Terri Wood, OSB #883325
Law Office of Terri Wood, P.C.
730 Van Buren Street
Eugene, Oregon 97402
541-484-4171
EMAIL: contact@terriwoodlawoffice.com

Attorney for MB

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

STATE OF OREGON, Plaintiff, -VS- MB Defendant	CASE No. 17CRXXXXX DEMURRER AND ALTERNATIVE MOTION TO DISMISS COUNTS 1-3 OF AMENDED INDICTMENT (Oral Argument Requested)

COMES NOW the Defendant, MB, by and through his undersigned attorney, and hereby demurs to the amended indictment and alternatively moves to dismiss Counts 1-3 of the amended indictment, upon the following grounds:

1. That by prohibiting various types of sexual contact with a "mentally incapacitated" person, the statutes alleged in Counts 1-3 of the amended indictment fail to give fair warning of the conduct they prohibit, both facially and as applied to Mr. MB's case;

2. That by prohibiting various types of sexual contact with a "physically helpless" person, the statutes alleged in Counts 1-3 of the amended indictment fail to give fair warning of the conduct they prohibit as applied to Mr. MB's case;

3. That by prohibiting various types of sexual contact with a "mentally incapacitated" person, those statutes are so vaguely crafted as to permit arbitrary or unequal application and unguided discretion in their prosecution, both facially and as applied to Mr. MB's case;

4. That by prohibiting various types of sexual contact with a "physically helpless" person, those statutes are so vaguely crafted as to permit arbitrary or unequal application and unguided discretion in their prosecution as applied to Mr. MB's case;

5. That the affirmative defense against Counts 1-3 of the amended indictment, provided by ORS 163.325(3), as it pertains to "mentally incapacitated," fails to provide fair notice to a defendant as to what he must establish by a preponderance of the evidence to be spared from conviction at trial, both facially and as applied to Mr. MB's case;

6. That the affirmative defense against Counts 1-3 of the amended indictment, provided by ORS 163.325(3), as it pertains to "physically helpless," fails to provide fair notice to a defendant as to what he must establish by a preponderance of the evidence to be spared from conviction at trial, as applied to Mr. MB's case;

7. That the affirmative defense against Counts 1-3 of the amended indictment, provided by ORS 163.325(3), as it pertains to "mentally incapacitated," is so vaguely crafted as to permit arbitrary or unequal application and unguided discretion by the fact-finder at trial in determining guilt, both facially and as applied to Mr. MB's case;

8. That the affirmative defense against Counts 1-3 of the amended indictment, provided by ORS 163.325(3), as it pertains to "physically helpless," is so vaguely crafted as to permit arbitrary or unequal application and unguided discretion by the fact-finder at trial in determining guilt as applied to Mr. MB's case;

All in violation of Article I, sections 11, 20 and 21 of the Oregon Constitution, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

This motion is made in good faith and not for the purpose of delay. It is supported by the points and authorities below and by such other grounds and authorities as may be offered in reply to the State's response to this motion, or at hearing on this motion. The defense requests an omnibus hearing in advance of the commencement of trial, set for December 17, 2018. The defense specifically reserves the right to renew all "as applied" challenges based upon the facts adduced at trial.

DATED this 25th day of October, 2018.

s/ Terri Wood

TERRI WOOD, OSB #883325
ATTORNEY FOR DEFENDANT

POINTS AND AUTHORITIES

1. <u>The Statutes At Issue And Basic Facts</u>

The amended indictment charges Mr. MB in Counts 1-3 with various Measure 11 sex crimes, all of which depend on proof that the alleged victim was "incapable of consent by reason of mental incapacitation or physical helplessness" at the time of the sexual acts. ORS 163.315 provides, in pertinent part:

> (1) A person is considered incapable of consenting to a sexual act if the person is:
> * * *
> (b) Mentally defective;
> (c) Mentally incapacitated; or
> (d) Physically helpless.

Thus, it appears that proof of incapacity to consent may be made by factually-distinct (mental or physical), alternative means. Each of the challenged counts of the amended indictment allege two statutory alternatives. This motion challenges the constitutionality of those criminal charges based on both methods of determining incapacity to consent alleged in the amended indictment, and the corresponding affirmative defense, as set forth below:

ORS 163.305(3) defines "mentally incapacitated" to mean "that a person is rendered incapable of appraising or controlling the conduct of the person at the time of the alleged offense." This statutory provision has yet to be authoritatively interpreted by the appellate courts.

ORS 163.305(5) defines "physically helpless" to mean "that a person is unconscious or for any other reason is physically unable to communicate unwillingness to act." A person who is asleep is "unconscious" within the meaning of

that statute, and therefore "physically helpless." *State v. Marker,* 263 Or App 669 (2014). Mr. MB's challenges are limited to the remainder of the definition, "or for any other reason is physically unable to communicate unwillingness to act," and any reference to "physically helpless" should be read with that limitation in mind.

ORS 163.325(3) provides, in pertinent part: "In any prosecution in which the victim's lack of consent is based solely upon the incapacity of the victim to consent because the victim is mentally defective, mentally incapacitated or physically helpless, it is an affirmative defense for the defendant to prove that at the time of the alleged offense the defendant did not know of the facts or conditions responsible for the victim's incapacity to consent."

According to the Discovery provided in Mr. MB's case, and trial testimony of the alleged victim, referred to hereafter as "KH," they ended up in his bed in the early morning hours after both had consumed various amounts of alcohol. Sexual contact ensued. At that time Mr. MB was 17 and KH was 16, and had known each other for many years, but not in a romantic or sexually intimate way. Apart from these basic facts, their accounts of the sexual encounter diverge dramatically: [Facts omitted].

Both KH and Mr. MB reportedly made inconsistent statements to others, and to each other in text messages, only some of which were preserved, concerning their versions of the sexual encounter, which both have denied or have claimed are not true, complete, or accurate. For simplicity sake, those hearsay statements are not included in the above summary. The legal arguments herein depend largely on KH's version of their sexual encounter as having occurred while she was asleep and while

groggy/intoxicated upon awakening, as Mr. MB's version results in no crimes having occurred.

2. <u>The Procedural Right To A Pretrial Challenge</u>

ORS 135.630(6) permits a demurrer to the indictment or certain charges therein when it appears on its face to be "not definite and certain." This provision codifies the requirement under Article 1, section 11 of the Oregon Constitution, which provides: "In all criminal prosecutions, the accused shall have the right . . . to demand the nature and cause of the accusation against him." *See, State v. Sanders*, 280 Or 685, 687-88 (1997)(en banc)(citing *State v. Smith,* 182 Or. 497, 502 (1948))("In determining the sufficiency of indictments we should consider Art. I, s 11 of the Oregon Constitution," and finding that sometimes describing the offense in the words of the statute is not sufficient"); *State v. Cooper,* 78 Or App 237, 239 (1986)("For an accusatory instrument to be sufficient against a demurrer, it must also satisfy the requirements of Article 1, section 11"). ORS 135.610(1) gives the trial court discretion to allow filing of a demurrer at a time after arraignment. *See generally, State v. Wimber,* 315 Or, 103, 111 (1992).

Supreme Court decisions make clear that, whether styled as a demurrer or motion, defendants may challenge the constitutionality of criminal statutes impacting their prosecution, both facially and as applied, through a pre-trial hearing. *See, e.g., State v. Fanus,* 336 Or. 63, 66-69 (2003)(defendant in aggravated murder prosecution may challenge the facial constitutionality under the Eighth Amendment of

penalty-phase statutes by way of pretrial demurrer). A defendant who wishes to make an "as applied" challenge to the enforcement of a statute has a constitutional right to a hearing to address that question. *See, State v. Sutherland,* 329 Or 359, 367 (1999)(en banc)(as applied challenge to Measure 11 monetary security statute under Article I, section 16, Oregon Constitution). Mr. MB's challenges are predicated on the provisions of the Oregon and United States Constitutions previously set forth above and discussed below.

3. The Constitutional Standards For Criminal Statutes and Indictments

Under the Oregon Constitution, the terms of a criminal statute must be sufficiently explicit to inform those who are subject to it of what conduct on their part will render them liable to its penalties. In addition, a criminal statute must not be so vague as to permit a judge or jury to exercise unguided discretion in punishing defendants, because this offends the prohibition against *ex post facto* laws embodied in Article I, section 21, of the Oregon Constitution.[1] *See, State v. Hodges,* 254 Or. 21, 27 (1969)(en banc)("A vague statute lends itself to an unconstitutional delegation of legislative power to the judge and jury, and, by permitting the jury to decide what the law will be, it offends the principle, if not the rule, against Ex post facto laws."). Simply stated, a level of uncertainty that allows those charged with enforcing and applying the laws "to make the law after the event" violates this provision. *See, State v.* Robertson, 293 Or 402, 408 (1982).

[1] "No *ex-post facto* law . . . shall ever be passed," id.

The Courts have found fault with statutes containing “open-ended” clauses that sweep too broadly, i.e., “without a legislative declaration of standards,” *Hodges, supra* at 27; *see also, Anderson v. Morrow,* 371 F.3d 1027, 1032 (9th Cir. 2004)(“A statute is vague [under the Fourteenth Amendment] if it does not provide explicit standards to those who apply them, so as to avoid arbitrary and discriminatory enforcement.”). *Hodges* invalidated one clause of the Contributing To The Delinquency Of A Minor statute, that criminalized the doing of “any act which manifestly tends to cause any child [to become delinquent].” The Supreme Court observed that the “vagueness of the challenged statute does not lie in its failure to define delinquency. We are permitted to look elsewhere in the statutes, if necessary, to find a definition of a ‘delinquent child.’” 254 Or. at 23. The defendant argued that even where the trial court can make a preliminary ruling that will narrow the scope of the statute, the challenged clause is nonetheless void on its face because it contained no standards by which a jury can determine guilt. Id., at 25. The Supreme Court agreed, explaining:

> It was argued in the case at bar that the jury should be permitted to exercise its own common sense and good judgment on the causes of delinquency, but this argument begs the question. Without a legislative declaration of standards, the trial court would have no basis for submitting one case to a jury and refusing to submit another case to a jury. Further, the trial jury would have no basis for deciding that a given course of conduct tended to endanger the welfare of a child, or that it had no such tendency. Some degree of ad hoc legislation by juries in finding defendants not guilty may be unavoidable and socially desirable to ease the edges of the criminal law, but the free-wheeling power to legislate so as to find a defendant guilty should not be institutionalized in a criminal statute. Such a statute not only creates a serious danger of inequality in the administration of the criminal law, but it runs squarely contrary to the purpose of Oregon Constitution, Art. I, s 21, which prohibits the delegation of legislative power.

1 Id., at 27-28.

2 The equal privileges and immunities clause of Article I, section 20[2] is also 3 implicated when vague laws give unbridled discretion to prosecutors, judges and jurors 4 to decide what is prohibited in a given case, for this results in the unequal application 5 of criminal laws. *State v. Graves,* 299 Or. 189, 195 (1985). This provision requires 6 that a governmental decision to offer or deny some advantage to a person "be made 7 by permissible criteria and consistently applied." *City of Salem v. Bruner*, 299 Or. 262, 8 268-69 (1985).

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10 A criminal statute need not define an offense with such precision that a person 11 in every case can determine in advance that a specific conduct will be within the 12 statute's reach. However, a reasonable degree of certainty is required by Article I, 13 sections 20 and 21. *See, Graves, supra,* 299 Or. at 195; *see also, State v. Higley*, 236 14 Or App 570, 573-75 (2010); *and compare, State v. Speedis*, 350 Or. 424, 435-36 15 (2011)(stating the "fair notice" requirement is only found in the Due Process Clause 16 of the Fourteenth Amendment to the United States Constitution).

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18 Under the Due Process Clause of the United States Constitution, a statute is 19 unconstitutionally vague "if it either contains no identifiable standard, *Kolender v.* 20 *Lawson,* 461 U.S. 352, 358 (1983), or employs a standard that relies on the shifting 21 and subjective judgments of the persons who are charged with enforcing it, *City of* 22 *Chicago v. Morales,* 527 U.S. 41, 62 (1999)." *State v. Illig-Renn,* 341 Or. 228, 240,

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[2] "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." Art. I, §20, Oregon Constitution.

(2006). Due Process also requires that a criminal statute give fair warning of what conduct will subject a citizen to punishment. In assessing a claim that a criminal statute fails to give fair warning, the test is whether the statute would "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly." *Id.,* at 241 (citing *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972)).

"The notice test of vagueness looks at the 'very words' of the statute in question to determine whether the statutory language is 'sufficiently precise to provide comprehensible notice' of the prohibited conduct.'" *Anderson, supra,* 371 F3d at 1031-32 (citations omitted).

"The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment." *Hoffman Estates v. Flipside, Hoffman Estates*, 455 US 489, 498 (1982). For example, enactments with civil, rather than criminal penalties, are subject to greater tolerance "because the consequences of imprecision are qualitatively less severe." *Id.* In the case at bar, all of the crimes carry minimum mandatory prison sentences under Measure 11, ranging from 75 to 100 months. Rarely do trial courts impose sentences greater than these minimum mandatory penalties, meaning that the prosecution by the charges brought, and the jury by its verdict, largely determine the criminal penalties for Measure 11 defendants.

When a statute is attacked as vague, for failing to define and communicate its coverage, the statute sometimes can be saved by a judicial interpretation that gives it

the required definiteness. But when such a saving construction cannot be attributed to the legislature with reasonable fidelity to the legislature's words and apparent intent, the statute is invalid as enacted. *See, e.g., Robertson, supra,* 293 Or. at 411. Mr. MB submits the statutory provisions that he challenges cannot be saved by a narrowing construction that would not be legislative in character, in that "[t]he problem is not that they communicate *no* meaning; it is that they have too many possible meanings. The definitions may share or even compound that problem." *State v. Moeller*, 105 Or App 434, 440, *rev. dismissed*, 312 Or. 76 (1991)(vagueness challenge to "scheme or network" enhancement to drug offenses; superseded by legislative action).

Article 1, section 11 of the Oregon Constitution must be consulted in determining the sufficiency of charging documents, and provides: "In all criminal prosecutions, the accused shall have the right . . . to demand the nature and cause of the accusation against him." *See, State v. Sanders*, *supra.* Simply reciting the language of a broadly worded statute may not pass constitutional muster. *Id.*; *State v. Cooper, supra* (holding a complaint charging misdemeanor of promoting gambling in the language of the statute, where the definitional statute prohibited "conduct that materially aids any form of gambling . . . [and] includes, but is not limited to" specific examples, was constitutionally void). The availability of discovery will not save an unspecific accusatory instrument if discovery is unlikely to inform the defendant of the specific criminal conduct the state intends to prove. *Sanders* (holding indictment was insufficient when it failed to allege which crime the defendant intended to commit in a

burglary charge, because discovery would not aid the defendant given the vast number of crimes on which the state could rely).

The Due Process Clause of the Fourteenth Amendment also "requires that a charging instrument describe an offense with sufficient precision and certainty to enable a presumptively innocent person to prepare for trial." *State v. Cooper, supra,* 78 Or App at 239-240.

Thus, even if this Court finds the challenged statutes to be facially constitutional, or constitutional as applied, it must consider the sufficiency of Counts 1-3 as charged in the amended indictment.

4. <u>"Mentally Incapacitated" Is Unconstitutionally Vague</u>

The defense has found no reported cases applying an interpretation of "mentally incapacitated," or upholding a conviction based on the victim being "mentally incapacitated" when disputed by the defendant, either before or after the statute's amendment in 2009 (effective January 1, 2010).[3] The statute previously provided: "Mentally incapacitated means that a person is rendered incapable of appraising or controlling the conduct of the person at the time of the alleged offense

[3] In *State v. Callender*, 181 Or App 636, 647-48 (2002), the court discussed an interpretation of "mentally incapacitated" in the process of interpreting the term "mentally defective," but that discussion is *dicta*. In *Burcham v. Franke,* 265 Or App 300 (2014), the court found defense counsel was ineffective for failing to challenge the State's novel interpretation of "mentally incapacitated" in a case involving the earlier version of the statute, and dealt only with the portion that was deleted in 2009. However, one could surmise from *Burcham* that extreme intoxication may result in a person being "mentally incapacitated," a logical conclusion which Mr. MB does not dispute; but that basis for incapacity is not at play in the instant case.

because of the influence of a controlled or other intoxicating substance administered to the person without the consent of the person or any other act committed on the person without consent." The law was then geared to prosecuting cases where the defendant had administered a "date rape" drug, or was otherwise responsible for the victim's intoxication. The legislative history shows the change resulted from arguments that, under the prior law, victims of sexual assault who became "mentally incapacitated" by their own voluntary intoxication had no recourse against "sexual predators" under the criminal law. See documents attached as Exhibit 1.

The plain language of the amended statute, however, has no such restrictions. All reference to involuntary intoxication or ingestion of intoxicants is gone: "mentally incapacitated" means "that a person is rendered incapable of appraising or controlling the conduct of the person at the time of the alleged offense." ORS 163.305(3). Legislative history is not relevant in determining whether a statute can survive a facial challenge based on vagueness, where the issue is whether the statute itself speaks with meaning to the ordinary person. *See, State v. Norris-Romine*, 134 Or App 204, 210 (1995).

The definitional statute for "mentally incapacitated" has no reference to any readily observable physical condition, such as being unconscious, *Compare,* ORS 163.305(5) ("physically helpless); nor does it reference an objective condition such as suffering from a mental disease or defect, *Compare,* ORS 163.305(2)("mentally defective"), although the definition is facially broad enough to encompass mental disorders as a contributing factor to mental incapacitation. Its plain language requires

1 a subjective assessment of an alleged victim's mental state—"is rendered incapable
2 of appraising or controlling [her] conduct"—arising from any and all causes,
3 conditions or combinations of facts and circumstances. The statute thus contains no
4 identifiable standard by which an ordinary person could determine if his otherwise
5 willing sexual partner could not legally consent, and invites *ad hoc* application by
6 prosecutors, judges and jurors.
7
8 Legislative history contains recognition that "intoxication does not equal
9 mental incapacity; mental incapacity is a state of extreme intoxication rendering a
10 person unable to appraise or control conduct." See Exhibit 1 (testimony of Christine
11 Herman, Executive Director, Attorney General's Sexual Assault Task Force). The
12 statute on its face, however, does not restrict application to grossly intoxicated
13 persons—a reasonably objective and observable condition. The criminal law's
14 requirement of "fair warning" is heightened in such circumstances because ingestion
15 of intoxicants is a common prelude to engaging in consensual sexual conduct. The
16 plain language of "mentally incapacitated" invites an amalgamation of being a bit
17 intoxicated, a bit sleepy, a dose of Prozac, with an underlay of panic disorder or
18 paranoia, to reach a subjective level where the alleged victim claims to be unable to
19 appraise or control his or her conduct.
20
21 Intoxication is also likely to lower inhibitions, including sexual inhibitions. At
22 what point during a night of consuming alcohol or other drugs, does the lowering of
23 one's inhibitions constitute an inability to control the urge to engage in sexual
24 conduct? At least the objective and static condition of an observable mental defect,
25

or physical condition such as unconsciousness, places a defendant on notice that an alleged victim may fall within the protected class. See, *State v. Reed*, 339 Or 239, 243-44 (2005)(a person who has a mental disability is not necessarily incapable of consenting to sex; "Rather, a person who can understand that another person has initiated some kind of sexual activity with that person may be capable of appraising the nature of the conduct and, thus, may be capable of consenting").

In contrast, "Mentally incapacitated" is a temporary, fleeting and abstract state of mind of the victim—not statutorily defined by reference to any readily observable physical condition or mental impairment—to be proven circumstantially and/or asserted directly through the alleged victim's testimony, and based on jurors' subjective determination of whether the victim was (for any reason offered in hindsight) unable to appraise or control her otherwise volitional sexual conduct with a defendant. Jurors are regularly asked to decide whether a person acted intentionally, knowingly, recklessly or negligently. These are mental states within the common experience of ordinary persons, even though defined by law. Being "rendered incapable of appraising or controlling [their] conduct"—other than through extreme intoxication—is not within the common experience of ordinary persons, and has no ordinary meaning.

With no identifiable standard for that determination, the risk is grave that jurors will make moral rather than factual judgments in determining guilt. If the State argues KH was "mentally incapacitated" based on her young age, sexual inexperience, consumption of some alcohol, being groggy from sleep, being in shock—i.e., unable to

speak or move—and myriad other factors including her basic insecurity, feelings of embarrassment, underlying mental/emotional disorders, etc., it invites jurors to feel that Mr. MB took unfair advantage of her and convict on that basis.

This risk is compounded if jurors are simply instructed by reciting the language of the statute, that KH was "rendered incapable of appraising or controlling her conduct". The Court of Appeals has indicated that an alleged victim who understands the mechanics of sex and that sexual conduct is occurring is not "mentally incapacitated," i.e., there is no inquiry as to the alleged victim's capacity to assess whether the sexual conduct is right or wrong, or morally appropriate.[4] But no appellate decision so restricts the definition of "mentally incapacitated."

5. "Mentally Incapacitated" And "Physically Helpless" Are Vague As Applied

The crimes based on "mental incapacity" and "physical helplessness" are also unconstitutionally vague as applied to the basic facts in Mr. MB's case, other than any crime the State contends was committed solely while KH was asleep.

The definitional statutes provide no guidance to jurors concerning what myriad of factors to consider in deciding whether KH was rendered incapable of appraising or

[4] "Mentally incapacitated" is distinctive from "mentally defective" in that the former requires an inability to appraise (or control) one's conduct, i.e., to understand the physical or mechanical nature of sexual conduct, whereas "mentally defective" requires an inability to appraise "*the nature* of the conduct," ORS 163.305(3); i.e., an ability to understand and assess the "right or wrong" and the "moral quality" of the conduct. See, *Callender*, *supra,* 181 Or App at 647-48 (discussing these two definitions and holding evidence that the victim understood the mechanics of sex did not establish as a matter of law that she was capable of appraising the nature of her conduct and, thus, was not "mentally defective.")

controlling [her] conduct," or made her "physically unable to communicate unwillingness to act." The statutes impose no bar on the State from waiting until closing argument to elect which facts and circumstances it wants to combine as proof of those material elements—including historical conditions and personality traits that arguably affected KH's ability to appraise or control her conduct, or make evident her unwillingness to engage in sexual acts. Mr. MB lacks notice as to what facts and circumstances he must prepare to rebut with affirmative evidence or to challenge on cross-examination. The statutes likewise provide no guidance to the Court in ruling on evidentiary objections to the State's evidence by the defense.

6. The Affirmative Defense Is Constitutionally Vague And Improperly Shifts The Burden Of Proof

The statutes criminalizing sexual conduct based on incapacity to consent do not require the State to prove a defendant knew the victim was "mentally defective," "mentally incapacitated" or "physically helpless." The State need only prove the defendant knowingly engaged in sexual conduct with the victim, and that the victim lacked capacity to consent under ORS 163.315. *State v. Phelps,* 141 Or App 555, 558 (1996)(so holding in a case based on "mentally defective"). Although the State is not required to prove the defendant knew the victim lacked the capacity to consent, the defendant may prove that he did not know as an affirmative defense to negate guilt. Id., at 558-59.

Representative Gelser, who introduced the 2009 bill changing the definition of "mentally incapacitated" on behalf of the Attorney General's task force, claimed the

new law "would focus on what the offender knew about the victim's ability to consent. . . The defense can still raise the issue of whether or not the defendants themselves were too mentally incapacitated to recognize the mental incapacitation of the other, or if the offenders had a developmental disability or some other thing that impeded their ability to understand the lack of capacity for the victim to consent." See Exhibit 1.

However, that legislative intent regarding the defendant's lack of knowledge of incapacity does not plainly appear in the statute providing this affirmative defense. ORS 163.325(3) provides, in pertinent part:

> In any prosecution in which the victim's lack of consent is based solely upon the incapacity of the victim to consent because the victim is mentally defective, mentally incapacitated or physically helpless, it is an affirmative defense for the defendant to prove that at the time of the alleged offense the defendant did not know of the facts or conditions responsible for the victim's incapacity to consent.

If, for example, a defendant knows his sex partner consumed a lot of alcohol (the "facts"?) or is very intoxicated (a "condition"?) but does not know that her level of intoxication has rendered her "mentally incapacitated," does his affirmative defense fail? The Court of Appeals has so construed the affirmative defense where incapacity to consent was based on the victim being "mentally defective" *See, State v. Anderson*, 137 Or App 36, 40-41 (1995).

In *Anderson,* the defendant objected to exclusion of opinion and reputation evidence of the victim having sexual relations with other men under OEC 412, asserting that he believed she had the capacity to consent based on those facts,

notwithstanding his knowledge of her mental defect.[5] The court found no error, observing "defendant's generalized belief that the victim could consent to sexual relations is immaterial; rather, to avoid culpability, defendant had to show that he 'did not know of the facts or conditions responsible for the victim's incapacity to consent." Id., at 40. The court readily identified those "facts or conditions" responsible for the victim's incapacity to consent as her mental defect: "Thus, the critical inquiry was whether defendant was aware of the victim's mental retardation. We agree with the state that the victim's alleged reputation for promiscuous sexual activity is immaterial to that inquiry." Id., at 40-41.

As previously discussed, the definition of "mentally incapacitated" has no reference to any readily observable or objectively determinable facts, such as being unconscious, or developmentally disabled. Any variety of facts, conditions and contributing factors may cause an alleged victim to reach a state of "mental incapacitation," or be "physically unable to communicate unwillingness to act," outside the presence or knowledge of a defendant; e.g., lack of sleep, drugs ingested hours before the alleged offense, mental or emotional defects masked by drugs or alcohol. Furthermore, the State need not specify the facts or conditions responsible for the alleged victim's incapacity until after the close of all evidence. Indeed, the State's opening statement at the first trial in Mr. MB's case did not discuss the meaning of these elements of the crimes nor indicate what facts it anticipated would be presented to prove those elements.

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[5] The trial court did admit specific acts of the victim's prior sexual experience, and public displays of sexual affection. *Anderson v. Morrow, supra,* 371 F3d at 1030.

Thus, the affirmative defense requires proof by the defendant that he did not know of facts or conditions "responsible for the victim's incapacity to consent," ORS 163.325(3), when he is left to guess at what those facts or conditions may be. In those circumstances, which the defense expects will occur at trial in Mr. MB's case, the statutes would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution: The defendant is forced to identify the facts and conditions responsible for the essential element of mental incapacity, and/or "any other reason [for the alleged victim being] physically unable to communicate unwillingness to act," i.e., to assist the State in proving those elements, and then prove his lack of knowledge thereof, in order to avail himself of the statutory defense. *See, e.g., Phelps, supra*, 141 Or App at 559-60 (the legislature may place upon a defendant the burden of going forward on an affirmative defense so long as the state is required to prove each element of the crime beyond a reasonable doubt).

Because the definition of "mentally incapacitated" makes no reference to any facts or conditions—unlike all of the other statutory incapacity grounds in ORS 163.315—and the challenged clause of "physically helpless" embraces "any reason," i.e., any facts or conditions for being unable to communicate lack of consent, who determines what those facts and conditions are, so that a jury can decide if the affirmative defense is established? What if the parties disagree as to what "facts or conditions [are] responsible for the victim's incapacity to consent," which in turn determine the applicability of the affirmative defense? Where the law is this unclear and uncertain, "judges and juries have 'unbridled discretion to decide what conduct'

comes within it," in violation of Article I, sections 20 and 21, *State v. Moeller*, 105 Or App 434, 439-41 (1991), and the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

For the reasons aforesaid, and such other grounds and authorities as may be presented by supplemental memoranda or at hearing, the Court should grant the demurrer or alternative motion to dismiss; and any denial should be without prejudice for all "as applied" challenges to be raised and renewed at trial.

DATED this 25th day of October, 2018.

s/ Terri Wood
TERRI WOOD, OSB #883325
ATTORNEY FOR DEFENDANT