IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR MULTNOMAH COUNTY

THE STATE OF OREGON, Plaintiff, v. JOSEPH GIBSON Defendant.	No. 19CR53042 STATE'S RESPONSE TO DEFENDANT'S DEMURRER Oral argument requested per UTCR 4.050

Comes now Rod Underhill, by and through Brad Kalbaugh, Deputy District Attorney, and respectfully moves the court for an order overruling and disallowing Defendant's demurrer pursuant to ORS 135.660. The state requests 1 hour for oral argument.

PROCEDURAL POSTURE

On August 22, 2019, a grand jury indicted Defendant on a single count of felony riot in violation of ORS 166.015 which states:

> "(1) A person commits the crime of riot if while participating with five or more other persons the person engages in tumultuous and violent conduct and thereby intentionally or recklessly creates a grave risk of causing public alarm."

The indictment filed in this case reads as follows:

> **COUNT 1**
> **RIOT**
>
> The said Defendant(s), **JOSEPH OWAN GIBSON**, on or about May 01, 2019, in the County of Multnomah, State of Oregon, 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, contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

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

LEGAL BRIEF AND ARGUMENT

An indictment serves three main functions. It must inform the defendant of the nature of the crime with sufficient particularity to enable the defendant to put forth a defense. It must identify the offense so as to enable the defendant to avail himself of his conviction or acquittal thereof for purposes of former jeopardy. And it must inform the court of the facts charged so that the court can determine whether they are sufficient to support a conviction. *State v. Fair*, 326 Or 485, 489 (1998). To accomplish these functions, ORS 132.510 *et seq* establishes the required content and form of an indictment. Among other things, an indictment must contain "a statement of the acts constituting the offense in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended." ORS 132.550 (7).

Whether an indictment can be challenged by means of demurrer is governed by statute. ORS 135.630 lists six permissible issues to raise by demurrer: "(1) that the grand jury had no legal authority to inquire into the crime charged on the indictment because the crime is not triable within the county; (2) that the indictment does not substantially conform to the requirements of ORS 132.510; (3) that the accusatory instrument charges more than one offense not separately stated; (4) that the facts stated do not constitute an offense; (5) that the accusatory instrument contains matter which, if true, would constitute a legal justification or excuse of the offense charged or other legal bar to the action; or (6) that the accusatory instrument is not definite and certain."

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I. The demurrer should be overruled and disallowed under ORS 135.630(6) because the facts as pled on the face of the indictment are definite and certain under existing case law.

A demurrer should be overruled when the charging instrument is definite and certain. A charging instrument is definite and certain for purposes of the demurrer statute when it echoes the language of the statute. *State v. Kelly*, 263 Or App 361, 366 (2014). It has always been a general rule in Oregon that an indictment drafted in the language of the statute is sufficient to overcome a demurrer. *State v. Nussbaum*, 261 Or 87, 91 (1971). In *Nussbaum*, a defendant demurred to an indictment charging riot on the basis that it was not definite and certain because it did not specifically identify the names of the individuals who acted in concert to commit the criminal act. *Id* at 89. Reasoning that the identities of the individuals were not elements of the crime as opposed to the fact that there were three or more people, the court ruled that the demurrer should have been denied.[1] *Id* at 96.

Here, because the indictment echoes the language of ORS 166.015, the charging instrument is definite and certain for purposes of ORS 135.630(6). Therefore, the demurrer should be overruled and disallowed.

II. The demurrer should be overruled and disallowed under ORS 135.630(4) and Article I, Section 8, because the facts as pled on the face of the indictment are sufficient to constitute an offense under existing case law.

A demurrer should be overruled if the facts stated on the face of the charging instrument do, in fact, state an offense. ORS 135.630 (4). An indictment that mirrors the language of the statute being violated is sufficient to state an offense. *State v. Reed*, 116 Or App 58, 59 (1992). An indictment fails to

[1] Before *Nussbaum* was published, the felony rioting statute at issue in *Nussbaum*, ORS 166.040, was repealed by 1971 c.743§432 and replaced by 1971 c.743§218 which was later codified at ORS 166.015. The amendments changed the elements of felony riot by, among other things, increasing the number of participants required to satisfy the gravamen of the crime from three people acting together to six.

state facts constituting an offense when it fails to allege each of the essential elements of the offense. *State v. Wimber*, 315 Or 103, 109 (1992). Where an indictment is unconstitutionally vague on its face, it may fail to state an offense. *See, e.g. State v. McKenzie*, 307 Or 554, 560 (1989) ("If a statute is constitutionally too vague, then the facts alleged in an indictment under such a statute do not and cannot constitute an offense. Thus, a vagueness challenge falls squarely under ORS 135.630(4) and the challenge can be made in a motion in arrest of judgment."). [2]

A vague law can offend numerous constitutional provisions including, but not limited to, the due process clause of the 5th and 14th Amendments to the United States Constitution as well as Article I, sections 20 & 21 of the Oregon Constitution. *State v. Robertson*, 293 Or 402, 408-409 (1982). Laws are supposed to provide individuals of ordinary intelligence a reasonable opportunity to know what is prohibited so that they can conduct themselves accordingly. Vague laws have the potential to trap the innocent by not providing fair notice. *Id* at 409, quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* 455 U.S. 489, 498 (1982). Additionally, by not providing explicit standards for those who apply them, vague laws impermissibly delegate basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis. *Id.* For a law to be facially unconstitutional, there can no reasonably likely circumstance under which the application of the statute would pass constitutional muster. *State v. Christian*, 354 Or 22, 40 (2013), citing *State v. Sutherland*, 329 Or 359, 365 (1999); *see also, United States v. Salerno*, 481 US 739, 745 (1987). A party who engages in conduct that is clearly proscribed cannot complain that the statute potentially is unconstitutionally vague with respect to others because, if that party's conduct clearly is proscribed by the statute, then the statute by extension cannot be said to be vague in all of its applications. *State v. Chakerian*, 325 Or 370, 382 (1997).

An overly broad statute announces a prohibition that includes, within its umbrella, conduct that is protected by the constitution. *State v. Robertson*, supra at 410-410. Because of concerns for the chilling

[2] "The only issue presented in *McKenzie* was whether a criminal statute may be challenged for unconstitutional vagueness by a motion for a judgment of acquittal made at the conclusion of the State's case. 307 Or at 556. In that situation, if the criminal statute under which the indictment was brought were held to be unconstitutionally vague and a judgment of acquittal were entered, then a later prosecution would be barred, because there would be no valid statutory basis on which such a prosecution could go forward." *State v. Wolfs*, 312 Or 646, 651 (1992).

effect that the enforcement of an overbroad law could have on free speech, such challenges are exclusive to restrictions on free expression. *State v. Christian*, supra at 35-37, quoting *Virginia v. Hicks*, 539 US 113, 119 (2003) ("We have provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech…"). Laws being challenged under Article I, Section 8, fall into two distinct classes: those that focus on the content of speech or writing, and those that focus on prohibiting results. *State v. Johnson*, 345 Or 190, 194 (2008) quoting *State v. Robertson*, supra at 412. Law that focus on prohibiting results can be further divided into two more subsets: those laws that expressly prohibit expression as a means of focusing on proscribing the prohibited results, and those laws that do not address expression whatsoever while still proscribing the prohibited results. Id. A law that prohibits expression as a means toward proscribing some sort of result must be scrutinized to see whether it encompasses protected speech and whether it can be interpreted so as to limit its scope. A law that is directed at proscribing some sort of result and is silent in regard to speech does not implicate Article I, section 8 on its face simply because someone violates the law by arriving at the prohibited effects by means of expression. Id. In general, the courts will not consider a facial challenge to a statute on overbreadth grounds if the statute's application to protected speech is not traceable to the statute's express terms. *State v. Illig-Renn*, 341 Or 228, 236 (2006). For purposes of the 1st Amendment, courts may invalidate a statute for facial overbreadth only if the statute proscribes a substantial amount of protected conduct in relation to its legitimate sweep. *Id* at 237, citing *Broadrick v. Oklahoma*, 413 US 601, 615 (1973).

Here, *State v. Chakerian*, holds that ORS 166.015 is neither vague on its face in violation of Article I, sections 20 and 21 nor overbroad in violation of Article I, section 8. 325 Or at 384. Therefore, the demurrer should be overruled and disallowed because *Chakerian* is still good law and because the same statute that was at issue in *Chakerian* is at issue in the case.

III. To the extent the demurrer relies on a theory that ORS 166.015 is unconstitutional as applied, the demurrer should be overruled and disallowed because Oregon law does not allow for as applied challenges to be made by demurrer.

When considering whether a law is unconstitutionally vague or overbroad, the plain language of the demurrer statute, ORS 135.630 limits the court to the four corners of the charging document. *State v. Cervantes*, 232 Or App 567, 573 (2009). When a charge is alleged in statutory language, defendants are unable to assert in a demurrer that the statute is unconstitutional as applied to them pre-trial because the court does not yet know what specific operative facts the state will present at trial. *State v. Chakerian*, supra at 373-374. It is reversible error for the court to consider facts not alleged in the complaint and sustain a demurrer on that basis. *State v. Reed*, *supra* at 59. *See, e.g.*, *State v. Morgan*, 151 Or App 750, 755 (1997) ("a demurrer cannot be sustained on the basis of facts extrinsic to the indictment"); *State v. Barker*, 140 Or App 82, 84 (1996) ("Defendant's argument about what he expects the state to present at trial is premature and does not provide a basis for sustaining a demurrer"); *State v. Durant*, 122 Or App 380, 382 (1993) ("A defendant may not rely on facts extrinsic to the indictment to support his theory of invalidity"); *State v. Kurtz*, 46 Or App 617, 624 (1980) ("Defendant does not contend that the indictment does not contain all the statutory requirements of the offense. To support his theory, defendant must rely on facts extrinsic to those contained in the indictment. A demurrer cannot be sustained on that basis"); *State v. Gates*, 31 Or App 353, 356 (1977) ("To reach [its] conclusions that the indictment was defective the court had to rely on facts not appearing on the face of the indictment. It follows that the demurrer should not have been sustained"). Because Oregon law expressly prohibits the consideration of extrinsic evidence in the context of a demurrer, and because the very nature of an as applied challenge to the constitutionality of a statue requires the defendant to present evidence beyond the information present in the four corners of the charging instrument, a demurrer is not available to a defendant challenging the constitutionally of a statute as applied.

Here, because Oregon courts have expressly stated time and again that extrinsic evidence is not permissible in the context of a demurrer, and because Defendant's argument urges the court to consider extrinsic evidence as part of an as applied argument, Defendant's demurrer should be overruled and disallowed.

IV. Defendant's procedural remedy to challenge ORS 166.015 as applied is via a motion in arrest of judgment.

Oregon's criminal code affords defendants a remedy to challenge the constitutionality of a law as applied to a defendant without violating Oregon's prohibition on extrinsic evidence in demurrers. ORS 136.500 specifically authorizes a motion in arrest of judgement to be made after a plea or verdict of guilty on either or both of the grounds stated in ORS 135.630 (1) and (4). As illustrated in *McKenzie*, where an indictment is unconstitutionally vague, it can subject itself to a challenge under ORS 135.630 (4) in that the facts stated do not state an offense[3]. 307 Or 554, 560 (1989). Because a motion in arrest of judgement under ORS 135.630 can be raised only after a plea or a verdict of guilty, it necessarily encompass facts extrinsic to those alleged in the charging instrument, thereby affording defendants in a criminal action an opportunity to litigate the constitutionality of a statute as applied.

Respectfully submitted this 8th day of October, 2019.

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District Attorney
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By _____
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[3] As the Court explained in *State v. Hankins*, *McKenzie* holds that when a defendant moves for a judgment of acquittal on the ground that the facts stated do not constitute an offense, the motion should be denied with leave to renew it after the verdict. In so holding, the Court reasoned that if a defendant is acquitted, the motion is moot, but if the defendant is convicted and the motion is renewed, the trial judge can address it on the merits. 342 Or 258, 265 (2007) quoting *State v. McKenzie*, 307 Or 554, 561 (1989).

Certificate of Service

I certify that on October 8, 2019, I caused the foregoing motion to join cases to be served upon the parties hereto by the method indicated below, and addressed as follows:

Counsel for Joesph Gibson James Buchal Murphy & Buchal, LLP. 3425 SW Yamhill Portland, OR 97214 jbuchal@mdllp.com	___ ___ ___ X X	HAND DELIVERY US MAIL FAX EMAIL (courtesy copy) ELECTRONIC SERVICE (UTCR 21.100)

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