IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON, Plaintiff, vs. ALAN SWINNEY, Defendant.	Case No.: 20CR50067 DEFENDANT'S REPLY TO THE STATE'S MEMORANDUM IN OPPOSITION TO RELEASE

I. DEFENDANT IS ENTITLED TO CONSTITUTIONAL RULINGS

In *State v. Sutherland*, the Oregon Supreme Court addressed both facial and as applied challenges to security amounts. "For a statute to be facially unconstitutional, it must be unconstitutional in all circumstances, *i.e.*, there can be no reasonably likely circumstances in which application of the statute would pass constitutional muster." 329 Or 359, 365, 987 P2d 501 (1999). Regarding as applied challenges, it agreed with the state's acknowledgment, at oral argument, that

> "if ORS 135.240(5) withstands a facial challenge based on the *amount* of security specified in the subsection * * * , then Measure 11 defendants still may challenge the imposition of the statutory amount on an as-applied basis. The ability to do so * * * presupposes a right to a hearing at which the trial court may consider the individual circumstances of a particular defendant."

Id. Sutherland, tells us that defendants have a right to a hearing on the constitutionality of the amount of security. *Id.* at 367 (statutes are subordinate to constitutional provisions).That it only refers to as-applied arguments under article I, section 16, of the Oregon constitution probably has something to do with its date of publication, October 7, 1999, predates not just Article I, section

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43—that amendment was approved by voters approximately one month later—but also the amendments to Article I, section 43, in question here, which occurred almost a decade later.

On that note, defendant's release arguments are not duplicative. In the first hearing, Defendant's prior counsel asked Judge Ryan to approve a conditional release. Judge Ryan clarified this by asking, near the end of the prior hearing, whether any request with regard to security was being made at that time, and counsel replied in the negative. Judge Ryan denied the motion for security release. In another prior hearing, Defendant's prior counsel asked for security to be reduced to $50,000. Per ORS 135.240(5)(a) this is not a request for the court to make a constitutional finding, it is merely a request to lower the security amount. A constitutional finding is necessary only if Defendant requests the security amount dip below $50,000, which is what Defendant is asking in this hearing.

At no previous point did any counsel for Defendant argue that imposing a $250,000 security amount for measure 11 defendant who sits behind Rawls's veil of ignorance is facially unconstitutional. This finding is vitally important. If Defendant is correct on that point, the status quo ante for security amount pursuant to ORS 135.245(1) is $50,000. Given the state's ongoing practice of insisting security in amounts defendants cannot pay is a sufficient amount, an initial amount of $50,000 changes the playing field, as DDA's would routinely be moving to increase security.

II. THE GOVERNMENT'S ASSERTION THAT "Oregon's system of setting security not unconstitutional" INDICATES A MISUNDERSTANDING OF OREGON'S RELEASE STATUTES

The government cites to *Burton v. Tomlinson*, 19 Or App 247, 249–53, 527 P2d 123 (1974), and *Schilb v. Kuebel*, 404 US 357, 359–60, 92 S Ct 479, 30 L Ed 2d (502) (1971) to support its contention that "Oregon's statutory scheme for determining when a person can be released conditionally, on their own recognizance, or upon posting security" has been found to be valid both by the Oregon Court of Appeals, and the United States Supreme Court.

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Defendant's request is constitutional. Sutherland speculates on where the right comes from and concludes article I, section 16.

The decision of whether to release a person on recognizance, conditional, or security release is governed by ORS 135.230(10) and ORS 135.245(3). That decision is what *form* of release ought to be imposed. *See State v. Slight*, 301 Or App 237, 247, 456 P3d 366 (2019). In measure 11 cases, no "release decision" is made. Instead, the circuit court *must* set a security amount and *may* set conditions applicable once a defendant has posted security. ORS 135.240(5).

Burton v. *Tomlinson* involved bail bondsmen, whose profession had just been legislatively outlawed by the Oregon legislature, arguing that the only method of release consistent with Article I, section 14, was sureties guaranteed by bail bondsmen. The court disagreed. This case does not say what the state suggests it does. *Schlilb* applies similar vitriol towards bail bondsmen in Illinois. 404 US at 359 ("Prior to 1964 the professional bail bondsmen system with all its abuses was in full and odorous bloom in Illinois." (footnote omitted)).

Defendant in this case makes no claim or argument that the system of setting security is unconstitutional, except to the degree that the Multnomah County District Attorney's office regularly and systematically requests security in amounts higher than defendants can afford and supports their arguments through moral suasion of courts. Two reasons for this are probable: (1) They believe they can continue to get away with it, and (2) They have no incentive to change it until courts finally start recognizing it. On that note, the Oregon Supreme Court recently granted mandamus on a case arguing the same issues. *State v. Hansen*, 20CR55934. That mandamus commanded Judge Moawad to

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"either (a)(1) set the security release amount in an amount not greater than necessary to 'reasonably assure the defendant's appearance' (ORS 135.265(1)), or (2) conduct a hearing to determine whether relator can be detained consistently with the standards of ORS 135.240(4); or (b), in the alternative, show cause for not doing so within 14 days from the date of this order."

Id.

Dated: May 13, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing

DEFENDANT'S REPLY TO THE STATE'S MEMORANDUM IN OPPOSITION TO RELEASE

on:

Deputy District Attorney Nathan Vasquez
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and

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reid.schweitzer@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 13, 2021.

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