IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF WASHINGTON

TATE OF OREGON,

Plaintiff.

Case No.: 24CR4904

ASHLE PENN,

PENN, Defendant DEFENDANT'S DEMURRER TO THE INDICTMENT ACCOMPANIED BY EFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE DEFENDANT'S MOTION TO SUPPRESS

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

Official court reporting services are requested.

UTCR 4.010 and UTCR 4.050(1).

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

The following sections will present documentary evidence and factual inconsistencies for the Court's omideration, including: Discrepancies between reported values on different dates, Mathematical errors in maning merchandise values, Documentation aboving certain facts were counted wice, Timeline impossibilities reporting sequences, Contradictions within the Stafe's som documentary evidence and corresponding testimony

Introduction

COMES NOW, Defendant Ash Le' Penn, through this Memorandum, respectfully submits her demurrer to the indictment and accompanying motion to dismiss and in the alternative motion to suppress. Although prior motions have been fifted by appointed counsed without first stacking the afficiency of the indictment. Defendant independently raises, in a proper and timely sequence, the threshold defects in the changing instrument pursuant to Rev. Stat. § 135.50. Under Oregon hav, domarrer issues must be resolved before are other previal challenge

DEFENDANT'S DEMURRER TO THE INDICTMENT ACCOMPANIED BY DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE DEFENDANT'S MOTION TO SUPPRESS - I

The Start's valuations of merchandise allegody lates appears questionable across several records showing substantial and trooding discrepancies in the individual and total valuations. The inventory lists contain departs substantial and trooding discrepancies in the individual and total valuations. The inventory lists contain departs directly within the relevant numritive for the incident. When these accounting discrepancies are properly addressed, the resulting annulgamented valuations appear to full below the \$1,000 felony threshold. These accounting discrepancies in the State's own records nine questions regarding the reliability of the evidence purportedly statistically discrepancies in the State's own records nine questions regarding the reliability of the evidence purportedly statistically discrepancies.

The night of Defendurl's arrest, officers documented a total of \$285.55 in the police report in contrast to much higher value of \$479.79 here provided relating to the September 18th incident. On the night of Defendurl's arrest the \$28.55 included one allegal return-studing \$93.53 and the other amount alleged to be made up of item not paid for nor returned in the amount of \$192.03 making the total amount, according to police nurratives \$285.55 (the course terminal control and \$285.65).

a total of SF379. 70 of this increase achieved by double-counting for the 22 deligeally student Most metally, as a waterum cleaner, which was a central focus during the arrest and clearly identifiable as a single item, appears twice on Target's has prevention records. Such discrepancies warrant judicial sentings, particularly when twice on Target's has prevention records. Such discrepancies warrant judicial sentings, particularly when considering that the resident's valuation places to total above thresholds revent to charging destines. The Court may wish to examine whether these record-keeping practices satisfy the standards of accuracy and reliability contemplated in Cr. Rev. Stat. § 16 (500), particularly as they relate to establishing both probable cause as well as the destiness of the Arterior of first self-termine or noview solutions.

Along with inflated loss values causing serious concern about the basis for probable cause in support of the charge of offself, the state's own bloometry testing establishes that the scired substance weighed less than two games. This measurement appears to implicate a critical element of the charge of Possession of Mechamphetanine and the contract of the charge of Possession of Mechamphetanine and the contract of the charge of Possession of Mechamphetanine and the contract of the charge of Possession of Mechamphetanine and the contract of the charge of Possession of Mechamphetanine and the contract of the charge of Possession of Mechamphetanine and the charge have been sufficiently stated. As attachated in Sutter to Sanders, 200 Oct. 685 (1977), an indicatment is insufficient where it is contradicted by the

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

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- B. Documented instances of double-counting items appearing to inflate values to achieve felony
- C. Unexplained numerical disparities in official reports

would have been nin

- D. Admissibility of the state's evidence both purporting to support probable cause as well as claims
- Timeline Impossibilities: State's discovery of text messages claim knowledge of information that would have been impossible to possess at the time reported, specifically:
- A. A message sent upon Defendant's entry into Target on September 18, 2024 at 9:06 PM, containing dollar amounts for merchandise not yet selected and identifying ten incidents when at most there
- B. References to a "10th incident" when documentation accounts for only 9 and, again, an amounthat would have only been known to law enforcement and the state at the conclusion of Defendant's time in Tarreet, but not at the moment she entered the store.
- Evidence Manipulation Indicators: The record contains factual contradictions suggesting alteration of evidence, including:
- A. Transposition of numbers increasing alleged values (\$148.85 reported as \$814.85 and a 68
- increase in value from the September $18^{\rm th}$ incident going from \$285.55 to \$479.79)
- B. Inclusion of merchandise documented as abandoned or returned in total theft values
- C. Communications lacking required timestamps and authentication elements
- Disparate Treatment Concerns: The documentation raises questions regarding the application of investigative and charging procedures, including:
- A. The focus on Defendant contradicted by surveillance footage in the possession of law enforcement at the time of arrest
- B. Disparities in the state's grand jury policies
- C. Selective enforcement indicators apparent in report discrepancies

These documented factual contradictions necessitate judicial examination of the evidence gathering in a and grand jury processes that form the foundation of this prosecution

B. Grounds for Motion to Dismiss

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

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:

- Fails to substantially conform to the requirements of Or. Rev. Stat. § 132:560 regarding joinder of
 offenses. See Postnot I, 277 Or App at 143 holding that the fact that a defendant may demur to an
 indictness on the ground that it a does not comply with Or. Rev. Stat. § 132:560 supports the
 conclusion that "in-charging instrument must above on its face that the requirements of Or. Rev. Stat. §
 322:560 have hower of combuses in orinfail.
- 2. As stated, contains facts which do not constitute an offense (Or. Rev. Stat. § 135.630(4));
- Contains matters which, if true, would constitute a legal justification or excuse of the charged offen
 or other legal bar to the action (Or. Rev. Stat. § 135.630(5)); and
 - Lacks the definiteness and certainty required by Oregon statutes and constitutional guarantees (Or. Rev. Stat. 8 135.630(6)).

III. Argument A. Grounds for Demurrer

1. Improper Joinder - Or, Rev. Stat. 8 135.630(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 active 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. § 132-5003), charges may be jound if they are "of the nume or similar character" of Tousd on the same set or transaction." In determining whether jornable is proper, Orogin courts consider factors under a "the temporal procuraity of the eds, imilarities in the elements of the offenses, whether there will be limiter orderor or evidentity overlap, and whether the charge involve the same or similar victims, locations,

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

The allegations presented may not sufficiently address the element of 'intent to deprive' as contemplated a under Or, Rev. Stat. § 164/05. UCC § 2-314 through § 2-316 establish the contractual nature of merchan-boyer prelationships, including implied warrantes and obligations, UCC § 2-703 specifically outlines sellers' remodes for breach of payment obligations, demonstrating the legislature's intent to address these matters through civil a channel. Targer's appropriate remody, if any, lies in these UCC provisions, not criminal prosecution. The Court 2 should consider whether such circumstances may affect the ability to establish the mental state contemplated by it 3 legislature in Or. Sc. Stat. § 164/015.

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

Crimial procession is improposite where the dispute centers on contractual obligations and understandings. Even accepting the State's allegations as presented, the Court may consider whether those criminatures more closely resemble the centeratual disputes contemplated by the UCC rather than the criminal southers addressed by theft statutes. The infectionent improperly transforms what may at most countines a breach of decontract into a criminal prosecution, violating legislative policy and constitutional protections for contractual 5 relationships:

4. Accusatory Instrument is Not Definite and Certain.

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

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The court is invited to consider the information known to the state at the time of this matter's grand jury

proceeding and scrutinize whether the prosecution appeared to violate its obligation not to permit materially false
and misleading testimony and its duty of candor before the court during the grand jury regarding:

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

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

Additionally, information about the circumstances of Defendant's arrest was conspicuously not presente

to the grand jury with only information gathered much later after Defendant's arrest and the state's realization that a misidentification had occurred. The state's search and science of information appears to have exceeded what would be a constitutionly permissible search by private purpty and like facts surrounding Defendant's arrest were not candidly provided to the grand jury but only information which was gathered though the state's search it provy was. Defendant respons that the court consider whether there was probable cause or reasonable suspicion conduct this warrantees assent which exceeded the initial private search and adjudicate whether this rowestigation completed with Fourth Amendment and Gregor's protections against unreasonable and/or unberlife arches.

The information presented to the grand jury described events stemming from a search conducted month infor Defendant's street violating Article 1 § 9 of the Oregon Constitution and the Fourth Amendment. The information of all or should be fact surrounding the information of all on the original inside, and the original reside, and the original statements containing that information were available to the State. Instead, the State elected to present only information obtained through a pos-bace word, without disclosing the circumstances of Defendard's similal error to the grand jury to accomplish what appears to be avoiding the fact that Defendant was racially profiled and ministentified, all a violation of Defendant's due process.

2. Fabrication of Probable Cause — Franks Violation

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

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

As established in State v. Puston. 277 Or. App. 137, 370 P.3d 904 (2016), rev. den., 360 Or. 42; (2016), on reconsideration, 285 Or. App. 730, 399 P.3d 485 (2017), improper joined recent when separate offenses lack factual interdependence. Here, the alleged the fit and drug possession incidents are independent in dements, time, motive, and proof. Then in the first degree and possession in cidents are independent in dements, time, motive, and proof. Then in the first degree and possession of a controlled substance (PCS) involves merely possession of contraband; theft requires intent to deprive the owner of property, while PCS oncemn an illegal controlled substance, there is no indication of a similar modus operandi connecting theft and PCS and there appears to be no inherence victoriary overlap.

Co. Rev. Stat. § 135.630 requires a charging instrument that charges multiple crimes to allege a basis for a price of the language of this section or with facts that are sufficient to establish compliance with this section. The requirements that the stante imposes for joinder, in turn, are enforceable by demurrer under Or. Rev. Stat. § (313.63.072.)

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

i. Insufficient Allegations of Culpable Mental State

The Indictment merely asserts that Defendant "fid unlawfully commit theft," without alleging a require analysis mental state. Or. Rev. Stat. § 164.015 demands "intent to deprive another of property," not merely an 20 "unlawfull state. The Origon Court of Appeals in State v. Felt, 108 Or. App. 730 (1991), emphasized that conclusory allegations are insufficient to establish criminal intent. The failure to allege that Defendant acted "attentionally," "throwingly," "revidensly," or "with criminal negligence" (Or. Rev. Stat. § 161.085) renders the 2d midstement would under Or. Rev. Stat. § 135.630(4).

ii. State's Discovery Disproves Essential Felony Elements

The State's own evidence undermines both the felory and mindementor charges which according to 6. Spreads V. Golden State Warrian 266 F.34 979, 988 (9th Cir. 2001) at the medion to distinst stage, "[fills court need not . . . accept as tree allegations that contradict matters properly subject to judicial notice or by exhibit' and to Court may deepend that allegation.

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The valuation element, which is essential to establishing Theft in the First Degree, contains a inconsistencies that may render it insufficient under the standards required by Co. Rev. Stat. § 135.60(6). The 68 discrepancy in valuations raises questions about whether the indicators statisfies the numbers of reliability, at definiteness and certainty articulated by the Oregon Supreme Court in State v. Sanders, 280 Oc 685, 690 (1977). Furthermore, the indicators reliance on the term unlawfully, without further specification, may present issues on notice within the context of a merchant-consumer transaction. The Oregon Supreme Court in State v. Sanders, 28 Oc 685, 690 (1977), beld that an accustory international market for the early constituting the offense with such Scientising as to enable the accused to understand the nature of the charge. The term "unlawfully" can encompose or the state of the charge of conduct—from breach of contract to regulatory violations to criminal acts—and fails to specify which

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

As the Court of Appeals noted in State v. Kinesid, 78 Or App 23, 20 (1886), "The purpose of an indicatener is to inform the defendant of the nature of the crime with sufficient particularity to enable him to make his defense." The Court may consider whether the absence of clear allegations describing the specific nature of the lagegdy valuated? conduct satisfacts the standards of definiteness and certainly required by Or. Rev. Stat. 8 [30] 135.50(a) and relevant conduct satisfacts the standards of definiteness and certainly required by Or. Rev. Stat. 8 [31] 131.00(a) and relevant conduction of the standards of definiteness and certainly required by Or. Rev. Stat. 8 [31] 131.00(a) 131.00(

IV. Legal Standards Related To Motion to Dismiss

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

- Documentary Evidence Discrepancies: The prosecution's own evidence contains mathema inconsistencies, including:
- A. Reported incident values that do not match itemized merchandise lists

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- 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 her instead state: "When I arrived at the store, I was informed that the female was currently selecting items inside the store and that Surah had witnessed the male removing the security wit from a securior."
- 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 compunion, not to

 Defendant although even this allegation is not supported by the provided footage.
- 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.

12 In Franks v. Deloware, 438 U.S. 154 (1978), the Supreme Court addressed the significance of accurate information in worm attenuous. Oregon counts her recognized similar principles in cases such as State v. Platha 198 Or App 41 (2019) and State v. Johnson, 340 Or 319 (2016), esablishing the importance of reathful and securita information in probable cause determination.

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

Additionally, the probable came afficient references a third party top identifying Defendent as "Income 20 offender." The affiliarity specifies for the first instance the unlawful conduct of a security tag removal not alleged to 22 offender. The affiliarity specifies for the first instance the unlawful conduct of a security tag removal not alleged to 22 offender. The affine president point is a similar to 23 offender who, again, does not make the same claim in their own contemporateous report 24 is in first questionable that the first party top was alleged to have come from Seath Fills and was made to 25 officer Ornoxo in Officer Rambin's report ye dispersion of the standard of the same claim in their own contemporateous report 25 officer Ornoxo in Officer Rambin's report ye officer Rambin testified that Kindey Baker notified him directly. 25 officer Ornoxo in Officer Rambin's report ye officer Rambin testified that Kindey Baker notified him directly. 26 officer Ornoxo in Officer Rambin's report ye officer Rambin testified that which the same claim in the control of the tip prior to Defendent's arrord which may have proven difficult as, again, 26 officer Rambin's report ye of the professor of Defendent's arrord which may have proven difficult as, again, 26 officer Rambin's report yes officer Rambin testified that Kindey Baker notified him directly. 26 officer Rambin's report yes officer Rambin testified that Kindey Baker notified him directly. 27 officer Rambin's report yes officer Rambin testified that Kindey Baker notified him directly. 28 officer Rambin's report yes officer Rambin testified that Kindey Baker notified him directly. 28 officer Rambin testified him directly. 28 officer Rambin testified him directly. 29 officer Rambin testified him directly. 29 officer Rambin testified him directly. 29 officer Rambin testified him directly. 20 officer Rambin testified him directly. 20 officer Rambin te

State v. Marx, 287 Or. 351 (1979), probable cause based on third-party information generally

Because the grand jury testimony identified that it was Kinley Baker who contacted Officer Rambin and iarah Fillis contacting Officer Orozco as established by the probable cause affidavit, there are serious concer ting judicial scrutiny related to the reliability of the tip, the presentation of testimony to the grand jury as rell as the statements made in the officer's probable cause affidavit – each of which is contradictory when viewed

3. Factual Issues Regarding Third-Party Information

The probable cause affidavit in this matter references a third-party tip identifying Defendant as a "known review of the affidavit and supporting docum ip appears to have occurred prior to Defendant's arrest. The discovery materials contain no information regarding tipster's reliability, basis of knowledge, or any verification procedures employed by law enforce

adictory statements about who provided the initial identification. Documentation indicates this identification urred primarily based on racial characteristics similar to a prior suspect. Oregon courts have established specific requirements regarding reliance on third-party information. In

ner v. United States, the Court of held that, when police rely on information from a third party to establish shable cause, corroboration of the informer's tip would establish probable cause. Oregon courts have followed this practice holding that under Article I, section 9, of the Oregon Constitution, when a police officer relies solely ceived is reliable." Similarly, in State v. Holdorf, 355 Or 812, 822 (2014), the Oregon Supreme Court held that the state must establish that an informant's information is reliable under the totality of the circumsta The documentation in this case lacks any demonstration of such reliability factors. This factual void

ification procedures raises significant questions about the initiation of this case that merits judicial ion. What's more is that officers had the benefit of surveillance in their custody which, if consulted, wo ave established that Defendant was not the individual whom she was misidentified to be, but officers did not nduct a constitutionally sufficient investigation in light of the full set of circumstances. The probable cause

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4. Suppression and Spoliation of Evidence

The discovery provided to date does not include certain items referenced in the reports including purchase s in Defendant's hand at the time of her arrest proving lawful ownership of the items returned. These ons, if found to be true, violate Brady v. Maryland, 373 U.S. 83 (1963) and Oregon due proces

5. Violations of Due Process — Oregon and Federal Constitutions

- a. Unlawful seizure (Art. I, § 9, Or. Const.; Fourth Am
 - b. Deprivation of notice and fair trial (Art. I, § 10, Or. Const.; Fourteenth Amendment);
 - c. Impaired right to counsel and confrontation (Art. I, § 11, Or. Const.; Sixth Amendment);
- d. Denial of equal protection (Art. I, \S 20, Or. Const.; Fourteenth Amendment). These systemic violations undermine the legitimacy of the proceedings and mandate dismissal.

6. Selective Prosecution Based on Racial Bias

Defendant was targeted based on racial similarity to a prior suspect without individualized rea ent based solely on race violates the Equal Protection Clause of the Fou endment and Art. I, § 20 of the Oregon Constitution. See United States v. Avery, 137 F.3d 343 (6th Cir. 1997) The state convened a grand jury although internal policies provide that at least three grand jury witnesses are ired to qualify a case for grand jury and although Defendant requested a preliminary hearing to challenge the

7. Violation of Right to Meaningful Participation in Defense

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

IV. PRAYER FOR RELIEF

WHEREFORE, Defendant respectfully requests that this Court:

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- 4. Preserve all statutory and constitutional objections for appellate review; and
- Grant such other relief as the Court deems just and proper.

Dated this 28th of April, 2025.

Ash Le' Peni Defendant

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