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8 SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO

9 PEOPLE OF THE STATE OF
10 CALIFORNIA

11 Plaintiff,

12 vs.

13 CRESCENT VELLUCCI,

14 Defendant.

Case No.: 11M07135

Department No. 9

NOTICE OF DEMURRER AND
DEMURRER

15 TO: EILEEN M. TEICHERT, CITY ATTORNEY FOR THE CITY OF SACRAMENTO

16
17 PLEASE TAKE NOTICE that on November 22, 2011, at 8:30 am, or as soon thereafter
18 as the matter may be heard, in Department 9 of the above entitled court, defendant, Crescent
19 Vellucci, by and through attorney, Joshua Kaizuka, will demur to the complaint, on file herein,
20 pursuant to Penal Code Section 1004, and the Due Process provisions of both the Federal and
21 State Constitutions.

22 DATED: November 10, 2011

Respectfully Submitted,
The Law Offices of Earl Carter and
Associates

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25
26 By: _____
Joshua Kaizuka

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POINTS AND AUTHORITIES IN
SUPPORT OF DEMURRER

14 INTRODUCTION

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16
17 California Penal Code section 1004 authorizes a defendant to challenge the
18 sufficiency of a complaint by demurrer. Section 1004 allows that a defendant may demur
19 to the complaint at any time prior to the entry of plea. However, local rule 5.11
20 specifically asserts that all pretrial motions, *including a demurrer*, are not waived by the
21 entry of plea, and can be filed at any time. In the instant case, while Mr. Vellucci has
22 entered a plea, meets the requirements set forth meets the local rule's requirement for the
23 filing of a pre-trial motion. (Local Rules for the Superior Court of California, County of
24 Sacramento, rule 5.11.)
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1 STATEMENT OF FACT

2 On, or about, October 6, 2011, Mr. Vellucci was arrested by Officers from the
3 Sacramento City Police Department while taking part in a peaceful protest in Cesar
4 Chavez Park. Mr. Vellucci was booked into the custody of the Sacramento County
5 Sherriff’s Department. On, or about, October 7, 2011, Mr. Vellucci signed an
6 “Agreement to Appear” and was released. On, or about, October 24, 2011, the City
7 Attorney’s Office for the City of Sacramento filed a one count complaint in the Superior
8 Court of California for the County of Sacramento. On October 26, 2011, Mr. Vellucci
9 was arraigned on this complaint charging a violation of Sacramento City Code section
10 12.72.090(a)(1).
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14 LAW AND ARGUMENT

15 I.

16 A DEMURRER LIES WHERE THE ACCUSATORY
17 PLEADING DOES NOT GIVE SUFFICIENT NOTICE OF
18 THE CONDUCT WHICH MUST BE DEFENDED
19 AGAINST.

20 A defendant is entitled to adequate notice, and some particularity, of the specific
21 criminal conduct he is required to defend against at trial. (*Lamadrid v. Municipal Court*
22 (1981) 118 Cal.App.3d 786, 790, citing *Sallas v. Municipal Court* (1978) 86 Cal.App.3d
23 737, 742-743; 5th, 6th and 14th Amends. to the U.S. Const., art. I, §§ VII, XIV, XV, and
24 XVI.) In this action the broad allegations of “loitering” and “remaining” are insufficient
25 to provide constitutionally adequate notice of the specific criminal conduct which
26 defendant is required to defend against at trial.
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1 II.

2 THE COMPLAINT FAILS TO PROVIDE DEFENDANT
3 WITH NOTICE OF THE NATURE AND CAUSE OF THE
4 ACCUSATION AGAINST HIM IN VIOLATION OF THE
5 SIXTH AND FOURTEENTH AMENDMENTS, AS WELL
6 AS CALIFORNIA DUE PROCESS PROTECTIONS.

7 State and federal due process protections require that a person be advised of the
8 charges against him so he may have a reasonable opportunity to prepare and present his
9 defense. (*In re Oliver* (1948) 333 U.S. 257 [273, 92 L.Ed. 683]; *Cooke v. United States*
10 (1925) 267 U.S. 517, 536-37 [17 L.Ed. 755].) “[A] person cannot be convicted of an
11 offense (other than a necessarily included offense) not charged against him by indictment
12 or information, whether or not there was evidence at trial to show that he had committed
13 the offense.” (*In re Hess* (1955) 45 Cal.2d 171, 174-75.) Furthermore, due process
14 requires a criminally accused be given sufficient notice of the charge against him such
15 that he or she can prepare to meet the charge against him or her and prepare a defense.
16 (*Lamadrid v. Superior Court, supra*, 118 Cal.App.3d at p. 790.) A defendant is “entitled
17 to be advised with some particularity which of the several available factual theories the
18 People would rely upon.” (*Id.* at p. 791.)

19 With regard to a fair trial, “[t]he sixth amendment requires, in part, that an
20 information state the elements of an offense charged with sufficient clarity to appraise a
21 defendant of what he must be prepared to defend against.” (*Givens v. Housewright* (9th
22 Cir. 1986) 786 F.2d 1378, 1380, citing *Russell v. United States* (1962) 369 U.S. 749, 763-
23 764.) The Sixth Amendment notice provisions guarantee a criminal defendant the right
24 to be clearly informed of the charge(s) against him or her. As stated by the United States
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1 Supreme Court in *Cole v. Arkansas* (1948) 333 U.S. 196, “[n]o principle of procedural
2 due process is more clearly established than that notice of the specific charge, and a
3 chance to be heard in a trial of the issues raised by that charge, if desired, are among the
4 constitutional rights of every accused in a criminal proceeding in all courts, state or
5 federal.” (*Id.* at p. 201.)
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8 In the present case, defendant has not been given sufficient notice to enable him to
9 prepare a defense to the crime the Prosecution seeks to prove he committed. In relevant
10 part, the complaint alleges only that the defendant “remained or loitered” in the park.
11 The lack of notice severely prejudices the defendant’s case.
12

13 III.

14 WHERE THE PROSECUTION MAY RELY ON DISTINCT
15 FACTUAL THEORIES FOR PROOF OF A SINGLE
16 COUNT, THEY MUST ELECT AND MAKE CLEAR
17 WHICH ACTS SUPPORT THE COUNT CHARGED.

18 The prosecution must provide notice of the act or acts which support the charge,
19 except where the offense contemplates not individual acts, but a course of conduct.
20 (*People v. Salvato* (1991) 234 Cal.App.3d 872, 881-882.) This exception arises in two
21 contexts. The first is when the acts are so closely connected that they form part of one
22 and the same transaction. The second is when the statute contemplates a continuous
23 course of conduct of a series of acts over a period of time. (*People v. Thompson* (1984)
24 160 Cal.App.3d 220, 224.) Neither exception applies here.
25
26

27 In the instant case, the prosecution has alleged a violation of Sacramento City
28 Code section 12.72.090(a)(1). In pertinent part, that code section makes criminal certain

1 uses of Sacramento parks where people “remain or loiter” outside of certain prescribed
2 times. Of import is that the code section outlaws two distinct and separate acts, that is to
3 remain *or* loiter. Here the prosecution has given no actual notice of which theory of
4 criminal liability they seek to prosecute the defendant. Loiter, as defined by case law, has
5 a very precise and definite legal meaning, and cannot be said to be synonymous with
6 remain. Courts have consistently held that loiter has a sinister or wrongful meaning and
7 connotes “lingering [in a] designated place for the purpose of committing a crime as
8 opportunity may be discovered”. (*In re Cregler* (1961) 56 Cal.2d 308, 311-312; Pen.
9 Code, §647(h).) Remain, on the other hand, as used in this statute would appear to
10 import the common usage of “to stay in the same place.” (Merriam-Webster, 3rd
11 Edition.)
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16 Where the allegations in an accusatory pleading show distinct acts which provide
17 distinct theories of liability, the prosecution must elect the acts which will be used to
18 support the pleading. (*People v. Moreno* (1973) 32 Cal.App.3d Supp. 1; *Sallas v.*
19 *Municipal Court, supra*, 86 Cal.App.3d at pp. 742-744; *Gaylord v. Municipal Court*
20 (1987) 196 Cal.App.3d 1348.) “[A] pleading which satisfies section 952 will not
21 invariably, when tested by demurrer, satisfy due process notice requirements.”
22 (*LaMadrid v. Municipal Court, supra*, 118 Cal.App.3d at p. 790; *People v. Jordan* (1971)
23 19 Cal.App.3d 362; see also *People v. Gordon* (1985) 165 Cal.App.3d 839, 865 [Conc.
24 Opn. by Sims, J.]
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1 In this case, the failure to elect creates a substantial risk that the defendant will be
2 unable to adequately prepare for trial. Also there is a danger that the prosecution will
3 attempt to use shifting theories of liability to convict the defendant. This is a violation of
4 the defendant's right to due process under both the federal and state constitutions.
5

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7 IV.

8 THE STATUTE DOES NOT PROVIDE ADEQUATE
9 GUIDELINES FOR ENFORCEMENT, AND ILLEGALLY
10 PERMITS ARBITRARY AND CAPRICIOUS
11 ENFORCEMENT.

12 As recently held in the context of gang injunctions, due process requires not only
13 that the law be specific enough to provide adequate notice of what is being prohibited,
14 but also that it not be so vague as to allow for arbitrary and discriminatory application.

15 "A directive 'in terms so vague that men of common intelligence
16 must necessarily guess at its meaning and differ as to its application,
17 violates the first essential of due process of law.' [Citation.]" (*In re Berry*
18 (1968) 68 Cal.2d 137, 156.) "[T]he underlying concern is the core due
19 process requirement of adequate *notice*." (*People ex rel Gallo v. Acuna*
20 (1997) 14 Cal.4th 1090, 1115.) "[A] law that is 'void for vagueness' not
21 only fails to provide adequate notice to those who must observe its
22 strictures, but also 'impermissibly delegates basic policy matters to
policemen, judges, and juries for resolution on an *ad hoc* and subjective
basis, with the attendant dangers of arbitrary and discriminatory
application.'" (*Id.*, at p. 1116.)

23 "Two principles guide the evaluation of whether a law . . . is
24 unconstitutionally vague. First, 'abstract legal commands must be applied
25 in a specific *context*. A contextual application of otherwise unqualified
26 legal language may supply the clue to a law's meaning, giving facially
27 standardless language a constitutionally sufficient concreteness.' Second,
28 only reasonable specificity is required. Thus, a statute 'will not be held void
for vagueness "if any reasonable and practical construction can be given its
language or if its terms may be made reasonably certain by reference to
other definable sources" (*People v. Lopez* (1998) 66 Cal.App.4th 615, 630.)
"[A] claim that a law is unconstitutionally vague can succeed *only* where

1 the litigant demonstrates, not that it affects a substantial number of others,
2 but that the law is vague as to her or ‘impermissibly vague in *all of its*
3 *applications.*’ (*Acuna, supra*, 14 Cal.4th at p. 1116.) [italics original.]

4 (*People ex rel. Totten v. Colonia Chiques* (2007) 156 Cal. App.4th 31, 47.)

5 There are no definitions in section 12.72.090 whatsoever. The terms “remain or
6 loiter” are neither defined in the statute itself, nor are they defined anywhere in the
7 statutory scheme. As stated above, the code section does not prohibit entry into the park.
8 Can a person walk through the park after seeing a movie at the Crest or going to a
9 restaurant in the area? Can a person stop and get a drink of water? Can one stop and tie
10 one’s shoes? Can one sit and meditate on the values espoused by Cesar Chavez, the
11 park’s namesake?
12

13
14 What about the term “emergency errand”? The code section states that it does not
15 apply “[t]o any person on an emergency errand”. Who decides what constitutes an
16 emergency? When does that emergency end? What is the scope of such an emergency?
17

18
19 Here, the park restriction is “so vague that men of common intelligence must
20 necessarily guess at its meaning and differ as to its application” (*In re Berry, supra*,
21 68 Cal.2d at p. 156.) Furthermore, it “impermissibly delegates basic policy matters to
22 policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the
23 attendant dangers of arbitrary and discriminatory application.” (*Acuna, supra*, 14
24 Cal.4th at p. 1116.) As such, the statute violates due process of law and is unenforceable.
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V.

STRICTER STANDARDS OF PERMISSIBLE
VAGUENESS SHOULD BE APPLIED TO SACRAMENTO
CITY CODE SECTION 12.72.090 BECAUSE THIS
STATUTE HAS THE POTENTIAL TO INHIBIT SPEECH.

Where a statute may interfere with, or inhibit, speech stricter standards should be applied by courts when determining whether the statute is impermissibly vague. (*Smith v. California* (1959) 361 U.S. 147, 151). This greater precision is necessary because, where a law is vague, a person is given the Hobson's choice of either acting at her peril or choosing not to engage in the free and vibrant dissemination of ideas. (*People v. Mirmirani* (1981) 30 Cal. 3d 375, 383).

Our country has a long and cherished history of using the town square as the focal point for those who wish to come together and vocalize their dissent. (*Gathright v. City of Portland* (2006) 439 F.3d 573, 576). Here there is no doubt that Defendant was participating in an organized meeting intended to vocalize a community's disapproval of our nation's distribution of wealth. This dissent was a political statement, and was, by all accounts, conducted in a peaceful manner. Moreover, the Defendant was vocalizing his dissent at precisely the place where we, as a community, would expect: the town square.

The statute at issue allows for city officials, and police, to impermissibly interfere with constitutionally protected speech, at a place that for over 150 years has been the

1 platform to protest for the right of speech and assembly. Cesar Chavez Plaza, in fact, is
2 built on the location of the original California State Capitol Building site.¹
3

4 Additionally, the code section provides no instruction as to how someone could
5 possibly know whether the organized event that they are taking part in is “sponsored or
6 cosponsored” by the appropriate city agency. This also has the effect of chilling speech
7 by dissuading people from taking part in otherwise legal forms of redress.
8

9
10 **CONCLUSION**

11 In this matter, the charges against the defendant are vague and do not give the
12 defendant adequate notice so that the defense may fairly respond to them. Furthermore,
13 the prosecution must elect which provision of the statute has been violated by the
14 defendant in order to comply with the demands of due process. Additionally, the statute
15 does not provide adequate guidelines for enforcing it, thereby permitting arbitrary
16 application. For the foregoing reasons, the defendant respectfully requests that the court
17 grant the demurrer.
18
19

20 DATED: November 10, 2011

20 Respectfully Submitted,
21 The Law Offices of Earl Carter and
22 Associates

23 By: _____
24 Joshua Kaizuka
25

26 _____
27 ¹ Construction of the capitol building was halted . . . [to prevent] the Legislature from exploiting current
28 and future generations of Californians with excessive state debt. . . . It seems quite fitting that a park named for
someone who spent much of his adult life fighting for the farm workers in California and other states would be built
upon the very foundation of a building where construction was halted to protect the people of California.
(www.parksguide.com/cesar-chavez-park/.)