ADVANCE SHEET HEADNOTE
October 3, 2023

2023 CO 51

No. 21SC856, *Dorsey v. People* — § 18-3-412.5, C.R.S. (2023), Failure to Register as a Sex Offender — Recidivist Provision — Class 6→Class 5 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 statute describing the crime of failure to register as a sex offender, § 18-3-412.5(2)(a), 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 allowing a judge to elevate a conviction for failure to register from a class 6 felony to a class 5 felony, based on a prior conviction for failure to register, doesn't violate a defendant's right to a jury trial under either the Sixth Amendment or article II, sections 23 and 25 of the Colorado Constitution.

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

2023 CO 51

Supreme Court Case No. 21SC856
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 18CA2333

Petitioner:

Charles K. Dorsey,

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 concurred specially and concurred in the judgment.

JUSTICE SAMOUR delivered the Opinion of the Court.

¶1 This case requires us to confront a similar issue to the one we take up in the companion case of *Caswell v. People*, 2023 CO 50, __ P.3d __, which we also announce today. In *Caswell*, the lead case, we hold that, at least under the circumstances there, a criminal defendant is not 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), which transforms a conviction from a misdemeanor into a felony. *Caswell*, ¶ 2. We conclude in *Caswell* that section 18-9-202(2)(b)(I) is a sentence enhancer, which may be proved to a judge by a preponderance of the evidence, not an element, which must be proved to a jury beyond a reasonable doubt. *Id.* at ¶ 3. Using the blueprint laid out in that case, we conclude in this case that a criminal defendant is not entitled to a jury trial on the recidivist provision of the failure to register as a sex offender statute, § 18-3-412.5(2)(a), C.R.S. (2023) ("subsection (2)(a)"), which transforms a conviction from a class 6 felony into a class 5 felony. *See id.* ("Failure to register as a sex offender is a class 6 felony . . . except that any second or subsequent offense of failure to register as a sex offender . . . is a class 5 felony.").

¶2 Because the failure-to-register statute doesn't explicitly state whether subsection (2)(a) 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)(a) a sentence enhancer, not an element of the offense.

¶3 We also hold that allowing a judge to elevate a conviction for failure to register from a class 6 felony to a class 5 felony, based on a prior conviction for failure to register, doesn't violate a defendant's right to a jury trial under either the Sixth Amendment or article II, sections 23 and 25 of the Colorado Constitution. In *Caswell*, we determine that, at least under the circumstances there, neither the Sixth Amendment nor article II, sections 16 and 23 require recidivism provisions that transform misdemeanors into felonies be proved to a jury beyond a reasonable doubt. ¶ 4. Here, we confront a simpler question. Unlike *Caswell*, this case doesn't consider the elevation of a misdemeanor into a felony. The fact of a prior conviction for failure to register merely elevates a subsequent conviction from one class of felony (a class 6 felony) to a more severe class of felony (a class 5 felony). Inasmuch as the statutory scheme in *Caswell* passes constitutional muster, the failure-to-register statutory scheme necessarily does as well.

¶4 A division of the court of appeals correctly decided that our legislature intended to make subsection (2)(a) a sentence enhancer, not an element. *People v. Dorsey*, 2021 COA 126, ¶ 25, 503 P.3d 145, 150. 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.* 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." *See Dorsey*, ¶ 25, 503 P.3d at 150.

¶5 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 a fact of prior convictions should be deemed an element of the offense or a sentence enhancer depends on the legislature's intent); *See also 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, 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.

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

I. Facts and Procedural History

¶7 Charles K. Dorsey was convicted in 1997 of criminal attempt to commit sexual assault in the second degree. As a result, Dorsey was required to register as a sex offender pursuant to section 16-22-103(2), C.R.S. (2023), which he did. After this initial registration, Dorsey was obligated to re-register as a sex offender every year within five business days before or after his birthday. *See* § 16-22-108(1)(b), C.R.S. (2023).

¶8 In 2010, Dorsey was charged in Denver with a class 6 felony for failure to register as a sex offender in violation of section 18-3-412.5.[1] He ultimately pled guilty to a class 1 misdemeanor failure-to-register offense. *See* § 18-3-412.5(3)(a)

[1] Although section 16-22-108(1)(b) refers to re-registering every year following the initial registration, the crime for failure to re-register is "failure to register." § 18-3-412.5.

(describing, as pertinent here, the misdemeanor crime of failure to register following a conviction for "misdemeanor unlawful sexual behavior," or for an offense whose "underlying factual basis . . . involves misdemeanor unlawful sexual behavior").

¶9 Dorsey failed to re-register as a sex offender for a second time in 2017, again in Denver. After a warrant issued for his arrest, he was taken into custody and charged with failure to register as a sex offender (second or subsequent offense), a class 5 felony. *See* § 18-3-412.5(2)(a). This time, the matter proceeded to a jury trial. Dorsey moved for a bifurcated trial in which the jury would first consider the substantive charge and then, if it found him guilty, determine whether he had a prior conviction for failure to register. The trial court initially granted his request "out of an abundance of caution," but it later reversed course and determined that bifurcation wasn't necessary. The prior-conviction provision of subsection (2)(a), reasoned the court, was a sentence enhancer that could be proved to the judge in the event of a conviction, not an element of the offense that had to be proved to the jury.

¶10 After the jury found Dorsey guilty of the substantive charge, the trial court ruled, at the sentencing hearing, that the People had proved the fact of his prior conviction by a preponderance of the evidence. Consequently, it entered a judgment of conviction on a class 5 felony.

¶11 On appeal, Dorsey complained that the People were required to prove his prior conviction to the jury beyond a reasonable doubt. A division of the court of appeals disagreed and affirmed Dorsey's conviction. *Dorsey*, ¶ 2, 503 P.3d at 146. Citing the division's decision in *People v. Caswell*, 2021 COA 111, 499 P.3d 361, the *Dorsey* division held that "the language and structure" of section 18-3-412.5 suggest that the General Assembly intended to treat a prior conviction as a sentence enhancer. ¶ 19, 503 P.3d at 148. More specifically, the *Dorsey* division explained that (1) the prior conviction language appears in a penalty subsection rather than in the subsection outlining the substantive crime and (2) the statute imposes no requirement on the prosecution to plead the fact of a prior conviction in the charging document. *Id.* The *Dorsey* division added that its conclusion was consistent with how other divisions had historically construed the relevant statutory scheme. *Id.* at ¶ 20, 503 P.3d at 148.

¶12 Notably, the division declined to address Dorsey's argument that regardless of the statute's language, courts must still "apply a functional test under the Sixth Amendment to determine whether the fact [of a prior conviction] increases the punishment for the crime." *Id.* at ¶ 25, 503 P.3d at 150. Relying on language from our court's decision in *Linnebur*, the division stated that it didn't need to address Dorsey's Sixth Amendment claim because the legislature clearly intended subsection (2)(a) to operate as a sentence enhancer. *Id.*

¶13 Dorsey then petitioned our court for certiorari. We granted his petition.[2]

II. Analysis

¶14 We begin with the standard of review. We then apply the five factors the Supreme Court outlined in *O'Brien* to discern whether the legislature intended to make subsection (2)(a) an element or a sentence enhancer. Because we conclude that our General Assembly meant to designate the felony-level transforming fact in subsection (2)(a) a sentence enhancer, we proceed to consider whether, as Dorsey contends, the legislature's approach violates the Sixth Amendment and article II.

A. Standard of Review

¶15 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

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

1. Whether the division erred in concluding that the recidivist provision in subsection 18-3-412.5(2)(a), C.R.S. (2022) (failure to register as a sex offender—second or subsequent offense) is a sentence enhancer, not an element of the criminal offense.
2. Whether, even assuming the recidivist provision in subsection 18-3-412.5(2)(a), C.R.S. (2022) is a sentence enhancer, allowing a judge to elevate the *class* or *level* of offense based on recidivism violates a defendant's Sixth Amendment right to a jury trial.

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.

¶16 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

¶17 The statute setting forth the crime of failure to register as a sex offender provides, in pertinent part, as follows:

> (1) A person who is required to register pursuant to article 22 of title 16 and who fails to comply with any of the requirements placed on registrants by said article 22, including but not limited to committing any of the acts specified in this subsection (1), commits the offense of failure to register as a sex offender[.]

. . . .

> (2)(a) *Failure to register as a sex offender is a class 6 felony* if the person was convicted of felony unlawful sexual behavior, or of another offense, the underlying factual basis of which includes felony unlawful sexual behavior, or if the person received a disposition or was adjudicated for an offense that would constitute felony unlawful sexual behavior if committed by an adult, or for another offense, the underlying factual basis of which involves felony unlawful sexual behavior; *except that any second or subsequent offense of failure to register as a sex offender by such person is a class 5 felony*.

§ 18-3-412.5 (emphases added).

¶18 Subsection (1) defines the crime of failure to register as a sex offender. Of particular interest here, it enumerates the elements of the offense, none of which is a prior conviction for failure to register. Other substantive provisions in the statute are consistent with subsection (1). Specifically, subsections (1)(a) through (1)(k), which provide alternative methods of committing the crime of failure to register, identify elements without including a prior conviction as one of those elements.

¶19 By contrast, subsection (2) deals strictly with sentencing; no elements appear in that subsection. As relevant here, subsection (2)(a) establishes that a first conviction for failure to register is a class 6 felony while a second or subsequent conviction for failure to register is a class 5 felony. Importantly, there is no requirement in subsection (2)(a) 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.

¶20 The remaining provisions in the statute are of no moment for our purposes. Subsection (1.5) creates an affirmative defense. Subsection (3) sets forth when failure to register constitutes a misdemeanor. Subsection (4) dictates how juveniles who fail to register are to be sentenced. Subsection (5) defines "unlawful sexual behavior." And subsection (6) outlines the procedures to be followed by law enforcement when someone convicted as a sexually violent predator fails to register.

¶21 The division concluded that the language and structure of section 18-3-412.5 clearly signal the legislature's intent to designate subsection (2)(a) a sentence enhancer, not an element. *Dorsey*, ¶ 19, 503 P.3d at 148. We wholeheartedly agree.

¶22 Apparently recognizing that the language and structure of subsection (2)(b) doesn't support his position, Dorsey looks for refuge in section 18-1-104, C.R.S. (2023), which generally defines and classifies offenses in Colorado. Dorsey argues that section 18-1-104 treats each class of felony as a different "offense": when the class of felony changes, the crime becomes a new offense with its own set of elements. But Dorsey misreads that statute. Section 18-1-104 simply explains that there is a system by which offenses are classified, including as felonies,

misdemeanors, and petty offenses. *See People v. Hopkins*, 2013 COA 74, ¶ 15, 328 P.3d 253, 257. It does nothing more.

2. Tradition

¶23 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).

¶24 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)(a) a sentence enhancer.

3. The Risk of Unfairness

¶25 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).

¶26 Tellingly, Dorsey recognized this risk before trial. He moved for bifurcation, attempting to prevent the jury from learning about his prior conviction before it decided whether he was guilty of the charged offense.

¶27 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."[3] *Almendarez-Torres*, 523 U.S. at 235. We conclude that in a jury trial for failure to register (second or subsequent offense), the risk of unfairness to the defendant stemming from evidence of a prior failure-to-register conviction indicates the legislature's intent to treat any such prior conviction as a sentence enhancer, not as an element.[4]

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[3] Dorsey does not contest the fact of his prior conviction.

[4] 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

¶28 Dorsey nevertheless maintains 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.

¶29 *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

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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 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.

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.[5]

¶30 Notwithstanding *Apprendi*'s carveout for prior convictions, Dorsey asserts that it violates the Sixth Amendment to designate a prior conviction a sentence enhancer because doing so strips juries of their nullification power. This argument, too, misses the mark. While the jury has a de facto *power* to nullify, a defendant does not have a *right* to jury nullification. *People v. Waller*, 2016 COA 115, ¶ 59, 412 P.3d 866, 878; *Crease v. McKune*, 189 F.3d 1188, 1194 (10th Cir. 1999).

¶31 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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[5] 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

¶32 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.

¶33 *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.

¶34 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.[6] A conviction for failure to register (first offense) is punishable as a class 6 felony with

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

imprisonment for a period of twelve to eighteen months and one year of mandatory parole, while failure to register as a sex offender (second or subsequent offense) is punishable as a class 5 felony with imprisonment for a period of one to three years followed by two years of mandatory parole. § 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 failure to register is yet another signal that our legislature intended to designate subsection (2)(a) a sentence enhancer, not an element.

¶35 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

¶36 Both parties note that the statute's legislative history is not particularly instructive for our purposes. We concur. Consequently, we deem legislative history in this case neutral.

6. Summary

¶37 In short, four of the five factors articulated by the Supreme Court in *O'Brien* signal a legislative intent to designate subsection (2)(a) a sentence enhancer. One of those four factors relates specifically to the language and structure of the statute under scrutiny. 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 subsection (2)(a) a

sentence enhancer, not an element. It follows that, contrary to Dorsey's position, the People didn't need to prove his prior failure-to-register conviction to the jury beyond a reasonable doubt.

¶38 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 conviction for failure to register when the establishment of such a criminal history makes the class of felony more severe. We tackle that question next.

C. Dorsey's Constitutional Claims

1. The Sixth Amendment

¶39 Dorsey contends that even if the legislature intended to designate subsection (2)(a) 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 Dorsey, because subsection (2)(a) transforms a conviction from a class 6 into a class 5 felony, and a class 5 felony conviction carries collateral consequences that a class 6 does not. We are unpersuaded.

¶40 Today, in *Caswell*, we conclude that, at least under the circumstances there, the Sixth Amendment does not require the jury to find the fact of a prior conviction even though it transforms a subsequent conviction from a misdemeanor into a felony. ¶ 56. We recognize in *Caswell* that "elevating a conviction from a

misdemeanor to a felony carries collateral consequences." *Id.* at ¶ 51. But we nevertheless hold that such consequences do not render the statutory scheme unconstitutional under the Sixth Amendment. *Id.* at ¶ 47. As we reason in that case, considering that "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 consequences of enhanced imprisonment, we discern no reason to prohibit the same based on collateral consequences that are much less serious." *Id.* at ¶ 51. The collateral consequences here accompanying the transformation of a conviction from a class 6 felony into a class 5 felony are not as severe as the collateral consequences in *Caswell* accompanying the transformation of a misdemeanor into a felony. Given that we conclude today that in *Caswell*, at least under the circumstances there, the cruelty-to-animals statutory scheme does not run afoul of the Sixth Amendment, we must necessarily conclude that the failure-to-register statutory scheme in this case does not either.

2. Article II of the Colorado Constitution

¶41 Pursuant to article II, sections 23 and 25 of the Colorado Constitution, Dorsey mounts a second constitutional challenge against the designation of subsection (2)(a) as a sentence enhancer. Dorsey maintains that the People were required to prove the fact of a prior conviction to the jury beyond a reasonable doubt because article II, section 23, one of two constitutional provisions addressing

the right to a jury trial, contains language that's more forceful than that found in the Sixth Amendment. He further argues that section 25 of article II, guaranteeing due process of law, requires that any fact that increases the punishment for a crime be proved to a jury beyond a reasonable doubt. We are unmoved.

¶42 We need not address the merits of Dorsey's contentions related to section 23. They fail for the same reasons that Caswell's carbon copy contentions fall short in the companion case. *See Caswell*, ¶¶ 62–63.

¶43 Dorsey's reliance on Colorado's due process clause, Colo. Const. art. II, § 25, fares no better. It is true that we have held that proof beyond a reasonable doubt of a defendant's guilt is part and parcel of our understanding of due process of law. *James v. People*, 727 P.2d 850, 853 (Colo. 1986), *overruled on other grounds by People v. Dunaway*, 88 P.3d 619 (Colo. 2004). However, Dorsey doesn't cite any post-*Apprendi* Colorado cases holding that our notions of due process require the fact of a prior conviction, when it increases the level of an offense, to be proved to a jury beyond a reasonable doubt. There are none.

¶44 Section 25 doesn't require that the fact of a prior conviction be proved to a jury beyond a reasonable doubt. Therefore, Dorsey's right to due process under the Colorado Constitution was not violated.

III. Conclusion

¶45 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 concurred specially and concurred in the judgment.

JUSTICE GABRIEL, concurring specially and concurring in the judgment.

¶46 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 recidivist provision of the failure to register as a sex offender statute are sentence enhancers, Maj. op. ¶ 37, although for the reasons set forth in my dissenting opinion in *Caswell v. People*, 2023 CO 50, ¶¶ 66–95, __ P.3d __ (Gabriel, J., dissenting), also decided today, I cannot join all of the majority's reasoning.

¶47 I also agree with the majority's ultimate conclusion that the prior conviction exception applies to the facts presented here and that therefore the trial court, rather than the jury, could make the requisite finding as to the fact of any prior convictions. Maj. op. ¶¶ 3, 28–29. I write separately, however, to explain why I perceive this case differently from *Caswell*, in which I dissented.

¶48 In *Caswell*, the fact of a prior conviction elevated a misdemeanor to a felony. The Supreme Court, however, has never extended its narrow prior conviction exception to that scenario, and for the reasons set forth in my dissent in *Caswell*, ¶¶ 82–92, __ P.3d at __ (Gabriel, J., dissenting), I would not do so.

¶49 In this case, in contrast, the fact of the prior conviction elevated a felony of one class to a felony of a higher class. In my view, the narrow prior conviction exception that the Supreme Court has thus far recognized, *see, e.g.*, *Apprendi v. New*

Jersey, 530 U.S. 466, 490 (2000), applies in this scenario. Indeed, to conclude otherwise, as petitioner, Charles K. Dorsey, requests, would require us, in effect, to override binding precedent from the Supreme Court, which we, of course, may not do.

¶50 Because, like the majority, *see* Maj. op. ¶¶ 3, 28–29, I believe that the prior conviction exception applies on the facts presented here, I join the majority's ultimate decision to affirm the judgment of the division below, although, again, I cannot join in all of the majority's reasoning.