IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

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| STATE OF OREGON,  Plaintiff, v.RYAN MONACO, Defendant. | ))))))))))) | Multnomah County Circuit Court No. 17CR48942DEFENDANT’S MOTION FOR PRE-TRIAL RELEASEORAL ARGUMENT REQUESTED ON EXPEDITED BASIS |

**MOTION**

 Pursuant to ORS 135.240, Defendant respectfully requests this court to order his release pending trial. Pursuant to UTCR 4.050, Defendant requests oral argument and estimates that an hour will be required for such argument. Defendant asks that the Court schedule a hearing on this motion as quickly as possible on an expedited basis. This motion is supported by the following attached exhibits:

1. Indictment

2. Officer Anderson Report

6. Detective Michaels Report

7. Petition for Restraining Order

9. Officer Ibrahim Report

10. Arrest Warrant

11. Officer Wonacott Report

12. In-Custody Interrogation of Defendant

13. Detective Neubauer Report

14. Indictment - Amended

15. Text Messages Between Mercier and Defendant

16. Declaration - W. Keith Goody

**FACTUAL BACKGROUND**[[1]](#footnote-1)

**The Alleged Crimes**

 On July 23, 2017, Portland police officers began investigating an arson-related homicide. The fire occurred in an apartment located at 9811 NE Glisan Street, where Tyler Ashley Mercier resided with Jason Miller and Taher Alhaji. (Exhibit 13, page 1). Miller and Alhaji died in the fire. (Exhibit 2, page 9; Exhibit 6, pages 1, 5).

 Defendant’s sister, Kristina Monaco, lived in a nearby apartment in the complex. She reported that Mercier had a standing restraining order against Defendant but that she still allowed Defendant to “come over and stay at the apartment frequently.” (Exhibit 2, page 9). Kristina also reported that she had spoken with Mercier, who told her that Defendant had called Mercier and told her that “he returned to their apartment and let the dogs out and poured gasoline on the couch and lit it on fire and left.” Mercier told Kristina that she was going to make defendant “fry for this.” (Exhibit 2, page 10).

 Shaymaah Mohamed lived in the apartment next door to Mercier, Miller and Alhaji. She reported that she had seen Defendant drive up and walk toward Mercier’s door around 2:00 a.m. that morning. Approximately ten minutes later, she looked out her window and saw that Defendant’s car was gone. Mohamed reported that she didn’t see anything suspicious before the fire, which occurred about an hour later. (Exhibit 2, pages 11-12; Exhibit 6, page 5).

 Detective Michaels and Detective Luiz interviewed Mercier on July 23, 2017. (Exhibit 6, pages 5-10; Exhibit 12, page 43). Mercier reported that she went out to bars with Defendant and friends of his from work on July 22. She and Defendant got into an argument in the parking lot of a bar called Boss Hawg’s. She went back to the apartment with Defendant but fled in her car while he was urinating because she “was afraid of what Mr. Monaco was going to do to her.” (Exhibit 6, pages 6). Defendant phoned and texted her. According to Mercier, Defendant “told her he was going to burn all her stuff up. He also told her he had soaked the couch in gasoline \* \* \* . He then told her the couch was the first thing to burn.” (Exhibit 6, page 7).

 Later that day, the Honorable David Rees issued a warrant for Defendant’s arrest. (Exhibit 6, page 10; Exhibit 10). Sheriff’s Deputy Wonacott and other officers located and arrested Defendant on July 26, 2017. Wonacott reported that Defendant looked “like he was going to pass out” even though he was “not exerting himself in any way.” Defendant “acted confused” and “had periods where he seemed to jolt to being alert, as if someone had just woke him up.” Defendant was taken by ambulance to a hospital, where he was given a CT scan. While at the hospital, he “seemed to become more alert and aware.” Subsequently, he was released by the hospital and transported to the Justice Center. (Exhibit 11, pages 2-3).

 On July 17, 2017, Detective Michaels and arson investigator Detective Lutz interviewed Defendant in jail using suggestive and coercive techniques.[[2]](#footnote-2) Eventually, Michaels elicited statements from Defendant in which he admitted to pouring “a little bit [of gasoline] on the couch,” asserting that it then ignited accidentally, he tried to put the fire out and “did not want to hurt nobody.” (Exhibit 12, pages 85-88).

**Inverness Jail Conditions**

 Attorney W. Keith Goody is lead counsel for Defendant in this case. Goody interviewed Defendant by phone on March 29, 2020 to inquire about conditions at the Inverness Jail, where Defendant is housed, as they may relate to the ongoing coronavirus pandemic. Defendant’s description of the conditions is set forth in the attached Declaration of attorney Goody (Exhibit 16).

**DISCUSSION**

**I. Introduction**

 Defendant was originally charged with four counts of Aggravated Murder (Counts 1, 2, 6 and 7), three counts of Arson in the First Degree (Count 3, 4 and 5), two counts of Felony Murder (Counts 8 and 9), two counts of Intentional Murder (Counts 10 and 11), four counts of Aggravated Animal Abuse in the First Degree (Counts 12, 13, 14 and 15), Assault in the Fourth Degree (Count 16) and Strangulation (Count 17). (Exhibit 1). Pursuant to Defendant’s Motion to Amend by Interlineation, Counts 1, 2, 6 and 7 now allege Murder in the First Degree, and Counts 8 through 15 now allege Murder in the Second Degree. (Exhibit 14).

 ORS 135.240 provides:

 “(1) Except as provided in subsections (2), (4) and (5) of this section, a defendant shall be released in accordance with ORS 135.230 to 135.290.

 “(2)(a) When the defendant is charged with murder, aggravated murder or treason, release shall be denied when the proof is evident or the presumption strong that the person is guilty.

 “(b) When the defendant is charged with murder or aggravated murder and the proof is not evident nor the presumption strong that the defendant is guilty, the court shall determine the issue of release as provided in subsection (4) of this section. In determining the issue of release under subsection (4) of this section, the court may consider any evidence used in making the determination required by this subsection.

 “(3) The magistrate may conduct such hearing as the magistrate considers necessary to determine whether, under subsection (2) of this section, the proof is evident or the presumption strong that the person is guilty.

 “(4)(a) Except as otherwise provided in subsection (5) of this section, when the defendant is charged with a violent felony, release shall be denied if the court finds:

 “(A) Except when the defendant is charged by indictment, that there is probable cause to believe that the defendant committed the crime; and

 “(B) By clear and convincing evidence, that there is a danger of physical injury or sexual victimization to the victim or members of the public by the defendant while on release.

 “(b) If the defendant wants to have a hearing on the issue of release, the defendant must request the hearing at the time of arraignment in circuit court. If the defendant requests a release hearing, the court must hold the hearing within five days of the request.

 “(c) At the release hearing, 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 state has the burden of producing evidence at the release hearing subject to ORS 40.015 (4).

 “(d) The defendant may be represented by counsel and may present evidence on any relevant issue. However, the hearing may not be used for purposes of discovery.

 “(e) If the court determines that the defendant is eligible for release in accordance with this subsection, the court shall set security or other appropriate conditions of release.

 “(f) When 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 and shall order the defendant held pending trial without release.

 “(B) Does not constitute a new criminal offense, the court may order the defendant to be taken back into custody, may order the defendant held pending trial and may set a security amount of not less than $250,000.

 “(5)(a) Notwithstanding any other provision of law, the court shall set a security amount of not less than $50,000 for a defendant charged with an offense listed in ORS 137.700 or 137.707 unless the court determines that amount to be unconstitutionally excessive, and may not release the defendant on 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 section;

 “(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.

 “(b) 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. When 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 the defendant held pending trial and may set a security amount of not less than $250,000.

 “(6) For purposes of this section, ‘violent felony’ means a felony offense in which there was an actual or threatened serious physical injury to the victim, or a felony sexual offense.”

**II. Timing of this Motion**

 Any discussion about release now must begin with subsection (4)(b) of ORS 135.240, which requires that a request for a release hearing must be made within five days of arraignment. Defendant acknowledges that he was arraigned on August 7, 2017, and five days from then has long since elapsed. That should not procedurally bar this motion for two reasons.

 First, the Indictment in this case was amended on December 26, 2019. To date, Defendant has not been arraigned on the Amended Indictment. The Amended Indictment supplanted the original Indictment. *Cf. Rucker v. Rucker*, 257 Or App 544, 552, 307 P3d 498 (2013) (“amended pleading completely replaced and superseded the prior pleading”). In *State v. Ellis*, 263 Or App 250, 256, 328 P3d 720, *rev den* 356 Or 400 (2014), the Court of Appeals quoted *State v. Davis*, 236 Or App 99, 237 P3d 835 (2010) for the propositions that (1) a speedy trial timer restarts when a charging instrument is dismissed and a new one is filed, and (2) the timer does not restart when the original charging instrument is not dismissed but an amended one with only “slight changes” is filed. But when a change to the amended charging instrument is “meaningful” with respect to the possible penalty that the defendant is exposed to, the new charging instrument starts a timer anew. *Ellis*, 263 Or App at 257-58. In this case, the Amended Indictment took the death penalty off the table pursuant to SB 1013. That is as meaningful of a change in penalty as the law ever contemplates, because “death is different” from all other penalties. *State v. Haugen*, 351 Or 325, 343, 266 P3d 68 (2011) (quoting *Woodson v. North Carolina*, 428 US 280, 96 S Ct 2978, 49 L Ed 2d 944 (1976)). The five-day time limit in ORS 135.240(4)(b) does not apply because it has not commenced.

 Second, the landscape has changed dramatically since Defendant was arraigned. On January 31, 2020, the United States Secretary of Health and Human Services declared a public health emergency related to the novel coronavirus known as SARS-coV-2. On March 13, 2020, Trump followed suit declaring a national emergency pursuant to 50 USC § 1601, *et seq.* On March 16, 2020, Oregon Chief Justice Martha Walters issued CJO 20-006 regarding the outbreak. On March 23, 2020, Oregon Governor Kate Brown issued Executive Order No. 20-12. On March 27, Chief Justice Walters issued an amended CJO 20-006. It provides, in part:

 “Each Presiding Judge should work with the local district attorney’s office, criminal defense attorneys, sheriff’s office, and community corrections department or other agency to identify persons housed in their jails who can be safely released or are eligible for release, including release under ORS 137.520 and ORS 137.750, for the purpose of managing the jail population by reducing those jail populations.”

CJO 20-006 (Amended), § 15(b).

 To the extent that Defendant “can be safely released,” CJO 20-006(15)(b) provides release authority in addition to any found in ORS 135.240 and is not subject to the limitation found in subsection (4)(b) of that statute. In any event, the five-day time limit in ORS 135.240(4)(b) must give way to concerns about the coronavirus risk. That is so because Article I, section 13, of the Oregon Constitution provides that, “No person arrested, or confined in jail, shall be treated with unnecessary rigor.”

 By its very terms, Article I, section 13 applies to pre-trial confinement. That restriction applies to conditions of confinement and requires the State “to protect inmates from serious health hazards.” *Billings v. Gates*, 323 Or 167, 177, 916 P2d 291 (1996) (quoting *Estelle v. Gamble*, 429 US 97, 97 S Ct 285, 50 L Ed 2d 251 (1976)). There is little question that the coronavirus pandemic presents a serious health hazard, and the State of Oregon has a duty to protect Defendant from it. Defendant cannot be said to have waived his right to that protection, when that serious health hazard had not even arisen when he was arraigned on August 7, 2017 or during the five-day period thereafter.

**III. The Merits of this Motion**

 **A. Subconstitutional Argument**

 **1. Intentional Murder**

 The murder charges in Counts 1-2 and 6-11 must be analyzed differently than the non-homicide charges in Counts 3-5 and 12-17. ORS 135.240(1). To the extent that ORS 135.240 comports with Article I, section 13, of the Oregon Constitution, the court is required to deny release when a defendant is charged with Murder and “the proof is evident or the presumption strong that the person is guilty.” ORS 135.240(2)(a). The proof in this case is not evident, and the presumption of guilt is not strong.

 The Murder charges in Counts 1, 6 and 10 allege that Defendant intentionally caused Taher Alhaji’s death. The Murder charges in Counts 2, 7 and 11 allege that he intentionally caused Jason Miller’s death. The only evidence that Defendant did anything intentionally is Mercier’s statement that Defendant “told her he was going to burn all her stuff up. He also told her he had soaked the couch in gasoline” and his coerced admission that he put a small amount of gasoline on Mercier’s couch.

 Mercier’s claim as to what Defendant told her on the phone is not credible. It is clear that Mercier was manipulating Defendant like a yo-yo with the restraining order she obtained against him. When Mercier and Defendant had their altercation on February 12, 2017, Mercier told Officer Ibrahim that Defendant had punched her in the eye. Ibrahim observed “minor injuries [to both Mercier and Defendant that] did not rise to the level of assault.” (Exhibit 9). Only when Mercier subsequently sought a FAPA restraining order more than two months later -- on April 21 -- did she come up with her claim that Defendant had strangled her on February 12. (Exhibit 7). That transparently after-the-fact accusation indicates that, at a minimum, she makes material omissions and/or exaggerates when she accuses Defendant of wrongdoing. Either way, they show that she is one who cannot be believed.

 More significantly, Mercier reported that, on the night of the fire, Defendant phoned and texted her incessantly prior to and after the fire. The texts were downloaded from Mercier’s phone. Not a single one of them say anything about gasoline or a fire or intending to burn anything. (Exhibit 15). The texts simply do not corroborate what she claims Defendant only said during the phone calls. While the February 12 complaint and related FAPA complaint indicate that Mercier is generally unreliable when it comes to making accusations against Defendant, the discrepancy between the purported phone statements and the documented text messages indicate that she is unbelievable in the specific instance of claiming that Defendant threatened to burn down the apartment.

 Defendant’s admission to putting a small amount of gas on Mercier’s couch is dubious. The reader is invited to read the lengthy torrent of suggestion and coercion that Defendant was bombarded with before he finally relented with that coerced admission. (Exhibit 12). As noted above, that will be the subject of a Motion to Suppress, but even if such a motion is denied, the factfinder will be able to weigh its reliability in the context of the coercive atmosphere in which it was extracted from Defendant. That reliability will be weighed in the context of the statement by Mercier’s neighbor, Mohamed, that Defendant left the scene around 2:00 a.m., about an hour before the fire occurred.

 In any event, there is no evidence that Defendant knew that either Alhaji and Miller were even at home the night of the fire. The purported threat he made to Mercier said nothing about hurting anyone, and even in “confessing,” Defendant maintained that he “did not want to hurt nobody.” There is simply no evidence that Defendant intended to harm, much less kill, anyone.

 **2. Felony Murder**

 Absent strong evidence that Defendant intended to kill anyone, the heart of this case is the felony murder (Murder in the Second Degree) charges in Counts 8 and 9. In those counts, Defendant is charged with causing the death of Jason Miller (Count 8) and Taher Alhaji (Count 9) “in the course of and in the furtherance of and in the immediate flight from” the crime of Arson in the First Degree as alleged in Count 3. As a matter of law, this heart of the case is weak. As a matter of fact, it is also weak.

 Felony murder is a strict liability offense under Oregon law in that it does not require the actor to intend the death of the victim. *State v. Blair*, 230 Or App 36, 55, 214 P3d 47 (2009), *aff’d* 348 Or 72, 228 P3d 564 (2010) (quoting Professor George M. Platt, one of the authors of the comprehensive 1971 revision to Oregon’s Criminal Code). In affirming the Court of Appeals’ construction of Oregon’s felony murder law,[[3]](#footnote-3) the Supreme Court observed that the 1971 revision maintained “an implied malice rule into felony murder.” *Blair*, 348 Or at 78. As a result, a “requisite culpable mens rea is established, as a matter of law, by the defendant’s commission or attempted commission of the predicate felony.” *Id.* at 80. In other words, a requisite mental state with respect to the homicide is presumed against a defendant solely by commission of the underlying felony.

 *Blair* was a statutory construction case. As such, the opinion did not contemplate the constitutionality of a statutory presumption of *mens rea* against a criminal defendant. As explained in Defendant’s Demurrer, that presumption renders the felony murder rule violative of due process.[[4]](#footnote-4) *Sandstrom v. Montana*, 442 US 510, 521-22, 99 S Ct 2450, 61 L Ed 2d 39 (1979).

 Even if Oregon’s felony murder law passed constitutional muster, the strength of those charges depends on the strength of the Arson in the First Degree charge in Count 3. ORS 164.325(1) defines the crime of Arson in the First Degree. It provides:

 “(1) A person commits the crime of arson in the first degree if:

 “(a) By starting a fire or causing an explosion, the person intentionally damages:

 “(A) Protected property of another;

 “(B) Any property, whether the property of the person or the property of another person, and such act recklessly places another person in danger of physical injury or protected property of another in danger of damage; or

 “(C) Any property, whether the property of the person or the property of another person, and recklessly causes serious physical injury to a firefighter or peace officer acting in the line of duty relating to the fire; or

 “(b) By knowingly engaging in the manufacture of methamphetamine, the person causes fire or causes an explosion that damages property described in paragraph (a) of this subsection.”

 Subsections (1)(a)(C) and (1)(b) have no application in this case -- they are not alleged. Subsections (1)(a)(A) is alleged, and (1)(a)(B) is ostensibly alleged. *See State v. Fair*, 326 Or 485, 490-91, 953 P2d 383 (1998) (ORS 132.560(1)(a) permits charging instrument to allege statutory alternatives in a single count).

 Under ORS 164.325(1)(a), Count 3 alleged that Defendant committed Arson in the First Degree by intentionally damaging “protected property.” “Protected property” is:

“any structure, place or thing customarily occupied by people, including ‘public buildings’ as defined by ORS 479.168 and ‘forestland,’ as defined by ORS 477.001.”

 Defendant acknowledges that there is some evidence that he intentionally damaged “protected property,” namely the apartment in which Mercier resided with Miller and Alhaji. That evidence is Mercier’s statement to police that Defendant called her and told her that “he was going to burn all her stuff up [and] had soaked the couch in gasoline.” As discussed above, Mercier’s claim about the content of Defendant’s call is not corroborated by the documented text messages that he sent contemporaneously. Moreover, Mercier is simply not a credible witness. The evidence of Arson in the First Degree under ORS 164.325(1)(a) is not strong.

 Alternatively, Count 3 ostensibly alleged Arson in the First Degree by alleging that Defendant intentionally damaged “protected property” and “that the commission of the above-described offense represented a threat of serious physical injury.” If the word “protected” is overlooked due to the weakness of that allegation, the allegation that Defendant’s intentional damaging of property “represented a threat of serious physical injury” does not allege any mental state with respect to the creation of that risk. Consequently, Count 3 does not allege Arson in the First Degree under ORS 164.325(1)(b), because that crime requires an allegation that the defendant acted recklessly with respect to that risk.

 But even if an allegation of recklessness with respect to the risk of serious physical injury could be imputed, the evidence of that allegation remains weak. In the coercive interview that Defendant participated in after his arrest, Defendant told Detective

Michaels that he believed Miller was not at home and that Alhaji was at work. (Exhibit 12, page 31). ORS 161.085(9) defines “recklessly” as:

“with respect to a result or to a circumstance described by a statute defining an offense, means that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.”

 In this case, obviously, the risk of “serious physical injury” was the risk that Miller and/or Alhaji would be injured or killed by Defendant’s alleged damaging of the couch, by putting gasoline on it and igniting it, whether that ignition was intentional or accidental. In the absence of strong evidence that Defendant knew that one or both of them were at home when he allegedly put gasoline on the couch, it cannot be said that there is strong evidence that he was aware of and consciously disregarded the risk that either, or both of them, would be seriously injured.

 **3. Violent Felony**

 Because the evidence on the murder charges is not strong, the Court must next turn to subsection (4)(a) of ORS 135.240 -- the section addressing charges of violent felonies. “Violent felony” means “a felony offense in which there was an actual or threatened serious physical injury to the victim, or a felony sexual offense.” Defendant concedes that, with the death of Miller and Alhaji, that the Indictment alleged violent felonies. Defendant further concedes that a grand jury has found probable cause to believe that he has committed those crimes. ORS 135.240(4)(a)(A).

 Defendant’s eligibility for release depends then, on whether there is clear and convincing evidence that “there is a danger of physical injury or sexual victimization to the victim or members of the public by the defendant while on release.” ORS 135.240(4)(a)(B). Miller and Alhaji are dead. Defendant cannot victimize them any further than he allegedly already has. There is no evidence that Defendant poses any risk to any “member of the immediate family of [either] decedent.” ORS 131.007. Mercier is the victim of the alleged Arson. But she has moved out of state under the Witness Intimidation Support Program. *See* WISP Order dated December 14, 2017. If Defendant were released, subject to ordinary conditions and fitted with a GPS device, he would present no risk to Mercier. As far as “members of the public” go, the Court should note that Defendant has a minimal criminal history. According to discovery provided by the State, it appears that Defendant’s criminal history score ranks at Level G of the felony sentencing guidelines (up to one non-person felony but no person felonies). It cannot be said that there is clear and convincing evidence that Defendant poses a risk to anyone if he is released from custody.

 That leaves us with subsection (5) of ORS 135.240. That provision merely requires that the court require at least $50,000 as a security amount for a Measure 11 crime, unless the court “determines that amount to be unconstitutionally excessive.” Defendant will, if necessary, litigate the appropriate and lawful amount of security.

 **B. Constitutional Argument**

 As mentioned above, Article I, section 13, of the Oregon Constitution provides that, “No person arrested, or confined in jail, shall be treated with unnecessary rigor” and it requires the State “to protect inmates from serious health hazards.” *Billings v. Gates*, 323 Or at 177. The current coronavirus pandemic undoubtedly presents such a serious health hazard.

 The very first section of Governor Brown’s Executive Order 20-12 provides that “non-essential \* \* \* gatherings of individuals outside of a home or place of residence \* \* \* are prohibited immediately \* \* \* if a distance of at least six feet between individuals cannot be maintained.” EO 20-12(1)(a). Subsection 1(e) provides:

 “Failure to comply with any of the provisions of this Executive Order constitutes an imminent threat and creates an immediate danger to public health. Any person found to be in violation of this Executive Order is subject to the penalties described in ORS 401.990.”

 ORS 401.990 provides:

 “Any person knowingly violating any provision of this chapter, or any of the rules, regulations or orders adopted and promulgated under this chapter, shall, upon conviction thereof, be guilty of a Class C misdemeanor.”

 Thus, the Governor’s executive order establishes requirements for which non-compliance constitutes a crime. The government cannot compel individuals to commit crimes. However, the social distancing minimum of six feet cannot be complied with in jail. Although most jails have discontinued inmate programs to accommodate the necessary distancing.

 The conditions in which Defendant is housed constitutes a crime, according to the governor’s order. Inmates line up adjacent to each other to be served food in the dining hall. Each receives their meals on a tray, then are seated at a table so small that the inmates are a mere 6” from each other and their trays are in contact with the trays of each of the other inmates at their table. Activities for inmates have been discontinued due to the coronavirus pandemic. Inmates are confined to their dorms when not in the dining hall for meals. The metal bunks within Defendant’s dorm are less than one foot from each other. There are five such bunks in each brick “box.” The brick boxes are 2’ apart. There are 50 inmates in the dorm. Inmates are coughing and sneezing incessantly in the dorm and continue to do so when in the dining hall. No inmates are removed for health reasons. Inmates wear latex gloves while working, which Defendant does by cleaning his dorm and serving meals. Otherwise, inmates are not allowed to wear gloves. Inmates are never allowed to wear masks, except when going to court. Masks are considered to be contraband in the jail.

 The social distancing contemplated by Governor Brown’s order is not, and evidently cannot, be complied with within the housing and dining facilities in the Inverness Jail in which inmates are required to constantly be in close proximity to each other. The health risk for those inmates is no less dire on account of their being people who are accused of crimes. The laws of physics and epidemiology are the same for everyone. The inmates are still presumed to be innocent.

 The Chief Justice’s recent order is in accord with the governor’s executive order. For the purpose of public safety:

“Courts should explore alternatives to current arrest and detention policies, including the use of cite-in-lieu of arrest where appropriate, to keep jail populations at a minimum.”

CJO 20-006 (Amended) § 14(c).

 There is no question that inmates in close proximity to each other pose the same “imminent threat” and “immediate danger to public health” as people who are not accused of crimes. Defendant poses no serious risk to any individual or the public in general if he were to be released pre-trial. Conversely, requiring him to continue being housed in close proximity to other inmates violates the proscription against unnecessary rigor, because it doesn’t protect Defendant from serious health hazards. That being so, this Court should hold the State to be treating Defendant with “unnecessary rigor,” and it should order his immediate pre-trial release, because the constitutional imperative trumps the statute. *State v. N.R.L.*, 354 Or 222, 227 n 3, 311 P3d 510 (2013) (“a statute in conflict with the constitution cannot stand”).

 For the same reasons, incarcerating Defendant in disregard of the serious health hazards posed by SARS-coV-2 violates Defendant’s rights under the United States Constitution. *County of Sacramento v. Lewis*, 523 US 833, 118 S Ct 1708, 140 L Ed 2d 1043 (1998) (*Estelle v. Gamble* proscription against “deliberate indifference” to inmate’s medical needs extends to pre-trial detention).

 Under the extraordinary circumstances presented by the coronavirus pandemic, ORS 135.240 is unconstitutional.

**CONCLUSION**

 For the foregoing reasons, this Court should order Defendant to be released from custody pending resolution of the criminal charges against him.

/s/ Andy Simrin

Andy Simrin #914310

415 NW 18th Ave

Portland, OR 97209

(503) 265-8940

andysimrin@oregonappeals.net

Attorney for Defendant

Ryan Monaco

1. This fact summary is taken from documents contained in discovery received by the defense from the State in this case. It is intended solely for the purpose of adjudicating this motion and is in no way intended to constitute admissions by Defendant in the event that this case goes to trial. Copies of the documentary exhibits referred to in this motion are attached. [↑](#footnote-ref-1)
2. A Motion to Suppress is forthcoming. [↑](#footnote-ref-2)
3. Felony murder is now codified as Murder in the Second Degree. ORS 163.115(1)(b); 2019 Or Laws, ch 635, § 4. Other than the new name for the offense, the substance of the felony murder law is unchanged. [↑](#footnote-ref-3)
4. Defendant filed his Demurrer on February 19, 2020. To date, the State has not filed any response contesting Defendant’s constitutional argument. [↑](#footnote-ref-4)