IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. SCOTT MICHAEL ASHKINS, Defendant-Appellant, Petitioner on Review.	Marion County Circuit Court No. 10C42610 CA A150038 SC S062468

BRIEF ON THE MERITS OF PETITIONER ON REVIEW, DEFENDANT-APPELLANT

Review of the Decision of the Court of Appeals
on Appeal from the Judgment of the Circuit Court for Marion County
Honorable ALBIN W. NORBLAD, Judge
Before: Ortega, Presiding Judge, Sercombe, Judge, and Hadlock, Judge
Affirmed With Opinion May 29, 2014

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QUESTION PRESENTED AND PROPOSED RULE OF LAW

Must a court instruct a jury that it must concur on one of several occurrences of a crime if the evidence presented at trial would permit the jury to find multiple, separate occurrences of that singly charged crime?

Yes. A trial court must instruct, when requested, a jury that it must agree on one of several occurrences of a crime if the evidence would permit the jury to find multiple, separate occurrences of that crime.

SUMMARY OF ARGUMENT

The state charged defendant with, among other things, one count of rape, one count of sodomy, and one count of unlawful sexual penetration. However, at trial, the state presented evidence of multiple, separate occurrences of each of those crimes. Defendant requested that the court instruct the jury that "10 jurors must agree on what factual occurrence constituted" each crime. The court declined. That refusal violated Article I, section 11, of the Oregon Constitution, and the Sixth Amendment of the United States Constitution.

Without an appropriate concurrence instruction, the court never made clear to the jury that a requisite number of them must actually agree on the same factual

incident to return a conviction on any particular count. Nothing in the jury instructions nor the verdict form distinguished the various factual incidents by offense so that, in convicting defendant of a particular offense, the jurors would understand the need for "substantial agreement as to just what defendant did" to be guilty of that crime. To that end, the court erred, defendant is entitled to a reversal of his convictions and a remand to the trial court for a new trial.

SUMMARY OF MATERIAL FACTS

Defendant married Barbara in 2003. (Tr. 50). They had previously been living together, and ultimately divorced in 2010. (Tr. 50; 89). When they lived together, defendant's son (and son (and daughter (lived with them in a three bedroom house. (Tr. 50-51).

Throughout 2009, reported on several occasions to law enforcement officials that her relationship with defendant consisted of verbal disagreements, but nothing physical. (Tr. 93; 214). However, on September 15, 2009, disclosed to Detective Hickam that defendant had been "mentally, sexually, and physically abus[ing]" and "off and on for the last four years." (Tr. 245).

Those disclosures surfaced a few weeks after Lori mother, hired a lawyer to serve a restraining order on defendant, and instigate

divorce proceedings on her behalf. (Tr. 95; 102; 188; 271). first reported defendant to law enforcement in July 2009 when defendant told to have the children back home in two hours, even though she wanted to take them to the coast. (Tr. 177-78).

On November 10, 2009, met with Amanda Harpell, a child abuse assessment center worker in Washington state. (Tr. 169). She discussed the alleged sexual abuse, indicating that she had sexual intercourse with defendant twice in the living room. (Tr. 166-67). She also reported that he did not engage in any other sexual activity but intercourse. (Tr. 167). Those statements directly conflicted with her trial testimony.

At trial, testified that she had sexual intercourse with defendant throughout the house, even though security cameras were placed all over the house for a variety of reasons. (Tr. 121; 272; 56). She said defendant also put his fingers inside her vagina on several occasions. (Tr. 125).

Similarly, to Detective Hingston, reported that defendant had sexual intercourse with her in the bedroom, bathroom, kitchen, and living room. (Tr. 206). She also said that defendant had vaginally penetrated her eight times with a toy rocket, and that she had performed oral sex on defendant "approximately three times." (Tr. 208). Those statements were admitted over defendant's objection at

trial. (Tr. 204-205).

All of those statements directly conflicted with what she told Katie Merola, a child welfare worker on April 8, 2009. To her, when asked about her home life, said that no one in her home had ever tried to touch her inappropriately. (Tr. 231).

Even though evidence was presented at trial that would correspond to different factual incidents of rape, sodomy, and sexual penetration, the state charged defendant only with one count of rape in the first degree, one count of sodomy in the first degree, one count of unlawful sexual penetration in the second degree, and one count of unlawful use of a weapon. (ER-1). The court allowed the jury to deliberate on the first three counts. (Tr. 259).

During trial, defendant objected to the introduction of out-of-court statements made to Detective Hingston. Defendant also requested the court instruct the jury of its obligation to concur on any factual occurrence that could support any guilty verdict. Specifically, defendant requested that the court instruct the jury that:

> "In order to reach a lawful guilty verdict as to any count, 10 jurors must agree on what factual occurrence constituted the crime. Thus, in this case, in order to reach a guilty verdict on any count, 10 jurors must agree on which factual occurrence constituted the offense."

(ER-12; "Special Jury Instruction No. 3"). In support of that request, defendant

cited State v. Boots, 308 Or 371 (1989), Article I, section 11, of the Oregon Constitution, United States v. Gipson, 553 F2d 453, 457-58 (5th Cir 1977), and the Sixth Amendment to the United States Constitution. The trial court declined, and defendant excepted. (Tr. 344-53). Defendant pointed out that without that instruction the jury has "not been asked to necessarily agree on a specific act that constitutes the crime." (Tr. 353). The court declined again. (Tr. 353). Those decisions led to this appeal.

On appeal, the court of appeals addressed the court's failure to exclude the alleged victim's hearsay statements, and the court's failure to instruct the jury on its obligation to concur as to the factual occurrence that was the basis for each offense. The court of appeals concluded that the trial court did not error in either respect. State v. Ashkins, 263 Or App 208 (2014).

Defendant filed a petition for reconsideration, explaining that (1) the court of appeals failed to follow State v. Pipkin, 354 Or 513 (2013) - - a case that this court decided after briefing in the court of appeals in this case - - and, (2) that the court of appeals relied exclusively on "plain error" cases in its opinion. The court of appeals denied that petition on July 16, 2014. This court allowed review on January 9, 2015.

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ARGUMENT

I. Overview: The Need for Concurrence Instructions

This court should clarify that, when requested, and evidence would allow the jury to chose amongst alternative factual occurrences that could support a singly charged offense, then the trial court must instruct the jury of its obligation to concur on what occurrence constituted the offense. This case presents that issue.

As indicated above, defendant requested that the trial court instruct the jury that,

> "In order to reach a lawful guilty verdict as to any count, 10 jurors must agree on what factual occurrence constituted the crime. Thus, in order to reach a guilty verdict on any count, 10 jurors must agree on which factual occurrence constituted the offense."

(ER-12). The trial court declined, and defendant excepted. (Tr. 353).

Thus, the issue should further reduce to whether any evidence supported the giving of that instruction because a "trial court is not vested with the discretion to refuse an instruction supported by the evidence." State v. McBride, 287 Or 315, 319 (1979). Because the state introduced multiple occurrences of each singly charged offense, any one of which could constitute a separate offense, then, in this case, the court was not vested with discretion to refuse the instruction. For the

following reasons, given defendant's requested instruction was an accurate statement of law supported by the record, the court of appeals erred in affirming the trial court's decision to not provide that instruction.

II. Article I, section 11, Jury Concurrence Requirement

"In 1934, the people approved a legislatively referred amendment to Article I, section 11, that for the first time expressly addressed jury concurrence and jury unanimity." State v. Pipkin, 354 Or at 526. In Pipkin, recently this court confronted when Article I, section 11, of the Oregon Constitution requires jury concurrence.[1] This court categorized "two conceptually distinct situations": one, where "a statute defines one crime but specifies alternative ways in which that crime can be committed," which this court confronted in State v. Boots, 308 Or 371 (1989), and State v. King, 316 Or 437 (1993), and, the other is "when the indictment charges a single violation of a crime but the evidence permits the jury to find multiple, separate occurrences of that crime." State v. Pipkin, 354 Or at 516-17.[2] The court of appeals noted, and defendant agrees, this case falls squarely

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[1]Article I, section 11, of the Oregon Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall have the right * * * that in the circuit court ten members of the jury may render a verdict of guilty or not guilty[.]"

[2]In Pipkin, this court noted that, "Boots reasoned that, as a matter of legislative intent, each aggravating circumstance is a separate element and, as

within the latter category. State v. Ashkins, 263 Or App at 219.

Within that latter category, in State v. Greeley, 220 Or App 19, 26 (2008), then-Judge Brewer noted that where the state relies on "alternative occurrences, each of which necessarily would constitute a separate offense," then the court must provide a concurrence instruction, just as in State v. Houston, 147 Or App 285, 292 (1997), where then-Judge Landau held that a jury concurrence instruction was required where "the jury was allowed to base its verdict on alternative factual occurrences, each of which itself would be a separate crime." Although Pipkin presented "the first situation," not "the other situation" as in this case, this court noted:

> "The other situation arises when the indictment charges a single violation of a crime but the evidence permits the jury to find multiple, separate occurrences of that crime. An indictment, for example, might charge one act of statutory rape, but the evidence may disclose multiple, separate occurrences of statutory rape. * * *. [State v. Hale, 335 Or 612 (2003) and State v. Lotches, 331 Or 455 (2000)] arose in that context.[3] Ordinarily, a defendant faced with that problem can ask

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such, requires jury unanimity." State v. Pipkin 354 Or at 519-20.

[3]At this point in the opinion, this court provided footnote 4, which stated:

> "In Lotches, the indictment charged the defendant with three counts of aggravated murder, each of which allegedly had been committed in the course of and furtherance of three separate predicate crimes. 331 Or at 462-63. The Boots issue arose because, for each count, the evidence permitted the jury to find multiple occurrences of each predicate crime. Id. at 465-69. Similarly, in Hale, the indictment

> the state to elect the occurrence on which it wishes to proceed and, in that way, limit the jury's consideration to a single occurrence. * * *. Alternatively, Hale and Lotches hold that a defendant can ask for an instruction requiring jury concurrence on one of the several occurrences that the record discloses."

State v. Pipkin, 354 Or at 517 (citations omitted). That final sentence - - indicating that a defendant can "ask for an instruction requiring jury concurrence on one of the several occurrences that the record discloses" - - is exactly what defendant did here. Thus, the evidence and law supported defendant's requested instruction.

III. Problems With Court of Appeals' Analysis in This Case

In affirming the trial court's decision to deny defendant's requested instruction, the court of appeals relied solely on "plain error" cases, namely Hale, Lotches, State v. Sparks, 336 Or 298 (2004), State v. Garcia, 211 Or App 290, 295 (2007), and State v. Pervish, 202 Or App 442 (2005). The court of appeals concluded that,

> "the court must give a jury concurrence instruction if (1) the

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> charged the defendant with five counts of aggravated murder based on the claim that the defendant had committed the murder to conceal the crime of third-degree sexual abuse and to conceal the perpetrator of that crime. 335 Or at 624-25. The Boots issue arose in Hale because, for each count, the evidence permitted the jury to find multiple, separate occurrences of the predicate crime of third-degree sexual abuse. Id at 629."

> occurrences differ as to some factual element - - such as the identities of the victim or perpetrator - - that is material or, as described in Boots, 'essential to the crime,' and (2) the instruction is necessary to avoid causing an 'impermissible danger of jury confusion.' Hale, 335 Or at 627; see Lotches, 331 Or at 467-71."

State v. Ashkins, 263 Or App at 222. By inserting the word "and" in the above sentence, that court misconstrued the meaning of the passage relied on in Hale. The exact quote from Hale follows:

> "We agree with defendant that, because the instructions that the jury was given with respect to each of the aggravated murder counts based on the crimes of third-degree sexual abuse and murder did not either limit the jury's consideration to a specific instance of third-degree sexual abuse or murder, committed by a particular perpetrator against a particular victim, or require jury unanimity concerning a choice among alternative scenarios, each instruction carried an impermissible danger of jury confusion as to the crime underlying each count."

State v. Hale, 335 Or at 627 (emphasis added). Hale makes clear that, under either situation, a jury unanimity instruction would not be required, meaning that the trial court would not commit "plain error" in failing to give the instruction if either of those safeguards were in place. However, to give the impression, as the court of appeals did here, that it is only legal error not to give the instruction unless both safeguards are in place is inaccurate.

In any event, the procedural posture here distinguishes this case from the "plain error" cases. Here, the question is not whether the trial court committed

"plain error" by failing to provide the instruction. Instead, the issue is whether the trial court erred in failing to give the instruction as requested by defendant. That procedural difference should be pivotal in analyzing the issue because, as stated above, a "trial court is not vested with the discretion to refuse an instruction supported by the evidence." State v. McBride, 287 Or 315, 319 (1979). In fact, as stated in Greeley, appellate courts "review a trial court's refusal to give a requested instruction for errors of law in light of the facts that are most favorable to defendant." State v. Greeley, 220 Or App 19, 21 (2008). So that should further reduce the inquiry to whether any evidence, viewed in the light most favorable to defendant, supported the instruction.

Without viewing the evidence in that light, but on that point, the court of appeals concluded:

> "As to all counts, defendant denied that any of the described incidents occurred at all. As in Sparks and Garcia, a jury concurrence instruction is not required as to the precise location or circumstances of defendant's various acts of abuse."

State v. Ashkins, 263 Or App at 223. Again, that court conflated the "plain error" analysis articulated in Sparks and Garcia - - where an instruction may not be required as to the precise location or circumstances of defendant's various acts of abuse - - with this case where evidence supported the giving of the instruction, when viewing the evidence in the light most favorable to defendant, meaning the

trial court would commit legal error in not giving it.

Cases in the latter procedural posture - - namely Houston and Pipkin - - hold that such an instruction is required when requested and alternative factual occurrences, each which itself would be a separate crime, could lead to conviction of the singly charged offense. The court of appeals failed to recognize that distinction.

The court of appeals concluded

> "Therefore, the trial court did not err by refusing to give defendant's instruction because the instruction did not correctly state the law as applied to the evidence in this case."

State v. Ashkins, 263 Or App at 224. That conclusion was erroneous because that court, (1) relied solely on "plain error" cases, (2) failed to properly view all the evidence in the light most favorable to defendant, (3) failed to follow Pipkin in its explanation of the "other situation," and (4) inserted the word "and" in place of "or" in its summary of Hale, to the extent that Hale provides any guidance in this area given defendant preserved the legal error here. For those reasons, this court should reverse.

IV. Sixth Amendment Jury Concurrence Requirement

Furthermore, failing to instruct the jury in the requested fashion above also violated the Sixth Amendment to the United States Constitution. The Sixth

Amendment provides, in pertinent part, that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation[.]"

The Sixth Amendment right to a jury trial is applicable to the states through the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Duncan v. Louisiana, 391 US 145 (1968).

The Sixth Amendment requires jurors "to be in substantial agreement as to just what a defendant did as a step preliminary to determining whether the defendant is guilty of the crime charged." United States v. Gipson, 553 F2d 453, 457-58 (5th Cir 1977). In other words, a "defendant's right to a unanimous verdict would not be preserved by mere agreement on guilt unless jury consensus on the defendant's course of action is also required." United States v. Payseno, 782 F2d 832, 836-37 (9th Cir 1986) (relying on Gipson in holding that district court committed plain error by failing to instruct jury with specific unanimity instruction).

Here, the court of appeals, relying on this court's passage from Pipkin concerning the "later disagree[ment] with the rationale in Gipson" in Schad v. Arizona, 501 US 624 (1991), concluded that the Sixth Amendment did not require

jury consensus in this case either. State v. Ashkins, 263 Or App at 218. Again that court missed the mark.

Schad dealt with "whether a first-degree murder conviction under jury instructions that did not require agreement on whether the defendant was guilty of premeditated murder or felony murder is unconstitutional." Schad v. Arizona, 501 US at 627. The issue - - similar to the issue presented in Pipkin - - was whether the jury had to agree as to how, precisely, defendant committed the singly charged offense. In other words, the issue in Pipkin was whether the jury needed to be instructed that it must agree on how defendant committed the single burglary. This court answered "no." Similarly, in Schad the issue was whether the jury needed to be instructed that it must agree on how defendant committed the singly charged offense of murder. Again, that court answered "no."

This case differs in material respects. Here, the state presented evidence that defendant committed multiple crimes, during separate occurrences, any one of which could have supported the singly charged offense. That differs significantly from whether the jury must agree as to "how" a defendant committed a singly charged offense. In the former scenario, Gipson remains as persuasive as ever. In the latter, Schad has called it into question. Because this case concerns the former situation, Gipson remains persuasive and the Sixth Amendment would also require

concurrence as to what set of presented facts actually occurred that would support the singly charged offense. In other words, without the court instructing the jury that it must concur on a particular occurrence, then there is the possibility that the jury never even concurred as to any particular occurrence of any particular charged offense. Although it returned guilty verdicts on each count, absent a concurrence instruction as to the factual predicate corresponding to each count, the jury's verdict may not represent a "true" consensus on any count.

V. Application: Proposed Rule in This Case

In this case, without instructing the jury that it had to agree on "what factual occurrence constituted the crime," the trial court allowed individual jurors to pick-and-chose alleged incidents, without ever insuring concurrence on any charged offense. For example, count 1 alleged, among other things, that defendant engaged in sexual intercourse with (ER-1). That constituted the sole charge of rape. However, at trial, described several separate occurrences of sexual intercourse that could have supported that single charge. (Tr. 121). Further, Detective Hingston testified, over defendant's objection, that defendant engaged in sexual intercourse with her repeatedly over a period of years in the bedroom, bathroom, on the kitchen table, and on the couch. (Tr. 206).[4] Hence,

[4]Pursuant to OEC 803(18a)(b), the court allowed Detective Hingston's hearsay testimony as "substantive evidence."

three jurors could have believed that the one count of rape in the first degree occurred at different times and different locations, yet no more than three ever agreed to any "particular" occurrence.

Similarly, count 2 alleged the sole count of sodomy. (ER-1). However, again, at trial, the state presented evidence that defendant repeatedly engaged in sodomy with Although testified that she never put "her open mouth on [defendant's] penis," Detective Hingston testified that told him that she performed oral sex on defendant "approximately three times." (Tr. 126; 208). Again, on that count, the court never instructed the jury that it must agree on any particular occurrence in order to render a valid guilty verdict as to the lone count.

Finally, count 3 alleged unlawful sexual penetration. The court instructed the jury that the prosecutor must prove that defendant penetrated vagina with "an object other than [defendant's] penis or mouth," before she was 14 years old. (Tr. 350). However, again, testified that defendant touched her with his finger multiple times before she turned 14 years old. (Tr. 124-25). And, the detective testified that told him that defendant vaginally penetrated her eight times with a toy rocket. (Tr. 208). Again, the trial court never insured, in any manner, that a requisite number of jurors concurred with any factual

occurrence that could support that sole charge. Some jurors might have convicted based on an alleged "toy rocket" incident, while others on a "finger" incident.[5]

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[5]The court of appeals observed that, "[c]ount 3 specifically identified defendant's finger as the 'object other than [his] penis or mouth' that penetrated the victim ('to wit: his finger')." State v. Ashkins, 263 Or App at 210. Also, that court noted that, "the instructions did not mention specifically defendant's finger as the object used for the unlawful penetration, as indicated in the indictment." Id. at 213.

However, the court of appeals failed to mention that the trial court, initially, told the jurors that count three alleged specifically that defendant used his finger in committing that lone act. (Tr. 26). Thus, reasonably the jury could have concluded that even though the state initially charged defendant with using his finger to commit that sole offense of unlawful penetration, by the time the court instructed the jury to deliberate on that count, the jury did not need to concur on any particular occurrence of penetration.

Similarly, the court of appeals stated that "the prosecutor's arguments identified defendant's finger as the penetration object." (App-21, n 11). "Likewise," that court continued, "the indictment and the prosecutor's statements made clear that the object of the penetration for Count 3 was defendant's finger." Id. at 223 n. 11. However, that is inaccurate, unsupported by the record.

First, the court never provided the jury the indictment. Second, and more importantly, in opening statements, the prosecutor said, defendant "[d]id penetrate her vagina with his finger. Used a homemade sex toy, that she will describe as a toy rocket to penetrate her." (Tr. 35). That was the only mention of any object used to penetrate her in opening statements by the prosecutor, hardly limiting the object to defendant's finger. (Tr. 35-41).

Finally, in closing argument, the prosecutor argued, in support of why the jury should believe trial testimony, because "she describes this toy rocket, both to Detective Hingston and then in court to you." (Tr. 322). Those are the only references to the objects used to penetrate her.

Clearly, the prosecutor mentioned both defendant's finger and toy rocket; in

Hence, just as in Houston and Gipson, the trial court erred in failing to instruct the jury that it must agree on a "factual occurrence" that could support any guilty verdict. This case did not provide the same factual situation as presented in King, Greeley, or State v. Phillips, 242 Or App 253 (2011); cases concerning "alternative evidence to establish a single offense." Here, as in Boots[6], Houston, Lotches, and Gipson, the prosecutor did not present evidence that merely supported "alternative methods of proving a single offense." To the contrary, each of the above referenced pieces of evidence in this case could have supported "alternative occurrences, each of which necessarily would constitute a separate

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no manner limiting the jury's deliberation to just the finger as the object of penetration. The record does not support the court of appeals' conclusion that the prosecutor "made clear that the object of penetration for Count 3 was defendant's finger." State v. Ashkins, 263 Or App at 223 n.11. In fact, the record supports exactly the opposite. The court of appeals must have relied on the state's answering brief on this point; yet the state cited to no transcript pages for its support in making that argument. (Resp. Br. 23).

[6]Again, as discussed in footnote 2, Boots falls into this category given "as a matter of legislative intent, each aggravating circumstance [that makes murder aggravated murder] is a separate element and, as such, requires jury unanimity." State v. Pipkin, 354 Or at 519-20. Thus, a jury concurrence instruction is required in that circumstance, where only one crime occurred but as a matter of legislative intent each circumstance is "a separate element," and here, where each piece of evidence could have supported "alternative occurrences, each of which necessarily would constitute a separate offense." Pipkin concerned one burglary, where the legislature did not, as in Boots, show any intent to make "entering" and "remaining" separate elements. Hence, in that case, this court affirmed the trial court's decision to not provide the jury a Boots instruction. State v. Pipkin, 354 Or at 515.

offense." State v. Greeley, 220 Or App at 26. Under those circumstances, Article I, section 11, of the Oregon Constitution, and the Sixth Amendment to the United States Constitution, require jury concurrence, especially when evidence presented at trial supported the instruction, defendant requested it, and the court took no other action to insure concurrence.

Although, in Pipkin, this court recognized that Article I, section 11, imposes limits on the legislature's ability to identify alternative means of proving the same element, this court also noted that, "[w]e need not, however, define those limits to decide this case." Pipkin, 354 Or at 529. This court relied on State v. Laundy, 103 Or 443, 466-75 (1922), in "noting limits on including multiple means of committing an act in a single count." Id. In Laundy, this court noted:

> "Each act was a separate and distinct transaction, and hence a separate and distinct offense. The defendant was prosecuted for two crimes in one trial. * * *. The law guarantees to every person the right to be tried for one offense at a time[.] * * *. When the state rested its case in chief, it had made a record showing that the defendant was being prosecuted for two separate and distinct offenses, although each was a violation of the same statute, and the defendant's motion to require the state to make an election should have been allowed."

State v. Laundy, 103 at 483. And, as this court recognized in Pipkin, instead of requesting an election in that circumstance, a defendant "can ask for an instruction requiring jury concurrence on one of the several occurrences that the record

discloses." State v. Pipkin, 354 Or at 257. That is exactly what defendant did. Thus, this court should reverse, and remand defendant's case for a new trial given the trial court failed to provide a requested instruction that the evidence supported.

The question presented here is not, as in Pipkin, whether the jury must be instructed that it must agree "how" defendant violated one particular statute that may be violated in a variety of ways. The question here is whether the jury, when requested, must be instructed that it must agree as to which occurrence constituted a singly charged offense, when the state has presented multiple acts, any one of which could constitute the singly charged offense. It appears in Pipkin this court concluded that this "other situation" is precisely one circumstance when such an instruction is required if requested.[7]

In their dissent in State v. Rodriguez-Castillo, 210 Or App 479, 524 (2007), rev'd on other grounds 345 Or 39 (2008), Justice Brewer and Justice Landau forecasted this problem and proposed a solution that, because the issue is preserved, is obtainable here. In that case, then-Judge Brewer noted:

"The most immediate problem with the state's argument is that,

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[7]In fact, the example that this court provided for this "other situation" in Pipkin is, "[a]n indictment, for example, might charge one act of statutory rape, but the evidence may disclose multiple, separate occurrences of statutory rape." State v. Pipkin, 354 Or at 517. That is precisely what transpired in regards to count 1, rape in the first degree, in this case.

> without an appropriate concurrence instruction, it was not made clear to the jury that each count corresponded to a different factual incident and that a requisite number of them must actually agree on the same factual incident to return a conviction on any particular count. Nothing in the jury instructions or the verdict forms distinguished the various factual incidents by offense so that, in convicting defendant on [a particular count], the jurors would understand the need for 'substantial agreement as to just what defendant did' to be guilty of that particular offense."

State v. Rodriguez-Castillo, 210 Or App at 524 (citing Boots, 308 Or at 380 (quoting Gipson, 553 F2d at 457-58)). So too here.

This case presents a parallel fact situation with only one pivotal difference; here, defendant preserved the issue, in Rodriguez-Castillo the issue was reviewed as "plain error." Hence, the proposed solution by then-Judge Brewer and then-Judge Landau, in that "plain error" case, is exactly what this court should adopt as the rule of the law in this case; namely, "A trial court must instruct, when requested, a jury that it must agree on one of several occurrences of a crime if the evidence would permit the jury to find multiple, separate occurrences of that crime."

CONCLUSION

The state prosecuted defendant for a single offense of rape in the first degree, sodomy in the first degree, and unlawful sexual penetration in the second degree, respectively. However, by the time the state rested, the state had presented evidence

that defendant had committed separate and distinct acts, in separate and distinct transactions, any one of which could have constituted the violation of each particular statute. Because of that presentation, once requested, the court was obligated to instruct the jury of its duty to concur on a particular occurrence as to each count. The court did not do so, thus, this court should reverse and remand for a new trial.

DATED: February 3, 2015.

Respectfully Submitted,

FERDER CASEBEER FRENCH & THOMPSON LLP

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I directed that the foregoing **BRIEF ON THE MERITS OF PETITIONER ON REVIEW, DEFENDANT-APPELLANT** be e-filed on February 3, 2015, by submitting the electronic form in Portable Document Format (PDF) that allows texts searching and allows copying and pasting text into another document to

http://appellate.courts.oregon.gov

I further certify that, on February 3, 2015, I directed the foregoing **BRIEF ON THE MERITS OF PETITIONER ON REVIEW, DEFENDANT-APPELLANT** to be served by e-filing and first class mail on:

Anna Joyce
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Oregon Department of Justice
1162 Court Street NE
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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05

Brief length: I certify that (1) this opening brief complies with the word-count limitation in ORAP 5.05(2)(b)(i)(A) in that this opening brief does not exceed 14,000 words, and (2) the word-count of this opening brief is 6,172 words.

Type size: I certify that the size of the type in this opening brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(g).

DATED: February 3, 2015

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