

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 No. 16CR24492

CA A163519

SC S067691

BRIEF ON THE MERITS OF
PETITIONER ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals on Appeal
from a Judgment of the Circuit Court for Marion County,
Honorable SEAN E. ARMSTRONG, Judge

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

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TABLE OF CONTENTS

INTRODUCTION	1
QUESTION PRESENTED AND PROPOSED RULE OF LAW	1
Question Presented	1
Proposed Rule of Law	2
STATEMENT OF THE CASE.....	2
SUMMARY OF ARGUMENT	4
ARGUMENT	6
A. The Oregon Constitution vests Oregon circuit courts with subject matter jurisdiction over criminal cases independently of the rules governing accusatory instruments.	6
1. As originally enacted, the Oregon Constitution gave circuit courts presumptive jurisdiction over all criminal cases, independently of the separate rules governing accusatory instruments.....	7
2. No subsequent constitutional amendment made circuit court subject matter jurisdiction conditional on compliance with the rules governing accusatory instruments.	9
3. This court’s case law confirms that circuit court subject matter jurisdiction over criminal cases exists independently of the rules governing accusatory instruments.	16
4. The legislature has never made accusatory instrument rules jurisdictional; instead, the statutory framework has always assumed subject matter jurisdiction even in the absence of a valid accusatory instrument.	20
B. <i>Huffman v. Alexander</i> was wrongly decided and should be overruled.....	24
1. <i>Huffman</i> conflicts with the text, context, and history of the Oregon Constitution, relying instead on a federal constitutional rule that no longer exists.	24
2. <i>Huffman</i> cannot be harmonized with <i>Terry</i> or <i>Cotton</i>	29

3. Most other jurisdictions nationwide hold that rules governing accusatory instruments are not jurisdictional. ...	31
C. A claim that a defendant did not validly waive preliminary hearing is subject to normal preservation requirements.....	32
CONCLUSION.....	35

TABLE OF AUTHORITIES

Cases Cited

<i>Black v. Arizala</i> , 337 Or 250, 95 P3d 1109 (2004)	16
<i>Coleman v. Alabama</i> , 399 US 1, 90 S Ct 1999, 26 L Ed 2d 387 (1970)	25
<i>Commonwealth v. Tyler</i> , 587 A2d 326 (Pa 1991).....	31
<i>Ex Parte Bain</i> , 121 US 1, 7 S Ct 781, 30 L Ed 849 (1887), <i>overruled by United States v. Cotton</i> , 535 US 625, 122 S Ct 1781, 152 L Ed 2d 860 (2002)	3, 24-31
<i>Ex Parte Stacey</i> , 45 Or 85, 75 P 1060 (1904)	18, 29
<i>Farmers Ins. Co. v. Mowry</i> , 350 Or 686, 261 P3d 1 (2011)	26, 27
<i>Garner v. Alexander</i> , 167 Or 670, 120 P2d 238, <i>cert den</i> , 316 US 690 (1941)	16, 17, 29
<i>Gerstein v. Pugh</i> , 420 US 103, 95 S Ct 854, 43 L Ed 2d 54 (1975)	25
<i>Hannah v. Wells</i> , 4 Or 249 (1872)	19, 20, 24
<i>Huffman v. Alexander</i> , 197 Or 283, 251 P2d 87 (1952), <i>reh’g den</i> , 197 Or 283 (1953).....	3, 5, 7, 24-27, 29-31

<i>Hurtado v. California</i> , 110 US 516, 4 S Ct 111, 28 L Ed 2d 232 (1884)	25
<i>Multnomah County Sheriff's Office v. Edwards</i> , 361 Or 761, 399 P3d 969 (2017)	14, 32
<i>People v. Alexander</i> , 663 P2d 1024 (Colo 1983).....	31
<i>People v. Hall</i> , 460 NW2d 520 (Mich 1990)	25, 31
<i>People v. Pompa-Ortiz</i> , 612 P2d 941 (Cal 1980).....	31
<i>PGE v. Ebasco Servs., Inc.</i> , 353 Or 849, 306 P3d 628 (2013)	32
<i>Powell v. State</i> , 583 A2d 1114 (Md Ct App 1991)	31
<i>School Dist. No. 1, Mult. Co. v. Nilsen</i> , 262 Or 559, 499 P2d 1309 (1972)	16
<i>State ex rel. Wernmark v. Hopkins</i> , 213 Or 669, 327 P2d 784 (1958)	12
<i>State v. Adams</i> , 554 NW2d 686 (Iowa 1996).....	31
<i>State v. Butler</i> , 897 P2d 1007 (Kan 1995).....	31
<i>State v. Compton</i> , 333 Or 274, 39 P3d 833 (2002)	17
<i>State v. Emmons</i> , 55 Or 352, 106 P 451 (1910)	18
<i>State v. Franklin</i> , 234 NW2d 610 (Neb 1975)	31
<i>State v. Haji</i> , 366 Or 384, 462 P3d 1240 (2020)	6, 10, 11, 16, 20
<i>State v. Hardman</i> , 828 P2d 902 (Idaho 1992)	32
<i>State v. Kerne</i> , 289 Or App 345, 410 P3d 369 (2017)	34

<i>State v. Keys</i> , 302 Or App 514, 460 P3d 1020 (2020)	3, 23, 29
<i>State v. Kuznetsov</i> , 345 Or 479, 199 P3d 311 (2008)	30
<i>State v. Long</i> , 408 So 2d 1221 (La 1982)	31
<i>State v. Lotches</i> , 331 Or 455, 17 P3d 1045 (2000)	17
<i>State v. Niblack</i> , 596 A2d 407 (Conn 1991)	32
<i>State v. Parkhurst</i> , 845 SW2d 31 (Mo 1992)	32
<i>State v. Payne</i> , 366 Or 588, 468 P3d 445 (2020)	25, 26, 27
<i>State v. Reinke</i> , 354 Or 98, 309 P3d 1059 (2013)	25
<i>State v. Smith</i> , 344 P3d 573 (Utah 2014)	31
<i>State v. Terry</i> , 333 Or 163, 37 P3d 157 (2001)	9, 12, 17, 20, 24, 29, 30
<i>State v. Tollefson</i> , 142 Or 192, 16 P2d 625 (1932)	13
<i>State v. Turnidge</i> , 359 Or 507, 373 P3d 138 (2016)	34
<i>State v. Webb</i> , 467 NW2d 108 (Wisc 1991)	31
<i>State v. Wimber</i> , 315 Or 103, 843 P2d 424 (1992)	30
<i>States v. Mechanik</i> , 475 US 66, 106 S Ct 938, 89 L Ed 2d 50 (1986)	25
<i>Stranahan v. Fred Meyer, Inc.</i> , 331 Or 38, 11 P3d 228 (2000)	26
<i>United States v. Cotton</i> , 535 US 625, 122 S Ct 1781, 152 L Ed 2d 860 (2002)	27, 28, 29

<i>Wink v. Marshall</i> , 237 Or 589, 392 P2d 768 (1964)	14
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Constitutional and Statutory Provisions

Deady ch 7, § 64	21
Deady chs 10, 11, §§ 115, 123.....	22
Deady chs 10, 11, §§ 117, 127.....	22
Deady ch 34, §§ 341-42	21
Deady ch 37, §§ 379-411	21
<i>Former</i> ORS 132.330.....	23
<i>Former</i> ORS 133.010 to 133.170 (1957).....	22
<i>Former</i> ORS 135.530.....	23
<i>Former</i> ORS 133.820 (1957).....	23
<i>Former</i> ORS 475.894 (2016).....	2
General Laws of Oregon, Crim Code, ch 35, §§ 343-59.....	21
Lord’s Oregon Laws, title XVIII, ch VIII, §§ 1485-86, 1495, 1497 (1910)	23
Lord’s Oregon Laws, title XVIII, ch XIX, §§ 1733-52 (1910)	22
Lord’s Oregon Laws, title XVIII, ch XXI, § 1795 (1910).....	23
Or Const, Art VII (Amended).....	9, 11, 12, 13, 14
Or Const, Art VII (Amended), § 2.....	9, 12, 17, 20
Or Const, Art VII (Amended), § 3.....	34, 35
Or Const, Art VII (Amended), § 5.....	12, 13, 14, 15, 30
Or Const, Art VII (Original)	7, 8, 9, 10, 11, 12, 13, 20
Or Const, Art VII (Original), § 2	16
Or Const, Art VII (Original), § 6	8
Or Const, Art VII (Original), § 8	21
Or Const, Art VII (Original), § 9	7, 11, 12, 17, 20
Or Const, Art VII (Original), § 12	8

Or Const, Art VII (Original), § 18	7, 9, 13
Or Laws 1889	21
Or Laws 1899, §§ 1-3	10
Or Laws 1909	10, 11
Or Laws 1910	11
Or Laws 1927	13
Or Laws 2017, ch 706, § 15	2
Oregon Laws, title XVIII, ch VIII, §§ 1485-86, 1495, 1497 (1920)	23
Oregon Laws, title XVIII, ch XIX, §§ 1733-37 (1920)	22
Oregon Laws, title XVIII, ch XXI, § 1795 (1920)	23
ORS 133.030	22
ORS 133.110 (2020)	22
ORS 133.450 (2020)	23
ORS 135.530	23
ORS 135.540	23
ORS 135.670	23
ORS 135.690 (1957)	23
ORS 135.690 (2020)	23
ORS 475.894	2
ORS 475.894(2)(b)	2
US Const, Amend V	25
US Const, Amend XIV	25

Other Authorities

Official Voters’ Pamphlet, General Election, June 1, 1908	11
Official Voters’ Pamphlet, Special Election, June 28, 1927	13
Wayne R. LaFave, 4 <i>Criminal Procedure</i> § 14.2(g) (4 th ed 2019)	31, 32
Wayne R. LaFave, 4 <i>Criminal Procedure</i> § 14.3(d) (4 th ed 2019)	31

Wayne R. LaFave,
4 *Criminal Procedure* § 14.4(e) (4th ed 2019)..... 31

**BRIEF ON THE MERITS OF
PETITIONER ON REVIEW, STATE OF OREGON**

INTRODUCTION

The Oregon Constitution broadly grants Oregon's circuit courts all jurisdiction not vested by law exclusively in some other court. Separately, the constitution sets out requirements for accusatory instruments in criminal proceedings, including the requirement of a grand jury indictment or a district attorney information and preliminary hearing, both of which may be waived by the defendant. This case asks whether, in criminal cases, a circuit court's subject matter jurisdiction depends on compliance with the rules governing accusatory instruments, including the rule that proceeding by information requires a preliminary hearing or valid waiver.

It does not. The claim that a defendant did not validly waive a preliminary hearing is not a challenge to the circuit court's subject matter jurisdiction. Such a claim of error is accordingly subject to normal preservation requirements.

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question Presented

Is a claim that a defendant did not validly waive preliminary hearing a challenge to the circuit court's subject matter jurisdiction?

Proposed Rule of Law

No. A claim that a defendant did not validly waive preliminary hearing is not a challenge to the circuit court's subject matter jurisdiction. Such a claim is accordingly subject to normal preservation requirements.

STATEMENT OF THE CASE

Police discovered a bindle of methamphetamine in defendant's wallet during a traffic stop. (10/20/16 Tr 5; eTCF 39-40 (stipulations of fact)). The state filed an information charging defendant with felony possession of methamphetamine. (ER-1; 4/29/16 Tr 2); *former* ORS 475.894 (2016).¹

At defendant's arraignment on that information, counsel was appointed to represent him and, shortly thereafter, counsel stated, "We are prepared to waive preliminary hearing at this time, reserving the right to assert that in the future should that become necessary." (4/29/16 Tr 2). But defendant never did assert his right to a preliminary hearing. Instead, after pursuing an unsuccessful motion to suppress evidence (eTCF 17-21, 27), defendant elected to waive jury and proceed to a trial to the court on stipulated facts. (10/20/16 Tr 3-6; eTCF 33). The trial

¹ At the time of defendant's offense, ORS 475.894 provided that unlawful possession of methamphetamine was a Class C felony. *Former* ORS 475.894 (2016). In 2017, ORS 475.894 was amended to categorize simple possession of methamphetamine as a Class A misdemeanor, and to identify several facts (focusing on the amount possessed and the defendant's prior convictions) that elevate the crime to a Class C felony. Or Laws 2017, ch 706, § 15, *codified at* ORS 475.894(2)(b).

court found defendant guilty, concluding beyond a reasonable doubt that he had, in fact, possessed methamphetamine. (10/20/16 Tr 6; eTCF 39-40; ER-2).

Appealing his conviction, defendant did not assign error to any affirmative trial court ruling or challenge the legal sufficiency of the evidence to convict him. Instead, defendant's sole argument, made for the first time on appeal, was that he never validly waived his right to a preliminary hearing, and that the trial court therefore lacked subject matter jurisdiction over the case, rendering his conviction void. (App Br 2-5). To support that argument, defendant cited *Huffman v. Alexander*, 197 Or 283, 300-01, 251 P2d 87 (1952), *reh'g den*, 197 Or 283 (1953), a decision of this court that relied on a since-disavowed 1887 decision of the United States Supreme Court for the proposition that substantive defects at the accusatory instrument stage are "jurisdictional" and thus render any subsequent conviction void. *Id.* (citing *Ex Parte Bain*, 121 US 1, 14, 7 S Ct 781, 30 L Ed 849 (1887), *overruled by United States v. Cotton*, 535 US 625, 122 S Ct 1781, 152 L Ed 2d 860 (2002)).

The Court of Appeals agreed with defendant. *State v. Keys*, 302 Or App 514, 526-27, 460 P3d 1020 (2020). In assessing defendant's argument, the Court of Appeals acknowledged the difficulty in trying to discern what this court in *Huffman* meant by "jurisdiction," and it also recognized tension between *Huffman* and other decisions of this court. *Id.* at 520-21. But the Court of Appeals nonetheless concluded that it was bound to follow *Huffman*, meaning that

defendant's unpreserved claim of error raised a "jurisdictional" defect in the trial proceedings that could be raised for the first time on appeal and that rendered defendant's conviction void. *Id.* at 526-27. On the state's petition, this court allowed review.

SUMMARY OF ARGUMENT

Oregon's circuit courts have subject matter jurisdiction over criminal cases independently of compliance with the rules governing accusatory instruments. As a result, a claim of non-compliance with the rules governing accusatory instruments does not challenge the circuit court's subject matter jurisdiction, and such a claim is accordingly subject to normal preservation requirements.

The provisions governing circuit court jurisdiction were enacted into the original Oregon Constitution of 1857 and have never been substantively modified. Those provisions broadly vest Oregon's circuit courts with all jurisdiction unless some other source of law divests them of jurisdiction. The separate and distinct constitutional provisions governing accusatory instruments in criminal cases enacted into the original constitution were not intended to create jurisdictional rules, nor did any subsequent amendment to those provisions have that intent. That framework for circuit court subject matter jurisdiction is corroborated by this court's case law.

Furthermore, no legislative action has ever made the rules governing accusatory instruments prerequisite to a circuit court's subject matter jurisdiction

over a criminal case. To the contrary, the statutory framework that has existed since statehood and continues to exist today authorizes circuit courts to act in criminal cases before any accusatory instrument issues, and even after one has been held invalid.

The sole source of authority supporting a contrary proposition—this court’s decision in *Huffman v. Alexander*—was incorrectly decided and should be overruled. *Huffman* engaged in no meaningful analysis of the pertinent provisions of the Oregon Constitution, but instead summarily relied on a United States Supreme Court decision that has since been overruled on the precise proposition for which *Huffman* cited it. *Huffman* is inconsistent with other cases of this court decided both before and after it, and it is also inconsistent with the great weight of authority from other jurisdictions nationwide.

In short, Oregon circuit court subject matter jurisdiction over criminal cases exists independently of the rules governing accusatory instruments, including the rule that proceeding by information requires a preliminary hearing or valid waiver. As a result, a claim that a defendant did not validly waive preliminary hearing is not a challenge to the trial court’s subject matter jurisdiction, and it accordingly is subject to normal preservation requirements.

ARGUMENT

A. The Oregon Constitution vests Oregon circuit courts with subject matter jurisdiction over criminal cases independently of the rules governing accusatory instruments.

This case raises a question of constitutional interpretation: What is the relationship between the Oregon Constitution's provision governing circuit court jurisdiction and the provision governing accusatory instruments in criminal proceedings? More specifically, the question is whether circuit court subject matter jurisdiction over criminal cases depends on compliance with the rules governing accusatory instruments. As explained below, it does not.

The pertinent provisions of the Oregon Constitution have a long history. The original Oregon Constitution of 1857 included provisions governing both the jurisdiction of Oregon's circuit courts and accusatory instruments in criminal cases. While the constitution's jurisdictional provisions have never been substantively modified, the provisions governing accusatory instruments have been amended several times over the years through the initiative and referendum processes.

In construing those provisions, this court examines the text of the pertinent provisions in context (including this court's case law), as well as the historical circumstances in which the provision was enacted, including any evidence bearing on the voters' intent in enacting amendments by initiative or referendum. *State v. Haji*, 366 Or 384, 400-01, 405, 462 P3d 1240 (2020). As explained below, under

the original enactment of the Oregon Constitution, (1) Oregon’s circuit courts exercised subject matter jurisdiction over the entire class of Oregon criminal proceedings, and (2) that jurisdiction was not conditional on compliance with rules governing accusatory instruments. No subsequent constitutional or statutory enactment has altered that jurisdictional framework. The sole source of authority supporting a jurisdictional view of the rules governing accusatory instruments—this court’s decision in *Huffman v. Alexander*—was wrongly decided and should be overruled.

1. As originally enacted, the Oregon Constitution gave circuit courts presumptive jurisdiction over all criminal cases, independently of the separate rules governing accusatory instruments.

As originally ratified in 1857, Article VII (Original), section 9, of the Oregon Constitution provided that circuit courts exercised subject matter jurisdiction over all cases unless some other source of law granted jurisdiction exclusively to some other court:

[a]ll 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.—

At that time, a separate and distinct provision governed accusatory instruments in criminal cases. Or Const, Art VII (Original), § 18. It required indictments to be approved by grand juries, unless the legislature modified that rule:

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.*—

Id. (emphasis added).

As a matter of text, the original 1857 constitution broadly vested “[a]ll judicial power, authority, and jurisdiction” in the circuit courts, and the only exception to that grant of authority was if some source of law vested jurisdiction “exclusively in some other court[.]” Or Const, Art VII (Original), § 9. That text created two important rules: first, a default rule that Oregon’s circuit courts had jurisdiction over all Oregon judicial proceedings, including all criminal cases; and second, an exception that would arise only when some source of law vested jurisdiction exclusively in a different court. That is, subject matter jurisdiction was a function of *which court* was the proper one to hear a matter, not compliance with procedures in particular cases.

Consistently, when other provisions of Article VII (Original) discuss “jurisdiction,” they speak of the power of specific courts to hear different classes of cases. Article VII (Original), section 6, limited the “jurisdiction” of the Supreme Court “only to revise the final decisions of the Circuit Courts * * *.” Article VII (Original), section 12, defined the “jurisdiction” of “[t]he County Court,” which included the power to hear probate matters, civil matters “not exceeding the amount or value of five hundred dollars,” and “such criminal

jurisdiction not extending to death or imprisonment in the penitentiary, as may be prescribed by law.”

While those provisions discussed jurisdiction as the power of different courts to hear different classes of cases, the text of Article VII (Original), section 18, dealing with accusatory instruments, made no mention of jurisdiction at all. Indeed, that section gave the legislature authority to “modify or abolish grand Juries.” Or Const, Art VII (Original), § 18. A provision that says nothing about jurisdiction but rather grants the legislature plenary authority to abolish grand juries altogether cannot have been intended to make accusatory instruments prerequisite to a circuit court’s exercise of subject matter jurisdiction over criminal cases.

In sum, the text of the original constitutional provisions and the context of other related constitutional provisions shows that circuit courts had subject matter jurisdiction over all criminal cases. That jurisdiction was not conditional on compliance with the separate and distinct rules governing accusatory instruments.

2. No subsequent constitutional amendment made circuit court subject matter jurisdiction conditional on compliance with the rules governing accusatory instruments.

The Oregon Constitution’s provisions regarding the presumptive scope of circuit court jurisdiction have never been substantively modified. *See State v. Terry*, 333 Or 163, 186, 37 P3d 157 (2001) (noting that the 1910 enactment of Article VII (Amended), section 2, did not change the jurisdictional scheme set out

in the original Article VII). By contrast, the constitutional provisions governing accusatory instruments have been amended multiple times. But as explained below, no evidence suggests that any amendment was intended to make circuit court subject matter jurisdiction conditional on compliance with the rules governing accusatory instruments.

The accusatory-instrument framework set out in the 1857 constitution first changed in 1899, when the legislature exercised its authority under Article VII (Original), section 18, to modify the grand jury system. *See Haji*, 366 Or at 412 (discussing Or Laws 1899, §§ 1-3, p 99). It enacted a statute that authorized criminal cases to proceed on a district attorney's information alone. *Id.* In 1908, however, the voters approved an amendment to Article VII (Original), section 18, that effectively repealed the legislature's attempt to narrow the right to grand jury indictments. *See Haji*, 366 Or at 412-13 (citing Or Laws 1909, p. 12). Those amendments made grand jury indictments mandatory for all crimes, felonies and misdemeanors alike, while also eliminating the legislature's plenary authority to "modify or abolish" grand juries. *Id.* As amended, Article VII (Original), section 18, provided, in pertinent part,

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."

Or Laws 1909, p. 12 (emphasis in original).

Notably, the 1908 voters left undisturbed Article VII (Original), section 9's description of circuit court jurisdiction. The 1908 amendments merely "re-established" the requirement of a grand jury indictment that had existed as a matter of statutory law prior to the 1899 statute authorizing the use of a district attorney's information. *Haji*, 366 Or at 413. Nothing in the text or context of the amendment or other information bearing on the voters' intent suggested any further purpose of imposing a novel limitation on the subject matter jurisdiction of the circuit courts over criminal proceedings. *See* Official Voters' Pamphlet, General Election, June 1, 1908, 114-17. Put a different way, just because the 1908 amendment established a constitutional requirement of a grand jury indictment does not ineluctably mean that the requirement was intended to be *jurisdictional* in nature. No evidence beyond the bare requirement itself suggests any such intent.²

The same holds true for all subsequent amendments to the pertinent constitutional provisions. In 1910 the voters adopted a comprehensively amended Article VII. Or Laws 1910, pp. 7-8. With respect to circuit court subject matter jurisdiction, Article VII (Amended), section 2, provided that "[t]he courts,

² And, as explained further below, the subsequent constitutional history, a case law and statutory framework existing contemporaneously with the 1908 amendment and all subsequent amendments further demonstrate that the creation of constitutional requirements for accusatory instruments was never intended to erect jurisdictional limitations on circuit court authority.

jurisdiction, and judicial system of Oregon, except so far as expressly changed by this amendment, shall remain as at present constituted until otherwise provided by law.” Nothing in Article VII (Amended) purported to “expressly change[]” the nature of circuit court subject matter jurisdiction enacted under Article VII (Original). *See Terry*, 333 Or at 186 (indicating that Article VII (Amended), section 2, intended the same jurisdictional framework previously operative under Article VII (Original), section 9).³

With respect to accusatory instruments, Article VII (Amended), section 5, restated Article VII (Original), section 18, as amended in 1908, with its requirement of a grand jury indictment for all criminal cases. Nothing in those amendments indicated any intent to narrow circuit court jurisdiction in criminal

³ This court has observed that, when the voters adopted Article VII (Amended), the parts of Article VII (Original) “which bore that numeral and in conflict with it were, of course, repealed,” and “[t]he other parts which did not conflict with the new and which were complementary to the latter * * * remained in force but were degraded in rank to the point where the legislature was authorized to repeal or amend them.” *State ex rel. Wernmark v. Hopkins*, 213 Or 669, 678, 327 P2d 784 (1958). But even under Article VII (Original), section 9, the legislature had authority to modify circuit court jurisdiction if it chose to. *See Or Const, Art VII (Original), § 9* (vesting all jurisdiction in the circuit courts unless the constitution or “laws consistent therewith” vested jurisdiction exclusively in some other court). Thus, given the presumptive jurisdiction over all cases granted by the original constitution, which was not conditional on compliance with the rules governing accusatory instruments, the question is whether any subsequent constitutional or statutory rule affirmatively made compliance with the rules governing accusatory instruments jurisdictional in nature.

cases or to condition jurisdiction on compliance with the rules governing accusatory instruments.

In 1927 and 1958, the voters enacted identical amendments to Article VII (Original), section 18, and Article VII (Amended), section 5, respectively. Those amendments added the following provision to those sections, authorizing defendants to waive the indictment requirement:

[I]f 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.

Or Laws 1927, p. 6. The available evidence shows that the principal purpose of those amendments was to “save time and expense in disposing of the cases of criminals who desire to plead guilty.” Official Voters’ Pamphlet, Special Election, June 28, 1927, pp. 8-9. Here, too, nothing in the available evidence suggests an intent to make circuit court subject matter jurisdiction conditional on compliance with the rules governing accusatory instruments.⁴

⁴ In expressly adopting the 1927 amendment to Article VII (Original), section 18, the 1958 amendment to Article VII (Amended), section 5, also formally repealed Article VII (Original), section 18. *See* Or Laws 1927, p. 6. In the period between the adoption of Article VII (Amended) in 1910 and the formal repeal of Article VII (Original), section 18, in 1958, both sections were treated as valid. *See State v. Tollefson*, 142 Or 192, 196-98, 16 P2d 625 (1932) (discussing relationship between Article VII (Original), section 18, and Article VII (Amended), section 5).

Indeed, the adoption of a waiver provision shows that the procedural requirements for charging a felony were not viewed as jurisdictional. “[T]he authority of a court to exercise judicial power cannot be conferred by waiver * * *.” *Multnomah County Sheriff’s Office v. Edwards*, 361 Or 761, 777-79, 399 P3d 969 (2017) (citing *Wink v. Marshall*, 237 Or 589, 592, 392 P2d 768 (1964)). Prior to the 1927 and 1958 amendments, a criminal prosecution could not constitutionally proceed without a grand jury indictment. Had that requirement been jurisdictional, it could not be waived. *Id.* at 777-79. The adoption of a provision allowing a criminal defendant to do just that, without any discussion of jurisdiction at all, further demonstrates that the rules governing accusatory instruments were never intended to affect circuit court subject matter jurisdiction over criminal cases. Instead, circuit court subject matter jurisdiction was an independent issue separate from those rules.

The last pertinent constitutional amendment came in 1974, when the voters approved the amendments to Article VII (Amended), section 5, that brought that section into the form it holds today. That amendment created the preliminary hearing as an alternative to a grand jury indictment or waiver of indictment, amending the provision to state, in pertinent 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.

Or Const, Art VII (Amended), § 5. Here as well, no evidence suggests any intent for those procedures to affect circuit court subject matter jurisdiction over criminal cases.

In sum, the pertinent constitutional provisions demonstrate that, as originally enacted in 1857, the Oregon Constitution vested Oregon's circuit courts with jurisdiction over criminal cases, without any intent that that jurisdiction be conditional on compliance with the rules governing accusatory instruments. No subsequent constitutional amendment was intended to alter that jurisdictional framework. Thus, as a matter of constitutional law, Oregon's circuit courts have presumptive jurisdiction over all criminal cases, and that jurisdiction is not conditional on compliance with the separate and distinct constitutional rules governing accusatory instruments.

3. This court’s case law confirms that circuit court subject matter jurisdiction over criminal cases exists independently of the rules governing accusatory instruments.

This court’s case law provides pertinent context for understanding the constitutional provisions at issue and confirms the foregoing understanding of the Oregon Constitution’s presumptive jurisdictional scheme. *See Haji*, 366 Or at 405 (contextual analysis of constitutional provision includes this court’s decisions interpreting provisions at issue). This court’s cases have always discussed “subject matter jurisdiction” in the same way that Article VII (Original), section 2, discusses it: as the power of a court to hear a general class of cases—*i.e.*, the general subject matter at issue—rather than something conditional on case-specific procedural requirements. *See Black v. Arizala*, 337 Or 250, 263-64, 95 P3d 1109 (2004) (quoting *Garner v. Alexander*, 167 Or 670, 675, 120 P2d 238, *cert den*, 316 US 690 (1941) (“Jurisdiction of the subject-matter is the power to deal with the general subject involved. In other words, the court must have cognizance of the class of cases to which the one to be adjudicated belongs.”)); *see also Black*, 263-64 (quoting *School Dist. No. 1, Mult. Co. v. Nilsen*, 262 Or 559, 566, 499 P2d 1309 (1972) (“[J]urisdiction over the subject matter exists when the constitution or the legislature or the unwritten law has told *this court* to do *something* about *this kind of dispute*.” (emphasis in original))).

This court has already applied that understanding of subject matter jurisdiction to expressly reject the claim that a defect at the accusatory instrument

stage divests the circuit court of subject matter jurisdiction. In *Terry*, this court explained that, “[u]nder the Oregon Constitution, circuit courts have subject matter jurisdiction over all actions unless a statute or rule of law divests them of jurisdiction.” *Terry*, 333 Or at 186 (citing Or Const, Art VII (Amended), § 2, and Or Const, Art VII (Original), § 9). With that understanding of circuit court subject matter jurisdiction, *Terry* held that a trial court retains subject matter jurisdiction over a criminal case even if the grand jury’s indictment is substantively defective. *Id.*; accord *State v. Compton*, 333 Or 274, 295-96, 39 P3d 833 (2002) (rejecting argument that substantive defect in indictment deprived trial court of jurisdiction); *State v. Lotches*, 331 Or 455, 465-66, 17 P3d 1045 (2000) (“Defendant’s jurisdictional argument also is not well taken.”).

Terry squarely addresses the issue raised in this case and resolves it in the state’s favor. Although few other decisions of this court directly address that issue, multiple other decisions of this court—with a single erroneous exception discussed further below—corroborate *Terry*’s conception of circuit court subject matter jurisdiction over criminal cases as independent of the rules governing accusatory instruments.

In *Garner v. Alexander*, 167 Or 670, 674, 120 P2d 1309, *cert den*, 316 US 690 (1941), for example, this court held that defects in grand jury qualifications are not jurisdictional. The petitioner in *Garner* sought relief on the ground that an unlawfully qualified grand jury issued her indictment. *Id.* at 675, 677. This court

rejected that argument. *Id.* In doing so, it explained that it could grant habeas relief only based on jurisdictional defects rendering the criminal judgment void.

Id. An unlawfully qualified grand jury was not such an error. *Id.* Although that error may have rendered the indictment voidable on a timely objection, the criminal trial court nonetheless “had plenary jurisdiction of the offense committed by the petitioner,” precluding habeas relief. *Id.*

In *State v. Emmons*, 55 Or 352, 357, 106 P 451 (1910), this court distinguished between the circuit court’s jurisdiction over an offense and a substantive defect in the indictment’s allegations. *See id.* at 357, 359. In doing so, this court observed 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. *Id.* at 357.

In *Ex Parte Stacey*, 45 Or 85, 88, 75 P 1060 (1904), this court similarly held that a defective indictment was not a jurisdictional problem. There, the habeas petitioner sought relief on the ground that his indictment omitted a necessary element of the crime. Recognizing that it could grant habeas relief only for jurisdictional defects, this court rejected the claim. *Id.* It explained that “[t]he circuit courts of this state have exclusive original jurisdiction of all felonies committed therein,” and that “where the trial court acquired jurisdiction of the

subject matter of an indictment and the person of the accused, the judgment of the court on the question whether the indictment sufficiently charged the crime * * *

can only be reviewed on appeal or writ of error, and habeas corpus will not lie.”

Id. In other words, the petitioner’s claim that his indictment was substantively defective did not raise a jurisdictional issue that could supply a basis for habeas relief; the trial court had jurisdiction over the case despite that defect. *Id.*

Finally, this court’s decision in *Hannah v. Wells*, 4 Or 249, 254 (1872), decided near in time to the original 1857 constitution, manifests that same understanding of circuit court jurisdiction. The defendant in *Hannah* challenged the jurisdiction of the court to act on a pre-indictment criminal complaint that did not comply with the rules governing a formal indictment. *Id.* at 251-52. This court rejected that argument, observing that the existing statutory framework authorized circuit courts to act in criminal proceedings in several ways before any formal indictment issued, observing that “the law does not require that the complaint shall be in writing before the magistrate can have jurisdiction to proceed” on the issue whether a person accused of criminal conduct should be held to answer on that accusation; that “there is nothing in the statute, or in the nature of the proceeding, to render it necessary or reasonable that the magistrate should set about drawing up a formal written charge before [the magistrate] commences the examination of witnesses” for that purpose; and “[t]his being the rule prescribed by statute, it is not necessary to the jurisdiction of the committing magistrate that there should be a

written complaint charging the crime with that certainty that is required in an indictment[.]” *Id.* at 253-54, 255.

In sum, this court’s case law consistently recognizes that Oregon’s circuit courts have subject matter jurisdiction over criminal cases independently of the rules governing accusatory instruments.

4. The legislature has never made accusatory instrument rules jurisdictional; instead, the statutory framework has always assumed subject matter jurisdiction even in the absence of a valid accusatory instrument.

As noted above, both Article VII (Original), section 9, and Article VII (Amended), section 2, contemplate potential legislative revision of circuit court subject matter jurisdiction. But the legislature has never chosen to make the rules for accusatory instruments prerequisites to a circuit court’s exercise of subject matter jurisdiction over a criminal case. *Cf. Terry*, 333 Or at 186 (holding that trial courts have subject matter jurisdiction over criminal cases despite substantive accusatory instrument defects). To the contrary, Oregon’s statutory framework for criminal procedure has always authorized circuit courts to act in criminal cases before an accusatory instrument has issued, and even after it has been held invalid.

As this court’s early decision in *Hannah* intimates, that was true of statutory framework for criminal procedure enacted contemporaneously with the original Constitution. *Cf. Haji*, 366 Or at 405 (judicial decisions are context for a constitutional provision’s meaning). The Deady Code authorized circuit courts to

issue arrest warrants based on any information or complaint, if the court’s examination yielded the conclusion that “the crime complained of has been committed, and that there is probable cause to believe that the person charged has committed it[.]” *See* General Laws of Oregon, Crim Code, ch 35, §§ 343-59, pp. 501-03 (Deady 1845-1864).⁵ Following the defendant’s arrest, the circuit court had authority to order the defendant committed to custody—*i.e.*, “held to answer”—even before a grand jury considered an indictment. Deady at ch 37, §§ 379-411, pp. 505-11; *see also id.* at ch 7, § 64, p. 452 (provision contemplating grand jury decision on indictment after a defendant has already been held to answer).

The Deady Code also contemplated that circuit courts would retain jurisdiction to act in criminal cases even if the indictment was set aside as

⁵ The Deady Code authorized “magistrates” to act in criminal cases before an indictment was found, and defined magistrates as including “[t]he justices of the supreme court”; “[t]he county judges and justices of the peace”; and “[a]ll municipal officers authorized to exercise the powers and perform the duties of a justice of the peace.” Deady at ch 34, §§ 341-42, p. 500. Although circuit court judges are not expressly identified in that definition, that was because, at that time, there were no independent circuit court judges; the justices of the Supreme Court sat as circuit judges in their respective districts. *See* Or Const, Art VII (Original), § 8 (providing that “[t]he Circuit Courts shall be held twice at least in each year in each County organized for judicial purposes, by one justices of the Supreme Court * * *.”); *Id.* § 10 (authorizing the legislature to “provide for the election of Supreme, and Circuit Judges, in distinct classes,” but only when “the white population of the State shall amount to Two Hundred Thousand[.]”). The legislature expressly added “judges of the circuit court” to the list of magistrates in 1889. Or Laws 1889, pp. 3-4.

substantively defective. Specifically, the Deady Code set out procedures for setting aside the indictment if it was “not found, endorsed, and presented” in compliance with certain code provisions, and it also authorized a defendant to demur to an indictment if, among other grounds, the grand jury lacked legal authority to act or “the facts stated [did] not constitute a crime.” Deady at chs 10, 11, §§ 115, 123, pp. 460-62. In either case, even if the court set aside the indictment or allowed the demurrer, the court retained authority to order the case “re-submitted to the same or another grand jury.” *Id.* at chs 10, 11, §§ 117, 127, pp. 461, 462. And if the court did order the case re-submitted, the defendant was required to remain in custody or post bail while the grand jury decided whether to issue a new indictment. *Id.* §§ 118, 129.

That statutory framework for criminal procedure has persisted throughout all subsequent amendments to the constitutional rules for accusatory instruments, and continues to exist today:

- Circuit courts have always held statutory authority to issue arrest warrants for crimes on information or complaint, before any formal accusatory instrument has issued. Lord’s Oregon Laws, title XVIII, ch XIX, §§ 1733-52 (1910); Oregon Laws, title XVIII, ch XIX, §§ 1733-37 (1920); *former* ORS 133.010 to 133.170 (1957); ORS 133.030 and ORS 133.110 (2020).
- Circuit courts have always held statutory authority to address the custodial status of a person suspected of criminal conduct even before a formal

accusatory instrument has issued. Lord’s Oregon Laws, title XVIII, ch XXI, § 1795 (1910); Oregon Laws, title XVIII, ch XXI, § 1795 (1920); *former* ORS 132.330 and ORS 133.820 (1957); ORS 133.450 (2020).

- Circuit courts have always had statutory authority to order the resubmission of a case to the grand jury (including holding the defendant in custody) even after setting aside the indictment or allowing a demurrer to it. Lord’s Oregon Laws, title XVIII, ch VIII, §§ 1485-86, 1495, 1497 (1910); Oregon Laws, title XVIII, ch VIII, §§ 1485-86, 1495, 1497 (1920); *former* ORS 135.530, ORS 135.540, ORS 135.670, ORS 135.690 (1957); ORS 135.530, ORS 135.540, ORS 135.670, and ORS 135.690 (2020).

Those statutory procedures are inconsistent with the proposition that a formal accusatory instrument is necessary for subject matter jurisdiction to “attach” in a criminal proceeding. *See Keys*, 302 Or App at 523, 526 n 9 (making that suggestion). They are also inconsistent with the proposition that substantive defects at the accusatory instrument stage divest the circuit court of subject matter jurisdiction.

That statutory framework has existed throughout all pertinent amendments to the constitutional provisions governing accusatory instruments, yet nothing in the text, context, or history of those amendments suggests that that statutory scheme ran afoul of limitations on circuit court subject matter jurisdiction over criminal cases. Nor does any decision of this court make that suggestion. Instead,

the consistent thread running from this court's 1872 decision in *Hannah* through the more recent decision in *Terry* is that Oregon's circuit courts have subject matter jurisdiction over criminal cases independently of the rules governing accusatory instruments.

B. *Huffman v. Alexander* was wrongly decided and should be overruled.

1. *Huffman* conflicts with the text, context, and history of the Oregon Constitution, relying instead on a federal constitutional rule that no longer exists.

The single aberration in that otherwise consistent understanding of circuit court subject matter jurisdiction is *Huffman v. Alexander*, 197 Or 283, 251 P2d 87 (1952), *reh'g den*, 197 Or 283 (1953). *Huffman* was decided when the Oregon Constitution required grand jury indictments for all criminal cases but also allowed a defendant to waive indictment. The petitioner in *Huffman* sought habeas relief on the ground that he never validly waived indictment and that, without a valid indictment or a valid waiver, the criminal trial court lacked jurisdiction over the case, rendering the petitioner's conviction void.

In resolving that question, *Huffman* engaged in no substantive analysis of the text, context, or history of the Oregon constitutional provisions governing circuit court jurisdiction or accusatory instruments. Instead, *Huffman* relied solely on a United States Supreme Court decision, *Ex Parte Bain*, which held under the Fifth Amendment's Indictment Clause that an indictment amended without resubmission to the grand jury divested the trial court of jurisdiction and rendered the

defendant’s subsequent conviction void. *Huffman*, 197 Or at 300 (discussing *Bain*). Citing *Bain*, this court in *Huffman* stated summarily that “the same rule must be applied under” the Oregon Constitution and, on that basis alone, it held that “[a] judgment rendered upon an information without waiver of indictment would be void.” *Id.*⁶

Huffman was wrong when it was decided and should be overruled.

Although this court generally “assumes that its earlier cases were correctly decided,” *State v. Payne*, 366 Or 588, 605, 468 P3d 445 (2020), that principle of *stare decisis* is “moral and intellectual, rather than arbitrary and inflexible,” *Farmers Ins. Co. v. Mowry*, 350 Or 686, 692, 261 P3d 1 (2011) (quoting *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 54, 11 P3d 228 (2000)). This court has

⁶ The Fifth Amendment’s Indictment Clause provides that “[n]o person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury[.]” The Fifth Amendment’s Indictment Clause has never been incorporated against the states under the Fourteenth Amendment. *See State v. Reinke*, 354 Or 98, 108, 309 P3d 1059 (2013) (discussing *Hurtado v. California*, 110 US 516, 534-35, 4 S Ct 111, 28 L Ed 2d 232 (1884)). Thus, while the federal constitution does require a neutral probable cause determination to justify extended detention after arrest, that judicial oversight “is not prerequisite to prosecution by information,” and any violation of that federal constitutional right “does not void a subsequent conviction.” *See Gerstein v. Pugh*, 420 US 103, 119, 95 S Ct 854, 43 L Ed 2d 54 (1975); *see also People v. Hall*, 460 NW2d 520, 525 (Mich 1990) (examining issue in context of whether preliminary hearing defects divest courts of subject matter jurisdiction); *cf. United States v. Mechanik*, 475 US 66, 70-71, 71 n 1, 106 S Ct 938, 89 L Ed 2d 50 (1986) (citing *Coleman v. Alabama*, 399 US 1, 10-11, 90 S Ct 1999, 26 L Ed 2d 387 (1970) (recognizing that constitutional defects at preliminary hearing stage can be subject to harmless-error review and thus cannot be jurisdictional defects)).

noted the ““important need to be able to correct past errors”” in cases interpreting the Oregon Constitution “because ‘[t]his court is the body with the ultimate responsibility for construing our constitution, and if we err, no other reviewing body can remedy that error.’” *Farmers*, 350 Or at 694 (quoting *Stranahan*, 331 Or at 53)). This court will revisit such prior precedent if it was “wrongly considered or wrongly decided the issue in question”; if “new information” calls the precedent’s interpretation into question or if “the legal or factual context has changed in such a way as to seriously undermine the reasoning or result of earlier cases”; or if this court failed “to follow its usual paradigm for considering and construing the meaning of the provision in question.” *Id.* at 694, 698 (quoting *Stranahan*, 331 Or at 54); accord *Payne*, 366 Or at 605.

All those considerations favor disavowing *Huffman*. First, not only did *Huffman* fail to apply this court’s usual paradigm for construing constitutional provisions, it failed to engage in any substantive analysis of the pertinent constitutional provisions at all. See *Farmers*, 350 Or at 694 (noting that basis for revisiting prior precedent). Instead, *Huffman* noted the rule applied by the United States Supreme Court in the 1887 *Bain* decision and held, without analysis, that “the same rule must be applied” under the Oregon Constitution. *Huffman*, 197 Or at 300.

Second, *Huffman*’s summary adoption of that federal rule led it to the incorrect result. *Farmers*, 350 Or at 694 (this court will revisit wrongly decided

precedent). For all the reasons explained earlier in this brief, the text, context, and history of the pertinent constitutional provisions shows that Oregon circuit courts have presumptive subject matter jurisdiction over all criminal cases, and no rule of constitutional or statutory law has ever made that jurisdiction depend on compliance with the rules governing accusatory instruments. In holding otherwise, *Huffman* departs from the Oregon Constitution and this court's cases decided both before and after *Huffman*.

Third, the federal *Bain* decision on which *Huffman* summarily relied has since been expressly overruled on the exact proposition for which *Huffman* cited it. *United States v. Cotton*, 535 US 625, 629-30, 122 S Ct 1781, 152 L Ed 2d 860 (2002); see also *Payne*, 366 Or at 605; *Farmers*, 350 Or at 694, 698 (this court will revisit precedent if new information calls a prior constitutional interpretation into question or if a changed legal context undermines the reasoning or result of an earlier case). In *Bain*, a federal habeas case, the petitioner collaterally challenged his criminal conviction on the ground that the trial court allowed an improper post-grand-jury amendment to the indictment. See *Cotton*, 535 US at 629 (discussing *Bain*). The Supreme Court in *Bain* agreed that the amendment to the indictment was improper, and further concluded that, as a result, “the jurisdiction of the offence [was] gone, and the court [had] no right to proceed any further in the progress of the case for want of an indictment.” *Id.*

In *Cotton*, however, the United States Supreme Court expressly disavowed *Bain*'s conception of jurisdiction, explaining that *Bain*

is a product of an era in which [the] Court's authority to review criminal convictions was greatly circumscribed. At the time it was decided, a defendant could not obtain direct review of his criminal conviction in the Supreme Court. * * * The Court's authority to issue a writ of habeas corpus was limited to cases in which the convicting court had no jurisdiction to render the judgment which it gave. * * * In 1887, therefore, [the] Court could examine constitutional errors in a criminal trial only on a writ of habeas corpus, and only then if it deemed the error "jurisdictional." The Court's desire to correct obvious constitutional violations led to a somewhat expansive notion of "jurisdiction," * * * which was more a fiction than anything else." * * *

Bain's elastic concept of jurisdiction is not what the term "jurisdiction" means today, *i.e.*, the court's statutory or constitutional *power* to adjudicate the case. * * * This latter concept of subject matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived. Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court. * * * In contrast, the grand jury right can be waived.

Cotton, 535 US at 630-31 (internal citations and quotation marks omitted; emphasis in original). In light of that, the Court concluded that *Bain*'s analysis of the indictment defect "in terms of 'jurisdiction' was mistaken," and that "[i]nsofar as it held that a defective indictment deprives a court of jurisdiction, *Bain* is overruled." *Id.* at 631.⁷

⁷ Because *Huffman* was a habeas case, this court was under the same constraints that incentivized *Bain* to articulate an overly expansive notion of jurisdiction—namely, the rule that a habeas court could only disturb criminal judgments if the judgment was *void*, including the absence of subject-matter

Footnote continued...

In sum, *Huffman*'s holding that the rules governing accusatory instruments are jurisdictional was based on an inadequate—indeed, wholly absent—analysis of the pertinent constitutional provisions; the conclusion *Huffman* reached cannot be reconciled with the text, context, and history of the pertinent constitutional provisions or this court's cases decided both before it and after it; and the federal rule that *Huffman* summarily adopted without analysis no longer exists. *Huffman* was wrong when it was decided. This court should now disavow it and hold that a claim that defendant did not validly waive preliminary hearing is not a challenge to the circuit court's subject matter jurisdiction over the criminal proceeding.

2. *Huffman* cannot be harmonized with *Terry* or *Cotton*.

Huffman also cannot be harmonized with *Terry* or *Cotton*, as the Court of Appeals attempted to do in the decision below. *See Keys*, 302 Or App at 523-24. The Court Appeals attempted to reconcile those cases by holding that, although substantive defects in an accusatory instrument do not affect subject matter jurisdiction (as *Terry* held), invalid waivers of preliminary hearing or indictment do (as *Huffman* held). *Id.*

That distinction does not withstand scrutiny. Nothing in the pertinent constitutional text suggests any basis for treating defects in a waiver of a

(...continued)

jurisdiction. *See Garner*, 167 Or at 674 (noting that constraint on relief available in state habeas proceedings); *Stacey*, 45 Or at 88 (same).

preliminary hearing or indictment as jurisdictional, while treating substantive defects in an accusatory instrument as non-jurisdictional. In other words, either the requirements of Article VII (Amended), section 5, are *all* jurisdictional, or none of them are. For the reasons explained above, none of them are.

Nor is there any principled, substantive difference between substantive pleading defects and invalid waivers. The grand jury and the preliminary hearing serve the same substantive purpose: to test the state's evidence of felony criminal conduct against a probable cause standard of proof. *State v. Kuznetsov*, 345 Or 479, 483-84, 199 P3d 311 (2008). As a result, a substantive defect in an indictment, such as the failure to allege a necessary element of the crime, ultimately poses the same defect as the absence of a preliminary hearing—in neither case has a neutral factfinder found probable cause to believe that felony criminal conduct has occurred. *See State v. Wimber*, 315 Or 103, 109, 843 P2d 424 (1992) (an indictment that omits necessary elements fails to allege criminal conduct).

Indeed, the “jurisdictional defect” in *Bain* was itself a substantive pleading defect—the amendment of an indictment without a new probable cause finding by the grand jury. *See Huffman*, 197 Or at 300 (discussing *Bain*). In other words, *Huffman*'s reliance on *Bain* is itself inconsistent with a distinction between substantive pleading defects and invalid waivers: *Huffman*'s conclusion that an

invalid waiver created a jurisdictional problem derived directly from *Bain*'s conclusion that a substantive pleading defect created a jurisdictional problem. *Id.*

3. Most other jurisdictions nationwide hold that rules governing accusatory instruments are not jurisdictional.

Disavowing *Huffman* would bring Oregon in line with the rule followed by most other jurisdictions nationwide. Wayne R. LaFave, 4 *Criminal Procedure* §§ 14.2(g), 14.3(d), 14.4(e) (4th ed 2019). In most states that allow prosecution by information, defects at the accusatory instrument stage do not affect the trial court's subject matter jurisdiction. *Id.*; see also *State v. Smith*, 344 P3d 573, 580 (Utah 2014); *State v. Adams*, 554 NW2d 686 (Iowa 1996); *State v. Butler*, 897 P2d 1007 (Kan 1995); *Commonwealth v. Tyler*, 587 A2d 326 (Pa 1991); *Powell v. State*, 583 A2d 1114 (Md Ct App 1991); *State v. Webb*, 467 NW2d 108 (Wisc 1991); *People v. Hall*, 460 NW2d 520, 525 (Mich 1990); *People v. Alexander*, 663 P2d 1024 (Colo 1983); *State v. Long*, 408 So 2d 1221 (La 1982); *People v. Pompa-Ortiz*, 612 P2d 941 (Cal 1980); *State v. Franklin*, 234 NW2d 610 (Neb 1975).

And all but one of the minority-rule jurisdictions cited by LaFave as holding accusatory instrument rules “jurisdictional” have either subsequently abandoned that approach explicitly or have otherwise held that defects at the accusatory instrument stage still remain subject to preservation requirements or harmless-error review—*i.e.*, they necessarily do not affect subject matter jurisdiction. Compare LaFave, *Criminal Procedure* at § 14.2(g) n 109, with *State v. Parkhurst*, 845 SW2d

31 (Mo 1992) (overruling prior cases, holding that defects at the accusatory instrument stage are not jurisdictional and are subject to harmless-error analysis); *State v. Niblack*, 596 A2d 407, 410 (Conn 1991) (prior references to probable cause determination as “jurisdictional prerequisite * * * pertain[ed], not to subject matter jurisdiction, but only to jurisdiction over the person of the defendant,” and thus objections to associated defects “are waived if not seasonably raised”); *State v. Hardman*, 828 P2d 902 (Idaho 1992) (“Where the fairness of a trial is uncontested, errors at the preliminary hearing are not grounds for vacating a conviction.”).

C. A claim that a defendant did not validly waive preliminary hearing is subject to normal preservation requirements.

“[S]ubject-matter jurisdiction ‘cannot be conferred by the parties by consent, nor can the want of jurisdiction be remedied by waiver, or by estoppel.’” *Edwards*, 361 Or at 778 (quoting *Wink*, 237 Or at 592). For that reason, challenges to the subject matter jurisdiction of the lower court “may be attacked ‘at any time and any place, whether directly or collaterally,’” including for the first time on appeal after trial. *See Edwards*, 361 Or at 778 (quoting *PGE v. Ebasco Servs., Inc.*, 353 Or 849, 856, 306 P3d 628 (2013)). But claims of error that do not affect the trial court’s subject matter jurisdiction generally “may be challenged only directly, in a preserved claim of error.” *Id.*

For all the reasons explained above, a claim that a defendant did not validly waive preliminary hearing is not a challenge to the circuit court's subject matter jurisdiction. Such a claim therefore generally cannot be raised for the first time on appeal to void an otherwise lawful conviction. Instead, such claims must be preserved in the trial court to be raised on appeal, or the claim must satisfy the rigorous standards for plain-error review.

That rule forecloses granting the relief that defendant seeks in this case and requires affirming the trial court's judgment. As defendant conceded before the Court of Appeals, he failed to preserve any objection to the lack of a preliminary hearing before the trial court. (App Br 5). In the alternative to defendant's argument that that error divested the trial court of subject-matter jurisdiction, defendant asked the court to review his claim as one of plain error. (*See id.*).

If this court agrees with the state that defendant's claim of error does not raise any jurisdictional defect, this court may choose to remand this case to the Court of Appeals to consider defendant's claim of plain error in the first instance. But this court could also dispense with defendant's plain error claim as a matter of law, for at least two reasons.

First, the claim of error is not one that is apparent on the face of this record. It is not apparent that defendant did not knowingly waive his right to a preliminary hearing; a court could find that no knowing waiver occurred only by impermissibly choosing between competing inferences raised by the record. *See State v.*

Turnidge, 359 Or 507, 518, 521-22, 373 P3d 138 (2016) (a claim does not qualify for plain error review if the court would have to choose between competing inferences to find the error). At defendant's arraignment, although his counsel purported to waive preliminary hearing at that time, counsel expressly reserved the right to assert the right to a preliminary hearing later if defendant determined that that was appropriate. (4/29/16 Tr 2). But defendant never did assert his right to a preliminary hearing; instead, he chose to plead not guilty to the charged crime and proceed to trial. (10/20/16 Tr 3-6; eTCF 33). Defendant's choice not to assert his right to a preliminary hearing despite expressly reserving his right to do so gives rise to an inference that defendant knowingly waived preliminary hearing. An appellate court would have to impermissibly reject that inference in order to find plain error on this record. *Turnidge*, 359 Or at 518, 521-22.

Second, even if the error was plain, it was harmless and cannot constitute reversible error. *See* Or Const, Art VII (Amended), § 3 (requiring appellate courts to affirm judgment despite non-prejudicial error); *accord State v. Kerne*, 289 Or App 345, 349-50, 410 P3d 369 (2017) (recognizing that appellate courts "will not and cannot exercise [their] discretion to correct a plain error" that is harmless). Here, defendant's claim is, in substance, a complaint that he never received a hearing at which the state's evidence was tested against a probable cause standard of proof. But the state's evidence was ultimately tested against a beyond-a-reasonable-doubt standard of proof at trial, and defendant does not challenge the

legal sufficiency of that evidence to support the trial court's finding of guilt under that standard. Nor does defendant identify any other way in which the absence of a preliminary hearing caused him prejudice. As a result, defendant has not shown any meaningful likelihood that the lack of a preliminary hearing affected the outcome of his trial proceedings, and Article VII (Amended), section 3, of the Oregon Constitution, thus requires affirming the trial court's judgment.

CONCLUSION

This court should reverse the Court of Appeals decision and affirm the trial court's judgment.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on October 1, 2020, I directed the original Brief on the Merits of Petitioner on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Kyle Krohn, attorneys for appellant, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(1)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b) and (2) the word-count of this brief (as described in ORAP 5.05(1)(a)) is 8,618 words. I further 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 as required by ORAP 5.05(3)(b).

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