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

STATE OF OREGON, Plaintiff, vs. ALAN SWINNEY, Defendant.	Case No. 20-CR-50067 DA 2350268-1 STATE'S RESPONSE TO DEFENDANT'S SENTENCING MEMORANDUM

COMES NOW the State of Oregon, by and through Nathan Vasquez and Reid Schweitzer, Deputy District Attorneys, in response to the legal arguments in Defendant's Sentencing Memorandum. Defendant's memorandum does not establish that any irregularity occurred or that sentencing him pursuant to the State's request is constitutionally impermissible. As such the State respectfully requests that the Court DENY the Defendant's requests.

I. The Mandatory Sentence under Ballot Measure 11 for Count 5 Is Not Cruel and Unusual Punishment

Defendant's first legal argument is that the mandatory minimum sentence of 70 months imprisonment dictated by ORS 137.700 (Ballot Measure 11) constitutes cruel and unusual punishment as applied to Count 5 in this case. The crux of his argument relies on a fundamental falsehood – that he was somehow not convicted in Count 5 of Assault in the Second Degree. He argues that because the jury convicted him of that charge on the theory of transferred intent, this somehow transforms the conviction into a lesser-included offense of Assault in the Fourth Degree, a Class A Misdemeanor. This assertion is without merit or authority. In determining

that transferred intent is an "elementary principle of criminal law," the Court of Appeals explained:

> The assassin who lies in wait, harboring in his bosom a murderous design to slay a human being, cannot extenuate his offense because he did not kill the particular person he designed to. All the circumstances constituting murder in the first degree are present, and if he is guilty at all he is guilty of that crime, and there is no more reason for lessening the degree of the crime in consequence of that circumstance than there would be in acquitting him out and out.

State v. Wesley, 254 Or. App. 697, 703 (2013).

The cases cited in advance of the Defendant's argument are unpersuasive. In State v. Koch, 169 Or App 223, 230 (2000), the defendant pled guilty to two counts of forgery, which the parties agreed would be punishable as level 3B on the sentencing guidelines gridblock, with a presumptive sentence of two years probation. The sentencing court found aggravating factors applied and imposed 48 months of prison. The Court of Appeals found that this sentence was constitutionally disproportionate, noting that even if the defendant had committed a more significant forgery his maximum sentence would have been 18 months incarceration.

The other case cited by the Defendant - State v. Simonson, 243 Or App 535 (2011) - concerns a specific and strange circumstance in sentencing a defendant for Sexual Abuse in the Second Degree. In that case, the court noted that the sentencing guidelines imposed a greater sentence for sexual intercourse with a victim between the ages of 16 and 18 than for sexual intercourse with a victim aged 14 or 15 and found that this was disproportionate in violation of the Oregon Constitution. This case is simply inapplicable to the case at hand as no such inherent disproportionality exists in the statutory scheme for Assault in the Second Degree.

In this case, Defendant was convicted of intentionally causing physical injury to another person by means of a dangerous weapon. Defendant's claim that his crime, which constitutes an Assault in the Second Degree, should be legally downgraded because he intended a different target with his dangerous weapon than the victim he injured runs in stark contrast to the principle described by the court in Wesley. And without his flawed and unfounded transmogrification of Count 5 from Assault in the Second Degree to Assault in the Fourth Degree, there is no comparison to the holding in Koch. The people of the State of Oregon have determined that a conviction for Assault in the Second Degree carries a minimum 70-month sentence and nothing about the Defendant's actions in this case justify a finding that imposing that sentence is so disproportionate as to violate the Oregon Constitution.[1]

II. Defendant Has Not Shown Impermissible Variance

Defendant next makes a perplexing argument in his sentencing memorandum that the State's evidence impermissibly varied from the indictment when the State advanced the theory of transferred intent in Count 5. He cites to State v. Samuel, 289 Or App 618, 627 (2017) for the proposition that the Court should not accept a guilty verdict for Count 5. This is a confounding argument, given that the defendant in Samuel raised the issue of impermissible variance in a motion for judgment of acquittal prior to the jury returning a verdict. In this case, the State made clear its theory of intent prior to the jury being sworn and the Court heard argument from the parties and found that the jury should properly be instructed on the doctrine of transferred intent. In arguing this issue now, the Defendant is not advancing an argument relating to sentencing, but is rather a rehashing of a settled matter of law in this case. His time for

[1] In fact, the victim testified that the injury to his eye caused by Defendant's criminal behavior persists to this day and may well be permanent. Such an injury could satisfy the legal definition for serious physical injury, thus making defendant's criminal conduct more akin to Assault in the First Degree than Assault in the Fourth Degree.

supplementing his motion for acquittal was prior to the jury's verdict and it should therefore be denied.[2]

III. The State is not Estopped from Arguing that Defendant's Crimes Constituted More than One Criminal Episode

Defendant alleges that the State made false representations and previously made inconsistent arguments that should prevent the State from arguing that his crimes occurred over more than one criminal episode. In his first argument, Defendant argues that the doctrine of equitable estoppel should be employed by the court against the State. Equitable estoppel is "employed to prevent one from proving an important fact to be something other than what by act or omission he has led another party justifiably to believe." Stovall v. Sally Salmon Seafood, 306 Or. 25, 33 (1988). The elements are:

> (1) a false representation (albeit an innocent one) was made (2) by someone having knowledge of the facts to (3) one who was ignorant of the truth, (4) that the statement was made with the intention that it be acted upon by the [ignorant party] and (5) that [the ignorant party] acted upon it.

Paulson v. Western Life Insurance Co., 292 Or. 38, 52–53 (1981).

[2] Even if Defendant had made his argument in a proper fashion, his argument should clearly fail. Based on undersigned counsel's nationwide survey of caselaw regarding arguments of variance between an indictment and a trial theory of transferred intent, every state that has ruled on the issue has held that transferred intent need not be pled specifically in the indictment and thus there is no impermissible variance when such a theory is advanced at trial: Brandon v. State, 263 So. 2d 560 (Miss. 1972); State v. Bakdash, 830 N.W.2d 906 (Minn. Ct. App. 2013); Taylor v. State, 260 Ind. 264, 295 N.E.2d 600 (1973); Matter of K.W.G., 953 S.W.2d 483 (Tex. App. 1997) (applying the transferred intent theory in a juvenile proceeding in which the juvenile was alleged to have committed aggravated assault and finding "[t]here has never been a requirement to plead transferred intent in ordinary criminal cases" nor any requirement to do so in juvenile matters); State v. Carpio, 1921-NMSC-063, 27 N.M. 265, 199 P. 1012; State v. Pforr, 461 So. 2d 1006 (Fla. Dist. Ct. App. 1984); State v. Gallagher, 83 N.J.L. 321, 85 A. 207 (Sup. Ct. 1912); Matthews v. State, 237 Ind. 677, 148 N.E.2d 334 (1958); State v. Mebane, 210 N.C. App. 492, 711 S.E.2d 206 (2011); People v. Godina, 223 Ill. App. 3d 205, 584 N.E.2d 523 (1991).

In State v. Bush, 174 Or App 280 (2001), the Court of Appeals recounted that, as is true of Defendant's argument, "Defendant has not cited, nor have we found, a case in which the doctrine of equitable estoppel has been applied against the state so as to bind a criminal court at sentencing." In that case, the defendant argued that because the indictment of various drug delivery/possession and gun/destructive device possession charges were alleged to have been part of the same criminal act or transaction, that the State should be estopped from later arguing that they arose from separate criminal episodes. Ultimately, the court found that the defendant had not proved the elements of equitable estoppel, finding that:

> Defendant does not contend that he was ignorant of the truth as to whether and which of the charged offenses arose from the same criminal episode(s). Nor has defendant made a convincing argument that he was prejudiced by the representation that the offenses arose from the same act or transaction, if it was false.[3]

Id. at 292–93.

As an initial matter, the Defendant has not shown that there was any false representation by the State regarding the number of criminal episodes. Indeed, the State has consistently maintained in its arguments, indictment, and evidence that the criminal acts occurred on two separate dates and were therefore at least two separate criminal episodes. Defendant in his memorandum misconstrues the State's arguments that the Defendant had (and indeed still has) a consistent motivation and intent to participate in violence based on his desire to engage in a civil war with "the Left" as a concession that each day that he goes out into the community to commit crimes in furtherance of that motivation is a part of a single criminal episode. There is nothing "false" or even inconsistent in designating Defendant's crimes on August 15 as separate

[3] In fact, the Court did not even definitively rule that equitable estoppel can apply in criminal court at sentencing, but merely assumed for the sake of argument that it did before finding that the defendant hadn't made a sufficient showing. Id. at 292.

acts and transactions from his crimes on August 22. Furthermore, even if Defendant could show that such crimes were truly only one criminal episode, he has made no showing or even an argument regarding how he was "ignorant to the truth" or that he as the ignorant party acted upon the false representation to his detriment. As such, he has not shown that equitable estoppel should be applied here, if such a doctrine even applies to criminal sentencing.

Defendant also argues that the doctrine of judicial estoppel should prevent the State from arguing multiple criminal episodes. He does so without citing a single case that establishes that judicial estoppel applies in the context of criminal sentencing. Even if he could make that showing, Defendant has not shown that the State has taken inconsistent positions. As noted above, the State has been perfectly consistent in arguing that Defendant's crimes occurred on separate days (indeed separate weeks) and were distinct actions, albeit actions that had a common criminal motive for civil war and violence. As such, this Court should find that he has not made a sufficient showing in this regard.

Respectfully submitted,

Dated this 9th day of December, 2021.

By: _____
Reid C. Schweitzer, OSB 191962
Deputy District Attorney

CERTIFICATE OF SERVICE

I, Reid C. Schweitzer, hereby certify that I have served a true copy of the State's Response to Defendant's Sentencing Memorandum via email on the following:

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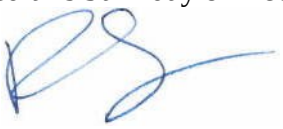
Courtesy Copy to the Court
The Honorable Heidi Moawad

Dated this 9th day of December, 2021.



By: _____
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