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

STATE OF OREGON,
Plaintiff,

-VS-

BENJAMIN PAUL JONES,
Defendant

CASE No. 07-CR-0043

MOTION TO ADMIT TESTIMONY OR
STATEMENT OF ETHAN FLETCHER ON
BEHALF OF DEFENDANT AT TRIAL
(Oral Argument Requested)

COMES NOW the Defendant, Benjamin Jones, by and through his undersigned attorney, and moves this Court for entry of its Order (1) prohibiting or requiring such action by the State as may be necessary to compel the testimony of material and essential defense witness, Ethan Fletcher; or, as a less-favored alternative, (2) admitting the recorded statement by Mr. Fletcher to the State's agent, Detective Souza, on February 9, 2007, into evidence at trial if offered by the defense.

1 The defense alleges that admission of Mr. Fletcher’s testimony or aforesaid
2 statement at trial should be granted upon the following grounds:

- 3 1) Mr. Jones’ right to compulsory process under Article I, Section 11 of the
4 Oregon Constitution, and/or the Sixth and Fourteenth Amendments to the
5 United States Constitution;
- 6 2) Mr. Jones’ right to confrontation of witnesses necessary to present his
7 defense under Article 1, Section 11 of the Oregon Constitution;
- 8 3) Mr. Jones’ right to Due Process under the Fourteenth Amendment of the
9 United States Constitution, including but not limited to the right to fully and
10 fairly present his defense, and the right to a fair trial which is violated when
11 the State withholds or wrongfully prevents the defense from offering
12 material, exculpatory evidence;
- 13 4) Mr. Jones’ right to admission of hearsay evidence under Oregon Evidence
14 Code, Rules 804(3)(g) or (h), ORS 40.465; and
- 15 5) Such other grounds and authorities as may be offered by way of
16 supplemental memoranda and at hearing on this Motion.

17 This motion is made in good faith and not for the purpose of delay. It is
18 supported by the points and authorities that follow, and attached exhibits.

19 The defense requests oral argument on this motion and the opportunity to
20 submit whatever evidence may be needed in light of the State’s response hereto, and
21 that the hearing be set at an omnibus hearing on all pretrial motions requested to be
22 set on October 29th.

1 DATED this _____ day of September, 2008.

2
3 _____
4 Terri Wood, OSB 88332
Attorney for Defendant

5 POINTS AND AUTHORITIES

6 1. Statement of Facts

7 Based on the State's theory of the case as set forth in the trial record of Mr.
8 Jones' co-defendant, Curt Gobar, Ethan Fletcher is an unindicted co-defendant and co-
9 conspirator in the crimes alleged against Gobar and Jones. See *State v. Gobar*,
10 Josephine County Circuit Court Case No. 07-CR-0074. The alleged victim, Chris
11 Murray, named Fletcher as an active participant in his alleged assault and kidnapping.
12 The State did not indict Fletcher when it indicted Gobar and Jones, reportedly because
13 Murray had not identified him in a photo line-up. Instead, at the same time as those
14 grand jury proceedings, the State and counsel for Mr. Fletcher were engaged in
15 negotiating a formal immunity agreement for Fletcher to speak with law enforcement
16 about the incident. About one week after Gobar and Jones were indicted, Fletcher was
17 questioned by lead Detective Souza, and made statements material and exculpatory to
18 the defense of both Jones and Gobar. At the conclusion of that interview, he told
19 Souza that Murray had made threatening phone calls to his home, and had pulled into
20 his driveway and peeled out, indicating at least that he and Murray knew each other.

21 Fletcher's statement was electronically recorded, and the State discovered the
22 immunity letter, Det. Souza's report of the interview, and the audio recording to the
23 defense. A copy of the immunity letter is attached hereto as Exhibit 101. A copy of
24 Det. Souza's report that summarized the interview is attached as Exhibit 102.
25

1 Gobar's attorneys subpoenaed Fletcher to testify for the defense at trial in April
2 2008. That trial occurred more than one year after the State had indicted Gobar and
3 Jones. The State had never filed charges against Fletcher. Upon learning the defense
4 intended to call Fletcher as a witness, the State advised the Court: "The State gave
5 him transactional immunity through Kris Woodburn, his attorney, to speak to law
6 enforcement, which he did. State didn't use his statements against him. State made
7 no deal with him. He has no immunity. He takes the stand, the State is going to charge
8 him." Gobar trial transcript, Vol. 1, p. 23, attached as Exhibit 103. Gobar's attorneys
9 contended that the State's grant of transactional immunity to Fletcher barred any
10 prosecution for the alleged crimes against Murray, citing *State v. Soriano*, 298 Or 392
11 (1984). *Id.*, at p. 24 (Exhibit 103). After an evidentiary hearing, the Court ruled that it
12 could rely on parole evidence to find that the State had not granted Fletcher
13 transactional immunity, and that any testimony he gave at trial would not be deemed
14 immunized pursuant to that earlier agreement. *Id.*, Vol. 2, pp. 167-170, attached as
15 Exhibit 104.

16 When called as a witness for defendant Gobar at trial, after being unequivocally
17 told the State would prosecute him if he testified, Fletcher invoked his right to remain
18 silent, and the Court found him to be unavailable as a witness. The parties then made
19 additional arguments regarding the admissibility of Fletcher's statement to Det. Souza
20 under various hearsay rules; the Court found no hearsay exception applied. *Id.*, Vol. 4,
21 pp. 604-614, attached as Exhibit 105. Based on Murray's testimony at Gobar's trial,
22 the State argued to the jury that Fletcher entered Murray's home and hit him in the
23 head with an ax handle and actively participated in his kidnapping. *Id.*, pp. 729-731,
24 Exhibit 106.

1 Upon information and belief, the State has not sought to indict Fletcher for the
2 alleged crimes against Murray at any time since he declined to testify for the defense
3 at Gobar’s trial, and will seek to prosecute only if Fletcher testifies on behalf of the
4 defense.

5 2. Compulsory Process

6 Article I, Section 11 of the Oregon Constitution provides, in pertinent part: “In
7 all criminal prosecutions, the accused shall have the right . . . to have compulsory
8 process for obtaining witnesses in his favor.”

9 The Sixth Amendment to the United States Constitution provides, in pertinent
10 part: “In all criminal prosecutions, the accused shall enjoy the right . . . to have
11 compulsory process for obtaining witnesses in his favor.” The Sixth Amendment is
12 applicable to the States under the Due Process clause of the Fourteenth Amendment.
13 *Washington v. Texas*, 388 U.S. 14 (1967)(holding that federal compulsory process
14 clause is incorporated in Due Process clause of Fourteenth Amendment).

15 The right to compulsory process, under the Article 1, section 11, of
16 the Oregon Constitution, parallels federal Sixth Amendment
17 jurisprudence. Under the Sixth Amendment, a defendant's right to
18 present witnesses is considered a fundamental element of the due
19 process of law, and includes the right to have a jury hear the
20 testimony of those witnesses. However, compulsory process does not
21 automatically trump other legitimate concerns and may, for example,
22 be subjected to a state's established rules of evidence and procedure.
23 Although a state may not arbitrarily deny a defendant's right to
24 present relevant and material evidence, it may subordinate that right
25 to other legitimate interests in the criminal trial process. A
defendant's right to present evidence may be denied if the state's
interest in excluding the evidence outweighs the value of the
challenged evidence to the defense. . . . Thus, the constitutional issue
reduces to a weighing of the state's interest in excluding defendant's
evidence against the value of that evidence to the defense.
State v. Beeler, 166 Or App 275, 283-284 (2000)(citations omitted).

1 Ordinarily, a defendant's compulsory process rights are not violated when a
2 witness invokes the right not to testify. However, if the State acts to influence a
3 witness to not testify, it may violate the defendant's rights to compulsory process.
4 See, e.g., *State v. Jones*, 89 Or App 133, 138-139 (1987). In the case at bar,
5 Fletcher was willing to testify until the Court ruled that he did not have immunity and
6 the State threatened to indict him if he did testify. The fact that nearly two years
7 have gone by without the State even attempting to charge Fletcher with the alleged
8 crimes should weigh heavily against any assertion by the State that its interest in
9 prosecuting Fletcher is superior to Jones' fundamental trial rights.

10 3. Confrontation of Defense Witnesses

11 Article 1, Section 11 of the Oregon Constitution provides, in pertinent part: "In
12 all criminal prosecutions, the accused shall have the right . . . to meet the witnesses
13 face to face." The Supreme Court, *en banc*, has held that Oregon's confrontation right
14 is broader than the Sixth Amendment's right "to be confronted with the witnesses
15 against" the accused, and extends to witnesses for the defense. *State ex rel. Gladden*
16 *v. Lonergan*, 201 Or 163, 176-177 (1954):

17 We have the firm opinion that importance must be attached, and effect
18 given, to the clear wording of our own constitutional provision. The
19 effect we have given it, to-wit: a guaranty that an accused shall have
20 the right to meet his own witnesses face to face, and to examine them
21 orally in the presence of court and jury, as well as the right to meet
22 face to face and cross-examine the witnesses against him, is in keeping
23 with well-recognized rules of constitutional construction. 11 Am.Jur.
24 658 to 709, incl., Constitutional Law, ch. 5. The provision vests
25 fundamental rights in the accused; it gives no rights to the state. The
rights so guaranteed to the accused may be waived by him, but they
cannot be denied him. As to the right to have witnesses in his favor
attend before court and jury to testify orally on his behalf, accused's
further right to compulsory process affords the means for its
enforcement. *Id.*

1 Ordinarily, a defendant's confrontation rights are not violated when a witness
2 invokes the right not to testify. However, if the State acts to influence a witness to
3 not testify, it may violate the defendant's right to confrontation under the Oregon
4 Constitution. See, e.g., *State v. Jones*, 89 Or App 133, 137-138 (1987).

5 4. Federal Due Process

6 The State has a continuing obligation to discover and disclose material
7 exculpatory evidence, including impeachment evidence, under *Brady v. Maryland*, 373
8 U.S. 83 (1963). This rule of constitutional law protects a defendant's Due Process
9 right to a fair trial guaranteed by the Fourteenth Amendment to the United States
10 Constitution. In the case at bar, the State complied with the disclosure requirements
11 of *Brady* by discovering Fletcher's statement that exculpated the defendants, as well
12 as contradicted and thereby impeached Murray's version of the events. But what
13 purpose is served by disclosure of *Brady* material, if the State then affirmatively acts
14 to prevent the evidence from being heard by the jury? See also, *United States v.*
15 *Ebbers*, 458 F.3d 110, 119 (2nd Cir. 2006)(Due Process is violated when the
16 prosecution "has deliberately denied 'immunity for the purpose of withholding
17 exculpatory evidence and gaining a tactical advantage through such manipulation.'").

18 In *Jones, supra*, the Court found no violation of the defendant's Due Process
19 rights because (1) "[i]n viewing all of the testimony which defendant sought to
20 introduce through [the witness], we find nothing definitely favorable to defendant,"
21 and (2) the State agreed not to object on hearsay grounds to the defense introducing
22 prior statements by the witness. 89 Or App at 135, 139.

23 The State's refusal to grant immunity to a defense witness violates Due Process
24 when the witness' testimony would be relevant to the defense, and the prosecution
25

1 intentionally caused the witness to invoke the right against self-incrimination. See
2 *United States v. Straub*, 538 F.3d 1147, 1157-58 (9th Cir. 2008):

3 Our cases have insisted that the government's actions need to
4 amount to something akin to prosecutorial misconduct. In *Williams*, we
5 stated that resolution of this claim “turns on whether the prosecution
6 took affirmative steps to prevent Williams's witnesses from
7 testifying.” 384 F.3d at 601 (emphasis added). We elaborated:
8 “Undue prosecutorial interference in a defense witness's decision to
9 testify arises when the prosecution intimidates or harasses the
10 witness to discourage the witness from testifying, for example, by
11 threatening the witness with prosecution for perjury or other offenses.
12 . . . The prosecution's conduct must amount to a substantial
13 interference with the defense witness's free and unhampered
14 determination to testify before the conduct violates the defendant's
15 right to due process. *Id.* at 601-02; see also *United States v. Lord*,
16 711 F.2d 887, 891 (9th Cir.1983) (holding that the record supported
17 finding that “prosecutorial misconduct” caused the defense witness to
18 invoke his Fifth Amendment privilege because the prosecutor told the
19 witness that “whether he would be prosecuted depended on his
20 testimony”); *United States v. Paris*, 827 F.2d 395, 401 (9th
21 Cir.1987); *United States v. Touw*, 769 F.2d 571, 573 (9th
22 Cir.1985).”

23 In the case at bar, the State gave Fletcher “transactional immunity” in exchange
24 for his agreement to be questioned by law enforcement, with full knowledge that
25 Fletcher was an active participant in the crimes, according to Murray. After obtaining
his statement, the State honored its agreement to not charge Fletcher, and later
disclosed his statement to Gobar and Jones. Then, upon learning that Gobar intended
to call Fletcher as a witness at trial more than a year after the alleged crimes occurred,
the State claimed Fletcher’s immunity extended only to his interview by law
enforcement, and further maintained it would prosecute him if he testified, causing
Fletcher to invoke his rights against self-incrimination. That was almost six months
ago, and the State continues to forego prosecution of Fletcher. This intentional
conduct by the State at Gobar’s trial, expected to be replayed at Jones’ trial, will

1 deprive Mr. Jones of material, exculpatory testimony, in violation of his fundamental
2 right to a fair trial, and thus empower this Court to compel the State to either honor
3 its earlier grant of transactional immunity to Fletcher, or to grant him immunity now.
4

5 5. OEC 804(3)(g)—Hearsay Exception for “Wrongful Conduct”

6 Hearsay by an unavailable declarant is not excludable if the “statement [is]
7 offered against a party who engaged in, directed or otherwise participated in wrongful
8 conduct that was intended to cause the declarant to be unavailable as a witness, and
9 did cause the declarant to be unavailable.” OEC 804(3)(g), ORS 40.465.

10 The “rule is primarily intended to apply in criminal cases.” Kirkpatrick, OREGON
11 EVIDENCE, §804.08, p. 857 (Fifth ed. 2007). The “conduct making the declarant
12 [unavailable] must be ‘wrongful’ but need not be criminal.” Id., at p. 858. The
13 language of the rule is similar to Federal Rule of Evidence 804(b)(6). Id., at pp. 857-
14 858. The language of the Oregon rule, like its federal counterpart, suggests that it
15 could be invoked by the defendant against the prosecution in a criminal case. See,
16 Mueller & Kirkpatrick, FEDERAL EVIDENCE 3d, §8:134 (2007)(noting that while the
17 rule suggests it could be raised by the defense, the rule is overwhelmingly seen to
18 operate against defendants).

19 Mr. Jones submits that if the conduct of the State causing Fletcher to invoke
20 his rights against self-incrimination and thereby be rendered unavailable as a witness
21 for the defense does not amount to a constitutional violation compelling a grant of
22 immunity, it is at least “wrongful conduct” that should entitled Jones to offer
23 Fletcher’s statement to Det. Souza as an exception to the rule excluding hearsay.
24
25

1 6. OEC 804(3)(h)—Residual Hearsay Exception

2 This rule exempts from a hearsay objection the statement of an unavailable
3 declarant meeting the following criteria:

- 4 (1) The statement is not covered by any other hearsay exception, but has
5 equivalent circumstantial guarantees of trustworthiness;
6 (2) The statement is offered as evidence of a material fact;
7 (3) The statement must be more probative on the point for which it is offered
8 than any other evidence that the proponent can procure through
9 reasonable efforts;
10 (4) The general purposes of the Evidence Code and the interest of justice will
11 best be served by the admission of the statement into evidence; and
12 (5) Adequate notice to the adverse party of intent to offer the statement and
13 the particulars of the statement.

14 The defense submits that Fletcher’s recorded statement to Souza is an eye-
15 witness account of the events giving rise to the charges against Jones and therefore
16 evidence of material facts.

17 The statement was made close in time to the events, with the assistance of
18 counsel, to a law enforcement officer, with knowledge that the statement was being
19 recorded and would be considered by the District Attorney, all circumstances that
20 would tend to cause a declarant to speak truthfully. *Cf.*, OEC 803(26)(a)(listing
21 factors related to trustworthiness of statement about domestic violence, including the
22 personal knowledge of the declarant, timing of the statement, and whether statement
23 was made to police officer or recorded). That the statement was the product of
24 questioning by the lead detective in this case, who had full knowledge of the alleged
25 victim’s version of events, the physical evidence, as well as Jones’ earlier statement to

1 police, and therefore the ability as well as the motive to ask questions designed to
2 elicit the truth from Fletcher, is a further guarantee of trustworthiness. *Cf.*, OEC
3 804(3)(a)(Former testimony exception). His statement is consistent with the trial
4 testimony of Curt Gobar, given under oath, and consistent with the physical evidence.
5 That Fletcher was an eyewitness to the material facts, and that he did not seek to
6 curry favor with the prosecution based on the content of his statement are further
7 guarantees of trustworthiness. That his attorney negotiated immunity prior to Fletcher
8 giving the statement evidences that the statement would be against his penal
9 interest, a further guarantee of trustworthiness. *Cf.*, OEC 804(3)(c)(Statement
10 against interest exception). The issue is not whether the Court or the prosecution
11 think Fletcher's statement is the truth; the only issue is whether there are
12 circumstantial guarantees of trustworthiness.

13 The statement is more probative on the point for which it is offered—the
14 eyewitness account of Fletcher, an active participant in the events—than any other
15 evidence Mr. Jones can procure, if Fletcher remains unavailable as a witness.

16 The interest of justice will be served by admission of the statement because it
17 will allow the jury to hear material, exculpatory evidence and afford Mr. Jones his
18 fundamental right to a fair trial, while allowing the State to preserve whatever ability it
19 has to prosecute Fletcher independent of this previously immunized statement.
20 Indeed, given that the State is deemed to have an interest in providing Mr. Jones a fair
21 trial, it would seem to strike the perfect balance, where both the State's and defense
22 interests are fully protected.

23 RESPECTFULLY SUBMITTED this _____ day of September, 2008.

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25 _____
Terri Wood, OSB 88332
Attorney for Defendant

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CERTIFICATE OF SERVICE

I hereby certify that I have made service of the foregoing MOTION TO ADMIT FLETCHER TESTIMONY and attached EXHIBITS 101 through 106, by mailing a full and exact copy thereof on _____, postage paid and deposited in the U.S. Mail at Eugene, OR, to the Josephine County District Attorney Office, 500 NW 6th Street, Grants Pass, OR 97526, attorney for plaintiff.

TERRI WOOD, OSB #88332