

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

THE STATE OF OREGON,

Plaintiff,

v.

JOSEPH GIBSON, RUSSELL SCHULTZ,
MACKENZIE LEWIS, and IAN KRAMER

Defendant.

Case Nos. 19CR53042, 19CR53035,
19CR53040, 19CR50007, and 19CR54815.

STATE'S RESPONSE IN OPPOSITION TO
DEFENDANT GIBSON'S MOTION TO COMPEL
THE STATE TO PRODUCE A SUFFICIENT BILL
OF PARTICULARS

Oral argument requested per UTCR 4.050

Comes now Mike Schmidt, by and through Brad Kalbaugh, Deputy District Attorney,
and respectfully moves the court for an order denying Defendant's above referenced motion. The
state requests one hour for oral argument.

PROCEDURAL POSTURE

The relevant facts are procedural in nature. The charging instrument against defendant
allegeds, among other things, that: "[defendant] did unlawfully and knowingly, while
participating with 5 or more other persons, engage in tumultuous and violent conduct, thereby
intentionally and recklessly creating a grave risk of causing public alarm." On August 27, 2019,
Defendant demurred to the indictment at arraignment, challenging the sufficiency of the charging
instrument under ORS 135.630 in that (1) that the accusatory instrument is not definite and

1 certain, (2) the facts stated do not constitute an offense, and (3) that the statute is
2 unconstitutionally vague as applied.

3 On March 6, 2020, an omnibus hearing was held for oral argument on several motions
4 including Defendant Gibson’s demurrer and Defendant Gibson’s motion for a bill of particulars.
5 Judge Souede made an oral ruling on the motions, disallowing the demurrer and granting the
6 motion for a bill of particulars only in part. See, Exhibit A. The State filed a bill of particulars on
7 June 30, 2020. See, Exhibit B.

8 **LEGAL BRIEF AND ARGUMENT**

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10 Notice pleading in Oregon criminal cases has been amorphous until recently, when the
11 Oregon Court of Appeals provided guidance on the topic in *State v. Payne*¹. Through the
12 analysis in *Payne*, the court clarified when criminal notice pleading is appropriate. *See, e.g.,*
13 *State v. Hale*, 335 Or 612 (2003) (holding that the defendant was not entitled to require the state
14 to make the indictment more definite after their demurrer was disallowed because the defendant
15 had other avenues available to him for acquiring that information, such as later moving the court
16 to require the state to elect a specific incident or requesting special jury instructions); *see also*
17 *State v. Antoine*, 269 Or App 66 (2015) (holding that based on *Hale*, the burden is on a defendant
18 to attempt to procure adequate and timely notice of the charges against him and although an
19 indictment usually suffices if it alleges the charged crime in the words of the statute defining the
20 offense, there are exceptions to that rule, including when: "discovery would not aid the defendant
21 because of the vast number of crimes from which the state could select in charging the
22 defendant."); *see also, State v. Ashkins*, 357 Or 652 (2015) (holding that where an indictment
23 charged a single occurrence of an offense, but “the evidence permitted the jury to find any one or
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26 ¹ *State v. Payne*, 298 Or App 411 (2019).

1 more among multiple, separate occurrences of that offense involving the same victim and the
2 same perpetrator[.]” the state was “required to elect which occurrence it would prove, or
3 alternatively, [the] defendant was entitled to a concurrence instruction.”).

4 The court also clarified the terms that should also be used. *See, e.g., Payne* at 427 (noting
5 that the motions in *Hale* and *Antoine* would more accurately be termed a “Motion for State’s
6 Election for Notice” or, alternatively, a “Motion for State’s Election to Make More Definite and
7 Certain”, and in contrast, a motion based on the reasons set forth in *Ashkins* would more
8 accurately be termed a “Motion for State’s Election for Concurrence” or, alternatively, a
9 “Motion for Concurrence Election and Jury Instruction.”

10 Laws are supposed to provide individuals of ordinary intelligence a reasonable opportunity to
11 know what is prohibited so that they can conduct themselves accordingly. *State v. Robertson*,
12 293 Or 402, 409 (1982)., quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*
13 455 U.S. 489, 498 (1982). Here, the Bill of Particulars produced by the state in response to the
14 court’s order when coupled with the plain language of the indictment certainly provides
15 defendant sufficient notice of alleged violations under existing Oregon law. Any further
16 clarification at this point is superfluous, unnecessary, and not rooted in statute or case law.

17 Additionally, Oregon law expressly prohibits the consideration of extrinsic evidence in the
18 context of a demurrer, and limits an unconstitutionally vague or overbroad challenge to the four
19 corners of the charging instrument. ORS 135.630; *see also, State v. Cervantes*, 232 Or App 567,
20 573 (2009). *State v. Chakerian*, holds that ORS 166.015 is neither vague on its face in violation
21 of Article I, sections 20 and 21 nor overbroad in violation of Article I, section 8. 325 Or at 384.
22 *Chakerian* is still good law and the same statute that was at issue in *Chakerian* is at issue in the
23 case.
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1 **I. Defense’s motion to compel the state to produce a sufficient bill of particulars is**
2 **another demurrer which this court has already overruled and disallowed.**

3 On August 27, 2019, Defendant demurred to the indictment at arraignment, challenging the
4 sufficiency of the charging instrument under ORS 135.630 in that (1) that the accusatory
5 instrument is not definite and certain, (2) the facts stated do not constitute an offense, and (3) that
6 the statute is unconstitutionally vague as applied. Judge Souede signed an order disallowing
7 defendant’s demurrer on August 25, 2020. See, Exhibit A.

8 The relief of a more definite and certain bill of particulars is inappropriate. *See, e.g., State v.*
9 *Hale*, 335 Or 612 (2003)(holding that the defendant was not entitled to require the state to make
10 the indictment more definite after their demurrer was disallowed because the defendant had other
11 avenues available to him for acquiring that information, such as later moving the court to require
12 the state to elect a specific incident or requesting special jury instructions). Here, Mr. Gibson
13 may move the court to require the state to elect a theory of guilt at trial or, alternatively, request a
14 special jury instruction.

15 Additionally, different forms of relief are available to remedy an unconstitutionally vague
16 challenge. Oregon’s criminal code affords defendants a remedy to challenge the constitutionality
17 of a law as applied to a defendant without violating Oregon’s prohibition on extrinsic evidence in
18 demurrers. ORS 136.500 specifically authorizes a motion in arrest of judgment to be made after
19 a plea or verdict of guilty on either or both of the grounds stated in ORS 135.630 (1) and (4).
20 Thus, defendant’s procedural remedy to challenge ORS 166.015 as applied is via a motion in
21 arrest of judgment.

22 Here, a decision has been made to disallow the demurrer, and any expansion allowing a bill
23 of particulars to further clarify evidence at this point functions as a second demurrer.
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1 Furthermore, Oregon case law does not contemplate defense’s request for a bill of particulars
2 under these circumstances. While an overruled and disallowed demurrer leaves defendants with
3 options, explained below, an expanded bill of particulars is not one of those options.

4 **II. Notice pleading in an Oregon criminal case does not include the relief sought by**
5 **defendant.**

6 A “motion for election” made early on in litigation, often pretrial, is conceptually similar to a
7 civil motion to make more definite and certain under ORCP 21 D². *State v. Payne*, 298 Or App
8 411, 416 (2019). The closest conceptual [criminal] equivalent would be a motion for a bill of
9 particulars. *See, e.g., State v. Darlene House & James House*, 260 Ore. 138, 142-43, 489 P2d
10 381 (1971) (explaining that the purpose of such a motion is “to provide the defendant with
11 further information respecting [a] charge [against him] so as to enable him to prepare his defense
12 and avoid prejudicial surprise at trial”). *Id.* at 417. In Oregon, we do not have a statute expressly
13 authorizing such a motion. *Id.* However, our case law has described situations in which an
14 indictment is sufficient to withstand a demurrer but still may fail to give a defendant adequate
15 notice of the precise charges against him. *Id.* In those instances, a “motion for election” is
16 appropriate under Oregon common law. *Id.* A motion for election gives a defendant more
17 information as to the basis for the charges against him. *Id.* [I]n terms of clarity of language, and
18 for the sake of a trial court accurately understanding the issue and argument presented, a motion
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23 ² ORCP 21 D:

24 “Upon motion made by a party before responding to a pleading, or if no responsive pleading is permitted by these
25 rules upon motion by a party within 10 days after service of the pleading, or upon the court’s own initiative at any
26 time, the court may require the pleading to be made definite and certain by amendment when the allegations of a
pleading are so indefinite or uncertain that the precise nature of the charge, defense, or reply is not apparent. If the
motion is granted and the order of the court is not obeyed within 10 days after service of the order or within such
other time as the court may fix, the court may strike the pleading to which the motion was directed or make such
order as it deems just.”

1 for election based on the reasons set forth in *Hale*³ or *Antoine*⁴ would more accurately be termed
2 a “Motion for State’s Election for Notice” or, alternatively, a “Motion for State’s Election to
3 Make More Definite and Certain.” *Id.* at 427.

4 **A. Under *State v. Hale*, Defendant may move the court to require the state to elect a**
5 **specific incident, or requesting a special jury instruction.**

6 In *Hale*, defendant was charged with 13 counts of aggravated murder and other noncapital
7 crimes. *State v. Antoine*, 303 Or App 485 (2020). The defendant demurred to the form of the
8 indictment. *Id.* at 494, quoting *State v. Hale*, 335 Or 612, 617-18 (2003). The defendant argued
9 that he was “entitled to notice of the particulars of the offenses he [was] alleged to have
10 committed” [.] *Id.* at 618. Defendant had been charged with aggravated murder under a theory
11 that he had committed the murders to conceal other alleged acts of sexual abuse in the third
12 degree. *Id.* Defendant argued that the names of the victims and the alleged sex abuse offenses
13 were not listed in the indictment, making the indictment not definite and certain. *Id.* The trial
14 court denied the demurrer because other avenues were available to defendant. *Id.* at 619.

16 The Oregon Supreme Court has found that indictments sufficient to withstand a demurrer
17 because they follow the statutory language may still be insufficient for the purpose of notifying
18 the defendant. *Payne* at 417. In *Hale*, the Supreme Court held that the issue of the sufficiency of
19 the indictment was timely raised by the demurrer, but that the defendant was not entitled to
20 require the state to make the indictment more definite and certain, and that the trial court's failure
21 to grant the demurrer was not error. *Id.* at 620-21. Overall, the court in *Hale* noted that the
22 “[d]efendant had other avenues available to him for acquiring that information, such as later
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26 ³ *State v. Hale*, 335 Or 612 (2003).

⁴ *State v. Antoine*, 269 Or App 66 (2015).

1 moving the court to require the state to elect a specific incident * * * or requesting special jury
2 instructions to clarify the matter. *Id.* at 612.

3 Here, Mr. Gibson has the same options outlined in *Hale*, should he proceed to trial. However,
4 the relief sought in Mr. Gibson's current motion is inappropriate under the *Hale* analysis.

5 **B. Under *State v. Antoine*, after a disallowed demurrer, further notice to defendant is**
6 **limited to when discovery would not aid the defendant because of the vast number**
7 **of crimes from which the state could select in charging the defendant.**

8 In *Antoine I*, the Court of Appeals addressed the issue of notice where the indictment charged
9 multiple counts of the same crime using the wording of the applicable statute, and each charge
10 was worded identically. *State v. Antoine*, 269 Or App 66 (2015). There, the defendant was
11 indicted on four counts of first-degree sodomy, and four counts of first-degree sexual abuse,
12 among other crimes. *Id.* at 68-69.

13 The state provided the defendant with a large amount of discovery, and the provided
14 discovery "indicated that the victim had reported a greater number of criminal sexual acts than
15 were alleged in the indictment." *Id.* at 70. The defendant's demurrer "asserted that the indictment
16 provided insufficient notice of the charges, placed him at risk of double jeopardy, and failed to
17 ensure that he was being tried only for those criminal acts for which the grand jury had indicted
18 him." *Id.*

19 The Court affirmed the trial court's overruling of the defendant's demurrer based on [their]
20 understanding of *Hale*. *Payne* at 421. The Court reasoned that *Hale* placed "the burden on a
21 defendant to attempt to procure adequate and timely notice of the charges against him, even
22 when an indictment that is alleged in the words of the statute does not provide such notice." *Id.*

1 Regarding the notice issue the defendant raised at trial and on appeal, [the court] confirmed
2 that although an indictment usually suffices if it alleges the charged crime in the words of the
3 statute defining the offense, there are exceptions to that rule. *Id.* Such an exception occurs when
4 "discovery would not aid the defendant because of the vast number of crimes from which the
5 state could select in charging the defendant." *Id.*

6 Here, Mr. Gibson faces a single charge of Riot. The facts in Mr. Gibson's case do not support
7 the outcome contemplated in *Antoine*. The single charge listed on Mr. Gibson's indictment and
8 discovery from a single incident on a single day in which Mr. Gibson records himself
9 proclaiming that he is in the middle of a riot are easily distinguishable from the issues that were
10 presented in *Antoine*. Therefore, the exception to the rule in *Antoine* is inapplicable to Mr.
11 Gibson.
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13 ***C. Under State v. Ashkins, at trial, a defendant may require the state to elect an***
14 ***occurrence it would prove, or alternatively, defendant may be entitled to a***
15 ***concurrence instruction.***

16 In *Ashkins*, the Supreme Court held that where an indictment charged a single occurrence of
17 an offense, but "the evidence permitted the jury to find any one or more among multiple,
18 separate occurrences of that offense involving the same victim and the same perpetrator[.]" the
19 state was "required to elect which occurrence it would prove, or alternatively, [the] defendant
20 was entitled to a concurrence instruction." *Payne* at 421-22, (quoting *Ashkins*, 357 Or at 659). In
21 other words, an election at the end of trial is an alternative to a *Boots* instruction. *Id.* In general, a
22 trial court has three primary tools at its disposal to ensure a jury bases its verdict on a discrete
23 factual situation: a jury instruction, a statement of issues, or a verdict form. *Id.*
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1 To ensure the jury limits its consideration in the manner contemplated by the motion for
2 election, the trial court needs to charge the jury in some manner. *See, e.g., State v. Coss*, 53 Ore.
3 462, 467, 101 P 193 (1909) ("If [the prosecution] selects some particular act * * *, the jury ought
4 not to be permitted to find the defendant guilty, because it may believe * * * that he did, in fact,
5 commit some other criminal act of a similar nature to that charged."); *State v. Pauley*, 211 Ore.
6 App. 674, 679 n 4, 156 P3d 128 (2007) ("To be effective, an election must be confirmed to the
7 jury by the court."). *Id.* At 422.

8 CONCLUSION

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10 Here, the State's indictment is definite and certain under existing Oregon law because it
11 echoes the language of the statute. *See, e.g., State v. Nussbaum*, 261 Or 87, 91 (1971).
12 Additionally, and as previously stated, a vagueness challenge falls squarely under ORS
13 135.630(4) and this sort of challenge can be made in a motion of arrest of judgment. Again,
14 *State v. Chakerian* holds that ORS 166.015 is neither vague on its face in violation of Article I,
15 sections 20 and 21 nor overbroad in violation of Article I, section 8.

16 Applying *Hale*, Mr. Gibson has more appropriate "avenues available to him for acquiring
17 that [clarified] information, such as later moving the court to require the state to elect a specific
18 incident * * * or requesting special jury instructions to clarify the matter. *Hale*. at 612. Thus, the
19 issue of making the indictment more definite and certain through this bill of particulars has
20 already been disposed of by the overruling and disallowance of the demurrer.

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22 Applying *Antoine* to Mr. Gibson's case, the court notes that an indictment may be challenged
23 if it alleges the charged crime in the words of the statute defining the offense. *Payne* at 421.
24 However, the court notes that: such an exception occurs when "discovery would not aid the
25 defendant because of the vast number of crimes from which the state could select in charging the
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1 defendant.” *Id.* Here, Mr. Gibson is charged with a single crime and not a vast potential of
2 unlimited crimes. Thus, applying *Antoine* to Mr. Gibson’s case, the exception noted in that case
3 in inapplicable because Mr. Gibson faces a single count, and he has been apprised of all
4 discovery intended to be used at trial by the state. See Exhibit B.

5 Applying *Ashkins*, “The end-of-trial motion to elect is designed to ensure that the jury agrees
6 as to every necessary element or concurs on the same occurrence in reaching a verdict on a
7 single count of a charged crime.” *Id.* Indeed, Mr. Gibson’s case has not reached this stage of
8 litigation. Thus, *Ashkins* should not be applied at this stage of the litigation.

9 Overall, defense is misguided in their application of a bill of particulars under Oregon law.
10 Neither *Hale*, *Antoine*, nor *Ashkins* allows for the type of relief sought by Mr. Gibson. Mr.
11 Gibson has the options of: later moving the court to require the state to elect a specific incident
12 or requesting special jury instructions to clarify the matter if this goes to trial, a motion in arrest
13 of judgement to be made after a plea or verdict of guilty on either or both of the grounds stated in
14 ORS 135.630 (1) and (4), or Mr. Gibson can go to trial and request a jury instruction, a statement
15 of issues, or a verdict form to try and ascertain the clarity that he is seeking from the state.

16 For the above stated reasons, it is the state’s position that an order requiring the state to
17 produce a “sufficient” or “actual” bill of particulars should be denied. The pre-trial demurrer has
18 already been disallowed. Defense’s motion for a bill of particulars is simply an improper way to
19 circumvent a proper motion for election at trial.

20 Respectfully submitted this _____ day of September, 2020.

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23 MIKE SCHMIDT
24 District Attorney
Multnomah County, Oregon

25 By /s/ Brad Kalbaugh
26 Deputy District Attorney, OSB#074335

Certificate of Service

I certify that on June 30, 2020, I caused the foregoing motion to join cases to be served upon the parties hereto by the method indicated below, and addressed as follows:

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