
Chapter 6

Challenging Enhancement Facts, A to Z

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Challenging Enhancement Facts A-Z

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ENHANCEMENT FACTS—**GENERALLY**

- The “**enhancement facts**” concept is a product of Senate Bill 528 (2005) (codified at ORS 136.760 to 136.792), enacted in response to *Blakely v. Washington*, 542 US 296, 124 S Ct 2531, 159 L Ed 2d 403 (2004).
- SB 528’s scheme defines “enhancement facts” as facts that are “**constitutionally required** to be **[i]** found “by a jury in order to increase the sentence that may be imposed upon conviction of a crime,” ORS 136.760(2); and **[ii]** found “beyond a reasonable doubt.” ORS 136.785(2).

ENHANCEMENT FACTS—GENERALLY

- The constitutional requirements:
 - **State:** “[F]acts which constitute the crime are [offense-specific and are] for the jury and those which characterize the defendant are [offender-specific and are] for the sentencing court.” *State v. Wedge*, 293 Or 598, 607, 652 P2d 773 (1982) (citing *State v. Quinn*, 290 Or 383, 406, 623 P2d 630 (1981)).
 - **Federal:** “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi v. New Jersey*, 530 US 466, 490, 120 S Ct 2348, 147 L Ed 2d 435 (2000).
 - Offense- **and** offender-specific facts are subject to the *Apprendi* rule.
See State v. Sawatzky, 195 Or App 159, 96 P3d 1288 (2004)
(invalidating six offense- and offender-specific aggravated-departure factors).

ENHANCEMENT FACTS—GENERALLY

- *Blakely* reaffirmed *Apprendi*, essentially by saying, “**You know what we said in *Apprendi* almost exactly four years ago? Well, we meant it.**”
- **When the Court decided *Blakely*, there were hundreds of cases in Oregon’s appellate courts, brought by defendants who were serving unconstitutional sentences.**
 - Of those hundreds of cases, **only nine** had preserved *Apprendi* rule objections.
 - Only those nine defendants, plus a dozen or so others who’d had jury trials, got relief.
 - The remaining hundreds of defendants served their unconstitutional sentences, costing the state tens of millions of dollars.
 - Only **the bold** raised *Apprendi* objections to aggravated-departure sentences.

ENHANCEMENT FACTS—GENERALLY

- Besides aggravating factors, other findings are “enhancement facts”:
 - **Subclassification (aka “subcategory”) factors.** *State v. Morris*, 288 Or App 364, 404 P3d 951 (2017).
 - **Juvenile adjudications.** *State v. Harris*, 339 Or 157, 118 P3d 236 (2005).
 - **Sexually violent dangerous offender findings**, under ORS 137.765(2). *State v. Hopson*, 220 Or App 366, 186 P3d 317 (2008), *adhered to on recons*, 228 Or App 91, 206 P3d 1206 (2009).
 - **Characteristics of prior convictions and juvenile adjudications** that must be proven, to use the priors as predicates in the application of recidivist schemes. *Shepard v. United States*, 544 US 13, 125 S Ct 1254, 161 L Ed 2d 205 (2005); *State v. Bray*, 342 Or 711, 168 P3d 983 (2007).
 - **Facts used to assess monetary fines**, e.g., compensatory fines **and** enhanced fines for “high blow” DUII convictions. *Southern Union Co. v. United States*, 567 US 343, 132 S Ct 2344, 183 L Ed 2d 318 (2012).

ENHANCEMENT FACTS—GENERALLY

ORS 136.765 **requires** pretrial notice of alleged enhancement facts, either:

- In the accusatory instrument (the indictment, or a DA’s information followed by preliminary hearing); **or**
- By a separate, pretrial “notice of intent to prove enhancement facts” (**with timing requirements**).
 - **But these notices may violate Article VII (Amended), section 5, of the Oregon Constitution. See *Felony Sentencing in Oregon: Guidelines, Statutes, Cases* § 1-7.4 (OCDLA 6th ed. 2019).**
 - **The bold** will raise this claim—**by pretrial motion demand for a preliminary hearing.** See ORS 136.785(5) (a jury verdict of guilt on an enhancement fact “may not be reexamined by the court”). See also *Ryan v. Palmateer*, 338 Or 278, 108 P3d 1127 (2005) (judgments *n.o.v.* are prohibited in criminal cases).

NOTICE

ENHANCEMENT FACTS—GENERALLY

Pretrial notice (in whatever form) must be **specific** as to which enhancement facts the state intends to prove. *State v. Alexander*, 255 Or App 594, 298 P3d 55 (2013).

- The grand jury's or the state's failure to give pretrial notice of enhancement facts **prohibits** their use. *State v. Heisser*, 350 Or 12, 249 P3d 113 (2011); *State v. Teeters*, 278 Or App 812, 379 P3d 839 (2016) (*per curiam*).
- “The trial court [has] **no** discretion to decide whether **other** [enhancement facts] might apply.” *State v. Speedis*, 350 Or 424, 436, 256 P3d 1061 (2011) (emphasis added; citing ORS 136.765).

<input type="checkbox"/> Crime was not merely an incidental violation of a separate statutory violation, but rather an indication defendant's willingness to commit more than one criminal offense. (137.123(5)(a)); <input type="checkbox"/> Crime caused or created a risk of causing greater or qualitatively different loss, injury or harm to the victim (137.123(5)(b)); <input type="checkbox"/> Crime caused or created a risk of causing loss, injury or harm to a different victim. (137.123(5)(b)).	
6. SB-528 / <i>Blakely</i> Notice: Pursuant to the rule announced in <i>Blakely v. Washington</i> , the State hereby gives notice to <u>on all counts on all cases addressed by this PTO</u> it may seek an upward departure which exceeds the maximum presumptive sentence established by the Oregon Sentencing Guidelines. At trial, the State will seek a jury finding the following factors supporting an upward departure:	
<input type="checkbox"/> On supervision for a 137.717 crime; <input type="checkbox"/> W/in 3 yrs of end supervision for 137.717 crime; <input type="checkbox"/> On supervision at the time of the crime; <input type="checkbox"/> Multiple unrelated victims and/or incidents; <input type="checkbox"/> Failure to appear history in instant case; <input type="checkbox"/> Violation of public/professional trust; <input type="checkbox"/> Deliberate cruelty to victim; <input type="checkbox"/> Motivated by race/religion/sexual orientation; <input type="checkbox"/> Vulnerable victim(s); <input type="checkbox"/> Persistent involvement in unrelated similar offenses; <input type="checkbox"/> Organized criminal operation; <input type="checkbox"/> Commission of crime on release status; <input type="checkbox"/> Probability that defendant cannot be rehabilitated; <input type="checkbox"/> Harm or loss greater than usual; <input type="checkbox"/> Threat of actual violence; <input type="checkbox"/> Use of a weapon; <input type="checkbox"/> Absolute disregard of immigration laws; <input type="checkbox"/> Other: _____	
Offer Expires:	PTO
DDA:	MJG
Date: 7/11/19	
Pre-Trial Offer - Revised	

ENHANCEMENT FACTS—GENERALLY

“Given the statutory text in the totality of its context, it is patent that the legislature intended an ‘enhancement fact’ to be a specific thing and not—as the state would have it—an entire constellation of unspecified possible things. Accordingly, a ‘notice’ that the state ‘may’ rely on any of 18 individual departure factors (**including some ineffable ‘[o]ther’**)—or any combination thereof—is the functional equivalent of **‘That’s for us to know and you to find out.’ It is no notice at all.’**

Alexander, 255 Or App at 599-600 (emphasis added; footnote omitted).

ENHANCEMENT FACTS—GENERALLY

- The jury may rely on facts adduced to prove crimes alleged in the charging instrument to decide enhancement facts. ORS 136.780.
- Jury vote requirements:
 - However many juror votes were required to convict of the underlying felony equals the number of votes required to convict of an enhancement fact. ORS 136.785(3)(a).
 - Only the votes of those jurors who voted to convict on the underlying felony, or alternate jurors selected in the event one or more jurors who voted to convict cannot continue, may be used to convict on an enhancement fact. ORS 136.785(3)(b).
 - A vote of anything less than the number needed for a conviction **should constitute an acquittal** of the enhancement fact. ORS 136.785(3).

ENHANCEMENT FACTS—GENERALLY

There are exceptions to the requirement that enhancement facts be tried to the jury:

- The defendant waives jury.
 - The defendant must waive jury explicitly and in writing. *See State v. Lafferty*, 240 Or App 564, 584-85, 247 P3d 1266 (2011) (declaring **ORS 136.776** unconstitutional).
 - The reasonable doubt standard still applies. ORS 136.785(2) and (4).
- The defendant **admits to the enhancement facts** when pleading to the accusatory instrument.

ENHANCEMENT FACTS—GENERALLY

SB 528 created a bifurcated scheme for trying enhancement facts—**(1)** a “trial” (guilt) phase **and** **(2)** a “sentencing” (penalty) phase (if there is one):

(1) ORS 136.770(1) **presumes** enhancement facts “relate[ed] to an **offense** charged in the accusatory instrument”—*i.e.*, offense-specific enhancement facts (subject to the *Wedge/Quinn* rule)—will be tried in the case’s “**trial**” phase, but with exceptions:

- The defendant defers to the “sentencing” phase, ORS 136.770(1)(a); **or**
- The court concludes that OEC 403-type concerns militate in favor of deferring to the “sentencing” phase, ORS 136.770(4).

ENHANCEMENT FACTS—GENERALLY

- (2) ORS 136.773(1) mandates trying enhancement facts “relate[ed] to the defendant”—*i.e.*, offender-specific enhancement facts—in the case’s “sentencing” phase (if there is one).
- Offender-specific enhancement facts may not be applied on a vicarious-liability basis. *Wedge*, 293 Or at 604.
 - Offender-specific enhancement facts include:
 - Enumerated Aggravating Factors B and D, and most (but not all) non-enumerated aggravating factors;
 - Some subclassification factors, *e.g.*, level 9 first-degree burglary;
 - Finding the existence of juvenile adjudications;
 - Making sexually violent dangerous offender findings; and
 - Finding the characteristics of priors that must be proven to use the priors as predicates in recidivist schemes.

ENHANCEMENT FACTS—GENERALLY

If the grand jury or the prosecution gave notice of offense-specific enhancement facts, but none of ORS 136.770’s exceptions applied and the prosecution neglected to try those enhancement facts during the “trial” phase:

- Those enhancement facts may not be tried in the “sentencing” phase. *Morris*, 288 Or App at 367.
 - Federal double jeopardy protections may prohibit the prosecution from reopening the “trial” phase—particularly if the jury has been discharged. Compare *Sattazahn v. Pennsylvania*, 537 US 101, 123 S Ct 732, 154 L Ed 2d 588 (2003) with *Price v. Georgia*, 398 US 323, 90 S Ct 1757, 26 L Ed 2d 300 (1970).
 - The bold will raise this claim.

ENHANCEMENT FACTS—GENERALLY

- Assuming felony convictions, the court holds a standard sentencing **hearing**.
- During the hearing, the court **may** rely on:
 - From the “trial” phase, alleged and properly found offense-specific enhancement facts.
 - From the “sentencing” phase (if there was one), alleged and properly found offense-specific enhancement facts that were deferred, and offender-specific enhancement facts.
 - “Notwithstanding the findings made by a jury relating to an enhancement fact, the court is **not** required to impose an enhanced sentence.” ORS 136.785(5).

ENHANCEMENT FACTS—GENERALLY

In cases on remand for **resentencing**, ORS 136.790 and ORS 136.792 **control**.

- ORS 136.790 authorizes notices of intent of **new** enhancement facts.
 - **But the new allegations may be time barred, the notice may require a preliminary hearing, Or Const, Article VII (Amended), § 5, and a trial on it may violate double jeopardy.**
 - **Nothing in ORS 136.790 and ORS 136.792 allows for a new “trial” phase, so the statutes prohibit alleging and trying new offense-specific enhancement facts.**
 - **The bold will raise these objections—before the start of the re-“sentencing” phase.**

ENHANCEMENT FACTS—GENERALLY

At the resentencing **hearing**, the court may rely on:

- Enhancement facts that were found during the original “trial” and “sentencing” phases, which were affirmed **or** went unchallenged on review. *See State v. Reinke II*, 289 Or App 10, 408 P3d 249 (2017) (applying law of the case doctrine on remand, to preclude challenge to enhancement facts that went unchallenged on review).
- Assuming they may be tried, **new offender**-specific enhancement facts that were alleged and properly found during the re-“sentencing” phase held on remand.

ENHANCEMENT FACTS—AGGRAVATING FACTORS

Courts have discretion to impose departure sentences in exceptional cases—*i.e.*, cases where the court finds that “**substantial and compelling reasons**” warrant imposing **other than** the presumptive sentence. ORS 137.671(1); OAR 213-003-0001.

- Properly found departure factors serve as the foundation of the “substantial and compelling reasons.” *Upton*, 339 Or at 679.
- If the court departs, **it must explain on the record** why the factors are “substantial and compelling.” *State v. Davilla*, 280 Or App 43, 69, 380 P3d 1003 (2016).
 - *See also State v. Mitchell*, 136 Or App 99, 103, 900 P2d 1083 (1995) (**court erred by failing to explain how aggravating factor warranted departure**).
 - “Substantial and compelling” findings, including “**individually sufficient**” findings, are **not** subject to the *Apprendi* rule. *Upton*, 339 Or at 681.

ENHANCEMENT FACTS—AGGRAVATING FACTORS

- A **mitigated** (“downward”) departure is a departure based on one or more mitigating factors, and is less severe than the specified presumptive sentence.
- An **aggravated** (“upward”) departure is a departure based on one or more aggravating factors, and is more severe than the specified presumptive sentence.
 - **Unless otherwise negotiated**, if the court imposed mitigated-departure probation (or even presumptive or optional probation), upon revocation, an aggravated departure **is prohibited**.
 - **Effective Jan. 1, 2019, House Bill 2462 (enrolled as Oregon Laws 2019, chapter 86) will forbid treating a veteran defendant's military service as an aggravating factor.**

ENHANCEMENT FACTS—AGGRAVATING FACTORS

The enumerated lists of departure factors are “nonexclusive.” OAR 213-008-0002(1).

- Owing to **the legislature's approval of the guidelines**, *State v. Langdon*, 330 Or 72, 74, 999 P2d 1127 (2000); Or Laws 2003, ch 453, § 2, and to **legislative control over guidelines amendments**, ORS 137.667(2), this non-exclusivity delegates authority to create and apply **non**-enumerated departure factors.
 - The delegation does **not** violate the separation of powers, *Speedis*, 350 Or at 432-33; **and**
 - **The creation of non-enumerated factors is not subject to the APA's rule-making requirements.** *Accord State v. McFerrin*, 289 Or App 96, 99-100 n 3, 408 P3d 263 (2017), *rev allowed*, 362 Or 794 (2018).

ENHANCEMENT FACTS—AGGRAVATING FACTORS

- There are viable challenges to the **retroactive** application of **non-sanctified**, non-enumerated **aggravating** factors, grounded on constitutionally based “**fair warning**” principles:
 1. Due process vagueness,
 2. Due process notice,
 3. State and federal prohibitions on *ex post facto* laws, and
 4. Federal prohibition on bills of attainder.
- *See Felony Sentencing in Oregon, § 7-4.3.13 (explaining these “fair warning” challenges).*
- Prevailing on these challenges would **entirely prohibit** the creation of **any additional**, non-enumerated aggravating factors.
- **The bold** will raise these claims—**by pretrial demurrer**. *Ryan v. Palmateer*; ORS 136.785(5).

ENHANCEMENT FACTS—AGGRAVATING FACTORS

- *Felony Sentencing in Oregon, §§ 7-4.3.13.1 to .8*, discuss most, if not all, reported decisions “sanctifying” non-enumerated aggravating factors.
 - Opinions that **mention** non-enumerated aggravating factors, **without** approving them on the merits, do **not** sanctify the factors. *See, e.g., State v. Kindler*, 277 Or App 242, 370 P3d 909 (2016) (no claim that nonenumerated factor, defendant “**willfully failed to appear for a mandatory proceeding in connection with this matter**,” was invalid, but court reversed on ground of procedural violation).
- **NOTE:** None of the fair warning-based challenges applies to non-sanctified, non-enumerated **mitigating** factors.
 - *See* Michael R. Levine, “171 Easy Mitigating Factors” (Jan. 1, 2019) (synopsizing hundreds of federal court decisions “sanctifying” nonenumerated mitigating factors).

ENHANCEMENT FACTS—AGGRAVATING FACTORS

Using the same set of facts to enhance punishment for the same crime twice—“double dipping”—is prohibited, because it violates:

- **Double jeopardy**, *Missouri v. Hunter*, 459 US 359, 103 S Ct 673, 74 L Ed 2d 535 (1983); and
- **Substantive due process**. *Alessi v. Quinlan*, 711 F2d 497 (2d Cir 1983) (irrational); unless
- The legislature made “crystal clear” its intent to allow “double dipping.” *Hunter*, 459 US at 368.

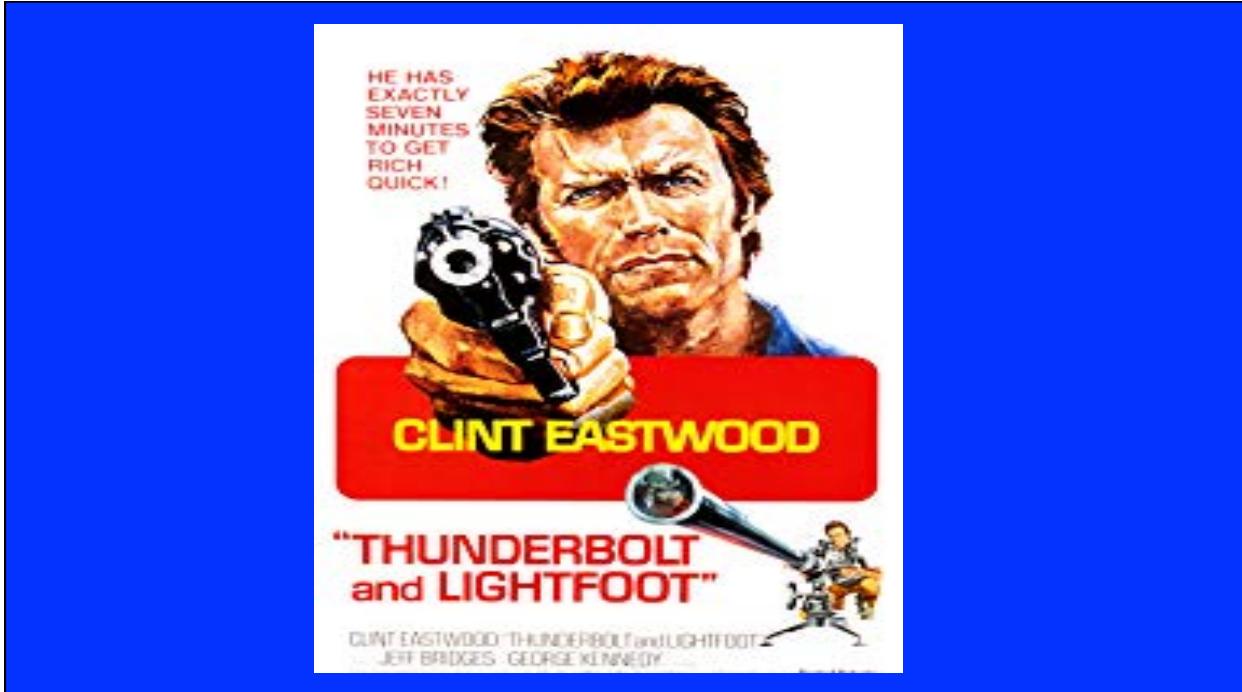
ENHANCEMENT FACTS—AGGRAVATING FACTORS

The guidelines have **two** “double-dipping” prohibitions:



(1) “If a factual aspect of a crime is a statutory element of the crime or is used to subclassify the crime on the Crime Seriousness Scale,” that aspect may not be used a second time, to prove an aggravating factor, unless the aspect is **“significantly different** from the usual[.]” OAR 213-008-0002(2).

- Example #1: Third-degree assault conviction based on use of a weapon element, **and** Aggravating Factor E, use of a weapon: to wit, **a switchblade**.
- Example #2: Level 9 first-degree burglary conviction based on “[t]he offender was armed with a deadly weapon” subclassification factor, **and** Aggravating Factor E, use of a weapon: to wit, **a 20 mm recoilless rifle**.



ENHANCEMENT FACTS—AGGRAVATING FACTORS

A “significantly different” finding **is** subject to the *Apprendi* rule. *See State v. Fox*, 262 Or App 473, 484-85, 324 P3d 608 (2014) (OAR 213-008-0002(2) **prohibited** using Aggravating Factor F (violation of public trust) on coercion conviction based on “public servant” element, because “[t]he jury did not make * * * a [significantly different] finding”).

- *Accord Sawatzky*, 195 Or App at 171-72 (invalidating trial court’s use of non-juried Aggravating Factor J, “degree of harm or loss attributed to the current crime of conviction was **significantly greater than typical for such an offense**”).
- A “significantly different” finding is a **specialized type** of aggravating factor, so is an enhancement fact.

ENHANCEMENT FACTS—AGGRAVATING FACTORS

- For OAR 213-008-0002(2)'s exception to the “double dipping” prohibition to apply:
 1. The grand jury or the prosecution must allege “significantly different from the usual,” *see* ORS 136.765;
 2. The prosecution must establish what may prove impossible: “the usual” factual aspect of the crime element or the subclassification factor;
 3. The prosecution must define “significantly different”; **and** 
 4. The prosecution must prove to the trier of fact, beyond a reasonable doubt, that the factual aspect is significantly different from the usual crime element or subclassification factor.
- The bold will raise this claim—**after jeopardy has attached.**

ENHANCEMENT FACTS—AGGRAVATING FACTORS

(2) OAR 213-008-0002(3) **strictly** prohibits basing an aggravating factor on a factual “aspect of the current crime of conviction which serves as a necessary element of a statutory mandatory sentence.”

- Example: The imposition of a mandatory firearm minimum prohibits use of Aggravating Factor E.
- OAR 213-008-0002(3) also may apply to facts used to prove the element of, for example, a Measure 11 crime.
 - Example: An assault 1 conviction, under the serious physical injury by deadly or dangerous weapon theory, may prohibit using Aggravating Factors E and J to depart, because the conviction carries a 90-month Measure 11 mandatory minimum.
- The bold will raise these claims—**by pretrial demurrer.**

ENHANCEMENT FACTS—AGGRAVATING FACTORS

Dangerous-offender departure sentences have a maximum **in**determinate (parole-eligible) component of up to 30 years, **and** a minimum **deter**minate (parole-ineligible) component.

- The dangerous-offender findings used to impose the **in**determinate component **are** subject to the **four-part test** from *State v. Huntley*, 302 Or 418, 730 P2d 1234 (1986), **and to** the SB 528 scheme, ORS 161.735(9), which modifies the *Huntley* test.
 - The **acceptable injustice** can't survive *Apprendi*.
- Aggravating factors used to impose a departure as the **deter**minate component **are not** subject to the *Apprendi* rule, *State v. Stephens*, 223 Or App 644, 198 P3d 423 (2008), *rev den*, 346 Or 11 (2009), so are not subject to the SB 528 scheme.
 - But proof of them **is** subject to the “panoply” of due process rights, described in *Specht v. Patterson*, 386 US 605, 87 S Ct 1209, 18 L Ed 2d 326 (1967).

ENHANCEMENT FACTS—RECIDIVIST SCHEMES

- A “recidivist scheme” relies on a defendant’s prior convictions and (sometimes) juvenile adjudications as “**predicates**,” to enhance punishment for his current convictions.
- There are two types of recidivist schemes:
 - **Traditional** schemes, which are grounded on a “selective-incapacitation” theory, and
 - **Non**-traditional schemes, which are grounded on a mass incarceration-oriented “collective-incapacitation” theory.

ENHANCEMENT FACTS—RECIDIVIST SCHEMES

- Traditional recidivist schemes use priors as predicates only if the defendant incurred the priors before committing his current crime.
 - This type of scheme establishes that the defendant's "prior" had no "specific deterrent" effect, which establishment proves incorrigibility. See *Witte v. United States*, 515 US 389, 391, 115 S Ct 2199 132 L Ed 2d 351 (1995) (rejecting double jeopardy challenge to application of traditional recidivist scheme).
- Oregon's traditional recidivist schemes include:
 - "Denny Smith." ORS 137.635.
 - Repeat Class A felony sex offender law. ORS 137.725.
 - Firearm-minimum statute. ORS 161.610(4).
 - Felony DUII. ORS 813.011.

ENHANCEMENT FACTS—RECIDIVIST SCHEMES

Non-traditional recidivist schemes also use current crimes of conviction as predicates if they stem from separate criminal episodes.

- "Separate criminal episodes" means the opposite of a "same criminal episode," and "same criminal episode" means:
 1. The crimes are "cross related," i.e., are so closely linked in time, place, and circumstance that a complete account of one charge cannot be related without relating details of the other charge, e.g., *State v. Witherspoon*, 250 Or App 316, 322, 280 P3d 1004 (2012) ("complete account" test); or
 2. The crimes are "directed toward the same criminal objective," e.g., *State v. Kautz*, 179 Or App 458, 466-67, 39 P3d 937 (2002) (the "criminal objective" test); or
 3. "[T]he possession of" multiple pieces of contraband (even if of different types) "at the same place and time, constitute" the same criminal episode. *State v. Boyd*, 271 Or 558, 570, 533 P2d 795 (1975).

ENHANCEMENT FACTS—RECIDIVIST SCHEMES

Oregon has at least eight **non**-traditional recidivist schemes.

1. Guidelines criminal-history scoring—*i.e.*, “**reconstituting**” criminal history. OAR 213-004-0006.
2. Separate convictions for crimes that otherwise would merge. ORS 161.067(2).
3. Major felony sex offender. ORS 137.690.
4. Repeat property offender. ORS 137.717.
5. Repeat felony sex offender. ORS 137.719.
6. Repeat methamphetamine offender. ORS 475.935.
7. Dangerous offender (in Class B and C felony cases). ORS 161.725(1)(b) and (c).
8. Guidelines consecutive-sentence limitations (shift-to-I, 200%, 400% rules). OAR 213-012-0020.

ENHANCEMENT FACTS—RECIDIVIST SCHEMES

To the extent a non-traditional recidivist scheme would apply without proof that the “prior” had no specific deterrent effect, so without proof of the defendant’s incorrigibility, non-traditional recidivist schemes are subject to attack under the double jeopardy theory advanced in *Witte v. United States*.

- Prevailing on this objection would **transform** the state’s non-traditional recidivist schemes into traditional schemes.
- **The bold** will raise this claim—at the sentencing hearing.

ENHANCEMENT FACTS—RECIDIVIST SCHEMES

- *State v. Bucholz*, 317 Or 309, 855 P2d 1100 (1993) first authorized criminal-history score “reconstitution,” and *State v. Cuevas*, 358 Or 147, 361 P3d 581 (2015) **reaffirmed** *Bucholz*.
- Reconstitution may be near the “ash heap of history,” thanks to:
 - Now Chief Justice Walters’s dissent in *Cuevas*: “This court was wrong in *Bucholz*. * * * This case requires that we reconsider *Bucholz* and correct that error.” 358 Or at 172.
 - Justice Duncan’s survey of the legislative history of the criminal-history scoring rule in *State v. Dulfu*, 363 Or 647, **659-63**, 426 P3d 641 (2018), confirms Walters’s *dissent*, by making clear that **the legislature never intended reconstitution**.
 - **The bold** will raise this claim—at the sentencing hearing.

ENHANCEMENT FACTS—RECIDIVIST SCHEMES

“**Other than the fact of a prior conviction**, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi*, 530 US at 490 (emphasis added).

- If a recidivist scheme requires proof of **characteristics** of prior convictions **and** juvenile adjudications, in order to use them as predicates, the priors’ **characteristics are** subject to the *Apprendi* rule, *Shepard*, 544 US at 24-26, **so also** to the SB 528 scheme. See *Felony Sentencing in Oregon*, § 1-7.8.1 (explaining theory).
 - **Example:** *Bray*, 342 Or at 724: “Persistent involvement” characteristic of prior convictions used to prove Aggravating Factor D **is** subject to the *Apprendi* rule.

ENHANCEMENT FACTS—RECIDIVIST SCHEMES

- The felony DUII statute allows use of an **out-of-state** DUII conviction as a predicate **if** the conviction has the **characteristic** of being based on a “**statutory counterpart**” to Oregon’s crime of DUII. ORS 813.011(1).
- Under the theory discussed at *Felony Sentencing in Oregon*, § 1-7.8.1, the “statutory counterpart” characteristic is subject to the *Apprendi* rule, so also to the SB 528 scheme; therefore:
 - The prosecution must allege the “statutory counterpart” characteristic, but **in the charging instrument only**.
 - During the “sentencing” phase (if there is one):
 - The prosecution must put the Oregon and out-of-state statutes into evidence.
 - The court must instruct the jury on the characteristic’s definition.
 - The parties would rely on the statutes and the definition to argue **for or against** finding the characteristic.
 - The jury would apply the definition to the statutes and decide, as a factual matter, whether the state met its burden of proving the characteristic beyond a reasonable doubt.

ENHANCEMENT FACTS—RECIDIVIST SCHEMES

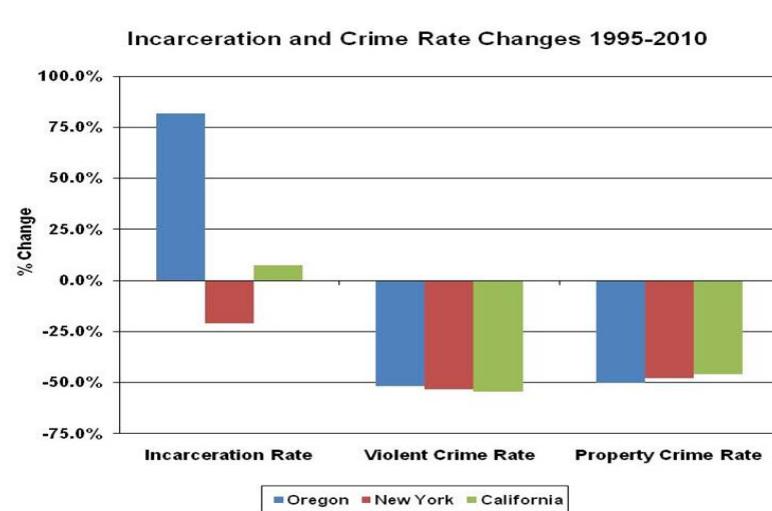
The theory discussed in **Section 1-7.8.1** of *Felony Sentencing in Oregon* could apply to the following recidivist **sentencing** schemes, which require proof of **characteristics** of certain prior convictions and (sometimes) juvenile adjudications:

- Felony DUII Criminal-History Scoring, OAR 213-004-0009(1). *Felony Sentencing*, § 3-4.1 and .2.
- Prior Guidelines-Era and Pre-Guidelines Era First-Degree Burglaries, OAR 213-004-0010. *Felony Sentencing*, § 3-5.1 and .2.
- General Criminal-History Scoring, OAR 213-004-0011(1) and (2). *Felony Sentencing*, § 3-6.1.
- “Denny Smith”, ORS 137.635. *Felony Sentencing*, § 4-2.1.
- Repeat Property Offender. *Felony Sentencing*, § 4-2.4.
- Repeat Felony Sex Offender. *Felony Sentencing*, § 4-2.6.
- Repeat Methamphetamine Offender. *Felony Sentencing*, § 4-2.7.
- Major Felony Sex Offender. *Felony Sentencing*, § 4-2.9.
- Repeat Class A Felony Sex Offender. *Felony Sentencing*, § 4-2.10.
- Dangerous Offender for Class B & C Felonies, ORS 161.725(1)(b) and (c). *Felony Sentencing*, § 7-5.4.1.

ENHANCEMENT FACTS—RECIDIVIST SCHEMES

- Assuming proof of a characteristic of predicate is subject to the *Apprendi* rule, no trial on the characteristic is permitted if the state failed to give pretrial notice of its intention to prove the characteristic. ORS 136.765.
- Because the characteristic of a defendant's prior "relates to the defendant," the characteristic may be tried only in the "sentencing" phase (if there is one). ORS 136.773(1).
- The bold will raise *Shepard* and *Bray* objections—before the "sentencing" phase and/or at the sentencing hearing—to using priors whose characteristics were found in violation of the *Apprendi* rule.

MASS INCARCERATION: A FAILED CRIMINOLOGICAL THEORY



Commission on Public Safety: Report to the Governor at 7 (Dec. 30, 2011).

“BYE, FELICIA”

