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SUPREME COURT, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 80203 Certiorari to the Colorado Court of Appeals Case No. 2016CA2133	
Petitioner CHARLES J. LINNEBUR v. Respondent THE PEOPLE OF THE STATE OF COLORADO	
Megan A. Ring Colorado State Public Defender MEREDITH K. ROSE 1300 Broadway, Suite 300 Denver, CO 80203 Phone: (303) 764-1400 Fax: (303) 764-1479 Email: PDApp.Service@coloradodefenders.us Atty. Reg. #45304	Case Number: 2018SC884

OPENING BRIEF

CERTIFICATE OF COMPLIANCE

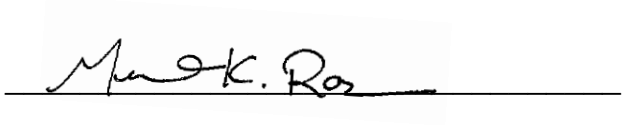
I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief does **not** comply with C.A.R. 28(g). This brief contains 12,846 words. A motion requesting that this Court accept the brief in excess of the maximum word count has been filed along with this brief.

This brief complies with the standard of review requirement set forth in C.A.R. 28(a)(7)(A).

> For each issue raised by the Petitioner, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.



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INTRODUCTION

When Charles Linnebur was found guilty of two felony offenses, it wasn't by a jury, but by a judge. Mr. Linnebur had not waived his right to a jury trial—and yet while a jury found him guilty of misdemeanor DWAI and DUI per se, the judge found that Mr. Linnebur had three prior convictions for drinking-and-driving-related offenses and transformed the jury's misdemeanor verdicts into felonies.

The court of appeals was unconcerned that this process deprived Mr. Linnebur of a jury finding of his previous convictions beyond a reasonable doubt. In fact, the court went further and held that prior convictions in this context may be proved to a judge by a mere preponderance of the evidence.

But prior convictions are an element of these crimes, meaning that they must be proved to a jury beyond a reasonable doubt. Even if the General Assembly had wanted to circumvent the protections of a jury trial and due process, which it did not, constitutional principles do not allow it.

Mr. Linnebur's felony convictions were obtained in violation of his fundamental constitutional rights, and this Court should reverse.

STATEMENT OF THE ISSUES PRESENTED

I. Whether the court of appeals erred in concluding that the portion of section 42-4-1301, C.R.S. (2018), that elevates a misdemeanor to a class four felony for driving under the influence ("DUI"), driving while ability impaired ("DWAI"), or DUI per se after three or more prior convictions for certain enumerated offenses establishes a sentence enhancer and not an element of the offense for purposes of determining whether jury findings are required.

II. Whether the court of appeals erred in concluding that, because sections 42-4-1301(1)(a), (1)(b), (2)(a), C.R.S. (2018), do not provide the applicable burden of proof, the prosecution must prove prior convictions in a felony DUI, DWAI, or DUI per se case under a preponderance of the evidence standard.

III. Whether, if a jury determination was required, the evidence in Mr. Linnebur's case was sufficient to prove DWAI fourth or subsequent offense and DUI per se fourth or subsequent offense under sections 42-4-1301(1)(b) and (2)(a).

STATEMENT OF THE CASE AND FACTS

Over two feet of snow fell in Strasburg, Colorado on the evening that Charles Linnebur drove his blue pickup truck into town. (TR 8/23/16 pp 139:21-22, 142:2-5) The truck clipped a power pole and a fence as he pulled away from

his parking spot, leaving tire tracks that followed him down the street. (Id. pp 140-141) The manager of his mobile home park called the police to report the accident after she noticed the damage and the tracks in the snow. (Id. pp 143-144)

Police officers pulled Mr. Linnebur over a few miles away. (Id. pp 149:13-24, 160:7-13) The officers thought that he might be driving under the influence of alcohol, and they asked him to get out of his car and participate in field sobriety tests. (Id. pp 199-202) It was cold, snowy, and dark on the side of the road. (Id. pp 159:10-12, 198:2-3) Mr. Linnebur performed badly on the roadside maneuvers, and the officers arrested him. (Id. pp 203-207) Mr. Linnebur agreed to a blood alcohol test, and his BAC result was 0.34, above the legal limit. (Id. p 209:11-17; TR 8/24/16 p 30:4-5)

The State prosecuted Mr. Linnebur on count 1: driving under the influence—fourth or subsequent offense,[1] with a lesser-included offense of driving while ability impaired[2]; and count 2: driving under the influence per se—fourth or subsequent offense.[3] (CF pp 27, 100-01) The prosecution alleged that Mr. Linnebur had five previous convictions for either DUI or DWAI. (CF p 28)

[1] § 42-4-1301(1)(a), C.R.S. (F4).
[2] § 42-4-1301(1)(b), C.R.S. (F4).
[3] § 42-4-1301(2)(a), C.R.S. (F4).

Mr. Linnebur filed a pretrial motion asking the trial court to rule that prior convictions are an element of felony DUI, felony DWAI, and felony DUI per se (collectively, "felony DUI"), that must be proved to a jury beyond a reasonable doubt. (CF p 62) Mr. Linnebur argued that he could not be convicted of felonies unless the jury found that he had qualifying prior convictions beyond a reasonable doubt. But the court ruled that prior convictions are merely sentence enhancers that elevate misdemeanor DUIs and DWAIs to felonies, and it held that Mr. Linnebur's prior convictions would be proved to the court by a preponderance of the evidence. (TR 8/23/16 pp 4-5)

A 12-member jury found Mr. Linnebur guilty of misdemeanor DWAI on count 1 and misdemeanor DUI per se on count 2. (CF pp 100-01) The jury made no finding that Mr. Linnebur had prior convictions because the prosecution presented no such evidence.

After the judge dismissed the jury, the prosecutor gave the court certified public records of three prior convictions for drinking-and-driving-related offenses and a DMV dossier under the name of Charles Linnebur. (TR 8/24/16 pp 135-140; EXs 10-13) The prosecutor asked the trial court to find, by a preponderance of the evidence, that Mr. Linnebur's present conviction was at least a fourth offense, and

he also asked the court to make a record whether it would find the prior convictions proven beyond a reasonable doubt. (TR 8/24/16 pp 139-140)

The court found beyond a reasonable doubt that Mr. Linnebur had three prior convictions for DUI or DWAI, without explaining its decision to apply the higher burden of proof. The judged then turned Mr. Linnebur's misdemeanor convictions into felonies. (Id. pp 140-44)

In an unpublished decision, the court of appeals affirmed. *People v. Linnebur*, No. 16CA2133 (Colo. App. Nov. 8, 2018). Relevant here, the court concluded that under the plain language of section 42-4-1301, C.R.S. (2018), prior convictions are sentence enhancers, not elements, and the prosecution can prove them to the trial court by a preponderance of the evidence. *Id.* ¶¶ 8-13. The court also decided that the prosecution had met that burden. *Id.* ¶¶ 14-19.

Mr. Linnebur appealed, and this Court granted certiorari review.

SUMMARY OF THE ARGUMENTS

I. Element or Sentence Enhancer. The General Assembly can designate a defendant's prior conviction as an "element," which must be found by a jury, or a "sentence enhancer," which can be found by a judge. The legislature's choice to place the felony provisions of DUI, DWAI, and DUI per se in the same subsections

as the rest of the elements of the crimes demonstrates its intent to make prior convictions an element of the felony offenses to be found by the jury.

Additionally, the prior-conviction exception to the constitutional right to a jury trial, as recognized in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), cannot apply to Colorado's felony DUI laws because instead of merely elevating the felony level of an offense, prior convictions in this context change a misdemeanor conviction into a felony.

By removing the determination of Mr. Linnebur's prior convictions from the jury, the trial court violated Mr. Linnebur's constitutional right to a jury trial.

II. Burden of Proof. Criminal defendants have the constitutional right to proof of every element of the charged crime beyond a reasonable doubt, as guaranteed by both the United States and Colorado constitutions. Even where a judge may find the fact of a defendant's prior conviction in place of a jury, due process requires that the prosecution prove this fact to the court beyond a reasonable doubt.

Additionally, principles of statutory construction and Colorado case law dictate that where a sentencing statute is silent regarding the burden of proof, the burden must be beyond a reasonable doubt.

The court of appeals held that because the felony DUI provisions are silent as to the burden of proof that applies to finding the fact of a defendant's prior convictions, the prosecution need only prove the priors by a preponderance of the evidence.

This diminished burden of proof violates a defendant's right to due process.

III. Sufficiency. If a jury determination of prior convictions is required in felony DUI cases, then the trial court committed structural sentencing error when it entered felony convictions on the jury's misdemeanor verdicts.

If, however, this Court declines to find structural error and instead reviews the jury-trial violation under the constitutional harmlessness standard, it should vacate the felony convictions for insufficient evidence because the prosecution failed to prove Mr. Linnebur's identity as the person previously convicted beyond a reasonable doubt.

In either case, the remedy is to vacate Mr. Linnebur's felony convictions and remand for resentencing on the jury's misdemeanor verdicts, because double jeopardy prohibits retrial.

ARGUMENT

I. The court of appeals erred in concluding that the portion of section 42-4-1301, C.R.S. (2018), that elevates a misdemeanor to a class four felony for DUI, DWAI, and DUI per se after three or more prior convictions establishes a sentence enhancer and not an element of the offense for purposes of determining whether jury findings are required.

A. Preservation and standard of review.

Mr. Linnebur's pretrial motion preserved this issue. (CF p 62) The trial court ruled that prior convictions may be proved to the court by a preponderance of the evidence, and the court of appeals agreed. (TR 8/23/16 pp 4-5; *People v. Linnebur*, No. 16CA2133 (Colo. App. Nov. 8, 2018), ¶ 13)

This Court reviews issues of statutory interpretation and constitutional challenges to sentencing schemes de novo. *People v. Tafoya*, 2019 CO 13, ¶ 17; *Lopez v. People*, 113 P.3d 713, 720 (Colo. 2005).

B. The crime of felony DUI requires the prosecution to prove a defendant's prior convictions to a jury beyond a reasonable doubt.

All drinking-and-driving-related convictions were misdemeanors until 2015 when the General Assembly amended section 42-4-1301, C.R.S. (2018). Ch. 262, § 42-4-1301, 2015 Colo. Sess. Laws 990, 990-1000; *see also Tafoya*, ¶ 15 (recognizing the "recent statutory amendment creating the crime of felony DUI"). The amendment added a felony provision to each of the subsections describing the elements of DUI, DWAI, and DUI per se:

> (1)(a) A person who drives a motor vehicle or vehicle under the influence of alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, commits driving under the influence. ***Driving under the influence is a misdemeanor, but it is a class 4 felony if the violation occurred after three or more prior convictions***, arising out of separate and distinct criminal episodes, for DUI, DUI per se, or DWAI; vehicular homicide . . . vehicular assault . . . or any combination thereof.
>
> (b) A person who drives a motor vehicle or vehicle while impaired by alcohol or by one or more drugs, or by a combination of alcohol and one or more drugs, commits driving while ability impaired. ***Driving while ability impaired is a misdemeanor, but it is a class 4 felony if the violation occurred after three or more prior convictions*** . . . .
>
> (2)(a) A person who drives a motor vehicle or vehicle when the person's BAC is 0.08 or more at the time of driving or within two hours after driving commits DUI per se. . . . ***DUI per se is a misdemeanor, but it is a class 4 felony if the violation occurred after three or more prior convictions*** . . . .

§ 42-4-1301 (emphases added).

This Court granted certiorari review to decide whether those felony provisions create substantive felony offenses or merely sentence enhancers for the purposes of the right to a jury trial. So the initial question is: what makes a fact an "element" or a "sentence enhancer"?

The Sixth Amendment guarantee of a jury trial and the Fifth Amendment right to due process together require that a jury find every *element* of a charged crime beyond a reasonable doubt. U.S. Const. amends. V, VI; Colo. Const. art. II, §§ 16, 23, 25. For constitutional purposes, an element is any fact that increases the statutorily authorized penalty for a crime. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). If a finding of fact produces a higher sentencing range, this "conclusively indicates that the fact is an element of a distinct and aggravated crime." *Alleyne v. United States*, 570 U.S. 99, 115-16 (2013).

Under this definition—and regardless of what term we use—prior convictions are an element of felony DUI because the prior convictions increase the range of punishment. *See Lewis v. People*, 261 P.3d 480, 483 (Colo. 2011) ("[F]or purposes of the Sixth Amendment guarantee of jury determinations, *it is inconsequential whether a required fact is organized in a particular statutory proscription as a sentencing factor or as an element* because in this context any factor that increases the defendant's sentence beyond the statutory maximum for his offense operates as the 'functional equivalent' of an element of a greater offense." (emphasis added) (citing *Apprendi*, 530 U.S. at 494 n.19)); *accord Ring v. Arizona*, 536 U.S. 584, 602 (2002).

A sentence enhancer, or sentencing factor, is a fact that can be found by a judge, instead of a jury, that helps the court fix the appropriate punishment within the statutorily prescribed range. *See People v. Padilla*, 907 P.2d 601, 606-07 (Colo. 1995).

But there is one kind of sentence enhancer that a judge may find that elevates the range of punishment: the fact of a defendant's prior conviction. *Apprendi*, 530 U.S. at 490. When *Apprendi* held that any fact that increases the penalty range for a crime is an "element" that must be found by a jury beyond a reasonable doubt, it recognized a possible exception for prior convictions.[4] *Id.* This "prior-conviction exception" is the offspring of the Court's earlier decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which courts have interpreted to stand for the proposition that the legislature may choose to allow a judge, instead of a jury, to find the fact of a defendant's prior conviction. *See id.* at

[4] The prior-conviction exception has not weathered well: it was the subject of Justice Scalia's withering dissent in *Almendarez-Torres v. United States*, 523 U.S. 224, 248 (1998) (Scalia, J., dissenting), and it has been roundly criticized ever since. *See Apprendi*, 530 U.S. at 499 (Thomas, J., concurring); *Shepard v. United States*, 544 U.S. 13, 27-28 (2005) (Thomas, J., concurring) (urging the Court to reconsider the prior-conviction exception because "a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided"). Indeed, even the *Apprendi* majority indicated that it might be inclined to overrule the prior-conviction exception had it been squarely presented in that case. 530 U.S. at 489-90.

484-90; *see also Misenhelter v. People*, 234 P.3d 657, 660 (Colo. 2010) (tracing evolution of prior-conviction exception from *Almendarez-Torres*).[5]

Within constitutional constraints, whether a prior conviction is an element (proved to the jury) or a sentence enhancer (found by a judge) depends on legislative intent in drafting each particular statute. *See United States v. O'Brien*, 560 U.S. 218, 225 (2010). If the legislature intends that the jury find the fact of a defendant's prior convictions—in other words, if the statute makes prior convictions an element of an offense—then the Sixth Amendment issue is resolved on the basis of statutory interpretation.

So the next question becomes: what did the General Assembly intend when it created the crime of felony DUI?

> *1. The General Assembly intended prior convictions to be an element of felony DUI according to the plain language and statutory structure of the felony provisions.*

"The power to define criminal conduct and to establish the legal components of criminal liability is vested in the General Assembly." *Copeland v. People*, 2

[5] Many courts have read *Almendarez-Torres* to allow trial courts to find prior convictions in place of juries, but *Almendarez-Torres* did not go that far, and the Supreme Court has since made clear that the case did not touch on the Sixth Amendment. *See Jones v. United States*, 526 U.S. 227, 248-49 (1999) (explaining *Almendarez-Torres* concerned only "the rights to indictment and notice"); *see also Apprendi*, 530 U.S. at 488 (stating "the specific question decided" in *Almendarez-Torres* "concerned the sufficiency of the indictment" and that "no question concerning the right to a jury trial . . . was before the Court").

P.3d 1283, 1286 (Colo. 2000). Subject to Sixth Amendment restraints, whether a given fact is an element of the crime or a sentence enhancer is a question for the legislature. *O'Brien*, 560 U.S. at 225.

"When [the legislature] is not explicit, as is often the case because it seldom directly addresses the distinction between sentencing factors and elements, *courts look to the provisions and the framework of the statute* to determine whether a fact is an element or a sentencing factor." *Id.* (emphasis added).

The plain language and structure of the felony DUI statutes unambiguously reveal the General Assembly's intent to make prior convictions an element of felony DUI.

a. The General Assembly put the felony provisions in the same subsections as the definitions of the substantive crimes.

The structure of the DUI, DWAI, and DUI per se subsections shows that "three or more prior convictions" is an element of the felony offenses because the elements of each are outlined in a single paragraph. *See* § 42-4-1301(1)(a), (1)(b), (2)(a), C.R.S. (2018). Importantly, the reclassification of a misdemeanor offense to a felony with proof of prior convictions is part of the elemental description—it is not located in a different section or even a different subsection. By presenting both the *definition* of the substantive offense and the *classification* in the same

subsection, the legislature indicated that it intends for prior convictions to operate as elements of each crime.

Section 42-4-1307, C.R.S. (2018), concerns penalties and holds additional insights. Section 1307 predates the creation of felony DUI and provides a comprehensive misdemeanor sentencing scheme for first-time offenders, second-time offenders, and third-and-subsequent misdemeanor offenders. § 42-4-1307(3)-(6), (9). Instead of amending section 1307—as one might expect the legislature to do if it intended simply to stiffen the penalties—the General Assembly chose to put the prior-conviction provisions in section 1301, which describes the substantive offenses. This shows the General Assembly's intent that provisions controlling DUI *sentencing* be located in section 1307, and the *substantive offense* be located in section 1301.

Further, this section was amended in 2015 to emphasize that its sentencing scheme does *not* apply to felony DUI. *See* Ch. 262, § 42-4-1301, 2015 Colo. Sess. Laws 990, 990-1000; *see also* § 42-4-1307(6)(a) ("Except as provided in section 42-4-1301(1)(a), (1)(b), and (2)(a) . . . ."). The legislature's choice to place sentencing provisions in a separate section shows that all of the language in sections 42-4-1301(1)(a), (1)(b), and (2)(a)—including the prior-conviction requirements—refers to elements of the offenses.

b. The General Assembly structured the felony DUI laws like POWPO and felony escape, and unlike statutes where prior convictions are a fact found by a judge.

The General Assembly's deliberate choices in structuring the felony DUI laws are even more obvious when compared with similar statutory schemes. Possession of weapons by previous offenders ("POWPO") is another statute that makes prior convictions an element that must be found by a jury, not a judge. *See People v. Fullerton*, 525 P.2d 1166, 1167 (Colo. 1974) (prior conviction is a substantive element of POWPO). The POWPO statute includes the fact of a previous conviction in the description of the substantive offense:

> A person commits the crime of possession of a weapon by a previous offender if the person knowingly possesses, uses, or carries upon his or her person a . . . weapon that is subject to the provisions of this article *subsequent to the person's conviction for a felony* . . . .

§ 18-12-108(1), C.R.S. (2018) (emphasis added).

Another example is felony escape (after conviction): "A person commits a class 2 felony if, while being in custody or confinement *following conviction of a class 1 or class 2 felony*, he knowingly escapes from said custody or confinement." § 18-8-208(1), C.R.S. (2018) (emphasis added); *see also* § 18-8-208(2), (4). A prior conviction is an essential element of escape. *People v. McKnight*, 626 P.2d 678, 683 (Colo. 1981); *People v. Sa'ra*, 117 P.3d 51, 56 (Colo. App. 2004).

POWPO and felony escape stand in contrast to a number of statutes where the legislature indicated that a defendant's prior convictions could be found by a judge. These include indecent exposure, § 18-7-302(1), (6), C.R.S. (2018), child abuse, § 18-6-401(1), (7), C.R.S. (2018), and cruelty to animals, § 18-9-202(1), (2), C.R.S. (2018). *See People v. Schreiber*, 226 P.3d 1221, 1223 (Colo. App. 2009) (prior convictions for indecent exposure are a sentence enhancer); *People v. Becker*, 2014 COA 36, ¶ 13 (same for child abuse); *People v. Harris*, 2016 COA 159, ¶ 75 (same for cruelty to animals).

Each of these statutes lays out the *elements* of the crime in one subsection and the *classification* of the offense and the prior-convictions sentence enhancer in a different subsection. *See O'Brien*, 560 U.S. at 234 ("[P]lacing factors in separate subsections is one way Congress might signal that it is treating them as sentencing factors as opposed to elements . . . ."); *Jones v. United States*, 526 U.S. 227, 232-33 (1999) (observing that the structure of the carjacking statute—a "principal paragraph" followed by "numbered subsections"—makes it "look" like the subsections create sentencing factors, not elements).

The habitual-offender sentencing statute, § 18-1.3-801, C.R.S. (2018), is another useful comparator. It is not a substantive offense but provides that a person with two or three previous felony convictions may be adjudged an habitual

offender, subject to heightened sentencing ranges. *Id.* Importantly, this scheme overtly allows for judicial fact-finding: section 18-1.3-803(4)(b), C.R.S. (2018), specifically states that the court, not the jury, will try the issue of whether the defendant has previous convictions. This stands in contrast to felony DUI, which does not establish a procedure for the court to find the prior convictions.

The General Assembly could have structured felony DUI like indecent exposure, child abuse, and animal cruelty by putting the prior-conviction sentence enhancer in a different subsection than the definition of the offense. It did not, nor did it expressly authorize judicial fact-finding, like in the habitual-offender sentencing scheme. Instead, the General Assembly drafted felony DUI like POWPO and escape (after conviction). This shows that the legislature intended for juries to find the prior convictions under the felony DUI statute. *See Shelter Mut. Ins. Co. v. Mid-Century Ins. Co.*, 246 P.3d 651, 655 (Colo. 2011) (when the legislature "clearly kn[ows] how to" articulate a rule, but does not do so, courts presume it did not intend that rule); *see also LaFond v. Sweeney*, 2015 CO 3, ¶ 12 ("Courts presume the legislature is aware of its own enactments and existing case law precedent.").

c. The General Assembly required the prosecution to plead the prior convictions in the indictment with the rest of the elements of felony DUI.

Another important indication of the legislature's intent comes from its requirement that the prosecution provide notice of the prior convictions when it charges felony DUI: "The prosecution shall set forth such prior convictions in the indictment or information." § 42-4-1301(1)(j). It is axiomatic that elements of a crime must be pleaded in the indictment, information, or complaint—but mere sentencing factors need not be. *Jones*, 526 U.S. at 232; *Almendarez-Torres*, 523 U.S. at 226, 228 (if a sentencing provision creates a separate crime, the prosecution "must write an indictment that mentions the additional element," including prior conviction); *Cervantes v. People*, 715 P.2d 783, 786 (Colo. 1986). The pleading requirement disappears, however, when the government charges a defendant with *misdemeanor* DUI or DWAI as a second or subsequent offense. § 42-4-1307(9)(b)(II) ("The prosecuting attorney shall not be required to plead or prove any previous convictions at trial.").

By requiring prior convictions to be set forth in the charging document, the legislature established them as more than mere sentencing factors: they are elements subject to the right to a jury trial.

d. The General Assembly substantially increased the severity of the punishment.

In the context of felony DUI, prior convictions significantly increase the length of the sentence that a defendant is exposed to upon conviction, which also cuts in favor of treating them as elements, not sentence enhancers.

A misdemeanor DUI conviction subjects an offender to a maximum sentence of 12 months in the county jail, § 42-4-1307(6)(a)(I), whereas a person convicted of felony DUI faces a presumptive range of two to six years in the Department of Corrections for this fourth-degree felony, § 18-1.3-401(1)(a)(V)(A), C.R.S. (2018).

Where a statutory provision increases the sentence so dramatically, courts presume that the legislature did not intend to dispense with traditional procedural safeguards like proof beyond a reasonable doubt and trial by jury. *O'Brien*, 560 U.S. at 230-31 ("[T]he severity of the increase in this case counsels in favor of finding that the prohibition is an element, at least absent some clear congressional indication to the contrary."); *Jones*, 526 U.S. at 233 ("It is at best questionable whether the specification of facts sufficient to increase a penalty range by two-thirds, let alone from 15 years to life, was meant to carry none of the process safeguards that elements of an offense bring with them for a defendant's benefit.").

The General Assembly's drafting decisions clearly communicate its intent for courts to treat prior convictions as an element of the felony offenses that must be found by a jury.

2. The court of appeals reached the wrong conclusion because it applied double-jeopardy case law to this jury-trial question.

The General Assembly's intent in adding the felony DUI provisions must guide the determination of whether prior convictions are found by the jury or by the judge, at least as a matter of statutory interpretation. The court of appeals mistakenly concluded that prior convictions are merely sentence enhancers because it relied on inapposite case law about double jeopardy instead of the right to a jury trial.

Below, the court reasoned that whether the prior convictions are substantive elements of the felony offense or sentence enhancers to the misdemeanor offense turned on whether "the defendant may be convicted of the underlying offense without any proof of the prior conviction." *Linnebur*, slip op. ¶ 8 (citing *People v. Gwinn*, 2018 COA 130, ¶ 44). Because a defendant may be convicted of *misdemeanor* DUI without proof of prior convictions, the court held that the priors can be proved to a judge by a preponderance of the evidence. *Id.* ¶¶ 12-13.

a. The difference between the right to a jury trial and the prohibition against double jeopardy.

Like other divisions of the court of appeals, *see Gwinn*, ¶ 44; *Schreiber*, 226 P.3d at 1223, the *Linnebur* division imported language from this Court's decision in *People v. Leske*, 957 P.2d 1030 (Colo. 1998), thus applying double-jeopardy law to determine whether a fact must be found by a jury.

The merger issue in *Leske* was whether sexual assault on a child was a lesser included offense of sexual assault on a child by one in a position of trust. 957 P.2d at 1034. *Leske* was a double-jeopardy case; it did not raise a jury-trial issue. Thus, *Leske* was concerned with whether a statutory penalty enhancement provision, or "sentence enhancer," was a substantive element of the charged offense "*for purposes of double jeopardy and merger analysis.*" *Id.* at 1039. In that context, this Court reasoned that a statutory provision is a sentence enhancer—that can be disregarded in a merger analysis—if it is not necessarily required to secure a conviction. *Id.*

But what makes a fact a sentence enhancer instead of an element is not the same for the jury-trial right as it is for double jeopardy. *See Lewis v. People*, 261 P.3d 480, 485 (Colo. 2011) ("It is far from clear that the functional equivalence of elements and sentencing factors for purposes of a criminal defendant's *right to a*

jury trial should apply equally to the constitutional presumption against *multiple simultaneous punishments* for the same offense." (emphases added)).

This is so because the double-jeopardy clauses and the jury-trial right provide very different constitutional protections.

The prohibition against double jeopardy serves several purposes: "it protects against a second prosecution for the same offense after an acquittal; it protects against a second prosecution for the same offense after conviction; and it protects against multiple punishments for the same offense." *Armintrout v. People*, 864 P.2d 576, 578 n.6 (Colo. 1993) (quoting *Boulies v. People*, 770 P.2d 1274, 1278 (Colo. 1989)); *see also* U.S. Const. amend. V; Colo. Const. art. II § 18. To serve their protective role, the double-jeopardy clauses must be construed broadly, and this means that courts should err on the side of merging two offenses into one conviction, rather than risking that a defendant may suffer two convictions for the same crime. For this reason, the test to determine whether two offenses merge is lenient; it disregards "sentence enhancers" that affect only the punishment and not the substantive offense. *See Armintrout*, 864 P.2d at 580 ("[W]e do not consider sentence enhancement provisions when determining whether one offense is the lesser included of another.").

The jury-trial right, on the other hand, ensures that "a jury must find beyond a reasonable doubt every fact which the law makes essential to a punishment that a judge might later seek to impose." *United States v. Haymond*, 139 S. Ct. 2369, 2376 (2019) (plurality) (quoting *Blakely v. Washington*, 542 U.S. 296, 304 (2004) (internal punctuation omitted). Juries exercise "supervisory authority" over the judiciary by limiting a judge's power to punish. *Id.* Again, to realize this protective power, the jury-trial right must be broadly construed. In this context, courts must ensure that the *jury* finds any fact increasing the prescribed range of penalties. *See id.* at 2377-78. For this reason, the test to determine whether a fact is found by a jury or a judge must err on the side of giving that fact to the jury.

The court of appeals ignored legislative intent by asking whether Mr. Linnebur could be convicted of DUI without proof of prior convictions, instead of "looking to the provisions and the framework of the statute to determine whether a fact is an element or a sentencing factor," *United States v. O'Brien*, 560 U.S. 218, 225 (2010). By answering a double-jeopardy question when the issue was Mr. Linnebur's jury-trial right, the court erroneously held that prior convictions for felony DUI are only a sentence enhancer.

b. Even under the *Leske* test, prior convictions must be proved to the jury, not to a judge.

The *Leske* test should be confined to the double-jeopardy context and should not be used to decide whether a judge can find prior convictions for the purposes of the jury-trial right. But if this Court decides to use that test here, prior convictions still must be proved to a jury.

Leske relied on the earlier double-jeopardy case of *Armintrout v. People*, which held that the fact that a defendant burgled a "dwelling" was a sentence enhancer for the purposes of double jeopardy; in other words, because the "dwelling" fact was not an element of burglary, it was irrelevant as to whether first- and second-degree burglary merged. 864 P.2d 576, 579-80 (Colo. 1993). Even so, *Armintrout* made clear that, whether it was an element or a sentence enhancer, the dwelling fact *had to be proved to the jury* beyond a reasonable doubt:

> A sentence enhancer is similar to an essential element of an offense in that *a defendant may not be sentenced at the higher felony level unless the factor enhancing the sentence is proved beyond a reasonable doubt*. Thus, Armintrout could not have been convicted of class 3 felony second degree burglary *unless the jury found, beyond a reasonable doubt*, that the burglary was of a "dwelling."

Id. at 580. Thus, even if prior convictions could be called "sentence enhancers" under *Leske* and *Armintrout*, Mr. Linnebur had the right to have them proved to the jury instead of the judge.

3. Defendants charged with felony DUI are entitled to a preliminary hearing, indicating that the prior convictions are not sentence enhancers.

This Court has weighed in on the meaning of the felony DUI provisions already once before, in *People v. Tafoya*, 2019 CO 13. *Tafoya* held that defendants who are in custody and charged with felony DUI are entitled to a preliminary hearing on the charge. *Id.* ¶ 16.

In reaching that conclusion, *Tafoya* rejected the argument of the prosecutor and the ruling of the trial court that the felony provisions create a separate *sentence enhancer* rather than a separate *crime*. *Id.* ¶¶ 10, 20. This Court reasoned that "section 42-4-1301(1)(a) and its related penalty provisions alternately accord the prior convictions qualities of both elements of an offense and sentence enhancers." *Id.* ¶ 27. Because Tafoya was accused of a class four felony DUI, not a misdemeanor DUI and a separate sentence enhancer, she had the right to a preliminary hearing. *Id.* ¶¶ 20, 27.

Tafoya also distinguished felony DUI from statutory schemes that contain substantive offenses plus separate sentence enhancers, including the habitual-

offender, crime-of-violence, and habitual-domestic-violence-offender statutes. *Id.* ¶¶ 25-26 & n.1. Under these other schemes, prior offenses are proved to the judge and no preliminary hearing is required, unlike felony DUI.

Although *Tafoya* did not reach the issue of whether prior convictions are elements of felony DUI for the purposes of jury findings, the result in that case compels the conclusion that they are. Why does a defendant get a preliminary hearing if prior convictions for felony DUI are only a sentence enhancer to misdemeanor DUI? A ruling from this Court that prior convictions are not elements for the purposes of the jury-trial right could not be squared with *Tafoya*.

Because the felony provisions give prior convictions the "quality" of an element, requiring a preliminary hearing, defendants are entitled to have a jury find that element, too.

4. If the felony DUI provisions are ambiguous, the rule of lenity requires that prior convictions be proved to the jury.

This Court in *Tafoya* indicated that the felony DUI laws may be ambiguous as to whether prior convictions are elements or sentence enhancers when it reasoned that the provisions "alternately accord the prior convictions qualities of both elements of an offense and sentence enhancers." ¶ 27.

When a criminal statute is ambiguous, the rule of lenity requires courts to construe that ambiguity in favor of the person whose liberty interests are at stake.

Faulkner v. Dist. Court, 826 P.2d 1277, 1278 (Colo. 1992); *accord People v. Summers*, 208 P.3d 251, 258 (Colo. 2009). Additionally, habitual criminality statutes are "drastically in derogation of the common law" and must be strictly construed against the right of the State to demand increased punishment. *Smalley v. People*, 304 P.2d 902, 906, 907 (Colo. 1956) (Moore, J., specially concurring); *accord Winter v. People*, 126 P.3d 192, 194 (Colo. 2006).

If it is ambiguous whether prior convictions are an element or a sentence enhancer for felony DUI, this Court must apply the rule of lenity and construe the statute in favor of Mr. Linnebur's right to a jury trial.

5. The prior-conviction exception cannot apply to felony DUI.

In addition to disregarding legislative intent, the court of appeals erred when it held that the prior-conviction exception could apply to felony DUI. In *Linnebur*, and in published decisions including *Gwinn*, *Becker*, and *Schreiber*, the court of appeals has created a body of law extending the prior-conviction exception to statutes that elevate a misdemeanor to a felony, without authority from any higher court.

a. The prior-conviction exception cannot be invoked to allow a judge to make a finding that elevates a misdemeanor to a felony.

The prior-conviction rule has always been a "narrow exception" to the jury-trial right. *Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013); *Apprendi v. New Jersey*, 530 U.S. 466, 487 (2000) ("[A]s we made plain in *Jones* last Term, *Almendarez-Torres* represents at best an exceptional departure from the historic practice that we have described." (internal citation omitted)); *id.* at 489-90 (treating the prior-conviction exception as "a narrow exception to the general rule" that facts that increase punishment must be found by a jury).

Although the statutes at issue in *Apprendi*, 530 U.S. at 488, *Blakely v. Washington*, 542 U.S. 296, 301 (2004), and *United States v. Booker*, 543 U.S. 220, 244 (2005), did not involve proof of prior convictions, the Supreme Court recognized prior convictions as a possible exception to the general rule that facts increasing criminal penalties must be found by a jury.

Apprendi, *Blakely*, and *Booker* relied on *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), for this rule. There, the Court held that an increased penalty for unlawful re-entry of a person deported for committing an aggravated felony was a sentence enhancer that did not need to be charged in the indictment.

Id. at 226-27.[6] The prior-conviction exception was premised on the assumption that a defendant has already received jury-trial and due-process protections for the prior convictions:

> Both the certainty that procedural safeguards attached to any "fact" of prior conviction, and the reality that *Almendarez-Torres* did not challenge the accuracy of that "fact" in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a "fact" increasing punishment beyond the maximum of the statutory range.

Apprendi, 530 U.S. at 488. (Here, of course, Mr. Linnebur is challenging the accuracy of that fact.)

This principle is undermined, however, when the prior convictions are for *misdemeanor* offenses, as with Colorado's felony DUI framework. Both substantive law and criminal procedure differ between a misdemeanor and a felony. *See* 1 Wayne R. LaFave, *Substantive Criminal Law* § 1.6(a) (3d ed. 2017). For example, defendants accused of a felony are entitled to a jury of 12, a greater number of peremptory challenges, and preliminary hearings under certain circumstances. Colo. Const. art. II § 23; § 16-5-301, C.R.S. (2018); § 18-1-406(1),

[6] Justice Scalia vigorously dissented. He argued that there was no rational basis to make recidivism an exception to the requirement of proof of facts to a jury beyond a reasonable doubt, simply because this fact goes only to the punishment. *Almendarez-Torres*, 523 U.S. at 258 (Scalia, J., dissenting); *see also Apprendi*, at 489-90 (observing that "it is arguable that *Almendarez-Torres* was incorrectly decided").

C.R.S. (2018); Crim. P. 23(a)(1); Crim. P. 24(d)(2). The consequences of a misdemeanor conviction are far less serious than a felony, so defendants have a diminished incentive to insist on their constitutional rights to counsel or to a jury trial. Thus, the assumption that prior convictions were obtained with all of the procedural protections required by the constitution is unsound when the prior conviction was a misdemeanor.

Another reason why the prior-conviction exception cannot apply to felony DUI is that transforming a misdemeanor to a felony changes the very nature of the offense. Felony convictions result in vastly greater collateral consequences for a defendant than misdemeanor convictions. These include loss of the right to vote and to serve on juries; curtailment of the right to possess a gun and other weapons; and the evidentiary consequence of a felony conviction used as impeachment in court. *People v. Schreiber*, 226 P.3d 1221, 1226-27 (Colo. App. 2009) (Bernard, J., concurring in part and dissenting in part). Felony convictions can be used as predicates for habitual-criminal sentencing. *See id.* And felons experience "a considerably greater weight of moral opprobrium." *Id.* at 1226.

Judge Bernard wrote separately in *Schreiber* to argue that the "substantial differences between misdemeanors and felonies" require prior misdemeanor convictions to be treated as elements of felony indecent exposure, not sentence

enhancers. 226 P.3d at 1226. Similarly, in *United States v. Rodriguez-Gonzales*, 358 F.3d 1156, 1160-61 (9th Cir. 2004), the Ninth Circuit Court of Appeals held that because the statute at issue "substantively transform[ed]" a misdemeanor to a felony, proof of the prior conviction was more than a mere sentencing factor, and the prior conviction must be charged in the indictment and found by the jury. The court distinguished *Almendarez-Torres* and refused to extend the prior-conviction exception. *Id.* at 1160-61; *see also* 29 Am. Jur. 2d Evidence § 194 (discussing holding of some courts that where a prior conviction elevates a misdemeanor to a felony, it is an essential element that must be proved beyond a reasonable doubt).

Assuming that the prior-conviction exception remains good law,[7] there is no authority that the exception can apply to felony DUI. Neither this Court nor the United States Supreme Court has ever applied the prior-conviction exception to allow a judge, instead of a jury, to find a fact that transforms a misdemeanor offense into a felony. This Court should decline to expand this "narrow exception"

[7] *See Shepard v. United States*, 544 U.S. 13, 27-28 (2005) (Thomas, J., concurring) (urging the Court to reconsider *Almendarez-Torres*'s continuing viability); *Lopez v. People*, 113 P.3d 713, 723 & n.9 (Colo. 2005); *but see Carachuri-Rosendo v. Holder*, 560 U.S. 563, 567 n.3 (2010) (observing in dicta that "recidivist simple possession" offense comported with *Almendarez-Torres* and allowed a judge to find prior convictions by a preponderance of the evidence and change a misdemeanor conviction to a felony).

to a defendant's right to have a jury find every fact that increases his punishment for a crime.

b. The Colorado Constitution provides greater jury-trial protection and should be construed to require proof to the jury of every fact that increases the penalty range.

It is the duty of the Colorado Supreme Court "to interpret the Colorado Constitution in a manner consistent with and more protective of the liberty interests of Colorado citizens than might otherwise be required under federal standards." *People v. Hillman*, 834 P.2d 1271, 1280 (Colo. 1992). This responsibility honors the individual rights of this state's citizens and provides "independent and supplemental" protections to those provided by the United States Constitution. *Id.*

The Colorado Constitution has two provisions addressing the right to a jury trial. Article II, section 16 guarantees a speedy public trial by an impartial jury of the county or district in which the offense occurred. But the framers of our state constitution went further and adopted article II, section 23, which states, "***The right of trial by jury shall remain inviolate in criminal cases***; but a jury in civil cases in all courts, or in criminal cases in courts not of record, may consist of less than twelve persons, as may be prescribed by law." Colo. Const. art. II § 23 (emphasis added).

This Court in *People v. Rodriguez*, 112 P.3d 693, 698 (Colo. 2005), said that article II, section 23 "goes beyond the protections of the Sixth Amendment and has no comparable federal counterpart." *Rodriguez* departed from the federal rule and held that the Colorado Constitution protects the criminal defendant's right to a jury of 12 because "Colorado's constitutional provisions are independent of, and may extend beyond, the federal constitution to offer greater protection for the people of Colorado." *Id.* at 698.

If this Court decides that the Sixth Amendment does not require that prior convictions be proved to the jury for felony DUI, it should nevertheless hold that the priors must go to the jury under the Colorado Constitution's increased protection for the jury-trial right. *Cf. State v. Auld*, 361 P.3d 471, 474-75 (Haw. 2015) (rejecting prior-conviction exception in the context of repeat offender sentencing under the Hawaii Constitution).

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The court of appeals wrongly held that prior convictions can be found by a judge in the context of felony DUI. The court ignored the plain language and structure of the felony DUI laws; it applied inapposite double-jeopardy law to a jury-trial question; and it extended the prior-conviction exception to a new context without authority. For all of the reasons discussed above, this Court should vacate

Mr. Linnebur's convictions for felony DWAI and felony DUI per se and remand the case for sentencing on misdemeanor offenses instead. *See* Issue III, *infra*.

II. The court of appeals erred in concluding that, because the felony DUI, DWAI, and DUI per se provisions do not provide the applicable burden of proof, the prosecution must prove prior convictions only under a preponderance of the evidence standard.

A. Preservation and standard of review.

Mr. Linnebur's pretrial motion argued that the applicable burden of proof must be beyond a reasonable doubt. (CF p 62) The trial court ruled that prior convictions may be proved by a preponderance of the evidence. (TR 8/23/16 pp 4-5)

This Court reviews questions of statutory interpretation de novo. *People v. Tafoya*, 2019 CO 13, ¶ 17.

B. If a judge, and not a jury, can find the fact of a defendant's prior convictions in a felony DUI case, the prosecution still must prove prior convictions beyond a reasonable doubt.

If this Court holds that the General Assembly unambiguously intended for prior convictions to be elements of felony DUI, that the statute is ambiguous, *or* that the prior-conviction exception cannot apply to felony DUI, then prior convictions *must* be proved to the jury beyond a reasonable doubt. *See Alleyne v. United States*, 570 U.S. 99, 103 (2013) (any fact that increases the penalty for a

crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt).

This Court can reach the merits of Issue II only if it first disregards *Tafoya* and holds that the General Assembly unambiguously intended to invoke the prior-conviction exception in the context of felony DUI. If this is the case, however, a defendant's prior convictions nevertheless must be proved beyond a reasonable doubt.

1. The Due Process Clauses of the United States and Colorado constitutions require the prosecution to prove prior convictions beyond a reasonable doubt.

Almendarez-Torres, *Apprendi*, and their progeny have recognized a possible prior-conviction exception permitting a judge, instead of a jury, to find the fact of a prior conviction. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998). And although *Apprendi* acknowledged that these decisions implicated "the proscription of any deprivation of liberty without due process of law," 530 U.S. at 476 (internal quotation marks omitted), none of these cases directly addressed what the burden of proof is when the prior-conviction exception is invoked. *See Almendarez-Torres*, 523 U.S. at 247-48 (where petition made no separate standard-of-proof claims regarding sentencing, Court "express[ed] no view on whether some heightened standard of

proof might apply to sentencing determinations that bear significantly on the severity of sentence"); *see also Apprendi*, 530 U.S. at 488 ("[N]o question concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact was before the [*Almendarez-Torres*] Court."); *see also* 6 Wayne LaFave et al., *Criminal Procedure* § 26.4(i) n.201 (4th ed. 2018) ("[T]he Court in *Almendarez-Torres* did not reach the burden of proof or right to jury issues for the fact of prior conviction."); *but see Carachuri-Rosendo v. Holder*, 560 U.S. 563, 568 n.3 (2010) (suggesting in dicta that "recidivist simple possession" properly allowed a judge to find prior convictions by a preponderance of the evidence).

The same appears true for this Court's cases adopting and applying *Apprendi* and its progeny: none directly addresses the burden of proof for the prior-conviction exception. *See, e.g.*, *Lopez v. People*, 113 P.3d 713, 723 (Colo. 2005) (discussing the four types of factors valid for use in aggravating sentencing and observing that they "comply with the *Apprendi–Blakely* rule and the Sixth Amendment" without discussing due-process requirements); *accord Villanueva v.*

People, 199 P.3d 1228, 1237-38 (Colo. 2008) (discussing *Blakely*'s concern for protecting the jury-trial right and a defendant's Sixth Amendment protections).[8]

Because *Apprendi* tells us that any fact *other than* the fact of a prior conviction must be proved beyond a reasonable doubt, the question is: what is the burden of proof *for prior convictions?*

a. The Fifth and Fourteenth Amendments require proof of every element beyond a reasonable doubt, including prior convictions.

Even where judges find prior convictions in place of juries, they must apply the beyond-a-reasonable-doubt standard because the prior convictions are still an element as a constitutional matter—to find them is to expand the defendant's legal

[8] Other jurisdictions have split regarding the burden of proof for the prior-conviction exception. *See* 39 Am. Jur. 2d Habitual Criminals, Etc. § 43 (discussing cases). Some federal circuits have read *Almendarez-Torres* as explicitly endorsing the preponderance standard, albeit with serious reservations about the continuing validity of prior-conviction exception itself. *See United States v. McDowell*, 745 F.3d 115, 123 (4th Cir. 2014) ("[*Almendarez-Torres*] held that the Sixth Amendment permits a judge to find the fact of a prior conviction by a mere preponderance of the evidence . . . ."); *id.* at 124 (explaining that applying the prior-conviction exception in the instant case "untethers the exception from its justifications and lays bare the exception's incompatibility with constitutional principles that are by now well settled," and urging reconsideration of the prior-conviction exception); *United States v. Davis*, 260 F.3d 965, 969 (8th Cir. 2001). Some states require proof beyond a reasonable doubt. *See State v. Auld*, 361 P.3d 471, 472-75 (Haw. 2015) (holding as a matter of state law that proof of prior convictions must be beyond a reasonable doubt); *State v. Fry*, 926 N.E.2d 1239, 1258-59 (Ohio 2010) ("Where a prior conviction elevates the degree of a subsequent offense, the prior conviction is an essential element that the state must prove beyond a reasonable doubt.").

penalty exposure—and due process requires that all elements be supported by proof beyond a reasonable doubt. *See* U.S. Const. amends. V, XIV; Colo. Const. art. II § 25; *Apprendi*, 530 U.S. at 476-77; *In re Winship*, 397 U.S. 358, 364 (1970).

Winship explained that, "[l]est there remain any doubt about the constitutional stature of the reasonable-doubt standard," the Due Process Clause mandates proof beyond a reasonable doubt "of every fact necessary to constitute the crime" with which a defendant is charged. 397 U.S. at 364. The reasonable-doubt standard is indispensable because it "impresses on the trier of fact the necessity of reaching a *subjective state of certitude* of the facts in issue." *Id.* (emphasis added). Otherwise, a defendant would be severely and unconstitutionally disadvantaged if he could be found guilty and "imprisoned for years" on the strength of evidence satisfying only a preponderance standard. *Id.* at 363. In addition to due process, the beyond-a-reasonable-doubt standard provides "concrete substance" to the bedrock constitutional principle that a defendant is presumed innocent. *Id.*

Apprendi acknowledged that *Winship*'s due-process protections extend, to an important degree, to findings that go not only to a defendant's guilt or innocence, but to the length of his sentence. 530 U.S. at 484. The Court reasoned that both

the jury-trial right and the reasonable-doubt requirement must also apply to facts that increase a criminal penalty:

> If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; *it necessarily follows that the defendant should not—at the moment the State is put to proof of those circumstances—be deprived of protections that have, until that point, unquestionably attached*.

Id. (emphasis added). Thus, a legislature may not circumvent the protections of *Winship* by simply redefining elements of an offense to characterize them as mere sentencing factors. *Id.* at 485.

Prior convictions are an element of the crime of felony DUI, regardless of who does the finding. For this reason, the prosecution must prove them by the constitutional standard of beyond a reasonable doubt.

b. Article II, section 25 of the Colorado Constitution also requires proof of prior convictions beyond a reasonable doubt.

The Colorado Constitution is more protective of a defendant's due-process rights than the federal constitution, *see People v. Young*, 814 P.2d 834, 842 (Colo. 1991), and this Court should hold that prior convictions must be proved beyond a reasonable doubt. *See* Colo. Const. art. II § 25 ("No person shall be deprived of life, liberty, or property, without due process of law."); *Juhan v. Dist. Court*, 439

P.2d 741, 745 (Colo. 1968) ("There is not the slightest requirement that the meaning of 'due process of law' shall be the same in each of the fifty states.").

Specifically, Colorado's due-process protection is greater than the federal guarantee regarding the burden of proof in criminal cases. *Juhan* held that a statute that shifted the burden of proving an insanity defense to the defendant violated article II, section 25. 439 P.2d at 743. This was so because the doctrine that the State must prove guilt beyond a reasonable doubt had become "part and parcel" of Colorado's concept of constitutional due process of law, and the legislature lacked the power to alter "this fundamental doctrine." *Id.* at 745-46; *see also Young*, 814 P.2d at 839, 842 (holding that Colorado's Due Process Clause also requires a higher standard of "certainty and reliability" for finding sentencing facts).

Because article II, section 25 creates greater due-process protections than required by the federal clauses, proof of prior convictions—even in the context of the prior-conviction exception—must be beyond a reasonable doubt.

2. Where a criminal sentencing statute is silent regarding the burden of proof, courts must apply the reasonable-doubt standard.

The court of appeals held that "when a sentencing statute does not establish a burden of proof, the prosecution need only prove the existence of prior conviction facts by a preponderance of the evidence." *People v. Linnebur*, No. 16CA2133 (Colo. App. Nov. 8, 2018), ¶ 13 (internal quotation marks omitted).

But regardless of due-process requirements, canons of statutory interpretation mandate that if a sentencing statute fails to set forth the burden of proof for a fact that increases the punishment, proof must be beyond a reasonable doubt.

a. Principles of statutory construction and case law dictate that proof must be beyond a reasonable doubt.

Two principles of statutory interpretation compel the conclusion that the court of appeals erred by endorsing the preponderance standard instead of the reasonable-doubt requirement.

First, "[t]he cardinal rule of statutory construction is that criminal statutes are to be strictly construed in favor of the accused." *People v. Hrapski*, 658 P.2d 1367, 1369 (Colo. 1983); *People v. Roybal*, 618 P.2d 1121, 1125 (Colo. 1980); *Pigford v. People*, 593 P.2d 354, 360 (Colo. 1979).

Second, when a statute is silent on an issue that should be within its scope, this creates an ambiguity, and the rule of lenity dictates that the statute be construed in favor of the defendant's liberty interests. *People v. Newton*, 764 P.2d 1182, 1189 (Colo. 1988); *People v. Tenneson*, 788 P.2d 786, 795 (Colo. 1990); *People v. Russo*, 713 P.2d 356, 364 (Colo. 1986); *People v. Mosley*, 397 P.3d 1122, 1126 (Colo. App. 2011).

This Court has already applied these principles to sentencing statutes that provide no burden of proof as to sentence enhancers. *Russo* addressed the crime-

of-violence statute, which provided that the prosecution could plead a crime of violence in a separate count of the information, and if the jury made a special finding that the defendant used a deadly weapon during the offense, the court was required to sentence the defendant in an aggravated range. 713 P.2d at 363-64. This Court concluded that the statute created a sentencing provision, not a separate felony, but the statute was silent as to the burden of proof. *Id.* at 364.

Russo held that the sentence enhancer must be proved beyond a reasonable doubt; this was a "just and reasonable result" given that the finding of a deadly weapon subjected defendants to a mandatory aggravated sentence. *Id.* The statute's silence implied the answer:

> We believe that *if the legislature intended to permit this special jury finding to be made on less than the reasonable doubt standard applicable to the trial of substantive crimes, it would have so stated*. To engraft a lesser standard of proof onto the statutory scheme in the face of this legislative silence would hardly comport with basic fairness.

Id. (emphasis added); *see also People v. Garcia*, 752 P.2d 570, 587 (Colo. 1988) (crime-of-violence statute requires proof beyond a reasonable doubt).

Similarly, *Tenneson* held that before a death sentence is imposed, the jury must be convinced beyond a reasonable doubt that mitigating factors do not outweigh aggravating factors—even though the statute did not specify a standard.

788 P.2d at 789-90. This Court reasoned that general constitutional principles about the burden of proof in criminal cases, including the due-process requirement of proof beyond a reasonable doubt "of every fact necessary" to constitute the charged crime, compelled the conclusion that the reasonable-doubt standard applies to sentencing proceedings under these circumstances. *Id.* at 794 (citing *In re Winship*, 397 U.S. 358, 364 (1969)). This Court noted that its previous cases imposed the reasonable-doubt requirement on statutes that were silent about facts "extraneous to the guilt determination" yet affecting the sentence imposed. *Id.* at 795. *Tenneson* also turned to the rule of lenity: "when a statute concerning a criminal offense is silent as to the burden of proof required, the rule of lenity dictates that we adopt a construction that favors the defendant." *Id.* (internal quotation marks omitted).

Two other contexts in which this Court has construed silence in favor of criminal defendants' rights include silence regarding the mens rea requirement, *People v. McNeese*, 892 P.2d 304, 311 (Colo. 1995) (implying the mental state of "knowingly"), and silence as to whether a defendant would be sentenced to jail or the department of corrections, *Brooks v. People*, 24 P. 553, 553 (Colo. 1890) (where a statute "admits equally of two constructions, that which is the more favorable to the defendant is to be preferred").

b. The court of appeals' reliance on *Lacey* is unfounded.

The court of appeals held that "when a sentencing statute does not establish a burden of proof, the prosecution need only prove the existence of prior conviction facts by a preponderance of the evidence." *Linnebur*, slip op. ¶ 13 (quoting *People v. Wilson*, 2013 COA 75, ¶ 43).

This rule from *Wilson*, repeated in other court of appeals cases, can be traced back to this Court's 1986 decision in *People v. Lacey*, 723 P.2d 111, 114 (Colo. 1986). *See Wilson*, ¶ 43; *People v. Schreiber*, 226 P.3d 1221, 1224 (Colo. App. 2009). But *Lacey* does not stand for the broad proposition that the court of appeals has attributed to it, and its precedential strength has been eroded by subsequent case law.

At issue in *Lacey* was section 18-1-105(9)(a)(III), C.R.S., which imposed longer sentences if a judge found "extraordinary aggravating circumstances." 723 P.2d at 112. In Lacey's case, the circumstance was that he was on probation at the time of the offense, and he argued that the statute violated due process because it didn't require notice in the information and proof of his probationary status beyond a reasonable doubt. *Id.* at 112-13.

Lacey held that section 18-1-105(9)(a)(III) was a sentence enhancement statute and that it complied with due process because it provided adequate notice

and because the prosecution had the burden to prove a defendant's probationary status. *Id.* at 113. But the *Lacey* court also held that the prosecution's burden of proving probationary status was only by a preponderance of the evidence. *Id.* at 113-14.

Lacey doesn't control here because its holding applied only to proving *probation*, not to proving other sentence-enhancing facts. The opinion relied on statutes governing probation revocation hearings and deferred sentence revocation hearings for its conclusion that proof was by a preponderance. *Id.* at 114. The statutes governing revocation require proof only by a preponderance because revocation hearings are subject to reduced constitutional protections. *See Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972) ("[R]evocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations.").

Lacey also predates *Apprendi*'s sea change in our understanding that any fact increasing the range of punishment is an element for constitutional purposes. When *Lacey* was decided, *Patterson v. New York*, 432 U.S. 197, 207 (1977), was the leading case on due-process protection, and it rejected the claim that when a statute links the severity of punishment to the presence or absence of an identified

fact, the prosecution must prove the fact beyond a reasonable doubt. *Apprendi* and its progeny overruled this idea.

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The court of appeals erred by holding that the fact of a prior conviction in a felony DUI trial can be proved by a mere preponderance, simply because the statute did not specify a burden of proof. This Court should reverse the holding of the court of appeals.

III. If a jury determination was required, the evidence in Mr. Linnebur's case was insufficient to prove felony DWAI and felony DUI per se.

A. Standard of review and preservation.

Appellate courts review sufficiency of the evidence claims de novo, and they need not be preserved. *McCoy v. People*, 2019 CO 44, ¶ 27.

B. Facts.

The jury heard no evidence that Mr. Linnebur had prior convictions that would qualify him for a felony DUI conviction. When the jury returned its verdicts, it found him guilty of misdemeanor DWAI and DUI per se.

After the trial court dismissed the jury, the prosecution presented evidence of prior convictions to the court. (TR 8/24/16 pp 135-40; EXs 10-13) The prosecutor said that Exhibits 10, 11, and 12 were certified public records of three prior convictions for drinking-and-driving-related offenses while Exhibit 13 was a

certified DMV dossier for Mr. Linnebur. (TR 8/24/16 pp 138-39) The prosecution called no witnesses.

The prosecutor asked the trial court to find by a preponderance of the evidence that Mr. Linnebur's present conviction was at least a fourth offense and also requested that the court make a record whether it would find the prior convictions proven beyond a reasonable doubt. (Id. pp 139-40)

Defense counsel objected based on lack of foundation, hearsay, confrontation, and due process, and argued that without a witness to identify Mr. Linnebur, there was no way to connect the documents to him. (Id. pp 136-37)

The trial court found that the records of convictions were self-authenticating and overruled defense counsel's objection. (Id. p 138:3-6) Without explanation, the court then stated that it found the three convictions beyond a reasonable doubt. (Id. pp 142-44)

C. If a jury determination of Mr. Linnebur's prior convictions was required, then the trial court committed structural error by sentencing Mr. Linnebur for felonies instead of the misdemeanor convictions supported by the jury's verdicts.

Mr. Linnebur's jury convicted him of misdemeanor offenses because it made no findings about prior convictions. The trial court removed that element from the jury's consideration and found it by itself.

When a court sentences a defendant on a crime different from the one on which the jury's verdict was based, it violates his due process and Sixth Amendment rights to a jury trial. *Medina v. People*, 163 P.3d 1136, 1138 (Colo. 2007); *see also* U.S. Const. amends. V, VI, XIV; *Blakely v. Washington*, 542 U.S. 296, 304 (2004) ("When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority." (internal citation and punctuation omitted)).

In *People v. Mason*, 643 P.2d 745, 753-55 (Colo. 1982), under a previous version of the habitual-offender sentencing statute, the trial court erroneously withdrew habitual criminal counts from the jury before it submitted its verdict. The court then found those counts itself after the jury was dismissed. *Id.* at 753. This was constitutional error because the trial court "improperly terminated the defendant's trial on the habitual criminal counts by discharging the jury without ever having submitted or received a jury verdict on the habitual criminal counts," and this Court declared the habitual conviction void and the sentence invalid. *Id.* at 753; *accord Medina*, 163 P.3d at 1141 (trial court's entry of a verdict on class 4 felony accessory instead of the class 5 offense "essentially judged Medina guilty of a new and different crime").

This Court must remand for Mr. Linnebur to be resentenced on the misdemeanor convictions that the jury's verdicts authorized. *See Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993) ("The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty."); *Medina*, 163 P.3d at 1141 (structural sentencing error that does not affect the jury's guilty verdict requires remand for resentencing).

Mr. Linnebur's prior convictions cannot now be retried to a different jury, as this violates double jeopardy. U.S. Const. amend. V; Colo. Const. art. II § 18. By removing the finding of prior convictions from the jury, the trial court deprived Mr. Linnebur "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); *accord United States v. Jorn*, 400 U.S. 470, 484 (1971) ("[W]here the judge, acting without the defendant's consent, aborts the proceeding, the defendant has been deprived of his valued right to have his trial completed by a particular tribunal." (internal quotation marks omitted)).

People v. Porter, 2015 CO 34, is not to the contrary. There, this Court held that the double jeopardy clauses do not prevent retrial of a defendant's habitual-offender counts. *Id.* ¶ 29. The habitual-offender statute creates a sentence-

enhancement scheme where a defendant's prior convictions must be tried to the court. § 18-1.3-803(4)(b), C.R.S. (2018); *Porter*, ¶¶ 2, 15. But if felony DUI requires the *jury* to find the prior convictions, then priors are an element of felony DUI, not a sentence enhancer to the misdemeanor offenses. Under *Medina* and *Mason*, Mr. Linnebur could not have this element retried by anyone. *See Medina*, 163 P.3d at 1141-42 (remanding for resentencing); *Mason*, 643 P.2d at 755.

1. Neder *and* Griego *do not apply.*

Neder v. United States, 527 U.S. 1, 9, 12-13 (1999), and *Griego v. People*, 19 P.3d 1, 8 (Colo. 2001), held that the omission or misdescription of an element of an offense in jury instructions is not structural error; instead, these errors can be reviewed under the constitutional harmlessness test. Where it is clear beyond a reasonable doubt that error did not contribute to the verdict obtained, it is harmless. *Neder*, 527 U.S. at 15-16; *Griego*, 19 P.3d at 8-9.

Neder and *Griego* both concluded that the errors in those cases were constitutionally harmless because no reasonable jury could have failed to find the element in question. *Neder*, 527 U.S. at 16; *Griego*, 19 P.3d at 9. And the appellate courts could make this determination *because the jury heard evidence of these missing elements at trial. Neder*, 527 U.S. at 18 (the omitted element was supported by uncontroverted evidence at trial); *Griego*, 19 P.3d at 9-10 (jury's

finding that defendant drove vehicle with "knowledge" satisfied omitted mens rea requirement of "knowingly").

What distinguishes this case from *Neder* and *Griego* is that the error here was not that the instructions neglected to ask the jury to find Mr. Linnebur's prior convictions. The error was a complete lack of evidence of prior convictions *at all*. *See Medina*, 163 P.3d at 1141 (where jury instructions were appropriate, *Neder* and *Griego* did not apply). The jury could not have found Mr. Linnebur guilty of felony DUI because it saw absolutely no proof of prior convictions.

In *Neder* and *Griego*, the question was whether the verdict would have been *the same* if the jury had been asked to find the omitted element. But if this Court reviews Mr. Linnebur's case for harmlessness, the question becomes: would the jury's verdict have been *different* if it had heard omitted evidence? Would the jury have found Mr. Linnebur guilty of the crimes of felony DWAI and felony DUI per se, instead of the misdemeanor offenses?

Finding the error harmless under these circumstances would be tantamount to sentencing Mr. Linnebur for a crime different from that supported by the jury's verdicts. *See Medina*, 163 P.3d at 1138. Because "[n]o matter how overwhelming the evidence, a sentencing court may not direct a verdict for the State," *id.* at 1140,

the jury's misdemeanor verdicts must be honored, and Mr. Linnebur must be resentenced accordingly.

D. The prosecution failed to prove Mr. Linnebur's prior convictions under any burden of proof.

If this Court reviews the jury-trial violation in this case under *Neder* and *Griego* and the constitutional harmless error standard, the question is whether the error in the judge finding the prior convictions, instead of the jury, is harmless beyond a reasonable doubt. It wasn't, as the proof of Mr. Linnebur's prior convictions was insufficient because the prosecution failed to prove his identity.

If a jury determination of prior convictions is required for felony DUI, then the burden of proof must be beyond a reasonable doubt. *See Alleyne v. United States*, 570 U.S. 99, 103 (2013) (under the Sixth Amendment, any fact that increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt).

Because proof must be beyond a reasonable doubt, cases from the habitual-offender sentencing context are directly on point. *See People v. Frost*, 5 P.3d 317, 325 (Colo. App. 1999) (prosecution must prove prior convictions beyond a reasonable doubt under habitual-offender statute).

"In any habitual criminal action the prosecution bears the burden of proving beyond a reasonable doubt that the accused is the person named in the prior

convictions." *People v. Mascarenas*, 666 P.2d 101, 110 (Colo. 1983); *O'Day v. People*, 166 P.2d 789, 791 (Colo. 1946).

To prove a defendant's identity as the person previously convicted beyond a reasonable doubt, more than certified copies of convictions are required. Evidence that conclusively shows a link between the person accused and the person previously convicted is necessary. The prosecution can accomplish this through various combinations of evidence:

- **By combining (1) judgments of conviction or mittimuses, (2) photographs or description of the defendant, and (3) a fingerprint match**,
    - *See Mascarenas*, 666 P.2d at 110 (holding that (1) certified copies of judgments of convictions, plus (2) photographs of the defendant containing his prison number, along with his name, and a description including his age, height, weight, nationality, race, build, complexion, and identifying marks, and (3) fingerprints, sufficed to prove his identity because the jury "was able to compare the abundance of documentary evidence with the evidence of the defendant's name, age, and appearance adduced at trial");
    - *Brown v. People*, 238 P.2d 847, 851 (Colo. 1951) (combination of (1) certified copies of judgments with (2) photographs of the previously convicted person and (3) fingerprint records matched by expert testimony sufficiently linked defendant to prior convictions).
    - *People v. Poindexter*, 338 P.3d 352, 361-62 (Colo. App. 2013) (pen pack containing (1) two mittimuses, (2) photographs with defendant's date of birth and inmate number, and (3) fingerprint identification cards provided sufficient information to link prior convictions to defendant);

Or

- **By combining documentary evidence and witness testimony**,
    - *See People v. Gilmore*, 97 P.3d 123, 134 (Colo. App. 2003) (certified copies of minute orders in two felony cases plus a probation officer's testimony that she supervised defendant's probation was sufficient);
    - *Frost*, 5 P.3d at 324 (combination of information, minute order, probation order, petition and order to terminate probation, and testimony of the victim in the prior prosecution, as well as defendant's own admission that he had been convicted of and sentenced for two prior sexual assaults was sufficient).

But absent a means of connecting the documentary evidence of prior convictions to the accused, the prosecution cannot bear its burden of proving identity. *De Gesualdo v. People*, 364 P.2d 374, 379 (Colo. 1961). In *De Gesualdo*, the prosecution submitted authenticated copies of the record of prior convictions to prove an habitual criminal charge. *Id.* at 378. This Court held that the evidence offered to prove the defendant's identity was legally insufficient because it failed to link these convictions to the defendant. *Id.* at 378-79 (reversing conviction because "no effort was made to prove by personal identity that the accused was the same person who had been previously convicted of the offenses evidenced by the records introduced"). *De Gesualdo* also held that proof that a defendant has the same name is not enough to satisfy the identity requirement:

> The prosecution's theory, no doubt, was that the name being unusual and coinciding with that of the previous convictions it was open for the jury to determine that De Gesualdo was the identical person previously convicted. However, *assumptions cannot be indulged in this sensitive area of the law. Our decisions have consistently required strict proof*.

Id. (emphasis added); *see also People v. Cooper*, 104 P.3d 307, 311-12 (Colo. App. 2004) (trial court erred by taking judicial notice of defendant's presentence report, without which the defendant's prior convictions were not sufficiently linked to him because the fact that he had the same name and date of birth as the person previously convicted was insufficient).

Here, the prosecution submitted documentary evidence—no witness testimony—of three prior convictions, and it needed to connect each one to Mr. Linnebur.

The evidence supporting each of these convictions had fatal deficiencies making it impossible to link the conviction with Mr. Linnebur, the man currently on trial. Notably, the packets of evidence contained nothing more definitive than a register of actions or a plea agreement: they included no fingerprints, photographs, or physical descriptions of the defendants that could be compared to Mr. Linnebur. (See EXs 10-12)

The most obviously deficient was the proof for prior conviction #3, a DUI from June 13, 2000 (case number 99T11956). (EX 12) Only two documents purported to prove this conviction: a probation order and a plea agreement. While the name on the documents was "Charles Linnebur," neither one has an address for the defendant *nor a date of birth.*

The trial court may have relied on Exhibit 13, a DMV dossier under the name Charles James Linnebur, to connect the evidence of each prior conviction to Mr. Linnebur. (See TR 8/24/16 pp 143-144) The dossier contained a photograph, a date of birth, and a physical description. The judge found that the dossier documented Mr. Linnebur. (Id. p 144:1-2)

The problem with the dossier is that although it listed a number of traffic citations with corresponding conviction dates and jurisdictions—the DMV notations *do not include case numbers*. (EX 13) This means that the only thing connecting the dossier to prior conviction #3, for instance, is that someone named Charles Linnebur was convicted of DUI in Adams County on June 13, 2000. There is no link regarding physical description, the defendant's address, the case number, or even a date of birth.

Relying on the dossier to prove Mr. Linnebur's prior convictions requires too many inferences to sustain the State's burden of proof. *See People v.*

Gonzales, 666 P.2d 123, 128 (Colo. 1983) (in reviewing the sufficiency of the evidence based on reasonable inferences, there must be "a logical and convincing connection between the facts established and the conclusion inferred" to avoid convictions based on "guessing, speculation or conjecture").

The result is that the documentary evidence of prior convictions fails to connect these convictions to Mr. Linnebur. While the evidence may have contained common elements, it ultimately could not link Mr. Linnebur to the three prior convictions by "strict proof," and courts cannot indulge assumptions in this sensitive area of the law, *De Gesualdo*, 364 P.2d at 378.

The error in the trial court finding the fact of Mr. Linnebur's previous convictions, instead of the jury, is not harmless beyond a reasonable doubt because there is more than a "reasonable *possibility*" that the error contributed to Mr. Linnebur's felony convictions. *See Hagos v. People*, 2012 CO 63, ¶ 11. The State bears the burden of proving that the error was harmless. *Id.* But here the evidence presented was insufficient, and where that is the case, the judgment and sentence must be reversed. *Stevenson v. People*, 367 P.2d 339, 340 (Colo. 1961).

The remedy, again, is to remand the case for Mr. Linnebur to be resentenced on misdemeanor convictions. *See Medina v. People*, 163 P.3d 1136, 1138 (Colo. 2007). Double jeopardy prevents the prior convictions supporting his current

felony conviction from being tried a different jury. U.S. Const. amend. V; Colo. Const. art. II § 18; *People v. Mason*, 643 P.2d 745, 755 (Colo. 1982). And double jeopardy prevents a complete retrial of both the underlying offense *and* the prior convictions, as Mr. Linnebur's first jury validly found him guilty of misdemeanor DWAI and DUI per se.

CONCLUSION

The trial court violated Mr. Linnebur's right to a jury trial and due-process right to proof beyond a reasonable doubt when it found that he had three prior convictions and transformed his misdemeanor convictions into felonies. Mr. Linnebur respectfully asks this Court to reverse his felony convictions and to remand this case for resentencing on the misdemeanor verdicts that his jury properly returned.

MEGAN A. RING
Colorado State Public Defender

MEREDITH K. ROSE, #45304
Deputy State Public Defender
Attorneys for CHARLES J. LINNEBUR
1300 Broadway, Suite 300
Denver, CO 80203
(303) 764-1400

CERTIFICATE OF SERVICE

I certify that, on September 30, 2019, a copy of this Opening Brief of Defendant-Appellant was electronically served through Colorado Courts E-Filing on Kevin E. McReynolds of the Attorney General's office through their AG Criminal Appeals account.