknowledged that, "[i]n some States [habitual proceedings] can be instituted even after conviction on the new substantive offense." *Spencer v. Texas*, 385 U.S. 554, 566 (1967).

There is also no legislative or judicial confusion on these points. Many States implement statutes and procedures that allow for situations where one jury will determine a substantive criminal offense, and a

different jury will evaluate habitual criminal charges.[5] Likewise, federal law allows for different juries to determine whether a defendant is guilty and whether that defendant should be subjected to the death penalty. 18 U.S.C. § 3593(b)(2)(C). Appellate state courts have also uniformly rejected the idea that double jeopardy requires the same jury to decide a substantive conviction and a sentencing enhancement.[6]

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[5] *See* Ala. Code § 13A-5-46(b), (g); Colo. Rev. Stat. § 18-1.3-803(1); Haw. Rev. Stat. § 712-1255(5); Kan. Stat. Ann. § 21-6620(d), (e); Ky. Rev. Stat. Ann. § 532.080(1); Mass. Gen. Laws ch. 278, § 11A; Miss. Code Ann. §§ 99-19-305(1), -355(1); Okla. Stat. tit. 22, § 929(B)(2); Or. Rev. Stat. § 136.792; S.D. Codified Laws § 23A-7-7; Va. Code Ann. § 19.2-295.1; W. Va. Code §§ 61-11-19, 62-8-4; Iowa R. Crim. P. 2.19(8)(c); Tex. Code Crim. P. Art. 37.07.

[6] *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."); *People v. Saunders*, 853 P.2d 1093, 1101 (Cal. 1993) (recognizing that the Double Jeopardy Clause "is designed to prevent an accused from being placed at risk more than once on a single charge; it is not concerned with whether, in a bifurcated trial, a single jury or multiple juries are utilized"); *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."); *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."); *Hankerson v. State*, 723 N.W.2d 232, 236–40 (Minn. 2006) (holding that a "proposed resentencing hearing," in which a sentencing jury would be convened on remand to comply with *Blakely v.*

This consistent rejection of Gregg's proposed rule makes sense, given that it finds no support in the Double Jeopardy Clause itself. Again, the Fifth Amendment states that "[n]o person shall * * * be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const., Amdt. 5. This Court has determined that this Clause provides criminal defendants with "three protections: 'It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.'" *Grady v. Corbin*, 495 U.S. 508, 516 (1990) (quoting *North*

Washington, 542 U.S. 296 (2004), did not violate the Double Jeopardy Clause, even though it would be a different jury than the underlying criminal conviction); *State v. Sawatzky*, 125 P.3d 722, 723 (Ore. 2005) (holding that, after a defendant's sentence was reversed on appeal for a *Blakely* violation, the trial court could empanel a sentencing jury to make findings on remand because it "[was] not a second prosecution," but rather "a sentencing hearing on remand—a continuation of a single prosecution"); *Stinchfield v. State*, 238 P.3d 858, 2008 WL 6113400, at *1–2 (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, at *18–19 (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"); *United States v. Vera*, 770 F.3d 1232, 1252–53 (9th Cir. 2014) (recognizing that "[s]entencing juries * * * are not unknown to the federal criminal justice system"); *People v. Williams*, 737 N.E.2d 230, 255 (Ill. 2000) (remanding a case for resentencing by a new jury after a defendant's death sentence was vacated and recognizing that there were no double jeopardy concerns); *Carruthers v. State*, 528 S.E.2d 217, 227 (Ga. 2000) (same).

Carolina v. Pearce, 395 U.S. 711, 717 (1969)). "These protections stem from the underlying premise that a defendant should not be twice tried or punished for the same offense." *Schiro v. Farley*, 510 U.S. 222, 229 (1994).

Again, Gregg has not yet faced *a single* sentencing proceeding (let alone *two* of them). Gregg's situation therefore implicates none of double jeopardy's three protections:

- he is not facing "a second prosecution for the same offense after acquittal," since he has never been acquitted of the pending habitual counts;
- he is not facing "a second prosecution for the same offense after conviction," since his original prosecution—which still awaits sentencing—is not yet complete; and
- he is not facing "multiple punishments for the same offense," since his sole punishment has yet to be decided.

See Pearce, 395 U.S. at 717. It's unclear how a sentencing jury deciding a habitual inquiry for the first time would put a defendant "twice in jeopardy" for "the same offense." U.S. Const., Amdt. 5; *Schiro*, 510 U.S. at 230 ("Schiro urges us to treat the sentencing phase of a single prosecution as a successive prosecution for purposes of the Double Jeopardy Clause. We decline to do so.").

Gregg points out that double jeopardy also protects against a second trial in one situation that doesn't involve a final judgment—namely, where the judge declares a mistrial without "manifest necessity." Pet. 19–21. He observes that allowing a "retrial" in this situation would interfere with a defendant's "valued

right to have his trial completed by a particular tribunal." *Id.* at 21 (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)).

Gregg tries to force this principle on his case, but the analogy doesn't fit. The rule "[p]revents a prosecutor or judge from subjecting a defendant to a *second prosecution* by discontinuing the trial when it appears that the jury might not convict." *Green v. United States*, 355 U.S. 184, 188 (1957) (emphasis added); *see also Crist v. Bretz*, 437 U.S. 28, 35 (1978) ("The basic reason for holding that a defendant is put in jeopardy even though the criminal proceeding against him terminates before verdict * * * is that the State with all its resources and power should not be allowed to make *repeated attempts to convict an individual for an alleged offense*." (internal quotation marks omitted) (emphasis added)); *Wade*, 336 U.S. at 688 ("Past cases have decided that a defendant * * * may be subjected to the kind of 'jeopardy' *that bars a second trial for the same offense* even though his trial is discontinued without a verdict." (emphasis added)). Here, Gregg is in no danger of being subjected to a "second trial for the same offense," so his "manifest necessity" analysis is inapt. To the extent Gregg is suggesting that double jeopardy applies whenever a jury is discharged without manifest necessity—regardless of the realities of a planned, bifurcated proceeding involving habitual sentencing charges—that would be exactly the sort of "rigid, mechanical rule" that this Court has "disparaged * * * in the interpretation of the Double Jeopardy Clause." *Serfass v. United States*, 420 U.S. 377, 390 (1975).

Ultimately, none of the concerns of the Fifth Amendment are implicated by a bifurcated trial with two different juries. To the contrary, a defendant can

only benefit from having a different jury determine the habitual sentencing phase. (After all, the first jury will have just found the defendant guilty of a crime.) That favorable dynamic is particularly true where evidence of the defendant's prior convictions has been introduced in the substantive phase for impeachment purposes. *See People v. Saunders*, 853 P.2d 1093, 1101 (Cal. 1993).

Gregg's proposed unitary jury rule would also frustrate prosecutions without promoting any purpose embodied in the Double Jeopardy Clause. Imagine, for example, that a jury convicts a defendant of a substantive crime in phase one of a trial, but deadlocks on habitual counts in phase two. What would happen next? Would the prosecution have to start the entire trial from scratch? Or would the prosecution have to forfeit the habitual enhancer and move forward with conventional sentencing, even though this Court "h[as] constantly adhered to the rule that a retrial following a 'hung jury' does not violate the Double Jeopardy Clause"? *See Richardson v. United States*, 468 U.S. 317, 324 (1984). That sort of windfall would be far afield from the "primary purpose" of the Fifth Amendment's prohibition on double jeopardy, which "protect[s] the integrity of a *final judgment*." *United States v. Scott*, 437 U.S. 82, 92 (1978) (emphasis added); *see also Crist*, 437 U.S. at 33 (referring to the English common-law rule that "a defendant has been put in jeopardy only when there has been a conviction or an acquittal—*after a complete trial*" (emphasis added)).

Even Justice Scalia's dissent in *Monge*—the very foundation of Gregg's argument—demonstrates the divide between what double jeopardy protects and what Gregg is currently facing. Justice Scalia warned that "[g]iving the State *a second chance* to prove [a defendant] guilty of [a habitual enhancer] would

violate the very core of the double jeopardy prohibition." *Monge*, 524 U.S. at 741 (Scalia, J., dissenting) (emphasis added). Here, the prosecution hasn't been given "a second chance" at anything. The Double Jeopardy Clause simply does not protect a defendant from facing a habitual criminal charge for the first time.

B. Because overruling *Monge* would not bar Gregg's first habitual sentencing hearing, the petition is asking for an advisory opinion on constitutional law.

If certiorari were granted in this case, any resulting opinion would clash with bedrock principles of constitutional authority and judicial restraint, regardless of how this Court would ultimately decide the merits. Article III provides federal courts with the power "to resolve not questions and issues but 'Cases' or 'Controversies.'" *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125, 132 (2011); U. S. Const., Art. III, §§ 1, 2. Accordingly, federal courts cannot "decide questions that cannot affect the rights of litigants in the case before them" or give "opinion[s] advising what the law would be upon a hypothetical state of facts." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (internal quotation marks omitted).

While the application of these principles may spark disagreement in some cases, this shouldn't be one of them. "[T]he oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (internal quotation marks omitted); *Coleman* v. *Miller*, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.) ("[I]t was not for courts to pass upon * * * abstract, intellectual problems but only if a concrete, living contest between adversaries called for the arbitrament of law."). This prohibition is acutely

applicable here, since Gregg is asking this Court to announce an expansion of the Fifth Amendment's scope in a case where he has suffered no Fifth Amendment injury. *See, e.g.*, *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality * * * unless such adjudication is unavoidable."); *Burton v. United States*, 196 U.S. 283, 295 (1905) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.").

The petition's position on why this case presents an issue of "national importance" actually shines a light on the disconnect between Gregg's proposed holding and his actual case. *See* Pet. 26–33. The petition's cautionary refrain is that, if the Court doesn't extend double jeopardy protections to habitual proceedings, defendants will face "repeated attempts by the prosecution after failure to win on the first try." Pet. 29 (citing *Erlinger*, 602 U.S. at 835), 30 ("Nothing in *Monge* prevents the prosecution from repeatedly asking different juries for the same sentencing enhancement, honing its trial strategies and perfecting its evidence through successive attempts at convincing a jury of the fact needed for the enhancement." (internal quotation marks omitted)), 31 ("[A]llowing prosecutors to retry a sentence enhancement previously rejected by the court following a defendant's successful appeal of an underlying conviction would place the defendant in * * * an incredible dilemma, which contravenes the purpose of the Double Jeopardy Clause." (internal quotation marks omitted), 23 ("Governments are perfectly able to prove sentencing factors on their first go, without the unfair advantage of a second bite at the

apple." (internal quotation marks omitted)). But here, the prosecution isn't seeking the "proverbial 'second bite at the apple'" that the Double Jeopardy Clause is designed to prohibit. *See Burks v. United States*, 437 U.S. 1, 17 (1978). Instead, the prosecution is still patiently waiting to present its evidence on the pending habitual charges *for the first time* in a case that has yet to reach final judgment.

This Court shouldn't issue a constitutional ruling based on hypothetical scenarios that other defendants might face in the future:

> Proceeding to decide the merits of possible constitutional challenges that could be brought by *other* plaintiffs is not necessary to resolve [a] case. Instead, any holding with respect to potential future plaintiffs would be "no more than an advisory opinion—which a federal court should never issue at all, and *especially* should not issue with regard to a constitutional question, as to which we seek to avoid even *non*advisory opinions."

Moody v. NetChoice, LLC, 603 U.S. 707, 755 (2024) (Thomas, J., concurring) (quoting *Chicago v. Morales*, 527 U.S. 41, 77 (1999) (Scalia, J., dissenting)).

If this Court were to ever consider extending double jeopardy principles to habitual sentencing proceedings, it should be in a case where a defendant is actually facing some sort of repeat adjudication of his habitual charges. Until that case presents itself, the issue is not appropriate for review.

CONCLUSION

For these reasons, the petition should be denied.

Respectfully submitted,

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April 24, 2026