IN THE SUPREME COURT OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Adverse Party,
v.
ZACKERY MAX DRIVER,
Defendant-Relator.
(CC 25CR23005) (SC S072990)

En Banc

Original proceeding in mandamus.*

On petition for a peremptory or alternative writ of mandamus filed June 1, 2026; considered and under advisement on July 14, 2026.

Sara Del Rubin, Assistant Attorney General, Salem, filed the memorandum in opposition for plaintiff-adverse party. Also on the memorandum were Dan Rayfield, Attorney General, and Paul L. Smith, Solicitor General.

Lindsey Burrows, Burrows Appellate Law LLC, Portland, filed the petition for writ of mandamus for defendant-relator.

PER CURIAM

The petition for writ of mandamus is denied.

James, J., dissented and filed an opinion, in which Masih, J., joined.

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* On petition for a writ of mandamus from an order of Washington County Circuit Court, Kathleen J. Proctor, Judge.

PER CURIAM.

The petition for a writ of mandamus is denied.[1]

JAMES, J., dissenting.

In this criminal case, defendant asserts that the state violated Oregon law in securing a felony indictment. ORS 132.320(7)(a) provides that "inadmissible hearsay of persons other than the peace officer who compiled the official report may not be presented to a grand jury." Defendant argues that, based on the witnesses listed on the indictment, it is apparent the state relied on a single officer to convey various out-of-court statements from multiple alleged victims. The state doesn't dispute that the officer did so, only that such statements were either not hearsay, or that some exception applied. Relator sought relief from the trial court, but none came. Relator then petitioned this court for an alternative writ of mandamus. Today, we deny that petition for mandamus relief.

Mandamus is an extraordinary remedy and, as such, is not appropriate in the vast majority of circumstances. It is also discretionary. I do not fault my colleagues for declining to exercise their discretion to allow the petition in this case. This case has imperfections. Even so, I see value in us taking up this case and write to explain my thinking.

When I read this record, I see a trial court uncertain if it has authority to act, even if it concludes that defendant has established that the state relied on inadmissible hearsay. I am concerned that our denial here may reinforce that uncertainty. As I will detail, a series of our decisions involving a separate statute—ORS 135.510, which lists two situations in which a court must set aside an indictment—have seemingly painted courts into a corner, and now, those decisions may have courts conclude that there is apparently nothing to be done, nor any mechanism by which courts can give effect to the intent of the legislature on the subject of the grand jury's

[1] As we have previously observed, "It is the prerogative of any member of this court to express their thoughts in separate opinions. Those separate opinions should not be taken as any indication of how the court, as a whole, would address an issue in a future case, nor as an invitation by the court for litigants to undertake such arguments." *State v. DeWitt Simons*, 375 Or 70, 93 n 12, 587 P 3d 311 (2026).

use of inadmissible hearsay. But it seems to me that our prior decisions may be distinguishable, and there are arguments we have yet to take up that there may be inherent authority for a trial court to set aside an indictment for violation of ORS 132.320(7)(a). As such, I would exercise my discretion to issue the alternative writ to consider those issues and to clarify the authority of trial courts in these circumstances.

I. BACKGROUND

On October 27, 2025, the state charged defendant by way of grand jury indictment with, among other things, 25 counts of promoting prostitution. None of the victims testified at the grand jury proceedings. Instead, according to the indictment, only one witness testified: a police officer. At the time it secured the indictment, no explicit hearsay exception applied for human trafficking.

As part of pretrial motions practice following the indictment, defendant argued to the trial court that the officer's grand jury testimony was hearsay, which the grand jury is prohibited by statute from hearing. Although defendant alleged that the indictment was obtained through improper hearsay testimony, he did not ask the trial court to set aside the indictment, likely believing that such relief was precluded in light of our decision in *State v. Stout*, 305 Or 34, 38, 749 P2d 1174 (1988), where, interpreting ORS 135.510(1), we held that "[t]his court has long held that the grounds listed in ORS 135.510 for setting aside an indictment are exclusive." Those grounds are largely procedural and do not include the use of inadmissible evidence. *See id.* at 41 (acknowledging that prosecutors generally may not use hearsay testimony in grand jury proceedings but refusing to set aside an indictment obtained based on hearsay testimony).

So, instead of asking the trial court to set aside the indictment, defendant asked the trial court for a preliminary hearing to determine whether there was probable cause to support the charge. When an individual is charged on an information, rather than an indictment, the district attorney must make a showing of probable cause to support the charge at a preliminary hearing before a judge. Or Const, Art VII (Amended), § 5(5). Defendant argued that the

relief for an improperly obtained indictment should be a preliminary hearing.[1]

Having established the relief that he was seeking, defendant then argued that the trial court should review the grand jury transcripts *in camera* to determine whether, in fact, the state had relied on improper hearsay testimony. The use of grand jury transcripts is limited by statute. Most relevantly, ORS 132.270(2)(c) provides that the transcripts may be released only for good cause:

> "Unless the court orders otherwise for good cause shown, the prosecuting attorney and the defense attorney may not copy, disseminate or republish the audio recording, the notes or report of a shorthand reporter, or a transcript prepared from the audio recording, notes or report, released pursuant to this subsection, except to provide a copy to an agent of the prosecuting attorney or defense attorney for the limited purpose of case preparation."

Defendant argued under that statute that there was good cause for the trial court to review the transcripts in this case. Anticipating the state's objection to that use of the transcripts under ORS 132.270(7)(b)—which provides that grand jury transcripts "[m]ay not be used to challenge the indorsement of an indictment as 'a true bill' or the proceedings that led to the indorsement"—defendant argued that, to the extent that ORS 132.270(7)(b) limits his ability to prove a violation, then the statute violates the remedies clause under Article I, section 10, of the Oregon Constitution.

In its response, the state in fact relied on ORS 132.270(7)(b), arguing that defendant was attempting to use the transcripts to challenge the grand jury proceedings. The state pointed out that, regardless of how defendant framed the relief he was seeking, he was trying to set aside the indictment based on the use of hearsay testimony, contrary to long-standing interpretation of the governing statutes. The state also argued that there is no good cause to review the transcripts if there is no relief.

The trial court denied defendant's motion. In doing so, the trial court found no good cause to review the transcripts

[1] In the alternative to a preliminary hearing, defendant asked the court to release him from custody. But he didn't develop that as an argument.

for the purpose of challenging the indictment. The trial court entered a written order denying the motion, which states,

> "The Court does not find good cause to release the grand jury proceeding/transcript to the court for the purpose of setting aside the indictment in this case. The transcript of the grand jury proceedings in this case was received at the motions hearing as an offer of proof and is labeled as defendant's exhibit 108. The court declines to find that ORS 132.[2]70[2] is unconstitutional and further does not find sufficient, or any grounds, to set aside the indictment in this case."

Defendant timely petitioned this court for a writ of mandamus to challenge that order. Although the trial court's good cause determination is likely reviewed for abuse of discretion, the trial court's ruling appears to be premised on a legal conclusion—namely, whether defendant was, in effect, seeking dismissal and whether that remedy is available for the alleged violation, if established. And that brings us to the question that lies at the heart of this dispute: If a trial court believes there has been a violation of ORS 132.320(7)(a), can a trial court grant a remedy?

II. ANALYSIS

A. *Grand Juries and Hearsay*

The grand jury is an ancient mechanism—one central to our democratic system and our Anglo-American rule of law—whose "function as an accusatory body serves a crucial role in protecting individual liberties." *State v. Burleson*, 342 Or 697, 703, 160 P3d 624 (2007). It is "an institution in which a group of ordinary citizens must approve of the initiation of the state power to accuse citizens of major crimes." *Id.* Consequently, it "serves as a brake on the state's potential abuse of the accusatory process." *Id.*

Whether grand juries should indict based on hearsay has long been a subject of debate.[3] Hearsay is inherently

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[2] The order refers to ORS 132.370, rather than ORS 132.270. That was a typographic error introduced by defendant's briefing. Despite the misattribution, the statute defendant challenged was ORS 132.270.

[3] *See, e.g.*, Beverly A. Patterson, *The Prosecutor's Unnecessary Use of Hearsay Evidence Before the Grand Jury*, 61 Wash U LQ 191 (1983); *The Grand Jury Reform Act of 1978: Hearings on S.3405 Before the Subcomm on Administrative Practice*

unreliable; that is why its use is prohibited at trial, absent an exception. And those exceptions are, themselves, designed to address discrete circumstances in which those statements are deemed to be more reliable. To illustrate, consider that a grand jury indictment based on hearsay could permit the following: a single grand jury witness testifies that "Mary told me that David told her, that Susan told him, that Bill told her that he saw the defendant steal the item." Indicting based on that testimony alone obviously carries significant risk.

Weighing that potential risk against such countervailing interests as minimizing trauma to victims, efficiency, and expediency, the majority of jurisdictions have chosen to permit the presentation of hearsay testimony before grand juries. Oregon has not. Indeed, Oregon is among a small number of states that have chosen to prohibit, in some manner, presentation of inadmissible hearsay to the grand jury. Specifically, Oregon permits otherwise inadmissible hearsay to be presented to the grand jury in a single circumstance. By its terms, ORS 132.320(7)(a) prohibits "inadmissible hearsay of persons other than the peace officer who compiled the official report." Thus, police officers may testify as to the hearsay of some other police officers, but inadmissible hearsay of all nonofficer witnesses is prohibited.

We first construed the grand jury hearsay prohibition in *State v. McDonald*, 231 Or 24, 34, 361 P2d 1001 (1961). There, despite the clear prohibition of the statute, we concluded that the legislature simply could not have meant what it said:

> "The defendant construes ORS 132.320 *** in its strict literal sense. It should be remembered that a grand jury is an investigating and accusatory body consisting, not of lawyers and jurists, but of laymen who have no power to determine the guilt of an accused, and we cannot, therefore, believe it was the intention of the legislature to require that the grand jury should hear only such testimony as

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and Procedure of the Senate Comm on the Judiciary, 95th Cong, 2d Sess. 154 (1978); John G. Cook, *Constitutional Rights of the Accused: Pretrial Rights* 488-90 (1972); Peter Arenella, *Reforming The Federal Grand Jury and The State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 Mich L Rev 463, 496-99 (1980); Leonard B. Boudin, *The Federal Grand Jury*, 61 Geo LJ 1, 25-29 (1972).

> would be competent in a court of law. We doubt that there are many grand juries which have not been subjected to hearsay testimony during their investigations. This statute is admonitory in character only, not mandatory, advising the grand jury to disregard incompetent evidence in returning an indictment and to consider evidence only of such character that it may be used in the trial to support a conviction of the accused."

Id.

The legislature responded by adopting OEC 101 (4)(b), which provides that most of the evidence code, including the rules governing witnesses and hearsay, does not apply to "[p]roceedings before grand juries, *except as required by ORS 132.320*." OEC 101(4)(b) (emphasis added). And to remove all doubt, the commentary to that rule specifically identified the offending language in *McDonald* to the effect that the rules of evidence were merely admonitory, adding, "The Legislative Assembly disapproves this case law. It intends that the statute mean what it says." OEC 101 Commentary (1981).

The legislative intent to preclude the presentation of hearsay evidence to the grand jury remains resolute. In 2017, for example, the Oregon Legislature took up the issue of the recordation of grand jury proceedings. At that point in time, Oregon was an outlier among a shrinking number of jurisdictions that did not record grand jury proceedings. Two bills were advanced in the 2017 regular session, Senate Bill (SB) 496, and SB 505, and testimony carried over between them.

The Oregon District Attorneys Association (ODAA) opposed the initial proposals and presented an amendment at the outset seeking to trade its support for grand jury recordation in exchange for certain procedural changes—importantly among them, the elimination of ORS 132.320(7)(a). *See* Written Testimony, SB 496 and SB 505, Senate Committee on Judiciary, Mar 8, 2017 (statement of Walt Beglau on behalf of the ODAA) (enumerating ODAA's concerns that, as drafted, SB 496 and SB 505 will disadvantage prosecutors); SB 496 (2017), -1 amendments (Mar 6, 2017) (proposing to amend ORS 132.320 to permit grand juries

to return indictments based entirely on hearsay statements related by a peace officer); SB 505 (2017), -1 amendments (Mar 6, 2017) (same). SB 496 and 505 were the subject of multiple hearings, and it was made demonstrably clear to the legislature—in charts, graphs, and testimony—that ORS 132.320(7)(a) was a minority rule. Once again, the Oregon Legislature kept it—rejecting the amendment and mandating the recording of grand juries with no changes to ORS 132.320(7)(a).

It is abundantly clear to me that the Oregon Legislature has made a deliberate choice to limit the presentation of hearsay evidence to grand juries, even though that is a minority rule nationally. It is also clear that the legislature does not view its prohibition as advisory. Indeed, faced with a concerted effort to repeal that requirement, it has declined to do so repeatedly and recently. So, if a court concludes that the statute has been violated, is there really nothing that court can do?

B. *The Inherent Supervisory Authority of a Court Over the Grand Jury*

The grand jury sits as part of the judicial branch of government. As we recently clarified in *State v. Wall*, 374 Or 407, 413-14, 578 P3d 1215 (2025):

> "It is the *court* that draws grand jurors 'from the jurors in attendance upon the circuit court at a particular jury service term.' ORS 132.010; *see also* ORS 132.020 (describing duties of the court in empaneling the grand jury); ORS 132.030 (permitting judge or clerk of the court to excuse a grand juror from service); ORS 132.050 (requiring the court to appoint a foreman and an alternate foreman of the grand jury); ORS 132.060 (requiring administration of grand juror oaths 'under the direction of the court'); ORS 132.070 (requiring the court to charge the grand jury and 'give it such information as the court deems proper concerning the nature of its powers and duties').
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> "The court resolves disputes about the grand jury proceedings, advises the grand jury on the law, and performs other functions with respect to the grand jury. *See* ORS 132.370(1) ('When the grand jury is in doubt whether the facts, as shown by the evidence before it, constitute a crime

> in law or whether the same has ceased to be punishable by reason of lapse of time or a former acquittal or conviction, it may make a presentment of the facts to the court, without mentioning the names of individuals, and ask the court for instructions concerning the law arising thereon.'); ORS 132.070 (the court charges the grand jury and gives it 'such information as the court deems proper concerning the nature of the [grand jury's] power and duties'); ORS 132.090(2) - (3) (the court may permit parents, guardians, guards, medical or other special attendant or nurse or qualified interpreters to be present in the grand jury room); ORS 132.250(2)(b) (the court may appoint and permit a certified court reporter to attend all proceedings of the grand jury); ORS 132.320(3) (the court may authorize the grand jury to receive an affidavit of a witness after good cause has been shown for the witness' inability to appear); and ORS 132.120 (the court discharges or continues the grand jury in session for such period of time as the judge deems advisable)."

(Emphasis in original).

Because the grand jury sits within the judicial branch, we have a special supervisory role over it. Other courts have concluded that that relationship gives rise to a court's common-law authority to fashion a remedy in the face of grand jury presentation issues. The United States Supreme Court has said, in the context of the federal court system, that "'guided by considerations of justice,' and in the exercise of supervisory powers, *** courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress." *United States v. Hasting*, 461 US 499, 505-06, 103 S Ct 1974, 76 L Ed 2d 96 (1983) (quoting *McNabb v. United States,* 318 US 332, 341, 63 S Ct 608, 87 L Ed 819 (1943) (brackets omitted)). Although the United States Supreme Court directs federal courts to invoke their inherent supervisory authority sparingly, it has approved of the practice in service of "threefold" purposes: (1) "to implement a remedy for violation of recognized rights," (2) "to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury," and (3) "as a remedy designed to deter illegal conduct." *Hasting*, 461 US at 505 (internal citations omitted). Elsewhere, the Court has noted that "any power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is

a very limited one." *United States v. Williams*, 504 US 36, 50, 112 S Ct 1735, 118 L Ed 2d 352 (1992).

The possibility that Oregon courts possess inherent supervisory authority over grand juries is an idea that we have never explored in our decisions concerning grand jury hearsay.[4] If Oregon courts were found to enjoy an equivalent inherent authority, even a limited exercise of that authority could plausibly include the ability to enforce the legislature's unambiguous intent to preclude grand juries from being presented hearsay evidence.

Following the legislature's reminder that it did not view its prohibition on grand jury hearsay as advisory, we took up the issue again in *State v. Stout*, where we avoided the import of the legislative commentary to OEC 101(4)(b) by shifting the focus onto a different statute:

> "[W]e need not consider the effect of OEC 101(4)(b) on *State v. McDonald*, *supra*, because another consideration disposes of this case. ORS 135.510 provides:
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> > "'(1) The indictment shall be set aside by the court upon the motion of the defendant in either of the following cases:
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> > "'(a) When it is not found, indorsed and presented as prescribed in ORS 132.360 [number of jurors required to concur], 132.400 to 132.430 [indorsement of indictment as 'a true bill'; filing and inspection of indictment; prohibition against disclosing any fact concerning an indictment not subject to public inspection; indorsement of indictment as 'not a true bill'] and 132.580 [requiring names of grand jury witnesses to be on indictment].
> >
> > "'(b) When the names of the witnesses examined before the grand jury are not inserted at the foot of the indictment or indorsed thereon.'"

305 Or at 38 (bracketed information in *Stout*). Then, we held, "[t]his court has long held that the grounds listed in ORS 135.510 for setting aside an indictment are exclusive." *Id.* *Stout* located support for that proposition in *State v. Whitney*, 7 Or 386, 388 (1879). On that issue, here is the entirety of *Whitney*'s reasoning:

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[4] I do not foreclose that there may be many other things that we have not considered concerning this issue.

> "Section 115 of the Criminal Code provides that 'the indictment must be set aside by the court upon the motion of the defendant in either of the following cases:—
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> "'1. When it is not found indorsed and presented as prescribed in chapter 7 of this Code.
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> "'2. When the names of the witnesses examined before the grand jury are not inserted at the foot of the indictment, or indorsed, thereon.'
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> "These, we hold, are the only two cases for which an indictment can be set aside; and as the section prohibiting any person, other than the district attorney, from appearing before the grand jury is not in chapter 7, there was no error in the ruling of the court."

Whitney, 7 Or at 388. Thus, *Stout* summarily held that, because the legislature had not included violations of ORS 132.320(7)(a) among the bases for setting aside an indictment under ORS 135.510, courts therefore lacked the ability to set aside an indictment for that reason.

There are plausible arguments that *Stout* may not control here, or perhaps, that its reach is limited. As an initial matter, it does not appear that the issue of exclusivity was properly before us, in either *Whitney* or *Stout*. From my review of those cases and the briefing (where it survives), we were never presented with the question of inherent advisory authority, nor asked to declare the statute exclusive. The sole question was whether the statute—not some other source of authority—permitted the court to set aside the indictment. So viewed, *Stout*'s passing remark about exclusivity was not necessary to the holding in that case and could perhaps be classified as *dictum*.

Further, ORS 135.510 speaks to when an "indictment *shall* be set aside by the court upon the motion of the defendant." ORS 135.510 (emphasis added). "The term 'shall' is a command expressing what is mandatory." *Bacote v. Johnson*, 333 Or 28, 33, 35 P3d 1019 (2001). Although ORS 135.510 declares when a court *must* set aside an indictment, it does not necessarily follow that a court lacks authority to set aside an indictment in other circumstances. As a general matter of text and grammar, a statute mandating a particular result in a specific set of

circumstances, without more, does not axiomatically foreclose discretionary authority to impose that same result for other, unenumerated circumstances. One could argue that, to accomplish that result, ORS 135.510 would need to say, "[t]he indictment shall *only* be set aside *** in either of the following cases." *Stout*'s interpretation of ORS 135.510 as exclusive may require inserting a word into the statute that is omitted, a practice this court generally forgoes. "[I]n constitutional as well as statutory interpretation, 'courts are not to insert what has been omitted, or to omit what has been inserted.'" *Linn County v. Brown*, 366 Or 334, 342, 461 P3d 966 (2020) (citing *AAA Oregon/Idaho Auto Source v. Dept. of Rev.*, 363 Or 411, 418, 423 P3d 71 (2018)); *see* Note, *Reconciling Textualism with Agency Prioritization Among Clear Statutory Mandates*, 137 Harv L Rev 2276, 2281 (2024) ("[A] court that interprets a statutory 'shall' provision as mandatory regardless of the circumstances overreads the text. *** The traditional approach is to see that text as an unconditional mandate for all circumstances ***. That reading, however, implicitly adds additional language to the statute.").

True, we have said that "whenever a statute limits a thing to be done in a particular form, it necessarily includes in itself a negative, *viz.*, that the thing shall not be done otherwise." *Scott v. Ford*, 52 Or 288, 296, 97 P 99 (1908) (internal citation omitted). That is an expression of the maxim *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another). *See* 19 *Cyclopedia of Law and Procedure* 23-27 (William Mack ed 1905). However, that maxim is not without detractors:

> "The rule that the expression of one thing is the exclusion of another is in direct contradiction to the habits of speech of most persons. To say that all men are mortal does not mean that all women are not, or that all other animals are not. There is no such implication, either in usage or in logic, unless there is a very particular emphasis on the word men. It is neither customary nor convenient to indicate such emphasis in statutes, and without this indication, the first comment on the rule is that it is not true."

Max Radin, *Statutory Interpretation*, 43 Harv L Rev 863, 873-74 (1929-30).

At a minimum, we have also cautioned that *expressio unius* is not a rule of law but is instead a *potential* tool to understanding legislative intent. *See, e.g.*, *Sunshine Dairy v. Peterson*, 183 Or 305, 324, 193 P2d 543 (1948) (the maxim *expressio unius* "is not a rule of thumb, but only one of many guides to construction"). That is, the maxim "is to be applied with caution and merely as an auxiliary rule to determine the legislative intention." *Cabell v. City of Cottage Grove,* 170 Or 256, 281, 130 P2d 1013 (1942); *see also* Frank E. Horack Jr., 2 *Sutherland Statutory Construction* § 4917, 418 (3d ed 1943) (warning that the maxim "requires great caution in its application, and in all cases is applicable only under certain conditions"). Courts must not "render to it fealty that is akin to a navigator's respect for the pole star." *Vaughn v. Langmack*, 236 Or 542, 574, 390 P2d 142 (1964) (Rossman, J., dissenting). Here, application of the maxim to ORS 135.510 requires an inquiry into purpose and legislative intent that we have yet to undertake in our case law.

We also have yet to engage in a comparison of our reasoning to other jurisdictions. For example, in *People v. Thomas*, 66 NYS 191 (NY Gen Term 1900), the defendant sought to set aside an indictment because the only evidence presented to the grand jury was based on hearsay. The court acknowledged "the inherent power of the court to set aside indictments improperly found," as established by other New York court decisions,[5] but in this case it reaffirmed that authority in light of section 313 of the New York criminal code, which, like the predecessor to ORS 135.510, outlined a limited number of grounds upon which the court "must" set aside an indictment upon motion of the defendant.[6] *Id.*

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[5] *See, e.g.*, *People v. Molineux*, 57 NYS 936, 937-39 (NY Gen Sess 1899) (explaining that "[i]t is within the power of the court to entertain a motion to inspect the minutes of the grand jury, and it is addressed to its discretion," and "[i]f the indictment was found without sufficient legal evidence to sustain it, it is not an indictment in contemplation of law, and cannot stand").

[6] The New York statute provided:

"The indictment must be set aside by the court in which the defendant is arraigned, and upon his motion, in either of the following cases, but in no other:

"(1) When it is not found, indorsed, and presented as prescribed in sections two hundred and sixty-eight and two hundred and seventy-two;

"(2) when a person has been permitted to be present during the session of a grand jury, while the charge embraced in the indictment was under

at 192-93. In fact, the language of the New York statute was quite like the version of ORS 135.510 that this court analyzed in *Whitney*, which is unsurprising given that Oregon's original criminal code was based largely on the work of an 1854 Oregon territorial commission who adopted the entire 1850 New York Code, as well as updates to that code undertaken in New York.[7]

The *Thomas* court began by construing the meaning of the word "must":

> "There is no doubt of the power of the legislature to 'prescribe a practice in criminal procedure which must be regarded by the courts, and which must be taken as exclusive of any practice the courts may seek to adopt in conflict with it.' The question is, has the legislature, by this section, taken away the inherent power of the court to set aside indictments for reasons other than those mentioned in it? The word 'must' is mandatory. It means 'obliged,' 'required,' and imports a physical or moral necessity. The word 'may,' when used in a statute which imposes an imperative duty, is construed to mean 'must,' but the word 'must' has never been construed to mean 'may.' It is peremptory. It excludes all discretion, and imposes upon the court an absolute duty to perform the requirements of the statute in which it is employed. Section 313, therefore, imposes upon the court, in the two cases therein referred to, the absolute duty to dismiss an indictment."

Thomas, 66 NYS at 193.

Thomas recognized a court's inherent authority to set aside an indictment *despite* the absolute duty to dismiss an indictment in the two enumerated scenarios:

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consideration, except as provided in sections two hundred and sixty-two, two hundred and sixty-three and two hundred and sixty-four."

NY Crim Proc Code § 313 (1897).

[7] In *The Sources of the Alaska and Oregon Codes*, 2 UCLA-Alaska L Rev 15, 27 (1972), Frederic E. Brown explained that "part of the Oregon Statutes relating to the manner of commencing and prosecuting actions at law, are taken, word for word, from the New York Code." In fact, "the codes of evidence and of criminal procedure added by [Judge Matthew P.] Deady in 1862 derive from [New York legal reformer David Dudley] Field's final drafts." *Id.* at 32. Brown noted that when the two men corresponded in later years, "Field requested samples of indictments used in Oregon, apparently because Oregon had a generation of experience with the codes before they were finally enacted in New York." *Id.* at 33.

> "But do the words 'but in no other' deprive the court of the power, to be exercised according to its discretion, to set aside indictments for other adequate reasons? Transposing the language of this section, it would read: 'In the two following cases, but in no other, the court must set aside the indictment.' Substitute for the word 'must' its definition and transposed it will read thus: 'In the two following cases, but in no other, the court is obliged [required] to set aside the indictment.' As to these two cases mentioned in this section the court has no discretion. There is an absolute requirement that in such cases the indictment shall be set aside. The provision is peremptory. The court must perform the duty imposed by this section, and, because of the limitation expressed in the words 'but in no other,' is not commanded to set aside an indictment for any other reasons than those expressed in the statute. This section, however, does not interfere with the discretionary power of the court to set aside an indictment for other sufficient reasons. While this section imposes upon the court a necessity to act in a certain way in either of the cases therein stated, it goes no further than to declare that such necessity, obligation, or requirement is not imposed upon the court in any other case; and the court still, as heretofore, has control and authority over its own records, and may still exercise its inherent right to set aside indictments for reasons other than those stated in section 313. It is only by the employment of clear and unequivocal language that the inherent powers of a court of general jurisdiction can be taken away by legislative enactment."

Id. at 193-94.

After concluding that the statute did not foreclose a court from invoking its inherent authority to set aside an indictment for reasons other than those enumerated in the relevant statute, the court then applied that rationale to a hypothetical scenario in which a grand jury indicted an individual without the requisite number of jurors:

> "Section 224 of the Code of Criminal Procedure declares that the presence of at least 16 members of a grand jury is necessary for the transaction of business. Section 268 provides that an indictment cannot be found without the concurrence of at least 12 grand jurors. Suppose an indictment is in fact found by a grand jury composed of less than 16, or that less than 12 concur in the finding of an indictment; may it not be set aside on motion, notwithstanding the

> terms of section 313? The question cannot be raised upon the trial, because a plea of not guilty concedes the validity of the indictment. It cannot be raised by demurrer, because such defect would not appear upon the face of the indictment, and because, moreover, it is not embraced within section 323 of the Code. If it may not be set aside upon motion, a person may be put upon trial, and subjected to all the expense, trouble, and ignominy incident thereto without any charge ever having been legally preferred against him. There can be no question, it seems to me, that in such case the court may set the indictment aside."

Id. at 194.

Like *Thomas*, other courts, either explicitly or implicitly, have also recognized the inherent authority of courts to set aside an indictment in the face of a statute providing only limited grounds for doing so. In *People v. Lawson*, 67 Ill 2d 449, 453, 367 NE 2d 1244, 1246 (1977), for example, the Illinois Supreme Court addressed that question after the state appealed a trial court's dismissal of indictments on due process grounds. The state highlighted how section 114-1 of the Code of Criminal Procedure of 1963, whose language is a bit broader than ORS 135.510, provided that a court could only dismiss a charge on certain select grounds, and a violation of due process was not among them. *Id.* at 454, 367 NE 2d at 1246. The court distinguished the prior cases in which it held that the trial court may not dismiss an indictment for a reason not enumerated in the statute on the grounds that those cases did not concern a clear denial of due process. *Id.* at 455, 367 NE 2d at 1246. Rather, the court reasoned, "Because the trial court has the obligation to insure a fair trial, it would seem only reasonable that, where there has been an unequivocally clear denial of due process such as actual and substantial prejudicial delay before an indictment or arrest, the trial court has the inherent authority to dismiss." *Id.* Accordingly, the court concluded, "a trial court has authority to dismiss an indictment, information or complaint on the basis of denial of due process even though that is not one of the grounds listed in section 114-1 of the Code of Criminal Procedure of 1963." *Id.* at 455, 367 NE 2d at 1246.

Similarly, in *State v. Manley*, 197 Iowa 46, 196 NW 724, 725 (1924), the defendant moved to quash an indictment

on the grounds that the grand jury had relied, in part, on hearsay evidence. At the time, Iowa law prescribed no particular remedy for a grand jury indictment obtained through incompetent evidence. Accordingly, the court understood the question before it as whether "the court has an inherent power to set aside an indictment on other grounds than those enumerated in the statute; that to hold otherwise would be to put a construction upon the statute that would render it obnoxious to constitutional provisions." *Id.*

Ultimately, the court declined to recognize such authority, concluding that the violation in question did not warrant it:

> "The proposition [that the court has an inherent power to set aside an indictment on other grounds than those enumerated in the statue] might, for the mere sake of argument, be conceded without aiding the defendant, though this court has for many years adhered to the rule that an indictment can only be set aside on grounds enumerated in the statute. The fact that the grand jury received incompetent evidence, or even acted on insufficient evidence, is not one of the grounds for setting it aside found in the statute. The power and authority, or even the duty in a proper case, to do a thing may exist, but it should be exercised only when the circumstances require it. If it be true, as insisted by counsel, that the court possesses an inherent power to set aside an indictment for causes not found in the statute, which no legislative act can constitutionally take away, still, if the situation of the defendant does not call for the exercise of such a power, no constitutional right of his has been abridged by the failure to exercise it."

Id. (citations omitted). In other words, the court did not foreclose the ability of the court to set aside an indictment for grounds other than those listed in the statute. It simply avoided answering the question because, in that case, it believed that such an authority would not need to be invoked because the presentation of incompetent evidence was not, in its view, a violation of defendant's constitutional rights. The court has reached a similar conclusion in other cases. *See State v. Baughman*, 111 Iowa 71, 82 NW 452, 453 (1900) ("Whether the court, in furtherance of justice, has the inherent power to set aside an indictment when procured

through exceptional means, not referred to in this title *** ought not to be determined until necessarily involved"); *State v. Olson*, 249 Iowa 536, 547, 86 NW 2d 214, 221 (1957) ("If it be assumed the [inherent] power [of the district court to set aside the indictment on a ground not specified in the statutes] exists, a proper case for its exercise has not been shown here.").

In sum, whether there exists inherent supervisory authority, and whether ORS 135.510 is, in fact, exclusive, and thereby extinguishes that inherent supervisory authority of courts over grand juries, is an issue worthy of this court's consideration. I would, therefore, exercise my discretion to allow the petition to consider those issues and clarify that point of law for the benefit of trial courts.

C. *Subsequent Legislative Changes*

As I have noted, this case has imperfections. In 2026, *after* the state obtained the indictment in this case, the Oregon Legislature adopted a hearsay exception potentially applicable to cases like this. Here, the state alleged an enterprise of promoting prostitution. Or Laws 2026, ch 71, section 1, amended the hearsay exceptions in ORS 40.460 to add a new exception:

> "(27)(a) A statement that purports to narrate, describe, report or explain a crime of trafficking in persons under ORS 163.266, purchasing sex with a minor under ORS 163.413, promoting prostitution under ORS 167.012, compelling prostitution under ORS 167.017, or any attempt, conspiracy or solicitation of a crime listed in this paragraph, that involves a commercial sex act as defined in ORS 163.266, if the statement:
>
> "(A) Was made by a victim of the crime within 24 hours before or after the victim engages in, or offers or agrees to engage in, the commercial sex act;
>
> "(B) Was recorded, either electronically or in writing, or was made to a peace officer as defined in ORS 161.015, corrections officer, youth correction officer, parole and probation officer, emergency medical services provider or firefighter; and
>
> "(C) Has sufficient indicia of reliability.

> "(b) In determining whether a statement has sufficient indicia of reliability under paragraph (a) of this subsection, the court shall consider all circumstances surrounding the statement. The court may consider, but is not limited to, the following factors in determining whether a statement has sufficient indicia of reliability:
>
> "(A) The personal knowledge of the declarant.
>
> "(B) Whether the statement is corroborated by evidence other than statements that are subject to admission only pursuant to this subsection.
>
> "(C) The timing of the statement.
>
> "(D) Whether the statement was elicited by leading questions.
>
> "(E) Subsequent statements made by the declarant. Recantation by a declarant is not sufficient reason for denying admission of a statement under this subsection in the absence of other factors indicating unreliability."

The effect of this change is that, although the indictment here was obtained at a time when those statements were more likely to be inadmissible hearsay, they are now potentially admissible hearsay at trial. I offer no opinion on whether an evidentiary change prior to trial renders the use of inadmissible hearsay before the grand jury harmless. However, that additional wrinkle surely impacts our exercise of discretion—both as to whether to grant the petition and whether to issue a final writ. But here, again, our cases may fairly be read as boxing us in.

We have elsewhere suggested that the sufficiency of evidence presented to a grand jury cannot be contested on appeal, using reasoning that could apply here as well. *See State v. Guse*, 237 Or 479, 482, 392 P2d 257 (1964) ("After a jury trial no useful purpose is served by an investigation of the sufficiency of the evidence taken before the grand jury. If the accused is acquitted the matter is moot. If he is convicted, it is irrelevant."). For that reason, there is at least a plausible argument that mandamus may be the only avenue for this court to address a trial court's authority to set aside an indictment for a violation of ORS 132.320(7)(a).

Therefore, although a statutory change of that nature might ordinarily persuade me to vote against

exercising our discretion to allow the petition, I am not so persuaded here, and I would vote to allow review. It seems to me that the best route for us is to obtain briefing and argument and to issue an opinion on the merits to clarify a trial court's authority on issues involving ORS 132.320(7)(a). To be sure, I recognize that doing so would require this court to grapple with the statutory changes to Oregon's hearsay exceptions, which might well result in us ultimately not reversing the trial court—*i.e.*, not issuing a writ. But that disposition would not diminish the utility of our speaking on this important area of law.

For these reasons, I respectfully dissent from the denial of the petition to issue an alternative writ.

Masih, J., joins in this dissenting opinion.