IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review v. CLIFFORD DARRELL KEYS, Defendant-Appellant, Respondent on Review	Marion County Circuit Court Case No. 16CR24492 CA A163519 S067691

RESPONDENT'S BRIEF ON THE MERITS ON REVIEW

Petition to review the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court
for Marion County
Honorable Sean E. Armstrong, Judge

Opinion Filed: February 26, 2020
Author of Opinion: HADLOCK, J. pro tempore
Before Judges: DeHoog, P. J., and Aoyagi, J., and Hadlock, J. pro tempore

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RESPONDENT'S BRIEF ON THE MERITS

Introduction

The state charged defendant with a felony by filing an information in the circuit court. At arraignment, the court appointed counsel for him. Without consulting defendant, the attorney purported to waive his right to a preliminary hearing. The court did not inquire further, and the case proceeded to trial and defendant's conviction.

On appeal, defendant argued that he did not validly waive his right to a preliminary hearing under Article VII (Amended), section 5, of the Oregon Constitution and that the error was either jurisdictional or plain error. The Court of Appeals agreed that defendant did not validly waive preliminary hearing and that the circuit court's error in proceeding without a preliminary hearing or waiver was jurisdictional. *State v. Keys*, 302 Or App 514, 460 P3d 1020, *rev allowed*, 366 Or 760 (2020).

The state did not argue on appeal that the defense attorney's waiver of preliminary hearing satisfied Article VII (Amended), section 5. *Keys*, 302 Or App at 517. Likewise, the state did not ask this court to review the Court of Appeals holding that defendant did not validly waive preliminary hearing. The state asked this court to review only whether defendant could raise the issue for the first time on appeal. That is the sole question before this court.

Revised Question Presented

May a defendant challenge a violation of their right to a preliminary hearing under Article VII (Amended), section 5, for the first time on appeal?

Proposed Rule of Law

A defendant may challenge a violation of their right to a preliminary hearing for the first time on appeal because a preliminary hearing or valid waiver of preliminary hearing is essential to the circuit court's subject-matter jurisdiction to try or convict the defendant based on an information that charges a felony. Alternatively, the right to a preliminary hearing is exempt from the preservation rule due to the unique nature and importance of that right.

Summary of Argument

Article VII (Amended), section 5, establishes prerequisites for a circuit court to try a felony charge. If the state files an information instead of a grand jury indictment, the court must either find probable cause at a preliminary hearing or secure the defendant's knowing waiver of indictment or preliminary hearing. Several aspects of the provision's text reflect that it creates a jurisdictional requirement. It erects a barrier to the state's invocation of the judicial power; it speaks only to a specific court and the initiation of a specific kind of case; and its placement in Article VII, which governs the judicial power, shows that it is not merely an individual right but a limit on judicial power.

The context and history of section 5 conclusively establish that it creates a jurisdictional requirement. When the voters adopted the indictment requirement in 1908, they would have known from Oregon and federal case law that indictments were a jurisdictional requirement and that the sufficiency of an indictment was subject to appellate review without having raised an objection at trial. This court later held that a valid waiver of indictment was essential for a circuit court to have subject-matter jurisdiction over an information. *Huffman v. Alexander*, 197 Or 283, 299-301, 251 P2d 87 (1952), *reh'g den*, 197 Or 283, 253 P2d 289 (1953). And the voters presumptively ratified *Huffman* when they repealed and reenacted the constitutional provision in 1958 and again in 1974.

In arguing to the contrary, the state relies on *State v. Terry*, 333 Or 163, 37 P3d 157 (2001), *cert den*, 536 US 910 (2002), and *United States v. Cotton*, 535 US 625, 122 S Ct 1781, 152 L Ed 2d 860 (2002). But *Cotton*'s break with historical precedent has almost no relevance here, because it addressed only federal law and was decided decades after the latest amendment to Article VII. *Cotton* provides no insight into what Oregon voters intended for the Oregon Constitution.

And, although *Huffman* and *Terry* conflict, this court should follow *Huffman* because it is directly on point. In contrast, *Terry* expressed an ambiguous analysis of a challenge to whether an indictment authorized the death penalty, which is not the issue here. But if this court confronts the tension

between the two decisions, it should reaffirm *Huffman* and overrule or disavow *Terry*. *Huffman* thoughtfully considered the text of Article VII, federal case law that provided historical context, and this court's case law. And *Huffman* is an integral part of the history of Article VII that the voters, legislature, and Court of Appeals have all relied upon. Whereas *Terry* ignored a century of context, broke with settled law without explanation, and has never been approved by the voters or legislature.

Alternatively, this court should hold that Article VII (Amended), section 5, establishes a right that is exempt from the preservation rule. This court has exempted other rights from preservation when they may be waived in only one way, require the court to take an active role in protecting the defendant, or are important to the integrity of the judicial system. All those considerations weigh in favor of exempting the right to a preliminary hearing from the preservation rule.

Argument

I. The preservation rule is well-established but flexible, and it gives way to some issues raised for the first time on appeal.

In this case, the Court of Appeals reversed defendant's felony conviction because the state charged him by information and the circuit court neither held a preliminary hearing nor secured defendant's knowing waiver of the right to a preliminary hearing. Although defendant did not preserve that challenge, the

Court of Appeals held that the circuit court's error deprived it of jurisdiction to try or convict defendant of a felony. The sole question before this court is whether the violation of defendant's right to a preliminary hearing is exempt from the preservation rule.

Preservation is a "general requirement" that a party must raise an issue at trial before it may raise the issue on appeal. *Peeples v. Lampert*, 345 Or 209, 219, 191 P3d 637 (2008). Oregon courts have followed that rule since before statehood. *O'Kelly v. Territory*, 1 Or 51, 58 (1853). The rule derives from "pragmatic" and "prudential" policy concerns, including judicial efficiency and fairness to the opposing party. *Peeples*, 345 at 219-20.

Because the preservation rule serves to promote—not frustrate—the ends of justice, the rule includes exceptions. As examples, an appellate court may exercise its discretion to correct "plain error," or a party may be excused from preservation if they had no practical ability to raise an issue below. *Id.* Two exceptions are rooted in the notion that pragmatism must yield to principle: challenges to subject-matter jurisdiction may be raised at any time, and specific personal rights can be judicially exempted from the preservation rule. Before turning to the issue on review, defendant discusses how this court has applied the latter two exceptions.

A. Subject-matter jurisdiction must always be considered on appeal, and it includes whether a party properly invoked the trial court's authority to exercise judicial power.

The preservation rule does not apply to errors that deprive a court of subject-matter jurisdiction. At its core, subject-matter jurisdiction means the court's "authority to exercise judicial power." *Multnomah County Sheriff's Office v. Edwards*, 361 Or 761, 777-78, 399 P3d 969 (2017). A judgment issued by a court that lacks subject-matter jurisdiction is "void" and "'incapable of being confirmed, ratified, or enforced in any manner or to any degree.'" *State v. McDonnell*, 343 Or 557, 562, 176 P3d 1236 (2007) (quoting *Black's Law Dictionary* 861 (8th ed 2004)). A void judgment can be challenged "'at any time and any place, whether directly or collaterally.'" *Id.* In contrast, non-jurisdictional errors may result in "voidable" judgments, which remain valid unless and until they are timely challenged. *Id.* at 562-63.

This court has long held that a party may challenge subject-matter jurisdiction for the first time on appeal. One justification for that rule is that "if the court below had no jurisdiction to proceed, this court, which possesses only appellate jurisdiction, could acquire none by the appeal." *Evans v. Christian*, 4 Or 375, 376 (1873). Indeed, this court will address jurisdiction *sua sponte* "rather than incumber its records with nullities in the form of void judgments." *Carver v. Jackson County*, 22 Or 62, 64, 29 P 77 (1892).

Unfortunately, this court has not articulated a precise test for determining a court's subject-matter jurisdiction. And, at times, this court has even suggested that other kinds of errors may render a judgment void for lack of "jurisdiction." *See, e.g.*, *PGE v. Ebasco Services, Inc.*, 353 Or 849, 861, 306 P3d 628 (2013) ("a violation of due process notice requirements may deprive the court of 'jurisdiction,'" where "'jurisdiction' is a term of art intended to convey that the violation was so significant as to render the resulting judgment void"); *Huffman*, 197 Or at 297-99 (noting that some "violation[s] of the constitutional rights of an accused person * * * will render the judgment void, even though the court had jurisdiction, in the narrow sense, over person and subject matter at the inception of the proceedings").[1]

But this case involves subject-matter jurisdiction: those things necessary for a court to exercise judicial power. And judicial power requires more than that the court have some general authority to address some general issue. Rather, the "irreducible constitutional task" of the judiciary is "adjudication." *Circuit Court v. AFSCME*, 295 Or 542, 550, 669 P2d 314 (1983). Courts do not act on their own initiative; they respond to "controversies between litigants." *In*

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[1] In contrast, "personal jurisdiction" refers to a court's authority to decide claims against a specific defendant, such as a foreign corporation. *E.g.*, *Figueroa v. BNSF Railway Co.*, 361 Or 142, 146, 390 P3d 1019 (2017). Personal jurisdiction can be waived, and a party that consents to personal jurisdiction cannot challenge it later. *Shriners Hospitals for Children v. Cox*, 364 Or 394, 401-02, 434 P3d 422 (2019).

re Ballot Title, 247 Or 488, 493, 431 P2d 1 (1967) (quoting *In re Workmen's Compensation Fund*, 224 NY 13, 119 NE 1027, 1028 (1918)).

Those controversies must be brought to the court by the litigants. Even if a court "*could* have jurisdiction of a particular subject," it cannot "assume jurisdiction of, and then proceed to decide, cases that are not properly before it." *Parmele v. Mathews*, 233 Or 616, 623, 379 P2d 869 (1963) (emphasis added). Rather, "the pleading by which a plaintiff or petitioner invokes the judicial power of the state must state a claim that on its face is adequate to set the judicial power in motion." *Oregon Medical Association v. Rawls*, 281 Or 293, 297 n 3, 574 P2d 1103 (1978); *see also Smith v. Conrad*, 23 Or 206, 212, 31 P 398 (1892) ("Before the jurisdiction of a court over the subject-matter can be said to exist, it must appear that a complaint, or what stands in its place, has been submitted, invoking the action of the court upon a matter within the scope of its jurisdiction as conferred by law.").

For example, the fact that a circuit court has jurisdiction over criminal cases in a general sense does not mean that a circuit court judge can point to some passerby, declare them guilty of a felony, and send them to prison. The judge cannot do so even if the district attorney assures them that the person is guilty. Any such judgment would be void and unenforceable.

Rather, a judge can exercise judicial power—jurisdiction—only when a party properly invokes the court's jurisdiction to resolve a dispute. For example,

in *Wilson v. Matthews*, 291 Or 33, 35, 628 P2d 393 (1981), the plaintiffs filed a forcible entry and detainer (FED) action in the circuit court. The defendants raised counterclaims, the court denied both parties' claims on the merits, and both parties appealed. *Id.* The Court of Appeals *sua sponte* held that the circuit court lacked jurisdiction. *Id.* At the time, the applicable statutes gave district courts exclusive jurisdiction over FED actions but allowed the transfer of such actions to circuit court if the defendant raised counterclaims. *Id.* at 37-38. Before this court, the plaintiffs argued that the circuit court had jurisdiction due to the counterclaims and that failing to file in the district court was procedural, not jurisdictional, error. *Id.* at 38.

This court affirmed the Court of Appeals. It explained that "[t]he trial court's jurisdiction is determined from the plaintiff's complaint, which must on its face invoke the jurisdictional power of the court in which it is filed." *Id.* at 39. Even if the circuit court *could* have acquired jurisdiction via transfer from the district court, the plaintiffs did not bring the case before it in that manner. "[B]ecause the proper procedure for invoking its authority in such cases was not utilized," the circuit court lacked subject-matter jurisdiction. *Id.*

This court has long held that subject-matter jurisdiction depends on "the allegations in the complaint or petition," not the mere "existence of a sustainable cause of action." *Dippold v. Cathlamet Timber Co.*, 98 Or 183, 189-90, 193 P 909 (1920); *accord Michels v. Hodges*, 326 Or 538, 546, 956 P2d 184

(1998) (holding that adoption petition that failed to allege basis for jurisdiction deprived circuit court of subject-matter jurisdiction). Indeed, subject-matter jurisdiction has historically been "linked in Oregon law" with the defense of failure to state a claim. *Waddill v. Anchor Hocking, Inc.*, 330 Or 376, 383, 8 P3d 200 (2000), *adh'd to on recons*, 331 Or 595, 18 P3d 1096 (2001). And this court often said that it would review for the first time on appeal *both* whether "the court below was without jurisdiction" *and* whether "it acted upon a pleading * * * which entirely failed to state a cause of action or defense," because either error would leave a court "without power to render a judgment that would be of any validity." *Id.* (quoting *Carver*, 22 Or at 63-64).

In *Waddill*, this court held that ORCP 21 abrogated the rule that failure to state a claim could be raised for the first time on appeal and instead provided that the issue is "waived" if not timely asserted. *Id.* at 383-84. But ORCP 21 does not apply in criminal cases, and this case turns on the requirements of Article VII of the Oregon Constitution, which predates ORCP 21. Moreover, in criminal cases the historical link between jurisdiction and failure to state a claim has not been severed. From the Deady Code to the present, objections to "the jurisdiction of the court over the subject of the accusatory instrument, or that the facts stated do not constitute an offense," are not waived by failing to demur but can be raised even after trial. ORS 135.640; *accord* General Laws of Oregon, Crim Code, ch XI, § 131, p 462-63 (Deady 1845-1864).

This court has also said that in criminal cases, subject-matter jurisdiction and failure to state a claim "are categorically the same, for it is manifest that a complaint or indictment that charges no offense is impotent to confer jurisdiction." *Kuhnhausen v. Stadelman*, 174 Or 290, 299, 148 P2d 239, *reh'g den*, 174 Or 290, 149 P2d 168 (1944) (quoting *Hotel Supply Co. v. Reid*, 16 Ala App 563, 563-64, 80 So 137 (1918)). The jurisdictional rule is narrow, though, and applies only when an indictment "fails to allege any crime." *Barnett v. Gladden*, 237 Or 76, 80, 390 P2d 614 (1964). Consequently, a defendant's failure to timely object requires the appellate court to construe the indictment "liberally * * * in favor of the state," whereas a timely challenge construes the indictment "strictly against the state." *State v. Goesser*, 203 Or 315, 325, 280 P2d 354 (1955); *cf., e.g., Ex parte Stacey*, 45 Or 85, 86-88, 75 P 1060 (1904) (argument that information alleged "and" when it should have alleged "or" might have rendered conviction voidable but not void).

One reason why failure to state a claim may be jurisdictional in criminal cases but not civil cases is that crimes are defined solely by statute, whereas civil claims can derive from the common law. *See, e.g., Belt v. Spaulding*, 17 Or 130, 136, 20 P 827 (1888) ("Crimes at common law are unknown in this state."). If the state fails to allege a statutory offense, it has not invoked the judicial power to resolve a criminal case. In contrast, a civil plaintiff's failure to allege an existing cause of action does not necessarily preclude the court from

announcing a new one or modifying an existing one to redress the plaintiff's injury. *See generally Doyle v. City of Medford*, 356 Or 336, 337 P3d 797 (2014) (discussing this court's creation of new common-law causes of action); *cf. Mueller v. Benning*, 314 Or 615, 620-21, 841 P2d 640 (1992) (under civil rule that pleadings should be liberally construed, inmate's *pro se* letter alleging inadequate counsel gave the court jurisdiction to grant post-conviction relief even though the letter was not labeled as such).

Finally, defendant acknowledges that the judicial power is not limited to resolving disputes between parties. Courts often act on requests by a single party or aligned parties, such as granting legal name changes, ORS 33.410, solemnizing marriages, ORS 106.120, or issuing search warrants, ORS 133.545. But even those examples require a party to bring the matter before the court in the proper manner. A judge could not arbitrarily bequeath someone a new name or declare two strangers married, and any such order would be void for lack of jurisdiction. *See Utley v. City of Independence*, 240 Or 384, 390, 402 P2d 91 (1965) ("when a judicial officer issues a warrant without a sworn complaint having been made, there is no judicial business properly before him, and he acts as a private citizen").

Perhaps the only time a court can act unilaterally is summary contempt for conduct in the court's immediate presence, which is uniquely "inherent" in the judicial power "because it is necessary to the exercise of all other powers."

Rust v. Pratt, 157 Or 505, 511, 72 P2d 533 (1937). Indeed, for other kinds of contempt, an accusatory instrument "is essential to the jurisdiction of the court." *State ex rel Jones v. Conn*, 37 Or 596, 598, 62 P 289 (1900).

B. Some constitutional rights are unique and important enough that this court has exempted them from the preservation rule.

Another exception to the preservation rule is that "a legal right may not be subject to preservation requirements due to the unique nature of the right itself." *Peeples*, 345 Or at 220-21. One example is the right to jury trial under Article I, section 11, of the Oregon Constitution. *Id.* (citing *State v. Barber*, 343 Or 525, 173 P3d 827 (2007)).

In *Barber*, 343 Or at 527, the defendant was convicted after a bench trial on stipulated facts after the trial court denied his motion to suppress evidence. The defendant's attorney arranged the bench trial, and the defendant said he had no objection to it. *Id.* On appeal, however, he argued that the lack of a written jury waiver violated Article I, section 11. *Id.* The Court of Appeals agreed that the trial court erred in proceeding without a written waiver but affirmed based on the defendant's failure to object. *Id.* at 527-28.

This court reversed. It explained that the "special peculiarity" of Article I, section 11, is not that it grants the defendant a right but that it permits the defendant to waive that right only in writing. *Id.* at 529. That makes the written waiver "itself a substantive constitutional right to which the accused is

entitled." *Id.* at 530. And the uniqueness of the provision "places errors committed with respect to it in a unique posture." *Id.* Because a court cannot "go [] to trial *at all*" without a written jury waiver, this court could not "identify any way in which an appellate court may elect" not to correct the error. *Id.* (emphasis in original). Consequently, the court had to reverse the defendant's convictions despite his lack of objection below. *Id.*

The right to counsel is also exempt from preservation. *State v. Cole*, 323 Or 30, 36, 912 P2d 907 (1996). In *Cole*, the defendant appeared without counsel at a suppression hearing. The court explained that he had a right to counsel, but he said that he wanted to represent himself. *Id.* at 32-33. After the court denied his motion to suppress, the defendant retained counsel and proceeded to trial. *Id.* at 33 n 1. On appeal, he challenged his waiver of counsel. The state argued that the error was not preserved, but this court held that a waiver of counsel is not subject to the preservation rule:

> "A defendant whose waiver of counsel is accepted without first being apprised of the risks of self-representation cannot be expected to object to acceptance of that waiver on the ground that he or she was not apprised of those risks."

Id. at 36.; *see also Dept. of Human Services v. T.L.*, 358 Or 679, 700-01, 369 P3d 1159 (2016) (holding that right to *adequate* counsel in juvenile dependency proceeding is exempt from preservation rule).

II. Under Article VII (Amended), section 5, a circuit court acquires jurisdiction to try a felony charge only from an indictment, an information and a preliminary hearing, or an information and the defendant's waiver of indictment or preliminary hearing.

Article VII (Amended) of the Oregon Constitution governs the judicial branch. Section 1 vests the "judicial power" in this court and other courts created by the legislature. The next several provisions address the membership of the courts and various procedures they must follow. At issue here is section 5. It provides that a defendant may not be charged with a felony in a circuit court without an indictment, an information and a preliminary hearing, or an information and the defendant's waiver of indictment or preliminary hearing.

Before addressing the meaning of Article VII (Amended), section 5, defendant first summarizes the grand jury and preliminary hearing processes. Second, defendant examines the current text of the constitution. Third, defendant reviews the 1908 amendment to Article VII that created the indictment requirement. Fourth, defendant addresses the subsequent history of Article VII. Fifth, defendant confronts the tension within this court's case law.

A. Grand juries and preliminary hearings prevent prosecutors from unilaterally initiating felony prosecutions.

The core principle of Article VII (Amended), section 5, is that "the state cannot charge a defendant with a felony unless persons outside the office of the prosecutor"—either a grand jury or a magistrate—"determine that the state has probable cause to move forward with that charge." *State v. Kuznetsov*, 345 Or

479, 483-84, 199 P3d 311 (2008). "The constitutionally required roles of the grand jury and the magistrate in felony cases operate as a check on the power of the district attorney and serve a critical function in protecting individual liberties." *Id.* at 484.

The grand jury is centuries old and derives from common-law practices. *State v. Gortmaker*, 295 Or 505, 510-12, 668 P2d 354 (1983). It comprises "a group of ordinary citizens" who "must approve of the initiation of the state power to accuse citizens of major crimes." *State v. Burleson*, 342 Or 697, 703, 160 P3d 624 (2007). Grand jurors are chosen by the circuit court and advised by the prosecutor. *Id.* at 704. But the jurors themselves determine which questions witnesses must answer, deliberate in private, and independently decide whether to return an indictment. *Id.* at 704-05.

Preliminary hearings also originated at common law. *Gerstein v. Pugh*, 420 US 103, 114-16, 95 S Ct 854, 43 L Ed 2d 54 (1975). Unlike the grand jury, preliminary hearings occur in open court with the defendant's participation. *Jury Service Resource Center v. De Muniz*, 340 Or 423, 432, 134 P3d 948 (2006). They include "a panoply of procedural guarantees," including a magistrate's determination of probable cause, the right to counsel, the right to cross-examine the state's witnesses, and the right to subpoena defense witnesses. *State v. Vasquez*, 336 Or 598, 611 n 10, 88 P3d 271 (2004) (quoting *State v. Clark*, 291 Or 231, 234, 630 P2d 810 (1981)).

B. The text of Article VII (Amended), section 5, shows that it creates mandatory prerequisites for the state to invoke a circuit court's power to try a felony charge and thereby limits the court's subject-matter jurisdiction.

Article VII (Amended), section 5, provides, in relevant part:

> "(3) Except as provided in subsections (4) and (5) of this section, a person shall be charged in a circuit court with the commission of any crime punishable as a felony only on indictment by a grand jury.
>
> "(4) The district attorney may charge a person on an information filed in circuit court of a crime punishable as a felony if the person appears before the judge of the circuit court and knowingly waives indictment.
>
> "(5) The district attorney may charge a person on an information filed in circuit court if, after a preliminary hearing before a magistrate, the person has been held to answer upon a showing of probable cause that a crime punishable as a felony has been committed and that the person has committed it, or if the person knowingly waives preliminary hearing."

Those provisions have "a lengthy history." *State v. Reinke*, 354 Or 98, 107, 309 P3d 1059, *adh'd to as modified on recons*, 354 Or 570, 316 P3d 286 (2013). They originated in a 1908 ballot initiative that amended Article VII (Original), section 18, and were amended several times between 1910 and 1974. *State v. Haji*, 366 Or 384, 399-400 & n 6, 462 P3d 1240 (2020). In interpreting a provision enacted and amended by the voters, this court seeks to discern the intent of the voters by examining the text and context of the provision. *Id.* at 400. For Article VII (Amended), section 5, that context includes its original text

and context, subsequent amendments, this court's case law, and pertinent case law from other jurisdictions *before* 1974. *Reinke*, 354 Or at 107-12.

The text of Article VII (Amended), section 5, does not use the word "jurisdiction." But several aspects of its text and context suggest that it imposes a jurisdictional limit on the circuit court. All three quoted provisions of section 5 specify when a defendant may be "charged" with a felony in a circuit court. This court has explained that a "charge" in that context means "one upon which the person accused may be put upon trial and convicted." *Ex parte Wessens*, 89 Or 587, 589, 175 P 73 (1918). A defendant has a "constitutional right to be tried only for the specific criminal act" that is charged in accordance with section 5. *State v. Long*, 320 Or 361, 370 n 13, 885 P2d 696 (1994).

In other words, Article VII (Amended), section 5, establishes requirements for the state to invoke the judicial power to resolve a dispute over whether the defendant is guilty of a felony. That is the essence of subject-matter jurisdiction. Although circuit courts generally have authority to hear criminal cases, *this* court lacks authority to adjudicate *this* case unless the state follows "the proper procedure for invoking [the court's] authority." *Wilson*, 291 Or at 35. If the state does not follow that procedure, then the case is "not properly before" the court, and the court lacks jurisdiction. *Parmele*, 233 Or at 623.

Additionally, the provision speaks only to the circuit court. It does not limit the power of any other court. For all of Oregon's history, circuit courts

have had exclusive jurisdiction to try or convict someone of a felony. *Stacey*, 45 Or at 88. But any magistrate has jurisdiction to issue an arrest warrant for any crime, including felonies. *Hannah v. Wells*, 4 Or 249, 253-54 (1872); ORS 133.020. Although circuit court judges are magistrates, so is every judge and justice in the state. ORS 133.030. When a circuit court judge issues an arrest warrant or holds someone to answer a criminal charge, they act *as a magistrate*. *Wessens*, 89 Or at 589. Consequently, Article VII (Amended), section 5, does not apply when a circuit court judge issues a warrant or holds someone to answer, because they are not exercising the power of the circuit court. *Id*. Indeed, subsection 5 provides that the district attorney may file an information in the circuit court "only *after* a showing of probable cause in a preliminary hearing before a magistrate." *Clark*, 291 Or at 234 (emphasis added). In other words, section 5 does not govern preliminary steps in a criminal prosecution. All it provides are requirements for the state to invoke the circuit court's exclusive power to try and convict a defendant of a felony.

The location of Article VII (Amended), section 5, is also significant. The voters placed it in Article VII, which establishes and regulates the judicial power. That suggests that section 5 itself regulates the judicial power, making it a jurisdictional requirement that courts must follow *sua sponte*. *See Burleson*, 342 Or at 704 (noting that the grand jury "is related to the judicial branch, because it is mentioned within the judicial article"). If the voters intended to

create only an individual right that must be asserted by the defendant to be effective, they likely would have placed it in Article I, which establishes individual rights. *Cf.* Or Const, Art I, § 11 (giving a defendant the right "to *demand* the nature and cause of the accusation against him" (emphasis added)).

The text of section 5 also shows that it does not involve personal jurisdiction. Personal jurisdiction can be established "by service of summons, by voluntary appearance, or by consent." *Decker v. Wiman*, 288 Or 687, 693, 607 P2d 1370 (1980). But Article VII (Amended), section 5, can be satisfied by filing an indictment, which does not require the defendant's presence. A grand jury can return an indictment against a defendant even if the defendant is outside Oregon. *E.g.*, *State v. Owen*, 119 Or 15, 244 P 516 (1926). Regardless of whether the defendant appears or not, section 5 directs a court try a felony charge only when its requirements have been met. In short, the provision's text suggests that it creates the kind of jurisdictional requirement that a court must enforce *sua sponte* and cannot be forfeited by the defendant's failure to raise it.

The state argues that jurisdiction cannot be waived, so allowing a defendant to waive indictment means the indictment requirement cannot be jurisdictional. The state is mistaken both about the nature of subject-matter jurisdiction and about how Article VII (Amended), section 5, works. The reason that a party cannot waive jurisdiction is, again, that subject-matter jurisdiction means the ability to exercise judicial power. *Edwards*, 361 Or at 778. Of course,

the *parties* cannot give a court power that it does not have. But the *legislative branch* can certainly do so. *Kellas v. Dept. of Corrections*, 341 Or 471, 484, 145 P3d 139 (2006). And the legislative branch—which includes the people—can condition that power on a party's consent. *See Michels*, 326 Or at 544-46 (explaining that consent of the parents is one statutory basis for subject-matter jurisdiction over an adoption proceeding).

In any event, Article VII (Amended), section 5, allows a defendant to waive indictment or preliminary hearing, not jurisdiction. The defendant's waiver does not authorize the court to hear a case that it has no power to hear; rather, it authorizes the prosecutor to initiate a case by filing an information. The waiver *combined* with the information gives the court jurisdiction—and it gives the court jurisdiction only because Article VII provides that the waiver and information together suffice to initiate a criminal charge.

Indeed, the defendant's waiver serves a similar function as the grand jury or preliminary hearing. The purpose of Article VII is to protect individuals from being charged with felonies unless a grand jury or magistrate finds probable cause. Although a defendant may waive that right, their waiver is "tantamount" to a finding of probable cause. *Hess v. Oregon German Baking Co.*, 31 Or 503, 505-06, 49 P 803 (1897). Either way, the prosecutor cannot initiate a felony prosecution without either the agreement of a grand jury or magistrate or the

defendant's waiver. Article VII simply lets the defendant choose which of those protections to invoke.

C. The text and context of the 1908 enactment of the indictment requirement show that the voters intended to create a jurisdictional bar to felony prosecution.

The indictment requirement originated in a 1908 amendment to Article VII (Original), section 18. The text of that amendment can generally be found in today's Article VII (Amended), section 5, with one key difference: the indictment requirement was absolute. It could not be waived, allowed no alternatives, and applied to all crimes. In other words, in 1908, *no* circuit court could hear *any* criminal charge except upon indictment. It is hard to describe that limitation as anything other than jurisdictional; it specifies the only way that the state can invoke the circuit court's power to adjudicate a criminal case.

The 1908 amendment did not apply to every criminal charge, however. Although circuit courts had exclusive jurisdiction over felonies, other courts could hear misdemeanors. *Stacey*, 45 Or at 88. In depriving circuit courts of authority over crimes charged without indictments, the amendment effectively applied only to felonies. Circuit courts could not try misdemeanor charges without an indictment, but lower courts retained jurisdiction over misdemeanors charged by a prosecutor. *See State v. Langworthy*, 55 Or 303, 314-16, 106 P 336 (1910) (holding that indictment requirement did not apply to justice court conviction that was appealed to circuit court).

As with the current text of Article VII, the 1908 amendment did not expressly refer to jurisdiction. But historical context shows that the voters knew they were enacting a jurisdictional requirement that this court would review for the first time on appeal.

1. Until 1899, Oregon law required an indictment before a defendant could be tried, and this court reviewed the sufficiency of indictments for the first time on appeal.

The original constitution did not require indictments and authorized the legislature to abolish them. Or Const, Art VII (Original), § 18 (1857). Until 1899, though, the legislature required an indictment before a person could be "tried" for a crime. The Codes and General Laws of Oregon, ch I, title I, § 1204 (Hill 2d ed 1892). Indeed, a "criminal action," meaning the trial and sentencing, could be commenced only by an indictment. *Id.* at §§ 1205, 1210. In contrast, any magistrate could issue an arrest warrant and hold a person to answer without an indictment. *Id.* at §§ 1547-48, 1566, 1608; *see also Vasquez*, 336 Or at 609 (before statehood, "[a] warrant could be obtained for the arrest of a person accused of such criminal offenses without an indictment, but the case itself could be tried only after an indictment was found"); *Hannah*, 4 Or at 253-55 (explaining that a person could be held on oral accusation but tried only on a written charge).

The legislature permitted defendants to challenge indictments on several bases, including nonconformity to statutory pleading requirements. The Codes

and General Laws of Oregon, ch I, title I, § 1322 (Hill 2d ed 1892). Most objections were waived if not raised by demurrer, but a defendant who did not demur could still object "to the jurisdiction of the court over the subject of the indictment, or that the facts stated do not constitute a crime," either at trial or via motion in arrest of judgment. *Id.* at § 1330.

This court heard many challenges to indictments, some of which were raised for the first time on appeal. It held that a claim that an indictment "fails to charge a crime" could be raised for the first time on appeal. *State v. Mack*, 20 Or 234, 235-36, 25 P 639 (1891). That included a claim that the indictment omitted an element of the offense. *State v. Jarvis*, 20 Or 437, 442, 26 P 302 (1891). But other challenges had to be preserved. *E.g.*, *State v. Jarvis*, 18 Or 360, 362, 23 P 251 (1890) (objection that indictment impermissibly charged multiple offenses was waived by lack of demurrer); *State v. McElvain*, 35 Or 365, 366-67, 58 P 525 (1899) (endorsement "a true bill" was "not essential to either the jurisdiction or the statement of the crime" and could not be raised for the first time on appeal). This court also noted the rule in other jurisdictions that an indictment by an unauthorized grand jury was "absolutely void, and the objection may be taken at any time, even on appeal." *State v. Witt*, 33 Or 594, 596, 55 P 1053 (1899). But a claim that a valid grand jury failed to "strictly and accurately" follow the law would be waived if not timely raised. *Id.*

2. In 1899, the legislature authorized prosecution by information for any offense; the voters responded by enacting a constitutional indictment requirement.

In 1899, the legislature authorized prosecutors to charge any crime—even "the most serious felonies"—by information. *Haji*, 366 Or at 412. In 1908, the voters responded by amending Article VII to require indictments in all criminal cases. The supporting statement in the voters' pamphlet provides historical evidence of the voters' intent. *Id.* at 411.

In vivid language, the statement warns against the dangers of unfettered prosecutions at the whim of district attorneys. Official Voters' Pamphlet, General Election, June 1, 1908, 116-17. It cautioned that the 1899 law did not require preliminary hearings and that defendants might not learn about a charge until their arrest. *Id.* at 116. Indeed, a person might "never be tried at all, the information or indictment may be dismissed, and yet his record is blackened." *Id.* Consequently, the power to file a criminal charge was "too much power to be vested in the hands of any one man." *Id.* The supporters also pointed to the indictment requirement in the federal constitution and urged voters to adopt the same requirement in Oregon:

> "The fathers of our country were careful to write that into the United States Constitution, but it is not yet an article of the State Constitution. The time has come when it should be there * * *."

Id. at 117.

That legislative history gives two reasons to find that the voters intended to make indictments a jurisdictional requirement. First, the purpose of the provision was to prevent a defendant from being charged with a felony at all, even before the defendant was arrested and regardless of whether the charge went to trial. That suggests that voters intended to preclude the state from even *filing* charges in the circuit court without the approval of the grand jury, and to thereby divest the circuit court of subject-matter jurisdiction to adjudicate charges except when that process was followed. The concern about defendants not learning about wrongful charges until their arrest further suggests that the voters intended courts to dismiss improperly filed charges before the defendant even made an appearance—in other words, courts should enforce the indictment requirement *sua sponte*.

Second, the argument that Oregon should adopt the federal indictment requirement shows that federal case law from before 1908 informs the voters' intent. When Oregon adopts the law of another jurisdiction, this court presumes that we have also adopted prior constructions of that law by the highest court of the jurisdiction. *State v. Stockfleth/Lassen*, 311 Or 40, 50, 804 P2d 471 (1991); *see also Priest v. Pearce*, 314 Or 411, 418-19, 840 P2d 65 (1992) (applying principle to constitutional provision based on Indiana Constitution). Thus, prior United States Supreme Court opinions provide context for Oregon's indictment requirement. And those opinions show that the requirement is jurisdictional.

3. Voters in 1908 would have known that the federal constitution required a valid indictment for a court to have jurisdiction to try a felony charge.

Until 1889, the United States Supreme Court could review criminal convictions only via writs of habeas corpus. *United States v. Sanges*, 144 US 310, 321-22, 12 S Ct 609, 36 L Ed 445 (1892). In habeas corpus, the Court could overturn a conviction only if it was "void." As we do today, the Court distinguished between void and voidable judgments. *E.g.*, *Ex parte Lange*, 85 US 163, 175-76, 21 L Ed 872 (1873).

The Court acknowledged that there had been "a great deal said and written, in many cases with embarrassing looseness of expression, as to the jurisdiction of the courts in criminal cases." *In re Bonner*, 151 US 242, 256-57, 14 S Ct 323, 38 L Ed 149 (1894). It clarified that the distinction between void and voidable criminal judgments turned on whether a court "keeps within the limitations prescribed by the law." *Id.* at 257. If the court did not keep within such limitations, its judgment was void. *Id.* If it did keep within the limitations, even if it erred, its judgment would not be void. *Id.*

The Court explained that a trial court could "take jurisdiction of a criminal case" only if the court had authority over the kind of offense at issue *and* the case was initiated in the "specifically prescribed manner." *Id.* For felonies, those jurisdictional requirements included an indictment. *Id.* The Court based that conclusion on the text and history of the Fifth Amendment:

> "It is never to be forgotten that in the construction of the language of the constitution here relied on, as, indeed, in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument. Undoubtedly the framers of this article had for a long time been absorbed in considering the arbitrary encroachments of the crown on the liberty of the subject and were imbued with the common-law estimate of the value of the grand jury as part of its system of criminal jurisprudence. They, therefore, must be understood to have used the language which they did in declaring that no person should be called to answer for any capital or otherwise infamous crime, except upon an indictment or presentment of a grand jury, in the full sense of its necessity and of its value. We are of the opinion that an indictment found by a grand jury was indispensable to the power of the court to try the petitioner for the crime with which he was charged."

Ex parte Bain, 121 US 1, 12-13, 7 S Ct 781, 30 L Ed 849 (1887).

But the Court distinguished between errors in an indictment that deprived a court of jurisdiction and errors that did not. A court exceeded its jurisdiction in convicting a defendant of a felony without an indictment or with an invalid indictment. *Ex parte Wilson*, 114 US 417, 429, 5 S Ct 935, 29 L Ed 89 (1885); *see also Wong Wing v. United States*, 163 US 228, 238, 16 S Ct 977, 41 L Ed 140 (1896) (court lacked jurisdiction to imprison noncitizen without indictment or jury trial); *Bain*, 121 US at 13 (court lacked jurisdiction after it improperly amended the indictment, because amended indictment "was no indictment of a grand jury"). But compliance with statutory pleading requirements or a noncitizen's presence on the grand jury were not jurisdictional issues. *Ex parte Yarbrough*, 110 US 651, 654, 4 S Ct 152, 28 L Ed 274 (1884) (pleading

requirements); *Ex parte Harding*, 120 US 782, 784, 7 S Ct 780, 30 L Ed 824 (1887) (noncitizen juror).

The state mistakenly cites *Stacey* as a case in which this court held that "a defective indictment was not a jurisdictional problem." *Brief on the Merits of Petitioner on Review* 18. To the contrary, *Stacey* involved a prosecution by information under the 1899 law. And a careful reading of *Stacey* supports defendant's position. *Stacey* involved a challenge to the wording in an information for robbery—specifically that it alleged violence "and" fear of violence instead of violence "or" fear of violence as the robbery statute required. 45 Or at 86-87. This court held that the error was not jurisdictional.

In reaching that conclusion, this court cited an Oklahoma decision that discussed when a court "acquired jurisdiction of the subject-matter of an indictment." *Id.* at 88 (citing *Ex parte Harlan*, 1 Okla 48, 27 P 920 (1891)). And the Oklahoma decision took its rule from federal law—including *Bain*. *Harlan*, 27 P at 922. That suggests that this court understood that "acquir[ing] jurisdiction of the subject-matter of an indictment" required the existence of a valid indictment. And it further supports the presumption that in 1908, four years after this court decided *Stacey*, the voters understood that they were incorporating the federal rule into the Oregon Constitution.

To recap, in 1908 the voters amended Article VII to provide that no circuit court could try any criminal charge without a grand jury indictment.

Because the voters limited the state's ability to invoke the judicial power and placed that limitation in the article of the constitution that governs judicial power, they likely intended it to be jurisdictional. The voters also did not merely reestablish the pre-1899 indictment requirement; they made it mandatory and forever beyond legislative alteration.

Moreover, voters knew that this court would review the sufficiency of an indictment—at least whether it stated every element of an offense—for the first time on appeal. They likely intended to incorporate the federal indictment requirement into the Oregon Constitution. They would have known that an indictment was a jurisdictional requirement in federal law. And they would have known that trial and appellate courts had to consider jurisdiction *sua sponte* whenever it was raised. Given all that context, it is highly likely that the voters intended to enact a jurisdictional requirement. At a minimum, the voters would have known that they were creating a right that would be subject to appellate review without an objection at trial.

4. After 1908, this court continued to review the sufficiency of indictments for the first time on appeal.

This court faced litigation over the indictment requirement almost as soon as it took effect. In *State v. Ju Nun*, 53 Or 1, 98 P 513 (1908), this court had affirmed the defendant's conviction based on an information under the 1899 law. After the 1908 amendment passed, the defendant petitioned for

rehearing, arguing that the amendment left the court "without jurisdiction." *Id.* at 8. This court did not dispute the defendant's premise that the indictment requirement was jurisdictional, but it concluded that the 1908 amendment required only "that no prosecution shall hereafter be commenced except in the manner stated" and that "the jurisdiction of the court to proceed with pending cases remains unimpaired." *Id.* at 9-10.

The state cites *State v. Emmons*, 55 Or 352, 106 P 451 (1910), for the proposition

> "that the circuit court's jurisdiction over a criminal offense was shown by any 'indicat[ion] in a general way [of] the kind of a crime alleged to have been committed'—that is, jurisdiction existed because the subject matter at issue was an Oregon criminal offense, and that jurisdiction was not lost due to substantive defects in the accusatory instrument."

Brief on the Merits of Petitioner on Review 18. But the state takes *Emmons* out of context. The quoted portion of the opinion merely describes the *caption* of an indictment, and the rest of the court's analysis is consistent with the principle that a *substantive* defect in an indictment deprives the court of jurisdiction:

> "The 'caption' of an indictment is the preamble, which is designed to indicate in a general way the kind of a crime alleged to have been committed and to show that the trial court has jurisdiction thereof. A mistake in the caption in designating the correct name of the offense is not a fatal defect, for *it is the sufficiency of the averments of the charging part of an indictment* that constitutes the gist of the accusation.
>
> "The caption will therefore be disregarded, and the charging part of the accusation, under consideration, will be re-examined to

> ascertain if it contains sufficient averments to uphold the judgment."

Emmons, 55 Or at 357 (emphasis added; citations omitted); *cf. Bain*, 121 US at 7 ("the caption is no part of the instrument found by the grand jury").

Moreover, this court continued to follow the rule that a defendant could challenge for the first time on appeal whether the indictment alleged a crime. *E.g.*, *State v. Robinson*, 74 Or 481, 482, 145 P 1057 (1915). And this court continued to hold that other challenges required a timely objection. *See, e.g.*, *State v. Gauthier*, 113 Or 297, 301, 231 P 141 (1924) (rejecting unpreserved argument that district attorney did not sign indictment); *cf. Garner v. Alexander*, 167 Or 670, 677, 120 P2d 238 (1941), *cert den*, 316 US 690 (1942) (holding that failure to include women on grand jury did not deprive court of jurisdiction; relying on federal case law).

D. Subsequent amendments to Article VII and this court's case law interpreting it definitively establish that it creates a subject-matter jurisdiction requirement for felony charges.

Between 1908 and today, the indictment provision of Article VII was subject to many amendments and appellate opinions. Defendant first addresses the earliest amendments, particularly the addition of a defendant's ability to waive indictment; second, this court's opinions interpreting the waiver provision; third, the 1958 and 1974 amendments that repealed and reenacted the provision and allowed preliminary hearings as an alternative to indictments; and fourth, the recent cases that the state relies upon.

1. In 1927, the voters amended Article VII to allow defendants to waive indictment, which did not diminish the defendant's rights in any way and required active participation by the circuit court.

In 1910, the voters replaced Article VII (Original) with Article VII (Amended). The new provision included the 1908 indictment requirement in Article VII (Amended), section 5. *Haji*, 366 Or at 400.

In 1927, the voters amended Article VII to allow defendants to waive indictment. Although the legislative referral purported to amend Article VII (Original), section 18, this court held that it actually amended Article VII (Amended), section 5. *State v. Tollefson*, 142 Or 192, 197-98, 16 P2d 625 (1932). Significantly, the defendant in *Tollefson* waived indictment, pleaded guilty to an information, and challenged the validity of the 1927 amendment and the sufficiency of the information for the first time on appeal. This court reached the merits of both challenges notwithstanding the lack of preservation.

The legislature's statement in support of the 1927 amendment identified "criminals who desire to plead guilty" as its focus. Official Voters' Pamphlet, Special Election, June 28, 1927, 9. Indeed, the legislature explained that the amendment would "not alter the present grand jury system of the state" outside of guilty pleas. *Id.* A defendant would "not suffer in any way because he does not lose the right of a grand jury investigation unless he expressly waives it."

Id. Defendants who wished to plead guilty would even *benefit* because they "need not wait a long period in jail before receiving sentence." *Id.*

The amendment also specified how a defendant could waive indictment. Although the waiver need not be in writing, "[i]t is essential" that the defendant "appear before the judge of the circuit court." *State v. Lillie*, 172 Or 194, 200, 139 P2d 576 (1943). And the waiver must "be not a general one which would allow the district attorney to charge any crime which he might choose, but a waiver of indictment for a particular crime which will authorize the district attorney to proceed against the accused by information for the commission of that crime and no other." *Id.*

The text of the amendment, as well as the statement from the legislature, reflect that it made only one change: where indictments had been mandatory, defendants could instead waive indictment and allow the prosecutor to initiate a case via information. Nothing about that change suggests that the voters intended to remove any existing protections of Article VII. Indeed, the amendment kept the requirement in Article VII as a limit on judicial power instead of moving it to Article I as a right of the defendant.

The voters likely expected courts to intervene *sua sponte* to ensure that waivers of indictment were knowing and voluntary. The amendment expressly required waivers to be executed in the presence of the judge. And the voters' pamphlet suggested that waivers would accompany guilty pleas, which

involved a colloquy between judge and defendant. *See, e.g., Kercheval v. United States*, 274 US 220, 223, 47 S Ct 582, 71 L Ed 1009 (1927) ("[C]ourts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences."). At the time, voters also would have known that defendants who pleaded guilty could appeal, and the plea would not preclude appellate review of the sufficiency of the indictment or the court's jurisdiction. *State v. Lewis*, 113 Or 359, 362, 230 P 543 (1924), *adh'd to on reh'g*, 113 Or 359, 232 P 1013 (1925).

2. This court addressed challenges to waivers of indictment in *Lillie* and *Huffman*, and it held that an invalid waiver deprived a court of subject-matter jurisdiction.

This court first considered a challenge to a waiver of indictment in *Lillie*. The defendant in that case was charged by information with larceny. 172 Or at 198. After he was convicted, he appealed and argued—for the first time—that he had not validly waived indictment and that the circuit court "never acquired jurisdiction." *Id.* at 199-200.

It appears that there was no transcript of the proceedings. Instead, the appellate record included the defendant's written waiver of indictment and the trial court's orders reciting what transpired at each hearing. The written waiver said that the defendant waived indictment as to the "crime" without identifying the crime. *Id.* at 199. The court's arraignment order erroneously identified the crime as "obtaining money by false pretenses." *Id.* at 204. Several months later,

"based on affidavits of bystanders and the court's memory," the court entered a *nunc pro tunc* order that said the defendant had been charged with larceny. *Id.*

The defendant claimed that his waiver was defective either because it did not specify the crime to which he waived indictment or because it specified the wrong crime. *Id.* at 201. This court rejected both claims; it concluded that the waiver applied to the crime that the defendant had been charged with, and it rejected his argument that the original arraignment order compelled a finding that he had waived indictment to the wrong crime. Rather, this court relied on the "rebuttable presumption" that the trial court complied with its duty to inform the defendant of the charge against him. *Id.* at 202. This court also held that the trial court had authority to issue the *nunc pro tunc* order and that this court had to accept the order as "a true and correct record of what actually occurred on the arraignment." *Id.* at 204. Consequently, the record established that the defendant had waived indictment on the charge of larceny, which permitted the circuit court to enter a conviction for that crime.

The defendant also argued that the record did not show that the court had explained his right to an indictment or allowed him to consult with counsel before waiving indictment. He argued that "all the facts necessary to confer jurisdiction upon the circuit court must appear affirmatively on the face of the record." *Id.* at 205. This court rejected that argument. Because the circuit court was a court of general jurisdiction, this court held that "the existence of the

facts necessary to give it jurisdiction to render the judgment appealed from will be presumed in the absence of something in the record which contradicts that presumption." *Id.* at 211. This court presumed "that the judge did his duty" to inform the defendant about his rights, "there being nothing in the record to indicate the contrary." *Id.* at 205.

Lillie did not resolve the question in this case—whether a valid waiver of indictment is a jurisdictional requirement that can be challenged for the first time on appeal. The defendant argued that it was, and this court did not reject that premise. To the contrary, this court reached the merits of the defendant's challenge even though he did not preserve it. At minimum, *Lillie* is consistent with the position that a waiver can be challenged for the first time on appeal.

Nine years later, this court held that a valid waiver of indictment was a jurisdictional requirement. *Huffman*, 197 Or at 299-301. *Huffman* was an appeal from an order dismissing the defendant's petition for a writ of habeas corpus. The defendant had challenged his waiver of indictment, but the trial court concluded that it could not consider that challenge. *Id.* at 295-96.

This court acknowledged that habeas corpus applied only if a conviction was void for lack of jurisdiction. *Id.* at 297. It noted that its opinion in *Garner* had been influenced by federal case law to state the scope of habeas corpus "somewhat more broadly" to include "violation[s] of the constitutional rights of an accused person" that "will render the judgment void, even though the court

had jurisdiction, in the narrow sense, over person and subject matter at the inception of the proceedings." *Id.* at 297-99. However, without applying that expanded review, this court turned "first" to "whether an Oregon court has jurisdiction to try a defendant on an information in the absence of a waiver of indictment." *Id.* at 299.

In answering that question, this court first quoted the portion of Article VII addressing waivers of indictment. *Id.* It then reviewed a treatise on habeas corpus and the United States Supreme Court's decisions in *Wilson* and *Bain*, each of which said that a valid indictment was necessary to invoke a court's jurisdiction over a felony charge. *Id.* This court acknowledged that the federal rule did not apply to state prosecutions, but it concluded based on those authorities and "the express language of the constitutional provision" that "the same rule must be applied" under Article VII:

> "[U]nless a defendant validly waives indictment he cannot be tried upon information filed by the district attorney. A judgment rendered upon an information without waiver of indictment would be void."

Id.

This court might have stated its holding more clearly, but the opinion reflects that a circuit court lacks subject-matter jurisdiction to try a criminal charge without an indictment or valid waiver of indictment. Although this court acknowledged the looser concept of jurisdiction that it articulated in *Garner*, it

ultimately addressed "first"—and only—jurisdiction "in the narrow sense, over person and subject matter at the inception of the proceedings." *Id.* at 299; *see also Chavez v. State*, 364 Or 654, 672, 438 P3d 381 (2019) (explaining that this court in *Huffman* applied the "well-established" jurisdictional basis for habeas corpus, not the novel non-jurisdictional theory).

This court then considered the presumptions that it had applied in *Lillie*. *Huffman*, 197 Or at 301. It noted that the original trial judge had entered an order that said the defendant "expressed his desire to waive indictment," that the judge advised him about his right to an indictment, and that he persisted in waiving indictment. *Id.* at 302. In contrast, the defendant asserted that he was uneducated and that his waiver resulted from fraud. *Id.* at 303.

After analyzing its decisions in *Lillie* and other cases, this court held that the trial court's orders were "presumed to be both true and valid," but a defendant in habeas corpus could present "evidence outside the record which tends to invalidate but not directly to contradict the judicial recital." *Id.* at 313-14. The defendant could not attack the record directly; if it was inaccurate, "the proper remedy is by motion to correct the record." *Id.* at 317. Because the factual disputes regarding the validity of the defendant's waiver needed to be resolved, this court remanded for further proceedings. *Id.* at 322.

This court explained that it had "considered this case at length because of the importance and novelty, at least in this jurisdiction, of the issues presented."

Id. at 329. It concluded by urging that "[a] primary responsibility rests upon the trial judges of the convicting courts," who should exercise "[e]xtreme care" to ensure that defendants understood their rights and that the record accurately reflected any colloquies regarding a waiver or plea. *Id.* at 331.

This court and the Court of Appeals subsequently applied *Huffman* in several challenges to criminal convictions. *See Ex parte Audett*, 202 Or 585, 590-91, 276 P2d 943 (1954) (holding that the record showed that the defendant validly waived indictment); *Anderson ex rel Poe v. Gladden*, 205 Or 538, 547, 288 P2d 823 (1955) (holding that trial court had jurisdiction to try the case on an indictment without a preliminary hearing); *Brady v. Calloway*, 11 Or App 30, 38, 501 P2d 72 (1972) (holding that trial court needed to determine the defendant's competence to waive indictment).

3. In 1958 and 1974, the voters repealed and reenacted the relevant provisions of Article VII, and their decisions ratified *Huffman*.

The subsequent history of Article VII includes both the establishment of preliminary hearings as an alternative to indictments and several instances where voters had the opportunity to ratify or reject *Huffman*. Each time, they voted in a manner consistent with *Huffman*.

In 1958, the voters approved an amendment that "rearrange[d] for purposes of convenience and clarity sections of the Constitution dealing with indictments, but ma[d]e[] no change in existing constitutional law except to

allow the use of more than one Grand Jury" within a single county. Official Voters' Pamphlet, General Election, Nov 4, 1958, 26. In particular, the amendment repealed Article VII (Original), section 18, in its entirety and moved its provisions, including the 1927 indictment waiver language, into Article VII (Amended), section 5.

In 1960, the voters rejected an amendment to Article VII that would have eliminated the indictment requirement and permitted the state to initiate any prosecution via information without a preliminary hearing. Official Voters' Pamphlet, General Election, Nov 8, 1960, 10. The supporters argued, *inter alia*, that most states had replaced indictments with informations and that grand juries were inefficient and did not protect defendants. *Id.* at 12-13. Although no opposing arguments were submitted, the voters rejected the amendment.[2]

In 1974, the voters repealed Article VII (Amended), section 5, in its entirety and enacted its current text. The main substantive change was to permit felony prosecutions via information if a magistrate found probable cause at a preliminary hearing or the defendant waived preliminary hearing; it also limited the provision to felonies. Official Voters' Pamphlet, General Election, Nov 5, 1974, 13. The explanatory statement noted that prosecutors could already charge misdemeanors without indictments in courts other than circuit courts. *Id.*

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[2] The voters had rejected a similar amendment in 1933. Official Voters' Pamphlet, Special Election, July 21, 1933, 15-16.

It concluded that the amendment would "substantially streamline the section but would make no substantive changes other than those described above." *Id.*

The voters likely understood that the amendment did not reduce a defendant's protections in any way. The explanatory statement said that the preliminary hearing or waiver would serve the same purpose as the grand jury, which was to ensure that prosecutors did not unilaterally initiate criminal charges. *Id.* Indeed, the statement in *opposition* to the measure argued only that grand juries did not protect defendants and should be entirely replaced with preliminary hearings. *Id.* at 15. By 1974, that was a common opinion. *E.g.*, *United States v. Dionisio*, 410 US 19, 23, 93 S Ct 777, 35 L Ed 2d 67 (1973) (Douglas, J., dissenting) ("It is, indeed, common knowledge that the grand jury, having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive."). *But see Burleson*, 342 Or at 705 ("[T]his court has determined that the grand jury, not the prosecutor, is the actor that drives the investigative process of the grand jury.").

Because the 1958 and 1974 amendments occurred after this court decided *Huffman*, *Huffman* provides context for the voters' intent. Voters in 1974 would have known that a valid waiver of indictment was a jurisdictional requirement, so they would have expected that a valid waiver of preliminary hearing—which they authorized in the same part of the constitution, using similar language—would also be jurisdictional. Voters also would have known that magistrates

had a statutory duty *sua sponte* to inform defendants about their right to a preliminary hearing. ORS 135.070(2) (1974).

But *Huffman* arguably requires even greater weight. This court has long followed the principle that when this court interprets a statute, and the legislature later repeals and reenacts the statute, "it is deemed that the Legislature has adopted the court's construction unless the contrary purpose is clearly shown by the language of the act." *Overland v. Jackson*, 128 Or 455, 463-64, 275 P 21 (1929). Although it has yet to apply that principle to the state constitution, this court generally interprets constitutional provisions in the same manner as statutes. *Couey v. Atkins*, 357 Or 460, 490, 355 P3d 866 (2015).

Here, the 1958 amendment repealed Article VII (Original), section 18, and reenacted its provisions in Article VII (Amended), section 5. Similarly, the 1974 amendment repealed Article VII (Amended), section 5, in its entirety and replaced it with the current version, which reenacted most of the same language. Both times, voters would have known how this court had interpreted Article VII in *Huffman*. Both times, they were told that the amendments would not change the law except for the specific modifications at issue. Consequently, the *Overland* presumption would hold that the voters "adopted the court's construction" of Article VII in both 1958 and 1974.

That presumption is especially apt for the 1958 amendment, because this court had previously interpreted Article VII (Original), section 18, and not

Article VII (Amended), section 5. *Huffman*, 197 Or at 299; *accord Lillie*, 172 Or at 197-98. The voters in 1927 purported to amend Article VII (Original), but this court held that they actually amended Article VII (Amended). *Tollefson*, 142 Or at 197-98. One purpose of the 1958 amendment was to eliminate the confusion of having two provisions on the same subject. By repealing the provision that this court interpreted in *Huffman* and placing its language into the remaining provision, while being told they were not changing the law, the voters would have understood that they were incorporating the rule from *Huffman* into Article VII (Amended), section 5.

Moreover, if the voters wanted to abrogate *Huffman*, they had the chance to do so in 1960. The 1960 amendment would have permitted prosecutions by information without a waiver of indictment, meaning it would have abolished the right that this court applied in *Huffman*. But the voters rejected that amendment and instead approved the 1974 amendment, which required preliminary hearings as an alternative protection of the defendant's rights.

This court addressed Article VII (Amended), section 5, soon after the 1974 amendment, and its analysis is consistent with the above conclusions. *State v. McCormick*, 280 Or 417, 423, 571 P2d 499 (1977). This court explained that preliminary hearings provided an equivalent safeguard to grand juries and that an information would be "void" without a preliminary hearing:

> "But the initiation of a prosecution was not left wholly to the sole discretion of district attorneys. The requirement that a magistrate must first have found probable cause to hold a defendant to answer represents the alternative to the older safeguard of requiring a showing of probable cause for an indictment to the grand jury. Thus, * * * an information that lacks a basis in an outstanding order to hold defendant to answer is indeed void."

Id.

4. Decades later, this court in *Terry* and the United States Supreme Court in *Cotton* held that the sufficiency of an indictment was not jurisdictional.

This court revisited the question of jurisdiction under Article VII (Amended), section 5, nearly 30 years later in *Terry*. *Terry* involved this court's direct review of a death sentence in which the defendant raised numerous challenges to the "pretrial, guilt, and penalty phases of his trial." 333 Or at 165. One challenge, which related only to the penalty phrase, involved the sufficiency of the indictment. *Id.* at 177, 184. The defendant argued that the jury's finding of "deliberation," which was necessary to impose the death penalty but *not* to convict him of aggravated murder, had to be alleged in the indictment. *Id.* at 184. Because the defendant failed to preserve that challenge, he argued that it was either jurisdictional or plain error. *Id.* at 185.

Before this court addressed the defendant's jurisdictional and plain error arguments, it noted that it would "consider and reject" his challenge *on the merits* for reasons to be explained later in the opinion. *Id.* at 185-86. This court then addressed jurisdiction. Its analysis, in its entirety, was as follows:

> "Subject matter jurisdiction defines the scope of proceedings that may be heard by a particular court of law and is conferred by statute or the constitution. *See* Charles E. Torcia, *Wharton's Criminal Procedure,* § 11 at 95 (13th ed 1989) ('A criminal court has jurisdiction, *i.e.*, the power to determine whether an accused is guilty of a particular crime and, if so, to impose a punishment therefor, if it has jurisdiction of the subject matter and of the person of the accused.'); *see also State v. Webb*, 324 Or 380, 393, 927 P2d 79 (1996) (holding that legislature granted two separate kinds of jurisdiction to district courts, *i.e.*, same criminal jurisdiction as justice court and concurrent jurisdiction with circuit courts of misdemeanors for which punishment may not exceed $3,000 fine). Under the Oregon Constitution, circuit courts have subject matter jurisdiction over all actions unless a statute or rule of law divests them of jurisdiction. *See* Or Const, Art VII (Amended), § 2 (not changing jurisdictional scheme set out in original Article VII); Or Const, Art VII (Original), § 9 (all jurisdiction not vested by law in another court shall be vested in circuit courts). In particular, the Oregon Constitution states that, once a person has been indicted by a grand jury, that person can be charged 'in a circuit court with the commission of any crime punishable as a felony.' Or Const, Art VII (Amended), § 5(3). The trial court therefore had subject matter jurisdiction to try defendant for the crime of aggravated murder, even if the indictment arguably was defective.[15]
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> ---
>
> "[15] An indictment, if it is defective, may be reviewed for error rather than for lack of subject matter jurisdiction. *See, e.g.*, *State v. Trueax*, 315 Or 396, 845 P2d 1291 (1993) (discrepancy between caption of indictment charging sodomy in third degree, required remand for entry of conviction for sodomy in third degree, not new trial); *State v. Woodson*, 315 Or 314, 845 P2d 203 (1993) (amendment of indictment to allege attempted rape rather than rape was not error)."

Id. at 186 & n 15 (one footnote omitted).

As it promised, this court then addressed the merits of the defendant's challenge. It held that the indictment was not deficient because it did not need to allege "deliberation." *Id.* at 189-90.

Defendant discusses *Terry* further in the next section of this brief. First, though, defendant addresses the other case that the state relies on. Five months after *Terry*, the United States Supreme Court overruled *Bain* in *Cotton*, 535 US 625. But *Cotton* has no relevance here. *Cotton* addressed federal law and has no precedential value in interpreting Article VII. Moreover, *Cotton* was decided nearly 30 years after the latest amendment to Article VII, so it provides no historical evidence of the voters' intentions.

This court rejected a similar attempt by the state to import contemporary federal law into the Oregon Constitution in *State v. Fugate*, 332 Or 195, 211-14, 26 P3d 802 (2001). *Fugate* involved an *ex post facto* challenge to a criminal statute. This court explained that it had interpreted the Ex Post Facto Clause of the Oregon Constitution based on the United States Supreme Court's opinions in *Strong v. The State*, 1 Blackf 193 (1822), and *Calder v. Bull*, 3 US (3 Dall) 386, 1 L Ed 648 (1798). The state countered with a recent opinion, *Carmell v. Texas*, 529 US 513, 120 S Ct 1620, 146 L Ed 2d 577 (2000), which articulated a different rule than *Strong* and *Calder*. This court rejected the state's argument, because the older cases provided historical evidence of the meaning of the Oregon Constitution and the recent case did not:

> "Whatever the merits of *Carmell* as a definitive statement of the scope of the fourth category under the federal *ex post facto* clause today, *Carmell* is not correct insofar as the Oregon *ex post facto* clause is concerned. Both *Strong* and *Calder* clearly stated that the fourth category forbade as a general rule a change in the rules of evidence that favored only the prosecution. * * * Those statements were in the minds of the framers when they enacted Article I, section 21. Under their understanding, all four categories identified in *Calder* are applicable in applying Article I, section 21."

Fugate, 332 Or at 213-14.

This court acknowledged that the historical analysis in *Strong* had been criticized. *Id.* at 213 n 6. But regardless of whether *Strong* was right or wrong, what mattered was "the fact that * * * *Calder* and *Strong* would have influenced what the framers of the Oregon Constitution understood by the prohibition against *ex post facto* laws." *Id.*

So too here. Each time the voters amended Article VII, *Bain* was still good law. *See, e.g.*, *Stirone v. United States*, 361 US 212, 217, 80 S Ct 270, 4 L Ed 2d 252 (1960) (noting that *Bain* "has never been disapproved"). Indeed, *Wilson*—which held that the absence of an indictment deprived a court of jurisdiction—has never been expressly overruled.

Bain and *Wilson* provide historical context for the meaning of Article VII. *Huffman* was correct to consider them. *Terry* was wrong to ignore them. And *Cotton* has no relevance except to the extent that its reasoning might be persuasive—but it is hard to see how the reasoning of a federal court decades after the latest amendment to Article VII could tell us much about what Oregon

voters intended. Likewise, it is hard to see what relevance recent appellate opinions from other states could have.

E. Principles of *stare decisis* favor reaffirming *Huffman*, which employed generally correct legal analysis and is subject to significant reliance interests, whereas *Terry* ignored over a century of context and case law.

Again, the question in this case is whether a defendant's waiver of preliminary hearing is a jurisdictional requirement that can be challenged for the first time on appeal. *Huffman* is directly on point and answers that question in the affirmative. Defendant acknowledges tension between *Terry* and *Huffman*, but *Terry* is not controlling for three reasons.

First, *Terry* involved a challenge to the sufficiency of an indictment, not a waiver of indictment. Indeed, the defendant's so-called "jurisdictional" challenge went only to his eligibility for a death sentence. He did not argue that it foreclosed the state from charging him with aggravated murder or that it deprived the circuit court of jurisdiction to try or convict him of that offense. Whether the absence of an indictment or waiver of indictment could deprive a court of jurisdiction over a criminal *charge* was not at issue.

Second, this court's analysis of jurisdiction was ambiguous. This court said that circuit courts have jurisdiction "unless a statute or rule of law divests them of jurisdiction" and that "[i]n particular" the constitution provides that "*once* a person has been indicted by a grand jury, that person can be charged"

with a felony. *Terry*, 333 Or at 186 (emphasis added). This court may have meant that the indictment requirement was a "particular" example of a rule that limited a court's jurisdiction. Which is precisely how the Court of Appeals interpreted *Terry* below. *Keys*, 302 Or App at 523 ("*Terry* can fairly be read to mean that a circuit court obtains jurisdiction to try a criminal defendant only 'once [that] person has been indicted by a grand jury,' given the structure of the paragraph in which the reference to indictment is included.").

Third, although this court's analysis of jurisdiction was not *dicta*, it was gratuitous. Its conclusion that the indictment was not defective would have disposed of both the plain error *and* jurisdictional arguments. This court could have simply followed the practice it used in cases like *Lillie*, *Tollefson*, and *Ju Nun*, and rejected the defendant's challenge on the merits without deciding whether it was jurisdictional. Although this court cannot ignore *Terry*, the above reasons all support a decision to distinguish or narrow it and apply *Huffman* instead.

However, if this court cannot reconcile *Huffman* and *Terry*, then it must choose one of them to follow and one to overrule. That decision involves more than just determining what the present justices of this court would say if they were writing on a blank slate. Rather, *stare decisis* requires this court to consider the broader implications of its decision to overrule precedent.

Stare decisis requires this court to "assume that its fully considered prior cases are correctly decided." *State v. Ciancanelli*, 339 Or 282, 290, 121 P3d 613 (2005). The rule is "prudential" and involves weighing the "competing needs for stability and flexibility in Oregon law." *Farmers Ins. Co. v. Mowry*, 350 Or 686, 697-98, 261 P3d 1 (2011). This court must not needlessly frustrate the reliance that Oregonians place on its decisions. *Id.* at 698.

That principle "applies with particular force in the arena of constitutional rights and responsibilities, because the Oregon Constitution is the fundamental document of this state and, as such, should be stable and reliable." *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 53, 11 P3d 228 (2000). However, this court has also noted that it "is the body with the ultimate responsibility for construing our constitution, and, if we err, no other reviewing body can remedy that error." *Id.*

For a party to persuade this court to overturn a constitutional precedent, this court has identified three factors that the party must establish: first, "that the constitutional rule that it attacks was not formulated either by means of the appropriate paradigm or by some suitable substitute;" second, that "application of the appropriate paradigm establishes that the challenged constitutional rule is incorrect;" and third, that "when the passage of time and the precedential use of the challenged rule is factored in, overturning the rule will not unduly cloud or complicate the law." *Ciancanelli*, 339 Or at 291.

Here, all three factors weigh in favor of reaffirming *Huffman* and, if necessary, overruling *Terry*. First, *Huffman* generally followed the appropriate method for interpreting the constitution. It considered "the express language of the constitutional provision" and federal law that provided historical context. *Huffman*, 197 Or at 299. It also reviewed this court's case law, including *Lillie*, *Garner*, and even *Ex parte Stacey*. *Id.* at 308. This court did not use magic words like "text, context, and legislative history," but it considered the appropriate sources of information for interpreting the constitution.

In contrast, *Terry* did not apply the correct method for interpreting the constitution. If this court wanted to decide whether the requirements of Article VII (Amended), section 5, were jurisdictional, then it had to consider *Huffman*, which was squarely on point. But this court did not acknowledge *Huffman*. Indeed, the defendant himself failed to cite *Huffman*. *See Appellant's Brief* & *Appellant's Reply Brief*, *State v. Terry*, S42818. Consequently, this court was not "presented with an important argument" and "failed to apply [its] usual framework for decision or adequately analyze the controlling issue." *Farmers Ins. Co.*, 350 Or at 698.

This court also engaged in minimal analysis of the text of Article VII (Amended), section 5. And it completely failed to address the history of the provision. Just one of the cases that the court cited addressed section 5, and that case involved a *preserved* challenge to an amendment to an indictment.

Woodson, 315 Or 314. This court did not acknowledge its history of reviewing the sufficiency of an indictment the first time on appeal. *E.g.*, *Goesser*, 203 Or at 325; *Jarvis*, 20 Or at 442. Nor did this court acknowledge its statements that failure to state an offense was jurisdictional error. *E.g.*, *Barnett*, 237 Or at 80. This court had considered that history just one year earlier in *Waddill*, 330 Or at 383-84, and explained that it departed from its historical practice due to ORCP 21. But ORCP 21 could not justify this court's departure from the same practice in a criminal case like *Terry*.[3]

As the analysis in this brief shows, the second *stare decisis* factor—which rule a correct analysis of the constitution would support—weighs in favor of reaffirming *Huffman* and overruling *Terry*. *Huffman* was correct when it was decided, and even if it was not, the voters ratified it when they repealed and reenacted the relevant provisions of Article VII in 1958 and 1974.

The third *stare decisis* factor, "the passage of time and the precedential use of the challenged rule" is highly relevant here. *Ciancanelli*, 339 Or at 291. Article VII has been subject to many amendments and appellate opinions, and the indictment requirement has been altered several times. That history does not merely inform the meaning of the provision, it gives Article VII (Amended) its

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[3] The Court of Appeals also saw *Terry* as a departure from settled law that required it to overrule ten of its opinions spanning 1970 to 2002. *State v. Daniel*, 222 Or App 362, 368, 193 P3d 1021 (2008); *State v. Caldwell*, 187 Or App 720, 723 & n 1, 69 P3d 830 (2003), *rev den*, 336 Or 376 (2004).

legitimacy. In *Carey v. Lincoln Loan Co.*, 342 Or 530, 157 P3d 775 (2007), this court considered an argument that Article VII (Amended) was not lawfully enacted in 1910. This court declined to reach the merits of that challenge and held that, even assuming that Article VII (Amended) was invalid in 1910, its subsequent history—including 10 further amendments and case law interpreting it—validated it and "cured any irregularities that might have accompanied its adoption." *Id.* at 542.

The history of Article VII gives this court several reasons to prefer *Huffman* over *Terry*. *Huffman* predates *Terry* by 50 years, and it predates two amendments to Article VII. Indeed, in both 1958 and 1974 the voters were told that they were not changing existing constitutional law. *Huffman* also predates the failed 1960 amendment that would have eliminated the indictment requirement. *Cf. Multnomah County v. Mehrwein*, 366 Or 295, 320-21, 462 P3d 706 (2020) (noting that voters may "decline to adopt a proposed constitutional amendment for a myriad of reasons" but that such a decision could "weigh against overturning a precedent" in some cases).

Thus, even if *Huffman* was wrongly decided, this is not a case where "no other reviewing body can remedy that error." *Stranahan*, 331 Or at 53. The voters have had several opportunities to address *Huffman*, and they consistently supported amendments that were consistent with it and rejected an amendment that was not. In contrast, the voters have had no opportunity to address *Terry*'s

construction of Article VII. This court may be faced with a choice between *Huffman* and *Terry*, but the voters have only ever had the chance to accept *Huffman*—and they have done so repeatedly.

The legislature has also relied on *Huffman*. In 1959, the legislature enacted the Post-Conviction Hearing Act (PCHA), which replaced habeas corpus as a defendant's means of collaterally challenging a criminal conviction. *See generally Chavez*, 364 Or at 668-70; *cf. Huffman v. Alexander*, 197 Or 283, 348, 253 P2d 289 (1953) (on rehearing) (encouraging the legislature "to enact a post-conviction statute, clearly defining the respective areas of habeas corpus").

The PCHA specifies bases for relief that mirror the principles this court articulated in *Huffman*, including a denial of constitutional rights that "render[s] the conviction void" and "[l]ack of jurisdiction of the court to impose the judgment." ORS 138.530(1)(a), (b). It also specifies that any relief available in habeas corpus before 1959 would remain available under the PCHA. ORS 138.530(2). Indeed, this court interpreted ORS 138.530(1)(a) to be consistent with *Huffman*. *Brooks v. Gladden*, 226 Or 191, 195, 358 P2d 1055 (1961). In other words, the relief that this court granted in *Huffman* remains available under the PCHA—and the statute's use of the word "void" has the same meaning that this court gave it in *Huffman*. To overrule *Huffman* at this late date would call into question the meaning of the PCHA, which in turn would

undermine the subsequent 60 years of case law interpreting it. In contrast, the state has not identified any legislative reliance on *Terry*.

Principles of *stare decisis* weigh in favor of reaffirming *Huffman*. They provide little support for *Terry*. If this court believes that it can reconcile the two decisions, it should do so. But if it cannot, then *Terry* must be overruled.

III. Alternatively, this court should hold that the right to a preliminary hearing under Article VII is exempt from the preservation rule due to its unique nature and importance.

If this court is uncomfortable calling the requirements of Article VII (Amended), section 5, "jurisdictional," it can and should hold that section 5 specifies the "unique" kind of right that does not require preservation. *Peeples*, 345 Or at 220-21.

The right to an indictment or preliminary hearing under Article VII (Amended), section 5, is like the right to a jury trial under Article I, section 11, which this court exempted from the preservation rule in *Barber*. The basis for this court's decision in *Barber* is that Article I, section 11, expressly allows a jury waiver to be executed only one way: in writing. 343 Or at 529-30. Similarly, Article VII (Amended), section 5, expressly allows a waiver of indictment or preliminary hearing to be executed only one way: in person. *See Lillie*, 172 Or at 200 ("It is essential, however, that the person desiring to waive indictment appear before the judge of the circuit court * * *.").

For both rights, "adherence to that method by the trial judge is itself a substantive constitutional right to which the accused is entitled." *Barber*, 343 Or at 530. Consequently, a court's error in proceeding without the required waiver lies "in going to trial *at all*." *Id.* And "there is no contest" between a right that can be waived only one way versus the court-created preservation rule. *Id.*

Moreover, this case arises in essentially the same posture as *Barber*. As in *Barber*, defendant lost a motion to suppress, consented to a stipulated facts trial, and challenged the validity of a waiver of his rights for the first time on appeal. Nothing about those circumstances dissuaded this court from reversing the defendant's conviction in *Barber*, and they should not matter here, either.

The right to an indictment or preliminary hearing also bears some similarity to the right to counsel, which is another exception to the preservation rule. A defendant's decision to demand or waive a preliminary hearing occurs at the beginning of the case—perhaps their first appearance where they meet their attorney for the first time. The defendant will have little opportunity to learn or weigh the benefits and drawbacks to either procedure. And if their attorney waives their rights on their behalf, few defendants would have the wherewithal to object. Consequently, it is critical that the judge fulfill their "primary responsibility" and exercise "[e]xtreme care" to ensure that the defendant understands their rights and that the record reflects the defendant's knowledge.

Huffman, 197 Or at 331. If the trial judge fails in that duty, then the appellate court should correct the error.

Exempting the right to a preliminary hearing from preservation would be consistent with the context and history of Article VII. Not just *Huffman*, but the many cases in which this court held that it would consider challenges to the sufficiency of an indictment for the first time on appeal. It would also be consistent with the protection against "the power of one man to brand another with a crime" that the voters have jealously guarded for over 100 years. Official Voters' Pamphlet, General Election, June 1, 1908, 116.

And it would be consistent with this court's repeated pronouncements about the importance of grand juries and preliminary hearings and the duty of the courts to protect them. Those "constitutionally required roles * * * operate as a check on the power of the district attorney and serve a critical function in protecting individual liberties." *Kuznetsov*, 345 Or at 484. In particular, they "serve [] as a brake on the state's potential abuse of the accusatory process." *Burleson*, 342 Or at 703. This court has also warned that "[u]nconstitutional grand jury selection proceedings cast doubt on the integrity of the whole judicial process and cannot be tolerated in Oregon." *Gortmaker*, 295 Or at 522 (citation omitted).

A criminal charge is a serious matter. And a criminal defendant has few tools for responding to an unfounded charge—there is no such thing as a

criminal motion for summary judgment, and criminal depositions are rarely allowed. The one protection that a person has against being charged with a felony and forced to go to trial is Article VII (Amended), section 5, of the Oregon Constitution. In this case, neither the judge, nor the prosecutor, nor even the defense attorney gave that right its due deference. But the Court of Appeals did. This court should affirm its decision.

CONCLUSION

Defendant respectfully requests that this court affirm the decision of the Court of Appeals and reverse the judgment of the trial court.

Respectfully submitted,

ERNEST G. LANNET
CHIEF DEFENDER
CRIMINAL APPELLATE SECTION
OFFICE OF PUBLIC DEFENSE SERVICES

Signed
By Kyle Krohn at 2:13 pm, Dec 03, 2020

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US Const, Amend V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Or Const, Art I, § 11

> In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor; provided, however, that any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone, such election to be in writing; provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise; provided further, that the existing laws and constitutional provisions relative to criminal prosecutions shall be continued and remain in effect as to all prosecutions for crimes committed before the taking effect of this amendment.

Or Const, Art VII (Original), § 1

> The Judicial power of the State shall be vested in a Suprume [sic] Court, Circuits [sic] Courts, and County Courts, which shall be Courts of Record having general jurisdiction, to be defined, limited, and regulated by law in accordance with this Constitution. Justices of the Peace may also be invested with limited Judicial powers, and Municipal Courts may be created to administer the regulations of incorporated towns, and cities.

Or Const, Art VII (Original), § 9

> All judicial power, authority, and jurisdiction not vested by this Constitution, or by laws consistent therewith, exclusively in some other Court shall belong to the Circuit Courts, and they shall have appellate jurisdiction, and supervisory control over the County Courts, and all other inferior Courts, Officers, and tribunals.

Or Const, Art VII (Original), § 18 (1857)

> The Legislative Assembly shall so provide that the most competent of the permanent citizens of the county shall be chosen for jurors; and out of the whole number in attendance at the court, seven shall be chosen by lot as grand jurors, five of whom must concur to find an indictment: But the Legislative Assembly may modify or abolish grand juries.

Or Const, Art VII (Amended), § 1

> The judicial power of the state shall be vested in one supreme court and in such other courts as may from time to time be created by law. The judges of the supreme and other courts shall be elected by the legal voters of the state or of their respective districts for a term of six years, and shall receive such compensation as may be provided by law, which compensation shall not be diminished during the term for which they are elected.

Or Const, Art VII (Amended), § 5

(1) The Legislative Assembly shall provide by law for:

(a) Selecting juries and qualifications of jurors;

(b) Drawing and summoning grand jurors from the regular jury list at any time, separate from the panel of petit jurors;

(c) Empaneling more than one grand jury in a county; and

(d) The sitting of a grand jury during vacation as well as session of the court.

(2) A grand jury shall consist of seven jurors chosen by lot from the whole number of jurors in attendance at the court, five of whom must concur to find an indictment.

(3) Except as provided in subsections (4) and (5) of this section, a person shall be charged in a circuit court with the commission of any crime punishable as a felony only on indictment by a grand jury.

(4) The district attorney may charge a person on an information filed in circuit court of a crime punishable as a felony if the person appears before the judge of the circuit court and knowingly waives indictment.

(5) The district attorney may charge a person on an information filed in circuit court if, after a preliminary hearing before a magistrate, the person has been held to answer upon a showing of probable cause that a crime punishable as a felony has been committed and that the person has committed it, or if the person knowingly waives preliminary hearing.

(6) An information shall be substantially in the form provided by law for an indictment. The district attorney may file an amended indictment or information whenever, by ruling of the court, an indictment or information is held to be defective in form.

(7) In civil cases three-fourths of the jury may render a verdict.

The Codes and General Laws of Oregon, ch I, title I, § 1204 (Hill 2d ed 1892)

> No person can be tried for the commission of a crime but upon the indictment of a grand jury, unless otherwise provided by law.

The Codes and General Laws of Oregon, ch I, title I, § 1205 (Hill 2d ed 1892)

> The proceeding by which a person is tried and punished for the commission of a crime is known in this code as a criminal action.

The Codes and General Laws of Oregon, ch I, title I, § 1210 (Hill 2d ed 1892)

> An action is commenced, within the meaning of this chapter, when the indictment is found by a grand jury and duly filed with the clerk of the court, or in cases triable without indictment found by a grand jury, when the indictment or complaint is filed or lodged in the court or with the officer having jurisdiction of the action.

The Codes and General Laws of Oregon, ch I, title I, § 1322 (Hill 2d ed 1892)

> The defendant may demur to the indictment when it appears upon the face thereof either,
>
> 1. That the grand jury by which it was found had no legal authority to inquire into the crime charged because the same is not triable within the county;
>
> 2. That it does not substantially conform to the requirements of chapter VII of this code;
>
> 3. That more than one crime is charged in the indictment;
>
> 4. That the facts stated do not constitute a crime;
>
> 5. That the indictment contains any matter which, if true, would constitute a legal justification or excuse of the crime charged, or other legal bar to the action.

The Codes and General Laws of Oregon, ch I, title I, § 1330 (Hill 2d ed 1892)

> When the objections mentioned in section 1322 appear upon the face of the indictment, they can only be taken by demurrer, except that the objection to the jurisdiction of the court over the subject of the indictment, or that the facts stated do not constitute a crime, may be taken at the trial, under the plea of not guilty and in arrest of judgment.

The Codes and General Laws of Oregon, ch I, title I, § 1547 (Hill 2d ed 1892)

> A magistrate is an officer having power to issue a warrant for the arrest of a person charged with the commission of a crime.

The Codes and General Laws of Oregon, ch I, title I, § 1548 (Hill 2d ed 1892)

> The following persons are magistrates;—
>
> 1. The justices of the supreme court;
>
> 2. The judges of the circuit court;
>
> 3. The county judges and justices of the peace;
>
> 4. All municipal officers authorized to exercise the powers and perform the duties of a justice of the peace.

The Codes and General Laws of Oregon, ch I, title I, § 1608 (Hill 2d ed 1892).

> If, however, it appear from the examination that a crime has been committed, and that there is sufficient cause to believe the defendant guilty thereof, the magistrate must make a written order, signed by him, to the following effect: “It appearing to me from the testimony produced before me on the examination, that the crime of (designating it generally) has been committed, and that there is suficient cause to believe A B guilty thereof, I order him to be held to answer the same.”

ORS 135.070 (1974)

When the defendant against whom an information has been filed in a preliminary proceeding appears before a magistrate on a charge of having committed a crime punishable as a felony, because any further proceedings are had the magistrate shall read to him the information and shall inform him:

(1) Of his right to the aid of counsel, that he is not required to make a statement and that any statement made by him may be used against him.

(2) That he is entitled to a preliminary hearing and of the nature of a preliminary hearing. If a preliminary hearing is requested, it shall be held as soon as practicable but in any event within five days, unless such time is extended for good cause shown.

ORS 138.530

(1) Post-conviction relief pursuant to ORS 138.510 to 138.680 shall be granted by the court when one or more of the following grounds is established by the petitioner:

(a) A substantial denial in the proceedings resulting in petitioner's conviction, or in the appellate review thereof, of petitioner's rights under the Constitution of the United States, or under the Constitution of the State of Oregon, or both, and which denial rendered the conviction void.

(b) Lack of jurisdiction of the court to impose the judgment rendered upon petitioner's conviction.

(c) Sentence in excess of, or otherwise not in accordance with, the sentence authorized by law for the crime of which petitioner was convicted; or unconstitutionality of such sentence.

(d) Unconstitutionality of the statute making criminal the acts for which petitioner was convicted.

(2) Whenever a person petitions for relief under ORS 138.510 to 138.680, ORS 138.510 to 138.680 shall not be construed to deny relief where such relief would have been available prior to May 26, 1959, under the writ of habeas corpus, nor shall it be construed to affect any powers of executive clemency or pardon provided by law.

[On Official Ballot, Nos. 334 and 335.]

CONSTITUTIONAL AMENDMENT.

Section 18 of Article VII of the Constitution of the State of Oregon shall be, and hereby is, amended to read as follows:

Section 18. The Legislative Assembly shall so provide that the most competent of the permanent citizens of the county shall be chosen for jurors; and out of the whole number in attendance at the court, seven shall be chosen by lot as grand jurors, five of whom must concur to find an indictment. No person shall be charged in any Circuit Court with the commission of any crime or misdemeanor defined or made punishable by any of the laws of this State, except upon indictment found by a grand jury. *Provided, however*, that any District Attorney may file an amended indictment whenever an indictment has, by a ruling of the court, been held to be defective in form.

ARGUMENT

(affirmative)

SUBMITTED BY

CHARLES H. CAREY, C. E. S. WOOD, W. S. U'REN, JOHN BAIN, C. S. JACKSON, L. A. McNARY, JOSEPH N. TEAL, BEN SELLING, EMANUEL SICHEL, H. J. PARKISON,

in favor of the measure designated on the official ballot as follows:

PROPOSED BY INITIATIVE PETITION

For constitutional amendment providing for the choosing of jurors and grand jurors, and that no person can be charged in the Circuit Courts with the commission of a crime or a misdemeanor except upon indictment found by a grand jury, except when a court holds an indictment to be defective, the District Attorney may file an amended indictment. Vote YES or NO.

334. Yes.

335. No.

ARGUMENT IN FAVOR OF ABOVE AMENDMENT.

Under the present law, any district attorney can file an information against a man for any crime, from murder down. The accused is not entitled of right to any preliminary hearing and the first he knows of the matter may be his arrest. He may never be tried at all, the information or indictment may be dismissed, and yet his record is blackened. It may be that it is not intended from the start that he ever should be tried, but the information is issued to serve some political purpose, private revenge or the scheme of a ring hostile to the victim. It is un-American. It is too much like the despotism of Russia and it is too much power to be vested in the hands of any one man. The whole history of Anglo-Saxon institutions is a battle against this very thing: the power of one man to brand another with crime and lodge him in prison. It is a return to the Star Chamber decrees of Charles I and the time was when Englishmen and Americans thought no time or money thrown away which protected every citizen from arbitrary arrest and arbitrary arraignment and trial at the will of a single man. In England the same jealousy exists today, and no man can be brought to trial save on an indictment

by a grand jury. The fathers of our country were careful to write that into the United States Constitution, but it is not yet an article of the State Constitution. The time has come when it should be there, for the time will inevitably come when wealth and great interests will seek to shut the mouth of every man who is against them; and if we may judge the future by the past, the powerful interests are apt to control the political offices, including the district attorney.

The only argument urged against this amendment is that the present plan is cheaper. If the citizens of Oregon prefer a few dollars to a great fundamental principle of personal liberty, then they certainly do not deserve their liberties and they might as well be left open to the whims, vengeance, mistakes or political intrigues of any district attorney. The citizens of this country will make a great mistake if they let go that part of the administration of the law which belongs to them through the grand jury and the petty jury, and we repeat that this present arbitrary power lodged in one man is un-American and dangerous.

CHAS. H. CAREY,
W. S. U'REN,
C. S. JACKSON,
JOSEPH N. TEAL,
C. E. S. WOOD,
JOHN BAIN,
L. A. McNARY,
BEN SELLING,
EMANUEL SICHEL,
H. J. PARKISON.

(Endorsed)—

Filed February 3, 1908.

F. W. BENSON, Secretary of State.

(On Official Ballot, Nos. 304 and 305)

AN AMENDMENT

To the constitution of the state of Oregon, to be submitted to the legal electors of the state of Oregon for their approval or rejection at the special election to be held June 28, 1927, to amend section 18 of article VII thereof; proposed by the thirty-fourth legislative assembly under house joint resolution No. 14, fled n the offce of the secretary of state, February 16, 1927, as authorized by chapter 437, General Laws of Oregon, 1927; filed in the office of the secretary of state March 3, 1927.

The following is the form and number in which the proposed amendment will be printed on the official ballot:

Constitutional Amendment—Referred to the People by the Legislative Assembly

Submitted by the Legislature—**CRIMINAL INFORMATION AMENDMENT**—Purpose: To provide that if any person appears before any judge of the circuit court and waives indictment for the commission of any crime or misdemeanor, such person may be charged in the circuit court with any such crime or misdemeanor on information filed by the district attorney.

304 Yes. I vote for the amendment. **Vote YES or NO**

305 No. I vote against the amendment.

HOUSE JOINT RESOLUTION NO. 14

Be It Resolved by the House of Representatives of the State of Oregon, the Senate jointly concurring:

That section 18 of article VII of the constitution of the state of Oregon shall be and is hereby amended to read as follows:

Sec. 18. *Verdict by Three-fourths Jury in Civil Cases; Jurors; Grand Jurors; Indictment May Be Amended, When.* In civil cases three-fourths of the jury may render a verdict. The legislative assembly shall so provide that the most competent of the permanent citizens of the county shall be chosen for jurors; and out of the whole number in attendance at the court seven shall be chosen by lot as grand jurors, five of whom must concur to find an indictment. But provision may be made by law for drawing and summoning the grand jurors from the regular jury list at any time, separate from the panel of petit jurors, and for the sitting of the grand jury during vacation as well as session of the court, as the judge may direct. No person shall be charged in any circuit court with the commission of any crime or misdemeanor defined or made punishable by any of the laws of this state, except upon indictment found by a grand jury; provided, however, that any district attorney may file an amended indictment whenever an indictment has, by a ruling of the court, been held to be defective in form; provided further, however, that if any person appear before any judge of the circuit court and waive indictment, such person may be charged in such court with any such crime or misdemeanor on information filed by the district attorney. Such information shall be substantially in the form provided by law for indictments, and the procedure after the filing of such information shall be as provided by law upon indictment.

Resolved, That this proposed amendment be submitted to the voters of the state of Oregon for their approval or rejection at the next general or special election; and be it further

Resolved, That the secretary of state be authorized and he hereby is directed to set aside two pages of the official pamphlet for publication of arguments in support of this amendment, and that a committee of two representatives and a senator be appointed to prepare said arguments for publication in said pamphlet.

Filed in the office of the secretary of state February 16, 1927.

For affirmative argument see page 9.

(On Official Ballot, Nos. 304 and 305)

ARGUMENT (Affirmative)

Submitted by the joint committee of the senate and house of representatives, thirty-fourth legislative assembly, in behalf of the **Criminal Information Amendment.**

The purpose of this proposed amendment to section 18, article VII of the state constitution, is to save time and expense in disposing of the cases of criminals who desire to plead guilty.

It does not alter the present grand jury system of the state except when persons charged with crime are willing to waive grand jury action and enter pleas of guilty.

Under the present constitutional provision, a person charged with a crime punishable in the circuit court must be bound over to the grand jury and await investigation by that body. This frequently causes, in counties of the state where there are but few court terms each year, unnecessary delay of many months in procuring the indictment.

It is a matter of common knowledge that a majority of criminal cases in this state are disposed of on pleas of guilty. Under the proposed amendment the expense and delay incident to the presentation of these cases to the grand jury would be dispensed with. The expense of such needless grand jury investigations in the state at large amounts to a great sum each year. Witnesses often must be called from great distances, the attendance of large numbers of witnesses frequently is required, the time of grand juries is taken up for days, all at public expense, simply to make it possible that the person charged may go into court, plead guilty and receive his sentence, a thing he has been willing to do from the start. The expense of such needless grand jury investigation often is as great as the expense of a trial would be.

It is safe to say that in some counties of the state this amendment would cut in half the circuit court expense in handling criminal cases. On the other hand the person accused of crime does not suffer in any way because he does not lose the right of a grand jury investigation unless he expressly waives it. The benefit accruing to the defendant under the proposed amendment is that he need not wait a long period in jail before receiving sentence.

Counties, as well as being saved the court expense, also will be saved the expense of maintaining such prisoners in jail while awaiting indictment.

This amendment was proposed and prepared by the district attorneys' association of the state, and it is believed that every argument is in favor of its adoption.

FRANK J. LONERGAN,
State Representative, 18th District.

D. C. LEWIS,
State Representative, 18th District.

A. W. NORBLAD,
State Senator, 15th District.

Measure No. 7

SPECIAL GRAND JURY BILL

Proposed by the Forty-ninth Legislative Assembly by Senate Joint Resolution No. 23, filed in the office of the Secretary of State May 29, 1957, and referred to the people as provided by section 1 of Article XVII of the Constitution.

CONSTITUTIONAL AMENDMENT

Be It Resolved by the Senate of the State of Oregon, the House of Representatives jointly concurring:

That section 18, Article VII (Original) of the Constitution of the State of Oregon, be repealed; and that section 5, Article VII (Amended) of the Constitution of the State of Oregon, be amended to read as follows:

Sec. 5. In civil cases three-fourths of the jury may render a verdict. The Legislative Assembly shall so provide that the most competent of the permanent citizens of the county shall be chosen for jurors; and out of the whole number in attendance at the court, seven shall be chosen by lot as grand jurors, five of whom must concur to find an indictment. But provision may be made by law for drawing and summoning the grand jurors from the regular jury list at any time, separate from the panel of petit jurors, *for empanelling more than one grand jury in a county* and for the sitting of [the] *a* grand jury during vacation as well as session of the court [, as the judge may direct]. No person shall be charged in any circuit court with the commission of any crime or misdemeanor defined or made punishable by any of the laws of this state, except upon indictment found by a grand jury; provided, however, that any district attorney may file an amended indictment whenever an indictment has, by a ruling of the court, been held to be defective in form. *Provided further, however, that if any person appear before any judge of the circuit court and waive indictment, such person may be charged in such court with any such crime or misdemeanor on information filed by the district attorney. Such information shall be substantially in the form provided by law for indictments, and the procedure after the filing of such information shall be as provided by law upon indictment.*

NOTE—Section 18, Article VII (Original), now reads as follows: "In civil cases three-fourths of the jury may render a verdict. The legislative assembly shall so provide that the most competent of the permanent citizens of the county shall be chosen for jurors; and out of the whole number in attendance at the court, seven shall be chosen by lot as grand jurors; five of whom must concur to find an indictment. But provision may be made by law for drawing and summoning the grand jurors from the regular jury list at any time, separate from the panel of petit jurors, and for the sitting of the grand jury during vacation as well as session of the court, as the judge may direct. No person shall be charged in any circuit court with the commission of any crime or misdemeanor defined or made punishable by any of the laws of this state, except upon indictment found by a grand jury; provided, however, that any district attorney may file an amended indictment whenever an indictment has, by a ruling of the court, been held to be defective in form. Provided further, however, that if any person appear before any judge of the circuit court and waive indictment, such person may be charged in such court with any such crime or misdemeanor on information filed by the district attorney. Such information shall be substantially in the form provided by law for

indictments, and the procedure after the filing of such information shall be as provided by law upon indictment".

NOTE—Matter to be deleted from the existing constitutional provisions is indicated by brackets. Matter to be added is printed in italic type.

BALLOT TITLE

SPECIAL GRAND JURY BILL—Purpose: To authorize the legislature to enact laws permitting the calling of a special grand jury.	**YES** ☐ **NO** ☐

7

Measure No. 7 Special Grand Jury Bill

EXPLANATION

By Committee Designated Pursuant to ORS 254.210

The Oregon Constitution now provides that no citizen may be tried for a crime unless he is indicted by a grand jury or waives such indictment. The Grand Jury is a basic part of our judicial system. The Grand Jury consists of seven jurors selected from the regular jury panel in each county. Its job is to screen the evidence against persons accused of crime to determine whether there is enough evidence to justify holding them for trial. In addition to these duties the Grand Jury may also have assigned to it long and complicated special investigations, to determine whether certain persons or certain situations justify criminal prosecutions.

At present the Constitution provides for only one Grand Jury in a county. Consequently, when a Grand Jury undertakes an unusual investigation it has a difficult time handling the regular run-of-the-mill cases involving common crimes which are presented to it from day to day. This proved to be true in Multnomah County in recent years.

This measure will authorize the legislature to provide by law for special Grand Juries to handle special matters in addition to regular Grand Juries to handle routine matters. In this way important investigations will not become sidetracked by routine matters, and routine investigations can be processed without delay. It will also permit the use of a special Grand Jury to consider charges involving law enforcement officials in any particular county. This will avoid the situation in which a Grand Jury is asked to consider charges against an official who is himself in charge of the conduct of the Grand Jury.

This measure also rearranges for purposes of convenience and clarity sections of the Constitution dealing with indictments, but makes no change in existing constitutional law except to allow the use of more than one Grand Jury.

JOHN C. BEATTY, JR., Portland
EUGENE E. MARSH, McMinnville
MANLEY B. STRAYER, Portland

Measure No. 7 Special Grand Jury Bill

ARGUMENT IN FAVOR

Submitted by the Legislative Committee Provided by Senate Joint Resolution No. 23 of the Forty-ninth Legislative Assembly (1957)

A "yes" vote on the proposition submitted by Senate Joint Resolution No. 23 will do away with a cause of delay in criminal investigations by permitting the use of more than one grand jury at a time.

The Constitution now provides for only one grand jury in a county. The occasional need for an extra grand jury was clearly shown during the 1956-57 vice investigation in Multnomah County. Then, some prisoners arrested on charges unrelated to those investigations had to wait more than six months before the grand jury had time to consider their cases and decide whether there was sufficient evidence even to bring a criminal charge against them. Normally this would be done almost immediately.

Injustice to the innocent and delay resulting in loss of evidence needed to convict the guilty can be avoided by using a special grand jury where long investigations need exclusive attention. Passage of this measure will make that possible.

The only other change made by this proposition is purely technical. Section 5 of Amended Article VII of the Constitution, as adopted in 1910, was identical with Section 18 of the Original Article VII. In 1927 the voters approved an amendment to Section 18 of the Original Article, which had never been repealed. This measure makes the same amendment, allowing waiver of indictment and plea to an information, to Section 5 of the Amended Article VII, and repeals Section 18 of the Original Article, since it then would be completely repetitious.

CARL H. FRANCIS, Senator, Yamhill County
JOSEPH S. CREPEAU, State Representative, Lane County
JOHN D. MOSSER, State Representative, Washington County

Measure No. 4

PERMITTING PROSECUTION BY INFORMATION OR INDICTMENT

Proposed by the Fiftieth Legislative Assembly by House Joint Resolution No. 10, filed in the office of the Secretary of State May 6, 1959, and referred to the people as provided by section 1 of Article XVII of the Constitution.

CONSTITUTIONAL AMENDMENT

Be It Resolved by the House of Representatives of the State of Oregon, the Senate jointly concurring:

That the Constitution of the State of Oregon be amended by creating a new section 10a to be added to and made a part of Article I, and that section 5, Article VII (Amended) of the Constitution of the State of Oregon be amended, such sections to read as follows:

Section 10a. Offenses heretofore required to be prosecuted in the circuit court by indictment may be prosecuted in the circuit court by information or by indictment as shall be provided by law. Until otherwise provided by law, the information shall be substantially in the form provided by law for the indictment, and the procedure after the filing of the information shall be as provided by law upon indictment.

Sec. 5. In civil cases three-fourths of the jury may render a verdict. The Legislative Assembly shall so provide that the most competent of the permanent citizens of the county shall be chosen for jurors; and out of the whole number in attendance at the court, seven shall be chosen by lot as grand jurors, five of whom must concur to find an indictment. But provision may be made by law for drawing and summoning the grand jurors from the regular jury list at any time, separate from the panel of petit jurors, for empanelling more than one grand jury in a county and for the sitting of a grand jury during vacation as well as session of the court. ~~[No person shall be charged in any circuit court with the commission of any crime or misdemeanor defined or made punishable by any of the laws of this state, except upon indictment found by a grand jury, provided, however, that any district attorney may file an amended indictment whenever an indictment has, by a ruling of the court, been held to be defective in form. Provided further, however, that if any person appear before any judge of the circuit court and waive indictment, such person may be charged in such court with any such crime or misdemeanor or information filed by the district attorney. Such information shall be substantially in the form provided by law for indict-~~

~~ments, and the procedure after the filing of such information shall be as provided by law upon indictment.]~~

NOTE: Matter in *italics* in an amended section is new; matter [~~lined out and bracketed~~] is existing law to be omitted.

BALLOT TITLE

PERMITTING PROSECUTION BY INFORMATION OR INDICTMENT—Purpose: To amend Constitution to permit district attorney to commence criminal prosecutions by filing written charges (called an "information") or by grand jury indictment as now provided.	**YES** ☐ **NO** ☐

Measure No. 4 Permitting Prosecution by Information or Indictment

EXPLANATION

By Committee Designated Pursuant to ORS 254.210

Under the laws of most states, including Oregon, no person may be tried, convicted or punished for a crime without a formal written accusation plainly stating the facts constituting the offense. There are several means by which persons may be so accused and brought to trial.

Usually the accusation is made by a grand jury, which in Oregon is composed of seven of the permanent citizens of the county selected by lot from the jurors in attendance upon the court. The accusation in such a case is called an indictment.

When permitted by law an accusation, by which a person may be charged with a crime and brought to trial, may also be made by a prosecuting attorney or other public officer. In such case the accusation is called an information.

Many states require that the accusations be made only by grand juries. This is the requirement for serious federal crimes under the Fifth Amendment to the United States Constitution. In Oregon since 1908, under a constitutional provision then adopted by the voters, no person may be charged in any circuit court with the commission of a crime, except upon indictment found by the grand jury.

Statistics reveal that, of 2196 cases submitted to grand juries in Multnomah County since the beginning of 1957, indictments were returned in 2043 cases and not true bills returned in 153 cases. This proportionate ratio would probably be reflected in other counties throughout the State.

The legislature has now submitted to the voters a proposal to amend this constitutional provision so as to permit persons to be tried, convicted and punished for crime, either upon an indictment by the grand jury as may now be done, or upon an information by the district attorney without the necessity for any examination of the charges by the grand jury.

If this constitutional amendment is adopted it will no longer be necessary for the district attorney to submit to the grand jury the question of whether any person should be accused of having committed a crime. The district attorney would be empowered, at his option and in his discretion, either to present the matter to the grand jury or to file an information against a person suspected of a crime.

EARL A. FEWLESS, Portland
IRVING RAND, Portland
JOHN P. RONCHETTO, Portland

Measure No. 4 Permitting Prosecution by Information or Indictment

ARGUMENT IN FAVOR

Submitted by the Legislative Committee Provided by House Joint Resolution No. 10 of the Fiftieth Legislative Assembly (1959)

Oregon's constitution provides that no person may be charged with the commission of a serious crime except by indictment of a grand jury, unless the accused waives indictment and agrees to be prosecuted upon an information filed by the District Attorney.

PURPOSE

The purpose of this proposed amendment is to improve the administration of criminal justice by permitting the legislature to provide an ALTERNATIVE method of commencing criminal prosecutions. It has been estimated that several hundred thousand dollars of the taxpayer's money can be saved during the next ten years if the obsolete, cumbersome and inefficient grand jury can be dispensed with in routine criminal cases.

Most persons familiar with the workings of the grand jury in Oregon are convinced that our state's criminal procedure can be greatly improved, without any loss of rights to the accused, by permitting the District Attorney to prosecute routine cases by means of an information filed by the District Attorney and dispensing with the requirement for grand jury hearings in all cases.

This proposal will not abolish the grand jury, nor will it modify or curtail the existing powers or duties of that body, which will remain available on call of the District Attorney or court. The proposal is merely to provide an ALTERNATIVE method of prosecution, i.e.: prosecution by information.

HISTORY

The grand jury is an institution of ancient English origin, and few persons would deny that it may have served a useful purpose during earlier times. However, in 1933, having found that this once respected and necessary institution had outlived its usefulness and had become a cumbersome and expensive obstacle to the administration of criminal justice, England abolished the grand jury for all practical purposes and replaced it with a more modern and efficient method of prosecution.

In so doing, England was merely following the lead already set by numerous American states which had earlier considered the merits of the grand jury system and having found no sound reason for their existence, had eliminated them substantially from their laws and constitutions.

UNITED STATES

The movement away from grand jury indictment and toward prosecution by information began about 1880 when California and several other western states authorized prosecution by information. Debates during the Oregon constitutional convention clearly indicate that grand juries were not highly regarded in Oregon during territorial times. In fact, the original Oregon constitution provided that the legislature could modify or abolish the grand jury system if they desired.

Prosecution by information is now approved by 27 states, many of which Washington and California for example, rarely use the grand jury at all

Oregon seems to be the only state in the West which still clings to the expensive, needless and cumbersome requirement of grand jury indictment in all serious cases.

FAULTS OF GRAND JURY

A few of the numerous faults of the grand jury system are:

1. It duplicates the function of the committing magistrate.
2. It constitutes an unnecessary and wasteful inconvenience for many citizens and officers who may be required to appear as witnesses as many as five times between arrest and trial.
3. It affords little actual protection to the accused since he has no right to be heard, to produce evidence or to call witnesses in his defense.
4. It permits the District Attorney to deny the accused a preliminary hearing by making a direct presentment to the grand jury.
5. It permits the District Attorney to escape responsibility by "hiding behind" the grand jury.
6. Grand jury procedure is highly technical resulting in delays and obstructions in the orderly course of justice.
7. Grand juries almost always follow the recommendation of the District Attorney who serves as their legal adviser.
8. The practice of smaller counties of not calling a grand jury for several weeks results in the denial of a "speedy trial".
9. It is an expensive and inefficient method of prosecution, unjustified by any substantial protection to those accused of crime.

INFORMATION APPROVED BY JUDGES

A recent poll shows that a vast majority of Oregon's trial and appellate judges favor prosecution by information as an alternative to grand jury indictment. In 1959, a special committee appointed by the Chief Justice of the Supreme Court examined this proposal thoroughly and concluded that an alternative method of prosecution would be desirable, particularly in metropolitan districts. Attorney General Robert Y. Thornton and a multitude of other distinguished lawyers, law professors and citizens have likewise endorsed prosecution by information as an alternative to indictment by a grand jury. In the words of one of Oregon's leading trial judges, presentation of criminal matters to a grand jury is a waste of time and money in most instances.

SUMMARY

Prosecution by information has worked most satisfactorily in those states that have given it a thorough trial. By saving time and considerable sums of tax dollars and eliminating unnecessary technicalities it has demonstrated its superiority over an older method of fact-finding by amateurs.

A system which would authorize prosecution for all crimes by indictment or information and which would still allow the court to summon a grand jury if one were deemed necessary seems highly desirable. Return of a grand jury indictment in routine cases is no longer necessary for a certain and safe administration of criminal justice and for this reason the tremendous expense of maintaining such an institution cannot be justified hereafter.

HARRY D. BOIVIN, State Senator, Klamath County
GEORGE VAN HOOMISSEN, State Representative, Multnomah County
SAM WILDERMAN, State Representative, Multnomah County

Measure No. 3

Revises Constitutional Requirements for Grand Juries

Referred by the Fifty-seventh Legislative Assembly as Senate Joint Resolution 1 as provided by section 1, Article XVII of the Constitution of Oregon.

Explanation

By Committee Designated Pursuant to ORS 254.210

This measure amends the Constitution by allowing the district attorney in certain cases the option of either seeking a grand jury indictment against a person charged with a felony (a serious crime punishable by imprisonment in the state penitentiary) or going directly to circuit court for trial by filing an information against such person thereby avoiding a grand jury proceeding.

This option in felony cases can be exercised by the district attorney in only two situations: (1) if the person charged with a felony has had a preliminary hearing before a magistrate at which the district attorney has established to the magistrate's satisfaction that there is probable cause to believe a felony has been committed and that the accused person has committed it; or (2) if the person accused of a felony has knowingly waived his right to a preliminary hearing before the magistrate on the issue of probable cause.

The purpose of these restrictions on the district attorney's option is to make certain as in (1), above, that some disinterested judicial officer (the magistrate) has determined that probable cause exists, or as in (2), where this hearing has been waived, to at least insure the reasonable implication that there is probable cause to conclude that a felony has been committed by the accused or the accused would have asked for the hearing. (By waiving this preliminary hearing, however, there is no implication or conclusion to be drawn that the person is guilty.)

Another change which the amendment would make would be to allow the district attorney to by-pass the grand jury entirely in cases involving any misdemeanor (less serious crimes which are usually punishable by no more than a year in a county jail rather than the state penitentiary) and proceed against the accused person by filing of an information in the district or circuit court.

By comparison the existing constitutional provision requires the district attorney to take all felony cases to the grand jury except those in which the accused waives his right to the grand jury hearing. In all the more serious of the misdemeanor cases (those triable in the circuit court) under the present Constitution the district attorney also is required to seek indictments before the grand jury unless the accused waives this right.

The proposed change keeps the traditional grand jury function in our system of criminal justice but makes it possible to use it in a more flexible manner within the limited discretion of the district attorney. A comparison of the language in the existing and the proposed sections of the Constitution discloses that the proposal will substantially streamline the section but would make no substantive changes other than those described above.

SENATOR BETTY BROWNE
SENATOR FRED HEARD
PROFESSOR GEORGE PLATT
HOWARD LONERGAN
MALCOLM F. MARSH

Measure No. 3

Revises Constitutional Requirements for Grand Juries

Argument in Favor

By Committee Designated Pursuant to ORS 254.210

This proposal would promote efficiency and fairness in our system of criminal justice by sharply reducing the use of the grand jury. Our present system is unable to cope with the increasing number of persons charged with crime, especially in the larger Oregon counties. In Multnomah County (Portland), for example, about 200 cases per month must presently be taken to the grand jury for indictment. The time consumed by this procedure, when added to all the other necessary steps in bringing a defendant to trial, is particularly crucial. The Oregon 60-day law requires that any person arrested must be tried within 60 days of his arrest or be discharged. This 60-day rule puts a strain on the already overburdened criminal justice system in larger counties. It has been estimated that 15 days could be saved in getting each defendant to trial if the necessity of bringing him before the grand jury could be eliminated.

The proponents believe that elimination of most grand jury proceedings is a desirable method of accomplishing greater efficiency in criminal cases. The grand jury is duplicative of the preliminary hearing step often employed in a criminal case. If such a preliminary hearing discloses that probable cause exists to proceed against the accused, there is no need for the grand jury to repeat the process of determining whether there is probable cause. In cases where the district attorney is himself in doubt as to probable cause to proceed, he may, under the proposed amendment, take such cases to the grand jury. He may also take any felony case to the grand jury, so that the district attorney in smaller, less busy counties may continue to employ the grand jury in all felony cases if he chooses. Thus, the proposed system, based on the discretion of the district attorney, assures that each county can follow the system best suited to its needs.

In conclusion, the proposed amendment will speed up the system where necessary and yet retain the grand jury for use in questionable cases and in its traditional role of investigating crime. Groups on record in favor of this proposal include the Criminal Law Committee of the Oregon State Bar, the American Civil Liberties Union, the Oregon District Attorneys Association, and the Oregon Criminal Law Revision Commission.

Measure No. 3

Revises Constitutional Requirements for Grand Juries

Argument in Opposition

By Committee Designated Pursuant to ORS 254.210

There is much to be said for abolition of the Grand Jury system and replacement by the modern English practice, whereby the evidence for and against an accused can be examined by a magistrate in Court in the presence of the defendant and defendant's counsel, and only if he, or a high court judge, decides the evidence is sufficient, can the defendant be charged and put to trial. Besides the efficiency of this system, it gives a defendant needed protection that is lacking in the Grand Jury system, which is conducted in secret, without the presence of a judge, defense counsel or defense witnesses.

But this measure does not abolish the Grand Jury and substitute a needed reform. Instead it allows the district attorney to use this antiquated and unfair method at his option.

This half-way measure should be rejected to await full reform.

Measure No. 3

Revises Constitutional Requirements for Grand Juries

Be It Resolved by the Legislative Assembly of the State of Oregon:

Paragraph 1. Section 5, Article VII (Amended), Oregon Constitution, is repealed, and the following section is adopted in lieu thereof:

SECTION 5. (1) The Legislative Assembly shall provide by law for:

(a) Selecting juries and the qualifications of jurors;

(b) Drawing and summoning grand jurors from the regular jury list at any time, separate from the panel of petit jurors;

(c) Empaneling more than one grand jury in a county; and

(d) The sitting of a grand jury during vacation as well as session of the court.

(2) A grand jury shall consist of seven jurors chosen by lot from the whole number of jurors in attendance at the court, five of whom must concur to find an indictment.

(3) Except as provided in subsections (4) and (5) of this section, a person shall be charged in a circuit court with the commission of any crime punishable as a felony only on indictment by a grand jury.

(4) The district attorney may charge a person on an information filed in circuit court of a crime punishable as a felony if the person appears before the judge of the circuit court and knowingly waives indictment.

(5) The district attorney may charge a person on an information filed in circuit court if, after a preliminary hearing before a magistrate, the person has been held to answer upon a showing of probable cause that a crime punishable as a felony has been committed and that the person has committed it, or if the person knowingly waives preliminary hearing.

(6) An information shall be substantially in the form provided by law for an indictment. The district attorney may file an amended indictment or information whenever, by ruling of the court, an indictment or information is held to be defective in form.

(7) In civil cases three-fourths of the jury may render a verdict.

Paragraph 2. The amendment proposed by this resolution shall be submitted to the people for their approval or rejection at the next regular general election held throughout the state.

NOTE: Matter in **bold face** in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted; complete new sections begin with **SECTION .**

BALLOT TITLE

3 REVISES CONSTITUTIONAL REQUIREMENTS FOR GRAND JURIES—Purpose: This measure amends Oregon Constitution to provide that a grand jury indictment is not necessary for a felony prosecution if a person has been charged and a magistrate finds at a preliminary hearing that there is probable cause to believe that the person in fact committed a felony. The amendment does not eliminate a citizen's right to jury trial, but only deals with the method by which a person is charged with a crime.

YES ☐

NO ☐

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05

Brief length

I certify that the word-count of this brief is 15,006 words. An order granting extended brief was issued on December 1, 2020, by Presiding Justice, Lynn R. Nakamoto.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes.

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Respondent's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on December 3, 2020.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Respondent's Brief on the Merits will be eServed pursuant to ORAP 16.45 on Benjamin Gutman #160599, Solicitor General, attorney for Plaintiff-Respondent.

Respectfully submitted,

ERNEST G. LANNET
CHIEF DEFENDER
CRIMINAL APPELLATE SECTION
OFFICE OF PUBLIC DEFENSE SERVICES

Signed
By Kyle Krohn at 2:13 pm, Dec 03, 2020

KYLE KROHN OSB #104301
DEPUTY PUBLIC DEFENDER
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Attorneys for Respondent on Review
Clifford Darrell Keys