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

STATE OF OREGON,

Plaintiff,

v.

REVER GRAND, INC.,

Defendant.

Case No. 24CR42893

DEFENDANT’S DEMURRER TO THE
INDICTMENT

Defendant requests oral argument and a pretrial hearing before trial. Defendant estimates 90 minutes for oral argument. Official court reporting services are requested. UTCR 4.010 and UTCR 4.050(1).

Defendant, Rever Grand, Inc., through counsel, hereby demurs to the indictment pursuant to ORS 135.610 and ORS 135.630.

Introduction

A defendant is authorized to demur to a charging instrument based on any of the six grounds specified in the demurrer statute, ORS 135.630. “A demurrer is a challenge to the charging instrument itself. It must be resolved based on the face of the charging instrument. When ruling on a demurrer, a trial court cannot consider facts other than those alleged in the charging instrument.” *State v. Warren*, 364 Or 105, 113 (2018) (internal citations omitted).

The indictment charges twelve counts of Making a False Claim For Health Care Payment in violation of ORS 165.692(2), with each count alleging that “an agent of

1 Rever Grand while acting within the scope of employment and on behalf of the
2 corporations,” during a specified date range, did “knowingly, and with the intent to obtain
3 a health care payment to which defendant was not entitled, conceal from and fail to
4 disclose to the Department of Human Services, a health care payor, the existence of
5 information.” Defendant demurs to those charges on multiple grounds.

6 First, “the facts stated do not constitute an offense,” ORS 135.630(4), because
7 ORS 165.692(2) fails to provide fair notice and is unconstitutionally vague in violation of
8 Article I, section 21, of the Oregon Constitution and the Fourteenth Amendment of the
9 United States Constitution.

10 Second, the statute is facially invalid for infringing on the rights guaranteed under
11 the First Amendment of the United States Constitution.

12 Third, the facts stated do not constitute an offense because the indictment fails to
13 allege that the defendant had a *legal duty* to disclose the existence of information to the
14 Department of Human Services, an element that must be grafted on to ORS 165.692(2)
15 by judicial construction if the statute can be saved.

16 Fourth, the indictment is either duplicitous because it charges multiple offenses in
17 each count in violation of ORS 132.560(1)(b), in which case defendant demurrers on the
18 grounds that the indictment charges more than one offense not separately stated, ORS
19 135.630(3); or it fails to contain “[a] statement of the acts constituting the offense in
20 ordinary and concise language, without repetition, and in such manner as to enable a
21 person of common understanding to know what is intended,” as required under ORS
22 132.550(7), and is subject to demurrer for failing to “substantially conform to the
23 requirements” of ORS 132.550, ORS 135.630(2).

1 **I. ORS 165.692(2) Is Unconstitutionally Vague Under The Oregon And United**
2 **States Constitutions.**

3 **A. Legal Standards**

4 Criminal statutes run afoul of the *ex post facto* provisions in Article I, section 21,
5 of the Oregon Constitution when they are so vague that they confer to the judge or jury
6 “uncontrolled discretion in punishing defendants.” *State v. Graves*, 299 Or 189, 195
7 (1985). A criminal statute offends the equal privileges and immunities clause in Article I,
8 section 20, when it lacks standards governing its application, thereby leaving it to the
9 particular prosecutor, judge and jury to determine what is prohibited in a given case. *Id.*
10 As the Oregon Supreme Court has explained: “A criminal statute need not define an
11 offense with such precision that a person in every case can determine in advance that a
12 specific conduct will be within the statute's reach. However, a reasonable degree of
13 certainty is required by Article I, sections 20 and 21.” *Id.*

14 Similarly, the due process guaranteed under the Fourteenth Amendment of the
15 United States Constitution prevents a state from “taking away someone's life, liberty, or
16 property under a criminal law so vague that it fails to give ordinary people fair notice of
17 the conduct it punishes, or so standardless that it invites arbitrary enforcement.”
18 *Johnson v. United States*, 576 U.S. 591, 595 (2015). “To satisfy due process, ‘a penal
19 statute [must] define the criminal offense [1] with sufficient definiteness that ordinary
20 people can understand what conduct is prohibited and [2] in a manner that does not
21 encourage arbitrary and discriminatory enforcement.’” *Skilling v. United States*, 561 U.S.
22 358, 130 S. Ct. 2896, 2904 (2010) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357
23 (1983)) (alteration in *Skilling*). “[A] statute which either forbids or requires the doing of
24 an act in terms so vague that men of common intelligence must necessarily guess at its

1 meaning and differ as to its application, violates the first essential of due process of
2 law." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). Federal due process
3 also requires statutes defining crimes to set forth clear standards or guidelines for their
4 application because "[w]here the legislature fails to provide such minimal guidelines, a
5 criminal statute may permit a standardless sweep [that] allows policemen, prosecutors,
6 and juries to pursue their personal predilections." *Kolender*, 461 U.S. at 358 (internal
7 quotation and citations omitted; alteration in original).

8 In sum, people are constitutionally entitled to fair notice of what constitutes
9 criminal behavior, particularly when the criminal behavior involves a failure to act. See
10 *Lambert v. California*, 355 U.S. 225 (1957) (finding that a conviction under a law
11 requiring convicted felons to register with police within five days of entering Los Angeles
12 violated the Fourteenth Amendment because the law did not require "the commission of
13 acts, or the failure to act under circumstances that should alert the doer to the
14 consequences of his deed" and instead could be violated by "conduct that is wholly
15 passive," the "mere failure to register," and where a penalty may result from an
16 individual's failure to act and holding that "actual knowledge of the duty to register or
17 proof of the probability of such knowledge and subsequent failure to comply are
18 necessary before a conviction under the ordinance can stand."). Specifically, statutes
19 that prohibit the failure to do an act, like ORS 165.695(2), must set out with sufficient
20 clarity and definiteness standards from which ordinary people can discern whether they
21 are subject to the statute, what act they must do in order to avoid violating the statute,
22 and when they must perform that act because due process prohibits a conviction under
23 a statute that fails to do so. *Id.*

1 A defendant challenging a statute under the Oregon Constitution must
2 "demonstrate that he was unable to determine from a reading of [the statute defining the
3 offense] that *his* conduct was prohibited." *State v. Butterfield*, 128 Or App 1, 8
4 (1994) (emphasis in original); see also *State v. Howard*, 325 Or App 696, 702 (2023)
5 (same). Under the United States Constitution, a defendant must show that he did not
6 have fair notice that his conduct was prohibited. *Grayned v. City of Rockford*, 408 US
7 104, 108 (1972); see also *Howard*, 325 Or App at 702 (same). As set forth below, ORS
8 165.692(2), defining the crime of making a false claim for health care payments, is
9 unconstitutionally vague because it failed to provide constitutionally adequate notice to
10 defendant that his conduct was prohibited and fails to set forth any discernable
11 standards for its application.

12 **B. ORS 165.692(2) Is Unconstitutionally Vague.**

13 The crime of making a false claim for health care payment is defined in ORS
14 165.692 as follows:

15 "A person commits the crime of making a false claim for health care
16 payment when the person:

17 "(1) Knowingly makes or causes to be made a claim for health care
18 payment that contains any false statement or false representation
19 of a material fact in order to receive a health care payment; or

20 "(2) Knowingly conceals from or fails to disclose to a health care payor
21 the occurrence of any event or the existence of any information with
22 the intent to obtain a health care payment to which the person is
23 not entitled, or to obtain or retain a health care payment in an
24 amount greater than that to which the person is or was entitled."

21 Subsection (1) of the statute is straightforward. The offense in ORS 165.692(1) is
22 committed when a person "makes" a claim for health care payment, an act which is
23 made unlawful under the statute if committed by a person who knows the claim contains
24 a materially false statement. Subsection (1) further requires that the proscribed act is

1 committed “in order to receive a health care payment,” a requirement that provides
2 context for determining the materiality of the false statement. The requirement that the
3 false statement be “material” serves to narrow the scope of the statute, ensuring that it
4 reaches the type of false statements warranting criminal punishment while excluding
5 from the statute’s reach claims containing false statements that are immaterial to the
6 person’s receipt of payment on the claim.

7 Subsection (2) is a horse of a different color. It is not straightforward. It is vague
8 and indefinite. Although entitled “making false claim for health care payment,” the
9 offense defined in Subsection (2) does not require the act of making a claim—its
10 elements do not even contain the words “make” or “claim.” The proscribed conduct
11 under subsection (2) occurs when a person, with the requisite intent, “[k]nowingly
12 conceals from or fails to disclose to a health care payor the occurrence of any event or
13 the existence of any information * * *.” ORS 165.692(2). Subsection (2) does not prohibit
14 an act at all; it prohibits a *failure* to act, *i.e.*, an omission.

15 Nor does subsection (2) require that the person actually obtain or retain a health
16 care payment to which the person is not entitled”; rather, it requires only the *intent* to
17 obtain or retain such a payment. No resulting pecuniary harm is required. And unlike
18 subsection (1), subsection (2) does not contain a materiality requirement or other
19 limitation or guidance on what information a person must disclose to avoid violating the
20 statute. Instead, the language in ORS 165.692(2) seemingly eschews any such
21 limitation, expressly criminalizing a person’s failure to disclose “the occurrence of *any*
22 event or the existence of *any* information” with the requisite intent. (Emphasis added).

23 While various crimes may be carried out by an “omission” rather than an “act,”
24 very few statutes in Oregon directly criminalize a person’s failure to act. Those that do

1 provide fair notice and constitutionally adequate standards from which a person can
2 discern whether they are subject to the statute, what act they must perform to avoid
3 violating the statute, and when they must perform that act. For example, one way that a
4 person can commit theft is through deception, including when a person “fails to correct a
5 false impression that the person previously created or confirmed.” ORS 164.085(1)(d).
6 The requirement that the person previously engaged in the act of creating or confirming
7 that false impression both gives rise to the duty and puts the person on notice that they
8 have a duty to correct that false impression. Furthermore, the statute does not extend to
9 “any” false impression; it must be one having pecuniary significance, ORS 164.085(2),
10 and the person must have both the intent to deprive the owner of the property and, in
11 failing to correct the false impression, the intent to defraud, ORS 164.015(1); ORS
12 164.085(1).

13 Similarly, under ORS 164.015(2) and ORS 164.065, a person who actually
14 obtains property, *e.g.*, a health care payment, and “knows or has good reason to know”
15 that they are not entitled to that payment or the full amount of the payment and, with the
16 intent to deprive the health care payor of those funds, “fails to take reasonable
17 measures to restore the property to the” health care payor commits the crime of theft.
18 ORS 164.065; ORS 164.015(2). By obtaining the payment to which they knew or had
19 good reason to know they were not entitled, the person was put on notice of their duty
20 to act.

21 Comparing ORS 165.692(2) to any other Oregon criminal statute defining an
22 offense in terms of a failure to act, the deficiencies in ORS 165.692(2) are obvious. *See*,
23 *e.g.*, ORS 411.630; ORS 163.693; ORS 164.868; ORS 164.872; ORS 164.085; ORS
24 164.065; ORS 181.599; ORS 657.300; ORS 657B.120. For example, ORS

1 411.630(1)(b) provides that “[a] person may not knowingly obtain or attempt to obtain * *
2 * any public assistance or medical assistance to which the person * * * is not entitled * *
3 * by means of:”

4 “(b) Failure to immediately notify the Department of Human Services or
5 the Oregon Health Authority, if required, of the receipt or
6 possession of property or income, or of any other change of
7 circumstances, which directly affects the eligibility for, or the
8 amount of, the assistance.”

9 Like ORS 165.692(2), ORS 411.630(1)(b) can be violated by a person’s failure to
10 disclose information. However, ORS 411.630(1)(b) requires circumstances which
11 ensure that the person is on notice of their duty to act, *i.e.*, the person must knowingly
12 obtain or attempt to obtain public assistance benefits to which they are not entitled. It
13 sets forth the specific information that the person must disclose to avoid violating the
14 statute, *i.e.*, the person’s “receipt or possession of property or income, or of any other
15 change of circumstances, which directly affects the eligibility for, or the amount of, the
16 assistance” to which the person is entitled.” *Id.* Its application is limited to those
17 situations wherein the person is, in fact, “required” to disclose the information because it
18 “directly affects” the person’s entitlement to the public assistance. Finally, it identifies
19 when the person must come forward with the information, *i.e.*, “immediately” upon the
20 receipt or possession of property or change of circumstances.

21 To avoid violating ORS 165.692(2), a person must make a disclosure, but the
22 statute does not set forth any circumstances that would notify a person of their duty to
23 act or provide any guidance as to the potential source of that duty. It does not identify or
24 set forth any standard for determining what information the person must disclose to
avoid violating the statute. It also does not identify when, or the circumstances under
which, the person must come forward with the information to avoid violating the statute.

1 It does not require that the person actually obtain, attempt to obtain, or retain a health
2 care payment to which the person is not entitled—the person must merely form the
3 intent to do so. Thus, its application is not limited to situations where the information not
4 disclosed is, in fact, material to the person’s entitlement to a health care payment.
5 These deficiencies are fatal. There is no way for a person to discern from the language
6 in ORS 165.692(2) what it prohibits or what a person must do to avoid violating the
7 statute.

8 The statute is unconstitutionally vague under Article I, sections 20 and 21, of the
9 Oregon Constitution because defendant did not and could not know or determine from
10 reading ORS 165.692(2) what conduct it prohibits or that any of his conduct was
11 prohibited. *See Butterfield*, 128 Or App at 8. It is also unconstitutional under the Due
12 Process Clause of the Fourteenth Amendment of the United States Constitution
13 because defendant did not have fair notice that his conduct was prohibited. *See*
14 *Grayned*, 408 US at 108. Moreover, the statute fails to set forth standards governing its
15 application which, as shown in this case, allows law enforcement officers and
16 prosecutors to use the statute to “pursue their personal predilections.” Accordingly,
17 defendant demurrers to the indictment charging a violation of ORS 165.692(2) on
18 grounds that those counts fail to state an offense due to constitutional defect. ORS
19 135.630(4); *see Robertson*, 293 Or at 405-406 (stating that demurrer under ORS
20 135.630(4) is proper vehicle for challenging constitutional defect in a statute).

21 **II. ORS 165.692(2) Is Facially Invalid Under The First Amendment**

22 The United States Supreme Court has long recognized that the right to freedom
23 of speech guaranteed under the First Amendment of the United States Constitution
24 “extends not only to the right to speak and write freely, but to the underlying right of

1 'freedom of thought.'" *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965). It has held
2 "that the right of freedom of thought protected by the First Amendment against state
3 action includes both the right to speak freely and the right to refrain from speaking at
4 all," because "[t]he right to speak and the right to refrain from speaking are
5 complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The United States Supreme Court has
6 explained that federal constitutional guarantees, including the freedom of speech and
7 the right to privacy reflects that "[o]ur whole constitutional heritage rebels at the thought
8 of giving government the power to control men's minds" and that a state law aimed at
9 "control[ling] the moral content of a person's thoughts * * * is wholly inconsistent with the
10 philosophy of the First Amendment." *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).
11 Accordingly, a state "cannot constitutionally premise legislation on the desirability of
12 controlling a person's private thoughts." *Id.* at 566.

14 ORS 165.692(2) is facially invalid because it criminalizes a person's private
15 thoughts, thereby infringing on the rights to freedom of speech and thought and the right
16 to privacy protected under the First and Fourteenth Amendments. Despite its location in
17 a statute entitled "making false claim for a health care payment," ORS 165.692(2) does
18 not require a person to make a false claim for a health care payment. It does not require
19 an act that causes or threatens to cause a financial harm. It does not require any act at
20 all. Nor does it proscribe the actual infliction of a financial harm, as the statute does not
21 require the person to actually obtain or retain a health care payment to which the person
22 is not entitled. The element that a person must knowingly fail to disclose "the
23 occurrence of *any* event or the *existence* of *any* information" is a nullity without a
24 materiality requirement or other limitations on the type and scope of information that

1 must be disclosed and the circumstances under which the disclosure must be made.
2 That is, there will always be information within a person's knowledge which has not
3 been disclosed and the existence of undisclosed information, alone, does not cause or
4 present a risk of a cognizable harm.

5 The only remaining component of the offense defined under ORS 165.692(2) is
6 the intent element: the intent to obtain or retain a health care payment to which the
7 person is not entitled. That is a culpable mental state and the state is permitted to make
8 criminal an act committed with that intent, as it did in ORS 165.692(1). The state is also
9 permitted to criminalize a failure to act by a person who has, in fact, obtained a health
10 care payment to which the person is not entitled, as it did in the theft statutes, ORS
11 164.015(2) and ORS 164.065. However, the state is *not* permitted to criminalize the
12 mere formation of an intent to obtain or retain a health care payment to which a person
13 is not entitled, as it did in ORS 164.692(2). The offense under ORS 164.692(2) is
14 committed and completed the moment the person forms an intent to obtain or retain a
15 health care payment to which they are not entitled. No act in furtherance of that intent is
16 required and no resulting harm is required. Thus, the "harm" proscribed under ORS
17 165.692(2) is the mere formation of a bad intent. However, the state cannot
18 constitutionally proscribe thoughts which it deems harmful. Thus, even if the state finds
19 such an intent to be blameworthy, it "cannot constitutionally premise legislation on the
20 desirability of controlling a person's private thoughts." *Stanley*, 394 US at 565. B

21 Accordingly, defendant demurrers to the charges of making a false claim for
22 health care payment on grounds that the facts stated do not constitute an offense, ORS
23 135.630(4), as ORS 165.692(2) is facially invalid under the First and Fourteenth
24 Amendments of the United States Constitution.

1 **III. The Indictment Fails To Allege An Essential Element Necessary To Prove A**
2 **Violation Of ORS 165.692(2): That The Person Had A Legal Duty To**
3 **Disclose Information And Failed To Do So.**

4 As set forth below, the indictment fails to allege a missing element that the state
5 must plead and prove for a conviction under ORS 165.695(2): that defendant had a
6 legal duty to disclose information to the Department of Human Services and knowingly
7 breached that duty. Therefore, defendant also demurs to each of the counts charging
8 violations of ORS 165.692(2) on grounds “[t]hat the facts stated do not constitute an
9 offense[.]” ORS 135.630(4).

10 "The general rule is that an indictment in the language of the statute creating the
11 offense is sufficient *as long as it alleges all of the elements of the crime that must be*
12 *proven for conviction.*" *State v. Haas*, 13 Or App 368, 373, *aff'd* 267 Or 489 (1973)
13 (citations omitted) (emphasis added). "An indictment fails to state facts constituting an
14 offense when it fails to allege each of the essential elements of the offense." *State v.*
15 *Wimber*, 315 Or 103, 109 (1992). The facts alleged in each of the counts charging a
16 violation of ORS 165.695(2) are essentially the same: that defendant did "knowingly,
17 and with the intent to obtain a health care payment to which defendant was not entitled,
18 conceal from and fail to disclose to the Department of Human Services, a health care
19 payor, the existence of information." Although tracking the language of ORS 165.695(2),
20 the indictment fails to allege an essential element that must be proven to hold a
21 defendant criminally liable under that statute. In other words, even if the facts alleged in
22 the indictment were true, they are insufficient to convict defendant of violating ORS
23 165.695(2) because each count fails to allege an essential element of the offense.

24 Under Oregon law, "[t]he minimal requirement for criminal liability is the
performance by a person of conduct which includes a voluntary act or the omission to

1 perform an act which the person is capable of performing.” ORS 161.095(1). “Conduct,”
2 “act,” “voluntary act” and “omission” are all statutorily defined terms. “‘Conduct’ means
3 an act or omission and its accompanying mental state.” ORS 161.085(4). “‘Act’ means a
4 bodily movement.” ORS 161.085(1). “‘Voluntary act’ means a bodily movement
5 performed consciously and includes the conscious possession or control of property.”
6 ORS 161.085(2). “‘Omission’ means a failure to perform an act the performance of
7 which is required by law.” ORS 161.085(3). These statutory provisions provide the
8 foundation for all crimes under state law and for interpreting criminal statutes and
9 determining what they prohibit. *See State v. Simonov*, 358 Or 531, 541 (2016)
10 (explaining that “‘conduct’ is the foundation of criminal liability” and applying “the
11 minimum requirements of criminal liability” standard under ORS 161.095, together with
12 the definitions of “conduct” and “voluntary act” in ORS 161.085, to construe elements of
13 a criminal statute). Criminal liability under any statute must be based either on (1) a
14 voluntary, conscious bodily movement by the person or (2) a person’s failure to perform
15 an act which the person was legally obligated to perform. Under this statutory structure,
16 the state cannot prosecute a defendant for an omission unaccompanied by action
17 unless the omitted act is one which the defendant is “required by law” to perform. Thus,
18 criminal liability for an omission does not arise from a person’s failure to act, but from
19 the person’s breach of their legal duty to perform an act.

20 The crime under ORS 165.692(2) is committed when a person “[k]nowingly
21 conceals from or fails to disclose to a health care payor * * * the occurrence of any
22 event or the existence of any information* * *” with the requisite intent. The statute does
23 not require proof of an “act” but, rather, proof of a failure to perform an act, *i.e.*, an
24 “omission.” Accordingly, like all crimes predicated on an “omission,” in order to obtain a

1 conviction under ORS 165.695(2), the state must also allege and prove that the
2 defendant had a legal duty to disclose information to the health care payor and
3 knowingly breached that duty. ORS 161.085(3); ORS 161.095(1). In other words,
4 alleging and proving that a defendant knowingly concealed or failed to disclose
5 information to a health care payor is insufficient to establish an offense under ORS
6 165.695(2); rather, the state must *also* allege and prove that the defendant was required
7 by law to disclose the information and knowingly breached that legal duty by failing to
8 do so.

9 Proof of a knowing violation of a legal duty is not just statutorily required, it is
10 constitutionally required. If ORS 165.695(2) could somehow survive a constitutional
11 challenge through judicial construction, it could not be interpreted as merely prohibiting
12 inaction—not disclosing information—with a bad intent. See *Graves*, 299 Or at 197
13 (explaining that a criminal statute subject to attack “for failing fairly to define and
14 communicate its coverage* * *can sometimes be saved by a judicial interpretation that
15 gives it the requisite definiteness.”). Because the statute does not require an act or a
16 resulting harm, and because the state cannot criminally punish a person for having a
17 bad thoughts or for doing nothing, criminal liability under ORS 165.695(2) *must* be
18 based on the person’s knowing breach of a legal duty to disclose information.

19 Consequently, the state must allege and prove that defendant breached a legal duty to
20 disclose “the existence of information” to prove an offense under ORS 165.695(2).

21 Absent that allegation, the indictment fails to state an offense.

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1 Furthermore, the indictment must identify the specific law from which the duty to
2 disclose arises in each count to inform the defendant of the nature of the charge.¹ While
3 it is often sufficient to charge an offense in the words of the statute defining it, ORS
4 165.695(2) is not such an offense. At minimum, each count must identify the alleged law
5 or legal duty the state claims the defendant breached in order for the defense to glean
6 from the discovery what information the defendant was required to disclose and
7 allegedly failed to disclose and when that failure to disclose occurred. See *State v.*
8 *Cooper*, 78 Or App 237, 240-42 (1986) (affirming trial court's decision to sustain a
9 demurrer to a complaint charging the defendant with the crime of promoting gambling
10 because statutory term "promotes gambling" was defined by a nonexclusive list of acts
11 and discovery was an insufficient substitute for a charging instrument that specified "the
12 acts allegedly committed" by the defendant.); *State v. Fair*, 326 Or 485,490 (1998)
13 (quoting *State v. Smith*, 182 Or 497, 502 (1948) (explaining that for some offenses "a
14 statement of the particular circumstances of the crime is necessary in order to charge
15 the defendant with having committed specific acts bringing him within the condemnation
16 of the statute."); *State v. Sanders*, 280 Or 685, 688 (1977) (finding indictment charging
17 burglary and alleging that the defendant entered into a building "with the intent to
18 commit a crime therein" insufficient because it failed to specify the crime defendant
19 intended to commit when he entered and explaining that discovery "might or might not
20

21
22 ¹ The specific law, and disclosure requirements under that law, would presumably
23 provide some standards for the judge or jury tasked with applying the law to the facts to
24 determine whether a particular defendant violated ORS 165.695(2), potentially limiting
the scope of what the defendant was legally required to disclose and when that
disclosure needed to occur. However, the statute still fails to provide fair notice to the
defendant as required under the Fourteenth Amendment and remains facially invalid
under the First Amendment.

1 give the defendant a clue, but one charged with a felony is entitled to more than a clue
2 to what the state contends are the elements of the crime charged.”).

3 Adding to the vagueness of the charges against Rever Grand, the indictment
4 alleges that the failure to disclose was by “an agent of Rever Grand while acting within
5 the scope of employment and on behalf of the corporation,” yet fails to identify what
6 agent or executive failed to disclose information or whether it was the agent or Rever
7 Grand that had the duty of disclosure. Thus, the indictment provides no guidance that
8 would assist defendant in identifying which agent or executive allegedly had a duty to
9 disclose information or when the alleged omission occurred.

10 Accordingly, defendant demurs to the indictment purporting to charge the offense
11 of Making a False Claim For Health Care Payment in violation of ORS 165.692(2) on
12 the ground “[t]hat the facts stated do not constitute an offense[,]” ORS 135.630(4); on
13 the ground “[t]hat the accusatory instrument is not definite and certain,” ORS
14 135.630(6); and on the ground that the indictment fails to substantially conform to the
15 requirements of ORS 132.550(7), which requires an indictment to contain “[a] statement
16 of the acts constituting the offense in ordinary and concise language, without repetition,
17 and in such manner as to enable a person of common understanding to know what is
18 intended,” ORS 135.630(2).

19
20 **IV. The Indictment Is Either Duplicious Or It Fails To Comply With The
Requirements OF ORS 132.550(7).**

21 ORS 135.630(3) authorizes a defendant to demurrer to an indictment that
22 “charges more than one offense not separately stated[.]” ORS 135.630(2) authorizes a
23 defendant to demur to an indictment for non-compliance with the requirements of
24 certain statutes, including ORS 132.560, which provides that “[t]wo or more offenses

1 may be charged in the same charging instrument *in a separate count for each*
2 *offense[.]*” ORS 132.560(1)(b) (emphasis added).

3 The indictment charges 12 separate counts of “making a false claim for health
4 care payment” in violation of ORS 165.692(2). The language in each count tracks ORS
5 165.692(2). The counts allege consecutive date ranges spanning more than 57 months,
6 with each individual count alleging a specific date range of approximately 180 days,
7 except Count 12 which alleges a period of just over two months. Each count also
8 contains a long list of “Department of Human Services run numbers” which represent
9 “claims” alleged to be “include[d]” in the particular count. However, the indictment does
10 not explain how the “claims” in those “run numbers” are “include[d]” in or even relevant
11 to the offense charged, which does not contain an “act” element requiring the making of
12 a claim or a “result” element requiring any injury, loss or other consequences resulting
13 from the omission.

14 The charging method used in the indictment appears to be based on ORS
15 165.694, which provides, in relevant part, that “single acts of making a false claim for
16 health care payment may be added together into aggregate counts of making false
17 claims for health care payments if the acts were committed * * *[a]gainst the same
18 health care payor* * *within a 180-day period.” ORS 165.694(1)(b). That is, it appears
19 that each count in the indictment represents a period of approximately 180-day period
20 beginning August 13, 2019, and continuing through May 31, 2024, for a total of 12
21 counts, with each count listing all “claims” “include[d]” in the specified 180-day period.

22 The purpose of the “aggregates counts” provision found under ORS 165.694 is
23 not clear. It is similar to *former* ORS 164.115(6), which permitted the value from “single
24 theft transactions” to be “added together” if the thefts were committed “[a]gainst the

1 same victim * * * within a 180-day period,” thereby allowing a prosecutor to charge a
2 defendant with a higher degree of theft in a single consolidated count. See Or. Laws
3 2023 c. 151 §6 (amending *former* ORS 164.115(6) to current version). However, under
4 the theft statutes, the value of the property stolen is used to measure the severity of the
5 conduct, *i.e.*, the degree of theft with which a defendant can be charged. The offense of
6 making a false claim for health care payment, on the other hand, is not divided into
7 different degrees of severity and does not require a resulting loss.

8 To the extent that ORS 165.694 serves a purpose, it expressly applies only to
9 “single acts of making a false claim for health care payment * * * if the acts were
10 committed * * * [a]gainst the same health care payor * * * within a 180-day period” and
11 requires the indictment to “identify those *claims* that are part of any aggregated counts.”
12 ORS 165.694 (emphasis added). Therefore, it would only apply to a charge under ORS
13 165.692(1), which requires an “act” of making a false “claim” for a health care payment.
14 It does not apply to a charge under ORS 165.692(2), which does not require an “act” of
15 making a claim or a “false claim.”

16 Moreover, whatever the effect or purpose of ORS 165.694 may be, it does not
17 override ORS 132.560. See Attachment A, Minutes, Senate Committee on Judiciary,
18 March 21, 1995 (Janine O’Neill Robben, Director of the Medicaid Fraud Unit, Oregon
19 Department of Justice, and drafter of the statute, was asked whether the section of SB
20 220 that later became ORS 165.694 was “meant to be in lieu of ORS 132.560 or
21 complimentary to” it, and Robben responded: “It is meant to be complimentary to.”).
22 Pursuant to ORS 132.560(1)(b), “[t]wo or more offenses may be charged in the same
23 charging instrument *in a separate count for each offense[.]*” (Emphasis added).
24 Charging “aggregated counts” of ORS 165.692 in a single count is not the same as

1 aggregating *the value* from “single theft transactions” to form a single, consolidated
2 count of theft that represents the overall severity of a defendant’s conduct. Rather, an
3 indictment charging “aggregated counts” of making false health care claim under ORS
4 165.692(2) in a single count is duplicitous and impermissible under ORS 132.560(1)(b).

5 The offense under ORS 165.692(2) is committed at the time of the omission, *i.e.*,
6 when a person is faced with circumstances under which they are legally required to
7 make a disclosure and fail to do so. Crimes predicated on omissions are not continuing
8 offenses; they are committed and complete when circumstance arise which trigger a
9 person’s legal duty to take a specific action and the person fails to perform that act. The
10 gravamen of the offense is the breach of that legal duty, not “the absence of action from
11 that point forward.” *State v. Depeche*, 242 Or App 155, 162-63 (2011) (rejecting state’s
12 argument that failure to register as a sex offender is an ongoing offense). Accordingly, a
13 single omission under circumstances requiring disclosure constitutes a single violation
14 of ORS 165.692(2); the absence of action from that point forward does not result in an
15 additional violations of ORS 165.692(2). Rather, a subsequent omission—*i.e.*, another
16 distinct breach of a legal duty to disclose information—is necessary to result in a
17 separate violation of ORS 165.692(2). See *State v. Nesbit*, 274 Or App 694, 696 (2015)
18 (where state’s evidence was that the defendant filed a single, false claim and
19 subsequently received multiple payments as a result, there was only one offense); *State*
20 *v. Spynu*, 278 Or App 250 (2016) (affirming multiple convictions of making false claims
21 for health care payment in violation of ORS 165.692(1) where state presented evidence
22 that the defendant committed separate acts of submitting distinct false vouchers at
23 different, distinct times).

1 If the state's theory here is that each "claim" or "run number" listed in an
2 individual count represents a distinct instance where defendant had a legal duty to
3 disclose certain information and knowingly failed to do so, the indictment is duplicitous
4 because it charges multiple offenses in each count in violation of ORS 132.560(1)(b).
5 Accordingly, defendant demurs to each of those counts on the grounds that the
6 indictment charges more than one offense not separately stated and does not
7 substantially conform to ORS 132.560. ORS 135.630(2) & (3).

8 If that is not the state's theory, the "run numbers" listed are not relevant to the
9 charges. Moreover, the number of counts and date alleged in each counts must reflect
10 the number and dates of specific omissions, not the number of 180-day periods within
11 the five-year statute of limitations for charging a violation of ORS 165.692. Thus, the
12 indictment fails to comply with ORS 132.550(7), which requires an indictment to contain
13 "[a] statement of the acts constituting the offense in ordinary and concise language,
14 without repetition, and in such manner as to enable a person of common understanding
15 to know what is intended." The Oregon Supreme Court has explained that ORS
16 132.550(7) entitles a defendant to pretrial notice by requiring that an indictment contain
17 specified information:

18 ""* * *(1) to inform the defendant of the nature of the crime with sufficient
19 particularity to enable him to make his defense, (2) to identify the offense
20 so as to enable the defendant to avail himself of his conviction or acquittal
21 thereof if he should be prosecuted further for the same cause, and (3) to
22 inform the court of the facts charged so that it may determine whether or
23 not they are sufficient to support a conviction.""

21 *Antoine v. Taylor*, 368 Or 760, 772 (2021) (quoting *State v. Cohen*, 289 Or 525, 529
22 (1980)). The indictment here fails to provide defendant with the requisite notice of the
23 charges against him, as it does not set forth facts which would allow the defense to
24 identify what information the defendant allegedly failed to disclose, how many omissions

1 the state is alleging, or when the omission or omissions occurred. Accordingly,
2 defendant demurs on the grounds that the indictment fails to comply with ORS
3 132.550(7). ORS 135.630(2).

4 DATED this 16th day of September, 2024.

5
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