IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

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| STATE OF OREGON,  Plaintiff,  vs.  xxxxxxx,  Defendant. | )  )  )  )  )  )  )  )  ) | No. xxxxxxx  DEMURRER-  Count 1 (Felony Computer Crime)    (Oral Argument Requested) |

COMES NOW the defendant, by and through his attorney, Ryan Scott, and demurs to count 1, on the grounds that the statute is unconstitutionally vague.

The indictment reads in part:

Count 1

Felony Computer Crime

The said Defendant(s), JOHN DOE, on or between October 29, 2008 and September 4, 2009, in the County of Multnomah, State of Oregon, did unlawfully and knowingly use a computer for the purpose of devising and executing a **scheme or artifice to defraud and to obtain money, property, and services by means of false pretences**. .

[Emphasis added.]

QUESTION PRESENTED

Given that the Oregon Court of Appeals has already found the phrase “scheme or network” to be unconstitutionally vague, is there any reason the same infirmity would not apply to “scheme or artifice”?

CASE LAW and ARGUMENT

Under the Oregon Constitution, a criminal statute must be sufficiently explicit to inform those who are subject to it of what conduct will render them liable to its penalties. *State v. Graves*, 299 Or 189 (1985). If not, the statute may be unconstitutionally vague.

A statute that does not provide a reasonable degree of certainty – thereby allowing the prosecutor, the trial judge or the jury to define the crime after the fact – is considered “vague” and violates Article I, Sections 20 and 21, of the Oregon Constitution, as well as the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *State v. Conrell/Pinnell*, 304 Or 27 (1987); *Graves, supra*; *State v. Robertson*, 293 Or 402 (1982); *Graynard v. City of Rockford*, 408 US 104 (1972).

A vague statute that fails to provide such “reasonable certainty” is problematic for three reasons. First, it may permit arbitrary or unequal application and uncontrolled judicial discretion, in violation of Article I, sections 20 and 21, of the Oregon Constitution. *State v. Krueger*, 208 Or App 166, 144 P3d 1007 (2006). Second, the statute may create an “unlawful delegation issue” under the Due Process Clause of the Fourteenth Amendment in that it “contains no identifiable standards or employs standards that rely on the shifting and subjective judgments of persons who are charged with enforcing it.” *Id.* (internal quotations omitted). Third, the statute “may be so poorly written as to fail to provide fair warning of the conduct that it prohibits, in violation of the Due Process Clause.” *Id.* (internal quotations omitted).

In *State v. Moeller*, 105 Ore. App. 434, 440 (1991), the court of appeals held the phrase “scheme or network” to be unconstitutionally vague. The same holding would seem appropriate here, where the language of the statute is “scheme or artifice.”

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The defendant reserves further argument until the hearing on this motion.

DATED this 16th day of \_\_\_\_\_\_\_\_, 2009.

Ryan Scott, OSB# 95526

Attorney for Defendant

**Certificate of Service**

On , 2009, a certified true copy of the attached DEMURRER AND MEMORANDUM IN SUPPORT was hand-delivered to Multnomah County District Attorney’s office and left with a person in charge.

Ryan Scott, OSB #95526

Attorney for Defendant