Terri Wood, OSB #88332
Law Office of Terri Wood, P.C.
730 Van Buren Street
Eugene, Oregon 97402
541-484-4171
Fax: 541-485-5923
Email: twood@callatg.com

Attorney for Benjamin Jones

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 REQUIRE STATE TO ELECT BASIS OF CRIMINAL LIABILITY FOR EACH COUNT OF INDICTMENT (ORAL ARGUMENT REQUESTED)

COMES NOW the Defendant, Ben Jones, by and through his undersigned attorney, and moves this Court for entry of its Order (1) requiring the State to timely elect the basis of his alleged criminal liability, i.e., as a principal, or as an accomplice, as to each Count charged against Mr. Jones in the Indictment, and (2) granting the defense adequate time to mount his defense after the election is made, including time

to make any other appropriate motions and to offer any additional relevant evidence related to the State's election, and to prepare and submit any additional proposed jury instructions, special jury instructions, or verdict forms.

The defense so moves upon the grounds that failure to require a timely election by the State may result in errors in evidentiary rulings during the course of trial that prejudice the defense, in confusion of the issues being tried, and in misleading the jury regarding the essential elements of the crimes charged against Mr. Jones, so as to violate his fundamental rights to a fair trial, including notice of the nature and cause of the charges against him, and proof beyond a reasonable doubt as to all essential elements of the charges against him, as found by a unanimous jury, guaranteed by Article I, Section 11 of the Oregon Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

In further support of this Motion, the defense submits that, because the State has already tried essentially the same case against co-defendant Curt Gobar, in Josephine County Circuit Court Case No. 07-CR-0074, and the State has obtained a detailed statement from Mr. Jones regarding what occurred, that the State has more than adequate information to make its election prior to the parties' opening statements.

The defense requests oral argument on this Motion, and that hearing on the Motion be held during an Omnibus hearing that is requested to be set on October 29, 2008.

This Motion is made in good faith and not for the purpose of delay. It is supported by the points and authorities that follow. The defense reserves the right to offer further grounds and authorities by way of supplemental memoranda and at hearing on this Motion.

DATED this _____ day of September, 2008.

Terri Wood, OSB 88332
Attorney for Defendant

POINTS AND AUTHORITIES

1. Under Oregon law, "a person is guilty of a crime if it is committed by the person's own conduct or by the conduct of another for which the person is criminally liable, or both." ORS 161.150. A companion statute, ORS 161.155, defines when a person is criminally liable for the conduct of another:

> A person is criminally liable for the conduct of another person constituting a crime if:
>
> (1) The person is made criminally liable by the statute defining the crime; or
>
> (2) With the intent to promote or facilitate the commission of the crime the person:
>
> (a) Solicits or commands such other person to commit the crime; or
>
> (b) Aids or abets or agrees or attempts to aid or abet such other person in planning or committing the crime; or
>
> (c) Having a legal duty to prevent the commission of the crime, fails to make an effort the person is legally required to make.

2. Whether a defendant is liable as a principal or accomplice involves proof of different facts; e.g., did the defendant personally assault the victim, or did he solicit

others to commit the assault and then absent himself from the scene of the crime, or did he aid and abet by holding the victim down while others hit him? "[J]uries must agree on the factual occurrences that constitute the statutorily defined elements of the crime at issue[.]" *State v. Houston*, 147 Or.App. 285, 292 (1997). However, "the trial court generally has the discretion to address the problem either by requiring the state to elect at the close of its case-in-chief or by giving appropriate jury instructions." *Id.* In addition, the timing of any election is within the discretion of the trial court:

> " ' * * * No statute of this state prescribes the time when an election must be made. We are aware of no reason which demands a holding that the election in all cases must be made at this or that stage of the case. It appears to us that the administration of justice will be better served if the rule governing election is flexible so that the state will not be forced to make a choice when it cannot intelligently do so, but which will afford the defendant sufficient time, after the choice has been made, to defend himself properly.' "

State v. Kibler, 1 Or.App. 208, 212 (1969)(citation omitted); see also, *State v. Yielding,* 238 Or. 419, 423 (1964) ("[T]he trial court need not require the state to elect until there has been enough testimony received to enable the prosecution to make an intelligent choice.").

3. The Supreme Court in *Yielding* stated that, "[i]n the exercise of its discretion, the trial court should require the state to settle upon a specific criminal act as soon as it can reasonably do so." *Id.* at 424. Mr. Jones contends that, given the prosecutor's experience in having already tried the same charges against his co-defendant, Mr. Gobar, as well as having the benefit of a detailed statement of the events from Mr. Jones to law enforcement, the State has more than enough "testimony" to make an intelligent choice.

When presented with a motion to compel an election, a trial court must balance the state's and a defendant's interests: "[T]he rule governing election is flexible so that the state will not be forced to make a choice when it cannot intelligently do so, but which will afford the defendant sufficient time, after the choice has been made, to defend himself properly." *State v. Lee*, 202 Or. 592, 607 (1954). The Supreme Court also has indicated that a trial court "should compel an election when it appears that if the application is denied, the defendant will be prejudiced or he will be prevented from properly making his defense[.]" *State v. Keelen*, 103 Or. 172, 180 (1922).

4. Accomplice liability involves different essential elements than principal liability, and therefore raises distinct legal issues affecting everything from the admissibility of evidence to jury instructions. In *State v. Burney*, 191 Or App 227 (2003), the court held that, despite different proof requirements, the state was not required to plead a theory of accomplice liability in the indictment. The court noted that an "accident of history" allowed a person charged as a principal to be convicted under an accomplice theory. *Burney* at 239. However, *Burney* made it clear that, even though the different elements of accomplice liability did not have to be pled, nevertheless accomplice liability involved different elements or proof requirements.

The *Burney* court wrote:

> **That is not to say that the substantive requirements of proof were collapsed as well.** Even after the adoption of the reforms, liability based on a theory of aiding and abetting required different proof from liability based on the theory that a defendant was the principal actor, that is, one who would have been regarded as the principal in the first degree at common law. 191 Or.App. at 234 [Emphasis added.]

The *Burney* court added: "Even after the adoption of the reforms, liability based on a theory of aiding and abetting *required different proof* from liability based on the theory that a defendant was the principal actor[.]" *Id.*

The Ninth Circuit has also recognized that accomplice liability requires proving different elements than principal liability, in connection to an accomplice liability statute nearly identical to the Oregon statute. In *United States v. Gaskins*, 849 F2d 454, 459-460 (9th Cir. 1988), the court explained:

> Nonetheless, arguments based on convicting a defendant as a principal or convicting a defendant as an aider and abettor are based on two conceptually different theories. **The difference in theories becomes apparent when one analyzes the elements necessary to convict a defendant under a given theory. The elements necessary to convict an individual under an aiding and abetting theory are (1) that the accused had the specific intent to facilitate the commission of a crime by another, (2) that the accused had the requisite intent of the underlying substantive offense, (3) that the accused assisted or participated in the commission of the underlying substantive offense, and (4) that someone committed the underlying substantive offense.** *See United States v. McDaniel,* 545 F.2d 642, 644 (9th Cir.1976) ("A defendant to be an aider and abetter must know that the activity condemned by the law is actually occurring and must intend to help the perpetrator."); *Short,* 493 F.2d at 1172 ("It is the aider and abettor's state of mind, rather than the state of mind of the principal, that determines the former's liability. . . . Thus the jury must be told that it must find that [the aider and abettor] knew that [the principal] was armed and intended to use the weapon and intended to aid him in that respect.").
>
> On the other hand, the elements necessary to convict an individual under the theory that he was the principal simply are (1) that he committed all of the acts as defined in the underlying substantive offense, and (2) that he committed these acts while possessing the requisite mental state. **Thus, the government's argument that an aider and abettor is a principal does not provide an**

> **answer to the issue before us because the argument ignores the different elements the government must prove under the two theories and ignores the different arguments that the defense may make concerning the elements of the theory involved.** *Id.* [Emphasis added].

Thus, for example, under accomplice liability theories, evidence of the state of mind of the principal(s), as well as the defendant-accomplice's state of mind, is highly relevant. Evidence of state of mind often falls within a recognized hearsay exception. The co-conspirator hearsay exemption is another evidentiary issue related to the theory of criminal liability for each charged offense. These are merely some of the issues that an early election by the State could help simply and thereby reduce confusion and the likelihood of reversible error at trial.

5. Article I, section 11, of the Oregon Constitution provides that, "[i]n all criminal prosecutions, the accused shall have the right to public trial by an impartial jury * * *[.][I]n the circuit court ten members of the jury may render a verdict of guilty or not guilty[.]" See also ORS 136.450(1) (requiring the concurrence of at least 10 of 12 jurors in criminal matters).

The jury concurrence requirement mandates that the requisite number of jurors agree on the factual occurrences that constitute a crime. *State v. Boots*, 308 Or. 371, 378-79 (1989). A court's failure to give a jury instruction requiring "agreement on all material elements of a charge in order to convict" is error. *State v. Lotches*, 331 Or. 455, 472, (2000), *cert. den.,* 534 U.S. 833 (2001). The test for whether a *Boots* instruction is required is whether the law or the indictment has made the fact at issue "essential to the crime charged." If so, the jury must be instructed concerning the necessity of concurrence on those essential elements of the charge in order to convict the defendant. See *Lotches*, 331 Or. at 472.

The jury unanimity rule of *Boots* applies to lesser felony charges, as well as aggravated murder. See, e.g., *State v. Pervish,* 202 Or.App. 442 (2005), *rev. den.,* 304 Or. 308 (2006).

Although the indictment need not plead liability as an accomplice in order to obtain a valid conviction on that theory, *Burney, supra*, the jury must be instructed on the additional essential elements of accomplice liability and must so find unanimously, beyond a reasonable doubt.

6. Whether a defendant is liable as a principal or accomplice also impacts sentencing issues. *See, e.g., State v. Flanigan*, 316 Or 329 (1993)(the sentence enhancement for Burglary I that the defendant threatened to cause physical injury does not apply to accomplices); *State v. Wedge*, 293 Or 598 (1982)(ORS 161.610(4), the gun minimum statute, which imposes a minimum sentence on defendants who use a firearm in the course of committing a felony, does not apply to accomplices who do not personally possess the firearm). The Sixth Amendment's jury trial right, made applicable to the States through the Fourteenth Amendment's Due Process Clause, also requires the jury to find any fact that serves to increase the potential punishment for a crime. See, e.g., *Blakely v. Washington,* 542 U.S. (2004), and *Apprendi v. New Jersey,* 530 U.S. 466 (2000).

RESPECTFULLY SUBMITTED this _____ day of September, 2008.

Terri Wood, OSB 88332
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I have made service of the foregoing MOTION TO REQUIRE STATE TO ELECT, 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