ADVANCE SHEET HEADNOTE
January 30, 2023

2023 CO 5

Nos. 22SA172 & 22SA173, *People v. Kembel* & *People v. Dexter*, —Felony DUI—Bifurcation of Elements of an Offense—Prior Convictions.

The question presented in these two original proceedings is whether a trial court may bifurcate the elements of the offense of felony DUI during a jury trial. The supreme court holds that a trial court may not bifurcate the elements of the offense of felony DUI (or of any offense) during a jury trial. Accordingly, the court makes absolute the rules to show cause issued in these cases.

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

2023 CO 5

Supreme Court Case No. 22SA172
Original Proceeding Pursuant to C.A.R. 21
Larimer County District Court Case No. 21CR1567
Honorable Sarah B. Cure, Judge

In Re
Plaintiff:

The People of the State of Colorado,

v.

Defendant:

Timothy Albert Kembel.

Rule Made Absolute
en banc
January 30, 2023

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Supreme Court Case No. 22SA173
Original Proceeding Pursuant to C.A.R. 21
Larimer County District Court Case No. 20CR2485
Honorable Sarah B. Cure, Judge

In Re
Plaintiff:

The People of the State of Colorado,

v.

Defendant:

Kerrie Lyn Dexter.

Rule Made Absolute
en banc
January 30, 2023

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JUSTICE SAMOUR delivered the Opinion of the Court, in which **CHIEF JUSTICE BOATRIGHT**, **JUSTICE MÁRQUEZ**, and **JUSTICE BERKENKOTTER** joined.
JUSTICE GABRIEL, joined by **JUSTICE HOOD** and **JUSTICE HART**, dissented.

JUSTICE SAMOUR delivered the Opinion of the Court.

¶1 In 1789, President George Washington wrote in a letter to his Attorney General that "the due administration of justice is the firmest pillar of good Government."[1] How right he was. Without its orderly, effective, and fair administration, justice cannot exist, and without justice, good government cannot exist. The proper administration of criminal justice is front and center in these two original proceedings.

¶2 We are asked whether a trial court may bifurcate the elements of felony DUI during a jury trial.[2] More specifically, the question presented is whether a jury trial for the offense of felony DUI may be conducted piecemeal, with the element of prior convictions tried separately, only after the jury returns a guilty "verdict" on the other elements.

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[1] Letter from President George Washington to Att'y Gen. Edmund Randolph (Sept. 28, 1789) (on file with the Library of Congress and available at https://www.loc.gov/resource/mgw2.022/?sp=177&st=text [https://perma.cc/NYA2-6F9W]).

[2] We use the following abbreviations in this opinion: (1) "DUI" for driving under the influence of alcohol, one or more drugs, or a combination of alcohol and one or more drugs; (2) "DWAI" for driving while ability impaired by alcohol, one or more drugs, or a combination of alcohol and one or more drugs; and (3) "felony DUI" for DUI (three or more prior convictions).

¶3 Almost fifty years ago, we answered a similar question in the negative in the context of the crime of possession of a weapon by a previous offender ("POWPO"). *See People v. Fullerton*, 525 P.2d 1166, 1167–68 (Colo. 1974). We acknowledged there the potential prejudice to Fullerton inherent in a unitary trial: The jury would necessarily hear evidence of his status as a convicted felon. *Id.* at 1167. But given that his status as a convicted felon was an element of the crime charged, we determined that any potential prejudice had to "be weighed against the need to prevent undue interference with the administration of criminal justice." *Id.* And because we concluded that bifurcation "would unduly interfere with the administration of the criminal justice system," we were unwilling to allow it.[3] *Id.* at 1168.

¶4 Today we stand steadfastly with *Fullerton*. We hold that a trial court may not bifurcate the elements of the offense of felony DUI (or of any offense) during a jury trial. Accordingly, we make absolute the rules to show cause we issued in these two cases.

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[3] Unless the context indicates otherwise, when we refer to bifurcation of a trial or bifurcation in general in this opinion, we mean splitting up the elements of an offense charged into two separate proceedings before the same jury.

I. Facts and Initial Procedural History

A. *People v. Kembel*

¶5 In the spring of 2021, a deputy with the Larimer County Sheriff's Office observed Timothy Albert Kembel driving a motorcycle in violation of the speed limit. Upon initiating a traffic stop and contacting Kembel, the deputy noticed indicia of drug intoxication. Following voluntary roadside maneuvers, the deputy arrested Kembel for DUI. The People later learned that Kembel had three prior convictions for DUI or DWAI and charged him with felony DUI. Kembel pled not guilty and the matter was set for a three-day jury trial.

B. *People v. Dexter*

¶6 In the fall of 2020, a Loveland police officer noticed that Kerrie Lyn Dexter was driving a car with defective headlights and brake lights. Upon initiating a traffic stop and contacting Dexter, the officer observed indicia of alcohol and drug intoxication. Following voluntary roadside maneuvers, the officer arrested Dexter for DUI. The People later learned that Dexter had four prior convictions for DUI or DWAI and charged her with felony DUI. Dexter pled not guilty and the matter was set for a three-day jury trial.

II. Litigation Regarding Motions to Bifurcate

¶7 Five days before his jury trial, Kembel filed a motion to bifurcate in which he asked that the element of prior convictions be tried separately from and

subsequent to the other elements of felony DUI. After a hearing during which it thoroughly considered the parties' positions and the relevant case law, the district court granted the motion in a detailed oral ruling. The People then requested and received a continuance so they could file a C.A.R. 21 petition in our court.

¶8 Shortly after the oral ruling in Kembel's case, Dexter filed a motion to bifurcate that resembled Kembel's motion.[4] The district court orally granted Dexter's motion and indicated it would issue a written order setting forth its rationale. Once again, the People requested and received a continuance so they could file a C.A.R. 21 petition in our court.

¶9 The district court thereafter simultaneously issued: (1) an order in Kembel's case clarifying and supplementing the earlier oral ruling in his case, and (2) an almost identical order in Dexter's case providing the rationale for the earlier oral ruling in her case. We take a moment now to unpack the court's orders.

¶10 The starting point for the court's analysis was its view that Colorado law contains no "clear or binding preceden[t] to prevent bifurcation of prior convictions in felony DUI trials." *Fullerton*, explained the court, was not on all

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[4] Dexter's case is set in front of the same district court judge presiding over Kembel's case. Like Kembel, Dexter is represented by the Colorado State Public Defender.

fours with these cases because, unlike felony DUI, POWPO has only two elements (possession of a weapon and status as a convicted felon) and "[o]ne element without the other is not necessarily illegal." Consequently, determined the court, in the POWPO context, bifurcation results "in an absurdity and a clear interference with the administration of justice." Not so here, said the court, where the elements of felony DUI unrelated to the prior convictions establish illegal conduct: that the defendant drove a motor vehicle or a vehicle under the influence of alcohol, one or more drugs, or a combination of alcohol and one or more drugs.

¶11 Reading *Fullerton* as embracing "a balancing test" that requires trial courts to weigh the potential prejudice to a defendant in a unitary trial against the interference with the administration of criminal justice in a bifurcated trial, the court ruled that bifurcation in the context of felony DUI should be allowed on an ad hoc basis. According to the court, this balancing test clearly disfavors bifurcating a trial when the People charge POWPO or any of the other offenses discussed in *Fullerton*—namely, possession of contraband while confined in a detention facility, committing assault while escaping from a place of confinement, and holding a hostage by threat of force while in custody or confinement ("example offenses"). As to these crimes, reasoned the court, bifurcation "would interfere with the administration of justice to a degree so severe" that mention of a prior felony conviction or incarceration "must necessarily be presented to the

jury in a unitary trial." The court thus agreed with *Fullerton* that limiting jury instructions are the best tools available "to protect due process" in those circumstances. But in the two cases before it, the court perceived that the potential for prejudice far outweighed any undue interference with the administration of justice.

¶12 On the potential prejudice side of the scale, the court placed the introduction of a defendant's relevant prior convictions, which the court viewed as highly unfair. The court stressed that this isn't just evidence of a defendant's "prior criminality"; it's evidence of convictions of the exact same offense charged (DUI) or of a lesser-included offense (DWAI). In so doing, the court contrasted felony DUI with POWPO, as only the former asks whether a defendant is guilty of essentially the "same charge to which he/she was previously convicted" on at least "three previous occasions."[5]

¶13 The court acknowledged that the prior convictions involved in POWPO are *always* felonies, while the prior convictions involved in felony DUI are *never* felonies. But the court nevertheless saw the latter as much more prejudicial to a

[5] The court added that *Fullerton*'s example offenses are even more distinguishable, as they leave "to the jury's imagination" whether the defendant has ever been convicted of a crime.

defendant because, in its opinion, they have "the potential to lead to confusion," as well as a greater likelihood to have "a cumulative effect" and to produce a conviction based on propensity evidence. The court thus deemed a unitary trial for felony DUI as engendering prejudice to "the highest order" that is unlikely to be allayed, let alone cured, by a limiting jury instruction.

¶14 By way of analogy, the court pointed to section 18-1.3-803(1), C.R.S. (2022), which requires that habitual criminal counts be tried separately from any substantive charge. Though this statute calls for a sentence enhancer to be tried in front of a judge after trial, not for bifurcation of an element of an offense during a jury trial, the court found that "the logic remain[ed] the same." Likewise, continued the court, Crim. P. 14 recognizes the danger of prejudice to the defendant when offenses are joined in the charging instrument or for trial.

¶15 On the justice administration side of the scale, the court placed bifurcation, which the court viewed as having "minimal interference" with the criminal justice system. Positing that bifurcation "would take no more of the jury's time" than a unitary trial, the court predicted that bifurcation would be more efficient and would likely lead to less confusion and smoother deliberations.

¶16 In the end, the court concluded that applying *Fullerton*'s "balancing test" yielded a different outcome in felony DUI trials than in POWPO trials. So, while *Fullerton* landed in the no-bifurcation camp, the court landed in the opposite camp.

¶17 After the court issued its written orders, the People sought our intervention pursuant to C.A.R. 21. We agreed to exercise our original jurisdiction and issued rules to show cause.

III. Original Jurisdiction

¶18 C.A.R. 21 vests us with sole discretion to exercise our original jurisdiction. *See* C.A.R. 21(a)(1). But because a C.A.R. 21 proceeding is extraordinary in nature and limited in purpose and availability, we have confined exercise of our original jurisdiction to such circumstances as when an appellate remedy would be inadequate, a party may suffer irreparable harm, or a petition raises an issue of first impression that has significant public importance. *People v. Cortes-Gonzalez*, 2022 CO 14, ¶ 21, 506 P.3d 835, 842.

¶19 In their petitions, the People argue that they have no adequate appellate remedy and that the district court resolved a novel issue of significant public importance. We agree on both counts.

¶20 First, should the district court's challenged orders stand, the People won't be able to seek redress during a direct appeal. And waiting to address the issue on direct appeal would mean that this district court, and likely others, would continue to bifurcate the elements of felony DUI for trial purposes. Hence, the People lack an adequate appellate remedy.

¶21 Second, whether the elements of felony DUI may be bifurcated for trial is a question of significant public importance that became relevant just two terms ago in *Linnebur v. People*, 2020 CO 79M, 476 P.3d 734. There, we held that "the fact of prior convictions" is an element of felony DUI that "must be proved to the jury beyond a reasonable doubt," not a sentence enhancer that "a judge may find by a preponderance of the evidence." *Id.* at ¶ 2, 476 P.3d at 735. But we didn't decide—because we didn't have to—whether the element of prior convictions may be severed from, and tried subsequent to, the other elements of felony DUI. Thus, the issue is one of first impression, and our decision today will have far-reaching consequences in felony DUI trials throughout the state.

¶22 Unsurprisingly, we chose to exercise our original jurisdiction in *Fullerton* after the district court granted a motion to bifurcate. *Fullerton*, 525 P.2d at 1167. Consistent with *Fullerton*, we determine that these are appropriate cases to exercise our original jurisdiction under C.A.R. 21.

IV. Analysis

¶23 We begin by identifying the controlling standard of review. We proceed to inspect the pertinent felony DUI statutory provisions. Against these backdrops, we revisit our opinion in *Linnebur*. We then travel back in time to *Fullerton* and decline the invitation to overturn it. Standing firmly with *Fullerton*, we conclude

that the district court erred in ordering bifurcation of the elements of the offense of felony DUI in these two cases.

A. Controlling Standard of Review

¶24 Appellate courts typically review a decision to bifurcate a trial for an abuse of discretion. *See People v. Harris*, 2016 COA 159, ¶ 74, 405 P.3d 361, 375. The question we confront here, however, is whether a court has the authority to bifurcate a trial by splitting up the elements of an offense charged. This is a legal question, which we review de novo. *See People v. Kilgore*, 2020 CO 6, ¶ 13, 455 P.3d 746, 749 (stating that, while review of a discovery order is normally for an abuse of discretion, whether the district court had authority to order the defense exhibits disclosed before trial was "a legal one" subject to de novo review).

B. Pertinent Felony DUI Statutory Provisions

¶25 Section 42-4-1301(1)(a), C.R.S. (2022), defines felony DUI:

> 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.

Section 42-4-1301(1)(j) requires that the indictment or information in a felony DUI case identify the defendant's relevant prior convictions. Section 42-4-1307(6.5)(a), C.R.S. (2022), in turn, specifies, among other things, that a person who

commits felony DUI must be sentenced in accordance with the presumptive ranges of prison penalties in section 18-1.3-401, C.R.S. (2022).

C. Our Recent Decision in *Linnebur*

¶26 In *Linnebur*, we were called upon to decide whether a defendant's prior convictions under section 42-4-1301(1)(a) "constitute an element of felony DUI or merely a sentence enhancer." *Linnebur*, ¶ 1, 476 P.3d at 735. The question mattered because the elements of an offense must always be "proved to the jury beyond a reasonable doubt," but some sentence enhancers may be found by "a judge . . . by a preponderance of the evidence." *Id.* at ¶ 2, 476 P.3d at 735.

¶27 In our quest for an answer, we turned first to the pertinent felony DUI statutory provisions. *Id.* at ¶ 8, 476 P.3d at 736. Because they don't explicitly say whether the fact of prior convictions is an element or a sentence enhancer, we looked for other indicators of the legislature's intent. *Id.* at ¶ 17, 476 P.3d at 738. Using *United States v. O'Brien*, 560 U.S. 218 (2010), as our guiding beacon, we focused on the language and structure of the statutory provisions, whether the fact of prior convictions is traditionally considered an element or a sentence enhancer, and the risk of unfairness (including the relative severity of the sentence) attendant

to each alternative.[6] *Linnebur*, ¶ 17, ¶ 17 n.3, 476 P.3d at 738, 738 n.3 (citing *O'Brien*, 560 U.S. at 225). Based on these factors, we ultimately concluded that "the General Assembly intended the fact of prior convictions to be treated as a substantive element of the offense to be proved to the jury beyond a reasonable doubt, rather than a sentence enhancer to be proved to a judge by a preponderance of the evidence." *Id.* at ¶ 8, 476 P.3d at 736.

¶28 The district court below recited our holding in *Linnebur*. It then echoed *Linnebur*'s acknowledgement of the additional protections a defendant charged with felony DUI enjoys by virtue of the legislature's classification of that offense as a felony instead of a misdemeanor—i.e., the right to a preliminary hearing when in custody and the right to be tried by a twelve-person jury.[7] *Id.* at ¶ 24, 476 P.3d at 739. Continuing, the district court highlighted a concern we expressed in *Linnebur*: Allowing a defendant to be tried to a jury for a misdemeanor (DUI) and then sentenced by a judge for a felony (felony DUI) on the basis of a fact that needs to be proved only by a preponderance of the evidence (the fact of prior

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[6] The legislative history didn't offer us any particularly helpful clues about the legislature's intent. *Linnebur*, ¶ 17 n.3, 476 P.3d at 738 n.3.

[7] After *Linnebur*, we held that a defendant who is out of custody is also entitled to a preliminary hearing on a felony DUI charge. *See People v. Huckabay*, 2020 CO 42, ¶ 2, 463 P.3d 283, 284.

convictions) risks running afoul of the Sixth Amendment. *Id.* at ¶ 29, 476 P.3d at 741. Drawing an inference from that discussion, the district court found it "impossible" that our court would "honor[] due process in . . . *Linnebur*, only to cut due process off at the knees by forbidding trial courts from bifurcating the prior convictions."

¶29 But we nowhere mentioned bifurcation in *Linnebur*. The issue simply wasn't teed up in that case.

¶30 Moreover, the dissent in *Linnebur* specifically cautioned that prior convictions could become fair game during a future felony DUI jury trial—"despite the risk of prejudice to the defendant"—as a direct result of the majority's treatment of that fact as an element of the offense. *Linnebur*, ¶ 54, 476 P.3d at 745–46 (Márquez, J., dissenting). Though conceding that we had no occasion there to opine on bifurcation, the dissent warned that our reasoning in *Fullerton* appeared to foreclose it.[8] *Id.* at ¶ 55, 476 P.3d at 746.

¶31 So, what exactly did we say in *Fullerton*? We segue to that case now.

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[8] The People petitioned for rehearing in part to seek clarification as to whether *Fullerton* "precludes bifurcation of the prior conviction evidence when proving every element of felony DUI to a jury." We denied their petition.

D. Turning Back the Clock to *Fullerton*

¶32 Charged with POWPO, Fullerton moved for bifurcation, urging the trial court to try the two elements of the offense separately before the same jury because to impart knowledge of his prior record to the jury "would unduly influence a verdict and finding on the issue of possession." *Fullerton*, 525 P.2d at 1167. The trial court granted the motion, and the People then challenged that order by invoking our original jurisdiction. *Id.* We issued a rule to show cause, which we subsequently made absolute. *Id.*

¶33 We recognized that "[b]ifurcated trials are permitted in prosecutions for second or subsequent offenses when the prior convictions are alleged *as a basis for imposition of a harsher sentence and are relevant only to punishment*." *Id.* (emphasis added). In such cases, we explained, most jurisdictions require a two-part trial to avoid prejudice to the defendant during the initial determination on the issue of guilt. *Id.* But Fullerton's felony record constituted an element of the substantive offense charged and was not an allegation relevant only to punishment. *Id.* That is, the complaint and information in his case didn't charge "a substantive offense and, in addition, a prior conviction unrelated to the substantive offense." *Id.* And because Fullerton's felony record didn't "go merely to the punishment to be imposed, but rather [was] *an element of the substantive offense charged*," a distinction

we labeled "critical," we contrasted his case with those in which bifurcation is appropriate.[9] *Id.* at 1167–68 (emphasis added).

¶34 Of course, we were not oblivious to the risk of prejudice in a unitary trial. *Id.* at 1167. But we were quick to observe that any such risk had to be "weighed against the need to prevent undue interference with the administration of criminal justice" in a bifurcated trial. *Id.* We cautioned that a defendant's rights, including the right to a fair trial, should "be safeguarded without the disruption" that bifurcation inevitably entails: "The proper way for the court to prevent the possibility that the evidence offered to establish one element of the crime will influence jury findings as to the other elements is to give careful and thorough jury instructions." *Id.* at 1168.

¶35 Contrary to the understanding of the district court and the defendants, *Fullerton* didn't adopt a balancing test to be applied by trial courts on a case-by-case basis. The word "balance" (or a derivative of it) doesn't appear anywhere in the opinion. Neither does the word "test." When we spoke about "weigh[ing]"

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[9] Any characterization of DUI as the "substantive offense" here is an attempt to circumvent our decision in *Fullerton*. The defendants have been charged with the substantive offense of felony DUI. To consider DUI the "substantive offense" would be to treat the fact of prior convictions as a sentence enhancer and not an element, which directly contradicts our holding in *Linnebur*. *See Linnebur*, ¶ 2, 476 P.3d at 735.

there, we simply meant that the risk of prejudice to the defendant inherent in a unitary trial wasn't dispositive. *Id.* at 1167. It had to be "weighed" against the need to avoid undue interference with the administration of criminal justice in a bifurcated trial. *Id.* And, after conducting such weighing, we decided that we could not approve of the bifurcation of the elements of an offense in a jury trial. *Id.* at 1168. So, the weighing we said was required, we ourselves conducted there, leaving nothing more for trial courts facing this question in future cases to balance. *Id.*

¶36 The district court and the defendants nevertheless attempt to restrict the scope of our holding in *Fullerton*. Our disavowal of bifurcation, however, cannot be construed as limited to cases in which a defendant is charged with POWPO or one of the example offenses. The core principle underlying our holding was that bifurcation of the elements of any standalone offense is not permissible because "the potential for disruption of the orderly trial of criminal cases is great." *Id.* Indeed, we were worried that permitting bifurcation in Fullerton's case would have an undesirable ripple effect. It's in that context that we referenced the example offenses. We remarked that the crime of POWPO was not an outlier—it had company:

> Many crimes contain one element which is more prejudicial than another. Were we to permit bifurcation in this case, every crime which contains two elements, one of which is prejudicial to the accused, could result in a bifurcated trial. Evidence introduced to

> establish the second element of each of the following offenses necessarily informs the jury of the fact, if not of the details, of the defendant's prior criminal record: Possessing contraband while confined in a detention facility . . . , committing an assault while escaping from a place of confinement . . . , holding a hostage by threat of force while in custody or confinement . . . . A bifurcated trial of these and other crimes containing a prejudicial element would unduly interfere with the administration of the criminal justice system. With good reason, "two-part jury trials are rare in our jurisprudence." *Spencer v. Texas*, 385 U.S. 554, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967).

Id. As this excerpt demonstrates, we were apprehensive about upholding the bifurcation order in Fullerton's case because we realized that doing so risked green-lighting bifurcation in any jury trial of a charge containing an element prejudicial to the defendant. *Id.*

¶37 In support of their misreading of *Fullerton*, the district court and the defendants seem to place considerable stock in two statements we made in passing: (1) "The trial judge has a duty to safeguard the rights of the accused and to ensure the fair conduct of the trial"; and (2) "[i]n the furtherance of that duty, [the trial judge] has broad discretion under Crim. P. 14 to order a separate trial of counts when their joinder would result in prejudice." *Id.* at 1167–68. Both are widely accepted legal concepts; neither supports the interpretation of *Fullerton* advanced by the district court and the defendants.

¶38 Crim. P. 14 addresses the relief a trial court may grant when it appears that a party will be "prejudiced by a joinder of offenses or of defendants in any

indictment or information, or by such joinder for trial together." To be sure, this rule authorizes the trial court to order separate trials "of counts" or "of defendants" to avoid prejudice to a party. But while Crim. P. 14 allows for severance of *counts or defendants*, it does not authorize the bifurcation of *elements* of an individual offense charged.

¶39 We recognized as much in *Fullerton*. 525 P.2d at 1168. Immediately after making the two statements upon which the district court and the defendants lean—regarding a trial court's duty to protect every defendant's rights and the relief available under Crim. P. 14—we qualified them as follows: "However, where, as here, the issues sought to be tried separately are both elements of the same crime, the potential for disruption of the orderly trial of criminal cases is great." *Id.* (drawing a distinction between the bifurcation of different substantive offenses and the bifurcation of the elements of a specific substantive offense). For that reason, we determined, the proper way to safeguard the rights of an accused charged with a single substantive offense is not through bifurcation but through carefully crafted jury instructions that guard against the potential of one element influencing the jury's findings on the remaining elements. *Id.* Thus, we concluded that bifurcation, whether of POWPO or of any "other crime[]," on account of one element being prejudicial to the defendant, was improper because it "would unduly interfere with the administration of the criminal justice system." *Id.* And

that ended the "weigh[ing]" we'd referenced earlier and put a bow on the analysis: "*Because the defendant's prior record was not merely relevant to punishment, but was an element of the crime charged,* we hold that the order of the trial court granting a bifurcated trial was in excess of its [authority]."[10] *Id.* at 1167–68 (emphasis added).

¶40 Considered in context, then, the two quoted statements from *Fullerton* cannot serve as the proverbial hook on which the district court and the defendants can hang their hats. Those statements cannot be reasonably read as authorizing bifurcation in this case. Nor can they be fairly understood as blessing a case-by-case balancing test.

¶41 Still, the district court and the defendants insist that, while weighing the relevant interests militated against bifurcating the elements of POWPO in *Fullerton*, such weighing begets the opposite result when, as here, two conditions exist: (1) a crime is established with proof of the elements that are unrelated to the element of prior convictions, and (2) a unitary trial would inform the jury about the defendant's prior convictions for offenses that are the same as or similar to the

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[10] We used "jurisdiction," not "authority," in *Fullerton*. 525 P.2d at 1168. We substitute the latter for the former to more precisely reflect what we meant to convey: Granting Fullerton's motion for bifurcation exceeded the trial court's authority. *See Authority*, Black's Law Dictionary (11th ed. 2019) (defining "authority" as "governmental power or jurisdiction <within the court's authority>").

precipitating charge. We are unpersuaded. The two-condition analytical framework championed by the district court and the defendants rests on their misapprehension of *Fullerton* as endorsing a case-specific balancing test that may permit the bifurcation of elements in some circumstances. We reiterate that *Fullerton* cannot reasonably be read as sanctioning such a test. In any event, our discussion in *Fullerton* (1) didn't consider the fact that bifurcation in a POWPO trial (or in a trial for one of the example offenses) could lead to an initial guilty "verdict" for conduct that's legal (such as simply possessing a weapon), and (2) didn't seek to distinguish among different degrees of potential prejudice to the defendant based on the type of prior-criminality evidence involved.

E. Declining the Invitation to Overturn *Fullerton*

¶42 In the alternative, the district court and the defendants invite us to overrule *Fullerton*. We decline to do so.

¶43 Under the judge-made doctrine of "stare decisis," a Latin term meaning "to stand by things decided," courts are required to "follow earlier judicial decisions when the same points arise again in litigation." *Stare Decisis*, Black's Law Dictionary (11th ed. 2019). It is now axiomatic that adherence to precedent promotes "uniformity, certainty, and stability of the law." *People v. Porter*, 2015 CO 34, ¶ 23, 348 P.3d 922, 927 (quoting *People v. LaRosa*, 2013 CO 2, ¶ 28, 293 P.3d 567, 574). Hence, we are faithful to a preexisting rule of law unless we are "clearly

convinced that the rule was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come from departing from precedent." *McShane v. Stirling Ranch Prop. Owners Ass'n*, 2017 CO 38, ¶ 26, 393 P.3d 978, 984 (quoting *People v. Blehm*, 983 P.2d 779, 788 (Colo. 1999)).

¶44 We are not clearly convinced that (1) *Fullerton* was wrongly decided or has outlived its days, or (2) more good than harm will come from departing from it. To the contrary, we remain troubled by the significant disruption that bifurcation of the elements of a single offense would necessarily cause in a jury trial. And we continue to be of the view that any potential for prejudice to the defendant cannot be given priority over the due administration of justice. Thus, we conclude that this is not one of those rare occasions in which the "iron grip of stare decisis" should be loosened. *United States v. Reveron Martinez*, 836 F.2d 684, 687 n.2 (1st Cir. 1988).

¶45 Homing in on the disruption that bifurcation would inevitably cause in a felony DUI jury trial, multiple concerns immediately come to mind. First, how would the trial court instruct prospective jurors about the elements of the charge at the beginning of the trial? Crim. P. 24(a)(2)(v) states that "the judge shall explain . . . in plain and clear language . . . *[the] elements of charged offenses*." (Emphasis added.) Simply instructing on the elements of DUI when a defendant

is charged with felony DUI would not comport with Crim. P. 24(a)(2)(v) and would require the court to deceive prospective jurors.

¶46 Second, how would the court or the parties question prospective jurors during voir dire about their ability to fairly and impartially consider the element of prior convictions in a felony DUI trial? What if a prospective juror improperly believes that an allegation that the defendant has three or more convictions suffices to relieve the People of their burden to prove each such conviction beyond a reasonable doubt? In a bifurcated proceeding, the court and the parties would not learn about that prospective juror's unacceptable perspective—at least not before trial.

¶47 Third, what authority would allow the court to decide *before trial* to instruct the jury on DUI instead of felony DUI? The defendants no doubt would assert that DUI is a lesser included offense of felony DUI. Be that as it may, we have made clear that a trial court should instruct on a lesser included offense only where there is *evidence in the record* to rationally support the jury's simultaneous acquittal of the greater charged offense and conviction of the lesser offense. *People v. Naranjo*, 2017 CO 87, ¶ 18, 401 P.3d 534, 538. Prior to trial, there is no record on which to make that determination. It follows that bifurcation would require trial courts to contravene longstanding case law.

¶48 Finally, what legal effect would a "verdict" of guilty on the elements of DUI have in a felony DUI trial? During oral arguments, the defendants maintained that if an insufficient number of jurors return for the second part of a bifurcated felony DUI trial and the court is left with the initial "verdict," jeopardy would attach and the People would be stuck with a DUI conviction. According to the defendants, the fact of prior convictions is an element for some purposes, namely, the applicable burden of proof and the requirement of a jury finding, but a sentence enhancer for other purposes, such as double jeopardy analysis. We, however, are unaware of any authority that supports this "have your cake and eat it too" proposition. Our jurisprudence is clear that an element is an element is an element. There are no part-time elements. Once a fact is endowed with elementhood, it can't be treated as something else. And if a mistrial were required in the hypothetical regarding an insufficient number of jurors returning for the second part of a bifurcated felony DUI trial, the result would be a senseless waste of resources.[11]

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[11] The hypothetical is not at all unrealistic. The district court's comments to the contrary notwithstanding, bifurcated trials are very difficult on jurors. In a felony DUI trial in which the elements are bifurcated, as jurors complete deliberations on the elements of DUI, they no doubt would start making plans to resume regular life. But after delivering their "verdict" on DUI, they would be ordered to cancel those plans so they may continue serving (including possibly the following day or

¶49 We realize that on the flip side of the coin is the potential for prejudice to a defendant in a unitary trial. But, as we noted in *Fullerton*, that potential can be largely neutralized through limiting jury instructions. 525 P.2d at 1168. We don't share the skepticism expressed by the district court and the defendants about the effectiveness of limiting instructions in this context.

¶50 To begin with, there is a "presumption of law" that jurors are generally able to "understand and follow a trial court's limiting instructions." *Qwest Servs. Corp. v. Blood*, 252 P.3d 1071, 1089 (Colo. 2011). Further, in the context of CRE 404(b) evidence, we have concluded that contemporaneous and final instructions informing the jury about the limited purpose of "other-crime evidence" suffices to safeguard against the potential for the jury to draw an inference of propensity or to otherwise misuse that evidence. *People v. Garner*, 806 P.2d 366, 374 (Colo. 1991); *accord* § 16-10-301(3), (4)(d), C.R.S. (2022) (addressing evidence of similar acts or transactions in a prosecution for one of the statutorily enumerated sexual offenses); § 18-6-801.5(4), C.R.S. (2022) (addressing evidence of similar acts or transactions involving domestic violence).

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after a weekend) in a surprise second proceeding on the element of prior convictions.

¶51 Of particular relevance for our purposes, other-crime evidence under CRE 404(b) is sometimes similar to evidence of the crime charged. *See People v. Rath*, 44 P.3d 1033, 1042 (Colo. 2002) ("Evidence of design or method offered to prove that the defendant . . . committed the charged offense generally depends much more heavily on the distinctiveness and similarity of the crimes than evidence offered merely to prove that the defendant acted intentionally."). The same is true of evidence admitted either pursuant to section 16-10-301, which is titled "Evidence of similar transactions," or pursuant to section 18-6-801.5, which refers to "similar acts or transactions" in subsection (4).

¶52 Granted, CRE 404(b) evidence doesn't always involve actual convictions, and, regardless, we have directed trial courts admitting such evidence to refer to it in front of the jury by using terms such as "transaction," "act," or "conduct," instead of terms such as "conviction," "crime," or "offense." *Garner*, 806 P.2d at 374. The legislature has issued similar edicts. *See* § 16-10-301(4)(e); § 18-6-801.5(5). By contrast, evidence of the element of prior convictions in a felony DUI trial necessarily involves convictions and tells the jury as much. But the point remains that any risk of prejudice may be tempered with contemporaneous and final instructions advising the jury that the evidence in question may be considered only for the limited purpose of determining whether the People have proved beyond a reasonable doubt each prior conviction included in the element of prior

convictions and may not be considered for any other reason. *Cf.* COLJI-Crim. D:02 (2021); COLJI-Crim. E:07.2 (2021). Such an instruction could also more specifically state that evidence offered to establish any prior conviction included in the element of prior convictions cannot influence the jury's findings as to the other elements of felony DUI.

¶53 Of course, we are realistic and understand that no limiting jury instruction can completely eliminate the potential prejudice to a defendant. We are under no illusion to the contrary. However, not all prejudice to a defendant is unfair. Evidence that's relevant and admissible may be prejudicial to a defendant, but it is not unfair. It can't be—it's relevant and admissible. All relevant and admissible evidence "is inherently prejudicial." *Masters v. People*, 58 P.3d 979, 1001 (Colo. 2002) (quoting *United States v. McRae*, 593 F.2d 700, 707 (5th Cir. 1979)). But the fact that evidence is prejudicial doesn't render it inadmissible; only *unfairly* prejudicial evidence is inadmissible. *Id.* "Unfair prejudice does not mean prejudice that results from the legitimate probative force of the evidence." *People v. Gibbens*, 905 P.2d 604, 608 (Colo. 1995); *see also United States v. Gilliam*, 994 F.2d 97, 100 (2d Cir. 1993) (explaining that evidence is unfairly prejudicial "only when it tends to have some adverse effect upon a defendant beyond tending to prove the fact or issue that justified its admission into evidence" (quoting *United States v. Figueroa*, 618 F.2d 934, 943 (2d Cir. 1980)).

¶54 Evidence of a defendant's prior convictions under section 42-4-1301(1)(a) is always relevant and admissible because it is evidence of an element of the substantive offense charged, and the People are required to prove that element beyond a reasonable doubt.[12] As such, it is not unfairly prejudicial. *Cf. Gilliam*, 994 F.2d at 100 (stating that evidence of a prior conviction is not unfairly prejudicial "where the prior conviction is an element of the crime; rather, it 'prove[s] the fact or issue that justified' its admission" (quoting *Figueroa*, 618 F.2d at 943)).

¶55 In our view, our decision in *Fullerton* is as sound today as it was in 1974 and is as valid in the felony DUI context as it is in the POWPO context. While a unitary trial in a felony DUI case will no doubt risk prejudice to the defendant, any prejudice isn't unfair and cannot receive preeminence over the need to avoid interference with the due administration of justice.

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[12] This circumstance distinguishes the two cases before us from *People v. Goldsberry*, 509 P.2d 801 (Colo. 1973), and *Salas v. People*, 493 P.2d 1356 (Colo. 1972), on which the defendants rely. The prejudicial evidence introduced in *Goldsberry* and *Salas*, which required a mistrial, was not admissible. *See Goldsberry*, 509 P.2d at 803; *Salas*, 493 P.2d at 1357. Indeed, in *Goldsberry*, we specifically acknowledged that when prejudicial evidence is introduced for a proper purpose and is thus admissible, the court should not declare a mistrial; rather, it should "give cautionary instructions limiting the purpose of such evidence." 509 P.2d at 803.

¶56 Because we are not clearly convinced that *Fullerton* was originally erroneous or is no longer sound, or that more good than harm will come from departing from it, we have no authority to overrule it. Stare decisis demands that we adhere to *Fullerton*. And we do.

F. Bifurcating Elements Was Erroneous

¶57 Standing firmly with *Fullerton*, we conclude that the district court erred in ordering bifurcation in these two cases. We hold that a trial court may not bifurcate the elements of the offense of felony DUI (or of any offense) during a jury trial.[13]

¶58 We readily recognize that today's outcome isn't ideal. Requiring a jury to hear that a defendant charged with felony DUI has three prior convictions for either DUI or a similar offense clearly increases the risk of a propensity verdict. We appreciate why the district court resorted to bifurcation as a prophylactic measure to shield the defendants' rights in these cases.

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[13] The defendants direct our attention to cases from other jurisdictions that appear to align with their position. But there are also cases from other jurisdictions that are compatible with today's decision. *See, e.g.*, *Baker v. State*, 966 P.2d 797, 798 (Okla. Crim. App. 1998); *State v. Fox*, 531 S.E.2d 64, 65–66 (W. Va. 1998). More importantly, cases from other jurisdictions have only marginal relevance here because *Fullerton*, our own case, reigns supreme in Colorado.

¶59 Unfortunately, however, our hands are tied by the legislature's intent—at least as we could best discern it in *Linnebur*. The legislature is certainly free to clarify that its pertinent amendments to section 42-4-1301(1)(a) merely meant to enhance the penalty for recidivist behavior.[14] It could do so by simply declaring that the fact of prior convictions in section 42-4-1301(1)(a) is a sentence enhancer to be proved to a judge by a preponderance of the evidence. Although due process and the Sixth Amendment require that some sentence enhancers be proved to a jury beyond a reasonable doubt, the U.S. Supreme Court has specifically exempted the fact of a prior conviction from this requirement.[15] *See United States v. Booker*, 543 U.S. 220, 244 (2005); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

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[14] Shortly after we published our decision in *Linnebur* in 2020, Senator John Cooke, one of the sponsors of the amendments that created the offense of felony DUI, suggested that some clarification may well be warranted. Michael Karlik, *State Supreme Court Decides 4-2 on Higher Burden of Proof for Felony DUI*, Colo. Pols. (June 2, 2021), https://www.coloradopolitics.com/news/state-supreme-court-decides-4-2-on-higher-burden-of-proof-for-felony-dui/article_704f1d06-22b8-11eb-9a53-1f8c92d7cd1b.html [https://perma.cc/4EK8-QVNJ]. In describing the impetus behind the enactment of felony DUI, he said, "After some point, you've got to say enough is enough . . . . The intent was to say if you have three misdemeanor DUIs, then on your fourth one, it's a felony, so it becomes a sentence enhancer."

[15] True, the fact of prior convictions does more than enhance the sentence for felony DUI; it also elevates the classification of the crime from a misdemeanor to a felony. But even treating the fact of prior convictions as a sentence enhancer, defendants charged with felony DUI would continue to enjoy significant protections: (1) the prior convictions would have to be identified in the indictment

V. Conclusion

¶60 For the foregoing reasons, we conclude that the district court erred in ordering bifurcation in these two cases. Accordingly, we make absolute the rules to show cause and remand for further proceedings consistent with this opinion.

JUSTICE GABRIEL, joined by **JUSTICE HOOD** and **JUSTICE HART**, dissented.

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or information (just as if they constituted an element of felony DUI), *see* § 42-4-1301(1)(j); (2) defendants would be entitled to a preliminary hearing (just as any defendant charged with a class 4 felony carrying mandatory sentencing would be), *see People v. Tafoya*, 2019 CO 13, ¶ 16, 434 P.3d 1193, 1196; and (3) defendants would qualify for a jury of twelve (just as any defendant charged with a felony would), *see* § 18-1-406(1), C.R.S. (2022). *See also Linnebur*, ¶ 24, 476 P.3d at 739 (making a similar observation). And while the fact of prior convictions would be subject to the preponderance of the evidence standard, we must remember that those prior convictions themselves would have been obtained after application of the full panoply of constitutional guarantees accorded to defendants in felony cases, including proof of guilt beyond a reasonable doubt. *See Linnebur*, ¶ 51, 476 P.3d at 745 (Márquez, J., dissenting); *see also Jones v. United States*, 526 U.S. 227, 249 (1999) ("[U]nlike virtually any other consideration used to enlarge the possible penalty for an offense, . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees."); *Apprendi v. New Jersey*, 530 U.S. 466, 496 (2000) (making a similar statement).

JUSTICE GABRIEL, joined by JUSTICE HOOD and JUSTICE HART, dissenting.

¶61 Today, the majority concludes that the trial court in the two cases before us erred when it granted defendants Timothy Albert Kembel's and Kerrie Lyn Dexter's motions to bifurcate their trials and ordered that their current driving under the influence ("DUI") convictions be tried before the question of whether they had three or more prior DUI or driving while ability impaired ("DWAI") convictions. Maj. op. ¶¶ 4, 60. As the majority correctly states, we have concluded that, for purposes of a felony DUI charge, the prior DUI convictions are elements of the offense. *Id.* at ¶ 21 (quoting *Linnebur v. People*, 2020 CO 79M, ¶ 2, 476 P.3d 734, 735). From this premise, and based on what I believe to be a fundamentally flawed reading of *People v. Fullerton*, 525 P.2d 1166 (Colo. 1974), and unfounded concerns regarding the administrative challenges that bifurcation would pose, the majority concludes that bifurcation in a felony DUI case is improper as a matter of law. *Id.* at ¶¶ 1, 4, 24, 43–46, 56.

¶62 Lost in the majority's reasoning, however, is the immense injustice that its decision will cause Kembel, Dexter, and felony DUI defendants throughout this state. Although I have great faith in juries in our system of justice, it belies reality to suggest that a person charged with a felony DUI will receive a fair trial when the jury hears about their three (or more) prior convictions of the same charge. To the contrary, the majority's opinion dramatically increases the likelihood of—and

indeed virtually assures—convictions in felony DUI cases because, in my view, even the most diligent and responsible jurors will not be able to set aside in their minds (or limit their consideration of) the fact that a defendant has already been convicted multiple times of the same offense. And this is true regardless of any limiting instruction that a trial court might try to craft.

¶63 Because (1) while professing to "stand steadfastly with *Fullerton*," Maj. op. ¶ 4, the majority all but ignores that case's long-established mandate to weigh the potential prejudice to a defendant from a unitary trial of the issues against the need to prevent undue interference with the administration of criminal justice, *Fullerton*, 525 P.2d at 1167, and (2) the majority's determination will result in unfair trials for felony DUI defendants throughout this state, I respectfully dissent.

I. Factual and Procedural Background

¶64 Both Kembel and Dexter filed motions to bifurcate their trials, arguing that the above-noted *Fullerton* balancing test compelled bifurcation and that they would be prejudiced if the trial court instead conducted unitary trials. The People did not file a response to Kembel's motion, but they did respond to Dexter's, contending that, under *Fullerton*, by bifurcating the elements of the crime charged, the trial court would exceed its jurisdiction.

¶65 The trial court disagreed with the People and granted the motions to bifurcate in both cases. In so ruling, the court concluded that the *Fullerton*

balancing test provided the applicable rule of decision, although *Fullerton* itself was distinguishable on its facts. Specifically, the court noted that *Fullerton* involved a charge of possession of a weapon by a previous offender ("POWPO"), in which one element of the crime charged (possession of a weapon) without the other (the prior conviction) is not necessarily illegal. Thus, the court concluded, bifurcation in a POWPO case would result in an "absurdity," leading the balancing test in *Fullerton* to weigh against bifurcation in that context.

¶66 In the cases before it, however, the court concluded that the *Fullerton* balancing test mandated bifurcation. The court so concluded because (1) in the context of a felony DUI charge, unlike a POWPO charge, the substantive offense (the present DUI charge) is, itself, a crime (subject to elevation to a felony based on the fact that Kembel and Dexter had three or more prior DUI or DWAI convictions); and (2) forcing these defendants to proceed to trial without bifurcating the prior convictions could result in juror confusion, prejudice, and a greater likelihood that they would be convicted based on their alleged propensity to commit the same crime. Thus, applying the *Fullerton* balancing test, the court concluded that the potential prejudice to Kembel and Dexter from proceeding with a unitary trial outweighed any possible undue interference with the administration of justice that would result from bifurcation.

¶67 The People then filed C.A.R. 21 petitions for rules to show cause in both cases, and we granted those petitions.

II. Analysis

¶68 I begin by setting forth the standard of review that applies to motions to bifurcate. I then address the applicable law, and I end by explaining why, on the facts presented, I perceive no abuse of discretion in the trial court's decision to bifurcate the question of the prior convictions from the present charges in these cases.

A. Standard of Review

¶69 An appellate court reviews a trial court's decision as to whether to bifurcate a defendant's trial for an abuse of discretion. *People v. Barajas*, 2021 COA 98, ¶¶ 9–10, 497 P.3d 1078, 1081–82; *People v. Harris*, 2016 COA 159, ¶ 74, 405 P.3d 361, 375; *People v. Robinson*, 187 P.3d 1166, 1175–76 (Colo. App. 2008); *see also* CRE 611(a) ("The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."); *People v. Hall*, 2021 CO 71M, ¶ 16, 496 P.3d 804, 810 (noting that a trial court has wide discretion in conducting a trial, subject to the duty to maintain an impartial forum, and that this includes

discretion regarding the order and presentation of evidence); *People v. Walden*, 224 P.3d 369, 376 (Colo. App. 2009) ("The order of proof at trial is a matter within the trial court's sound discretion, and courts are given wide latitude in deciding these matters.").

¶70 A trial court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair, or when it misapplies the law. *People v. Johnson*, 2021 CO 35, ¶ 16, 486 P.3d 1154, 1158; *Harris*, ¶ 74, 405 P.3d at 375.

B. Applicable Law

¶71 All parties agree that in *Linnebur*, ¶ 2, 476 P.3d at 735, this court concluded that in the context of a felony DUI charge, the fact of prior convictions is an element of the crime that the prosecution must prove beyond a reasonable doubt, rather than a sentence enhancer that a judge may find by a preponderance of the evidence. We did not, however, address in *Linnebur* the issue presented here, namely, whether trial courts may bifurcate a defendant's current DUI charge from the defendant's prior DUI or DWAI convictions in a felony DUI case. That question is now squarely before us.

¶72 Like the majority, I believe that our analysis should begin with *Fullerton*, 525 P.2d at 1167–68. In my view, however, the majority fundamentally misreads that case, which likely explains why the majority completely ignores the part of

that opinion (i.e., concerning a trial court's jurisdiction) on which the People actually rely.

¶73 In *Fullerton*, this court considered whether a trial court erred in granting a motion to bifurcate the elements of weapon possession and the defendant's prior felony record in a case involving a POWPO charge. *Id.* We began by observing that (1) "[b]ifurcated trials are permitted in prosecutions for second or subsequent offenses when the prior convictions are alleged as a basis for imposition of a harsher sentence and are relevant only to punishment" and (2) "[t]he weight of modern authority calls for a mandatory two-stage trial for the trial of the collateral issue of enhanced punishment to avoid prejudice to the defendant in the initial determination of the issue of guilt." *Id.* at 1167. We stated, however, that the case there before us did not involve a collateral issue of enhanced punishment but rather was an element of the substantive offense, which we deemed a "critical" distinction. *Id.* Specifically, we pointed out that the case was "not a case where the information charged a substantive offense and, in addition, a prior conviction unrelated to the substantive offense," noting that in such a case, "proof of the prior conviction could not be admitted prior to proof of the substantive offense." *Id.*

¶74 We then set forth the rule for determining whether a unitary trial could proceed in cases like the one there before us:

> The potential prejudice to the defendant from a unitary trial of the issues must be weighed against the need to prevent undue

> interference with the administration of criminal justice. The trial judge has a duty to safeguard the rights of the accused and to ensure the fair conduct of the trial.

Id. at 1167–68. (Notwithstanding the majority's protestations to the contrary, Maj. op. ¶ 35, by definition, this *is* a balancing test because it requires a court to weigh competing interests and to decide which should prevail. *See Balancing Test*, Black's Law Dictionary (11th ed. 2019) (defining "balancing test" as "[a] doctrine whereby an adjudicator measures competing interests and decides which interest should prevail").)

¶75 Applying this rule in *Fullerton*, we concluded that bifurcating the elements in that case unduly interfered with the administration of the criminal justice system, and we cited in support of that determination other examples of crimes that cannot properly be bifurcated, such as crimes in which confinement in a detention facility is an element. *Fullerton*, 525 P.2d at 1168. We ended by stating, without citation to *any* authority, that because the defendant's prior record was not merely relevant to punishment but also was an element of the charged crime, "the order of the trial court granting a bifurcated trial was in excess of its jurisdiction." *Id.*

¶76 Although I agree with the majority and with the People that *Fullerton* provides the applicable rule for our decision, I disagree that that rule lies either in the *Fullerton* court's statement regarding jurisdiction or in its conclusion on the

facts there before it. Rather, the applicable rule for our decision is *Fullerton*'s above-quoted balancing test.

¶77 Regarding the *Fullerton* court's statement as to the trial court's jurisdiction, I perceive no basis for such a statement, and the court cited none. To the contrary, I believe that the trial court had jurisdiction to enter the ruling that it did, and for the same reason, I do not question the trial court's jurisdiction to rule as it did in the cases now before us. Indeed, the majority does not appear to disagree with my view on this point. Instead, the majority changes the *Fullerton* court's use of the word "jurisdiction," *id.*, to the word "authority," contending, nearly forty years after the fact, that our predecessors really meant "authority," Maj. op. ¶ 39 n.10. The majority makes this argument without any basis other than its own post hoc conjecture and notwithstanding the fact that the *Fullerton* court's statement regarding the trial court's jurisdiction was the centerpiece of the People's argument as to why bifurcation was improper here.

¶78 Regarding our conclusion on the facts before us in *Fullerton*, our determination on those facts made perfect sense. Specifically, bifurcation in that case would have required an initial trial on the question of whether the defendant possessed a weapon, but such a trial would assuredly have confused the jury because weapon possession is not, in and of itself, illegal. The same problem would arise regarding crimes committed while a defendant is in prison. Such

charges cannot reasonably be tried by separating the defendant's confinement from the conduct committed during that confinement because the defendant's confinement status is intrinsic to the crime charged, and bifurcation would change the entire nature of that crime.

¶79 This case, however, is different. The crime with which Kembel and Dexter are charged is DUI under section 42-4-1301(1)(a), C.R.S. (2022) ("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."). As a result, I perceive no juror confusion that would result from requiring the jury to determine whether Kembel and Dexter drove under the influence, which is itself a crime, before asking the jury to decide whether they had "three or more prior convictions, arising out of separate and distinct criminal episodes, for DUI, DUI per se, or DWAI," among other crimes. *Id.* Indeed, these cases are, for all practical purposes, ones in which "the information charged a substantive offense and, in addition, . . . prior conviction[s] unrelated to the substantive offense," and therefore, under *Fullerton*, 525 P.2d at 1167, proof of the prior convictions could not be admitted prior to proof of the substantive offense.

¶80 Cases from around the country are in accord. For example, in *Ostlund v. State*, 51 P.3d 938, 941–42 & 941 n.22 (Alaska Ct. App. 2002), the court observed that "the majority of jurisdictions" considering whether to conduct a unitary trial

in a case in which a charge of driving while intoxicated ("DWI") is elevated to a felony based on prior convictions for the same offense have concluded that bifurcation, stipulation, or waiver "are the proper ways to try felony DWI offenses to protect a defendant from being unfairly prejudiced by evidence of his earlier DWI convictions." (Collecting cases and concluding that the trial court abused its discretion by not either bifurcating the trial, proceeding by way of a stipulation as to the prior convictions, or trying the prior convictions to the court upon receipt of a valid waiver of the right to a jury trial.); *see also Peters v. State*, 692 S.W.2d 243, 245–46 (Ark. 1985) (concluding, in a case in which the fact of three prior convictions is an element of felony DWI, that the trial should be bifurcated in order to "protect[] the defendant from prejudice by preventing the jury from considering the three prior convictions during their initial determination of guilt or innocence"); *State v. Harbaugh*, 754 So. 2d 691, 694 (Fla. 2000) (per curiam) (noting that a previously adopted bifurcated trial process in felony DUI prosecutions continued to apply even though it had since been established that the fact of the defendant's prior convictions was an element of the offense that had to be proven to a jury beyond a reasonable doubt, and holding that "felony DUI trials must be conducted before the jury in two stages because the concern remains about tainting the consideration of the current misdemeanor DUI with evidence concerning the past DUI"); *State v. Roy*, 899 P.2d 441, 444 (Idaho 1995) (holding

that "in a DUI case where the charge is enhanced to a felony due to the existence of prior convictions, the jury should not be informed during the first phase of the trial that the defendant is charged with a felony").

¶81 The reason for such a rule is obvious: absent bifurcation, "the jury is directly confronted with evidence of defendant's prior criminal activity and the presumption of innocence is destroyed and . . . '[i]f the presumption of [innocence] is destroyed by proof of an unrelated offense, it is more easily destroyed by proof of a similar related offense.'" *Harbaugh*, 754 So. 2d at 693 (quoting *State v. Rodriguez*, 575 So. 2d 1262, 1265 (Fla. 1991)); *accord Ostlund*, 51 P.3d at 942.

C. Bifurcation Here

¶82 Turning then to the cases now before us, I have little difficulty concluding that the trial court did not abuse its discretion or otherwise err in ordering bifurcation on the facts presented.

¶83 As noted above, *Fullerton*, 525 P.2d at 1167, provides that in assessing the propriety of bifurcation in cases like these, "[t]he potential prejudice to the defendant from a unitary trial of the issues must be weighed against the need to prevent undue interference with the administration of criminal justice."

¶84 Here, as the trial court found, the potential prejudice to Kembel and Dexter is obvious. As noted above, it simply belies reality to suggest that defendants charged with a felony DUI would receive a fair trial when the jury hears about

their three (or more) prior convictions of the same charge. The majority's opinion thus virtually assures a conviction in every felony DUI case because I do not believe that even the most diligent and responsible jurors would be able to set aside in their minds (or limit their consideration of) the fact that a defendant has been convicted multiple times of the same offense that they are considering. Rather, the jurors would likely convict, inappropriately, based on the defendant's propensity to commit the crime charged.

¶85 On this point, I am not persuaded by the majority's assertion that the potential for prejudice "can be largely neutralized through limiting jury instructions." Maj. op. ¶ 49. With all due respect, in my view, such an assertion is fanciful.

¶86 As to the other side of the *Fullerton* scale, I perceive *no* interference—much less undue interference—with the administration of justice that would arise from bifurcated trials in these cases. The prosecution would be required to produce evidence relating to the current DUI charges as well as evidence of the prior DUI/DWAI convictions regardless of whether the trials were bifurcated. And whether all of the evidence was provided in a single, longer trial or bifurcated, shorter trials, the overall length of time the parties, the judicial officer, and the jury would need to spend on these cases would not vary greatly because the parties would be presenting the same evidence. In fact, the time commitment could be

less for a bifurcated trial because if the jury were to acquit the defendant on the current DUI charge, a second proceeding on the prior convictions would be unnecessary.

¶87 Accordingly, I would conclude that the potential prejudice to Kembel and Dexter from a unitary trial far outweighs any alleged interference with the administration of justice in these cases. I would thus further conclude that the trial court acted well within its discretion in ordering bifurcated trials here, and I would therefore discharge the rules to show cause.

¶88 In reaching this conclusion, I am unpersuaded by the majority's rationale, which effectively elevates administrative challenges over fundamentally just procedures and the right of criminal defendants to a fair trial. *See* Maj. op. ¶¶ 45–48.

¶89 Specifically, although I acknowledge that bifurcation in cases like these will require courts to alter their procedures slightly, I see no insurmountable impediment to doing so. In fact, criminal courts in Colorado and elsewhere have often bifurcated trials without interfering in any way with the administration of justice.

¶90 For example, in *Robinson*, 187 P.3d at 1170, the trial court denied the defendant's request for separate trials on controlled substance counts, on the one hand, and a POWPO charge, on the other. Instead, the court ordered a bifurcated

trial in which the charges would be presented to the same jury, but with the controlled substance counts being tried first. *Id.* The defendant was convicted, and he appealed, arguing that the trial court had erred in denying his motion for separate trials before different juries and instead allowing a bifurcated trial before the same jury. *Id.* at 1174. A division of our court of appeals rejected this argument, concluding that the trial court did not abuse its discretion in bifurcating the trial. *Id.* at 1174–76. And more recently, the division in *Barajas*, ¶¶ 9–10, 497 P.3d at 1081–82, reached the identical conclusion in the same factual scenario.

¶91 And although no Colorado appellate decision to date appears to have addressed the issue of bifurcation in the felony DUI context, courts in other jurisdictions, in cases going back decades, not only have routinely conducted bifurcated trials in such cases, but also have *required* bifurcation in those circumstances. *See, e.g.*, *Ostlund*, 51 P.3d at 941–42; *Peters*, 692 S.W.2d at 245–46; *Harbaugh*, 754 So. 2d at 694; *Roy*, 899 P.2d at 444.

¶92 Accordingly, conducting bifurcated trials has long been familiar to trial courts in Colorado and elsewhere, and I have full confidence that Colorado trial courts would have little difficulty in conducting such proceedings in the felony DUI context.

¶93 Nor do I share the majority's concern that bifurcation would pose problems regarding how to instruct juries and how to manage voir dire. *See* Maj. op.

¶¶ 45–46. The Idaho Supreme Court addressed this very issue, in circumstances identical to those present here, almost three decades ago. Specifically, in *Roy*, 899 P.2d at 443, the court noted that it had adopted a procedure whereby the information in cases like these would be prepared in two parts, with the first part setting forth the substantive offense charged and the second part alleging the prior convictions. During the first phase of the bifurcated trial, the court would read only the first part of the information to the jury, and the trial would proceed as if there were no allegations of prior convictions. *Id.* If the jury returned a verdict on the substantive charge, then the court would read the second part of the information to the jury, and the jury would be allowed to consider the prior convictions. *Id.*

¶94 In my view, this procedure was perfectly appropriate, and it in no way misled the jury. Nor would it do so here. The fact is that the crime with which Kembel and Dexter are charged is driving under the influence, *see* § 42-4-1301(1)(a), and that is precisely what the jury would be told. Moreover, instructing the jury in this way avoids all of the concerns with voir dire that the majority posits. *See* Maj. op. ¶ 46. And I note that this is merely one way bifurcated trials in felony DUI cases might proceed. I have no doubt that trial courts might develop other procedures that could just as easily be employed to ensure a fair trial for all parties involved.

¶95 And although the majority expresses concern that jurors might not return for the second part of a bifurcated trial or will be upset if they believe that their work is complete but are then told that they have more work to do, *see id.* at ¶ 48 & n.11, for several reasons, I am unpersuaded.

¶96 First, it seems self-evident to me that an accused person's right to a fair trial in circumstances like these must prevail over such potentially minor inconveniences or irritation on the part of some jurors.

¶97 Second, trials are frequently inconvenient to jurors. In my experience, however, even when inconvenienced, most jurors devote themselves to carrying out their civic duties with exceptional diligence. And I perceive no realistic likelihood that jurors will choose not to return for the second part of a bifurcated trial when required to do so.

¶98 Third, the same concern for juror irritation arises whenever cases are bifurcated, and I am not aware of any outcries of undue interference with the administration of justice that have emerged as a result. Indeed, existing case law from Colorado provides some guidance as to how to deal with this concern. For example, in *Barajas*, ¶ 4, 497 P.3d at 1081, the trial court advised the prospective jurors during voir dire that "for planning purposes, you should all plan to be here through the rest of this week, through Friday, although the evidence we think will be finished Thursday, and you may even begin to begin your deliberations late

Thursday." The court did not tell the jurors that the trial would consist of two phases, *id.*, although it is not clear to me that it would have been problematic had the court done so. Regardless, the jurors were told when their service would likely end, and in my view, that allowed the jurors to plan accordingly.

¶99 Finally, I am unpersuaded by the People's position that upholding the trial court's bifurcation orders here would render Colorado an outlier. As the above-described case law shows, many (if not, in fact, the majority of) jurisdictions to have addressed the issue now before us have concluded that bifurcation is warranted and appropriate in these circumstances. For all of the reasons discussed above, I am persuaded by this significant body of case law.

III. Conclusion

¶100 For these reasons, I believe that the majority's opinion (1) inappropriately departs from our long-established mandate to weigh the potential prejudice to a defendant from a unitary trial of the issues against the need to prevent undue interference with the administration of criminal justice; (2) results in substantial prejudice to felony DUI defendants in this state; and (3) offers no persuasive justification for doing so.

¶101 Because I further believe that such a determination will result in manifestly unfair trials and thus unjust convictions in felony DUI cases in this state, I would discharge the rules to show cause. I therefore respectfully dissent.