NO. 24-5460

# In the Supreme Court of the United States

TROY L. FIELDS,
*Petitioner*,

v.

STATE OF COLORADO,
*Respondent*.

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

## COLORADO'S BRIEF IN OPPOSITION


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## INTRODUCTION

Petitioner was convicted and sentenced in a cold case for kidnapping and sex assault under a long-superseded Colorado habitual criminal statute. Under the statute, the jury was required to—and did—find that Petitioner had the required prior convictions. It did not, however, specifically find that the prior convictions arose out of "separate and distinct criminal episodes." Petitioner raised this issue to the Colorado Court of Appeals, which rejected his challenge under existing precedent, and the Colorado Supreme Court denied certiorari. Shortly thereafter, this Court announced its decision in *Erlinger v. United States*, 602 U.S. 821 (2024), which made clear that a jury—not a judge—must make factual findings regarding whether prior convictions arose from separate criminal episodes. Petitioner now asks this Court for a remand to the court of appeals to address his challenge again in light of *Erlinger*. Alternatively, he asks for plenary review for this Court to directly address *Erlinger*'s application to state recidivist statutes. The Court should decline both invitations.

Petitioner has no reasonable probability of success on remand, and the equities in this case weigh against further proceedings. A jury already found that petitioner had three prior convictions, and the record establishes that these were not related in time, place, or motivation. Under these facts, even if there were error, it was undoubtedly harmless. On top of that, petitioner was simultaneously convicted under a separate statute, which required the jury to find that *petitioner had already been determined to be a habitual offender in a prior case*. Petitioner does not challenge this

separate conviction, for which he will serve a life sentence in prison, even without the conviction at issue here. The equities, therefore, do not support further proceedings.

Nor is plenary review appropriate or warranted. Because this was a cold case, the recidivist statute at issue was superseded long ago, making this a poor vehicle to review Colorado law. Furthermore, *Erlinger* is less than a year old, and state courts are sorting through its application to their respective laws. At this point, the need for further guidance is unknown, but certainly unripe for this Court's review. This Court should deny the petition.

## STATEMENT OF THE CASE

In 1994, a stranger kidnapped the victim, J.C., and brutally raped her at knife-point in her own home. Pet. App. 2a. He then held J.C. hostage while he robbed her. *Id.* Luckily, J.C. was able to escape. *Id.* But police were unable to find her attacker, and the case went cold. *Id.* Decades later, DNA advances conclusively determined that petitioner was the stranger who attacked J.C. *Id.*

The People of the State of Colorado charged petitioner with sexual assault and kidnapping, and a jury convicted him as charged. *Id.* at 3a. Under state law, petitioner's kidnapping conviction normally carried a maximum presumptive sentence of 24 years. § 18-3-302(3), C.R.S. (1994); § 18-1.3-401(1)(a)(V)(A), C.R.S. (2017). But under Colorado's recidivist statute, known as the Habitual Criminal Act, the trial court

must impose an enhanced sentence if a defendant has certain qualifying prior convictions. § 16-13-101(2), C.R.S. (1994) (relocated to § 18-1.3-801(2)(a)(1)(I)(A), C.R.S. (2017)). Where a defendant "has been three times previously convicted, upon charges separately brought and tried, and arising out of separate and distinct criminal episodes . . . of a felony," the Act requires a mandatory sentence of four times the maximum presumptive sentence. *Id.*

In 1994, as today, the Act required the information or indictment to specify by date and place the prior convictions supporting the habitual criminal charges. § 16-13-103(2), C.R.S. (1994); § 18-1.3-803(2), C.R.S. (2024). The 1994 procedure for trying those charges, however, was different from the procedure in place today. In 1994, when petitioner committed the triggering crimes,[1] Colorado law required a jury to determine whether the defendant had committed the prior convictions as alleged in the information. § 16-13-103(4), C.R.S. (1994). "All other questions relating to the habitual criminal statute," including whether the charged felonies arose "out of separate and distinct criminal episodes," "were matters of law for the court." *People v. Jones*, 967 P.2d 166, 168-69 (Colo. App. 1997).

[1] In Colorado, the "triggering" offense is the present offense subject to sentencing enhancement, and the "predicate" offenses are the prior convictions. *See Wells-Yates v. People*, 454 P.3d 191, 195 n.1 (Colo. 2019).

The parties in this case followed the 1994 procedure. *See* Pet. App. 15a. In a bifurcated proceeding to the same jury that had rendered guilt on the triggering offense, the jury found as follows:

1. That the Defendant has been previously convicted of Burglary on September 12, 1988 and sentenced on September 12, 1988 in Sedgwick County, Kansas.
2. That the Defendant has been previously convicted of Burglary and Theft over $150 and sentenced on April 1, 1988 in Shawnee County, Kansas.
3. That the Defendant has been previously convicted of Attempted Possession of an Opiate or Narcotic Drug and sentenced on April 8, 1988 in Shawnee County, Kansas.
4. That the Defendant has been previously convicted of Forgery and sentenced on December 21, 1989 in Shawnee County, Kansas.
5. That the Defendant has been previously convicted of Attempted Possession of Opiate or Narcotic Drug and sentenced on December 21, 1989 in Shawnee County, Kansas.

CF, pp 955-59, 973-977.

This was not the first time a jury had adjudicated petitioner a habitual criminal based on these prior convictions. *See* Pet. App. 143a. Back in 1994, shortly after attacking J.C., petitioner burgled another residence. *Id.* But for those crimes, he was apprehended and tried without delay. *Id.* In 1995, after a jury found him guilty of those triggering offenses, it also adjudicated him a habitual criminal, and his sentence for burglary was enhanced as the Act required. *Id.*

In 1994, as today, a defendant who has been previously adjudicated a habitual criminal who is thereafter convicted of a statutorily defined crime of violence must be

sentenced to life in prison with the possibility of parole after serving 40 years. § 16-13-101(2.5), C.R.S. (1994); § 18-1.3-801(2.5), C.R.S. (2024). In the present case, because the jury found petitioner had committed the sexual assault of J.C. as a crime of violence, they were asked to determine whether he had been previously adjudicated a habitual criminal. Pet. App. 143a. They unanimously agreed he had been so adjudicated. *Id.* Accordingly, the court sentenced petitioner to a mandatory term of life for sexually assaulting J.C. *Id.* at 3a, 144a. He is currently serving this sentence concurrently with the 96-year sentence for kidnapping. *Id.* at 3a. Petitioner does not challenge this separate conviction or the life sentence it carries in this Court.

Petitioner directly appealed his conviction and sentence, and a division of the Colorado Court of Appeals affirmed. Pet. App. 1a. As relevant here, petitioner argued that, although a jury determined he had been previously convicted as alleged, his constitutional right to a jury was violated when the trial court imposed his 96-year sentence for kidnapping because the judge, rather than the jury, determined whether his prior convictions were based upon charges arising from separate and distinct criminal episodes. *Id.* at 12a-14a.

The division rejected petitioner's argument. *Id.* At that time, Colorado considered habitual criminal sentencing to fall within *Apprendi*'s[2] prior conviction exception, such that no jury trial was constitutionally required. *See People v. Session*, 480 P.3d 747, 753 (Colo. App. 2020); *see also People v. Nunn*, 148 P.3d 222, 227 (Colo. App. 2006). Following this law, the division rejected petitioner's constitutional challenge and affirmed his kidnapping sentence. Pet. App. 12a-14a. The Colorado Supreme Court denied his petition for a writ of certiorari. *Id.* at 17a.

Shortly thereafter, this Court announced *Erlinger v. United States*, 602 U.S. 821 (2024). That case concerned the Armed Career Criminal Act (ACCA), which imposes lengthy mandatory prison terms on certain defendants who have previously committed qualifying felonies on different occasions. *Id.* at 825. This Court confirmed that any fact that increases a defendant's exposure to punishment must be proved to a jury beyond a reasonable doubt, with one exception—the fact of a prior conviction. *Id.* at 830-31, 838. Reviewing the ACCA, however, the Court concluded that the question of whether a defendant's prior convictions occurred on "different occasions" does not fall within that exception. *Id.* at 838. Rather, the prior conviction exception permits a judge to "do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." *Id.* at 838 (citation

[2] *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

omitted). Accordingly, this Court concluded that it would be a violation of a defendant's Fifth and Sixth Amendment rights for a judge, rather than a jury, to decide that a defendant's past offenses were committed on separate occasions. *Id.* at 825, 849.

Likening his case to *Erlinger*, Petitioner requests this Court vacate the division's judgment and remand this case for further consideration. Alternatively, he asks for plenary review, and ultimately, for this Court to consider whether to expand *Erlinger* to state court recidivist statutes. This Court should deny both requests.

## REASONS FOR DENYING THE PETITION

### I. The Court Should Not Grant, Vacate, and Remand.

This Court's power to issue a grant-vacate-remand ("GVR") order "should be exercised sparingly." *Lawrence v. Chater*, 516 U.S. 163, 173 (1996) (per curiam). GVR orders are appropriate when there is a "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Id.* at 167. But a GVR order is inappropriate "if the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court." *Id.* Ultimately, whether a GVR order is appropriate depends "on the equities of the case." *Id.* at 168.

Colorado agrees that *Erlinger* requires a jury to determine every fact regarding a defendant's prior conviction (except the crime and its elements) that is necessary to increase the defendant's exposure to habitual criminal punishment, and that such a

holding impacts the habitual criminal act under which petitioner was sentenced. *See* 602 U.S. at 835. Accordingly, the court of appeals' resolution of this issue under *Apprendi*'s prior conviction exception conflicts with *Erlinger*.

Nevertheless, a GVR order is inappropriate in this case for two reasons. First, there is no reasonable probability that petitioner would ultimately prevail on remand. Second, even if petitioner could prevail, it would not practically impact his controlling sentence; a remand would require unnecessary expense and further delay justice for the victim.

### A. There is no reasonable probability petitioner would prevail on remand.

First, assuming error in this case, it was not reversible error. A GVR order would subject "the parties to a pointless remand to the Court of Appeals and another round of briefing and argument, when the Court of Appeals' decision is a foregone conclusion." *Erlinger*, 602 U.S. at 861 *(*Kavanaugh, J., dissenting).

This Court has long ruled that "most constitutional errors," including Sixth Amendment errors, "can be harmless." *Washington v. Recuenco*, 548 U.S. 212, 218 (2006).[3] The alleged error in this case is no exception. *See id.*; *see also Erlinger*, 602

[3] In the Colorado court of appeals, the parties disputed whether petitioner had adequately preserved his constitutional claim of error such that it could be reviewed only for plain error. *See* Pet. App. 129a. And contrary to his petition, Pet. 5, and as the record he cites now reflects, *see id.*, petitioner did not argue to the trial court that the federal constitution (as opposed to the statute) required the jury make

U.S. at 850 (Roberts, C.J., concurring) (noting violations of a defendant's Fifth and Sixth Amendment right to have a jury determine ACCA's different occasions inquiry "are subject to harmless error review"); *see also Erlinger*, 602 U.S. at 859 (Kavanaugh, J., dissenting) (same). And, so far, a majority of the circuit court of appeals have reviewed *Erlinger* errors for harmless error. *See United States v. Campbell*, --- F.4th ---, 2024 WL 4864338, *4 (6th Cir. Nov. 22, 2024) (collecting cases). Considering this law, the alleged "[f]ailure to submit a sentencing factor to the jury" that enhances the defendant's final sentence "is not structural error" that "requir[es] automatic reversal." *Id.* at *3 (quoting *Recuenco*, 548 U.S. at 218, 222).

Here, any remand to the court of appeals will require a determination of whether the error was harmless. Petitioner claims that the trial court did not submit the "separate and distinct criminal episodes" inquiry to the jury, and thus, the jury's verdict was not sufficient to subject him to enhanced sentencing. *See* Pet. 9. He then argues that, had the jury been "[p]resented with evidence about the times, locations, purpose, and character of [his] crimes," it might or might not have found they arose out of separate and distinct criminal episodes. *Id.* But this case was not close on this point.

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a specific finding of "separate and distinct criminal episodes", *id.* at 130a. However, because petitioner cannot prevail even under the higher standard for preserved errors, for purposes of this brief, Colorado proceeds as if the constitutional claim was preserved.

Unlike Mr. Erlinger, who could point to three burglaries committed within a span of days to argue that the prior offenses were not committed on different occasions, *see* 602 U.S. at 826-27, petitioner has made no such affirmative argument here about the facts of his prior convictions. *See* Pet. 9-10. And rightly so—his convictions varied by type of crime (including burglary, theft, drug-related crimes, and forgery), were imposed over a span of years (between 1987 and 1989) and arose in two different jurisdictions.[4] Pet. App. 141a; CF, pp 955-59, 973-977. There is no reasonable possibility that the jury would have found his prior convictions were part of a single criminal episode. *See Jones*, 967 P.2d at 169 (concluding that "'criminal episode' should be given the same meaning as under the mandatory joinder statute," which requires that "multiple offenses committed within a single jurisdiction must be joined in a single prosecution 'if they are based on the same act or series of acts arising from the same criminal episode'"); *see also Jeffrey v. District Court*, 626 P.2d 631, 639 (Colo.

[4] Although these facts are sufficient under Colorado law to prove the convictions arose out of separate and distinct criminal episodes, beyond these facts, petitioner later provided additional supporting details about his crimes to the trial court. CF, p 1052. According to petitioner:

> In Kansas in the 1980s, Mr. Fields allegedly pled guilty to a burglary charge, Attempted Unlawful Possession of a Controlled Substance charges, a forgery charge and a burglary and theft charge. The burglary charges arose when he met a friend to help his friend dispose of some stolen property. The burglary and theft charge arose when Mr. Fields and an accomplice broke into a nightclub to steal liquor from the bar and change from the cigarette machine. The unlawful possession charges arose when he was caught with residue amounts of cocaine. The forgery charge was a bad check that he was given for $25.00 dollars.

*Id.*

1981) ("'[A] series of acts arising from the same criminal episode' would include physical acts that are committed simultaneously or in close sequence, that occur in the same place or closely related places, and that form part of a schematic whole.").

The "harmless-error rule" serves the "important purpose" of ensuring that appellate courts "do not set aside convictions or sentences 'for small errors or defects that have little, if any, likelihood of having changed the result.'" *Erlinger*, 602 U.S. at 859 (Kavanaugh, J., dissenting) (citing *Neder v. United States*, 527 U.S. 1, 19 (1999)). Considering this record, it is a "foregone conclusion" that any error will be deemed harmless. *Id.* at 861 (Kavanaugh, J., dissenting). Any error here did not prejudice petitioner, and the "equities of the case" weigh against remand. *Lawrence*, 516 U.S. at 167-68. Respondent's interests in moving forward dwarf the speculative benefits of having the court of appeals reconsider its ruling.

### B. Even if petitioner could prevail on remand, the equities in this case weigh against remand.

"Judicial efficiency and finality are important values," and this Court's "GVR power should not be exercised for mere convenience." *Stutson v. United States*, 516 U.S. 193, 197 (1996) (internal citation omitted). Given petitioner's controlling life sentence, finality interests weigh against a GVR order.

Remanding this case for reconsideration in light of *Erlinger* will not impact petitioner's controlling sentence. Petitioner, who is currently 56 years old, is serving

concurrent sentences for the crimes he committed in this case: 96 years for kidnapping, and life with the possibility of parole after 40 years for sexual assault. Pet. App. 32a. As he did before the court of appeals, petitioner limits his Sixth Amendment challenge to only his habitual sentence for kidnapping. Pet. App. 12a-14a. Accordingly, petitioner's life sentence will not be impacted by a remand regarding his kidnapping sentence.

Although this fact may not render petitioner's request for a GVR order technically moot, its existence creates a practical barrier to meaningful relief. For this reason, even if petitioner were to prevail on remand and obtain resentencing to a lesser term of years for kidnapping, he would still be serving the same controlling sentence in this case: life in prison.

Weighed against the slim chance of any relief, let alone practical relief, is the fact that a GVR order would further prolong justice for the victim. Crime victims have a right to proceedings "free from unreasonable delay." 18 U.S.C. § 3771 (2024). The victim in this case was assaulted in 1994; it took nearly 25 years before petitioner was brought to justice. Pet. App. 2a. The victim has already waited decades for closure. Prolonging finality for a remand on a claim that has little chance of prevailing and would not impact Petitioner's controlling sentence is an unnecessary elevation of procedure over substance and could constitute an "unreasonable delay."

In sum, that petitioner's controlling sentence would remain unchanged is a "forgone conclusion." The delay and further cost outweigh any potential benefits of a remand.

## II. Plenary Review is unwarranted.

Alternatively, petitioner asks this Court to grant plenary review to address *Erlinger*'s application to state-law recidivist schemes that mirror ACCA. Pet. 10. This Court need not dwell long on this request. Petitioner's case was prosecuted under a long-superseded statute, and addressed in an unpublished, non-binding intermediate state court opinion, making it a poor vehicle for plenary review. And state courts are already considering *Erlinger*'s impact to their analogous recidivism statutes. Cutting that process short is unwarranted.

### A. This case presents a poor vehicle for addressing Erlinger's application to state-law recidivist schemes.

Using petitioner's case as the vehicle for parsing *Erlinger*'s application to state recidivist statutes is ill-advised, for two main reasons.

First, the issue presented arises in an unusual context that may distort the analysis: petitioner received the jury trial the 1994 Act required. Pet. App. 14a-15a. Unlike *Erlinger*, where the trial court rejected Mr. Erlinger's request for a jury and "proceeded to find for itself that each of his 26-year-old burglaries occurred on distinct

occasions," 602 U.S. at 827, the jury in this case determined that petitioner had been previously convicted as alleged in the information.

Perhaps this fact is of no consequence, as petitioner contends, because the jury did not specifically find those convictions arose out of separate criminal episodes. Or perhaps it resolves the issue. *See, e.g.*, *People v. Wandel*, 713 P.2d 398, 400-01 (Colo. App. 1985) (holding that where "the instructions given to the jury specified the different dates of the . . . convictions and set forth what defendant had been convicted of in each case," "the instructions adequately informed the jury of the law" such that a separate instruction that the habitual counts "arose out of separate and distinct episodes" was not required); *cf. People v. Chambers*, 900 P.2d 1249, 1254 (Colo. App. 1994) (rejecting challenge that jury had failed to make specific findings on an element of the Act, explaining that the jury's findings necessarily carried with them a determination that the element had been met). Either way, that petitioner received a jury trial eliminates a straightforward application of *Erlinger*.

Second, this case was tried in accordance with the 1994 procedure, which no longer exists. *Compare* § 16-13-103, C.R.S. (1994) (providing for a trial of habitual counts to a jury), *with* § 18-1.3-803, C.R.S. (2024) (providing for a trial of habitual counts to the court). So, this case does not present a clean vehicle to address how

*Erlinger* applies to Colorado's current statutory procedure. And even if the 1994 procedure was constitutionally infirm, it is an error that is unlikely to ever reoccur. This fact alone makes it ill-suited to carry the banner for state-level *Erlinger* expansion.

### B. State courts should be permitted to consider *Erlinger*'s application to their laws in the first instance.

It has been only six months since this Court decided *Erlinger*, and state courts are grappling with how the case applies to various state-specific sentencing schemes to address recidivism. Plenary review at this time would cut that process short. *Erlinger* gives state courts sufficient guidance on how to address jury and judicial fact-finding relative to state-law habitual offender schemes. Having provided such guidance, this Court should let these state-law-specific issues percolate.

In *Erlinger*, this Court clearly held that the Sixth Amendment requires that the question of whether prior convictions were for offenses that occurred on separate occasions for the purposes of ACCA needed to be found by a unanimous jury. 602 U.S. at 835. As applied to future criminal prosecutions, states are bringing their procedures into compliance with that command. Indeed, this Court recognized that such an adjustment period would be required: "States that have not already done so can likewise adjust to any state-law implications of our straightforward application of *Apprendi* to ACCA's different-occasions requirement." 602 U.S. at 848 (cleaned up). The states are currently adjusting, and Colorado is no exception.

The Colorado Supreme Court is currently considering whether state trial courts can "continue to employ the statutory habitual procedure (which requires a judicial determination) while simultaneously complying with *Erlinger* (which requires a jury *determination*)." *In re: People v. Andrew Gregg*, Case No. 2024SA272 (petition for review filed Oct. 9, 2024). In *Gregg*, the defendant asked the district court to dismiss the habitual offender counts against him, arguing that following *Erlinger*, it would violate the Double Jeopardy Clause to empanel a second jury to determine whether the prior convictions "arose out of separate and distinct criminal episodes," and the district court agreed, dismissing the habitual offender counts. *See id.* at Exs. A-C. In arguing that the court was indeed permitted to empanel a second jury to determine specific facts related to the habitual offender counts, the prosecution in *Gregg* seeks to reconcile Colorado law with *Erlinger*. The Colorado high court issued an order to show cause as to why the prosecution's relief should not be granted, and it directed amicus briefs be filed by varied entities with an interest in the issue, including the Colorado Criminal Defense Bar, the ACLU of Colorado, the Colorado District Attorney's Council, the Colorado Attorney General, and the Colorado State Public Defender. *See* Order to Show Cause, No. 2024SA272 (Colo. Oct. 18, 2024). Colorado is thus seeking to resolve these issues in the context of its existing habitual offender statute, and plenary review of this case would stop that effort in its tracks.

Courts in other states are doing the same, with results varying based on state-specific nuances. *See State v. Porter*, --- P.3d ----, 2024 WL 4846422, at *2-3 (Ariz. Ct. App. Nov. 21, 2024) (holding that, under *Erlinger*, the "same occasion" inquiry of Arizona's recidivist statute should have been submitted to a jury, but holding the error did not prejudice the defendant); *see also State v. Anderson*, 552 P.3d 803, 811 (Wash. Ct. App. 2024) (holding that because *Erlinger* did not overrule *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), there was no need for a remand for a jury to find whether a prior-conviction enhancement could be applied); *State v. Carlton*, --- A.3d ----, 2024 WL 4896871, at *1-15 (N.J. Super. Ct. App. Div. Nov. 27, 2024) (holding that the failure to submit habitual offender information to a jury could not be harmless following *Erlinger*); *People v. Banks*, 218 N.Y.S.3d 519, 527–35 (N.Y. Sup. Ct. 2024) (holding that *Erlinger* required forgoing habitual sentencing for all cases currently on appeal, as courts could not empanel a new jury to find facts related to the habitual count sentencing enhancements).[5]

[5] New York courts themselves have split on whether *Erlinger* requires certain aspects of New York's habitual offender scheme to be found by a unanimous jury. *Compare id. and People v. Lopez*, 216 N.Y.S.3d 518 (N.Y. Sup. Ct. 2024), *with People v. Rivera*, --- N.Y.S. 3d ----, 2024 WL 4596717, at *3 (N.Y. Sup. Ct. Oct. 28, 2024) (collecting cases showing the disagreement). *Rivera* stated that *Erlinger* "did not establish a new constitutional rule" and rejecting argument that it applied as the defendant had "already been adjudicated a [persistent violent felony offender]" under analogous New York law, so there was no need for a jury finding as to certain facts related to the defendant's prior convictions. But neither the New York Court of Appeals nor the Appellate Division has yet issued an opinion resolving that conflict. That state-level appellate courts are available to resolve complex state-law-specific issues arising in applying *Erlinger* further counsels against accepting review in this case.

What is more, some of these courts have recognized that legislative solutions are required. *See Banks*, 218 N.Y.S.3d at 531 (noting "*Erlinger* has created a problem that needs a solution, and fast," but concluding that only the state legislature could provide that solution). That not only state courts, but state legislatures, will step into the arena to resolve those concerns further counsels against accepting review.

In sum, state recidivist statutes are not a monolith. Given their diversity, and respecting principles of federalism, the States have numerous options available to them for crafting habitual offender schemes consistent with *Erlinger*. This Court should allow that democratic process to run its course.

## CONCLUSION

Colorado respectfully requests that this Court deny petitioner's request for a GVR order. Alternatively, this Court should deny plenary review.

Respectfully submitted,

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