IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF

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| State of OREGON,  Plaintiff,  v.  ,  Defendant. | Case No.  **DEMURRER** |

COMES NOW, Defendant, by and through his attorney and hereby demurs to the Indictment, under ORS 135.610, *et. Seq.*, Article I, section 10 of the Oregon Constitution, and Fourteenth Amendment to the United States Constitution and requests a hearing on this matter under ORS 135.650 on the grounds that this accusatory instrument and the statutory scheme on which it is based:

1. The facts stated do not constitute an offense; and,
2. 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.

This demurrer is not made for the purpose of delay, and is supported by the attached points and authorities and memorandum of law, and, in the opinion of counsel, is well founded in law.

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**FACTS**

The Defendant was arrested [date] on charges of theft in the [ ] degree. The state filed an Information that contained the charge of theft in the first degree based upon the text of ORS 164.055(1)(b). The state asserts that the theft was alleged to have occurred “during a riot, fire, explosion, catastrophe or other emergency in an area affected by the riot, fire, explosion, catastrophe or other emergency” because the state was under Governor Brown’s March 8, 2020 executive order No. 20-03; “DECLARATION OF EMERGENCY DUE TO CORONAVIRUS (COVID-19) OUTBREAK IN OREGON”.

**LAW AND ARGUMENT**

ORS 164.055 states in relevant part:

(1) A person commits the crime of theft in the first degree if, by means other than extortion, the person commits theft as defined in ORS 164.015 [Theft described] and:

b) The theft is committed during a riot, fire, explosion, catastrophe or other emergency in an area affected by the riot, fire, explosion, catastrophe or *other emergency*[.]

(emphasis added).

The statute does not go on to define what the term “other emergency” actually constitutes. Here, the State alleges that the declared emergency related to COVID-19 is sufficient, in and of itself, to trigger the “other emergency” provision[[1]](#footnote-1). ORS 164.055(1)(b) has remained substantially unchanged since first enacted as part of the 1971 criminal code revision[[2]](#footnote-2). The defense has been unable to locate, despite exhaustive search, any appellate cases of Theft 1 based on ORS 164.055(1)(b).

**1. Analysis of legislative history.**

ORS 164.055(1)(b) is an anti-looting provision of the theft in the first degree statute. In *State v. Slatton*, 268 Or App. 556 (2015) the Oregon Court of Appeals engaged in an in depth analysis of ORS 164.055. With regard to ORS 164.055(1)(b) the Court stated:

“The paragraph relating to thefts that occur during a riot sought to address the problem of looting during instances of mass disturbance and major catastrophe. In response to looting that apparently followed an earthquake in Los Angeles and other public unrest in Portland during the summer of 1970, the legislature deemed it appropriate to subject looters to elevated punishment as felons.”

268 Or App at 572 (Tape Recording, Senate Criminal Law and Procedures Committee, SB 40, Mar. 2, 1971, Tape 4, Side 1 (statement of John Christman; statement of Richard Barton)) (internal citations omitted).

The current emergency declaration due to the COVID-19 pandemic does not equate to the sort of “mass disturbance and major catastrophe” described above in that placing quarantine measures in effect does not promote looting. A charge of theft in the first degree cannot therefore be supported by the facts plead in the indictment.

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**2. *Ejusdem generis*: Defining the undefined terminology contained within a list of terms.**

When a legal term is not defined by statute, the Oregon Supreme Court has stated, “[t]o discern the legislature's intent, we consider the statutory text, context, and any relevant legislative history.” *State v. Kurtz*, 350 Or. 65, 71 (2011). The Court “has developed certain principles that pertain to the interpretation of statutory text that consists of a general term accompanied by examples of the general term. One such principle, *ejusdem generis*, serves to confine the interpretation of the general term according to one or more common characteristics of the listed examples.” *Id*. at 74.

To clarify, the Court is required to look at the specific examples of defined terms within a law and determine the common theme or themes. Next, the court examines the undefined or non-enumerated term and clarifies the meaning of it by fitting it within the theme or themes defined by the other terms.

*Kurtz* dealt with the determination of whether or not a tribal police officer was a “police officer” and/or a “peace officer” under several statutes defining the terms which listed multiple examples of police agencies under their definitions, but not members of a tribal police agency. The Court used the doctrine of *ejusdem generis* to reach the conclusion that a tribal officer was both a “police offer” and a “peace officer” for the purpose of the several statutes.

Here, the listed examples are (1) Riot, (2) Fire, (3) Explosion, and (4) Catastrophe. Incorporating the legislative history as explained by the Oregon Court of Appeals it is obvious that the common thread among the listed examples include only those events that lend themselves to immediate and substantial likelihood of looting. The disease of COVID-19 and the subsequent stay at home orders are not of the type of harm that the legislature intended to be the subject of the “other emergency” provision of ORS 164.055(1)(b).

**CONCLUSION**

Based upon the legislative history and the doctrine of *ejusdem generis* it is readily apparent that the present state of emergency does not meet the statutory definition of “other emergency under ORS 164.055(1)(b). Accordingly, (1) the facts stated in the indictment do not constitute the offense of theft in the first degree, and (2) 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. Therefore, the Defendant respectfully prays that the Court grant this demurrer to the indictment.

Respectfully submitted,

DATED: \_\_\_\_ June, 2020

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Attorney for Defendant

**CERTIFICATE OF SERVICE**

I hereby certify that I, , served a true and correct copy of: (1) DEMURRER, [ ] County v. [ ], Case # in the Circuit Court of [ ], State of Oregon on the date indicated below by placing the documents in a sealed envelope addressed to the person at the address listed below and delivered by:

[X] via regular mail.

[ ] hand delivery.

[ ] fax transmission.

[ ] overnight delivery.

District Attorney

DATED this \_\_\_\_\_\_ day of June, 2020

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Attorney for Defendant

1. According to the Federal Register, 58 national emergencies have been declared since the National Emergency Act of 1976 was signed into law by President Gerald Ford. And 31 have been annually renewed and are currently still in effect, as listed in the Federal Register. [↑](#footnote-ref-1)
2. Oregon Laws Chapter 706 Section 10 changed the law from "The theft is committed during a riot, fire, explosion, catastrophe or other emergency in an area affected thereby; or" to "...in an area affected by the riot, fire, explosion, catastrophe or other emergency;" [↑](#footnote-ref-2)