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

REPLY 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

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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Continued…

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional and Statutory Provisions

Other Authorities

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

SUMMARY OF ARGUMENT

There is no question in this case that the procedural requirements of Article VII (Amended), section 5, are important and ought to be followed in all felony cases. Nor is there any question that the failure to follow those requirements over an objection will reflect trial court error, and that the failure to follow them without objection may be raised for the first time on appeal as a claim of plain error, subject to the standards governing such claims.

The issue in this case, instead, is whether the failure to follow those requirements divests the trial court of subject matter jurisdiction such that any subsequent proceedings are completely void, regardless whether a claim of error was preserved or, if not, would satisfy the standards governing plain-error review. As the state's brief on the merits explains, the answer to that question is no. A defect at the accusatory instrument stage may reflect trial court error, sometimes even plain error, but it does not divest the trial court of subject matter jurisdiction over the case.

In arguing otherwise, defendant (1) misreads this court's cases on preservation and plain error; (2) misconstrues the context for the 1908 amendments to Article VII (Original), section 18; and (3) incorrectly suggests that lay Oregon voters' "ratified" this court's erroneous decision in *Huffman v.*

Alexander, 197 Or 283, 251 P2d 87 (1952), when they approved enactments that were silent on the issue raised in *Huffman* and expressly presented to the voters as nonsubstantive. This court should reject defendant's arguments, reverse the Court of Appeals decision, and affirm the trial court's judgment.

ARGUMENT

A. This court's case law does not support defendant's understanding of preservation and plain error.

Defendant begins by arguing that, even if the state is correct that accusatory instrument defects do not divest the trial court of subject matter jurisdiction, this court should still hold such defects exempt from ORAP 5.45(1)'s preservation and plain error framework. (*See* Resp BOM 4-5, 13-14); ORAP 5.45(1) ("No matter claimed as error will be considered on appeal unless the claim of error was preserved in the lower court" or the error otherwise satisfies the standards governing plain-error review). Defendant contends that such a freestanding exemption from that preservation and plain error framework can be found in this court's decisions in *State v. Barber*, 343 Or 525, 173 P3d 827 (2007), and *State v. Cole*, 323 Or 30, 912 P2d 907 (1996).

Defendant misreads both of those cases. *Barber* held that a trial court commits reversible *plain* error by proceeding with a bench trial absent a written jury waiver. *Barber*, 343 Or at 528, 530. And *Cole* held that an error in permitting a defendant to represent himself is *preserved* when the court's error

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lay in failing to fully apprise a defendant who wished to proceed *pro se* of the risks of self-representation. *Cole*, 323 Or at 35-36.

In short, neither *Barber* nor *Cole* describe scenarios or rights that are not subject to ORAP 5.45(1)'s preservation and plain error framework. Consistently with those decisions, the state's position here is that, to be raised on appeal, a defect at the accusatory instrument stage must either be preserved or must satisfy the standards governing plain-error review.

Furthermore, the asserted error here—the trial court's acceptance of an invalid waiver of the right to a hearing in which the state's evidence is tested against a probable cause standard of proof—is unlike the errors in *Barber* and *Cole*. Unlike the error in *Barber*, the error here remains susceptible to a harmlessness analysis. *Cf. United States v. Mechanik*, 475 US 66, 70-71, 71 n 1, 106 S Ct 938, 89 L Ed 2d 50 (1986) (deprivation of federal constitutional right to a preliminary hearing is subject to harmlessness analysis); Wayne R. LaFave, 4 *Criminal Procedure* §§ 14.2(g), 14.3(d); 14.4(e) (4th ed 2019) (explaining majority rule nationwide that preliminary hearing defects are susceptible to harmlessness analysis). And unlike the error in *Cole*—where the defendant *wanted* to waive counsel, but the trial court's error lay in failing to fully apprise him of the risks of doing so—a defendant who *does not* wish to waive preliminary hearing can be expected to object if the trial court attempts to proceed as if he does.

B. Defendant misconstrues the text and context of the 1908 amendment to Article VII (Original), section 18.

The core of defendant's argument before this court focuses on the 1908 amendment to Article VII (Original), section 18, of the Oregon Constitution, which reinstated the requirement of charging crimes solely by indictment. Defendant contends that the text and context of that amendment shows that the voters intended it to erect a novel limitation on circuit court subject matter jurisdiction over criminal cases. But defendant is mistaken. The text and structure do not support defendant's argument, and defendant misreads this court's and the federal case law context for that amendment.

1. The text and structure of the 1908 amendment does not support defendant's argument.

First, defendant argues that the text and structure of the 1908 amendment show that the voters intended it to erect a new limitation on the subject matter jurisdiction of Oregon's circuit courts. (Resp BOM at 17-22). Defendant acknowledges that the constitutional provision does not explicitly set out a jurisdictional rule. (Resp BOM at 18). Nonetheless, defendant argues that that rule is proved circumstantially by the provision's reference to "circuit court" and its placement in Article VII rather than Article I, which, according to defendant, shows that the voters understood it as a limitation on judicial power rather than a personal right of individual defendants. (*Id.*).

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Defendant is wrong on both points. As to the textual argument, the bare reference to "circuit court" does not make the 1908 version of Article VII (Original), section 18, a jurisdictional provision. Article VII (Original), section 9, already provided that circuit courts had "all judicial power, authority, and jurisdiction," unless the constitution or laws "vested [jurisdiction] exclusively in some other court." Nothing about the reference to "circuit court" in the 1908 amendments describes the indictment rule in those terms. Instead, the most likely reason that the 1908 amendment provided that "[n]o person shall be charged in any circuit court" except by indictment was because, as defendant recognizes, the amendment was specifically intended to repeal the 1899 statute that allowed crimes to be "charged" by *other* means. *See State v. Haji*, 366 Or 384, 412-13, 462 P3d 1240 (2020) (explaining purpose of the 1908 amendment to repeal the 1899 law and "re-establish[]" the indictment requirement).

The placement in Article VII instead of Article I also fails to support defendant's argument. The reason that provision was enacted into Article VII (Original), section 18, was because that was the section that had always addressed grand juries and indictments. Contrary to defendant's argument that the voters would have understood the 1908 amendment as a limitation on judicial power rather than an individual right, the Voters' Pamphlet expressly described the indictment requirement as "a great fundamental principle of *personal liberty*." (App 10 (emphasis added)). And the Voters' Pamphlet

additionally shows that the powers the voters were focused on restraining were those of district attorneys, not the judiciary. (*See* App 9-10); *Haji*, 366 Or at 412-13 (noting that the argument in favor of those amendments in the Voters' Pamphlet was "a resounding call to voters to control the unchecked powers of district attorneys to charge crimes").

In short, defendant's text and structure arguments supply poor evidence that the 1908 voters intended to enact a new jurisdictional rule that they did not explicitly set out in the constitutional text. *See State v. Mills*, 354 Or 350, 354, 356, 312 P3d 515 (2013) (noting that the best evidence of the intended meaning of a constitutional provision is its text, and rejecting a proffered interpretation in part because nothing in the provision set out that proffered meaning explicitly).

2. Defendant misconstrues this court's case law.

Next, defendant argues that this court's case law preexisting the 1908 amendments is contextual proof that the 1908 voters intended to enact a jurisdictional rule. As defendant concedes, however, none of the cases he cites holds that the indictment requirement is jurisdictional. (Resp BOM at 50). Instead, defendant attempts to distill a jurisdictional rule from three different types of cases, none of which ultimately supports defendant's position. First, defendant cites cases in which this court has addressed accusatory instrument defects for the first time on appeal. But those cases make clear that this court has done that for reasons other than the defect being jurisdictional. Second,

defendant cites cases acknowledging that challenges to the failure of an accusatory instrument to state facts constituting a crime have, like jurisdictional challenges, in the past been allowed to be raised for the first time on appeal. But those cases still consistently distinguish between jurisdictional challenges and pleading challenges as two different things. Third, defendant cites cases holding that all jurisdictional facts must be alleged in the initiating document. But those cases involve matters of "special" or "limited jurisdiction," which, as this court has already expressly held, have no application to a circuit court's general jurisdiction over criminal cases.

(a) The cases in which this court reached an accusatory instrument defect for the first time on appeal do so for reasons other than the defect being jurisdictional.

First, defendant cites cases of this court that addressed indictment issues for the first time on appeal. Defendant cites two pre-1908 cases: *State v. Mack*, 20 Or 234, 25 P 639 (1891), and *State v. Jarvis*, 20 Or 437, 26 P 302 (1891). But this court did not address those issues for the first time on appeal because they were jurisdictional; rather, it did so based on considerations strongly resembling plain error review.

In *Mack*, the defendant argued for the first time on appeal that his indictment failed to allege essential elements of the crime charged. *Mack*, 20 Or at 235. The state argued that this court should decline to reach the error based on the lack of a "bill of exceptions," but this court rejected that argument,

concluding that the indictment defect "is in the judgment roll; in the indictment itself" and that "[s]uch an error is not waived by silence or cured by judgment." *Id.* at 235-36. Reaching an error despite the lack of a "bill of exceptions" because the error appears "in the judgment roll" look a lot like reaching an error despite the lack of an objection because the error is apparent on the face of the record, in the same way this court would undertake plain error review today. *See id.*; *see also id.* at 234 (syllabus stating holding as "[w]here the error relied upon on appeal appears from the judgment roll, no bill of exceptions is necessary").[1]

This court followed *Mack* in *State v. Martin*, 54 Or 403, 405, 100 P 1106 (1909), and again in *State v. Robinson*, 74 Or 481, 482, 145 P 1057 (1915), which defendant also cites. (Resp BOM at 32). That is, *Robinson* addressed an indictment defect claim for the first time on appeal pursuant to *Mack*'s plain-error principles, *not* because the defect was jurisdictional in nature.

The other pre-1908 case defendant cites is *Jarvis*, in which the defendant was indicted for and convicted of the crime of incest. *Jarvis*, 20 Or at 438. But there, this court principally reversed because the evidence at trial proved a

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[1] *Mack*, in turn, cited this court's early decision in *State v. Bruce*, 5 Or 68, 71 (1873), which also recognized that Oregon statutory law generally required indictment challenges to be raised by demurrer, except for claims that the grand jury lacked authority to act or that the facts alleged did not constitute a crime. This court recently recognized those principles in *Haji*, 366 Or at 418.

different crime than that alleged in the indictment, not based on substantive defects in the indictment. *See id.* at 438, 441-42 (noting that the indictment charged incest, which required proof of mutual assent, yet the evidence proved a non-consensual forcible rape).

To the extent *Jarvis* addressed indictment defects, it strongly indicated that such defects were not jurisdictional: Despite expressing agreement with the defendant's argument that the indictment charging incest should have affirmatively alleged the element of "mutual assent," this court also suggested that "perhaps the indictment is sufficient after judgment[.]" *Id.* That statement is directly inconsistent with defendant's position. If an indictment's omission of a necessary element may be cured by judgment, the defect cannot be one divesting the circuit court of subject matter jurisdiction.[2]

In sum, although defendant can identify pre-1908 cases in which this court addressed an accusatory instrument defect for the first time on appeal,

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[2] That suggestion of *Jarvis* is in some tension with this court's decision in *Mack*, decided shortly before *Jarvis*, which stated that an indictment defect that appears "in the judgment roll" was not "cured by judgment." Even if *Mack* was correct that an indictment defect is not cured by judgment, that still falls short of establishing that the defect is jurisdictional. Regardless, as context for 1908 amendment, confusion in this court's case law regarding the specific legal nature of an indictment defect supports the state's position that the voters would not have understood the 1908 amendment to create a novel limitation on circuit court subject matter jurisdiction absent some more explicit indication to that effect.

those cases do not establish that this court did so because the defects were jurisdictional. Those cases accordingly do not supply contextual support for defendant's claim that the voters intended the 1908 amendment to enact a novel limitation on circuit court subject matter jurisdiction.

(b) This court's cases consistently distinguish between jurisdictional challenges and pleading challenges.

Second, defendant notes that this court's cases discuss jurisdictional challenges and pleading challenges as ones that, in the past, have been allowed to be raised for the first time on appeal. But, in doing so, those cases consistently distinguish between those two types of challenges as two different things. *See, e.g.*, *Martin*, 54 Or at 405 (distinguishing between (1) "the objection to the jurisdiction of the court over the subject-matter of the indictment" and (2) the objection "that the facts so stated do not constitute a crime"); *State v. Lewis*, 113 Or 359, 362, 230 P 543 (1924) (separately identifying a challenge that an indictment "fails to state facts sufficient constitute a crime" and a challenge that "the court has no jurisdiction over the offense charged").

Indeed, contrary to defendant's assertion (Resp BOM at 31-32), *State v. Emmons*, 55 Or 352, 106 P 451 (1910), directly supports that distinction. There, this court distinguished between (1) "[t]he 'caption' of an indictment," 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*"; and (2) "the sufficiency of the averments of the charging part of an indictment." *Id.* at 357 (emphasis added). This court explained that, in assessing the sufficiency of the allegations, "[t]he caption will * * * be disregarded." *Id.* That is, in analyzing the substantive sufficiency of the indictment, this court could "disregard[]" the portion of the indictment that established the court's subject matter jurisdiction over the crime charged—further establishing that the substantive sufficiency of an indictment was an issue distinct from the court's subject matter jurisdiction. *See id.*

(c) Cases addressing special or limited jurisdiction have nothing to do with Oregon circuit courts' general jurisdiction over criminal cases.

Third, and finally, defendant tries to bridge the gap between jurisdictional challenges and pleading challenges by citing cases—in particular, a forcible entry and detainer case and an adoption case—holding that all jurisdictional facts need to be pleaded in the initiating document. (*See* Resp BOM at 8-10). The problem with defendant's argument is that those cases involve matters of "special" or "limited jurisdiction," and have nothing to do with a circuit courts' general jurisdiction over criminal cases. *In re Adoption of Abelsen*, 190 Or 319, 324, 225 P2d 768 (1950) (adoption proceedings are a "special" proceeding such that, when a court of general jurisdiction hears an adoption matter, it is treated as "a court of limited and special jurisdiction in that all jurisdictional facts must

appear affirmatively by the record"); *Schroeder v. Woody*, 166 Or 93, 96, 109 P2d 597 (1941) (noting the same about forcible entry and detainer cases).

This court explained how those principles have no application to criminal cases in *State v. Lillie*, 172 Or 194, 200-01, 139 P2d 576 (1943). There, the defendant was charged by information after he purportedly waived indictment. *Id.* On appeal, he contended that his conviction was void because his waiver was invalid, arguing that, when a criminal case proceeds on an information rather than indictment, the court is one of special rather than general jurisdiction, meaning that "all the facts necessary to confer jurisdiction upon the circuit court must appear affirmatively on the face of the record." *Id.* at 206. The defendant asserted that certain factual omissions from his own waiver thus meant that "jurisdiction [was] lacking." *Id.* at 206.

This court rejected that argument as "based upon an entire misconception of the nature of the court's jurisdiction in a criminal case[.]" *Id.* at 201, 206. In doing so, this court explained that "[t]he circuit courts of Oregon have from their beginning had general jurisdiction in cases of felony," and that "a court of general jurisdiction proceeding within the scope of its powers will be presumed to have jurisdiction to give the judgments and decrees it renders until the contrary appears." *Id.* at 206, 210-11. Notably, this court in *Lillie* also quoted with approval a 1910 decision of the Delaware Supreme Court explaining that trying a defendant "upon presentment by informations, instead of by

indictment, is a matter of procedure and not jurisdiction." *Id.* at 208 (quoting *Godwin v. State*, 74 A 1101 (Del 1910)).

In sum, defendant cites no case from this court that supports his contention that the 1908 amendment enacted a limitation on the subject matter jurisdiction of Oregon's circuit courts over criminal cases.

3. Federal case law is not context for the 1908 amendment and, even if it is, it fails to establish that the voters intended the indictment requirement to be jurisdictional in nature.

Defendant also argues that federal case law holds that indictments are jurisdictional and supplies context establishing that the voters intended the 1908 amendment to enact a jurisdictional rule. This court should reject that argument for either of two reasons. First, the evidence fails to establish that the voters intended the 1908 amendment to adopt the federal indictment rule such that the adoption incorporated federal case law interpreting the federal rule. And second, even if the federal case law is context for the voters' intent, that case law fails to clearly establish a jurisdictional indictment rule with sufficient clarity to overcome the other contextual evidence suggesting that the voters would not have understood the 1908 amendment to enact any novel limitation on circuit court subject matter jurisdiction.

(a) The evidence fails to establish that the 1908 voters intended to adopt the federal indictment rule.

First, the evidence does not establish that the voters intended the 1908 amendment to adopt the federal indictment rule in all its substantive particulars,

as opposed to adopting a parallel, but substantively independent, state indictment rule. Although similarly worded, the 1908 amendment does not duplicate the federal grand-jury indictment clause. *See Mills*, 354 Or at 356 (rejecting argument that constitutional provision intended to adopt preexisting common-law rule in part because the text did not explicitly indicate any intent to do so). The proposition that the voters must have intended to adopt the federal rule by enacting a similar general indictment requirement is also difficult to reconcile with this court's robust tradition of independent state constitutional interpretation—even as to provisions that closely mirror federal ones. *See, e.g.*, *State v. Vondehn*, 348 Or 462, 480-81, 236 P3d 691 (2010) (interpreting state constitutional guarantee against self-incrimination differently than the nearly identical federal constitutional guarantee).

Moreover, although the Voters' Pamphlet argument in favor of the 1908 amendment referred to the federal grand jury indictment clause, it did so only after, and in support of, a more basic argument that an indictment requirement would place salutary limits on the power of district attorneys to charge crimes. (App 9-10). And it did so in the same breath as a reference to the indictment requirement in England, (*id.*), yet defendant does not contend that the 1908 voters thereby intended to adopt the entire common law of England bearing on indictments. On balance, that evidence fails to establish that the 1908 voters

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intended to adopt the federal indictment rule, as opposed to adopting a parallel, but substantively independent, state indictment rule.

(b) Even if federal case law is context for the voters' intent, it still fails to establish that the voters understood the 1908 amendment to enact a jurisdictional rule.

Regardless, even if the federal case law is considered as context for the 1908 amendment, it fails to establish a federal jurisdictional indictment rule with sufficient clarity to outweigh the other context suggesting that the voters would not have understood the 1908 amendment to enact any novel limitation on circuit court subject matter jurisdiction. *See State v. Guzman*, 366 Or 18, 33-34, 455 P3d 485 (2019) (citing *State v. Shaw*, 338 Or 586, 604, 113 P3d 898 (2005) (rejecting prior case-law context because other context was more persuasive)).

For example, in *Ex Parte Harlan*, 27 P 920, 921 (Okla 1891), a case cited with approval by this court in *Ex Parte Stacey*, 45 Or 85, 87-88, 75 P 1060 (1904), (and decided after the *Ex Parte Bain*, 121 US 1, 7 S Ct 781, 30 L Ed 849 (1887), decision on which defendant principally relies), the Oklahoma Supreme Court cited *Ex Parte Watkins*, 28 US 193, 7 L Ed 650 (1830), for the proposition that substantive indictment defects do not deprive the trial court of subject matter jurisdiction. The Oklahoma Supreme Court also cited the *Bain* decision, but not for the proposition that indictment defects deprived a court of subject matter jurisdiction; rather, *Harlan* cited *Bain* solely for the general

proposition that only jurisdictional defects warranted habeas relief. *Harlan*, 27 P at 922.

The *In re Bonner* case cited by defendant further exemplifies the ambiguity of the federal case law. (Resp BOM at 26 (citing *In re Bonner*, 151 US 242, 14 S Ct 323, 38 L Ed 149 (1894)). In that case, also decided after *Bain*, the Court described a ruling that was outside the sentencing court's authority as "jurisdictional." *Bonner*, 151 US at 254-56.

But other portions of the decision strongly indicate that those sorts of deviations from the court's authority do not implicate the court's subject matter jurisdiction. In particular, *Bonner* made clear that, when a defendant's conviction is sound and the trial court's only action in "excess" of its jurisdiction lay in a sentencing ruling beyond its authority, the judgment was only void "to the extent of such excess[.]" *Id.* at 257. The Court contrasted *those* sorts of errors with the "rare" case in which "no correction can be made of the judgment" because "the court had under the law, no jurisdiction of the case—that is, *no right to take cognizance of the offense alleged*." *Id.* at 262 (emphasis added); *cf. Black v. Arizala*, 337 Or 250, 263, 95 P3d 1109 (2004) (quoting *Garner v. Alexander*, 167 Or 670, 675, 120 P2d 238 (1941), for the proposition that subject matter jurisdiction is the power of a court take "cognizance of the class of cases to which the one to be adjudicated belongs").

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In short, the pre-1908 federal case law fails to establish a federal jurisdictional indictment rule with sufficient clarity to control this court's analysis of the 1908 voters' intent. *See Guzman*, 366 Or at 33-34. Instead, the cases of this court discussed above, and the other cases and statutory framework discussed in the state's brief on the merits, more persuasively show that the voters would not have understood the 1908 amendment to enact any novel limitation on circuit court subject matter jurisdiction absent some more explicit indication to that effect.

In that regard, defendant also argues that the state misreads *Ex Parte Stacey*, but defendant is wrong. (Resp BOM at 29-30). *Stacey* involved a claim that the trial court lacked jurisdiction because the information failed to state facts constituting a crime. *Stacey*, 45 Or at 86. In rejecting that argument, this court explained that, even if an accusatory instrument fails to state facts constituting a crime, that does not affect the trial court's subject matter jurisdiction. *Id.* at 87-88. That supports the state's argument here, and provides much more persuasive context than the ambiguous federal case law on which defendant relies. And, as just discussed, the Oklahoma Supreme Court decision in *Harlan* that this court cited with approval in *Stacey* also supports the state's position, not defendant's. (*See* Resp BOM at 27-28 (suggesting otherwise)); *Harlan*, 27 P at 921 (citing *Ex Parte Watkins*, 28 US at 206, for the proposition that indictment defects do not deprive a court of subject matter jurisdiction, and

citing *Bain* solely for the general proposition that only jurisdictional defects warrant habeas relief).

In sum, defendant misreads the text and context of the 1908 amendment. The evidence shows that the voters intended that amendment to repeal the 1899 statute authorizing crimes to be charged by information, to allow crimes to be charged solely by indictment, and to insulate that requirement from legislative revision moving forward. The evidence fails to establish that the voters intended to go further and enact a novel limitation on the subject matter jurisdiction of Oregon's circuit courts over criminal cases.

C. The voters have not "ratified" *Huffman*.

Finally, defendant argues that, even if the 1908 voters did not intend to enact a jurisdictional limitation, the voters "ratified" the holding of *Huffman v. Alexander*, 197 Or 283, when they repealed and reenacted Article VII (Amended), section 5, in 1958 and 1974.[3] (Resp BOM at 40-45). Defendant generally acknowledges that both of those amendments were presented to voters as housekeeping amendments that made no substantive changes to the

[3] Defendant also suggests that the voters ratified *Huffman* when they rejected a proposed amendment in 1960 that did not purport to address circuit court jurisdiction but would have eliminated the indictment requirement and allowed all crimes to be charged by information. But absent circumstances not present here, this court generally declines to draw inferences from the failure to enact a law. *See State v. Supanchick*, 354 Or 737, 752 n 11, 323 P3d 231 (2014) (so noting) (citing *Berry v. Branner*, 245 Or 307, 311, 421 P2d 996 (1966)).

text of the Article VII (Amended), section 5. (Resp BOM at 40-42). Nevertheless, defendant contends that the voters' approval of those nonsubstantive amendments "ratified" *Huffman*'s holding. (Resp BOM at 43). To support that argument, he cites a 1929 decision of this court stating that, when the legislature repeals and reenacts a 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." (*Id.* (citing *Overland v. Jackson*, 128 Or 455, 463-64, 275 P 21 (1929)). In other words, defendant argues that, although the 1958 and 1974 amendments were *silent* as to the issue addressed in *Huffman*, this court should interpret that silence as a ratification of *Huffman*.

This court should reject that argument because it partakes of interpretive presumptions that this court has expressly disavowed. *See Farmers Ins. Co. v. Mowry*, 350 Or 686, 695-97, 261 P3d 1 (2011) (disavowing the related "rule of prior interpretation," which "posits that a judicial decision interpreting a statute becomes ratified by legislative silence and thus can only be changed by the legislature"). As this court explained in *Mowry*, interpreting enactments on the presumption that silence means acquiescence "is a legal fiction that assumes, usually without foundation in any particular case, that legislative silence is meant to carry a particular meaning—as relevant here, affirmation of the judicial decision at issue." *Id.* at 696. "In reality, the legislature may decline to address a judicial decision for any number of reasons, none of which

necessarily constitutes an endorsement of the decision's reasoning or result[.]" *Id.*

In rejecting that interpretive assumption, this court made clear that it "does not surrender its authority to reexamine a prior interpretation of a statute merely because the legislature has been silent on the issue." *Id.* This court should follow that same principle here, and decline defendant's invitation to surrender its authority to reexamine *Huffman* based on the questionable fiction that voters "ratified" the substantive holding of that case when they approved amendments that were silent as to the issue addressed in *Huffman* and expressly presented to them as nonsubstantive.[4]

CONCLUSION

For all the reasons stated above and in the state's brief on the merits, failure to follow the requirements of Article VII (Amended), section 5, of the Oregon Constitution reflects trial court error, and maybe sometimes even plain error, but it does not divest the trial court of subject matter jurisdiction over the case. As a result, a claim of error predicated on the failure to follow those requirements must either be preserved, or it must satisfy the standards

[4] This court cited *Overland*'s rule in its recent decision in *Guzman*, but only for the purpose of illustrating that interpretive presumptions about case law generally are applied to decisions of a court of last resort, rather than decisions of intermediate appellate courts. *Guzman*, 366 Or at 29. This court has not applied the *Overland* rule in resolving the merits of any case following *Mowry*.

governing plain error review. This court should reverse the Court of Appeals decision holding to the contrary and affirm the trial court's judgment.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on December 17, 2020, I directed the original Reply 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 4,995 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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