

No. 25-891

In the Supreme Court of the United States

ANDREW BURGESS GREGG,

Petitioner,

v.

COLORADO,

Respondent.

**On Petition for a Writ of Certiorari to
the Colorado Supreme Court**

REPLY BRIEF FOR PETITIONER

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PARTIES TO THE PROCEEDING

The disclosure statement included in the petition remains accurate.

TABLE OF CONTENTS

PARTIES TO THE PROCEEDINGi

A. The decision below rests on *Monge*. 1

B. The decision below is inconsistent with
Apprendi..... 3

C. The State’s practical arguments against
review are unfounded. 7

CONCLUSION 11

TABLE OF AUTHORITIES

| | Page(s) |
|---|-------------------|
| Cases | |
| <i>Alleyne v. United States</i> , 570 U.S. 99 (2013)..... | 2, 6 |
| <i>Almendarez-Torres v. United States</i> , 523 U.S. 224 (1998)..... | 3 |
| <i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000)..... | 1-4, 11 |
| <i>Carruthers v. State</i> , 528 S.E.2d 217 (Ga. 2000) | 9 |
| <i>Crist v. Bretz</i> , 437 U.S. 28 (1978)..... | 5, 7 |
| <i>Erlinger v. United States</i> , 602 U.S. 821 (2024)..... | 1, 3-6, 8, 10, 11 |
| <i>Hankerson v. State</i> , 723 N.W.2d 232 (Minn. 2006)..... | 9 |
| <i>Harris v. French</i> , 182 F.3d 907 (4th Cir. 1999)..... | 10 |
| <i>Monge v. California</i> , 524 U.S. 721 (1998)..... | 1-3, 6 |
| <i>Oyler v. Boles</i> , 368 U.S. 488 (1962)..... | 7 |
| <i>People v. Mason</i> , 643 P.2d 745 (Colo. 1982) | 6 |
| <i>People v. Williams</i> , 737 N.E.2d 230 (Ill. 2000)..... | 9 |
| <i>Sattazahn v. Pennsylvania</i> , 537 U.S. 101 (2003)..... | 3, 4 |

TABLE OF AUTHORITIES—continued

| | Page(s) |
|---|----------------|
| <i>Schiro v. Farley</i> , 510 U.S. 222 (1994) | 8 |
| <i>Sevier v. Commonwealth</i> , 434 S.W.3d 443 (Ky. 2014) | 10 |
| <i>Spencer v. Texas</i> , 385 U.S. 554 (1967) | 7, 8 |
| <i>State v. Sawatzky</i> , 125 P.3d 722 (Or. 2005) | 9 |
| <i>Stinchfield v. State</i> , 238 P.3d 858 (Nev. 2008) | 9 |
| <i>United States v. Vera</i> , 770 F.3d 1232 (9th Cir. 2014) | 9 |
| <i>Wade v. Hunter</i> , 336 U.S. 684 (1949) | 1, 5 |
| Constitutions and Statutes | |
| U.S. Const. amend. V. | 1, 4-5, 10 |
| U.S. Const. amend. VI. | 1, 4, 10-11 |
| 18 U.S.C. § 3593 | 8 |
| Ala. Code § 13A-5-46(b) | 9 |

REPLY BRIEF FOR PETITIONER

The petition shows that the decision below relied on *Monge* to hold that habitual-offender sentencing proceedings do not place the defendant in jeopardy for an “offense.” The petition also shows that the Colorado Supreme Court misunderstood *Apprendi* and *Erlinger*, which make clear that a recidivism enhancement *is* an element of the substantive offense.

The State now barely denies those points. Instead, it insists that a second jury may be empaneled to resolve charges on any element of the offense that a first jury failed to consider. But that assertion is wrong. A defendant is entitled to “have his trial completed by a particular tribunal.” *Wade*, 336 U.S. at 689. A judge may not “even *empanel*[]” a jury when the defendant already has faced trial “on the charged crime” (*Erlinger*, 602 U.S. at 845), as occurred here. And the State would leave intact a ruling that confuses the law by misstating the relationship between the Fifth and Sixth Amendments. This Court’s review is warranted.

A. The decision below rests on *Monge*.

1. The petition noted that the decision below relied exclusively on *Monge*’s holding that recidivism sentence enhancements are not elements of the “offense” for double-jeopardy purposes. Pet. 8-9. The State suggests, halfheartedly, that “that’s not exactly correct.” Opp. 3. The State is wrong.

The Colorado Supreme Court could not have been clearer that its rejection of petitioner’s double-jeopardy claim relied only on *Monge*. The court explained that *Monge* had led it to reverse its own prior rule that recidivism sentence enhancements *do* trigger double-jeopardy protections (Pet. App. 15a); that, in its view, *Monge* “remained good law post-*Apprendi*” (*ibid.*); and

that *Erlinger* “did not overrule *Monge*.” *Id.* at 17a; see *id.* at 19a. The Colorado Supreme Court therefore pointed to *Monge* in stating—*three times*—“that double jeopardy protections do not apply to habitual criminal sentencing proceedings because those proceedings ‘do not place a defendant in jeopardy for an “offense.”’” *Id.* at 18a (quoting *Monge*, 524 U.S. at 728); see *id.* at 15a (quoting *Monge*), 19a (paraphrasing *Monge*). For good measure, the court added that “[w]e have interpreted the Colorado Constitution in the same manner.” *Id.* at 18a.

To be sure, as the State notes (Opp. 3-4), the Colorado court opined that there was no second proceeding here because “the entire process of conviction” was not yet complete. Pet. App. 18a (citation omitted). But that observation was simply an application of the *Monge* rule, necessarily turning on the understanding that habitual-offender status is *not* an element of the substantive offense that already had been tried. If eligibility for a recidivism sentence enhancement *is* an element of the offense that already has been tried—that is, if *Monge*’s contrary holding is incorrect—jeopardy has attached. The State’s invocation of the Colorado court’s statement that there has not been a second proceeding therefore does nothing to detract from the centrality of *Monge* to the holding below.

2. The State also is wrong in its (equally halfhearted) suggestion that the petition “overstates the tension between *Monge* and *Apprendi*.” Opp. 5. As this Court has noted repeatedly, “[c]onsistent with common-law and early American practice, *Apprendi* concluded that any ‘facts that increase the prescribed range of penalties to which a criminal defendant is exposed’ are elements of the crime.” *Alleyne*, 570 U.S. at 111 (quoting *Apprendi*, 530 U.S. at 490); see

Sattazahn, 537 U.S. at 111; Pet. 11; see also *Erlinger*, 602 U.S. at 833-834. In contrast, *Monge* was premised on express *rejection* of “an absolute rule that a[] [sentence] enhancement constitutes an element of the offense any time that it increases the maximum sentence.” 524 U.S. at 729. We elaborate in the petition on that “tension,” which has been widely noted (see Pet. 10-15); the State offers no response.¹

B. The decision below is inconsistent with *Apprendi*.

This takes us to the State’s central contention: that jeopardy has not yet attached in this case—and consequently that there is no need to address the vitality of *Monge*—because petitioner “is still waiting to have his *first* habitual sentencing hearing.” Opp. 6. The State repeats this point on virtually every page of its opposition, insisting that double jeopardy is not implicated here because petitioner “has not yet faced a *single* sentencing proceeding.” *Id.* at 10; see *id.* at 5-13. The State is of course correct that the habitual-

¹ The State points to a footnote in *Apprendi* that it characterizes as “reject[ing] the notion that [*Apprendi*’s] ruling was inconsistent with *Monge*.” Opp. 5 (citing 530 U.S. at 488 n.14). But *Apprendi* certainly did not endorse *Monge*’s “reject[ion] [of] an absolute rule that an enhancement constitutes an element of the offense any time that it increases the maximum sentence.” *Monge*, 524 U.S. at 729. It was the *Apprendi* dissent that relied on this holding of *Monge*. See 530 U.S. at 524, 536 (O’Connor, J., dissenting). In contrast, the footnote from the *Apprendi* majority cited by the State took pains to distance the issue in *Monge* from that presented in *Apprendi* (for reasons specific to the California law applied in *Monge*); and the *Apprendi* majority was clear that it *rejected* *Monge*’s “absolute rule” as improperly resting on a decision (*Almendarez-Torres v. United States*, 523 U.S. 224 (1998)) that “simply cannot bear that broad reading.” 530 U.S. at 488 n.14.

offender determination has not yet been made, but its conclusion does not follow: to the contrary, the State is simply embracing the constitutional error committed by the Colorado Supreme Court.

The State's argument assumes that the recidivism finding is a "sentencing proceeding" that is, for constitutional purposes, a separate process from the constitutionally required jury trial on the elements of the offense. The precise nature of the State's theory in making this assertion is not entirely clear. But whatever the State means to argue, it is incorrect.

First, the State may mean to contend that the habitual-offender determination is not an element of the underlying offense. See Opp. 11 (petitioner is "in no danger of being subjected to a 'second trial for the same offense'"). But if that is the State's argument, it is flatly inconsistent with the *Apprendi* line of decisions, which (as just noted) rejected that argument.

Second, the State may mean to suggest that the *Apprendi* doctrine governs only the Sixth Amendment's jury-trial guarantee and is inapplicable to the understanding of "offense" that controls under the Fifth Amendment's Double Jeopardy Clause. But that theory, too, is wrong. As noted in the petition (at 3, 12-13), the Fifth and Sixth Amendments "provide a defendant with entirely complementary protections at a different stage of the proceedings." *Erlinger*, 602 U.S. at 845. There is "no principled reason to distinguish * * * between what constitutes an offense for purposes of the Sixth Amendment's jury-trial guarantee and what constitutes an 'offence' for purposes of the Fifth Amendment's Double Jeopardy Clause." *Sattazahn*, 537 U.S. at 111 (opinion of Scalia, J.).

Third, the State may mean simply that, even if the recidivism finding *is* an element of the underlying offense, “[t]here is no constitutional right to have the same jury decide substantive charges and habitual sentencing proceedings.” Opp. 6 (bolding omitted). This may be the State’s central argument: that a jury finding leading to an enhanced sentence somehow is an “independent determination[]” that, although occurring after the substantive conviction and discharge of the convicting jury, may be made by a different jury than the one determining other elements of the offense. Opp. 4, 6-7.

But this view, if it is the State’s view, departs from core double-jeopardy principles. As explained in the petition (at 19-20), it is fundamental that jeopardy attaches when a jury is empaneled to try an “offense,” and empaneling a new jury to try the same “offense” after dismissal of the first jury is the definition of a double-jeopardy violation. For that reason, “[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.” *Erlinger*, 602 U.S. at 845. This rule protects a “defendant’s ‘valued right to have his trial completed by a *particular* tribunal.’” *Crist*, 437 U.S. at 36 (emphasis added) (quoting *Wade*, 336 U.S. at 689). And here, in *Erlinger*’s words, the habitual-offender determination *is* an element of the “charged crime,” petitioner “has already faced trial” on that charged crime, jeopardy attached at that time—and another trial on an element of that offense, before a separate jury, would be double jeopardy.

Although the State expresses surprise at this conclusion (Opp. 6-7), it is hardly novel. As we show in

the petition (at 20), that was the common-law understanding of double jeopardy. Indeed, as we also note, it was the express rule *in Colorado* prior to *Monge*. Pet. 20. At that time, in circumstances closely analogous to those here, the Colorado Supreme Court—applying this Court’s precedent—held that “double jeopardy principles” prevented trial of a defendant on a habitual-offender count after discharge of the jury that had returned a verdict on the substantive count, even where the first jury had not yet considered habitual-offender status. *People v. Mason*, 643 P.2d 745, 754-755 (Colo. 1982). The Colorado Supreme Court subsequently changed its rule to allow for a post-verdict finding of habitual-offender status—in response to *Monge*. See Pet. App. 15a; Pet. 8, 20.²

And consider the implications of the State’s proposed approach. Because nothing about the State’s theory is unique to recidivism enhancements, it would allow a new trial before a separate jury of *every* offense element involving the finding of a “fact that increases’ a defendant’s exposure to punishment.” *Erlinger*, 602 U.S. at 833 (quoting *Alleyne*, 570 U.S. at 111-113). In every case involving the possibility of such a sentence enhancement, the state could first try the underlying offense and then empanel a separate jury (or separate juries, if there is more than one possible enhance-

² The State notes Justice Scalia’s observation, in *Monge*, that California already had made an attempt to establish recidivism in that case. Opp. 12-13. That is so. But this does not detract from the relevance here of Justice Scalia’s explanation that “[t]he fundamental distinction between facts that are *elements* of a criminal offense and facts that go only to the *sentence* provides the foundation for our entire double jeopardy jurisprudence.” 524 U.S. at 738 (Scalia, J., dissenting). That distinction makes double-jeopardy protections applicable here.

ment) to address the additional offense elements *seriatim*. Indeed, under this approach the prosecution could, for example, convict a defendant of manslaughter and then pile on, trying a new charge of premeditated murder before a second jury. In the State's telling, there would be no double-jeopardy problem with this approach because, not yet having attempted to prove premeditation, "the prosecution hasn't been given 'a second chance' at anything." Opp. 13 (citation omitted). But such a regime would be plainly inconsistent with "the federal rule that jeopardy attaches when the jury is empaneled and sworn." *Crist*, 437 U.S. at 36.

C. The State's practical arguments against review are unfounded.

The State also offers a hodgepodge of additional arguments against review: that this Court supposedly has approved the use of multiple juries; that existing practice routinely has one jury resolve a substantive offense and another determine eligibility for a sentence enhancement; and that state courts uniformly have rejected double jeopardy claims in these circumstances. All these arguments are wrong.

First, the State is incorrect in its veiled suggestion that the Court "has repeatedly approved of this type of bifurcated criminal trial." Opp. 7. Although the State's primary authority (*Oyler v. Boles*, 368 U.S. 488 (1962)) did involve a recidivism sentence enhancement, that pre-*Apprendi* decision had nothing to do with the issue presented here; the language quoted by the State addressed the defendant's argument that insufficient notice of the consequences of a recidivism finding denied him due process. See 368 U.S. at 452-454. The other (pre-*Apprendi*) authority upon which the State relies (*Spencer v. Texas*, 385 U.S. 554 (1967))

is even further afield, rejecting the argument that introduction during trial of evidence of a prior conviction denied the defendant due process; in that case, the same jury made findings regarding the underlying offense and recidivism. See *id.* at 558-559, 563-564.³ These decisions say nothing about the double-jeopardy question in this case.

Second, the State is wrong in contending that it is routine for different juries to decide substantive charges and eligibility for recidivism enhancement. Opp. 7-8. *Erlinger* makes clear that the usual practice (endorsed, in that case, by the United States) is for a *single* jury to address the substantive charge and, “if [that jury] finds the defendant guilty, the[n] turn[] to consider evidence regarding” recidivism. 602 U.S. at 847. Most of the statutes invoked by the State (Opp. 7-9) are wholly consistent with this understanding. The federal death-penalty statute, for example, provides that the sentencing hearing is held “before the jury that determined the defendant’s guilt” unless that jury “was discharged for good cause”—that is, unless there is a manifest necessity to empanel a new jury. 18 U.S.C. §§ 3593(b)(1), (b)(2)(C). Some of the state laws cited by the State similarly provide that, “[i]f the defendant was tried and convicted by a jury,

³ We also note that some observations in *Spencer* are no longer good law. The Court there stated that certain jurisdictions left the recidivism determination to the judge and not the jury (see 385 U.S. at 566); that approach is unconstitutional under *Erlinger*. The State likewise gets no mileage from *Schiro v. Farley*, 510 U.S. 222 (1994) (cited at Opp. 10). There, the judge had the authority to impose a capital sentence, and did so after hearing sentencing evidence along with an advisory jury. 510 U.S. at 226-227. There was no suggestion that the judge made findings as to an element of the offense. The Court’s approval of that procedure has no application to this case.

the sentence hearing shall be conducted *before that same jury* unless it is impossible or impracticable to do so.” Ala. Code § 13A-5-46(b) (emphasis added).⁴ Of course, states sometimes may make use of a second jury, as when required by manifest necessity or when the defendant consents. See Pet. 20. But the court below did not rely on any such consideration, and the State seems to agree that there was no manifest necessity for dismissing the first and empaneling a new jury here simply because this was a “planned, bifurcated proceeding.” Opp. 11.

Third, the State is wrong to assert that state courts have “uniformly rejected the idea that double jeopardy requires the same jury to decide a substantive conviction and a sentencing enhancement.” Opp. 8-9 & n.6 (citing cases). Actually, the State cites *no* post-*Appendi* decision standing for that proposition.⁵

⁴ A few statutes cited by the State do contemplate use of a separate jury to address recidivism. See Opp. 8 n.5 (citing statutes from Hawaii, Massachusetts, West Virginia, and Iowa). But others cited by the State, like the Alabama statute quoted in text, allow empaneling of a second jury only if use of the first is impossible or impracticable. See *ibid.* (citing statutes from Kentucky and Mississippi). Still other statutes cited by the State have no bearing on the issue here: Oregon (addressing sentencing after remand); South Dakota (permitting use of a second jury “at the request of the defendant”); Virginia (addressing sentence after remand, and not addressing sentence enhancement); Texas (not addressing sentence enhancement).

⁵ Some of the decisions it does cite involved resentencing on remand. *Hankerson v. State*, 723 N.W.2d 232 (Minn. 2006); *State v. Sawatzky*, 125 P.3d 722, 723 (Or. 2005); *People v. Williams*, 737 N.E.2d 230, 255 (Ill. 2000); *Carruthers v. State*, 528 S.E.2d 217, 227 (Ga. 2000), overruled by *Vergara v. State*, 657 S.E.2d 863 (Ga. 2008). Others involved sentencings that were not element-of-the-offense enhancements. *United States v. Vera*, 770 F.3d 1232, 1252-1253 (9th Cir. 2014); *Stinchfield v. State*, 238

Fourth, the State offers a number of practical or policy concerns that, it claims, favor “a bifurcated trial with two different juries.” Opp. 11-12. It suggests, for example, that defendants would benefit from use of separate juries. But this Court addressed, and rejected, precisely that argument in *Erlinger*, explaining that “traditional tools exist to address the prejudicial effect evidence about a defendant’s past crimes can have on a jury.” 602 U.S. at 847. The State also professes confusion about the resolution of hypothetical situations that could arise with the proper application of double-jeopardy principles. Opp. 12. But these situations have not proved unworkable, even though (as we have explained) the use of a single jury to resolve substantive and enhancement questions is commonplace. In any event, such “arguments from efficiency cannot alter the demands of the Fifth and Sixth Amendments.” *Erlinger*, 602 U.S. at 847.

Finally, the State’s contention that reversal here would be an advisory opinion is perplexing. Opp. 13-15. Our contention is that jeopardy has attached, “even *empaneling* a jury” is impermissible (*Erlinger*, 602 U.S. at 845), and further proceedings therefore are precluded. That is just what the trial court properly held below. There would be nothing advisory about that ruling.

Ultimately, the problem presented here is familiar. This Court has repeatedly stepped in to correct

P.3d 858, 2008 WL 6113400, at *1-2 (Nev. 2008). And still others involved one-off situations that don’t assist the State. *Harris v. French*, 182 F.3d 907, 1999 WL 496941, at *18-19 (4th Cir. 1999) (new jury after counsel replaced), abrogated by *McCarver v. Lee*, 221 F.3d 583 (4th Cir. 2000); *Sevier v. Commonwealth*, 434 S.W.3d 443, 464 n.57 (Ky. 2014) (no enhancement issues decided).

misapplication of the *Apprendi* doctrine by lower courts that have resisted it. See *Erlinger*, 602 U.S. at 833-834. This case is the latest in that line. The result should be the same: the Court should grant review to affirm the governing constitutional principle and bring clarity to Fifth and Sixth Amendment law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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