IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR MULTNOMAH COUNTY

THE STATE OF OREGON, Plaintiff, v. ALAN SWINNEY Defendant.	No. 20CR50067 RESPONSE TO DEFENDANT'S MOTION TO DISMISS FOR IMPROPER EVIDENCE SUBMITTED TO THE GRAND JURY

Defendant has moved to dismiss the indictment in this case on the grounds that the grand jury was not adequately instructed that evidence from one criminal episode could not be considered when assessing whether the State had met its burden in the other. Defendant asserts that not explicitly prohibiting the grand jury from considering all the evidence as to every count violated Oregon statutory provisions relating to the presentation of evidence at grand jury and denied him due process of law under the United States Constitution. He asserts that the appropriate remedy is dismissal of the indictment. For the reasons discussed below, none of these arguments are well taken and the court should deny the motion.

SUMMARY OF ARGUMENT

"[A]n indictment cannot be set aside because the grand jury considered evidence that might not be admissible at trial." *State v. Dike*, 921 Or App 542, 546 (1988). Defendant does not explain how, notwithstanding this statement of law, he can prevail on a request to have the indictment set aside because the grand jury considered evidence that might not be admissible at trial.

Defendant's claim must derive from some source of law, in this case that could be 1) Oregon statutory law; 2) Oregon constitutional law; or 3) Federal constitutional law. As outlined below, it fails under each.

A. Statutory Authority

- Oregon law prohibits a statutory challenge to an indictment on the basis of a defect in grand jury proceedings outside of two specifically enumerated areas not relevant here. ORS 135.510; *State v. Dike*, 921 Or App 542, 546 (1988).

- Oregon law also expressly prohibits the use of grand jury recordings as a basis to challenge the resulting indictment. ORS 132.270(7). The use of such recordings to allege what did and did not happen in grand jury is the foundation on which defendant's motion is built.

- Lastly, Oregon law does not permit a defendant to move for dismissal in the interest of justice. ORS 135.755, the statutory hook of defendant's "motion to dismiss," permits that motion only *sua sponte* by the court or on the application of the district attorney.

B. The Oregon constitution

- Oregon's constitution lacks a due process clause, which is the sole constitutional theory on which defendant premises his motion to dismiss.

C. The United States constitution

- The United States Supreme Court has expressly and repeatedly stated that purported evidentiary irregularities during a grand jury proceeding do not violation a defendant's constitutional rights. *United States v. Calandra*, 414 U.S. 338 (1974); *United States v. Costello*, 350 U.S. 359 (1956).

- In any event, "[t]he prosecutor is under no obligation to give the grand jury legal instructions." *United States v. Zangger*, 848 F.2d 923 (8th Cir. 1988).

ARGUMENT

I. THE EVIDENCE PRESENTED TO THE GRAND JURY WAS LAWFUL.

Defendant does not challenge the lawfulness of any of the evidence presented to the grand jury. Rather, defendant's motion is predicated on the assumption that certain of the properly presented evidence could only be considered by the finder of fact at trial as to certain counts and not as to others.

There are two problems with this: 1) on the facts of this case the evidence of each criminal episode, at the time of the grand jury, was cross-admissible under OEC 404(3) under then-controlling Supreme Court precedent as to the other; 2) even if it were not, defense has cited no precedent or authority suggesting that a grand jury must be given limiting instructions, and if it must, that the failure to do so is a defect of constitutional magnitude, and if it is, that the appropriate remedy for such is dismissal of an indictment. To prevail defendant must establish all three, and he has cited precedent for none.

Oregon appellate courts have, twice, held expressly contrary to defendant's position. *State v. McDonald*, 231 Or 24, 35 (1961); *State v. Dike*, 921 Or App 542, 546 (1988).

Although there are multiple procedural reasons, discussed in depth below, why this court cannot examine the details of the evidence submitted to grand jury, this case presents an unusual, if not unique, posture. At the time of the grand jury proceeding in September of 2020, *State v. Johns*, 301 Or 535 (1986), was good law and had been for over three decades. Under *Johns* evidence of similar acts was admissible to prove a defendant's intent in a particular instance, provided the court balanced multiple factors.[1] However, in January of 2021, the Oregon Supreme Court overruled *Johns* with their opinion in *State v. Skillicorn*, 367 Or 464 (2021).

Under the state of the law as it currently stands, the State would agree that the jury should be given a limiting instruction directing them not to consider evidence of defendant's acts during one criminal episode as evidence that the defendant is guilty of acts during the other. However, this does not mean that failure to instruct the grand jury in accordance with an interpretation of the law that did not exist at the time of grand jury somehow tainted the indictment. The indictment was lawfully obtained, and the trial will also be held in scrupulous compliance with

[1] This substantially over-simplifies the *Johns* analysis.

the current controlling interpretations of the rules of evidence. Both are fully within the mandate of due process.

II. THE COURT HAS NO AUTHORITY TO DISMISS AN INDICTMENT EVEN IF THE GRAND JURY WAS TAINTED WITH INCOMPETENT EVIDENCE.

Assuming for purposes of argument that that improper evidence was considered by the grand jury, the court still may not dismiss an indictment.[2] The Oregon Supreme Court has ruled that the trial court has no authority to inquire into the competency of the evidence considered by the grand jury in returning an indictment.

> There can be no question that when an accusatory indictment is returned there is a presumption that the grand jury has acted in accordance with the admonition of [ORS 132.390] and ORS 132.320. Since, as previously pointed out, this presumption is only overcome when there is a total failure to endorse the names of any witnesses upon the returned indictment, it must follow, under the well-settled rule in the majority of jurisdictions, including the state of Oregon, that the fact a grand jury may have been prejudiced by hearsay evidence or prejudicial publicity which it ought not to consider is not grounds for dismissing or quashing an indictment, for the trial court would then be required to inquire into and determine in advance of each trial the sufficiency of all of the evidence to sustain or reject an indictment, *which it may not do*.

State v. McDonald, 231 Or 24, 35 (1961) (internal citations omitted, emphasis added).

Defendant acknowledges *McDonald*, but argues its holding has been superseded by the unofficial commentary to OEC 101(4)(b). While defendant accurately points out that commentary expresses disapproval of certain specific language in *McDonald*, language that the Supreme Court itself subsequently repudiated, it brazenly ignores the subsequent Supreme Court decision pointing out that the relevant commentary was never actually adopted by the legislature

[2] Although defendant frames his motion as challenging the instructions (or lack thereof) that were given to the grand jury, this is truly a challenge to the evidence presented to the grand jury. He argues that the grand jury, because it was not properly instructed, considered evidence on certain of the counts in the indictment that it should not have.

and, even were it controlling, that the core holding of *McDonald* still stands. *State v. Stout*, 305 Or 34 (1988).

In *Stout*, the court addressed defendant's argument about the continued vitality of *McDonald* at length and ultimately found that, whether the specific language in *McDonald* was or was not disapproved by the legislature, *McDonald's* underlying premise remained in force: the remedy, if any, for introduction of inadmissible evidence in violation of ORS 132.320 was not dismissal of an indictment:

> We do not reaffirm the *McDonald* court's language that compliance with ORS 132.320 is "admonitory in character only, not mandatory." That may have been only a poorly chosen way to say that noncompliance would not invalidate an indictment, whatever other sanctions might be invoked. It does not mean that prosecutors may use hearsay testimony before grand juries. The unofficial commentary to OEC 101(4)(b) makes plain that this also was the view of those who prepared the Oregon Evidence Code. But the commentary is by no means a clear indication that the legislature intended to change this court's long-standing interpretation of ORS 135.510. Under that interpretation, the statutory defect of which defendant complains is not a ground for setting aside the indictment.

Stout, 305 Or at 41-42. Thus, *McDonald's* admonition that the court may not "determine in advance of each trial the sufficiency of all of the evidence to sustain or reject an indictment," remains undisturbed. *McDonald*, 231 Or at 35.

Pursuant to ORS 135.510 an indictment may only be set aside if it is 1) not properly found, indorsed, or presented or 2) the names of the witnesses are not inserted at the bottom of the indictment. As defendant has alleged neither of these as reasons to set aside the indictment, there is no basis for dismissal. The courts have been clear that ORS 135.510 provides the only statutory grounds on which an indictment may be set aside, and that a challenge to the evidence considered is not included within its scope. *State v. Stout*, 305 Or 34, 41 (1988) ("[I]f an indictment cannot be attacked on the ground that the grand jury heard insufficient evidence, it follows that it cannot be attacked on the ground that the grand jury heard the wrong type of

evidence.") *State v. Dike*, 921 Or App 542, 546 (1988) ("It also follows that an indictment cannot be set aside because the grand jury considered evidence that might not be admissible at trial.")

Defendant's citation to ORS 135.755 does not alter the force of these holdings. *Stout* provides clearly that "an indictment cannot be set aside on any statutory ground save those listed in ORS 135.510," and ORS 135.755 is a statute. Defendant has attempted to avoid the clear statements of *McDonald*, *Stout*, and *Dike* by casting his objection to the grand jury proceedings as one of due process and ORS 135.755 as simply the vehicle for implementing the requirements of due process. However, as discussed below, the United States Supreme Court has repeatedly held that the introduction of incompetent evidence at grand jury is not a constitutional violation.

In any event, ORS 135.755 does not authorize the *defendant* to move for dismissal under this section, which is precisely what he has done with his "motion to dismiss."

Moreover, all fourteen reported appellate opinions evaluating the merits of a court's *sua sponte* dismissal under ORS 135.755 have reversed the dismissal order. See, e.g., *State v. Shepherd*, 21 Or App 52, 55 (1975) ("dismissal is a drastic remedy which is to be reserved for severe situations").[3] There are no reported opinions affirming a trial court's decision to dismiss under ORS 135.755 despite the permissive, abuse of discretion, standard of review.

III. DEFENDANT IS PROHIBITED BY LAW FROM USING THE RECORDING OF THE GRAND JURY PROCEEDINGS TO CHALLENGE THE RESULTING INDICTMENT.

The only even arguably relevant change in the law since *Stout's* clear prohibition on statutory challenges to an indictment based on evidentiary issues at grand jury is that grand jury

[3] The other thirteen cases finding *sua sponte* dismissal under ORS 135.755 inappropriate are: *State v. Peekema*, 328 Or 342 (1999); *State v. Vasquez-Hernandez*, 159 Or App 64 (1999); *State v. Swett*, 158 Or App 28 (1999); *State v. Stough*, 148 Or App 353 (1997); *State v. Sanchez*, 136 Or App 329 (1995); *State v. Hadsell*, 129 Or App 171 (1994); *State v. Adams*, 86 Or App 139 (1987); *State v. Mock*, 80 Or App 365 (1986); *State v. Phon Yos*, 71 Or App 57 (1984); *State v. Bethune*, 51 Or App 271 (1981); *State v. Martindale*, 30 Or App 1127 (1977); *State v. Sharp*, 28 Or App 429 (1977); and *State v. Hoare*, 20 Or App 439 (1975).

proceedings are now recorded.[4] SB 505 (2017), which imposed the requirement that testimony presented to a grand jury be recorded, also included a provision in Section 3(7) prohibiting precisely what defendant is doing in his motion to dismiss:

> An audio recording […] of a grand jury proceeding […] may not be used to challenge the indorsement of an indictment 'a true bill' or the proceedings that led to the indorsement

This provision is codified in ORS 132.270(7), and has not been amended since enacted in 2017. Even assuming defendant's premise that a constitutional violation occurred in grand jury (something the State strongly contests), the legislature is entitled to proscribe statutory limits and procedures that restrict the assertion of a constitutional right. See, e.g. *State v. Bartz*, 314 Or 353 (1992) (noting that imposing a statute of limitations did not unconstitutionally suspend the writ of *habeas corpus*).

Defendant is not prohibited by ORS 132.270(7) from moving the court to limit the evidence that may be used to seek his conviction. Rather, the law only prohibits him from relying on certain evidence to challenge a preliminary step in the process: the indictment. This does not materially impair his access to all appropriate process to challenge the State's case at trial. Just as *Bartz* found that the imposition of a statute of limitations to limit the system costs of potentially meritorious post-conviction litigation was permissible, so too is legislation that limits pre-trial litigation about the propriety of grand jury proceedings.

[4] Of marginal relevance, only the presentation of *evidence* is recorded. Instruction on the applicable law by the district attorney under the authority granted by ORS 132.340 is not subject to recordation. ORS 132.260(1).

IV. DUE PROCESS DOES NOT AFFORD THE DEFENDANT THE RIGHT TO ATTACK HIS INDICTMENT BASED ON THE EVIDENCE PRESENTED TO THE GRAND JURY.

Because the Oregon constitution lacks a Due Process Clause, the federal Due Process Clause must be the source of any process that defendant asserts he is due.

On that front, the Eleventh Circuit has written that "this kind of pretrial challenge to the evidence supporting an indictment would be wholly inconsistent with the Supreme Court's repeated pronouncements." *United States v. Kaley*, 677 F. 3d 1316 (7th Cir. 2012). In the words of the *Kaley* court, quoting liberally from the United States Supreme Court, "a rule allowing defendants to challenge indictments on the basis of inadequate or incompetent evidence 'would run counter to the whole history of the grand jury institution,' and 'would result in interminable delay but add nothing to the assurance of a fair trial.'" *Id*. 1324 (quoting *United States v. Costello*, 350 U.S. 359 (1956)).

Subsequent to *Costello* the United States Supreme Court expressly stated that a grand jury's consideration of incompetent evidence does not violate the constitution.

> The grand jury's sources of information are widely drawn, and the validity of an indictment is not affected by the character of the evidence considered. Thus, an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence; or even on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination.

United States v. Calandra, 414 U.S. 338 (1974) (internal citations omitted). And, indeed, if the consideration of evidence that would so readily be subject to suppression as evidence obtained in violation of *Miranda* does not warrant setting aside an indictment under the constitution, the constitution cannot be stretched to demand such a result based on purported instructional error on a technical, and reasonably disputed, point of law.

In *Calandra*, the Court of Appeals had held that due process afforded a person appearing in front of the grand jury the right to litigate whether or not evidence had been unlawfully seized where that evidence was the basis of the questions he was being asked. The Supreme Court reversed and, for the reasons quoted above, held that no such constitutional right exists at the grand jury stage.

Due process does allow a defendant the right to challenge the propriety of evidence that will be used as the basis to seek his conviction, and that right is effectuated by the pre-trial omnibus hearing that limits and clarifies the evidence that may be introduced at trial. Due process does not provide a remedy if evidence that would not be admissible at trial is presented to the grand jury in large part because the purpose of a grand jury investigation is significantly different than that of a trial. See, *Turner v. Lynch*, 534 F. Supp. 686 (S.D.N.Y. 1982) ("The Constitution requires only that the integrity of the fact-finding process be upheld by restricting the admissibility at trial of tainted evidence, not by precluding its introduction before a grand jury.") In his opinion in *Turner*, Judge Knapp ably articulated his reasoning for this conclusion as follows:

> The main function of a grand jury is to determine if probable cause exists to believe that a crime has been committed and, if so, to file charges against such persons as are reasonably believed to have committed it. *Branzburg v. Hays* 408 U.S. 665, 686-87 (1972). To do so, the grand jury has broad powers of investigation that are "unrestrained by the technical, procedural and evidentiary rules governing the conduct of criminal trials." *United States v. Ciambrone* F.2d 616, 622 (2d Cir. 1979) 601. For instance, a grand jury may consider evidence obtained in violation of the Fourth Amendment, *United States v. Calandra,* 414 U.S. 338 (1974), in violation of the Fifth Amendment, *United States v. Blue* 384 U.S. 251, 255 n.3 (1966), or it may rely upon hearsay or otherwise incompetent evidence, *United States* v. *Costello,* 350 U.S. 359 (1956).

Id. (citations cleaned up)

This all is to say, a defendant does not have a due process right to have the grand jury consider, or not consider, any particular evidence. Indeed, the grand jury is, as a matter of

constitutional law, "unrestrained by the […] evidentiary rules governing the conduct of criminal trials." *United States v. Calandra*, 414 U.S. 338 (1974).[5]

The Ninth Circuit has held that the bar to a constitution-based pre-trial dismissal of an indictment is a high one:

> the constitutionally-based independence of grand juries and prosecutors necessarily limits a court's review of grand jury proceedings. Consequently, we have ruled that the "(d)ismissal of an indictment is required only in flagrant cases in which the grand jury has been overreached or deceived in some significant way ...." It must be shown that the prosecutor's conduct significantly infringed upon the ability of the grand jury to exercise its independent judgment.

United States v. Cederquist, 641 F.2d 1347 (9th Cir. 1981) (internal citations omitted). If, as the United States Supreme Court has held, a prosecutor becoming incensed and actively threatening a witness in front of the grand jury is not an "irregularity of constitutional proportions" then the lack of legal instruction on a disputed point of law certainly cannot be. See, *Beck v. Washington*, 369 U.S. 541, 555 (1962).

V. NEITHER THE CONSTITUTION NOR OREGON STATUTES REQUIRE DETAILED LEGAL INSTRUCTIONS BE GIVEN TO THE GRAND JURY.

No Oregon authority addresses what nature or depth of instruction a grand jury must or can be given by the prosecutor.[6] However, as defendant has alleged that the lack of appropriate instruction constituted a due process violation, review of applicable federal precedent is instructive.

Summarizing the status of instructional challenges to an indictment, the Eighth Circuit, citing the Ninth Circuit and the Supreme Court, wrote:

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[5] Of course, Oregon *statutory* law does restrict what evidence may be presented, but this section focuses solely on defendant's constitutional arguments. See the preceding sections for discussion of why defendant's statutory arguments fail.

[6] The clause of ORS 132.340 providing that the district attorney shall "advise [the grand jury] in relation to its duties" has not been construed in any appellate opinion.

> [Defendant] contends the section 1461 count of the indictment should have been dismissed because the prosecutor presenting the case did not instruct the grand jury on the "applicable law" of obscenity. We disagree. *The prosecutor is under no obligation to give the grand jury legal instructions.* "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits."

United States v. Zangger, 848 F.2d 923, 925 (8th Cir. 1988) (internal citations omitted, emphasis added) (quoting *Costello v. United States*, 350 U.S. 359, 363 (1956)). See also, *United States v. Kenny*, 645 F.2d 1323, 1347 (9th Cir. 1981) *cert. den.* 452 U.S. 920 (1981) (finding that nothing in the Constitution "imposes the additional requirement that grand jurors receive legal instructions," noting that "the giving of such instructions portends protracted review of their adequacy and correctness by the trial court during motions to dismiss," and declining to "launch courts on the journey through such a toilsome mire[.]")

Defendant's procedural and substantive due process rights against arbitrary or unlawful conviction of a crime are vindicated by his ability to fully challenge all evidence against him at trial, or in a pre-trial OEC 104 hearing. They do not extend to granular litigation of instructions given or not given to the grand jury, the "toilsome mire" identified by the Ninth Circuit in *Kenny*. In *Zanger*, above, the prosecution was not required delve into the complex law of obscenity and was permitted to instruct the grand jury as to only the statutory elements in the indictment. And, as in *Kenny*, there is no "additional requirement" of further instruction. So too here. A limiting instruction based on the fluid and complex law of other acts evidence was not constitutionally required for a valid indictment to issue.

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CONCLUSION

The court should deny defendant's motion to dismiss for each of the following independently sufficient grounds:

- The Oregon courts have repeatedly held that the trial court lacks authority to inquire into evidentiary issues arising during a grand jury proceeding.
- The United States Supreme Court has repeatedly held that a defendant has no constitutional right to challenge the propriety of evidence before the grand jury.
- There is no constitutional requirement that the grand jury be instructed on *any* legal issue beyond the elements of a crime.
- Defendant's motion is procedurally barred because he may not move for dismissal under ORS 135.755.
- Defendant's motion requires analysis of what did, and did not, occur in the grand jury room. He is prohibited by law from relying on grand jury recordings to do so, and has no other way of demonstrating the purported irregularity about which he complains.
- In any event, the evidence at issue was lawfully considered by the grand jury.

Dated this 20th day of September, 2021.

Respectfully Submitted,

MIKE SCHMIDT
District Attorney
Multnomah County

By _____
Adam Gibbs
Sr. Deputy District Attorney

CERTIFICATE OF SERVICE

I certify that on September 20, 2021, I caused the foregoing Response to be served upon the parties hereto by the method indicated below:

Mr. Joseph Westover Multnomah Defenders Inc 522 SW 5th Ave Ste 1000 Portland OR 97204 jwestover@multnomahdefenders.org	___	HAND DELIVERY
	___	US MAIL
	___	FAX
	X	EMAIL (courtesy copy)
	X	ELECTRONIC SERVICE (UTCR 21.100)

/s/ Adam Gibbs
Adam Gibbs, OSB 083354
Sr. Deputy District Attorney