

Filed: September 12, 2013

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Respondent on Review,

V.

LEONARD LLOYD REINKE,

Petitioner on Review.

(CC 090130185; CA A144138; SC S059760)

On review from the Court of Appeals.*

Argued and submitted on May 3, 2012, at Portland Community College, Portland, Oregon. Resubmitted January 7, 2013.

Ernest G. Lannet, Chief Deputy Defender, Office of Public Defense Services, Salem, argued the cause and filed the briefs for petitioner on review. With him on the briefs was Peter Gartlan, Chief Defender.

Doug M. Petrina, Assistant Attorney General, Salem, argued the cause and filed the brief for respondent on review. With him on the brief were John R. Kroger, Attorney General, and Anna M. Joyce, Solicitor General.

Before Balmer, Chief Justice, and Kistler, Walters, Linder, and Landau, Justices.**

KISTLER, J.

The decision of the Court of Appeals and the judgment of the circuit court are affirmed.

*Appeal from Multnomah County Circuit Court, Richard C. Baldwin, Judge. 245 Or App 33, 260 P3d 820 (2011).

**Brewer and Baldwin, JJ., did not participate in the consideration or decision of this case.

1 KISTLER, J.

2 Ordinarily, a trial court may impose up to a 10-year prison sentence on
3 persons convicted of second-degree kidnapping. *See* ORS 161.605(2). However, if the
4 court or a jury makes certain factual findings, the court may sentence a person convicted
5 of second-degree kidnapping as a dangerous offender and impose a 30-year prison
6 sentence. *See* ORS 161.725(1)(b) (authorizing the imposition of that sentence). The
7 question in this case is whether the Oregon Constitution requires that the facts necessary
8 to impose a dangerous offender sentence be found by the grand jury and pleaded in the
9 indictment. Following this court's decisions, the trial court held that it does not, and the
10 Court of Appeals affirmed in a per curiam opinion. *See State v. Reinke*, 245 Or App 33,
11 260 P3d 820 (2011). We allowed defendant's petition for review and now affirm the
12 Court of Appeals decision and the trial court's judgment.

13 The details of the crime that gave rise to this case are not material to the
14 issues that defendant raises on review. Suffice it to say that defendant kidnapped the
15 victim as part of an effort to persuade her not to testify against one of his friends. The
16 friend had terrorized, raped, and sodomized the victim, and the victim feared that
17 defendant would use a gun to harm her during the kidnapping. As a result of defendant's
18 acts, the grand jury indicted him for, among other things, second-degree kidnapping.
19 Before trial, the state notified defendant that it would ask the court to sentence him as a
20 dangerous offender if he was convicted of second-degree kidnapping. At trial, defendant
21 waived his right to a jury, and the trial court convicted him of that crime in addition to
22 other crimes.

1 At the sentencing hearing, defendant did not dispute that the trial court
2 could sentence him to up to 10 years' imprisonment for the crime of second-degree
3 kidnapping. He argued, however, that the state could not seek a 30-year dangerous
4 offender sentence because the grand jury had not found the facts necessary to impose that
5 sentence. In defendant's view, under the state constitution, those sentencing facts were
6 "elements" of the offense that had to be found by the grand jury and pleaded in the
7 indictment. Relying on this court's cases, the trial court disagreed. The court ruled that
8 the state constitution only required the grand jury to find and plead the elements of
9 second-degree kidnapping. The trial court proceeded to find the factual prerequisites for
10 imposing a dangerous offender sentence and sentenced defendant to slightly more than 23
11 years in prison. The Court of Appeals affirmed the trial court's judgment. We allowed
12 defendant's petition for review to consider whether sentence enhancement facts are
13 elements of an offense that, as a matter of state constitutional law, the grand jury must
14 find and the indictment must allege.¹

15 Before considering that issue, we first set out the statutes that underlie
16 defendant's constitutional challenge. ORS 163.225 defines the crime of second-degree
17 kidnapping. A person commits that crime if, "with intent to interfere substantially with
18 another person's liberty, and without consent or legal authority," the person "[t]akes [the

¹ In Oregon, the state may charge a defendant with a felony by an indictment issued by the grand jury, by a prosecutor's information if the defendant waives indictment, or by a prosecutor's information followed by a preliminary hearing. *See* Or Const, Art VII (Amended), § 5. Because the state charged defendant by indictment, we refer only to that charging instrument.

1 other] person from one place to another" or "[s]ecretly confines the person in a place
2 where the person is not likely to be found." ORS 163.225. Second-degree kidnapping is
3 a Class B felony, which carries with it a 10-year maximum sentence. *See* ORS
4 163.225(3) (classifying second-degree kidnapping as a Class B felony); ORS 161.605(2)
5 (authorizing 10-year maximum sentences for Class B felonies).

6 A separate statute authorizes trial courts to impose dangerous offender
7 sentences if a defendant is convicted of a felony and certain criteria are met. ORS
8 161.725(1). As applied here, that statute permitted the trial court to sentence defendant
9 as a dangerous offender and impose up to a 30-year sentence if it found that
10 (1) "defendant [w]as being sentenced for a felony that seriously endangered the life or
11 safety of another"; (2) defendant previously had been convicted of a separate felony; and
12 (3) "defendant [w]as suffering from a severe personality disorder indicating a propensity
13 toward crimes that seriously endanger the life or safety of another." ORS 161.725(1)(b).²

14 We refer to facts that authorize the imposition of a greater sentence than
15 that authorized by the underlying offense (in this case, the three facts necessary to impose
16 a dangerous offender sentence) as "sentence enhancement facts." State statutes require
17 that prosecutors give defendants timely written notice of sentence enhancement facts.
18 ORS 136.765. They permit but do not require those facts to be found by the grand jury
19 and pleaded in the indictment. *Id.* In this case, the grand jury did not find any sentence

² The criteria for sentencing a defendant as a dangerous offender differ based on the type of felony for which the defendant has been convicted. Because defendant was convicted of a Class B felony, the criteria set out in ORS 167.725(1)(b) apply.

1 enhancement facts. Rather, as noted above, the state gave defendant separate written
2 notice before trial that it intended to ask the court to impose a dangerous offender
3 sentence and that it would seek to prove the applicable sentence enhancement facts at a
4 separate sentencing hearing if the jury found defendant guilty of second-degree
5 kidnapping.

6 On review, defendant does not dispute that the state gave him timely
7 written notice that it intended to seek a dangerous offender sentence, as ORS 136.765
8 requires. Defendant also does not dispute that he knowingly waived his right to have a
9 jury decide the facts necessary to impose that sentence. Finally, he does not dispute that
10 the record permitted the trial court to find beyond a reasonable doubt each of the facts
11 necessary to impose a dangerous offender sentence. Defendant's dispute centers on a
12 narrower issue. He argues that, under the Oregon Constitution, the trial court could not
13 consider whether to impose a dangerous offender sentence unless the grand jury first
14 found probable cause to believe that the factual prerequisites for imposing that sentence
15 existed and alleged those facts in the indictment.

16 This is not the first time that we have considered this issue. In 1988, the
17 court rejected the defendant's argument that, because Article I, section 11, of the Oregon
18 Constitution requires that some facts related to a defendant's sentence be found by the
19 jury, the state constitution also requires that those facts be found by the grand jury and
20 pleaded in the indictment. *State v. Wagner*, 305 Or 115, 171-72, 752 P2d 1136 (1988),
21 *vac'd and rem'd on other grounds*, 492 US 914, 109 S Ct 3235, 106 L Ed 2d 583 (1989).
22 *Wagner* held that, under state law, an indictment must give a defendant notice of the

1 elements of the crime he or she is charged with committing. *Id.* The indictment need
2 not, however, give a defendant notice of any sentence enhancement facts that may
3 increase the punishment for committing that crime. *Id.*

4 For some time, that state constitutional decision went unquestioned.
5 However, in the mid-1990s, federal challenges to the pleading and proof of sentence
6 enhancement facts began to be made. In *Almendarez-Torres v. United States*, 523 US
7 224, 228, 118 S Ct 1219, 140 L Ed 2d 350 (1998), the United States Supreme Court
8 reiterated that, as a matter of federal constitutional law, an indictment in federal court
9 "must set forth each element of the crime that it charges." The Court explained, however,
10 that an indictment "need not set forth factors relevant only to the sentencing of an
11 offender found guilty of the charged crime." *Id.* In *Almandarez-Torres*, the Court
12 applied a five-factor test to determine whether a fact that enhanced a defendant's sentence
13 was an element of the offense or a sentencing factor. *Id.* at 242-43. Two years later, the
14 Court stated a different test to distinguish elements from sentencing factors for the
15 purposes of the federal constitution. *Apprendi v. New Jersey*, 530 US 466, 490, 120 S Ct
16 2348, 147 L Ed 2d 435 (2000). The Court held in *Apprendi* that, under the Sixth and
17 Fourteenth Amendments, "[o]ther than the fact of a prior conviction, any fact that
18 increases the penalty for a crime beyond the prescribed statutory maximum must be
19 submitted to a jury, and proved beyond a reasonable doubt." *Id.*

20 The decision in *Apprendi* arose out of a state criminal prosecution, and the
21 Court was careful to note in *Apprendi* that the Fourteenth Amendment had "not been
22 construed to include the Fifth Amendment right to 'presentment or indictment of a Grand

1 Jury' that was implicated in our recent decision in *Almendarez-Torres v. United States*,
2 523 US 224 (1998)." 530 US at 477 n 3. The Court accordingly did not hold in *Apprendi*
3 that the Fifth Amendment requires states to include sentence enhancement facts in the
4 indictment. *Accord Ring v. Arizona*, 536 US 584, 122 S Ct 2428, 153 L Ed 2d 556
5 (2002).

6 After *Apprendi*, some defendants argued in this court that we should hold
7 that the federal constitution requires states to include sentence enhancement facts in
8 indictments. Given *Apprendi*'s reasoning, we explained in *State v. Cox*, 337 Or 477, 498-
9 500, 98 P3d 1103 (2004), that the defendant's unpreserved federal constitutional claim
10 raising that issue did not constitute plain error and did not reach it. Shortly after this
11 court decided *Cox*, another case squarely presented the issue, and we explained that,
12 "[a]lthough *Apprendi* requires that the jury find the facts that would support an enhanced
13 sentence, we do not agree that *Apprendi* requires, as a matter of state criminal procedure,
14 that enhancement factors be set out in the indictment." *State v. Sawatzky*, 339 Or 689,
15 698, 125 P3d 722 (2005). The court explained that neither *Apprendi* nor *Blakely v.*
16 *Washington*, 542 US 296, 124 S Ct 2531, 159 L Ed 2d 403 (2004), had held that the
17 Grand Jury Clause of the Fifth Amendment applies to the states and that the relevant
18 question under state law is whether the indictment sets out the elements of the offense, as
19 defined by the state legislature. *Id.*; *cf. Hurtado v. California*, 110 US 516, 534-35, 4 S
20 Ct 111, 28 L Ed 232 (1884) (holding that due process does not require states to proceed
21 by indictment in felony cases).

22 After *Sawatzky*, some defendants returned to the argument that this court

1 had considered and rejected in *Wagner*. They argued that, even if the federal constitution
2 does not require that state indictments include sentence enhancement facts, the state
3 constitution imposes that requirement. Those defendants argued, in effect, that we should
4 interpret the state constitution the same way that the federal courts had interpreted the
5 Grand Jury Clause of the Fifth Amendment; that is, we should hold that, as a matter of
6 state constitutional law, sentence enhancement facts are elements of the offense that must
7 be pleaded in the indictment. This court has consistently rejected those arguments and
8 has adhered to its holding in *Wagner* that, as a matter of state constitutional law, the
9 legislature defines the elements of the offense that must be pleaded in an indictment and
10 that, as a matter of legislative intent, a crime does not include sentence enhancement
11 facts. *See, e.g., State v. Johnson*, 340 Or 319, 352, 131 P3d 173 (2006) (rejecting the
12 argument that, because the state and federal constitutions require the jury to find certain
13 sentencing factors, the grand jury must do so); *State v. Oatney*, 335 Or 276, 292-97, 66
14 P3d 475 (2003) (same), *cert den*, 540 US 1151 (2004); *State v. Compton*, 333 Or 274,
15 295-96, 39 P3d 833 (same), *cert den*, 537 US 841 (2002).

16 Defendant asks us to revisit those state constitutional holdings. He
17 contends that Article VII (Amended), section 5, and Article I, section 11, of the Oregon
18 Constitution require that sentence enhancement facts be found by the grand jury and
19 pleaded in the indictment. He acknowledges that, for us to agree with him, we would
20 have to overrule our decision in *Wagner* and all our cases that have followed it. He
21 argues, however, that the parties in those cases did not brief the state constitutional issues
22 fully, nor did this court undertake the thorough textual and historical analysis of those

1 constitutional provisions that we have undertaken in other cases. *See Priest v. Pearce*,
2 314 Or 411, 415-16, 840 P2d 65 (1992) (explaining the methodology for interpreting
3 original constitutional provisions). In this case, defendant and the state have engaged in
4 an extensive analysis of those provisions, and we turn to the question whether, in light of
5 the text of Article VII (Amended), section 5, and Article I, section 11, the history of those
6 provisions, and our cases interpreting them, *Wagner* erred in holding that, under the
7 Oregon Constitution, the grand jury need not find sentence enhancement facts or plead
8 them in the indictment.

9 I. ARTICLE VII (AMENDED), SECTION 5

10 The current version of Article VII (Amended), section 5, consists of seven
11 subsections that, among other things, authorize the legislature to provide for the selection
12 of jurors and grand jurors, specify the number of grand jurors who comprise the grand
13 jury, and determine the number of jurors necessary to render a verdict in civil cases. *See*,
14 *e.g.*, Or Const, Art VII (Amended), § 5(1), (2), and (7). Three subsections bear on the
15 issue that defendant raises in this case. Subsection 3 is the state analogue of the Grand
16 Jury Clause of the Fifth Amendment. It provides that "a person shall be charged in a
17 circuit court with the commission of any crime punishable as a felony only on indictment
18 by a grand jury." *Id.* § 5(3).³ Subsections 4 and 5 state exceptions to that rule.
19 Subsection 4 provides that the district attorney may charge a person with "a crime

³ The Grand Jury Clause of the Fifth Amendment similarly provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury[.]" US Const, Amend V.

1 punishable as a felony" by information if the person appears in circuit court and waives
2 indictment. *Id.* § 5(4). Subsection 5 provides that the district attorney may charge a
3 person by information if, after a preliminary hearing before a magistrate, "the person has
4 been held to answer upon a showing of probable cause that a crime punishable as a felony
5 has been committed and that the person has committed it." *Id.* § 5(5).

6 Article VII (Amended), section 5, requires the state to proceed by an
7 indictment or an information if it wishes to charge a "crime punishable as a felony." As
8 we understand it, defendant's argument under that section turns on the proposition that
9 the constitutional phrase "a crime punishable as a felony" refers not only to the elements
10 of the underlying crime but also to any fact that authorizes an enhanced sentence for that
11 crime; that is, he views the word "crime" as referring to both the elements of the offense
12 and any sentence enhancement fact that the prosecutor invokes as a basis for seeking a
13 greater sentence.

14 The people enacted the current version of Article VII (Amended), section 5,
15 in 1974 after the legislature referred an amendment to that section to the voters. *See Or*
16 *Laws 1973, SJR 1 (referring the measure).*⁴ We interpret an initiated or referred
17 constitutional amendment the same way that we interpret a statute; that is, we look to the
18 text, context, and legislative history of the amendment to determine the intent of the
19 voters in providing that "a person shall be charged * * * with a crime punishable as a

⁴ The legislatively referred measure repealed the existing text of section 5 and replaced it with the current text of that section. *See Or Laws 1973, SJR 1 (referring the measure).*

1 felony only on indictment by a grand jury." *See State v. Harrell*, 353 Or 247, 254-55,
2 297 P3d 461 (2013) (referred constitutional amendments); *Ecumenical Ministries v.*
3 *Oregon State Lottery Comm.*, 318 Or 551, 559-60, 871 P2d 106 (1994) (initiated
4 constitutional amendments).

5 The text of subsection 5(3) is difficult to square with defendant's argument.

6 Ordinarily, the word "crime" means:

7 "an act or the commission of an act that is forbidden or the omission of a
8 duty that is commanded by a public law of a sovereign state to the injury of
9 the public welfare and that makes the offender liable to punishment by that
10 law in a proceeding brought against him by the state by indictment,
11 information, complaint, or similar criminal procedure."

12 *Webster's Third New Int'l Dictionary* 536 (unabridged ed 1971); *see Dept. of Rev. v.*
13 *Faris*, 345 Or 97, 101, 190 P3d 364 (2008) (looking to the dictionary definition for the
14 ordinary meaning of a word). The acts that the criminal code forbids are the elements of
15 second-degree kidnapping, as set out in ORS 163.225. To paraphrase the court's
16 reasoning in *Wagner*, a defendant commits the "crime" of second-degree kidnapping
17 without regard to whether he or she is sentenced as a dangerous offender or not. It
18 follows that the elements of the crime of kidnapping are all that the text of Article VII
19 (Amended), section 5(3), requires the grand jury to find.⁵

20 The context leads to the same conclusion. Context includes "the
21 preexisting common law and the statutory framework within which the law was enacted."

⁵ The phrase that modifies the noun "crime" -- "punishable as a felony" -- adds nothing to defendant's argument. It simply makes clear that, as used in Article VII (Amended), section 5(3), the term "crime" refers only to felonies.

1 *Klamath Irrigation District v. United States*, 348 Or 15, 23, 227 P3d 1145 (2010).

2 Article VII (Amended), section 5, has a lengthy history. When the people first adopted
3 the Oregon Constitution, they provided that,

4 "The Legislative Assembly shall so provide that the most competent of the
5 permanent citizens of the county shall be chosen for jurors; and out of the
6 whole number in attendance at the Court, seven shall be chosen by lot as
7 grand Jurors, Five of whom must concur to find an indictment: But the
8 Legislative Assembly may modify or abolish grand Juries."

9 Or Const, Art VII (Original), § 18 (1857). As originally enacted, the grand jury provision
10 did not specify what the grand jury had to find to indict a defendant. The original
11 provision, however, authorized the legislature to modify or abolish grand juries. To the
12 extent that the original provision sheds any light on the issue that defendant raises, it
13 suggests that the legislature's power to abolish the grand jury included the lesser power to
14 define both how the grand jury functioned and what it needed to find to issue an
15 indictment.

16 In 1899, the legislature authorized district attorneys to file a prosecutor's
17 information rather than an indictment "charging any person or persons with the
18 commission of any crime defined and made punishable by any of the laws of this state."
19 Or Laws 1899, § 1, p 99. The legislative amendment departed from the common law in
20 that it permitted the use of an information, without more, to charge a felony. *See*
21 *Hurtado*, 110 US at 534-35 (holding that the federal constitution permitted states to use a
22 prosecutor's information to charge felonies in derogation of the common law).⁶

⁶ A prosecutor's information was a statement, usually sworn, that had not been tested either by the grand jury or the court and was not sufficient at common law to

1 In 1908, the people voted to amend Article VII (Original), section 18, and
2 made a grand jury indictment mandatory for both crimes and misdemeanors. See Or
3 Laws 1909, p 12. As amended, Article VII (Original), section 18 (1909), provided:

4 "No person shall be charged in any Circuit Court with the commission of
5 any crime or misdemeanor defined or made punishable by any of the laws
6 of this State, except upon indictment found by a grand jury. *Provided,*
7 *however,* that any District Attorney may file an amended indictment
8 whenever an indictment has, by a ruling of the court, been held to be
9 defective in form."

10 Between 1908 and 1973, the people amended Article VII three more times.⁷ The phrase
11 relevant to this case "crime or misdemeanor" appeared in the 1908 amendment and
12 remained unchanged during that period. In 1908, the phrase "crime or misdemeanor"
13 referred to the prohibited acts that constitute those offenses. *See Webster's Int'l*
14 *Dictionary* 344 (unabridged ed 1900) (defining "crime" as "[a]ny violation of law"); *id.* at
15 929 (defining "misdemeanor" as "[a] crime less than a felony"). Nothing in the
16 contemporaneous definitions of those terms suggests that the grand jury had to find any

charge a felony. *See* Joel Prentiss Bishop, 1 *Commentaries on the Law of Criminal Procedure* §§ 141-44 (1872). Under the current version of Article VII (Amended), section 5, a district attorney can charge a felony by information only if the defendant either waives indictment or the information is followed by a preliminary hearing at which a magistrate determines that probable cause exists to believe that the defendant committed the charged crime.

⁷ In 1910, the people adopted Article VII (Amended). *See* Or Laws 1911, p 8. Article VII (Amended), section 5(5) (1911), incorporated the wording of Article VII (Original), section 18 (1909). *See id.* In 1927, the people amended Article VII (Amended), section 5(5), by adding a second proviso that authorized a defendant to waive indictment and proceed by information. Or Laws 1929, pp 5-6. Finally, in 1957, the people repealed Article VII (Original) and made minor grammatical changes to Article VII (Amended), section 5(5). Or Laws 1959, p 6.

1 sentence enhancement facts.

2 The same conclusion follows from the participial phrase "defined or made
3 punishable by the laws of this state" that modifies "crime or misdemeanor." The "laws of
4 this state" that define or make punishable crimes or misdemeanors are the criminal laws
5 that define the prohibited acts. At least, that is the ordinary reading of the text of the
6 1908 amendment, which serves as context for the 1974 amendment to Article VII
7 (Amended), section 5.

8 This court's cases have confirmed that ordinary reading of Article VII
9 (Amended), section 5. *See State v. Hicks*, 213 Or 619, 641, 325 P2d 794 (1958). In
10 *Hicks*, the defendant argued that Article VII (Amended), section 5 (1929), required that
11 sentence enhancement facts be pleaded in the indictment. *Id.* at 640-41. This court
12 rejected that argument, reasoning:

13 "The words 'charged * * * with the commission of any crime * * *' refer to
14 the conventional charge accusing a defendant of criminal acts for the
15 commission of which the state seeks to impose punishment. This court has
16 uniformly construed that provision as being inapplicable to an information
17 under the Habitual Criminal Act [which provides for enhanced sentences
18 for defendants with prior convictions]. If such had not been the
19 construction [of Article VII (Amended), section 5], the [habitual criminal]
20 act could never have been applied in this or in many other states."

21 *Id.* at 641 (ellipses in original). This court squarely held in *Hicks* that Article VII
22 (Amended), section 5 (1929), required only that the grand jury determine that there is
23 probable cause to find the elements of the "conventional charge." According to *Hicks*,
24 that section did not also require the grand jury to find sentence enhancement facts.
25 *Hicks's* interpretation of the word "crime" in Article VII (Amended), section 5 (1929),

1 forms the backdrop against which the 1974 amendment to that article was adopted and
2 informs the meaning of the word "crime" in the 1974 amendment. *See Mastriano v.*
3 *Board of Parole*, 342 Or 684, 693, 159 P3d 1151 (2007).

4 A different strand of case law also informs the understanding of the grand
5 jury provision that the voters adopted in 1974. That case law addresses the relationship
6 among the common law, the legislature's authority to provide what an indictment must
7 contain, and Article VII (Amended), section 5. At common law, if the punishment for a
8 crime was enhanced, then the grand jury had to find both the elements of the crime and
9 the sentence enhancement facts. *See State v. Waterhouse*, 209 Or 424, 429-31, 307 P2d
10 327 (1957) (describing the common-law practice). As early as 1824, however, the
11 Massachusetts Supreme Judicial Court held that the legislature could vary the common
12 law and provide that sentence enhancement facts need not be found by the grand jury and
13 included in the indictment. *See Ross's Case*, 19 Mass 165, 171 (1824). It was sufficient,
14 the Massachusetts court held, to give the defendant notice of those sentencing facts by a
15 different means and prove them at a separate sentencing hearing. *Id.* More specifically,
16 the court rejected the defendant's argument that sentence enhancement facts (in that case,
17 a prior conviction) had to be included in the indictment. *See id.* and n 2.

18 Consistently with *Ross's Case*, this court and other courts held before 1974
19 that state legislatures retain the power to vary the common law and provide for notice of
20 sentence enhancement facts separately from the indictment. *See, e.g., State v. Smith*, 128
21 Or 515, 522-23, 273 P 323 (1929); *People v. Gowasky*, 244 NY 451, 155 NE 737 (1929);
22 *cf. Graham v. West Virginia*, 224 US 616, 625-29, 32 S Ct 583, 56 L Ed 917 (1912)

1 (following the reasoning in *Ross's Case* and holding that a state statute similar to the one
2 in *Ross's Case* did not violate the Due Process Clause). However, if the legislature failed
3 to specify that sentence enhancement facts need not be pleaded in the indictment, then
4 this court inferred that the legislature "intended that the common-law procedure should
5 govern." *Waterhouse*, 209 Or at 434; *cf. State v. Newlin*, 92 Or 589, 182 P 133 (1919);
6 *State v. Newlin*, 92 Or 597, 182 P 135 (1919).⁸ Specifically, the court concluded that, if
7 the legislature did not provide for notice of sentence enhancement facts by some means
8 other than by indictment, then the sentence enhancement fact had to be pleaded in the
9 indictment. That was so whether the sentence enhancement fact was offense or offender
10 specific. *See State v. Blacker*, 234 Or 131, 135-36, 380 P2d 789 (1963) (applying the
11 same rule to offense-specific sentence enhancement facts).

12 There is a suggestion in defendant's brief that, when the people adopted
13 Article VII (Amended), section 5, in 1974, they would have understood that sentence
14 enhancement facts that went to the offender's character need not be pleaded in the
15 indictment, but that sentence enhancement factors that went to the nature of the offense
16 must be pleaded in the indictment. None of the cases decided before 1974 drew that
17 distinction, however. And, as noted, this court applied the same legislative presumption
18 in *Blacker* to offense-specific enhancement facts that it applied to offender-specific

⁸ The court did not explain its reasoning in either of the *Newlin* cases, but the statute authorizing enhanced sentences for prior convictions for selling intoxicating liquor did not specify that the state need not plead the prior conviction in the indictment, *see* Oregon Laws, title XIX, ch VIII, § 2224-61 (1920), and the court held that the failure to include the prior convictions in the indictment precluded the state from seeking an enhanced punishment based on the defendant's prior conviction.

1 enhancement facts; that is, it held that an offense-specific enhancement fact had to be
2 pleaded in the indictment unless the legislature had provided otherwise. 234 Or at 135-
3 36.⁹

4 When the people adopted the current version of Article VII (Amended),
5 section 5 in 1974, the state of the law in Oregon and elsewhere was that the common law
6 required that sentence enhancement facts be pleaded in an indictment, but the legislature
7 had the power to specify otherwise. The question whether the grand jury had to find and
8 plead sentence enhancement facts turned on legislative intent. If the legislature had
9 manifested its intent to depart from the common-law rule, then the grand jury did not
10 have to find or plead any sentence enhance facts. Rather, to borrow the phrase that this
11 court used in *Hicks*, the grand jury had to find and plead only the elements of the
12 "conventional charge." The context demonstrates that, when the people adopted the
13 current version of Article VII (Amended), section 5, they would have understood that
14 whether a sentence enhancement fact was an element of the crime that had to be pleaded
15 in the indictment was a question of legislative intent and turned on whether the legislature

⁹ Defendant also appears to rely on *State v. Hoffman*, 236 Or 98, 385 P2d 741 (1963), to support a different view of the pre-1974 case law. His reliance on *Hoffman* is misplaced. In that case, the court recognized that, at common law, "a prior conviction was regarded as part of an indictment which must be established when the Crown sought to invoke an enhanced penalty for the crime charged." *Id.* at 104-05 (citing *Blacker* and *Waterhouse*). It recognized, however, that the legislature could and had provided that those sentence enhancement facts were not part of the crime and need not be pleaded in the indictment. *Id.* In reaching that conclusion, the court did not distinguish between different types of sentence enhancement facts. Rather, what mattered in the court's analysis was that those sentence enhancement facts were not "acts declared to be criminal by legislative action." *Id.* at 107.

1 had provided a means of giving notice of those facts other than by indictment.

2 Not only is the context at odds with defendant's interpretation of Article VII
3 (Amended), section 5, but the legislative history of the current version of that section
4 does not support defendant's position. As noted, the people adopted the current version
5 of section 5 in 1974 after the legislature referred a measure to the people. The official
6 explanation accompanying the measure stated that its purpose was to give prosecutors
7 greater latitude to charge by information. *See* Official Voters' Pamphlet, General
8 Election, Nov 5, 1974, 13. The explanation told the voters that the new procedure would
9 ensure that there is probable cause that "a felony has been committed." *Id.* Similarly, the
10 ballot title for the measure explained that a grand jury indictment was not necessary if "a
11 magistrate finds at a preliminary hearing that there is probable cause to believe that the
12 person in fact committed a felony." *Id.* at 16. Both the ballot title and the official
13 explanation of the measure equated the word "crime" in the text of the proposed
14 amendment with the word "felony." The term felony ordinarily refers to specific
15 offenses, such as second-degree kidnapping, not enhanced punishment authorized for
16 those offenses.

17 Considering the text, context, and legislative history of Article VII
18 (Amended), section 5, we conclude that section 5 requires the grand jury to find and
19 plead only the elements of the crime as defined by the legislature. Article VII
20 (Amended), section 5, does not contemplate, as a matter of state constitutional law, a
21 "crime" that differs from the conventional crime that the legislature has defined. To be
22 sure, this court's earlier cases state that, when the legislature has not provided some other

1 means by which defendants may be notified of sentence enhancement facts, we may infer
2 that the legislature intended that the grand jury would find and the indictment would
3 plead those facts. That inference does not operate as a matter of constitutional law;
4 rather, it reflects an understanding of the legislature's intent. And it does not help
5 defendant in this case. As noted, the legislature has provided that a prosecutor need not
6 plead sentence enhancement facts in the indictment. ORS 136.765. Timely written
7 notice will suffice. *Id.* Defendant's constitutional challenge under Article VII
8 (Amended), section 5, fails.

9 II. ARTICLE I, SECTION 11

10 Defendant also argues that the grand jury's failure to find and plead the
11 facts necessary to impose a dangerous offender sentence violates Article I, section 11.
12 Defendant relies on two clauses in Article I, section 11, to support that argument. *See Or*
13 *Const, Art I, § 11.* One of those clauses, the Notice Clause, provides a person accused of
14 a crime the right "to demand the nature and cause of the accusation against him." *Id.*
15 Another clause, the Jury Trial Clause, guarantees the accused "the right to public trial by
16 an impartial jury" in all criminal prosecutions. *Id.* Those two clauses concern distinct
17 rights, and we address defendant's arguments under each clause separately.

18 A. *The Notice Clause of Article I, section 11*

19 At common law, an indictment served to put a defendant on notice of the
20 charges against him or her. *See* Wayne R. LaFave, Jerold H. Israel, Nancy J. King, and
21 Orin S. Kerr, 5 *Criminal Procedure* § 19.1(a) (3d ed 2007). Initially, common-law
22 pleading requirements were fairly straightforward. *Id.* (discussing fourteenth-century

1 pleading requirements). Later, they became technical and arcane. *Id.* § 19.1(b). Indeed,
2 one author described a common-law indictment as a "lengthy and tortuous document"
3 "replete with archaic terminology and ritualistic formulae * * * [which] served more to
4 mystify than inform the defendant." *Id.* § 19.1(a) (quoting Note, 53 Harv L Rev 122, 122
5 (1939)). As a result, some courts in the mid-nineteenth century began to relax the
6 common-law pleading rules. *Id.* § 19.1(b). However, constitutional clauses, such as the
7 Notice Clause in Article I, section 11, which gives a defendant the right "to demand the
8 nature and cause of the accusation against him," limit the extent to which courts and the
9 legislature can simplify what an indictment must contain. *See State v. Smith*, 182 Or 497,
10 501-02, 188 P2d 998 (1948).

11 This court explained in *Smith* that the Notice Clause in Article I, section 11,
12 permits the simplification of common-law pleading rules but does not "authorize the
13 omission from an indictment of allegations necessary to describe a specific crime." *Id.* at
14 501 (citing *Commonwealth v. Freelove*, 150 Mass 66, 22 NE 435 (1889)). In *Smith*, the
15 question was whether the indictment was sufficiently particular, and this court held that
16 the defendant's statutory opportunity to demur to the indictment and "question [its]
17 sufficiency * * * as to definiteness and certainty meets * * * the requirements of the bill
18 of rights in this respect"; that is, the procedural opportunity to demur to the indictment
19 was sufficient to satisfy the constitutional right of an accused to demand notice of the
20 nature and cause of the accusations against him or her. *Id.* at 507.

21 The court in *Smith* did not have occasion to address the issue defendant
22 raises here -- whether sentence enhancement facts are "allegations necessary to describe a

1 specific crime" within the meaning of the Notice Clause of Article I, section 11. *See*
2 *Smith*, 182 Or at 501 (using that phrase to describe what the constitution requires an
3 indictment to contain). Defendant relies on two passages from Bishop's 1895 treatise on
4 criminal procedure to show that they are. One passage on which defendant relies
5 addressed common-law pleading requirements. The other passage referred to clauses
6 similar to the one in Article I, section 11, that give an accused the right to be informed of
7 the nature and cause of the accusation.¹⁰

8 Defendant's argument based on Bishop's treatise rests on three premises,
9 each of which is essential to his conclusion. The first premise is that the passages from
10 Bishop on which defendant relies refer to sentence enhancement facts rather than facts
11 that distinguish one degree of a crime from another. The second premise is that the
12 Notice Clause of Article I, section 11, incorporates the common-law pleading
13 requirements described in Bishop's treatise. The third premise is that the Notice Clause,
14 as defendant interprets it, survived the 1974 amendment to Article VII (Amended),
15 section 5. We consider those issues in turn.

16 Defendant relies on statements from Bishop's treatise on criminal procedure
17 that the common law required that an indictment contain "every fact which is legally
18 essential to the punishment to be inflicted." *See* Joel Prentiss Bishop, 1 *Commentaries on*

¹⁰ Although defendant states that the constitutional passage he quotes is from Bishop's 1858 treatise on substantive criminal law, the passage is not found in that treatise but comes instead from Bishop's 1895 treatise on criminal procedure. *See* Joel Prentiss Bishop, 1 *New Criminal Procedure* § 88 (1895).

1 *the Law of Criminal Procedure* §§ 77, 81, 84, 88 (1872).¹¹ For example, Bishop wrote:

2 "[T]he common law requires each and every individual thing which itself
3 or a statute has made an element in the wrong *upon which the punishment is*
4 *based*, to be alleged in the indictment. The court, in adjudging the
5 punishment, -- or the jury, in assessing it, as is done in some of our States,
6 -- can take into its consideration nothing except what is specifically charged
7 in the indictment."

8 *Id.* § 84 (summarizing two cases previously discussed) (emphasis added). To prove that
9 proposition, Bishop discussed two cases in which the English courts had held that an
10 indictment must specify the facts on which the crime and the increased punishment
11 depend. *See Criminal Procedure* §§ 82-83. The two cases that Bishop discussed suggest
12 that his statement may not mean as much as defendant perceives.

13 In one case, a statute divided the crime of burglary into two degrees. *Id.*
14 § 83. The higher degree of the crime, which Bishop characterized as the "first degree of
15 burglary," required proof of breaking and entering a dwelling house and, while inside,
16 striking an inhabitant. *Id.* Bishop explained that the indictment in the case was deficient
17 because it alleged that the defendant had broken and entered into a house and had struck
18 "D. James" when, in fact, the person whom the defendant had struck was named Jones,
19 not James. *Id.*

20 Two propositions follow from Bishop's description of that case. First, it

¹¹ The 1872 and 1895 versions of Bishop's treatise differ in minor respects. To the extent that either version of those treatises provides an insight into the framers' intent, the 1872 treatise is closer in time and thus more relevant. Accordingly, we refer to the 1872 version of Bishop's treatise in considering defendant's argument. As noted below, an 1866 version of Bishop's treatise exists that differs from the 1872 version; it is closer in time and provides even less support for defendant's argument.

1 appears that the offense that the indictment charged (first-degree burglary) was a separate
2 offense from the lesser degree of the crime. The lower degree of the crime consisted of
3 breaking and entering, and the higher degree consisted of breaking, entering, and striking
4 an inhabitant. To say that an indictment must allege all the elements of a separate offense
5 that carries a greater punishment is unexceptional and does not suggest, as defendant
6 concludes, an intent to require that sentence enhancement facts be pleaded in addition to
7 the elements of the offense. Second, the deficiency in the indictment that Bishop
8 identified was not the failure to allege an element of the offense, much less the failure to
9 allege a sentence enhancement fact; rather, the deficiency was a variance between the
10 facts alleged and proved. Although the statement from Bishop appears, at first blush, to
11 support defendant's position, one of the cases on which that statement is based suggests
12 that it may mean less than first appears.

13 The other case that Bishop discusses is to the same effect. *See id.* § 82
14 (discussing *King v. Monteth*, 168 Eng Rep 452).¹² The defendant in *Monteth's* case was
15 charged with the crime of assault with intent to rob. *Monteth*, 168 Eng Rep at 452. That
16 crime, as described in the decision, was a separate offense that carried with it a greater
17 punishment than assault. *Id.* at 452-53. The problem with the indictment, according to
18 the decision, was that it omitted an allegation that Monteth had acted with force and
19 violence. As a result, the indictment alleged an assault with an intent to steal rather than
20 an assault with an intent to rob. *Id.* Because the crime with which Monteth was charged,

¹² Bishop takes the description of *Monteth's* case from an English treatise, *Russell on Crimes*. *See Criminal Procedure* § 82.

1 as the decision described it, was a separate offense that carried a greater punishment, the
2 principle that Bishop drew from it again appears unremarkable: If a separate offense
3 carries a greater punishment, the indictment must allege all the elements of that offense.

4 Having discussed common-law requirements, Bishop stated that the federal
5 constitution followed the common law. *Criminal Procedure* § 88. He then mentioned
6 various federal constitutional clauses, many of which do not appear to have anything to
7 do with what the grand jury must find or the indictment must plead. *See id.* Among the
8 clauses he cited, however, was the clause in the Sixth Amendment that provides that "in
9 all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the
10 nature and cause of the accusation." *Id.* Bishop concluded that that clause and similar
11 state constitutional clauses are:

12 "full and complete guarantees, to all persons held for crimes of whatever
13 sort, that, before they shall be convicted, there shall be an allegation made
14 against them of every element of crime which the law makes essential to
15 the punishment to be inflicted."

16 *Id.* Read in the context of Bishop's preceding discussion of the common law, that
17 statement provides less support for defendant than first appears. To the extent that
18 Bishop is speaking only about separate offenses in describing both the common law and
19 the constitutional guarantees, the statement is unexceptional.¹³

¹³ To the extent that defendant argues that Bishop's statements, taken at face value, reflect the understanding of the persons who adopted the Oregon Constitution, we reach a different conclusion. Bishop published the 1872 edition of his treatise 15 years after Oregon's constitution was drafted and adopted. The first edition of Bishop's treatise on criminal procedure was published in 1866 and omits almost all the statements on which defendant relies in support of his argument. *See* Joel Prentiss Bishop, *Commentaries on the Law of Criminal Procedure*, §§ 293-95 (1866). Those sections

1 This is not to say that the common law is completely at odds with
2 defendant's position. In his concurring opinion in *Apprendi*, Justice Thomas explained
3 that, beginning in the mid-nineteenth century, some courts recognized that a fact that
4 increased punishment either was an element of the offense or "create[d] two grades of
5 crime." *See* 530 US at 502-09 (Thomas, J., concurring).¹⁴ Justice Thomas's opinion
6 relied primarily on cases from Massachusetts and Wisconsin that interpreted statutes
7 providing increased punishment for different criminal acts. One case, for example, held
8 that an indictment for larceny must allege the value of the object stolen both because that
9 was "well settled practice" and because the Massachusetts statutes "prescribe[d] the
10 punishment for larceny, with reference to the value of the property stolen." *Hope v.*
11 *Commonwealth*, 50 Mass 136, 137 (1845).

12 The court did not explain in *Hope* whether the value of the property was an
13 element of an offense that distinguished different degrees of larceny or whether the
14 differing values of the property stolen were sentence enhancement facts that increased the
15 punishment for a single offense of larceny.¹⁵ Two years later, however, the

address the need to plead allegations related to punishment and are consistent with the conclusion we reach.

¹⁴ Defendant does not rely on either Justice Thomas's concurring opinion or the cases cited in it. However, the concurrence undertook an extensive review of mid-nineteenth century cases, and we would be remiss if we did not examine both the cases Justice Thomas cited and the conclusions he drew from them.

¹⁵ Justice Thomas's concurring opinion sets out the larceny statute in a footnote. *See Apprendi*, 530 US at 503 n 3. The statute is ambiguous as to whether the legislature intended to create three separate offenses or a single offense with increased punishment based on the differing value of the property taken.

1 Massachusetts Supreme Judicial Court described a similar set of statutes as one that
2 "creat[es] two grades of crime." *See Larned v. Commonwealth*, 53 Mass 240, 242 (1847)
3 (describing burglary statutes). Justice Thomas found both cases informative. As we
4 understand the Massachusetts cases, the court inferred from the terms of the statute that
5 the legislature had intended to create two separate offenses, the greater of which
6 authorized the imposition of increased punishment.

7 The primary case from Wisconsin that Justice Thomas cited is to the same
8 effect. *See Lacy v. State*, 15 Wis 15 (1862). In that case, a statute made it a crime to
9 willfully and maliciously burn a dwelling house at night and provided three degrees of
10 punishment if: (1) no one was lawfully inside when the house was burned, (2) a person
11 was lawfully inside but no one died as a result of the fire, and (3) a person died as a result
12 of the fire. *See Apprendi*, 530 US at 504 n 4 (quoting the Wisconsin statute). In *Lacy*,
13 the indictment alleged that the defendant had willfully and maliciously burned the barn
14 and "dwelling house of Manoah Griffin, * * * one Manoah Griffin * * * being then in
15 said dwelling house," but that the burning had not resulted in Manoah Griffin's death. *Id.*
16 at 16.

17 The Wisconsin Supreme Court explained that the statute "create[d] three
18 distinct statutory offenses," and it recognized that the state had intended to charge the
19 defendant with the mid-level offense -- burning a dwelling house while a person was
20 lawfully inside without causing the loss of that person's life. *Id.* at 16. The court
21 concluded, however, that the indictment was deficient because it did not allege that
22 Manoah Griffin was "lawfully" inside Manoah Griffin's dwelling house. *Id.* at 16-17.

1 The court reasoned, "[i]t is certainly not impossible that there might be one Manoah
2 Griffin who owned the dwelling house, and another by the same name unlawfully in it
3 when it was consumed" by fire. *Id.* at 17.¹⁶ Because the indictment had failed to allege a
4 fact necessary to sentence the defendant for the mid-level offense, the court reversed his
5 conviction and remanded to permit the trial court to sentence the defendant for the lesser-
6 included offense of burning a dwelling house with no one lawfully inside. *Id.* at 19-20.

7 Relying primarily on those Massachusetts and Wisconsin cases, Justice
8 Thomas concluded that, as a matter of federal constitutional law, facts that lead to
9 increased punishment are elements of the offense that must be pleaded in the indictment
10 and proved to the jury.¹⁷ In our view, those cases turn on what the legislature intended;
11 that is, the courts in those cases inferred that the legislature intended to create different
12 degrees of a crime based on the harm inflicted. There is a difference between inferring
13 that the legislature intended to create separate offenses or degrees of a crime and inferring
14 that it intended to create a single offense with increasing degrees of punishment based on
15 the presence of differing sentence enhancement factors. Few people would dispute that

¹⁶ The court held out the possibility that the result might have been different if the indictment had referred to "said Manoah Griffin" instead of "one Manoah Griffin." In that case, it might be possible to infer that the Manoah Griffin who was inside the dwelling house was the Manoah Griffin who owned it. *See Lacy*, 15 Wis at 17.

¹⁷ Some scholars have questioned whether the nineteenth century cases were as uniform as Justice Thomas's concurring opinion suggested. *See* Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 Yale L J 1097, 1129 (2001) (relying on statements from a case from another jurisdiction to conclude that "there was no uniform rule of charging and proving all sentence enhancements at common law").

1 an indictment must allege all the elements of a separate offense. And, if as those cases
2 suggest, that is all that the Massachusetts and Wisconsin decisions stand for, then those
3 cases shed little light on whether, as a matter of constitutional law, the framers of
4 Oregon's constitution would have understood that the right to demand the nature and
5 cause of the accusation against a person requires an indictment to plead facts that, as a
6 matter of legislative intent, are merely sentence enhancement factors.

7 Beyond that, as discussed above, the common law assumed that sentence
8 enhancement facts had to be pleaded in the indictment unless the legislature provided
9 otherwise. *See Waterhouse*, 209 Or at 429-31 (describing the common-law practice);
10 *Ross's Case*, 19 Mass 165, 171 (1824) (same). If, however, the legislature provided
11 another means of notifying a defendant of sentence enhancement facts, then those facts
12 did not have to be pleaded in the indictment. *Id.* In our view, even if we assumed that
13 the Notice Clause in Article I, section 11, incorporated common-law pleading
14 requirements, it is difficult to identify a consistent or coherent common-law practice that
15 would require indictments to plead sentence enhancement facts that, as a matter of
16 legislative intent, are not elements of the crime. The initial premise on which defendant's
17 Notice Clause argument rests is, at best, suspect.

18 The second premise on which defendant's argument rests is also
19 problematic. As noted, his argument rests on the premise that the persons who wrote and
20 adopted the Notice Clause of Article I, section 11, intended that indictments in criminal
21 cases would conform to common-law pleading practice. Defendant selects one aspect of
22 what he perceives to be common-law pleading practice -- that an indictment must plead

1 sentence enhancement facts. He overlooks, however, other aspects of that practice, such
2 as the sort of technical and arcane pleading requirements on which the decisions in *Lacy*
3 and *Monteth* turned. Defendant never explains why the voters would have intended to
4 incorporate the former aspect of common-law practice without also incorporating the
5 latter. *Cf. State v. Smith*, 301 Or 681, 697, 725 P2d 894 (1986) (plurality) (explaining
6 that "the tail goes with the hide").

7 This court has rejected the proposition that the Notice Clause of Article I,
8 section 11, requires that indictments include the sort of technical and arcane factual detail
9 that nineteenth-century common-law pleading practice did. *See, e.g., Smith*, 182 Or at
10 509. If the people did not intend to require that indictments conform to that aspect of
11 nineteenth-century pleading practice, it is difficult to see why they would have intended
12 that the Notice Clause would incorporate what is, in our view, a far more uncertain
13 common-law proposition -- that an indictment must go beyond pleading the elements of
14 the crime and also plead sentence enhancement facts.

15 Defendant's argument faces a final hurdle. Even if there were some
16 suggestion that the common law required indictments to plead sentence enhancement
17 facts and that, in adopting the Notice Clause in 1857, the voters intended to give
18 constitutional effect to that common-law practice, the current version of Article VII
19 (Amended), section 5, looks in a different direction. As explained above, Article VII
20 (Amended), section 5, requires the grand jury to determine whether probable cause exists
21 for the elements of the legislatively defined crime. It does not require the grand jury to
22 determine whether there is probable cause for sentence enhancement facts that would

1 support, for example, a dangerous offender sentence.

2 It is difficult to reconcile the two constitutional provisions, at least as
3 defendant interprets the Notice Clause of Article I, section 11. If defendant's reading of
4 the Notice Clause were correct, it would require an indictment to plead facts that Article
5 VII (Amended), section 5, does not require the grand jury to find. The two provisions, as
6 defendant interprets them, conflict. In that event, the later-enacted provision controls.
7 *See In re Fadeley*, 310 Or 548, 560, 802 P2d 31 (1990) (explaining that, to the extent that
8 Article VII (Amended), section 8, conflicted with Article I, section 8, the later-enacted
9 provision controlled); *see also Coalition for Equit. School Fund.v. State of Oregon*, 311
10 Or 300, 309, 811 P2d 116 (1991) (same). As this court reasoned in *Fadeley*, "[w]hen the
11 people, in the face of a pre-existing [constitutional] right, * * * adopt a constitutional
12 amendment that by its fair import modifies the pre-existing right, the later amendment
13 must be given its due." 310 Or at 560. We hold that the Notice Clause of Article I,
14 section 11, does not require that an indictment allege sentence enhancement facts.

15 *B. The Jury Trial Clause of Article I, section 11*

16 Defendant invokes one other clause in Article I, section 11, the clause that
17 guarantees an accused the "right to public trial by an impartial jury" in all criminal
18 prosecutions. Defendant argues that, as we have interpreted the Jury Trial Clause, he had
19 a right to have the jury find one of the three sentence enhancement facts necessary to
20 impose a dangerous offender sentence -- whether he was "being sentenced for a felony
21 that seriously endangered the life or safety of another." *See* ORS 161.725(1)(b). The
22 state does not dispute that the Jury Trial Clause of Article I, section 11, required the jury

1 to find that fact, and we assume that it did. The question that remains is whether the Jury
2 Trial Clause also governs what the grand jury must find and the indictment must plead.

3 In interpreting an original constitutional provision, we consider the text of
4 the provision, its history, and our cases interpreting it. *See Priest*, 314 Or at 415-16
5 (looking to those sources). Textually, the clause of Article I, section 11, on which
6 defendant relies guarantees the right to a jury trial in all criminal prosecutions. Or Const,
7 Art I, § 11. It does not address the facts that the grand jury must find in order to return an
8 indictment. The two bodies are distinct, and it is textually difficult to convert a
9 constitutional right to a trial by jury into a requirement that governs what the grand jury
10 must find to issue an indictment.

11 The second problem is related to the first. The context is at odds with
12 defendant's reliance on the Jury Trial Clause of Article I, section 11. As explained above,
13 a separate provision of the constitution, Article VII (Amended), section 5, governs the
14 facts that the grand jury must find to return an indictment for a felony. As also explained
15 above, that provision does not require that grand juries find sentence enhancement facts
16 to indict a defendant for a crime. We would have to ignore Article VII (Amended),
17 section 5, and indeed read it out of the constitution, to interpret the Jury Trial Clause of
18 Article I, section 11, as defendant urges us to do. To the extent that the two constitutional
19 provisions conflict, Article VII (Amended), section 5, controls. *See Fadeley*, 310 Or at
20 560.

21 There is another contextual problem with defendant's argument. This court
22 explained in *State v. Ice*, 343 Or 248, 257, 170 P3d 1049 (2007), *rev'd on other grounds*,

1 555 US 160, 129 S Ct 711, 172 L Ed 2d 517 (2009), that the existence of the jury trial
2 right under Article I, section 11, does not "tur[n] on whether the [sentencing] factor
3 extends the length of a defendant's sentence beyond the statutory maximum," which is
4 one criterion for identifying sentence enhancement facts. Put differently, the class of
5 facts that the Jury Trial Clause of Article I, section 11, requires juries to find is not
6 coextensive with the class of sentence enhancement facts. The former class is both
7 broader and narrower than the latter class.¹⁸ In our view, the lack of identity between the
8 facts that the Jury Trial Clause requires the jury to find and sentence enhancement facts,
9 makes the Jury Trial Clause of the Oregon Constitution an unlikely source for the
10 constitutional requirement that defendant asks us to announce.

11 Finally, our cases consistently have held that, even though the Jury Trial
12 Clause of Article I, section 11, requires the jury to find some facts related to sentencing,
13 those sentencing facts are not elements of the offense that the grand jury must find and
14 that the indictment must plead. *See, e.g., Johnson*, 340 Or at 352; *Oatney*, 335 Or at 292-
15 97; *Wagner*, 304 Or at 171-72. We consistently have held that, as a matter of state
16 constitutional law, the grand jury's task is more limited. *Johnson*, 340 Or at 352. It only
17 needs to find the elements of the "conventional charge" as the legislature has defined it.

¹⁸ As the court explained in *Ice*, the Jury Trial Clause requires juries to find some facts necessary to impose mandatory minimum sentences, even though those facts do not result in a greater sentence than the statutory maximum. *See* 343 Or at 257. Conversely, the Jury Trial Clause does not require juries to find facts that result in a greater sentence than the statutory maximum when, to use a shorthand formulation, those facts relate to the offender rather than the offense. *See id.* at 257-61 (describing which "offense-specific" facts the Jury Trial Clause requires a jury to find).

1 *Id.*; *Hicks*, 213 Or at 641. It need not find any sentence enhancement facts. In that
2 regard, we note that none of the common-law history that defendant has cited (to the
3 extent it provides any support for him) supports the proposition that the grand jury must
4 find only a subset of sentence enhancement facts. Defendant thus provides no history to
5 support his argument that the Jury Trial Clause of Article I, section 11, requires the grand
6 jury to find the same limited set of facts that it requires juries to find. The text of the Jury
7 Trial Clause, its history, and the cases interpreting it provide no support for defendant's
8 reliance on that clause. We conclude that neither Article VII (Amended), section 5, nor
9 the two clauses in Article I, section 11, on which defendant relies required the grand jury
10 to find and plead sentence enhancement facts.

11 The decision of the Court of Appeals and the judgment of the circuit court
12 are affirmed.