ADVANCE SHEET HEADNOTE
October 3, 2023

2023 CO 50

No. 21SC749, *Caswell v. People*—§ 18-9-202, C.R.S. (2023), Cruelty to Animals—Recidivist Provision—Misdemeanor→Felony Transforming Fact—Element v. Sentence Enhancer—Sixth Amendment Right to a Jury Trial—Article II of the Colorado Constitution.

The supreme court holds that the General Assembly intended to designate the recidivist provision of the cruelty-to-animals statute, § 18-9-202(2)(b)(I), C.R.S. (2023), a sentence enhancer, which may be proved to a judge by a preponderance of the evidence, not an element of the offense, which must be proved to a jury beyond a reasonable doubt. The court further holds that where, as here, a cruelty-to-animals (second or subsequent offense) case (1) includes notice in the charging document of the prior conviction for cruelty to animals and (2) is treated as a felony throughout the proceedings—including in terms of its prosecution in district court (not county court), the right to a preliminary hearing (if eligible), the number of peremptory challenges, and the number of jurors—the Sixth Amendment doesn't require that the misdemeanor→felony transforming fact in subsection (2)(b)(I) be proved to a jury beyond a reasonable doubt. Lastly, the

court holds that, even assuming the defendant's state constitutional challenge was forfeited and not waived, no plain error occurred.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2023 CO 50

Supreme Court Case No. 21SC749
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 18CA464

Petitioner:

Constance Eileen Caswell,

v.

Respondent:

The People of the State of Colorado.

Judgment Affirmed
en banc
October 3, 2023

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JUSTICE SAMOUR delivered the Opinion of the Court, in which **CHIEF JUSTICE BOATRIGHT**, **JUSTICE MÁRQUEZ**, **JUSTICE HOOD**, **JUSTICE HART**, and **JUSTICE BERKENKOTTER** joined.
JUSTICE GABRIEL dissented.

JUSTICE SAMOUR delivered the Opinion of the Court.

¶1 Our forefathers considered the right to trial by jury on par with the right to vote. *See United States v. Haymond*, 139 S. Ct. 2369, 2375 (2019). They viewed the two rights as "the heart and lungs, the mainspring and the center wheel" of our liberties, absent which "the body must die; the watch must run down; the government must become arbitrary." *Id.* (quoting Letter from Clarendon to W. Pym (Jan. 27, 1766), in 1 Papers of John Adams 169 (R. Taylor ed. 1977)). Much as the right to vote sought to protect the people's power over their government's executive and legislative functions, the right to trial by jury sought to protect the people's power over their government's judicial functions. *Id.*

¶2 The right to trial by jury in criminal cases is a pillar of the Bill of Rights and a core ingredient of the American scheme of justice. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968); *Haymond*, 139 S. Ct. at 2376. Accordingly, the Fourteenth Amendment guarantees the right to a jury trial in all state criminal cases, which if tried in federal court, would come within the protective canopy of the Sixth Amendment. *Duncan*, 391 U.S. at 149. But is a criminal defendant in Colorado state court entitled to a jury trial on the recidivist provision of the cruelty-to-animals statute, § 18-9-202(2)(b)(I), C.R.S. (2023) ("subsection (2)(b)(I)"), which transforms a conviction from a misdemeanor into a felony? *See id.* ("A second or subsequent conviction under the provisions of paragraph (a) of subsection (1) of

this section is a class 6 felony," not a class 1 misdemeanor). The answer is no, at least not under the circumstances of this case.

¶3 Because the cruelty-to-animals statute doesn't explicitly state whether subsection (2)(b)(I) sets forth an element of the offense, which must be proved to a jury beyond a reasonable doubt, or a sentence enhancer, which may be proved to a judge by a preponderance of the evidence, we look to the provisions and framework of the statute to determine the legislature's intent. *See United States v. O'Brien*, 560 U.S. 218, 225 (2010). More specifically, we consult (1) the language and structure of the statute, (2) tradition, (3) the risk of unfairness, (4) the severity of the sentence, and (5) the statute's legislative history. *Id.* Applying this multi-factor standard, we hold that our General Assembly intended to designate subsection (2)(b)(I) a sentence enhancer, not an element of the offense.

¶4 We further hold that where, as here, a cruelty-to-animals (second or subsequent offense) case (1) includes notice in the charging document of the prior conviction for cruelty to animals and (2) is treated as a felony throughout the proceedings—including in terms of its prosecution in district court (not county court), the right to a preliminary hearing (if eligible), the number of peremptory challenges, and the number of jurors—the Sixth Amendment doesn't require that the misdemeanor→felony transforming fact in subsection (2)(b)(I) be proved to a jury beyond a reasonable doubt. Lastly, we hold that, even assuming the

defendant's state constitutional challenge was forfeited and not waived, no plain error occurred.[1]

¶5 A division of the court of appeals correctly determined that our legislature intended to make subsection (2)(b)(I) a sentence enhancer, not an element. *People v. Caswell*, 2021 COA 111, ¶ 10, 499 P.3d 361, 363. However, the division incorrectly concluded that it could bypass the Sixth Amendment question because it was able to discern a clear legislative intent to treat the fact of a prior conviction as a sentence enhancer. *Id.* at ¶ 19, 499 P.3d at 365. In doing so, the division relied on part of our discussion in *Linnebur v. People*, 2020 CO 79M, ¶ 31, 476 P.3d 734, 741: "[I]f we can glean a clear legislative intent in either direction, then we may leave aside the Sixth Amendment issue and simply resolve this case as a matter of statutory interpretation." *Caswell*, ¶ 19, 499 P.3d at 365.

¶6 Today we clarify that we could set aside the Sixth Amendment issue in *Linnebur* because we ruled that the fact of prior convictions was an element of felony DUI that had to be proved to the jury beyond a reasonable doubt, thereby granting Linnebur the relief the Sixth Amendment required. *See Linnebur*, ¶ 31, 476 P.3d at 741 (noting that, "subject to constitutional limitations," whether the fact of prior convictions should be deemed an element of the offense or a sentence

[1] The defendant did not make her state constitutional claim before the trial court, and although she raised it on appeal, the court of appeals declined to address it.

enhancer depends on the legislature's intent); *O'Brien*, 560 U.S. at 224–25 (explaining that, "[s]ubject to th[e] constitutional constraint[s]" of the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, whether a given fact is an element of the crime itself or a sentence enhancer is a question for the legislature). Because we conclude here that the legislature intended to make the fact of a prior conviction a sentence enhancer, and because we assume without deciding that the defendant's state constitutional challenge was not waived, we must address whether our General Assembly's approach violates the Sixth Amendment or article II of the Colorado Constitution. As mentioned, we rule that both constitutional claims fall short.

¶7 Therefore, we affirm the division's judgment. But we do so on partially different grounds.

I. Facts and Procedural History

¶8 Pursuant to a request from Lakewood Animal Control, Deputy Joseph Colpitts, a deputy with the Lincoln County Sheriff's Office ("LCSO"), conducted a welfare check on the animals at Constance Eileen Caswell's residential property in Limon, Colorado, on March 15, 2016. Thereafter, the Colorado Humane Society informed the LCSO that it had received a call from someone expressing concern about those animals. Three days after his initial visit, Deputy Colpitts returned to Caswell's property with an investigator from the Colorado Humane Society and

an inspector from the Pet Animal Care and Facilities Act Program. They met with Caswell about her animals' welfare.

¶9 Approximately two weeks later, on March 31, LCSO deputies executed a search warrant at Caswell's property. They seized sixty animals: forty-six dogs, four cats, five birds, and five horses. According to the deputies, there was no food or water for the dogs; no water or fresh air for the cats; no food, drinkable water, or fresh air for the birds; and no drinkable water or sufficient food for the horses. The deputies made additional troubling observations: certain enclosed spaces where some animals were located were covered in trash and feces and smelled strongly of ammonia; some of the animals were underweight, others were dehydrated, and still others appeared to be suffering from untreated medical conditions; and there were five dead dogs that had to be exhumed.

¶10 Based on the deputies' search, the People filed a complaint charging Caswell with forty-three class 6 felony counts of cruelty to animals for acts occurring between March 15 and March 31, 2016. Cruelty to animals is generally a class 1 misdemeanor, § 18-9-202(2)(a), but pursuant to subsection (2)(b)(I) of the statute, it is a class 6 felony if the defendant has a prior conviction for that crime. Each of the counts brought against Caswell identified her prior cruelty-to-animals conviction as a fact that elevated the classification of the charge from a misdemeanor to a felony and enhanced the applicable sentence.

¶11 The People treated Caswell's case as a felony case from beginning to end. Thus, her case was filed and prosecuted in district court (not county court), and she was afforded all the rights available to any defendant charged with a felony, including the right to five peremptory challenges, the right to an additional peremptory challenge for every alternate juror selected, and the right to a jury of twelve.[2]

¶12 Before trial, defense counsel moved for bifurcation to prevent the jury from hearing about his client's prior conviction for cruelty to animals. The trial court denied the motion as moot, however, ruling that the fact of a prior conviction was a sentence enhancer, not an element of the crime, which meant that it didn't have to be proved to the jury beyond a reasonable doubt.

¶13 The jury found Caswell guilty of all forty-three counts. During the sentencing hearing, Caswell conceded that she had previously been convicted of cruelty to animals. The trial court accordingly entered forty-three class 6 felony convictions. It then sentenced Caswell to eight years of probation, forty-three days in jail, and forty-seven days of in-home detention.

¶14 Caswell appealed, and a division of the court of appeals affirmed. *Caswell*, ¶ 1, 499 P.3d at 362. Citing our decision in *Linnebur*, the division rejected Caswell's

[2] Caswell wasn't eligible for a preliminary hearing on the class 6 felony of cruelty to animals (second offense).

contention that her convictions should be reversed because our General Assembly intended the recidivist provision in subsection (2)(b)(I) to be an element of the offense to be proved to the jury beyond a reasonable doubt. *Id.* at ¶ 5, 499 P.3d at 363.

¶15 In *Linnebur*, a case that dealt with the crime of felony DUI, we explained that where a statute doesn't explicitly state whether the fact of prior convictions constitutes an element or a sentence enhancer, "we must look for other evidence of the General Assembly's intent." ¶ 17, 476 P.3d at 738. We listed the five factors the Supreme Court has identified as relevant in deciphering such legislative intent: (1) the statute's "language and structure, (2) tradition, (3) risk of unfairness, (4) severity of the sentence, and (5) legislative history." *Id.* at ¶ 10, 476 P.3d at 737 (quoting *O'Brien*, 560 U.S. at 225).

¶16 The division zeroed in on the first factor—the language and structure of the cruelty-to-animals statute—and concluded that it "clearly signal[s] the General Assembly's intent" to designate the fact of a prior conviction a sentence enhancer. *Caswell*, ¶ 10, 499 P.3d at 363. Subsection (2)(b)(I), indicated the division, resides in the part of the statute addressing sentencing, not in the part of the statute setting forth the elements of the offense. *Id.* at ¶ 11, 499 P.3d at 363–64. Further, added the division, the statute doesn't require that a prior conviction be pled in the charging document. *Id.* at ¶ 12, 499 P.3d at 364. Thus, concluded the division,

although our court determined in *Linnebur* that the language and structure of the DUI statutory scheme clearly indicate that the General Assembly intended to make the fact of prior convictions an element of the offense of felony DUI, the language and structure of the cruelty-to-animals statute reflect a different legislative intent regarding the fact of a prior conviction. *Id.* at ¶¶ 13, 17, 499 P.3d at 364.

¶17 Although the division acknowledged that our analysis in *Linnebur* also discussed tradition and the risk of unfairness, it was unpersuaded that either factor mattered in this case. *Id.* at ¶¶ 18–19, 499 P.3d at 364–65. Tradition, noted the division, would certainly weigh in favor of considering the fact of a prior conviction as a sentence enhancer because recidivism has historically been deemed a sentence enhancer. *Id.* at ¶ 18, 499 P.3d at 364. And the division believed it could ignore the risk of unfairness—and, by extension, any potential violation of the Sixth Amendment—because it inferred from our opinion in *Linnebur* that it was free to "resolve this case as a matter of statutory interpretation."[3] *Id.* at ¶ 19, 499 P.3d at 365 (quoting *Linnebur*, ¶ 31, 476 P.3d at 741). Finally, the division did

[3] In *Linnebur*, we commented that the unfairness associated with permitting the defendant to be tried for a misdemeanor to the jury and then sentenced for a felony by the judge on the basis of a fact that had to be proved only by a preponderance of the evidence was so significant that it risked running afoul of the Sixth Amendment. ¶ 29, 476 P.3d at 741. Ultimately, though, we didn't see the need to deal with any Sixth Amendment concerns, observing that the legislature clearly intended the fact of prior convictions to be treated as an element. *Id.* at ¶ 31, 476 P.3d at 741. As we stated above, we clarify this point today.

not discuss the remaining factors—the severity of the sentence and the statute's legislative history.[4]

¶18 Caswell then petitioned our court for certiorari. We granted her petition.[5]

II. Analysis

¶19 We begin by setting forth the standard that governs our review. Next, in our quest to discern whether the legislature intended to make subsection (2)(b)(I) an element or a sentence enhancer, we apply the five factors the Supreme Court outlined in *O'Brien*. Because we conclude that our General Assembly meant to designate the misdemeanor→felony transforming fact in subsection (2)(b)(I) a sentence enhancer, and because we assume without deciding that Caswell didn't waive her state constitutional challenge, we proceed to consider whether, as Caswell contends, the legislature's approach violates the Sixth Amendment and article II.

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[4] In *Linnebur*, we considered the severity of the sentence as part of our evaluation of the risk of unfairness, and we determined that the pertinent legislative history was not especially helpful. ¶ 17 n.3, 476 P.3d at 738 n.3.

[5] We agreed to review the following two questions:

1. Whether the prior-conviction provision of the animal cruelty statute is a sentence enhancer or an element of the offense.
2. Whether a fact that transforms a misdemeanor into a felony must be found by a jury beyond a reasonable doubt.

A. Standard of Review

¶20 Whether the legislature meant to make a statutory provision an element versus a sentence enhancer is a question of law that we review de novo. *Linnebur*, ¶ 9, 476 P.3d at 736. Subject to constitutional constraints, it is the legislature's prerogative to designate a fact in a statutory scheme either an element of the offense or a sentence enhancer. *O'Brien*, 560 U.S. at 225. This is not a distinction without a difference. "Elements of a crime must be charged in an indictment and proved to a jury beyond a reasonable doubt." *Id.* at 224. Sentencing factors, however, "can be proved to a judge at sentencing by a preponderance of the evidence." *Id.* Unfortunately, legislatures seldom explicitly state whether a statutory provision is an element or a sentence enhancer, leaving courts to sort it out. *Id.* at 225.

¶21 When, as here, the legislature is not explicit, courts must "look to the provisions and the framework of the statute to determine whether a fact is an element or a sentencing factor." *Id.* As noted, this entails an examination of five factors: (1) the statute's language and structure, (2) tradition, (3) the risk of unfairness, (4) the severity of the sentence, and (5) the statute's legislative history. *Id.* We take up each factor in turn.

B. *O'Brien*'s Five Factors

1. The Statute's Language and Structure

¶22 Caswell concedes that the language and structure of the statute make subsection (2)(b)(I) "look[] like a sentence enhancer." She argues, though, that "[l]ooks can be deceiving." Fair enough. However, in this instance, what you see is what you get.

¶23 The cruelty-to-animals statute provides, in pertinent part, as follows:

> (1)(a) A person commits cruelty to animals if he or she knowingly, recklessly, or with criminal negligence overdrives, overloads, overworks, torments, deprives of necessary sustenance, unnecessarily or cruelly beats, allows to be housed in a manner that results in chronic or repeated serious physical harm, carries or confines in or upon any vehicles in a cruel or reckless manner, . . . or otherwise mistreats or neglects any animal, or causes or procures it to be done, or, having the charge or custody of any animal, fails to provide it with proper food, drink, or protection from the weather consistent with the species, breed, and type of animal involved, or abandons an animal.
>
> . . . .
>
> (2)(a) Except as otherwise provided in subsection (2)(b) of this section, cruelty to animals . . . is a class 1 misdemeanor.
>
> . . . .
>
> (2)(b)(I) A second or subsequent conviction under the provisions of paragraph (a) of subsection (1) of this section is a class 6 felony.

§ 18-9-202.

¶24 Subsection (1)(a) defines the crime of cruelty to animals charged in this case. Of particular interest here, it enumerates the elements of the offense. But a prior conviction for cruelty to animals is conspicuously absent from the flock. Other substantive provisions in the statute are consistent with subsection (1)(a). Specifically, subsections (1)(b) and (1.5)(a)–(c), which provide alternative methods of committing the crime of cruelty to animals and set forth additional related crimes, identify the elements of each offense without including a prior conviction as one of those elements.

¶25 By contrast, subsection (2) deals strictly with sentencing; no elements appear in that subsection. Subsection (2)(a) establishes that a first conviction for cruelty to animals is a class 1 misdemeanor, while subsection (2)(b)(I) makes a second or subsequent conviction for cruelty to animals a class 6 felony. Importantly, there is no requirement in subsection (2)(b)(I) to plead any prior conviction in the charging document. It is now an irrefragable principle that elements must be pled in the charging document. *O'Brien*, 560 U.S. at 224.

¶26 The remaining provisions in the statute are of no moment for our purposes. Subsection (1.8) simply authorizes a peace officer to impound an animal under certain circumstances and delineates when a licensed veterinarian may euthanize such an animal without a court order. Subsection (2.5) creates an affirmative defense. Subsection (3) clarifies that nothing in the statute is meant to alter the

authority of the parks and wildlife commission or to prohibit conduct permitted by title 33. And subsection (4) provides the short title of the statute ("Punky's Law").

¶27 The division concluded that the language and structure of section 18-9-202 clearly signal the legislature's intent to designate subsection (2)(b)(I) a sentence enhancer, not an element. *Caswell*, ¶ 10, 499 P.3d at 363. We wholeheartedly agree.

¶28 Caswell reminds us, however, that we reached the opposite result in *Linnebur* after inspecting the language and structure of the DUI statutory scheme. True enough. But a juxtaposition of the two statutory schemes shows why. First, unlike subsection (2)(b)(I), the provision in the DUI statutory scheme regarding the fact of prior convictions appears in the section that defines the underlying crime and lists its elements. *See* § 42-4-1301(1)(a), C.R.S. (2023). Second, in contrast to subsection (2)(b)(I), the sentence enhancer provisions in the DUI statutory scheme omit reference to the prior convictions the prosecution must establish. *See* § 42-4-1307(5)–(6), C.R.S. (2023). And third, there is no pleading requirement related to the recidivism provision in the cruelty-to-animals statutory scheme, but the felony DUI statutory scheme requires that the People allege the pertinent prior convictions in the charging document. *See* § 42-4-1301(1)(j). Thus, although we rely on the same analytical framework in both cases, the outcomes are as different as the two statutory schemes.

2. Tradition

¶29 Recidivist statutory provisions requiring harsher punishment have a rich history that dates back to colonial times. *Parke v. Raley*, 506 U.S. 20, 26 (1992). As the Supreme Court stated more than a century ago in *Graham v. West Virginia*, 224 U.S. 616, 623 (1912), the propriety of imposing more severe punishment upon recidivists "has long been recognized in this country and in England." Indeed, recidivism may well be "the most traditional" basis to increase an offender's sentence. *Almendarez-Torres v. United States*, 523 U.S. 224, 243 (1998).

¶30 In *Linnebur*, we acknowledged that tradition "would certainly weigh in favor of considering the fact of prior convictions to be a sentence enhancer." ¶ 26, 476 P.3d at 739. We echo that sentiment today. Therefore, in our view, this factor also supports the conclusion that the legislature meant to designate the recidivist provision in subsection (2)(b)(I) a sentence enhancer.

3. The Risk of Unfairness

¶31 There is an inherent risk of unfairness to defendants in designating the fact of a prior conviction an element of the charged offense. *See Almendarez-Torres*, 523 U.S. at 235. Such designation would require the jury to hear about a defendant's prior conviction before deciding whether the defendant is guilty of the charged offense. This is so because the People "must prove every element of the charged offense beyond a reasonable doubt," *People v. Vidauri*, 2021 CO 25,

¶ 10, 486 P.3d 239, 241, and "a trial court may not bifurcate the elements of . . . any [charged] offense . . . during a jury trial," *People v. Kembel*, 2023 CO 5, ¶ 4, 524 P.3d 18, 21. The risk of unfairness is magnified where, as here, the prior conviction is for precisely the same type of crime as the one charged. *See People v. Fullerton*, 525 P.2d 1166, 1168 (Colo. 1974).

¶32 Tellingly, Caswell recognized this risk before trial. She moved for bifurcation, attempting to prevent the jury from learning about her prior conviction before it decided whether she was guilty of the charged offense.

¶33 Like the Supreme Court, "we do not believe, other things being equal, that [the legislature] would have wanted to create this kind of unfairness in respect to facts that are almost never contested."[6] *Almendarez-Torres*, 523 U.S. at 235. We conclude that in a jury trial for cruelty to animals (second or subsequent offense), the risk of unfairness to the defendant stemming from evidence of a prior cruelty-to-animals conviction indicates the legislature's intent to treat any such prior conviction as a sentence enhancer, not as an element.[7]

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[6] Caswell stipulated at the sentencing hearing that she had a prior conviction for cruelty to animals.

[7] We recognize that we said in *Kembel* that "the potential for prejudice" to the defendant in this type of situation may be largely neutralized through limiting jury instructions. ¶ 49, 524 P.3d at 28. But we also made it clear there that it is unrealistic to expect instructions to completely eliminate that "potential prejudice." *Id.* at ¶ 53, 524 P.3d at 29. In any event, the question before us today

¶34 Caswell pushes back. She maintains that the fact of a prior conviction should have been found by the jury because her prior conviction is for a misdemeanor, and in her view, the reliability of misdemeanor convictions is automatically suspect. But Caswell cites no authority, and we've uncovered none, suggesting that misdemeanor convictions are categorically unreliable. Nor has Caswell made us aware of any reason why her prior misdemeanor conviction, in particular, was faulty.

¶35 Besides, were we to agree with Caswell, we'd transgress the legislature's mandate in subsection (2)(b)(I) that a prior misdemeanor conviction enhances the punishment for a recidivist defendant. Our task is to uncover, not undermine, the legislature's intent.[8] Doing as Caswell suggests would also require us to flout our decision in *People v. Huber*, 139 P.3d 628, 632 (Colo. 2006), where we expressly declared that "[a] judge no more has to find additional facts when the defendant's

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differs from the one we faced in *Kembel*. Here, we're seeking to discern whether, given the risk of unfairness to defendants, *the legislature intended* to designate the fact of a prior conviction an element of the offense. In *Kembel*, that train had left the station—it departed the moment we concluded in *Linnebur* that the fact of prior convictions is an element of felony DUI—and the only question was whether the element of prior convictions could be bifurcated from the other elements during a jury trial.

[8] We do not address Caswell's contention regarding the provision in subsection (2)(b)(I) permitting a nolo contendere plea to be considered a prior conviction for purposes of that subsection. Caswell's prior conviction did not involve a nolo contendere plea.

prior conviction is for a misdemeanor than when it is for a felony." "[A]s long as the prior conviction arose from procedures that satisfy the Sixth and Fourteenth Amendments, the judge may consider the prior conviction at sentencing," regardless of whether it is a felony or a misdemeanor. *Id.*

¶36 At any rate, to the extent that Caswell focuses on the differences in procedural safeguards governing felony cases and misdemeanor cases, she misses the mark. Even if the fact of a prior conviction in subsection (2)(b)(I) were presented to the jury, it wouldn't be to relitigate the matter; rather, the jury would simply determine whether the defendant was the person who was convicted of cruelty to animals in the prior case identified in the charging document. Thus, presenting the fact of a prior conviction to the jury would not remedy the deficiencies that Caswell assumes exist in all misdemeanor prosecutions.

¶37 Caswell nevertheless asserts that taking the fact of a prior conviction away from the jury's determination is intrinsically unfair to defendants. The Supreme Court disagrees, however, and we're bound by its jurisprudence.

¶38 *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), teaches that a fact that increases the sentence for a crime beyond the statutory maximum must be proved to a jury beyond a reasonable doubt, with one notable exception—when the sentence-enhancing fact relates to a prior conviction. *See Blakely v. Washington*, 542 U.S. 296, 301 (2004) (applying the rule expressed in *Apprendi* that, save for the

fact of a prior conviction, any fact increasing the penalty of a crime beyond the maximum set by the legislature must be proved to a jury beyond a reasonable doubt); *see also Alleyne v. United States*, 570 U.S. 99, 103 (2013) (extending the *Apprendi* rule to facts that increase the mandatory minimum to which a defendant is exposed). It is "[w]ith that exception" that the majority in *Apprendi* endorsed the statement of the rule set forth in the concurring opinions: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." 530 U.S. at 490 (alteration in original) (quoting *Jones v. United States*, 526 U.S. 227, 252–53 (1999) (Stevens, J., concurring)). *Apprendi*'s carveout for prior convictions is rooted in *Almendarez-Torres*, which remains good law almost a quarter of a century later.[9]

¶39 In short, like the two previous factors, the risk of unfairness factor belongs on the sentence enhancer side of the ledger. That's where we place it.

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[9] The Supreme Court posited in *Apprendi* that *Almendarez-Torres* was "arguabl[y] . . . incorrectly decided." 530 U.S. at 489. But it nevertheless honored the holding in that case. *Id.* at 489–90. Indeed, as noted, that's the genesis of the prior-conviction carveout. And the Supreme Court has declined to overrule *Almendarez-Torres* since. Of course, so long as *Almendarez-Torres* remains good law, we must adhere to it.

4. Severity of the Sentence

¶40 A drastic, or even substantial, increase in an offender's potential sentence based on the establishment of a fact is an indication that the legislature meant to designate that fact an element. For example, in *O'Brien*, the Supreme Court considered a statute that prohibited (1) the use or carrying of a firearm in relation to a crime of violence or a drug-trafficking crime, or (2) the possession of a firearm in furtherance of any of those crimes. 560 U.S. at 221. But if the firearm was a machine gun, the statute vaulted the mandatory minimum sentence from five to thirty years in prison. *Id.* The question the Court grappled with was whether the fact that the firearm was a machine gun was an element to be proved to a jury or a sentence enhancer that could be proved to a judge at sentencing. *Id.* The Court concluded that the sentence enhancement at issue was "not akin to the 'incremental changes in the minimum' that one would 'expect to see in provisions meant to identify matters for the sentencing judge's consideration,' . . . (from 5 years to 7 years); it [was] a drastic, sixfold increase that strongly suggest[ed] a separate substantive crime." *Id.* at 229 (quoting *Harris v. United States*, 536 U.S. 545, 554 (2002)). Although the Court acknowledged that there were some arguments in favor of treating the machine-gun provision as a sentencing factor, it ultimately held that the provision should be deemed "an element of an offense." *Id.* at 235.

¶41 *Jones* sheds additional light on the matter. There, the Court reviewed a statute prohibiting carjacking while possessing a firearm and using force, violence, or intimidation. *Jones*, 526 U.S. at 230. A violation of the statute carried a maximum of fifteen years in prison. *Id.* But if serious bodily injury resulted, the maximum went up to twenty-five years. *Id.* And if death resulted, the maximum was a potential life sentence. *Id.* The Court was understandably dubious that "the specification of facts sufficient to increase a penalty range by two-thirds, let alone from 15 years to life, was meant to carry none of the process safeguards that elements of an offense bring with them for a defendant's benefit." *Id.* at 233. And because adopting the government's position would have raised serious constitutional questions, the Court resolved any doubt on the issue of statutory construction in favor of avoiding such questions. *Id.* at 251. It thus construed the statute as "establishing three separate offenses by the specification of distinct elements, each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict." *Id.* at 252.

¶42 In stark contrast to *O'Brien* and *Jones*, here, the fact of a prior conviction does not substantially, let alone drastically, change the severity of the sentence.[10] A conviction for cruelty to animals (first offense) is punishable as a class 1

[10] We underscore that neither of the sentence-enhancing facts in *O'Brien* and *Jones* was a prior conviction.

misdemeanor (the most serious misdemeanor class) with imprisonment in jail for a period of six to eighteen months, *see* § 18-1.3-501(1)(a), C.R.S. (2023), while a conviction for cruelty to animals (second or subsequent offense) is punishable as a class 6 felony (the least serious felony class) with imprisonment in the Department of Corrections for a period of twelve to eighteen months, followed by an additional twelve months of mandatory parole, *see* § 18-1.3-401(1)(a)(V)(A), C.R.S. (2023). In our view, the incremental increase in punishment resulting from a prior conviction for cruelty to animals is yet another signal that our legislature intended to designate subsection (2)(b)(I) a sentence enhancer, not an element.

¶43 That leaves only one factor, the statute's legislative history. But as we discuss next, it is of little assistance because, like Switzerland, it is neutral.

5. The Statute's Legislative History

¶44 Both parties note that the statute's legislative history has little bearing on the present inquiry. We concur. Consequently, we deem legislative history in this case neutral.

6. Summary

¶45 In short, four of the five factors articulated by the Supreme Court in *O'Brien* signal a legislative intent to designate subsection (2)(b)(I) a sentence enhancer. One of those four factors relates specifically to the language and structure of the statute under the microscope. And the last factor, legislative history, favors

neither side of the sentence-enhancer/element coin. We therefore conclude that our General Assembly intended to designate the fact of prior convictions in the cruelty-to-animals statute a sentence enhancer, not an element. It follows that, contrary to Caswell's position, the People didn't need to prove her prior conviction for cruelty to animals to the jury beyond a reasonable doubt.

¶46 The question remains whether it violates the Sixth Amendment or article II to have a judge decide by a preponderance of the evidence whether a defendant has a prior cruelty-to-animals conviction when the establishment of such a criminal history transforms a misdemeanor into a felony. We tackle that question next.

C. Caswell's Constitutional Claims

1. The Sixth Amendment

¶47 Caswell contends that even if the legislature intended to designate subsection (2)(b)(I) a sentence enhancer, the Sixth Amendment still requires that the fact of a prior conviction be submitted to a jury and proved beyond a reasonable doubt. This is so, continues Caswell, because subsection (2)(b)(I) transforms a conviction from a misdemeanor into a felony, and a felony conviction carries collateral consequences that a misdemeanor conviction does not. We are unpersuaded.

¶48 As far as the parties and our court can tell, with the exception of the Ninth Circuit, *see United States v. Rodriguez-Gonzales*, 358 F.3d 1156, 1158 (9th Cir. 2004), and a division of our own court of appeals, *see People v. Viburg*, 2020 COA 8M, ¶¶ 15–28, 477 P.3d 746, 749–51, every court that has faced this argument has rejected it. *See, e.g.*, *State v. Palmer*, 189 P.3d 69, 75 (Utah Ct. App. 2008) (indicating that "virtually all of the other jurisdictions that have addressed this issue have rejected [the] proposition" that a statutory provision that elevates a conviction from a misdemeanor to a felony based on a defendant's criminal history must be considered an element); *State v. Pike*, 162 S.W.3d 464, 468, 472 (Mo. 2005); *Talley v. State*, No. 172,2003, 2003 WL 23104202, at *2 (Del. Dec. 29, 2003); *People v. Braman*, 765 N.E.2d 500, 502–04 (Ill. App. Ct. 2002); *State v. Kendall*, 58 P.3d 660, 667–68 (Kan. 2002); *State v. LeBaron,* 808 A.2d 541, 543–45 (N.H. 2002).

¶49 What's more, the validity of the only out-of-state case weighing in Caswell's favor—*Rodriguez-Gonzales*—is iffy at best. As the Court of Appeals of Utah noted in *Palmer*, two years before *Rodriguez-Gonzales* was decided, the Ninth Circuit, sitting en banc, reached the opposite conclusion. 189 P.3d at 76 n.13 (citing *United States v. Corona-Sanchez*, 291 F.3d 1201, 1208–11 (9th Cir. 2002) (en banc)). In doing so, the Ninth Circuit's majority declined to adopt the dissent's position—namely, that "[r]aising the level of crime from a misdemeanor to a felony adds such grave consequences for the individual charged with a crime that it seems wholly

inconceivable that the element which causes this escalation can be deemed merely a sentencing factor." *Corona-Sanchez*, 291 F.3d at 1219 (Kozinski, J., dissenting). And since *Rodriguez-Gonzales* was announced, a different panel of the Ninth Circuit has held that "a mandatory minimum sentence of life imprisonment based on [the judge's] finding that [the defendant] had two prior" convictions was a sentencing factor that didn't have to be proved to the jury beyond a reasonable doubt. *United States v. McCaney*, 177 Fed. App'x. 704, 709–10 (9th Cir. 2006).

¶50 Today we join the majority of jurisdictions. We therefore overrule *Viburg* to the extent that it conflicts with this opinion.

¶51 We recognize that elevating a conviction from a misdemeanor to a felony carries collateral consequences. They include: the loss of the right to vote while incarcerated, the loss of the right to own firearms, the possibility of habitual criminal charges upon the subsequent commission of a felony, impeachment while testifying in a future proceeding, and the inability to obtain certain employment. But such consequences in no way nullify the holdings in *Almendarez-Torres* and *Apprendi*. Inasmuch as the Supreme Court is willing to allow the fact of prior convictions to be proved to a judge by a preponderance of the evidence notwithstanding the serious consequence of enhanced imprisonment, we discern no reason to prohibit the same based on collateral consequences that are much less serious.

¶52 Notably, in *Almendarez-Torres*, the Court ruled that the fact of prior convictions did not need to be proved to the jury beyond a reasonable doubt even though that fact drastically enhanced the potential sentence tenfold, from a prison term of two years to a prison term of twenty years. 523 U.S. at 226–27. *Apprendi* didn't disavow *Almendarez-Torres*, and courts have since upheld sentences enhancing the term of confinement, including to a sentence of life imprisonment, based on prior convictions. *See United States v. Ceballos*, 302 F.3d 679, 696 (7th Cir. 2002); *United States v. Boone*, 279 F.3d 163, 186 n.16 (3d Cir. 2002); *United States v. Phipps*, 259 F.3d 961, 962–63 (8th Cir. 2001).

¶53 The aforementioned collateral consequences are, for Caswell, but a slim reed on which to lean. To be sure, they "pale in comparison to the complete loss of freedom—sometimes for life—approved by the Supreme Court and applied by other jurisdictions."[11] *Palmer*, 189 P.3d at 76.

¶54 Caswell assumes that *Almendarez-Torres* and *Apprendi* do not apply when the sentence-enhancing prior conviction is a misdemeanor instead of a felony. Again, we see no basis in the law to question the validity of a conviction simply

[11] Of course, a defendant whose prison time is increased as a result of prior convictions also cannot vote, possess a weapon, or obtain any gainful employment during the extra years of incarceration. *Palmer*, 189 P.3d at 76. Caswell ignores these collateral consequences of enhanced imprisonment.

because it is a misdemeanor and not a felony. And neither *Almendarez-Torres* nor *Apprendi* excluded non-felony convictions from the criminal-history carveout.

¶55 Still, Caswell makes much of the concern we expressed in *Linnebur* regarding the unfairness associated with allowing a defendant to be tried for a misdemeanor and then sentenced for a felony "on the basis of a fact that had to be proved [to a judge] only by a preponderance of the evidence." ¶ 29, 476 P.3d at 741. But that concern is tempered here for two reasons: (1) the People provided notice in the complaint that they intended to rely on Caswell's prior cruelty-to-animals conviction to transform any conviction on the count charged from a misdemeanor into a felony and to enhance her sentence; and (2) Caswell's case was treated like a felony case, not a misdemeanor case, from beginning to end. In other words, from the fledgling stages of this litigation, Caswell knew that the People sought to convict her of a class 6 felony based on her prior conviction for cruelty to animals, and she was prosecuted and tried just as if she had been facing a class 6 felony.

¶56 We hold that where, as here, a cruelty-to-animals (second or subsequent offense) case (1) includes notice in the charging document of the prior conviction for cruelty to animals and (2) is treated as a felony throughout the proceedings—including in terms of its prosecution in district court (not county court), the right to a preliminary hearing (if eligible), the number of peremptory

challenges, and the number of jurors—the Sixth Amendment doesn't require that the misdemeanor→felony transforming fact in subsection (2)(b)(I) be proved to a jury beyond a reasonable doubt.[12] Thus, the Sixth Amendment did not require the People to prove Caswell's prior cruelty-to-animals conviction to the jury beyond a reasonable doubt.

¶57 To be clear, we do not extend *Apprendi*'s criminal-history carveout today. Instead, we do as we must: We apply it. Nothing in *Apprendi* or its progeny suggests that the carveout is subject to restrictions that render it inapplicable where, as here, the fact of a prior conviction transforms a misdemeanor into a felony. And we are not at liberty to assume that the carveout is inapposite simply because the Supreme Court has never had occasion to apply it to a misdemeanor→felony transforming fact. Nor does the narrow nature of the carveout, which is limited in scope to the fact of a prior conviction, affect the analysis. A prior conviction is a prior conviction, regardless of whether it transforms a misdemeanor into a felony or not.

[12] To be clear, today's decision should not be understood as suggesting that a Sixth Amendment violation would have occurred if the People had failed to provide notice of Caswell's prior conviction in the charging document and if the case had not been treated as a felony from its inception. We need not, and thus do not, decide whether Caswell's right to a jury trial under the Sixth Amendment would have been violated under those circumstances.

2. Article II of the Colorado Constitution

¶58 Pursuant to article II, sections 16 and 23 of the Colorado Constitution, Caswell mounts a second constitutional challenge against the designation of subsection (2)(b)(I) as a sentence enhancer. This claim is unpreserved. The People ask us to determine that the issue has been waived and is not reviewable. *See People v. Rediger*, 2018 CO 32, ¶ 40, 416 P.3d 893, 902 (observing that a waiver, which is the intentional relinquishment of a known right or privilege, "extinguishes error, and therefore appellate review"). Caswell counters that the issue has merely been forfeited and is thus subject to plain error review. *See id.* (explaining that forfeiture happens through neglect and that "this court may review a forfeited error under the plain error standard"). We need not take sides, however, because even assuming the issue was forfeited and not waived, we perceive no plain error.

¶59 "An error is plain if it is obvious and substantial and so undermines the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction." *Id.* at ¶ 48, 416 P.3d at 903. Caswell does not assert, let alone demonstrate, that any error was obvious or substantial. Nor does she argue, never mind show, that the claimed error so undermined the fundamental fairness of her trial that it now casts serious doubt on the judgment of conviction.

¶60 In any event, no error occurred here. Caswell maintains that the People were required to prove the fact of a prior conviction to the jury beyond a reasonable doubt because our state constitution addresses the right to a jury trial in two separate provisions, sections 16 and 23 of article II, and because section 23 contains language that's more forceful than that found in the Sixth Amendment. We are unmoved.

¶61 As for section 16, Caswell essentially concedes that it does not substantively differ from the Sixth Amendment. Accordingly, for all the reasons that Caswell's Sixth Amendment challenge fails, her section 16 challenge also fails.

¶62 And as for section 23, there is no indication that our framers meant to expand the scope of the right to a jury trial under section 16 to require that a jury find beyond a reasonable doubt the fact of a prior conviction when such a fact enhances a defendant's punishment. Caswell insists, though, that section 23 should be interpreted to require as much because it states that the right to trial by jury must remain "inviolate" in criminal cases. But if we were to adopt Caswell's construction of "inviolate," our constitution would be violated every time a judge finds by a preponderance of the evidence the existence of a prior conviction to enhance a defendant's sentence. That would gallop headlong into our jurisprudence. *See Lopez v. People*, 113 P.3d 713, 723 (Colo. 2005) (recognizing that

under *Apprendi*, "the fact of a prior conviction is expressly excepted from the jury trial requirement"); *Huber*, 139 P.3d at 631–32 (same).

¶63 Nor does the plain language of section 23 (including the word "inviolate") support the conclusion that when the fact of a prior conviction elevates a misdemeanor to a felony, it must be proved to the jury beyond a reasonable doubt. Our constitution doesn't even distinguish between felonies and misdemeanors; it defines only felonies. *See* Colo. Const. art. XVIII, § 4. Besides, as we discussed above, Caswell was charged, prosecuted, and tried as though she faced a felony, rendering the procedural differences between felonies and misdemeanors immaterial here. And, in any case, we stress that we established almost two decades ago that a prior conviction for a misdemeanor can enhance a defendant's sentence in the same way a prior conviction for a felony can. *Huber*, 139 P.3d at 631–32.

¶64 In sum, there was no error, much less plain error, here. Caswell's right to a jury trial under the Colorado Constitution was not violated.

III. Conclusion

¶65 We affirm the division's judgment. However, for the reasons we've set forth in this opinion, we do so on partially different grounds.

JUSTICE GABRIEL dissented.

JUSTICE GABRIEL, dissenting.

¶66 The Supreme Court has recognized, as a general rule, that "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 U.S. 466, 490 (2000); *see also Alleyne v. United States*, 570 U.S. 99, 103 (2013) (extending the *Apprendi* rule to facts that increase the mandatory minimum sentence to which a defendant is exposed, noting that such a fact is an "element" that must be submitted to the jury).

¶67 The Court, however, has recognized an exception to this general rule for the "fact of a prior conviction." *Apprendi*, 530 U.S. at 490. And although the Court has expressed doubt about the continuing vitality of the precedent on which this prior conviction exception is based, the Court has yet to overrule that precedent, though it has repeatedly described the exception as "narrow" and as an "exceptional departure" from the general rule. *Alleyne*, 570 U.S. at 111 n.1; *Apprendi*, 530 U.S. at 487.

¶68 Against this backdrop, the principal question before us today is whether we should extend the narrow prior conviction exception to a case in which the establishment of a prior conviction elevates a misdemeanor to a felony. Unlike the majority, I do not think that we should do so. Rather, because elevating a criminal offense from a misdemeanor to a felony changes the very nature of the offense

(with significant consequences for the defendant), I believe that in this circumstance, the Sixth Amendment requires that a jury, and not the trial judge, find the fact of the prior conviction beyond a reasonable doubt.

¶69 Accordingly, I respectfully dissent.

I. Factual and Procedural Background

¶70 The pertinent facts are not in dispute. Constance Eileen Caswell was charged with and subsequently convicted of forty-three counts of cruelty to animals under section 18-9-202, C.R.S. (2023). Under that statute, cruelty to animals is generally a class 1 misdemeanor, but a second or subsequent conviction elevates that crime to a class 6 felony. § 18-9-202(2)(a), (b)(I). Here, the trial court found that Caswell had a prior conviction and thus entered felony convictions at sentencing.

¶71 Caswell appealed, and in a unanimous, published opinion, a division of our court of appeals affirmed, concluding that because the language of section 18-9-202 indicates that the legislature clearly intended prior convictions to be sentence enhancers under that provision, such prior convictions need not be found by a jury. *People v. Caswell*, 2021 COA 111, ¶ 20, 499 P.3d 361, 365.

¶72 We then granted certiorari.

II. Analysis

¶73 I agree with the majority's ultimate determination that the application of the factors set forth in *United States v. O'Brien*, 560 U.S. 218, 225 (2010), would result in a conclusion that prior convictions for purposes of the animal cruelty statute are sentence enhancers. Maj. op. ¶ 44. But this does not end our inquiry. Rather, we must still decide whether the Sixth Amendment requires that a jury determine, beyond a reasonable doubt, a fact that would transform a misdemeanor into a felony. I thus begin by setting forth the applicable law in this area. I then proceed to explain why I believe that a jury must make this determination.

A. Applicable Law

¶74 In *Apprendi*, 530 U.S. at 477–78, the Supreme Court recognized the historically significant role of criminal jury trials, which are guaranteed by the Sixth Amendment to the United States Constitution:

> "[T]o guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties," trial by jury has been understood to require that "*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . . ."
>
> Equally well founded is the companion right to have the jury verdict based on proof beyond a reasonable doubt. "The 'demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, [though] its crystallization into the formula "beyond a reasonable doubt" seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the

> measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt.'"

(Alterations in original; first quoting 2 Joseph Story, *Commentaries on the Constitution of the United States* 540–41 (4th ed. 1873); then quoting 4 William Blackstone, *Commentaries on the Laws of England* 343 (1769) (emphasis added); and then quoting *In re Winship*, 397 U.S. 358, 361–62 (1970); other citations omitted.)

¶75 Consistent with the foregoing principles, the Court recognized that "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." *Apprendi*, 530 U.S. at 478 (footnote omitted).

¶76 The Court thus adopted a general rule providing that "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." *Id.* at 490. In establishing this rule, however, the Court acknowledged that *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), had carved out an exception to the rule. *Apprendi*, 530 U.S. at 487–90. This exception has come to be referred to as the "prior conviction exception." *See id.* at 490.

¶77 In *Almendarez-Torres*, 523 U.S. at 227, the Court considered an indictment that charged the defendant with having been found in the United States after being deported. The defendant pleaded guilty, admitting that he had been deported,

that he had later unlawfully reentered the United States, and that his prior deportation had resulted from three earlier aggravated felony convictions. *Id.* The case then proceeded to sentencing, where the defendant argued that because an indictment must allege all of the elements of a crime and his indictment had not mentioned his prior aggravated felony convictions, the court could not sentence him to more than two years, which was the maximum sentence for a defendant without prior convictions. *Id.* The district court disagreed and sentenced the defendant within the guideline range for offenders with prior convictions. *Id.*

¶78 The case ultimately found its way to the Supreme Court, and that Court likewise rejected the defendant's argument, concluding that the defendant could be sentenced in the aggravated range, notwithstanding the fact that the government had not charged the earlier convictions in the indictment. *Id.* at 226–27. In support of this conclusion, the Court deemed significant the fact that the defendant had admitted his prior convictions at the time he pleaded guilty. *See id.* at 248. As a result, the case presented no question as to the right to a jury trial or the standard of proof to be applied to any contested issue of fact that was before the Court. *See id.* And the Court expressed no view as to whether a heightened standard of proof might apply to sentencing determinations that bear significantly on the severity of the sentence. *Id.*

¶79 In light of the foregoing, I do not perceive the prior conviction exception on which the majority so heavily relies to be the firm and incontrovertible principle of law that the majority supposes it to be. *Almendarez-Torres* itself did not adopt a broad prior conviction exception. Indeed, the question of whether the fact of a prior conviction could be decided by the judge rather than the jury was not even before the Court. Rather, the question decided concerned the sufficiency of the indictment. *Id.* at 226–27.

¶80 Nonetheless, I cannot ignore the fact that in characterizing *Almendarez-Torres* as "at best an exceptional departure" from the general rule, the *Apprendi* Court at least suggested that *Almendarez-Torres* had, in fact, established an exception to the historic practice of having juries decide all facts that would increase the penalty for a crime beyond prescribed statutory maximums. *Apprendi*, 530 U.S. at 487; *see also United States v. Haymond*, 139 S. Ct. 2369, 2377 n.3 (2019) (observing that the Court has recognized a narrow prior conviction exception). And this is so even though (1) the *Apprendi* Court itself went on to muse that "it is arguable that *Almendarez-Torres* was incorrectly decided[] and that a logical application of [the Court's reasoning in *Apprendi*] should apply if the recidivist issue were contested," *Apprendi*, 530 U.S. at 489–90 (footnote omitted), and (2) other justices have echoed that sentiment both at the time *Apprendi* was decided and in the years since, *see, e.g.*, *Shepard v. United States*, 544 U.S. 13, 27 (2005)

(Thomas, J., concurring in part and concurring in the judgment) ("*Almendarez-Torres* . . . has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided."); *Apprendi*, 530 U.S. at 520 (Thomas, J., concurring) (noting an error in *Almendarez-Torres* to which Justice Thomas had succumbed when he joined the 5–4 majority opinion in that case).

¶81 For these reasons, and because the Supreme Court has not yet expressly overruled its precedents adopting and reaffirming the so-called "prior conviction exception," I cannot agree with Caswell that the exception is nothing more than dicta that has obtained the force of law based on the mere repetition of that dicta. Instead, I feel bound to acknowledge the existence of a prior conviction exception, although I must also adhere to the Supreme Court's repeated admonition that this deviation from the general rule is "narrow" and represents an "exceptional departure" from that rule. *Alleyne*, 570 U.S. at 111 n.1; *Apprendi*, 530 U.S. at 487.

¶82 And this is where I part company with my colleagues in the majority. Specifically, unlike my colleagues, I do not believe that the "narrow" exception adopted in *Almendarez-Torres* controls this case. The fact is that the Supreme Court has *never* extended the prior conviction exception to a case in which the fact of a prior conviction elevates a misdemeanor to a felony. (The majority does not suggest otherwise; it simply assumes that the prior conviction exception applies

in this scenario. *See* Maj. op. ¶¶ 37, 50.) Accordingly, in my view, the question presented here, properly framed, is whether we should *expand* the so-called prior conviction exception to such a case. Given the Supreme Court's repeated and consistent acknowledgement of the historic importance of the Sixth Amendment right to a jury trial (a view that the majority likewise espouses here, *see id.* at ¶¶ 1–2), as well as the Court's steadfast protection of that right, *see, e.g.*, *United States v. Booker*, 543 U.S. 220, 230–34 (2005); *Blakely v. Washington*, 542 U.S. 296, 305 (2004); *Ring v. Arizona*, 536 U.S. 584, 589 (2002), I believe that the answer is "no." I next explain why I reach that conclusion.

B. Application

¶83 As an initial matter, and consistent with what I have noted above, *Almendarez-Torres*, 523 U.S. at 228, ultimately concluded that an indictment "need not set forth factors relevant *only to the sentencing* of an offender found guilty of the charged crime." (Emphasis added.) In a case in which a prior conviction elevates a misdemeanor to a felony, however, it is not only the sentence that changes. To the contrary, the entire nature of the crime changes. *United States v. Rodriguez-Gonzales*, 358 F.3d 1156, 1160 (9th Cir. 2004). Thus, in my view, *Almendarez-Torres* does not apply to the facts presented here.

¶84 In addition, and related to my last point, the consequences of elevating a misdemeanor to a felony extend well beyond merely increasing the length of a

defendant's sentence. *People v. Viburg*, 2020 COA 8M, ¶ 17, 477 P.3d 746, 750; *People v. Schreiber*, 226 P.3d 1221, 1225 (Colo. App. 2009) (Bernard, J., concurring in part and dissenting in part).

¶85 For example, a felony conviction results in incarceration in the state penitentiary, whereas a misdemeanor conviction results in incarceration in the county jail. Colo. Const. art. XVIII, § 4; *Viburg*, ¶ 18, 477 P.3d at 750. This is significant because for well over a century, we have recognized that confinement in the state penitentiary is "more severe than confinement in a county jail, on account of the disgrace and reproach attached to confinement in an institution . . . set apart as a place for the incarceration of the more depraved and infamous classes of offenders." *Brooks v. People*, 24 P. 553, 553 (Colo. 1890); *accord Viburg*, ¶¶ 18–19, 477 P.3d at 750.

¶86 Moreover, precisely because the consequences of a felony conviction far exceed those of a misdemeanor conviction, felony defendants are afforded procedural protections beyond those afforded to misdemeanor defendants. For example, felony defendants are tried by juries of twelve, whereas misdemeanor defendants are tried by juries of six. § 18-1-406(1), C.R.S. (2023); Crim. P. 23(a)(1)–(2). Also, most felony defendants are entitled to five peremptory challenges, whereas misdemeanor defendants are allowed only three. Crim. P. 24(d)(2). And some felony defendants are entitled to preliminary hearings, which

give the court the opportunity to screen out cases in which prosecution is unwarranted, whereas misdemeanor defendants are not entitled to preliminary hearings. § 16-5-301(1)(a), C.R.S. (2023); *see also People v. Brothers*, 2013 CO 31, ¶ 16, 308 P.3d 1213, 1216 (noting that the purpose of a preliminary hearing is to screen out cases in which prosecution is unwarranted).

¶87 Finally, and not least important, felony convictions have significant collateral consequences that do not follow from misdemeanor convictions. For example, those convicted of a felony cannot vote while they are incarcerated. Colo. Const. art. VII, § 10; § 1-2-103(4), C.R.S. (2023). Convicted felons may be prohibited from owning firearms. § 18-12-108(1), C.R.S. (2023). Convicted felons may be barred from entering into certain professions. *See, e.g.*, § 12-20-404(1)(d)(I), C.R.S. (2023) (authorizing the director, board, or commission having regulatory authority over certain professions or occupations to deny, refuse to renew, revoke, or suspend a license, certification, or registration of an applicant, licensee, certificate holder, or registrant if that applicant, licensee, certificate holder, or registrant has committed an act or engaged in conduct constituting grounds for discipline or unprofessional conduct under a statutory provision governing the particular profession or occupation); § 12-100-120(1)(e), C.R.S. (2023) (authorizing the state board of accountancy to take disciplinary action against an accountant who has been convicted of a felony); § 44-20-121(3)(c), C.R.S. (2023) (providing that

a car manufacturer's or distributor's license may be denied, suspended, or revoked upon conviction of a felony). Certain felony convictions can be predicate offenses for purposes of a habitual criminal designation, § 18-1.3-801, C.R.S. (2023), and a person who has been convicted of two or more prior felonies might not be eligible for probation, § 18-1.3-201(2.5)(a)–(b), C.R.S. (2023). And a felony conviction may be used to impeach a witness's testimony. *See* § 13-90-101, C.R.S. (2023) ("[T]he conviction of any person for any felony may be shown for the purpose of affecting the credibility of such witness.").

¶88 As then-Judge and later Chief Judge of the Colorado Court of Appeals, Steven Bernard, correctly observed, "These collateral consequences are not trifling. They affect the exercise of important civil rights; or restrict the ability to earn a living; or expose one to additional penalties in the future; or undermine one's credibility in future proceedings." *Schreiber*, 226 P.3d at 1227 (Bernard, J., concurring in part and dissenting in part).

¶89 For these reasons, unlike the majority, I cannot agree that for Sixth Amendment purposes, a prior conviction that elevates a misdemeanor to a felony is merely a sentence enhancer that can be decided by the court after a felony conviction enters. Rather, as the Ninth Circuit and a division of our court of appeals have concluded, the differences between a misdemeanor and a felony are so fundamental that they do not merely affect the length of the defendant's

sentence but rather alter "the very nature of [her] crime." *Rodriguez-Gonzales*, 358 F.3d at 1161; *accord Viburg*, ¶ 25, 477 P.3d at 751.

¶90 I am not persuaded otherwise by the majority's reliance on the fact that Caswell received some of the procedural protections afforded felony defendants (e.g., a preliminary hearing and a jury of twelve). Maj. op. ¶¶ 11, 54. A critical question in cases regarding prior convictions is one of identity, that is, whether the defendant presently before the court committed the prior offense. *See, e.g.*, *Gorostieta v. People*, 2022 CO 41, ¶¶ 18–28, 516 P.3d 902, 905–07. Absent a finding of identity, the prior conviction is not established. *See id.* Accordingly, were the majority correct in its view of the law here, then in a case like this one, the judge—and the judge alone—will make a critical factual finding (i.e., on the question of identity) that will determine whether the defendant has committed a misdemeanor or a felony.

¶91 I do not believe that the Sixth Amendment authorizes a judge to make such a determination over a defendant's assertion of the right to have a jury decide that question, even if some of the other procedural protections afforded felony defendants were satisfied. Given the severe consequences facing such defendants, "close enough" cannot be constitutionally sufficient. Rather, in accordance with the above-described case law, I believe that the critical issue of identity must be presented to a jury, which can convict the defendant of a felony only if it finds the

fact of identity—and all other facts necessary to establish the prior conviction—beyond a reasonable doubt.

¶92 I am also unpersuaded by the majority's attempt to distinguish *O'Brien*, 560 U.S. at 221, 229–31, and *Jones v. United States*, 526 U.S. 227, 233 (1999), on the ground that the sentence enhancements there at issue were more severe than the sentence enhancement that Caswell faced in this case. Maj. op. ¶ 41. Assuredly, Caswell's Sixth Amendment right to a jury trial cannot turn on a court's subjective determination as to whether the sentence increase triggered by a finding of a prior conviction was severe enough.

III. Conclusion

¶93 For these reasons, unlike the majority, I would conclude that when the fact of a prior conviction elevates a misdemeanor to a felony, the Sixth Amendment requires that a jury find that fact beyond a reasonable doubt.

¶94 In so concluding, I acknowledge that the Supreme Court's jurisprudence in the years since *Almendarez-Torres* was decided has resulted in some uncertainty in this area, not only in Colorado, but also in federal and state courts throughout the country. Accordingly, and with great respect, I would urge the Supreme Court—whether in this or another case—to clarify whether the prior conviction exception remains viable and, if so, whether it applies in cases like this one, in which the fact of a prior conviction elevates a misdemeanor to a felony.

¶95 Because I am not convinced that the prior conviction exception applies here, I would reverse the judgment of the division below. Accordingly, I respectfully dissent.