No. A-

In the Supreme Court of the United States

ANDREW BURGESS GREGG,

Applicant,

v.

PEOPLE OF THE STATE OF COLORADO,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

To the Honorable Neil M. Gorsuch, Associate Justice and Circuit Justice for the United States Court of Appeals for the Tenth Circuit:

Pursuant to 28 U.S.C. § 2101(d) and Rule 13.5 of the Rules of this Court, applicant Andrew Burgess Gregg respectfully requests a 30-day extension of time, to and including January 27, 2026, within which to file a petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Colorado in this case.

The Colorado Supreme Court issued its judgment on September 29, 2025. Unless extended, the time to file a petition for a writ of certiorari will expire on December 28, 2025. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1257(a). A copy of the Colorado Supreme Court's opinion is attached.

1. Applicant Andrew Burgess Gregg was charged in Colorado state court with several criminal offenses (the "substantive counts"), as well as four "habitual criminal counts" alleging that he had committed prior felonies. Under Colorado law, if a jury

convicted applicant of the substantive offenses, a further finding that he had committed the prior offenses would expose him to a substantial additional penalty as a habitual offender. App., *infra*, A5-A6, A9. The jury did return a conviction on the substantive offenses. Applying then-existing Colorado procedure, the trial court discharged the jury and set a hearing so that the judge could himself make the fact-finding necessary to resolve the habitual counts. *Id*. at 5.

Before the trial court could hold that hearing, however, this Court decided *Erlinger* v. *United States*, 602 U.S. 821 (2024). The Court there held that the U.S. Constitution's Sixth Amendment requires that a jury make the determination whether a defendant had committed prior crimes triggering enhanced punishment under the Armed Career Criminal Act, a federal statute that in relevant part is substantially identical to Colorado's habitual criminal sentencing scheme. The trial court in this case therefore held that, under *Erlinger*, the determination of applicant's habitual offender status would have to be made by a jury. But, the court continued, because jeopardy already had attached, empaneling a second jury in the same case to make the habitual offender determination would violate applicant's double jeopardy rights. The trial court therefore ordered the habitual offender counts dismissed. App. *infra*, at A7.

The State challenged this ruling in an original proceeding before the Colorado Supreme Court, which reversed. That Court relied on *Monge* v. *California*, 524 U.S. 721 (1998), which had held that the Double Jeopardy Clause is inapplicable to noncapital sentencing proceedings because "the [sentencing] determinations at issue

do not place a defendant in jeopardy for an 'offense.'" *Id*. at 728. See App.*, infra*, A17-A18. The court below noted applicant's argument that *Monge* could not be reconciled with this Court's more recent decisions in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), *Erlinger*, and other rulings holding that any facts that "'increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime." *Alleyne* v. *United States*, 570 U.S. 99, 111 (2013) (quoting *Apprendi*, 530 U.S. at 490). See App., *infra*, A19-A20. But the Colorado court rejected that view, observing that "the *Erlinger* court did not overrule *Monge*" and therefore that *Erlinger* "does not disrupt the well-settled precedent that double jeopardy protections do not apply in habitual criminal sentencing proceedings." *Id*. at A20, A22. Accordingly, the court below found dispositive *Monge*'s holding that sentencing "proceedings do not place a defendant in jeopardy for an offense." *Id*. at A20 (quoting *Monge*, 524 U.S. at 728) (internal quotation marks omitted).

2. The petition for a writ of certiorari will argue that review is warranted because the holding of *Monge* cannot be reconciled with the Court's more recent decisions. In *Monge*, decided by a vote of five-to-four, the Court rejected "an absolute rule that an enhancement constitutes an element of the offense any time that it increases the maximum sentence." 524 U.S. at 729. But just two years later, in *Apprendi*, the Court substantially repudiated that conclusion, holding that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. This change in approach has been widely

acknowledged; dissenting in *Apprendi*, Justice O'Connor recognized that the decision "will surely be remembered as a watershed change in constitutional law." *Id.* at 524 (O'Connor, J., dissenting). In the succeeding years the Court repeatedly has applied and expanded *Apprendi*, most recently in *Erlinger*.

The reasoning of *Monge* is inconsistent with the *Apprendi* line of decisions. As noted, *Monge* does *not* accept that a sentence "enhancement constitutes an element of the offense" when "it increases the maximum sentence to which a defendant is exposed." 524 U.S. at 729. In contrast, *Apprendi* and subsequent decisions *embrace* that understanding in applying the Sixth Amendment jury-trial right. And as a plurality of the Court has recognized, 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* v. *Pennsylvania*, 537 U.S. 101, 111 (2003) (plurality opinion). See *Erlinger*, 602 U.S. at 845 ("The Fifth and Sixth Amendments' jury trial rights provide a defendant with entirely complementary protections * * * 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."); see also *Monge*, 524 U.S. at 738 (Scalia, J., dissenting); *United States* v. *Blanton*, 476 F.3d 767, 772 (9th Cir. 2007) ("in *Monge* the Court found it significant that the sentencing enhancement at issue was not part of the offense, noting that the Court had rejected 'an absolute rule that an enhancement constitutes an element of the offense any time that it increases the

maximum sentence to which a defendant is exposed.' * * * But in *Apprendi* the Court embraced precisely that rule.").

As the Court explained in *Erlinger*, the "principles [of] *Apprendi* and *Alleyne* * * * are now so firmly entrenched" that the Court has "overruled several decisions inconsistent with them." 602 U.S. at 833-34. See*, e.g.*, *Ring* v. Arizona, 536 U.S. 584, 609 (2002) (overruling *Walton* v. *Arizona*, 497 U.S. 639 (1990)); *Alleyne*, 570 U.S. at 116 (overruling *Harris* v. *United States*, 536 U.S. 545 (2002)); *Hurst* v. *Florida,* 577 U.S. 92, 102 (2016) (overruling *Hildwin* v. *Florida*, 490 U.S. 638 (1989) and *Spaziano* v. *Florida*, 468 U.S. 447 (1984)). The petition will argue that the Court should now give similar consideration to rethinking the status of *Monge*.

3. Applicant requests this extension of time to file the petition for a writ of certiorari because undersigned counsel had no involvement in the case before the Colorado state courts. Counsel accordingly seeks additional time to review and familiarize himself with the record and with the complex issues presented here.

In addition, counsel primarily responsible for preparing the petition also has responsibility for a number of other matters with proximate due dates, including: *Alban Osio* v. *Maduro*, No. 25-12365 (11th Cir.), brief for appellees, filed Dec. 8; *American Trucking Ass'ns, Inc.* v. *Alviti*, No. 18-378 (D.R.I.), objections to magistrate report, due Dec. 16; *United States* v. *Hemani*, No. 24-1234 (U.S. Sup. Ct.), *amicus* brief, due Dec. 19; and *HBK Master Fund L.P. v. Newrez LLC*, No. 2025-04926 (N.Y. App. Dev.), appellees' brief, due Jan. 7, 2025. Accordingly, an extension of time is warranted.

For the foregoing reasons, the application for a 30-day extension of time, to and including January 27, 2026, within which to file a petition for a writ of certiorari in this case should be granted.

Respectfully submitted.

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