The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2025 CO 57

Supreme Court Case No. 24SA272
Original Proceeding Pursuant to C.A.R. 21
Mesa County District Court Case No. 23CR289
Honorable Matthew D. Barrett, Judge

In Re
Plaintiff:

The People of the State of Colorado,

v.

Defendant:

Andrew Burgess Gregg.

Order Made Absolute
en banc
September 29, 2025

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JUSTICE BOATRIGHT delivered the Opinion of the Court, in which **JUSTICE GABRIEL**, **JUSTICE HART**, **JUSTICE SAMOUR**, and **JUSTICE BERKENKOTTER** joined.

CHIEF JUSTICE MÁRQUEZ, joined by **JUSTICE HOOD**, concurred in part and dissented in part.

JUSTICE BOATRIGHT delivered the Opinion of the Court.

¶1 In this original proceeding, we consider two issues: (1) how trial courts should resolve the interaction between the prior version of Colorado's habitual criminal sentencing statute, § 18-1.3-803, C.R.S. (2024), and *Erlinger v. United States*, 602 U.S. 821 (2024); and (2) whether the Double Jeopardy Clause bars a trial court from empaneling a second jury to determine a defendant's habitual criminal status. The parties agree that section 18-1.3-803 (the "sentencing statute") previously required a judge to make habitual criminal findings, whereas *Erlinger* requires a jury to make those findings.

¶2 Nevertheless, the People contend that the sentencing statute and *Erlinger* are compatible because a jury could *first* adjudicate the habitual criminal counts (satisfying *Erlinger*), and *then* a judge could confirm or reject those findings (satisfying the sentencing statute). They also posit that, in this case—where a jury found Andrew Burgess Gregg guilty of substantive crimes but did not decide his habitual counts—a new jury can determine those counts without violating his double jeopardy rights. Gregg counters that the sentencing statute is unconstitutional under *Erlinger*. Alternatively, Gregg argues that the Double Jeopardy Clause prevents a court from empaneling a new jury to decide a

defendant's habitual criminal charges after it has discharged the jury that issued a verdict on the substantive offenses.[1]

¶3 We agree with the People. Accordingly, we hold that Colorado's former habitual criminal sentencing statute is not facially unconstitutional and can operate within the constitutional limits set forth in *Erlinger*. We also hold that, here, the Double Jeopardy Clause does not bar a trial court from empaneling a second jury to determine a defendant's habitual criminal status.

¶4 Therefore, we make the order to show cause absolute and reinstate Gregg's habitual criminal charges so a jury can assess them.

I. Facts and Procedural History

¶5 The People charged Gregg with aggravated robbery, attempt to influence a public servant, and false reporting. They also brought four habitual criminal counts under section 18-1.3-801, C.R.S. (2024),[2] alleging that Gregg had committed four prior felonies. A jury convicted Gregg of robbery, attempt to influence a public servant, and false reporting. The trial court then discharged the jury and set a habitual criminal hearing to determine the habitual criminal counts.

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[1] The trial court, as a respondent, primarily agrees with Gregg's double jeopardy argument. It alternatively asks us to remand the case for it to address the constitutionality of the sentencing statute in the first instance.

[2] This version of the statute was in effect when the underlying events of this case occurred.

¶6 Before the court held the habitual criminal hearing, the United States Supreme Court announced *Erlinger*, which addressed the Armed Career Criminal Act ("ACCA"). 602 U.S. at 825. The ACCA mandates enhanced sentences for defendants who have three prior convictions for violent felonies or serious drug offenses "committed on occasions different from one another." 18 U.S.C. § 924(e)(1). *Erlinger* held that defendants are "entitled to have a jury resolve ACCA's occasions inquiry unanimously and beyond a reasonable doubt." 602 U.S. at 835.

¶7 Relying on *Erlinger*, Gregg moved to dismiss his habitual criminal counts. He argued that *Erlinger* precluded the trial court from finding him a habitual criminal under section 18-1.3-801(2)(a)(I), which escalates the sentence for a defendant who has been "three times previously convicted, upon charges separately brought and tried, and arising out of separate and distinct criminal episodes." Gregg further argued that empaneling a new jury to make this finding would violate the Double Jeopardy Clause. The People opposed Gregg's motion, asserting that jeopardy had not attached to the habitual criminal counts. The People thus argued that the court could first determine whether Gregg was *the person* who was previously convicted; if so, the court could then empanel a second jury to determine whether those prior convictions stemmed from separate and distinct episodes.

¶8 The trial court granted Gregg's motion to dismiss his habitual criminal counts. Without addressing whether *Erlinger* rendered the sentencing statute unconstitutional, the court found that it could not empanel a second jury to assess the habitual criminal counts because jeopardy had attached.

¶9 The People then sought relief under C.A.R. 21, and we issued an order to show cause.

II. Jurisdiction and Standard of Review

¶10 C.A.R. 21 grants this court "sole discretion to exercise our original jurisdiction." *People v. Justice*, 2023 CO 9, ¶ 17, 524 P.3d 1178, 1182 (quoting *People v. Cortes-Gonzalez*, 2022 CO 14, ¶ 21, 506 P.3d 835, 842). However, "[r]elief under this rule is extraordinary in nature and . . . will be granted only when no other adequate remedy is available." C.A.R. 21(a)(2). Previously, we have exercised our discretion under Rule 21 "when an appellate remedy would be inadequate, when a party may otherwise suffer irreparable harm, [or] when a petition raises 'issues of significant public importance that we have not yet considered.'" *People v. Walthour*, 2023 CO 55, ¶ 8, 537 P.3d 371, 374 (alteration in original) (quoting *People v. Kilgore*, 2020 CO 6, ¶ 8, 455 P.3d 746, 748).

¶11 The People argue that this case is one of first impression and of significant public importance. We agree. Determining the relationship between *Erlinger* and the sentencing statute will affect matters of significant public importance—the

constitutionality of our sentencing statute and its impact on habitual criminal charges in Colorado. Therefore, we choose to exercise our jurisdiction.

¶12 As for the standard of review, trial courts generally have broad discretion when imposing sentences, decisions that "will not be overturned absent a clear abuse of that discretion." *Lopez v. People*, 113 P.3d 713, 720 (Colo. 2005). However, when a sentencing decision involves constitutional issues, the standard of review is de novo. *Id.* Here, the trial court's decision implicates Gregg's constitutional right to a jury. Thus, we review the trial court's decision de novo.

¶13 In construing the sentencing statute, our analysis must "seek to ascertain and give effect to the General Assembly's intent." *McBride v. People*, 2022 CO 30, ¶ 23, 511 P.3d 613, 617. In doing so, we must construe the statute "to avoid constitutional conflicts if possible." *Lopez*, 113 P.3d at 728 (citing *People v. Holmes*, 959 P.2d 406, 415 (Colo. 1998)). Thus, "if a challenged statute is capable of several constructions, one of which is constitutional, the constitutional construction must be adopted." *People v. Schoondermark*, 699 P.2d 411, 415 (Colo. 1985).

III. Analysis

¶14 The People's petition presents two issues, and we address each in turn. First, we assess the interplay between the prior version of Colorado's habitual criminal sentencing statute and *Erlinger*, ultimately determining that this prior version of the habitual criminal sentencing statute remains constitutional. Second,

we examine Gregg's double jeopardy concerns and conclude that double jeopardy issues do not prevent a second jury from deciding his habitual criminal counts.

A. The Interaction Between Colorado's Habitual Criminal Sentencing Statute and *Erlinger*

¶15 We begin by examining the prior language of Colorado's habitual criminal sentencing scheme; specifically, sections 18-1.3-801 and 18-1.3-803(4). We next discuss the Supreme Court's decision in *Erlinger*. Finally, we analyze the interaction between the sentencing statute and *Erlinger*.

1. Colorado's Habitual Criminal Sentencing Statute

¶16 Sections 18-1.3-801 to -804, C.R.S. (2024), constitute Colorado's habitual criminal sentencing scheme. This scheme "does not establish a substantive offense but instead provides for increased penalties for repeat offenders based on a defendant's previous convictions." *Campbell v. People*, 2020 CO 49, ¶ 47, 464 P.3d 759, 768. A defendant is a habitual offender, and thus implicated in this sentencing scheme, if they have been convicted of a felony and "three times previously convicted, upon charges separately brought and tried, and arising out of separate and distinct criminal episodes." § 18-1.3-801(2)(a)(I).

¶17 Section 18-1.3-803 creates a bifurcated scheme for habitual charges.[3] Specifically, subsection (1) formerly provided that if a guilty verdict was returned

[3] After oral argument in this case, the legislature passed Senate Bill 25-189, which amends section 18-1.3-803(1) to require "a jury to determine whether . . . the

on the substantive offense, "*the court shall conduct a separate sentencing hearing* to determine whether or not the defendant has suffered such previous felony convictions." § 18-1.3-803(1) (emphasis added). Subsection (4) was more specific. It provided a two-phase procedure: First, "[t]he *jury* shall render a verdict" on the substantive offense, and then, if the jury's verdict is guilty, "*the trial judge . . . shall proceed* to try the issues of whether the defendant has been previously convicted as alleged." § 18-1.3-803(4)(a)–(b) (emphases added). The parties and their amici agree that the plain language of section 18-1.3-803 required a judge to make habitual criminal findings.

2. The Supreme Court's Decision in *Erlinger*

¶18 In *Erlinger*, the Court reiterated that "[v]irtually 'any fact' that 'increase[s] the prescribed range of penalties to which a criminal defendant is exposed' must be resolved by a unanimous jury beyond a reasonable doubt." 602 U.S. at 834 (second alteration in original) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). The Court continued to recognize that there is "a narrow exception" to

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defendant has suffered the alleged previous felony convictions, whether the convictions were separately brought and tried, and whether the convictions arose out of separate and distinct criminal episodes" for the purpose of determining whether the defendant is a habitual criminal. S.B. 25-189, 75th Gen. Assemb., Reg. Sess. (Colo. 2025). As amended, section 18-1.3-803(1) allows the court to empanel a new jury to make such a determination "when necessary and as constitutionally permissible." *Id.*

Apprendi's rule that allows "judges to find only 'the fact of a prior conviction.'" *Id.* at 838 (quoting *Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013)). But because the ACCA's "occasions inquiry" contemplates more than the simple fact of a prior conviction—it instead asks whether those convictions were committed "on occasions different from one another," 18 U.S.C. § 924(e)(1)—the Court deemed this exception inapplicable. *Erlinger*, 602 U.S. at 838. Therefore, the Court held that Erlinger "was entitled to have a jury resolve [the] ACCA's occasions inquiry unanimously and beyond a reasonable doubt." *Id.* at 835.

¶19 The first question here is how this holding influences Colorado's former habitual criminal sentencing scheme, which enhanced a defendant's sentence for prior convictions "arising out of separate and distinct criminal episodes," § 18-1.3-801(1)(b)(I), but which instructed "the trial judge" to find the fact of such prior convictions, § 18-1.3-803(4). We now turn to that question.

3. Colorado's Former Habitual Criminal Sentencing Statute Is Compatible with *Erlinger*

¶20 A statute is facially unconstitutional when it "is unconstitutional in all its applications." *Dallman v. Ritter*, 225 P.3d 610, 625 (Colo. 2010). Gregg argues that *Erlinger* rendered the habitual criminal sentencing statute unconstitutional. He contends that the statute unambiguously removed juries from the habitual criminal phase of trial because it repeatedly stated that "the trial judge" must decide whether the defendant has been previously convicted as alleged. He

argues that the legislature's intent to exclude juries from this process is clear because the statute used the word "judge" instead of "factfinder" or "court," and it authorized a "replacement judge" if the judge "who presided" over the substantive phase of the trial was unavailable. § 18-1.3-803(1), (4)(b), (5)(b), (6). In Gregg's view, this conflicted with *Erlinger* because it eliminated juries from the habitual criminal phase of trial.

¶21 The People agree that *Erlinger* requires the jury to find that a defendant's prior convictions arose "out of separate and distinct criminal episodes." *See* § 18-1.3-801(2)(a)(I). But they argue that the former version of the sentencing statute remains constitutional following *Erlinger*. Specifically, the People propose the following two-step procedure: (1) the jury determines whether a defendant's prior convictions arose out of separate and distinct criminal episodes; and (2) if the jury so finds, the judge then conducts a secondary review of the same evidence. They contend that this process complies with both *Erlinger*—because the jury makes the requisite finding—and the sentencing statute—because the trial judge still "determine[s] by separate hearing and verdict whether the defendant has been convicted as alleged." § 18-1.3-803(4).

¶22 To resolve these dueling interpretations, we first look to *Lopez v. People*, 113 P.3d 713 (Colo. 2005). In *Lopez*, we addressed the constitutionality of courts' heightening defendants' sentences based on "extraordinary aggravating

circumstances" under section 18-1.3-401(6), C.R.S. (2025). 113 P.3d at 725. We explained that when sentencing requires judicial fact-finding to which the defendant has not stipulated,[4] the rule announced in *Blakely v. Washington*, 542 U.S. 296 (2004), applies. *Lopez*, 113 P.3d at 726–27. "The *Blakely* rule is concerned specifically with defendants' constitutional protections in criminal proceedings, particularly the right to a jury determination, beyond a reasonable doubt, that facts exist that expose the defendant to criminal penalties." *Id.* at 726. We acknowledged that section 18-1.3-401(6) *could* be applied unconstitutionally but that the possibility of such did not require finding the statute unconstitutional. *Lopez*, 113 P.3d at 728.

¶23 Ultimately, *Lopez* held that section 18-1.3-401(6) is constitutional so long as it is properly applied (i.e., when sentence-enhancing facts considered by the court are either *Blakely*-compliant or *Blakely*-exempt).[5] 113 P.3d at 719, 728. Thus, in construing the statute to avoid a constitutional conflict (as is required), we ratified a process in which a sentencing judge considers facts previously found by a jury. *Id.* at 728–29, 731.

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[4] Gregg did not admit his prior convictions or stipulate to judicial fact-finding for sentencing purposes.

[5] As relevant to this case, prior convictions are *Blakely*-exempt, and thus may be considered by a judge, because "these facts have been determined by a jury beyond a reasonable doubt or admitted by the defendant in a knowing and voluntary plea agreement." *Lopez*, 113 P.3d at 730.

¶24 Though the circumstances here are different, we draw guidance from *Lopez* and utilize the solution in that case as a model. To begin, it is undisputed that *Erlinger* applies to Colorado's habitual criminal sentencing statute because there are no material differences, regarding the inquiry into separate offenses, between the ACCA and section 18-1.3-801. *See* 18 U.S.C. § 924(e); § 18-1.3-801. We recognize that the question of separate and distinct criminal episodes demands a jury finding because it requires more than a mere determination of "what crime, with what elements, the defendant was convicted of." *Erlinger*, 602 U.S. at 838 (quoting *Mathis v. United States*, 579 U.S. 500, 511–12 (2016)). But while the former habitual criminal sentencing statute instructed "the trial judge" to determine "whether the defendant has been convicted as alleged," § 18-1.3-803(4), it did not explicitly *prohibit* the jury from finding that those prior convictions stemmed from separate and distinct criminal episodes. Nor does *Erlinger* forbid a judge's review of a jury's habitual criminal determination. If there is a procedure that satisfies the requirements of both the statute and *Erlinger*, like in *Lopez*, then, by definition, the statute is not facially unconstitutional.

¶25 Hence, we conclude that under the sentencing statute as applied to cases that arise before the 2025 version went into effect, a jury should first determine whether the defendant's prior convictions were based on charges arising out of separate and distinct criminal episodes. If the jury so finds, then the trial judge

should review the jury's findings for sufficiency of the evidence, regarding whether the defendant "has been previously convicted as alleged." *See* § 18-1.3-803(4)(b); *see also People v. LaRosa*, 2013 CO 2, ¶ 35, 293 P.3d 567, 575 (explaining that the sufficiency of the evidence test "requires the court to consider whether a reasonable mind could conclude that 'each material element of the offense was proven beyond a reasonable doubt'" (quoting *People v. Bennett*, 515 P.2d 466, 470 (Colo. 1973))). If the court determines that the jury's findings are supported by sufficient evidence, then it will enter the judgment and thereby satisfy the sentencing statute. Conversely, if the jury does not find that the defendant's prior convictions were based on charges arising out of separate and distinct criminal episodes, then the court must acquit the defendant of the habitual criminal counts.

¶26 Because this procedure complies with *Erlinger*, we hold that Colorado's former habitual criminal sentencing statute is not facially unconstitutional.

B. Double Jeopardy in the Context of Habitual Criminal Sentencing

¶27 We now consider whether, when the jury that found the defendant guilty of the substantive offense has been discharged, the Double Jeopardy Clause bars a trial court from empaneling a second jury to decide the defendant's habitual criminal counts.

1. Double Jeopardy Jurisprudence

¶28 The Double Jeopardy Clauses of the United States and Colorado Constitutions protect against successive prosecutions for the same offense after acquittal and against multiple punishments for the same offense. U.S. Const. amends. V, XIV; Colo. Const. art. II, § 18; *see also Brown v. Ohio*, 432 U.S. 161, 165 (1977); *People v. Leske*, 957 P.2d 1030, 1035 n.5 (Colo. 1998). As for habitual criminal counts, that determination is "independent of the determination of guilt on the underlying substantive offense." *Oyler v. Boles*, 368 U.S. 448, 452 (1962).

¶29 In *Bullington v. Missouri*, 451 U.S. 430, 439, 446 (1981), after the jury found the defendant guilty of murder but imposed a life sentence rather than the death penalty, the Supreme Court held that the Double Jeopardy Clause prevented the state from seeking the death penalty on retrial, reasoning that capital sentencing hearings "have the hallmarks of [a] trial on guilt or innocence." A few months later, we applied *Bullington*'s rationale to habitual criminal sentencing in *People v. Quintana*, 634 P.2d 413 (Colo. 1981), *overruled by*, *People v. Porter*, 2015 CO 34, 348 P.3d 922. There, we noted that Colorado's then-extant habitual criminal statute required notice of "prior convictions by separate counts in the information or indictment, . . . a formal arraignment, . . . proof beyond a reasonable doubt[,] . . . [and] bifurcated trial and separate verdict provisions." *Id.* at 419. We thus held that double jeopardy protections applied because "an adjudication of habitual

criminality [may] be made only in accordance with the same procedural and constitutional safeguards traditionally associated with a trial on guilt or innocence." *Id.*

¶30 The following year, in *People v. Mason*, 643 P.2d 745, 754–55 (Colo. 1982), we considered a case where the trial court discharged the jury that rendered the verdict on the defendant's substantive offense and then improperly made habitual criminal findings, in violation of the then-extant statute. *See* § 16-13-103(4), C.R.S. (1973) ("[T]he jury impaneled to try the substantive offense shall determine by separate verdict whether the defendant has been convicted as alleged."). We held that double jeopardy principles precluded a retrial on Mason's habitual criminal counts because the trial court "deprived the defendant of his valued right to a jury verdict on the prior conviction counts *by that particular jury impaneled and sworn to try the case*." *Mason*, 643 P.2d at 755 (emphasis added).

¶31 Years later, in *Monge v. California*, 524 U.S. 721 (1998), the Supreme Court limited *Bullington* to capital sentencing hearings only. The Court stated that for other sentencing proceedings, the Double Jeopardy Clause is inapplicable because "the determinations at issue do not place a defendant in jeopardy for an 'offense.'" *Monge*, 524 U.S. at 728. The Court thus held that double jeopardy "does not preclude retrial on a prior conviction allegation in the noncapital sentencing context." *Id.* at 734.

¶32 *Monge* led us to reverse course and follow federal precedent in *Porter*, where we held that "Colorado double jeopardy law does not apply to noncapital sentencing proceedings." *Porter*, ¶¶ 3–4, 348 P.3d at 923. *Porter* thereby overruled *Quintana*. *Id.* at ¶ 3, 348 P.3d at 923. In doing so, we concluded that *Monge* remained good law post-*Apprendi* because *Apprendi* discussed *Monge* "without questioning its continued viability and exempted 'the fact of a prior conviction' from its holding." *Id.* at ¶ 17 n.4, 348 P.3d at 926 n.4 (quoting *Apprendi*, 530 U.S. at 490).

¶33 Most recently, in *Erlinger*, the Court addressed an amicus's argument that because the Double Jeopardy Clause "permits a judge to ask whether the government has charged a defendant for the same crime a second time," it follows that "a judge can also look into the defendant's past conduct to increase his sentence." 602 U.S. at 844. The Court rejected that argument, stating that 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," whereas the jury trial right provides "entirely complementary protections . . . by ensuring that, once a jury *is* lawfully empaneled," the government must prove its case to that jury. *Id.* at 845. Notably, the Court's discussion of double jeopardy in *Erlinger* did *not* reference *Monge*'s limiting of double jeopardy to capital sentencing hearings. *See id.* at 844.

2. Double Jeopardy Protections Do Not Apply to Habitual Criminal Counts if the Jury Didn't Render a Verdict

¶34 In this case, the trial court relied on *Erlinger* and *Mason* to conclude that the Double Jeopardy Clause barred it from empaneling a new jury to decide Gregg's habitual criminal counts. Gregg now argues that this ruling was correct, contending that habitual criminal sentencing hearings implicate double jeopardy because they carry all the "hallmarks of the trial on guilt or innocence," *Bullington*, 451 U.S. at 439.[6] Additionally, he notes that these adjudications have severe sentencing consequences, such as a potential sentence of life imprisonment. *See* § 18-1.3-801(1)(a).

¶35 Alternatively, Gregg argues that *Monge*, which held that double jeopardy only applies to capital sentencing proceedings, was abrogated by *Erlinger*, and therefore, he urges this court to reconcile our holding in *Porter* (Colorado's equivalent of *Monge*) accordingly. *See Monge*, 524 U.S. at 734; *Erlinger*, 602 U.S. at 835; *Porter*, ¶ 4, 348 P.3d at 923. He also suggests that even if *Monge* remains good law, its status is "precarious," which allows us to overrule *Porter* and conclude that

[6] According to Gregg, these hallmarks include: notice requirements, § 18-1.3-803(2); defendants' denial or admission, § 18-1.3-803(3); the prosecution bearing the burden of proof, § 18-1.3-803(4)(b); specific rules of evidence, *see* § 18-1.3-803(5)(a)–(b); fact-finding by a jury—except for the fact of a prior conviction, *Mathis*, 579 U.S. at 511; *Erlinger*, 602 U.S. at 834–35; and judges' sentencing authority, § 18-1.3-801.

the Colorado Constitution requires double jeopardy protections. Gregg references other nonbinding precedent that has recognized the limitations of *Monge* or diverged from it since *Apprendi*.[7]

¶36 But the *Erlinger* court did not overrule *Monge*; in fact, it did not even mention *Monge* aside from a single citation regarding an issue entirely separate from double jeopardy—the validity of the prior conviction exception in *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998). *Erlinger*, 602 U.S. at 838 (stating that *Almendarez-Torres*'s "'narrow exception' permitting judges to find only 'the fact of a prior conviction'" persists (quoting *Alleyne*, 570 U.S. at 111 n.1)). And the Supreme Court has consistently affirmed 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.'" *Monge*,

[7] Gregg cites two cases from Texas appellate courts, one case from the Ninth Circuit, and another from the federal district court of Massachusetts. *See Ex parte Watkins*, 73 S.W.3d 264, 271 (Tex. Crim. App. 2002) (observing that the "reach of *Monge* was significantly curtailed by a sharply divided Court in *Apprendi* two years later"); *State v. Atwood*, 16 S.W.3d 192, 194 (Tex. Ct. App. 2000) (holding that *Monge* only permitted a retrial if the punishment issue was a legitimate sentence enhancement issue and not an actual element of the offense); *United States v. Blanton*, 476 F.3d 767, 772 (9th Cir. 2007) ("Without question, *Monge* stands for the proposition that, outside of the death penalty context, double jeopardy considerations do not apply to sentencing proceedings. But *Monge*'s analysis of double jeopardy in the sentencing context was undertaken before the Court's decision in *Apprendi*." (citation omitted)); *United States v. Gurley*, 860 F. Supp. 2d 95, 114–16 (D. Mass. 2012).

524 U.S. at 728; *see also Graham v. West Virginia*, 224 U.S. 616, 629 (1912); *Parke v. Raley*, 506 U.S. 20, 27 (1992); *Almendarez-Torres*, 523 U.S. at 247 ("[T]he sentencing-related circumstances of recidivism are not part of the definition of the offense for double jeopardy purposes.").

¶37 We have interpreted the Colorado Constitution in the same manner. *See Porter*, ¶ 29, 348 P.3d at 929. As we explained in *Porter*, the Double Jeopardy Clause 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). ¶ 9, 348 P.3d at 924. Yet habitual adjudications do "not involve a new crime or a substantive offense." *People v. Hampton*, 876 P.2d 1236, 1241 (Colo. 1994). That is, "the habitual-criminal statute describes a *status rather than a substantive offense*." *People ex rel. Faulk v. Dist. Ct.*, 673 P.2d 998, 1000 (Colo. 1983) (emphasis added). Moreover, trials with habitual criminal counts are "bifurcated and proceed[] in two phases." *Hampton*, 876 P.2d at 1241. Because "habitual adjudication is only one component of the entire process of conviction," it is not a second proceeding. *Id.* at 1242. And without a second proceeding, there is no double jeopardy concern.

¶38 *Erlinger* does not mandate otherwise. Again, the *Erlinger* court simply rejected the claim that judges (rather than juries) can resolve the ACCA's "occasions inquiry" because they can make double jeopardy determinations.

602 U.S. at 835, 844–45. When the Supreme Court "revisits a precedent," it usually "consider[s] 'the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision.'" *Ramos v. Louisiana*, 590 U.S. 83, 106 (2020) (quoting *Franchise Tax Bd. v. Hyatt*, 587 U.S. 230, 248 (2019)). The Court did not conduct that type of analysis in *Erlinger* and, thus, in no way overruled its precedent on double jeopardy. *See* 602 U.S. at 844–45. Therefore, *Erlinger* does not disrupt the well-settled precedent that double jeopardy protections do not apply in habitual criminal sentencing proceedings. *See Monge*, 524 U.S. at 728; *see also Porter*, ¶ 26, 348 P.3d at 928 (relying on *Faulk*, 673 P.2d at 1000). Accordingly, we hold that, here, the Double Jeopardy Clause does not bar a trial court from empaneling a second jury to determine a defendant's habitual criminal status.

¶39 Applying our holding to Gregg's case, it is undisputed that Gregg's substantive offenses were properly tried by a jury, which the court discharged before it determined his habitual criminal counts. 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.

IV. Conclusion

¶40 For the foregoing reasons, we make the order to show cause absolute and reinstate Gregg's habitual criminal charges so a jury can assess them.

CHIEF JUSTICE MÁRQUEZ, joined by **JUSTICE HOOD**, concurred in part and dissented in part.

CHIEF JUSTICE MÁRQUEZ, joined by JUSTICE HOOD, concurring in part and dissenting in part.

¶41 Before it was recently amended, Colorado's habitual criminal sentencing scheme expressly required a "trial judge" to adjudicate a defendant's habitual criminal charges. § 18-1.3-803(4)(b), C.R.S. (2024). Specifically, a judge was required to determine whether the defendant "has been three times previously convicted, upon charges separately brought and tried, and arising out of separate and distinct criminal episodes." § 18-1.3-801(2)(a)(I), C.R.S. (2025). Section 18-1.3-803(5)(b) further directed that during the sentencing hearing, the "trial judge" must "consider" any admissions the defendant made during the trial on the substantive offense "only as they affect the defendant's credibility."[1]

¶42 Last year, the U.S. Supreme Court rejected this approach, holding in *Erlinger v. United States*, 602 U.S. 821, 834–35 (2024), that to subject a defendant to more severe penalties as a repeat offender, the U.S. Constitution requires a unanimous *jury* to determine beyond a reasonable doubt that the defendant's past offenses were committed on separate occasions.

¶43 The majority nevertheless holds that "Colorado's former habitual criminal sentencing statute is not facially unconstitutional and can operate within the

[1] The former version of section 18-1.3-803(6) similarly prescribed judicial factfinding.

constitutional limits set forth in *Erlinger*." Maj. op. ¶ 3. To preserve the statute, the majority effectively rewrites it to require a jury to make the separate-occasions determination and then require the trial judge to review the jury's findings by a sufficiency of the evidence standard. *Id.* at ¶ 25. The majority points to no language in the statute that supports such a remedy. Instead, it justifies its method by relying on *Lopez v. People*, 113 P.3d 713 (Colo. 2005). Maj. op. ¶¶ 23–24.

¶44 *Lopez* does not support the majority's approach to preserving the former version of section 18-1.3-803. Moreover, today's opinion suggests that a court may salvage an otherwise unconstitutional statute as long as it articulates some conceivable, constitutional interpretation of the offending provision, however divorced from its actual language.

¶45 I cannot support the majority's use of *Lopez* or its conclusion. The former version of section 18-1.3-803 is plainly unconstitutional, insofar as it violates *Erlinger*. I would therefore sever the unconstitutional language, leaving trial courts to fill the gap with *Erlinger*'s requirement that a jury make habitual factual findings. This approach would allow courts to empanel a second jury for habitual criminal sentencing proceedings (I agree with the majority that this process would not violate double jeopardy) without rewriting the statute. Accordingly, I respectfully dissent in part.

I. The Former Version of Section 18-1.3-803 Runs Afoul of *Erlinger*

¶46 "We determine legislative intent primarily from the plain language of the statute." *Romero v. People*, 179 P.3d 984, 986 (Colo. 2007). We also "construe the statute as a whole, in an effort to give consistent, harmonious, and sensible effect to all its parts." *People v. Diaz*, 2015 CO 28, ¶ 12, 347 P.3d 621, 624. Generally, "words and phrases utilized in a statute should be given effect according to their plain and ordinary meaning because we presume the General Assembly meant what it said." *Town of Minturn v. Tucker,* 2013 CO 3, ¶ 27, 293 P.3d 581, 590.

¶47 Colorado's habitual criminal sentencing scheme mandates an enhanced sentence for felony offenders who have been previously convicted of three felonies "upon charges separately brought and tried, and arising out of separate and distinct criminal episodes." § 18-1.3-801(2)(a)(I). Section 18-1.3-803 prescribes the procedure for sentencing a defendant as a habitual criminal per the requirements set forth in section 18-1.3-801. Section 18-1.3-803 bifurcates the substantive and sentencing phases of the trial. In the prior version of the statute, the jury's role was to "render a verdict upon the issue of the defendant's guilt or innocence of the substantive offense charged." § 18-1.3-803(4)(a). If the jury found the defendant guilty of the substantive offense, section 18-1.3-803(4)(b) then required the "trial judge" to "*try the issues* of whether the defendant has been previously convicted as alleged." (Emphasis added.) This meant that the trial judge determined

whether a defendant committed three previous felonies "upon charges separately brought and tried, and arising out of separate and distinct criminal episodes." § 18-1.3-801(2)(a)(I). Yet *Erlinger* expressly holds that the U.S. Constitution requires that a *jury*, not a judge, make such findings.

¶48 The majority essentially adopts the People's argument that, to run afoul of *Erlinger*, Colorado's habitual criminal sentencing statute must explicitly *prohibit* a jury from making habitual determinations. Maj. op. ¶ 24 ("[Section 18-1.3-803] did not explicitly *prohibit* the jury from finding that those prior convictions stemmed from separate and distinct criminal episodes."); *see also* Reply Brief for Petitioner at 8 ("A [habitual] hearing . . . must be before the court *without jury*." (quoting N.Y. Crim. Proc. Law § 400.15(7)(a))).

¶49 But the absence of an express prohibition does not amount to express statutory authorization. Especially here, where the statute is not silent about the identity of the factfinder. We have stated that "[w]e do not add words to the statute or subtract words from it." *Turbyne v. People*, 151 P.3d 563, 567 (Colo. 2007); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 96 (2012) ("[W]hat a text does not provide is unprovided . . . .").

¶50 Furthermore, the plain language of section 18-1.3-803 requiring a judge, not a jury, to make all factual findings is confirmed by the statutory history of this provision. The statute long provided for a jury to determine whether a defendant

was a habitual offender, but in 1995, the General Assembly struck the references to the "jury" as factfinder and replaced them with "trial judge." Ch. 129, sec. 14, § 16-13-103(1), (4), (4)(b), (5)(b), (6), 1995 Colo. Sess. Laws 462, 467–68.[2] The only reasonable inference to be drawn from these amendments is that the legislature intended for the judge, and *not* the jury, to be the factfinder in this context. *See People v. McCullough*, 6 P.3d 774, 778 (Colo. 2000) ("[W]hen a statute is amended, it is presumed that the legislature intended to change the law.").

¶51 *Erlinger* now makes clear that the Fifth and Sixth Amendments require a *jury* to determine whether prior convictions arose out of separate episodes if those prior convictions are to be used to enhance a defendant's sentence. 602 U.S. at 834–35. This means that to the extent section 18-1.3-803 requires a trial judge to make such findings, it is unconstitutional. The General Assembly recognized this

[2] In the same year, the General Assembly also amended the procedure for the imposition of the death penalty, replacing the factfinder from a jury to a panel of three judges. Ch. 244, sec. 1, § 16-11-103(1)(a), (1)(b), (1)(c), (2), (3), (7)(b), 1995 Colo. Sess. Laws 1290, 1290–93. In 2002, the U.S. Supreme Court held that a jury must act as the factfinder for the imposition of the death penalty. *Ring v. Arizona*, 536 U.S. 584, 609 (2002); *see also Woldt v. People*, 64 P.3d 256, 259 (Colo. 2003) (holding "Colorado's three-judge capital sentencing statute . . . unconstitutional on its face after *Ring*."). The General Assembly convened a special session following *Ring* to amend the sentencing scheme to reinstate the jury as the factfinder during the sentencing phase of a capital case. *See* Ch. 1, sec. 1, § 16-11-103, 2002 Colo. Sess. Laws, 3d Extraordinary Sess. 1, 1–5. It left unchanged the habitual criminal sentencing provisions that required factfinding by a judge.

and amended the statute in direct response to *Erlinger*.[3] On June 2, 2025, Governor Polis signed that amendment into law. S.B. 25-189, 75th Gen. Assemb., Reg. Sess. (Colo. 2025) ("Concerning Requiring a Jury to Determine Whether a Defendant Has Prior Qualifying Convictions . . . ."). The amended law substitutes "jury" for "judge" throughout and now[4] requires a jury to determine whether "the convictions were separately brought and tried, and whether the convictions arose out of separate and distinct criminal episodes." *See* Ch. 344, sec. 1, § 18-1.3-803(1), (4), (4)(b), (5)(b), 2025 Colo. Sess. Laws 1866, 1866–68. The legislature's response to *Erlinger* indicates that it understood that section 18-1.3-803 required a judge to engage in impermissible factfinding.

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[3] Multiple comments by the bill's sponsors confirm this. During the May 3, 2025, appropriations meeting, Representative Espenoza stated, "This bill . . . was necessary because the U.S. Supreme Court issued . . . *Erlinger*." Second Reading of S.B. 189 before the House, 75th Gen. Assemb., 1st Sess. (May 3, 2025). Her co-sponsor, Representative Soper, continued, "This is a very simple bill to codify the Supreme Court's holding within Colorado law. . . . If we don't make this change then Colorado statute is in violation of the federal constitution as interpreted by the U.S. Supreme Court." *Id.* Similarly, during the third reading in the senate, Senator Snyder, another co-sponsor, stated, "Colorado will be going to a jury determination on habitual status. That comes right out of the Supreme Court *Erlinger* decision . . . so we either do it by this well-stakeholded [sic] bill . . . or we let the Colorado Supreme Court decide. But realize we are very vulnerable right now." Third Reading of S.B. 189 before the Senate, 75th Gen. Assemb., 1st Sess. (Apr. 17, 2025). The bill passed both houses nearly unanimously.

[4] S.B. 25-189 was effective on June 2, 2025, and applies prospectively to sentencing hearings conducted on or after its effective date. Ch. 344, sec. 3, 2025 Colo. Sess. Laws 1868, 1868. This legislation was passed after oral arguments in this case.

¶52 In sum, the prior version of section 18-1.3-803 is unconstitutional to the extent that it runs afoul of *Erlinger*.

II. *Lopez* Does Not Support the Majority's Adopted Procedure

¶53 Instead of conceding that the former version of section 18-1.3-803 is unconstitutional, the majority adopts a reading of the statute that requires juries to make *Erlinger*-required factual findings and then requires the judge to review those findings under a sufficiency of the evidence standard. Maj. op. ¶ 25. It relies on *Lopez* to justify its approach, explaining that in that case we construed a statute to be "constitutional so long as it is properly applied" in order to avoid a constitutional conflict. *Id.* at ¶ 23. The majority asserts that "[t]hough the circumstances here are different, we draw guidance from *Lopez* and utilize the solution in that case as a model." *Id.* at ¶ 24.

¶54 While the majority's approach appears to apply the canon of constitutional doubt[5] to section 18-1.3-803, "[w]e cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question." *United States v.*

[5] The canon of constitutional doubt requires a court to interpret a statute "in a way that avoids placing its constitutionality in doubt." Scalia & Garner, *supra*, at 247; *see also Miller v. French*, 530 U.S. 327, 341 (2000) ("[W]hile this construction raises constitutional questions, the canon of constitutional doubt permits us to avoid such questions only where the saving construction is not 'plainly contrary to the intent of Congress.'" (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988))).

Locke, 471 U.S. 84, 96 (1985) (quoting *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933)). In other words, the solution we applied in *Lopez* is inapplicable here because the problem we faced in that case was fundamentally different from the one section 18-1.3-803 presents.

¶55 In *Lopez*, we considered how *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), affected Colorado's aggravated sentencing statute.[6] *Lopez*, 113 P.3d at 715. Specifically, we addressed which facts a judge may constitutionally consider when finding extraordinary aggravating circumstances that may increase a defendant's sentence.

¶56 As we acknowledged, section 18-1.3-401(6), C.R.S. (2025), suggests that a judge may engage in factfinding prohibited by *Blakely* and *Apprendi*:

> In imposing a sentence to incarceration, *the court* shall impose a definite sentence which is within the presumptive ranges set forth in subsection (1) of this section *unless it concludes* that extraordinary mitigating or aggravating circumstances are present, are based on evidence in the record of the sentencing hearing and the presentence report, and support a different sentence which better serves the purposes of this code with respect to sentencing, as set forth in section 18-1-102.5. *If the court finds* such extraordinary mitigating or aggravating circumstances, it may impose a sentence which is lesser or greater than the presumptive range; except that in no case shall the

[6] In *Apprendi*, the Court held 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. In *Blakely*, the Court defined "statutory maximum" as "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." 542 U.S. at 303.

> term of sentence be greater than twice the maximum nor less than one-half the minimum term authorized in the presumptive range for the punishment of the offense.

(Emphases added.)

¶57 Although the statute directs "the court" to "conclude[]" and "find[]" circumstances that would increase a defendant's sentence beyond the presumptive range, *id.*, we reasoned that a narrow application of the statute preserved its constitutionality. *Lopez*, 113 P.3d at 729–30. Specifically, we held that a trial judge may apply this provision consistent with the constitution so long as the judge relies only on what we termed "*Blakely*-compliant" and "*Blakely*-exempt" facts that are "present in the record of a sentencing hearing as section 18-1.3-401(6) requires." *Id.* at 729. *Blakely*-compliant facts are those "admitted by the defendant, found by the jury, or found by a judge when the defendant has consented to judicial fact-finding for sentencing purposes," and a *Blakely*-exempt fact is the fact of a prior conviction.[7] *Id.* at 723.

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[7] In *Lopez*, we recognized that a judicial finding of "a prior conviction is expressly excepted from the jury trial requirement" under *Apprendi*. *Lopez*, 113 P.3d at 723. *Erlinger* did not go so far as to preclude a judge from determining the fact of a prior conviction. 602 U.S. at 837–38 (explaining that this exception "persists as a 'narrow exception' permitting judges to find only 'the fact of a prior conviction.'" (quoting *Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013))). However, our court has reasoned that "the [prior conviction] exception extends beyond the fact of conviction to 'facts regarding prior convictions.'" *People v. Huber*, 139 P.3d 628, 633 (Colo. 2006) (quoting *Lopez*, 113 P.3d at 716). After *Erlinger*, our broad interpretation of the prior conviction exception seems in doubt.

¶58 Stated differently, we construed the statute to require a judge to base aggravating circumstances determinations on at least one fact that had already been determined consistent with *Blakely* and catalogued in the "record of the sentencing hearing and the presentence report." § 18-1.3-401(6); *see also Lopez*, 113 P.3d at 731. This was a reasonable construction because section 18-1.3-401(6) "does not mandate a restricted or increased sentencing range based on judicial fact-finding." *Lopez*, 113 P.3d at 719.

¶59 By contrast, the prior version of section 18-1.3-803 expressly *required* judicial factfinding. There is no way to simply narrow this mandate consistent with the requirements of *Erlinger*. The majority's solution is to create an entirely new factfinding process by a jury and convert the judicial factfinding to judicial review. The majority asserts that this process is permissible because *Lopez* authorizes a judge to base their habitual determination on "facts previously found by a jury." Maj. op. ¶¶ 23–24. But unlike the aggravated sentencing statute in *Lopez*, the relevant facts under section 18-1.3-803 were not previously constitutionally determined by a jury. Instead, subsections (4)(b), (5)(b), and (6) of that statute required such facts to be determined by "the trial judge."

¶60 Thus, unlike the narrowed construction we authorized in *Lopez*, the majority instead *expands* section 18-1.3-803's application well beyond (and directly contrary to) its express language to preserve its constitutionality. *See* Maj. op. ¶ 25. The

majority fails to support its novel approach with citation to any authority, and I could find no cases in which we applied *Lopez* similarly.

¶61 Indeed, we have previously refused to extend the holding of *Lopez* when the problem at issue was too plainly different. In *People v. Montour*, 157 P.3d 489, 496–97 (Colo. 2007), we considered whether *Lopez* could be applied in the capital punishment context because eligibility for the death penalty also required a finding of aggravating circumstances. *See* § 18-1.3-1201(2)(a), C.R.S. (2006).[8] We concluded that the *Lopez* approach was inapplicable because the two sentencing schemes were "fundamentally different." *Montour*, 157 P.3d at 496. We reasoned that a judge could not base death penalty eligibility on the single *Blakely*-exempt fact of a prior conviction because the capital sentencing scheme required a finding of multiple factors, and "[c]apital defendants have a right to a jury trial on all aggravating facts used to determine death eligibility" beyond the fact of a prior conviction. *Id.* at 497.

¶62 Simply put, the "solution" that *Lopez* stands for is adherence to the constitutional-doubt canon. Neither *Lopez* nor that canon of construction supports expanding, let alone directly contradicting, a statute's clear procedural requirements. It did not in *Montour*, and it does not here.

[8] Colorado abolished the death penalty on March 23, 2020, for offenses charged on or after July 1, 2020. *See* Ch. 61, sec. 1, § 16-11-901, 2020 Colo. Sess. Laws, 204, 204.

¶63 In sum, the majority's effort to preserve the constitutionality of section 18-1.3-803's judicial factfinding provisions is unsupported by *Lopez* and our case law. I recognize that "declaring a statute unconstitutional is one of the gravest duties impressed upon the courts." *People v. Graves*, 2016 CO 15, ¶ 9, 368 P.3d 317, 322. But there is no reasonable constitutional construction of section 18-1.3-803's requirement that a judge make the requisite factual findings to adjudicate a defendant a habitual offender. The General Assembly recognized this and amended the statute accordingly.

¶64 Unlike the majority, I cannot support rewriting the statute to add a jury trial followed by judicial review under a process that was not contemplated by the legislature. The former version of section 18-1.3-803 is unconstitutional insofar as it runs afoul of *Erlinger*, and I would simply declare it so.

III. Section 18-1.3-803's Judicial Factfinding Provisions Are Unconstitutional and Must Be Severed, Leaving *Erlinger* to Fill the Gaps

¶65 While I do not see a possible constitutional application of the former version of section 18-1.3-803 as written, the unconstitutional provisions can be severed while leaving the remaining valid provisions intact. *See* § 2-4-204, C.R.S. (2025). Here, simply carving out the judge as factfinder would allow *Erlinger* and the constitution to fill the gap, essentially replacing "judge" with "jury." This approach is consistent with section 2-4-204, leaves the habitual criminal sentencing

scheme intact, and is what the General Assembly would have preferred to ensure the statute's validity.

¶66 As already discussed, there is no conceivable set of circumstances under which section 18-1.3-803's judicial factfinding provisions can be constitutionally applied. *See Woldt v. People*, 64 P.3d 256, 266 (Colo. 2003) ("A statute is facially unconstitutional only if no conceivable set of circumstances exists under which it may be applied in a constitutionally permissible manner."). The language in subsections (4)(b), (5)(b), and (6) charging the "trial judge" with factfinding must be stricken because it is expressly unconstitutional under *Erlinger*. The question is one of remedy.

¶67 "When a statute is unconstitutional, the proper remedy is determined by looking to legislative intent"—that is, by determining "what the General Assembly would have intended in light of our constitutional holding." *Montour*, 157 P.3d at 502. We also "take guidance from the U.S. Supreme Court, which cautions that we should 'try not to nullify more of a legislature's work than is necessary.'" *People v. Tate*, 2015 CO 42, ¶ 6, 352 P.3d 959, 962 (quoting *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006)).

¶68 If it is clear the General Assembly would have intended for the law to remain valid, "the constitutional provision may be sustained and the unconstitutional stricken." *City of Lakewood v. Colfax Unlimited Ass'n*, 634 P.2d 52,

70 (Colo. 1981). This depends on "the autonomy of the portions remaining after the defective provisions have been deleted." *Id.* The remaining portions are autonomous unless they are "so riddled with omissions that [they] cannot be salvaged as a meaningful legislative enactment." *Montour*, 157 P.3d at 502; *see also* § 2-4-204 ("If any provision of a statute is . . . unconstitutional, the remaining provisions of the statute are valid . . . unless the court determines that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.").

¶69 Applying those principles here, it is clear that the General Assembly's primary intent is to maintain a valid habitual criminal sentencing scheme. It enacted what we now know as the Habitual Criminal Act almost a hundred years ago. Ch. 85, secs. 1–5, 1929 Colo. Sess. Laws 309, 309–12. Its continued purpose is to "punish[] more severely 'those individuals who show a propensity toward repeated criminal conduct.'" *Wells-Yates v. People*, 2019 CO 90M, ¶ 1, 454 P.3d 191, 195 (quoting *People v. Dist. Ct.*, 711 P.2d 666, 670 (Colo. 1985)).

¶70 Given the General Assembly's historical and sustained interest in ensuring that Colorado has a valid habitual criminal sentencing scheme, there is little question that it would prefer to invalidate the unconstitutional language rather than invalidate the entire Act. While it is true that the 1995 General Assembly changed the factfinder from a jury to a judge, it surely would have kept factfinding

with the jury in light of *Erlinger*'s holding. The recent passage of S.B. 25-189 confirms this. The General Assembly expressly intended for its habitual criminal sentencing scheme to remain valid while complying with the constitution.

¶71 Moreover, the statute is administrable without the designation of "trial judge" throughout. While striking this language leaves no express factfinder, *Erlinger* and the constitution require that a jury fill the gap. *See* U.S. Const. amends. V, VI; Colo. Const. art. 2, § 23; *see also* § 18-1-406(1), C.R.S. (2025). Trial courts will have no trouble applying this constitutional and statutory procedure. They are familiar with the jury as factfinder in felony proceedings and do not need section 18-1.3-803's guidance. The remaining portions of the statute also remain intact, such as the requirement that the court conduct a separate sentencing hearing, § 18-1.3-803(1); that the defendant admit or deny the previous convictions, § 18-1.3-803(3); and that the prosecutor prove the defendant is a habitual offender beyond a reasonable doubt, § 18-1.3-803(4)(b). Whether the factfinder is a jury or a judge, the habitual criminal sentencing scheme is substantively the same. Put differently, striking "trial judge" does not leave the statute "riddled with omissions" because a sentencing court will follow *Erlinger* and the constitution, and the remaining provisions are independent of the judge as factfinder.

¶72 In sum, section 18-1.3-803's prior designation of the "trial judge" as the procedural factfinder is unconstitutional. However, these provisions can be

severed to preserve the habitual criminal sentencing scheme's overall continued validity. This is what the General Assembly would have intended in light of *Erlinger*. It also leaves the remaining portions administrable because *Erlinger* and the constitution require that a jury replace "trial judge." Unlike the majority's approach, this conclusion upholds the General Assembly's intent without transgressing our judicial role.

IV. Conclusion

¶73 The majority rewrites the former version of section 18-1.3-803, a decision unsupported by the statute's plain language, legislative intent, and *Lopez*. I cannot join this approach. Instead, section 18-1.3-803's language designating the "trial judge" as the factfinder cannot survive under *Erlinger*. I would sever that language as unconstitutional. Doing so would leave the habitual criminal sentencing scheme intact, allowing courts to use juries to make habitual findings as *Erlinger* requires. I agree with the majority that courts may empanel a second jury for habitual criminal sentencing proceedings consistent with double jeopardy protections. Because S.B. 25-189 applies to sentencing hearings held after its effective date, any that were on pause after *Erlinger* may now proceed under this new legislation.

¶74 Accordingly, I respectfully dissent in part.