IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON, Plaintiff, vs. ALAN JAMES SWINNEY, Defendant.	Case No.: 20CR50067 DEFENDANT'S RELEASE MOTION UTCR 4.050: 1 Hour

Comes now defendant, Alan James Swinney, by and through counsel, Joseph Westover, moves this court for an order reducing his security amount to $250.

This motion is, in the opinion of counsel, well founded in law and was neither made nor filed for the purpose of delay, and is supported by the memorandum of law below. Defendant relies upon the contents of this motion as well as any additional authorities that produced at the hearing on this motion, all pleadings, records, and files in this case, and any oral or documentary evidence as may be produced at the hearing on this motion.

I. DEFENDANT'S REQUEST IS TO FIX SECURITY, NOT REDUCE IT

In Oregon, "[e]xcept as provided in ORS 135.240, a person in custody has the right to immediate security release or to be taken before a magistrate without undue delay." ORS 135.245. The indictment charging defendant lists a security amount. In this case, that amount is $560,000. That amount corresponds to an Order Adopting a Security Release Schedule. The current security amount is set pursuant to ORS 135.245, it is not an amount determined by a magistrate pursuant to ORS 135.265(1), which reads "[i]f the defendant is not released on

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personal recognizance under ORS 135.255, or granted conditional release under ORS 135.260, or fails to agree to the provisions of the conditional release, the magistrate shall set a security amount that will reasonably assure the defendant's appearance."

The only amount that has been determined to be facially constitutional upon arrest is $50,000. *See State v. Sutherland*, 329 Or 359, 367, 987, P2d 501 (1999) (The $50,000 "specified by [ORS 135.240(5)(a)] as the minimum amount that 'shall' be imposed must be read as the minimum amount that is to be imposed initially, *on arrest*. Thereafter, defendant may request a hearing for the purposes of establishing that, as to him or her, requiring that or a higher amount as security is constitutionally impermissible." (emphasis added)).

Given this, as a prelude to defendant's motion to reduce bail to $0, the court should set the bail amount at the constitutionally permissible $50,000.

II. THE MULTNOMAH COUNTY SECURITY SCHEDULE'S IMPOSITION OF $250,000 FOR EACH MEASURE 11 OFFENSE IS FACIALLY UNCONSTITUTIONAL

Multnomah County's security release schedule sets bail at $250,000 for "[a]ny Felony Offense Included in ORS 137.700 and 137.707." This is unconstitutionally excessive and contrary to Oregon's release statutes. Several issues present.

First, "[n]otwithstanding any other provision of law, the court shall set a security amount of not less than $50,000 or a defendant charged with an offense listed in ORS 137.700 * * *." ORS 135.240(5)(a). The $50,000

> "specified by that statute as the minimum amount that 'shall' be imposed must be read as the minimum amount that is to be imposed initially, *on arrest*. Thereafter, defendant may request a hearing for the purposes of establishing that, as to him or her, requiring that or a higher amount as security is constitutionally impermissible."

State v. Sutherland, 329 Or 359, 367, 987 P2d 501 (1999). The decision as to excessiveness "necessarily presupposes a factual inquiry into the issue of 'excessiveness.' Only a hearing can provide that factual inquiry." *Id.* That hearing where the trial court will "consider the individual

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circumstances of a particular defendant." *Id.* Ultimately, the court concluded that the $50,000 minimum initial bail was not facially unconstitutional under either the Oregon or federal constitutions. *Id.* at 368.

Sutherland's language that $50,000 is the minimum amount to be imposed initially, *on arrest*, indicates the $50,000 should be imposed pursuant to ORS 135.240—"Except as provided in ORS 135.240, a person in custody has the right to immediate security release * * * ."—not ORS 135.265—fixing bail in an amount following a hearing where the magistrate has considered the individual circumstances of the particular defendant. *See also Gillmore v. Pearce*, 302 Or 572, 580, 731 P2d 1039 (1987) ("[T]he judge must—if he is to make an informed decision—take into consideration such matters as the nature of the defendant, the nature of the offense and the possible penalties which could be imposed if defendant was convicted.")

Second,

> "[w]hen a defendant who has been released violates a condition of release and the violation: (A) Constitutes a new criminal offense, the court shall cause the defendant to be taken back into custody, shall order the defendant held pending trial and shall set a security amount of not less than $250,000. (B) Does not constitute a new criminal offense, the court may order the defendant to be taken back into custody, may order defendant held pending trial and may set a security amount of not less than $250,000."

ORS 135.240(5)(b). Multnomah County's bail schedule treats every defendant charged with a measure 11 offense, *without any factual inquiry at all*, as if they have (1) already posted bail, (2) violated the conditions of their release, and (3) that violation constitutes a new criminal offense. In setting the bail schedule, the Multnomah County Circuit Court has, in effect, preempted ORS 135.240(5)(a) with ORS 135.240(5)(b)(A), declaring that all defendants alleged to have committed an ORS 137.700 offense, all of whom maintain the presumption of innocence on that charge, shall be presumed to have *committed an additional offense*. There are no circumstances in which this is anything but an abuse of discretion. *See Delaney v. Shobe*, 218 Or 626, 628, 346 P2d 126 (1959).

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Third, the Oregon Supreme Court has repeatedly opined that bail "is not to be set so as to make it impossible, as a practical matter, for a prisoner to secure release." *Gillmore v. Pearce,* 302 Or 572, 580, 731 P2d 1039 (1987). In Multnomah County, defendants who remain in custody following their arrest are presumed indigent, and are appointed an attorney at arraignment without any inquiry into their means. Requiring a defendant in such a situation to post a minimum of $25,000 when the same system presumes their indigency and sets the amount, as a practical matter, impossibly high, and constitutes a practice of preventive detention, which "not authorized by the Oregon statutory scheme." *Id.* at 577.

For these reasons, setting security at $250,000 upon a defendant's arrest constitutes excessive bail, and the court should, prior to hearing defendant's argument to fix bail, reduce the amount to the only number currently determined to pass facial constitutional muster: $50,000.

III. THE COURT IS NOT MAKING A "RELEASE DECISION," IT IS MERELY FIXING BAIL AND IMPOSING ANY OTHER REASONABLE CONDITIONS, PURSUANT TO ORS 135.240(5)

In non-measure 11 cases when a release hearing occurs, the magistrate must first make a release decision as defined as by ORS 135.230(10), which requires the court, upon considering the primary and secondary release criteria, to make a determination as to what *form* of release to impose.

Four forms of release exist in Oregon. The first three, per statute, are personal recognizance, ORS 135.230(6), conditional release, ORS 135.230(2), and security release, ORS 137.230(12). Those three forms

"are independent, with little overlap.

> "In choosing among those three types of release, the releasing magistrate makes a 'release decision' [as defined by ORS 135.230(10)] Thus, a 'release decision' is a decision as to the 'form of release,' not a decision as to whether release shall be ordered in the first instance. Accordingly, the 'primary release criteria' and 'secondary release criteria' set forth in ORS 135.240(7) and (11) respectively guide the magistrate's decision making as to what *form* of release—recognizance, security, or conditional—is most appropriate, and if conditional release, what conditions are best suited."

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State v. Slight, 301 Or App 237, 247, 456 P3d 366 (2019) (alteration added) (emphasis in original).

In cases where a defendant is charged with a measure 11 offense, instead of making a release decision, the magistrate *must* impose the fourth type of release, which is a hybrid between a security and conditional release. *See* ORS 135.240(5)(a). There, a magistrate may not impose

> "any form of release other than a security release if: (A) The United States Constitution or the Oregon Constitution prohibits the denial of release under subsection (4) of this subsection; (B) The court determines that the defendant is eligible for release under subsection (4) of this section; or (C) The court finds that the offense is not a violent felony."

Id. In this case, defendant may only be released on a security release.

Whereas in non-measure 11 cases the court may not impose conditions beyond the security amount, ORS 135.245(4) (Upon a finding that release of the person on personal recognizance is unwarranted, the magistrate shall impose *either* conditional release or security release."); *Slight*, 301 Or App at 247; *also compare* ORS 135.365(1) (in security release cases, requiring the magistrate to "set a security amount that will reasonably assure the defendant's appearance) *with* ORS 135.260(1) (defining the scope allowable conditions in a conditional release case), in measure 11 cases, "[i]n addition to the security amount described in paragraph (a) of this subsection, the court may impose any supervisory conditions deemed necessary for the protection of the victim and the community," ORS 135.240(5)(b).

The court here is required to set a security amount and is permitted to impose additional conditions not limited to assuring defendant's later appearance.

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IV. UNDER OREGON LAW, THE ABILITY OF THE ACCUSED TO ACTUALLY PAY THE SECURITY AMOUNT MUST BE CONSIDERED WHEN SETTING IT.

The Oregon Supreme Court has repeatedly held that the security amount "is not to be set so as to make it impossible, as a practical matter, for a prisoner to secure release." *Gillmore v. Pearce*, 302 Or 572, 580, 731 P2d 1039 (1987); *see also State ex rel. Lowrey v. Merryman*, 296 Or 254, 258, 674 P2d 1173 (1984) ("the purpose of 'bail' is to ensure appearance and that it may not be set at an amount chosen, as a practical matter, to make it impossible for a prisoner to secure release."); *Owens v. Duryee* 285 Or 75, 80, 589 P2d 1115 (1979) ("Bail may not be set at an amount chosen in order to make it impossible, as a practical matter, for a prisoner to secure his release.").

The ability of a the accused to give bail in particular has been repeatedly endorsed by the court. *See Gillmore v. Pearce*, 302 Or. at 580; *State ex rel. Lowrey v. Merryman* 296 Or. at 258; *Owens v. Duryee* 285 Or. at 80. The court must consider defendant's legal and factual indigence in determining the amount of security to impose.

When setting that amount, ORS 135.265(1) requires "the security amount to be set at the lowest amount that will 'reasonably assure the defendant's appearance.'" *Application of Liberman*, 293 Or 457, 466, 650 P2d 83 (1982); *see also Gillmore*, 302 Or at 580; *State ex rel. Lowrey v. Merryman* 296 Or at 258; *Owens*, 285 Or at 80.

V. A DEFENDANT'S DANGER TO THE COMMUNITY CANNOT BE USED TO DETERMINE THE AMOUNT OF SECURITY REQUIRED.

Oregon's statutes and their interpretive history are clear that the defendant's danger to the community is not relevant to the security amount. While those factors are used elsewhere, statute and case law show that considering them in setting the security amount is inappropriate.

A decision about the security amount is a specific process, and must be treated as distinct from several other decisions in the release process. The defendant's dangerousness is relevant when a court, in non-measure 11 "establishes the *form* of the release most likely to ensure the

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safety of the public and the victim, the defendant's court appearance and that the defendant does not engage in domestic violence while on release." ORS 135.230(10) (emphasis added). When a court decides between a conditional release, security release, or release on recognizance, (which is what is meant by "form of the release," see *Gillmore v. Pearce* 302 Or. 572, 579 (1987)) it must take into account the primary release criteria, which include the protection of the public. ORS 135.230(7)(a).

However, if, as here, the court's release decision is already made for it, statutory language indicates that protection of the community should not be relevant to the size of the security. ORS 135.265(1) specifies that "If the defendant is not released on personal recognizance under ORS 135.255, or granted conditional release under ORS 135.260, or fails to agree to the provisions of the conditional release, the magistrate shall set a security amount that will reasonably assure the defendant's appearance." In addition:

> "[W]hile the possibility that a person charged may commit other criminal offenses if released may be considered in determining whether the person should be released on his personal recognizance or be subjected to conditional release, the release amount chosen is not to be based upon the same criterion. The sole criterion to be considered in establishing the amount of security is the reasonable assurance of appearance by defendant for trial."

Gillmore, 302 Or at 579; *see also Application of Liberman*, 293 Or at 466 ("It is implicit in ORS 135.265(1) that the security amount be set at the lowest amount that will 'reasonably assure defendant's appearance.'").

ORS 135.240 supports this interpretation as well. "*In addition* to the security amount described in paragraph (a) of this subsection, the court may impose any supervisory conditions deemed necessary for the protection of the victim and the community." ORS 134.240(5)(b). By specifically stating that conditions with the safety of the community in mind may be imposed "in addition" to the security, the legislature crystalized its intent: the safety of the community cannot be considered when imposing security amount.

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VI. BAIL OF $50,000 OR MORE IS UNCONSTITUTIONAL AS IS APPLIES TO DEFENDANT PURSUANT TO ARTICLE I, SECTION 16, OF THE OREGON CONSTITUTION

Article I, section 16, of the Oregon Constitution reads, "Excessive bail shall not be required * * * ." In *Sutherland*, the Oregon Supreme Court held that ORS 135.240(5), requiring a minimum of $50,000 for security "for a defendant charged with" a measure 11 offense was facially constitutional. 329 Or at 368. However, any defendant charged with such offense has the right to a hearing where he or she may challenge the any amount of bail as excessive. *Id.* at 367. Not a lot of case law interprets what constitutes "excessive" bail.

Some might argue that a defendant's inability to post bail does not, by itself, render bail unconstitutional. They would cite to *Delaney*, which reads, "In any event, the mere fact of inability to give bail in the amount set is not sufficient reason for holding the amount excessive." 218 Or at 629 (citing *Ex parte Paul*, 36 Okla Crim 86, 252 P 853 (1927) (Per Curiam) ("The mere fact that a defendant cannot make bond in the amount fixed by the trial court does not necessarily make such amount excessive."). Defendant's case is distinguishable.

Because this case involves measure 11 offenses, the "release decision" has already been made. The court *must* impose some amount of security, and that security must be the minimal "amount that will reasonably assure the defendant's appearance" at all necessary time. ORS 136.265(1); *see Gillmore v. Pearce*, 302 Or 572, 577, 731 P2d 1039 (1987) (Security amounts "are supposed to represent the least onerous amount whose possibility of loss reasonably assures the attendance at trial of the person charged. The likelihood that the charged person will or will not commit other offenses while released contributes nothing to the calculation of that monetary amount."). Defendant is not a flight risk, and he has a place to stay while in Oregon.

CONCLUSION

For the foregoing reasons, as well as any further evidence or arguments adduced at the hearing, the Court should find that $250,000 security for a measure 11 count, absent any fact

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other than the accusation, is facially unconstitutional. Said another way, the only constitutional security amount for a measure 11 offense, until a magistrate has the opportunity to consider relevant facts, is $50,000. This court should also consider only what it is permitted to consider in setting the security amount, what is reasonably necessary to assure Defendant's appearance at trial, and given the utter lack of any evidence Defendant is a flight risk, it should set that security amount at $250. Finally, it should impose any supervisory conditions it deems necessary for the protection of the complaining witnesses and the community.

Dated: May 3, 2021

/s/ Joseph Westover
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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing

DEFENDANT'S RELEASE MOTION

on:

Deputy District Attorney Nathan Vasquez
kelly.burris@mcda.us

by the e-mailing a full, true, and correct copy thereof to the individual(s) at the e-mail address(es) shown above and via the Oregon File & Serve system on the date set forth below.

Dated: May 3, 2021.

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