

1 **IN THE CIRCUIT COURT OF THE STATE OF OREGON**
2 **FOR THE COUNTY OF WASHINGTON**
3

4 STATE OF OREGON,

5 **Plaintiff,**

6 vs.

7 ASHLE PENN,

8 **Defendant**
9

Case No.: **24CR49043**

**DEFENDANT’S DEMURRER TO THE
INDICTMENT ACCOMPANIED BY
DEFENDANT’S MOTION TO DISMISS OR IN
THE ALTERNATIVE DEFENDANT’S
MOTION TO SUPPRESS**

10 Defendant requests oral argument and a pretrial hearing and Defendant estimates 120 minutes for oral arguments.

11 Official court reporting services are requested.

12 UTCRC 4.010 and UTCRC 4.050(1).

13 While Defendant acknowledges previously appointed counsel's motion to dismiss, Defendant incorporates
14 those arguments only to the extent they are not in conflict with the stated facts herein. Defendant notes that
15 appointed counsel's assertion that the value of property alleged to have been taken still exceeds the requisite felony
16 threshold despite conflicting discovery appears inconsistent with documentary evidence, which Defendant’s
17 demurrer and alternative motions to suppress or dismiss will address in detail.

18 The following sections will present documentary evidence and factual inconsistencies for the Court's
19 consideration, including: Discrepancies between reported values on different dates, Mathematical errors in
20 summing merchandise values, Documentation showing certain items were counted twice, Timeline impossibilities
21 in reporting sequences, Contradictions within the State's own documentary evidence and corresponding testimony.

22 **I. Introduction**

23 **COMES NOW**, Defendant Ash Le' Penn, through this Memorandum, respectfully submits her demurrer
24 to the indictment and accompanying motion to dismiss and in the alternative motion to suppress. Although prior
25 motions have been filed by appointed counsel without first attacking the sufficiency of the indictment, Defendant
26 independently raises, in a proper and timely sequence, the threshold defects in the charging instrument pursuant to
27 Or. Rev. Stat. § 135.630. Under Oregon law, demurrer issues must be resolved before any other pretrial challenges.
28

See *State v. Sanders*, 280 Or. 685 (1977). Defendant now challenges the indictment by contesting the legal sufficiency on its face.

II. Statement of Legal Standards

Defendant asserts that the indictment should be dismissed pursuant to grounds for demurrer under Or. Rev. Stat. § 135.630(2) as the indictment:

1. Fails to substantially conform to the requirements of Or. Rev. Stat. § 132.560 regarding joinder of offenses. See *Poston I*, 277 Or App at 143 holding that the fact that a defendant may demur to an indictment on the ground that it does not comply with Or. Rev. Stat. § 132.560 supports the conclusion that “a charging instrument must show *on its face* that the requirements of Or. Rev. Stat. § 132.560 *have been met*” (emphases in original).
2. As stated, contains facts which do not constitute an offense (Or. Rev. Stat. § 135.630(4));
3. Contains matters which, if true, would constitute a legal justification or excuse of the charged offense or other legal bar to the action (Or. Rev. Stat. § 135.630(5)); and
4. Lacks the definiteness and certainty required by Oregon statutes and constitutional guarantees (Or. Rev. Stat. § 135.630(6)).

III. Argument

A. Grounds for Demurrer

1. Improper Joinder — Or. Rev. Stat. § 135.630(2)

The Indictment charges two distinct offenses: Theft in the First Degree under Or. Rev. Stat. § 164.055; and Unlawful Possession of Methamphetamine under Or. Rev. Stat. § 475.894— claiming these are “separate act[s] and transaction[s] but as part of crimes that are of the same or similar character and common scheme and plan.”

No factual basis has been provided sufficiently connecting the alleged theft and drug possession to a common scheme or stating with specificity how they are of the same or similar character.

Under Or. Rev. Stat. § 132.560(3), charges may be joined if they are “of the same or similar character” or “based on the same act or transaction.” In determining whether joinder is proper, Oregon courts consider factors such as “the temporal proximity of the acts, similarities in the elements of the offenses, whether there will be similar evidence or evidentiary overlap, and whether the charges involve the same or similar victims, locations,

1 intent, modus operandi, or acts.” See *State v. Brown*, 326 Or App 293, 299-300, 532 P3d 1078 (2023) (quoting
2 *State v. Garrett*, 300 Or App 671, 682-84, 455 P3d 979 (2019), rev den, 366 Or 827 (2020)).

3 As established in *State v. Poston*, 277 Or. App. 137, 370 P.3d 904 (2016), rev. den., 360 Or. 423
4 (2016), on reconsideration, 285 Or. App. 750, 399 P.3d 488 (2017), improper joinder occurs when separate
5 offenses lack factual interdependence. Here, the alleged theft and drug possession incidents are independent in
6 elements, time, motive, and proof. Theft in the first degree and possession of methamphetamine have no
7 overlapping elements. Theft involves taking/appropriating property, while possession of a controlled substance
8 (PCS) involves merely possession of contraband; theft requires intent to deprive the owner of property, while PCS
9 requires knowing possession; theft concerns property belonging to another person, while PCS concerns an illegal
10 controlled substance; there is no indication of a similar modus operandi connecting theft and PCS and there appears
11 to be no inherent evidentiary overlap.

12 Or. Rev. Stat. § 135.630 requires a charging instrument that charges multiple crimes to allege a basis for
13 joinder in the language of this section or with facts that are sufficient to establish compliance with this section. The
14 requirements that the statute imposes for joinder, in turn, are enforceable by demurrer under Or. Rev. Stat. §
15 135.630(2).

16 **2. Failure to State a Crime — Or. Rev. Stat. § 135.630(4)**

17 **i. Insufficient Allegations of Culpable Mental State**

18 The Indictment merely asserts that Defendant "did unlawfully commit theft," without alleging a required
19 culpable mental state. Or. Rev. Stat. § 164.015 demands "intent to deprive another of property," not merely an
20 "unlawful" taking. The Oregon Court of Appeals in *State v. Felt*, 108 Or. App. 730 (1991), emphasized that
21 conclusory allegations are insufficient to establish criminal intent. The failure to allege that Defendant acted
22 "intentionally," "knowingly," "recklessly," or "with criminal negligence" (Or. Rev. Stat. § 161.085) renders the
23 indictment void under Or. Rev. Stat. § 135.630(4).

24 **ii. State's Discovery Disproves Essential Felony Elements**

25 The State's own evidence undermines both the felony and misdemeanor charges which according to
26 *Sprewell v. Golden State Warriors* 266 F.3d 979, 988 (9th Cir. 2001) at the motion to dismiss stage, “[t]he court
27 need not . . . accept as true allegations that contradict matters properly subject to judicial notice or by exhibit” and
28 the Court may disregard that allegation.

1 The State's valuations of merchandise allegedly taken appears questionable across several records showing
2 substantial and troubling discrepancies in the individual and total valuations. The inventory lists contain duplicate
3 entries where items are listed multiple times and includes items that were not actually alleged to have been taken
4 directly within the relevant narrative for the incident. When these accounting discrepancies are properly addressed,
5 the resulting amalgamated valuations appear to fall below the \$1,000 felony threshold. These accounting
6 discrepancies in the State's own records raise questions regarding the reliability of the evidence purportedly
7 establishing the felony threshold required for Theft in the First Degree.

8 The night of Defendant's arrest, officers documented a total of \$285.55 in the police report in contrast to a
9 much higher value of \$479.79 later provided relating to the September 18th incident. On the night of Defendant's
10 arrest the \$285.55 included one alleged return—totaling \$93.53 and the other amount alleged to be made up of items
11 not paid for nor returned in the amount of \$192.03 making the total amount, according to police narratives \$285.55
12 (the correct summation would total \$285.56).

13 Further, Target subsequently provided a total loss valuation from the night of Defendant's arrest claiming
14 a total of \$479.79 - a 68% increase achieved by double-counting 16 of the 24 allegedly stolen items. Most notably,
15 a vacuum cleaner, which was a central focus during the arrest and clearly identifiable as a single item, appears
16 twice on Target's loss prevention records. Such discrepancies warrant judicial scrutiny, particularly when
17 considering that the revised valuation places the total above thresholds relevant to charging decisions. The Court
18 may wish to examine whether these record-keeping practices satisfy the standards of accuracy and reliability
19 contemplated in Or. Rev. Stat. § 165.080, particularly as they relate to establishing both probable cause as well as
20 the elements of the charged offense that depend on precise valuation.

21 Along with inflated loss values causing serious concern about the basis for probable cause in support of
22 the charge of theft, the state's own laboratory testing establishes that the seized substance weighed less than two
23 grams. This measurement appears to implicate a critical element of the charge of Possession of Methamphetamine
24 under Or. Rev. Stat. § 475.894. The Court may wish to consider whether this scientific evidence provided by the
25 State itself, can lawfully justify that all elements necessary to maintain this charge have been sufficiently stated. As
26 articulated in *State v. Sanders*, 280 Or. 685 (1977), an indictment is insufficient where it is contradicted by the
27 State's own evidence.

28 **3. Presence of a Legal Bar to Prosecution — Or. Rev. Stat. § 135.630(5)**

1 Defendant further demurs to the charging instrument on the grounds that the alleged conduct falls within
2 the realm of merchant-consumer contractual relationships governed by the Uniform Commercial Code, not
3 criminal law. Even the Criminal Law Revision Commission's Commentary to Or. Rev. Stat. § 164.015 explicitly
4 recognizes that certain property disputes should be resolved through civil remedies rather than criminal
5 prosecution. See *State v. Dumond*, 270 Or. 854, 855 (Or. 1974) court held that if an injured party has a remedy by
6 a civil action, the crime may be compromised.

7 The allegations presented may not sufficiently address the element of 'intent to deprive' as contemplated
8 under Or. Rev. Stat. § 164.015. UCC § 2-314 through § 2-316 establish the contractual nature of merchant-buyer
9 relationships, including implied warranties and obligations. UCC § 2-703 specifically outlines sellers' remedies for
10 breach of payment obligations, demonstrating the legislature's intent to address these matters through civil
11 channels. Target's appropriate remedy, if any, lies in these UCC provisions, not criminal prosecution. The Court
12 should consider whether such circumstances may affect the ability to establish the mental state contemplated by the
13 legislature in Or. Rev. Stat. § 164.015.

14 Furthermore, merchants bear a duty to notify customers of potential payment issues before
15 escalating to accusations of theft, particularly in situations involving self-checkout or where items may be
16 inadvertently overlooked. Industry standards and the doctrine of good faith and fair dealing (UCC § 1-304) support
17 this obligation. The record does not indicate that Target provided notice or an opportunity to address potential
18 payment issues before pursuing criminal charges. The Court may consider whether such practices align with the
19 obligations of good faith and fair dealing under UCC § 1-304.

20 Criminal prosecution is inappropriate where the dispute centers on contractual obligations and
21 understandings. Even accepting the State's allegations as presented, the Court may consider whether these
22 circumstances more closely resemble the contractual disputes contemplated by the UCC rather than the criminal
23 conduct addressed by theft statutes. The indictment improperly transforms what may at most constitute a breach of
24 contract into a criminal prosecution, violating legislative policy and constitutional protections for contractual
25 relationships.

26 **4. Accusatory Instrument is Not Definite and Certain.**

27 Defendant challenges the indictment for failing to meet the constitutional and statutory requirements of
28 definiteness and certainty under Or. Rev. Stat. § 135.630(6).

1 The valuation element, which is essential to establishing Theft in the First Degree, contains
2 inconsistencies that may render it insufficient under the standards required by Or. Rev. Stat. § 135.630(6). The 68%
3 discrepancy in valuations raises questions about whether the indictment satisfies the standards of reliability,
4 definiteness and certainty articulated by the Oregon Supreme Court in *State v. Sanders*, 280 Or 685, 690 (1977).
5 Furthermore, the indictment's reliance on the term 'unlawfully,' without further specification, may present issues of
6 notice within the context of a merchant-consumer transaction. The Oregon Supreme Court in *State v. Sanders*, 280
7 Or 685, 690 (1977), held that an accusatory instrument must "set forth the acts constituting the offense with such
8 certainty as to enable the accused to understand the nature of the charge." The term "unlawfully" can encompass a
9 range of conduct—from breach of contract to regulatory violations to criminal acts—and fails to specify which
10 actions the state considers criminal.

11 This ambiguity is especially problematic in a retail context where the line between incomplete transactions
12 and theft may depend on various factors including merchandise placement, clear customer intent, store policies,
13 and payment processing. The indictment does not identify specific acts or omissions that allegedly transformed an
14 ordinary consumer transaction into a criminal act. This lack of specificity is likely to affect Defendant's ability to
15 understand the nature of the allegations and prepare an adequate defense.

16 As the Court of Appeals noted in *State v. Kincaid*, 78 Or App 23, 30 (1986), "The purpose of an
17 indictment is to inform the defendant of the nature of the crime with sufficient particularity to enable him to make
18 his defense." The Court may consider whether the absence of clear allegations describing the specific nature of the
19 allegedly 'unlawful' conduct satisfies the standards of definiteness and certainty required by Or. Rev. Stat. §
20 135.630(6) and relevant case law, as it could refer to numerous scenarios including: inadvertent failure to complete
21 a transaction, disputed payment processing, or merchandise accidentally left in a shopping cart—each carrying
22 vastly different legal implications.

23 **IV. Legal Standards Related To Motion to Dismiss**

24 The record in this matter contains troubling factual discrepancies that warrant this Court's careful and strict
25 scrutiny. Defendant respectfully submits:

26 **1. Documentary Evidence Discrepancies:** The prosecution's own evidence contains mathematical
27 inconsistencies, including:

28 A. Reported incident values that do not match itemized merchandise lists

1 B. Documented instances of double-counting items appearing to inflate values to achieve felony
2 thresholds

3 C. Unexplained numerical disparities in official reports

4 D. Admissibility of the state's evidence both purporting to support probable cause as well as claims
5 of loss

6 **2. Timeline Impossibilities:** State's discovery of text messages claim knowledge of information that
7 would have been impossible to possess at the time reported, specifically:

8 A. A message sent upon Defendant's entry into Target on September 18, 2024 at 9:06 PM, containing
9 dollar amounts for merchandise not yet selected and identifying ten incidents when at most there
10 would have been nine.

11 B. References to a "10th incident" when documentation accounts for only 9 and, again, an amount
12 that would have only been known to law enforcement and the state at the conclusion of Defendant's
13 time in Target, but not at the moment she entered the store.

14 **3. Evidence Manipulation Indicators:** The record contains factual contradictions suggesting alteration of
15 evidence, including:

16 A. Transposition of numbers increasing alleged values (\$148.85 reported as \$814.85 and a 68%
17 increase in value from the September 18th incident going from \$285.55 to \$479.79)

18 B. Inclusion of merchandise documented as abandoned or returned in total theft values

19 C. Communications lacking required timestamps and authentication elements

20 **4. Disparate Treatment Concerns:** The documentation raises questions regarding the application of
21 investigative and charging procedures, including:

22 A. The focus on Defendant contradicted by surveillance footage in the possession of law
23 enforcement at the time of arrest

24 B. Disparities in the state's grand jury policies

25 C. Selective enforcement indicators apparent in report discrepancies

26 These documented factual contradictions necessitate judicial examination of the evidence gathering,
27 reporting, and grand jury processes that form the foundation of this prosecution.

28 **B. Grounds for Motion to Dismiss**

1 **1. Duty of Candor to Court and Defendant's Due Process Entitlements**

2 The court is invited to consider the information known to the state at the time of this matter's grand jury
3 proceeding and scrutinize whether the prosecution appeared to violate its obligation not to permit materially false
4 and misleading testimony and its duty of candor before the court during the grand jury regarding:

- 5 a. Who contacted law enforcement, when and for what purpose;
6 b. The valuation of alleged losses and the presence of certain reporting/complaining parties;
7 c. The chain of events surrounding Defendant's arrest.

8 Discovery materials show that statements made to the grand jury differ from contemporaneous reports and
9 other narrative statements made on the night of Defendant's arrest. Specifically, the grand jury witnesses' accounts
10 regarding the chain of events and valuation of merchandise were inconsistent with those earlier reports.

11 Additionally, information about the circumstances of Defendant's arrest was conspicuously not presented
12 to the grand jury with only information gathered much later after Defendant's arrest and the state's realization that
13 a misidentification had occurred. The state's search and seizure of information appears to have exceeded what
14 would be a constitutionally permissible search by private party and still, the facts surrounding Defendant's arrest
15 were not candidly provided to the grand jury but only information which was gathered through the state's search by
16 proxy was. Defendant requests that the court consider whether there was probable cause or reasonable suspicion to
17 conduct this warrantless search which exceeded the initial private search and adjudicate whether this investigation
18 complied with Fourth Amendment and Oregon's protections against unreasonable and/or unlawful searches.

19 The information presented to the grand jury described events stemming from a search conducted months
20 after Defendant's arrest violating Article 1 § 9 of the Oregon Constitution and the Fourth Amendment. The
21 information did not include facts surrounding the original incident, although contemporaneous reports and witness
22 statements containing that information were available to the State. Instead, the State elected to present only
23 information obtained through a post-hoc search, without disclosing the circumstances of Defendant's initial arrest
24 to the grand jury to accomplish what appears to be avoiding the fact that Defendant was racially profiled and
25 misidentified; all a violation of Defendant's due process.

26 **2. Fabrication of Probable Cause — Franks Violation**

27 The record in this case reflects several factual inconsistencies between the Officer's affidavit and
28 contemporaneous reports regarding key allegations.

- a. The officer's affidavit states: "While waiting for the female to leave the store, Sarah informed me that her and another male, Barry Washington, were actively removing the security wrapping off of a vacuum."
- b. The contemporaneous incident reports from the night in question do not document this specific allegation against the Defendant but instead state: "When I arrived at the store, I was informed that the female was currently selecting items inside the store and that Sarah had witnessed the male removing the security wire from a vacuum."
- c. The surveillance footage reviewed does not show the Defendant engaging in this activity.
- d. The contemporaneous reports explicitly attribute the tag removal to the Defendant's companion, not to the Defendant although even this allegation is not supported by the provided footage.
- e. Even Target's detailed minute-by-minute account of the pair's in-store behavior does not support the allegation that the Defendant removed security tags.

In *Franks v. Delaware*, 438 U.S. 154 (1978), the Supreme Court addressed the significance of accurate information in sworn statements. Oregon courts have recognized similar principles in cases such as *State v. Hulse*, 198 Or App 41 (2005) and *State v. Johnson*, 340 Or 319 (2006), establishing the importance of truthful and accurate information in probable cause determinations.

The factual discrepancies presented here relate directly to elements required for probable cause as well as the charged offense, including both valuation and intent. The contradictions are documented in the Officer's own reports and statements, creating a record that contains mutually exclusive factual assertions about the same incident.

Additionally, the probable cause affidavit references a third-party tip identifying Defendant as a "known offender." The affidavit specifies for the first instance the unlawful conduct of a security tag removal not alleged to have occurred by the reporting witness' account but allegedly, as reflected in Officer Rambin's report was said to have been observed by the tipster who, again, does not make the same claim in their own contemporaneous reports. It is further questionable that the third party tip was alleged to have come from Sarah Fillis and was made to Officer Orozco in Officer Rambin's report yet Officer Rambin testified that Kinley Baker notified him directly. Still, reporting witness statements do not describe any unlawful behavior from Defendant, nor was there any independent police corroboration of the tip prior to Defendant's arrest which may have proven difficult as, again, there was no unlawful behavior observed by the reporting or complaining party. Under the standards articulated

1 in *State v. Marx*, 287 Or. 351 (1979), probable cause based on third-party information generally requires some
2 indication of reliability or corroboration.

3 Because the grand jury testimony identified that it was Kinley Baker who contacted Officer Rambin and
4 not Sarah Fillis contacting Officer Orozco as established by the probable cause affidavit, there are serious concerns
5 warranting judicial scrutiny related to the reliability of the tip, the presentation of testimony to the grand jury as
6 well as the statements made in the officer's probable cause affidavit – each of which is contradictory when viewed
7 collectively.

8 **3. Factual Issues Regarding Third-Party Information**

9 The probable cause affidavit in this matter references a third-party tip identifying Defendant as a "known
10 offender." Upon review of the affidavit and supporting documentation, no independent police corroboration of this
11 tip appears to have occurred prior to Defendant's arrest. The discovery materials contain no information regarding
12 the tipster's reliability, basis of knowledge, or any verification procedures employed by law enforcement.

13 Moreover, the record reveals inconsistent attributions as to the source of this information, with
14 contradictory statements about who provided the initial identification. Documentation indicates this identification
15 occurred primarily based on racial characteristics similar to a prior suspect.

16 Oregon courts have established specific requirements regarding reliance on third-party information. In
17 *Draper v. United States*, the Court held that, when police rely on information from a third party to establish
18 probable cause, corroboration of the informer's tip would establish probable cause. Oregon courts have followed in
19 this practice holding that under Article I, section 9, of the Oregon Constitution, when a police officer relies solely
20 on information from someone else to establish probable cause, the state must demonstrate that the information
21 received is reliable." Similarly, in *State v. Holdorf*, 355 Or 812, 822 (2014), the Oregon Supreme Court held that
22 "the state must establish that an informant's information is reliable under the totality of the circumstances."

23 The documentation in this case lacks any demonstration of such reliability factors. This factual void
24 regarding verification procedures raises significant questions about the initiation of this case that merits judicial
25 examination. What's more is that officers had the benefit of surveillance in their custody which, if consulted, would
26 have established that Defendant was not the individual whom she was misidentified to be, but officers did not
27 conduct a constitutionally sufficient investigation in light of the full set of circumstances. The probable cause
28 affidavit submitted by Officer Rambin materially misstates and omits critical facts, warranting judicial scrutiny as

1 to whether these statements present a substantial preliminary showing of potential falsehood or reckless disregard
2 for the truth under *Franks v. Delaware*, 438 U.S. 154 (1978).

3 **4. Suppression and Spoliation of Evidence**

4 The discovery provided to date does not include certain items referenced in the reports including purchase
5 receipts in Defendant's hand at the time of her arrest proving lawful ownership of the items returned. These
6 omissions, if found to be true, violate *Brady v. Maryland*, 373 U.S. 83 (1963) and Oregon due process standards,
7 warranting dismissal.

8 **5. Violations of Due Process — Oregon and Federal Constitutions**

9 The cumulative constitutional violations include:

- 10 a. Unlawful seizure (Art. I, § 9, Or. Const.; Fourth Amendment);
- 11 b. Deprivation of notice and fair trial (Art. I, § 10, Or. Const.; Fourteenth Amendment);
- 12 c. Impaired right to counsel and confrontation (Art. I, § 11, Or. Const.; Sixth Amendment);
- 13 d. Denial of equal protection (Art. I, § 20, Or. Const.; Fourteenth Amendment).

14 These systemic violations undermine the legitimacy of the proceedings and mandate dismissal.

15 **6. Selective Prosecution Based on Racial Bias**

16 Defendant was targeted based on racial similarity to a prior suspect without individualized reasonable
17 suspicion. Selective enforcement based solely on race violates the Equal Protection Clause of the Fourteenth
18 Amendment and Art. I, § 20 of the Oregon Constitution. See *United States v. Avery*, 137 F.3d 343 (6th Cir. 1997).
19 The state convened a grand jury although internal policies provide that at least three grand jury witnesses are
20 required to qualify a case for grand jury and although Defendant requested a preliminary hearing to challenge the
21 basis for probable cause in the charging process in open court.

22 **7. Violation of Right to Meaningful Participation in Defense**

23 Despite Defendant's clear invocation of the right to contribute to fundamental trial decisions (such as
24 demurrer), prior counsel failed to raise a demurrer before seeking dismissal. This denial of strategic autonomy
25 violates *Faretta v. California*, 422 U.S. 806 (1975) and *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018).

26 **IV. PRAYER FOR RELIEF**

27 WHEREFORE, Defendant respectfully requests that this Court:

- 28 1. Sustain the Demurrer and dismiss the Indictment with prejudice;

2. Suppress all evidence obtained through unconstitutional means;
3. Vacate all subsequent proceedings tainted by structural error;
4. Preserve all statutory and constitutional objections for appellate review; and
5. Grant such other relief as the Court deems just and proper.

Respectfully submitted,

Dated this 28th of April, 2025.

Ash Le' Penn
Defendant