

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

STATE OF OREGON,	)	Case No.: 20CR50067
	)	
Plaintiff,	)	DEFENDANT'S MOTION IN OPPOSITION
	)	TO UNLAWFUL PREVENTIVE
vs.	)	DETENTION
	)	
ALAN SWINNEY,	)	
	)	
Defendant.	)	UTCR 4.050: One hour.

Comes now Defendant, Alan Swinney, by and through counsel Joseph Westover, and hereby moves this court for an order reducing his bail to an amount he can afford. This motion is in the opinion of counsel well founded in law and neither made nor filed for the purposes of delay.

Pursuant to UTCR 4.050, Defendant requests an evidentiary hearing and estimates the time necessary for this hearing will not exceed one hours.

**FACTS**

On September 30, 2020, Defendant voluntarily went into custody after being secretly indicted on this case. On October 19, 2020, Defendant appeared in custody for a release hearing, at which his attorneys asked for him to be conditionally released. At the time, Defendant was represented by the Oliveros Law Group, PC. Judge Ryan summarily denied Defendant's request. On November 3, 2020, Defendant again appeared for a release hearing, wherein Defendant's attorneys requested his security be reduced and that the court impose any conditions it believed would be necessary. Judge Silver declined to reduce Defendant's bail, but did impose conditions

1 on Defendant should he post security. On February 25, 2021, a waiver of the 60-day rule was  
2 filed. On March 3, 2021, The Oliveros Law Group moved to withdraw as counsel, and on March  
3 26, Judge Albrecht appointed current counsel. Defendant subsequently filed two additional  
4 release motions and requested a hearing on the matter. That hearing was to occur on May 14,  
5 2021, more than three months ago.

6 Prior to any hearing, Judge Russell sustained the State's objection under ORS 135.285 on  
7 the grounds that circumstances had not changed. As a result of that decision, the court did not  
8 consider what would have been the state's two requests: (1) to *raise* security on Defendant, or in  
9 the alternative, to deny release under ORS 135.240(4).

#### 10 MEMORANDUM OF LAW

11 Two forms of preventive detention exist, one is lawful so long as it complies with due  
12 process, and the other is absolutely prohibited. Lawfully, under ORS 135.240(4), security can be  
13 denied if a person is (1) charged with a violent felony, (2) either the person is charged by  
14 indictment or there is probable cause to believe the person committed the violent felony, and (3)  
15 "by clear and convincing evidence, that there is a danger of physical injury or sexual  
16 victimization to the victim or members of the public by the defendant while on release." *See*  
17 *United States v. Salerno*, 481 US 739, 107 S Ct 2095, 95 L Ed 2d 697 (1987).

18 The impermissible form of preventive detention was long ago described in *Owens v.*  
19 *Duryee*: "Bail may not be set at an amount chose in order to make it impossible, as a practical  
20 matter, for a prisoner to secure his release." 285 Or 75, 80, 589 P2d 1115 (1979). Almost a  
21 decade later, Justice Gillette wrote,

22 "This court has stated on many occasions that the total amount of security to be  
23 posted must be no more than is necessary to reasonably assure the attendance of  
24 the person charged at trial. *See, e.g., Cooper v. Burks*, 289 Or. 449, 702 P.2d 1107  
25 (1985); *State ex rel. Lowrey v. Merryman*, 296 Or. 254, 674 P.2d 1173 (1984);  
*Sexson v. Merten, supra*; *Owens v. Duryee*, 285 Or. 75, 589 P.2d 1115 (1979). **It  
is not to be set as to make it impossible, as a practical matter, for a prisoner  
to secure release.** *State ex rel. v. Merryman, supra*, 296 Or. At 258, 674 P.2d  
1173; *Owens v. Duryee, supra*, 285 Or. at 80, 589 P.2d 1115."

1 *Gillmore v. Pearce*, 302 Or 572, 580, 731 P2d 1039 (1987). Here, Defendant's security remains  
2 aligned with the bail schedule that currently assigns a security amount to every charge,  
3 regardless of circumstances.<sup>1</sup> But, it remains so because the prosecution in this case, appearing at  
4 three release hearings, has (1) objected to a conditional release, (2) objected to reducing security,  
5 and now, (3) objected to even hearing Defendant's novel release motion while simultaneously (a)  
6 requesting an *increase* in security, and (b) asking to proceed pursuant to ORS 135.240(4) and  
7 deny Defendant bail.<sup>2</sup> Defendant has not posted security, and is on record that he cannot afford  
8 it. Were these the only facts, it could be possible to conclude the state is not engaging in the  
9 unlawful form of preventive detention. But those are not the only facts.

10 The final release hearing—where the prosecutor told defense counsel he'd be seeking  
11 preventive detention “if [defense] is going to make these arguments<sup>3</sup>”—occurred on May 14,  
12 2021, which at the time of this writing is more than three months ago. Since then the state has  
13 not contacted Defendant inquiring about availability for an ORS 135.240(4) hearing. It has  
14 evidently taken no steps whatsoever to seek a lawful form of preventive detention. That fact,  
15 coupled with the public history of this case, demonstrates one thing and one thing only: the  
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18 <sup>1</sup> Defendant believes automatically setting a security amount for a measure 11 offense at  
19 \$250,000, regardless of circumstances, facially violates Article I, section 16, of the Oregon  
20 Constitution, but that is not his argument here.

21 <sup>2</sup> Although the following argument is irrelevant to Defendant's current position, he makes it in a  
22 footnote in anticipation of the prosecutor's response. The government waives its right to an ORS  
23 135.240(4)(a) hearing if it stipulates to a security amount. ORS 135.240(4)(c) (“At the release  
24 hearing, [and keep in mind, there have been two release hearings in which the state appeared and  
25 made no suggestion it was not consenting to security] **unless the state stipulates to the setting  
of security or release, the court shall make the inquiry set forth in paragraph (a) of this  
subsection.**”). The plain meaning of that subsection indicates that the state's ask of the court at a  
release hearing is not, “we'd like a hearing under ORS 135.240(4)(a) please,” it is, “we're not  
stipulating to security or release.” Because the government has twice stipulated to a security  
amount and once requested it be raised, it has foregone its opportunity to present evidence  
relevant to whether the court can deny bail.

<sup>3</sup> This is defense counsel's recollection of a conversation with the prosecutor in the hallway  
outside the courtroom immediately prior to the hearing.

1 prosecutor believes the current security amount obviates the need to carry his burden under ORS  
2 135.240(4)(a).

3 This violates due process and the Oregon Constitution and the required remedy is  
4 Defendant's release on a security amount he can afford.

5 **CONCLUSION**

6 Based upon the above, Defendant respectfully requests his security be reduced to \$25.

7  
8 Dated: August 23, 2021.

9 /s/ Joseph Westover  
10 Joseph Westover, OSB 141427  
11 [jwestover@multnomahdefenders.org](mailto:jwestover@multnomahdefenders.org)  
12 Attorney for Defendant  
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1 **CERTIFICATE OF SERVICE**

2  
3 I hereby certify that I served the foregoing

4 **DEFENDANT'S OPPOSITION TO UNLAWFUL PREVENTIVE**  
5 **DETENTION**

6 on:

7 Deputy District Attorney Nathan Vasquez  
8 [nathan.vasquez@mcda.us](mailto:nathan.vasquez@mcda.us)

9 and

10 Deputy District Attorney Reid Schweitzer  
11 [reid.schweitzer@mcda.us](mailto:reid.schweitzer@mcda.us)

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

14 Dated: August 23, 2021.

15  
16 /s/ Joseph Westover  
17 Joseph Westover, OSB 141427  
18 [jwestover@multnomahdefenders.org](mailto:jwestover@multnomahdefenders.org)  
19 Attorney for Defendant  
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