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XXXXX

IN THE CIRCUIT COURT OF THE STATE OF OREGON

LANE COUNTY

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| STATE OF OREGON,  Plaintiff,  vs. xxxxxx,   Defendant. \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | )))))))))))) | Case No. MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT’S MOTION FOR RECOGNIZANCE RELEASEOral Argument and Expedited Hearing Requested |

1. **Statement of the Case and Relevant Facts**

xxxxxx is charged by indictment of xxxxxx. He has been in custody at the Lane County Jail in this case since xxxxx. His prior criminal history includes xxxxx.

The next court date in Mr. xxxx’s matter is xxxx, for a hearing on a motion to suppress filed by the defense. Trial in this matter is set for xxxx.

Mr. xxx is being held on bail. Neither he, nor his family can afford to post security. Before his arrest, Mr. xxx [information re lack of financial resources to post cash bail.]

Due to the outbreak of COVID-19, Oregon Circuit Courts are operating under Level Three restrictions on operations through at least March 27, 2020, in order to significantly limit the number of persons in the courthouses and “to minimize any health risks to court personnel, litigants, representatives, and others who come to our courthouses.” *See* Chief Justice Order 20-006 at 1. Yesterday, Chief Justice Martha Walters sent an email that was circulated to members of the Oregon State Bar stating that she expects that the courts would be required to restrict their operations for extended periods after the current order expires. *See* Declaration of Counsel.

In addition, since the COVID-19 outbreak the Lane County Jails has ended contact visits between attorneys and clients. *Id*. Attorneys can schedule non-contact visits with their clients limited to one hour between 8:00 a.m. and 3:00 p.m. *Id.* The phones set aside for attorney conversations will also be used for clergy visits during the same time period. *Id*. The jail is setting up a single phone where counsel can, by appointment, call in and speak to their clients for no more than 30 minutes at a time. *Id*.

1. **Law and Argument**

# The Court Should Release Mr. Xxxxx on a Release Agreement, because he Cannot Afford Bail, and is at a High Risk of Dying or Hospitalization from COVID-19 without Self-Quarantine at Home.

On January 31, 2020, U.S. Department of Health and Human Services Secretary Alex Azar declared a Public Health Emergency related to the spread of the 2019 novel coronavirus.  On Wednesday, March 11, 2020, Governor Kate Brown declared a state of emergency in Oregon.  That same day, the World Health Organization officially declared COVID-19 (the disease caused by the coronavirus) a pandemic.  Both Lane County and the City of Eugene have declared states of emergency due to the virus.  And on Friday, March 13, 2020, President Trump declared a National Emergency related to the coronavirus.

The number of confirmed cases of COVID-19 is increasing so rapidly that by the time this memorandum is filed, the number will have increased. According to the Oregon Health Authority, as of March 19, 2020, at 8:00 a.m. there are 88 confirmed cases of COVID-19 in Oregon. *See* <https://govstatus.egov.com/OR-OHA-COVID-19> (last visited March 19, 2020). There have been two confirmed cases in Lane County with one death. Notably, the single recorded fatality was attributed to COVID-19 after the deceased was treated at the hospital for a cardiac event. *See* Adam Duvernay, *Lane County Woman’s COVID-Related Death Third in Oregon*, The Register Guard (March 17, 2020) available at <https://www.registerguard.com/news/20200317/lane-county-womanrsquos-covid-related-death-third-in-oregon> (last visited March 19, 2020). Every expectation is that the number of infections due to COVID-19 will get much worse. According to the March 11, 2020, testimony of Dr. Anthony Fauci, director of the National Institute of Allergy and Infectious Diseases, “we will see more cases, and things will get worse than they are right now….  How much worse we’ll get will depend on our ability to do two things: to contain the influx of people who are infected coming from the outside, and the ability to contain and mitigate within our own country….  Bottom line, it’s going to get worse.” *See* <https://www.npr.org/sections/health-shots/2020/03/11/814460233/coronavirus-1-000-cases-now-in-u-s-and-it-s-going-to-get-worse-fauci-says> (last visited March 19, 2020).

COVID-19 is more dangerous for some than others. Unfortunately, Mr. Xxxxx is in the category of people who are in a great deal of danger upon contracting this contagious disease. Mr. Xxxxx is [client-specific health facts]. *See* Declaration of Counsel.

 COVID-19 is an illness from which most people recover. Among all people with confirmed cases, existing information shows that about 80% experience mild symptoms, 20% are severely or critically ill, and roughly 2% die.[[1]](#footnote-1) Within these general statistics, however, two categories of people are vastly more likely to suffer severe symptoms or die: older people and people with chronic medical conditions.

 Older people with coronavirus are more likely to die. As of February, those diagnosed with coronavirus between the ages of 60 and 69 had a 3.6% risk of dying; those between 70 and 79 had an 8% chance of dying; and those 80 or above had a 14.8% chance of dying.[[2]](#footnote-2)

 Older people diagnosed with coronavirus are also much more likely to be very sick. The median age of someone hospitalized with coronavirus is 66, whereas the median age of someone with more mild symptoms is 51.[[3]](#footnote-3) People who need to be hospitalized have an array of severe symptoms, including acute respiratory distress, cardiac injury, arrhythmia, septic shock, liver dysfunction, acute kidney injury, and multi-organ failure.[[4]](#footnote-4) Of those admitted to a hospital for coronavirus, the majority are so sick as to be placed on mechanical ventilators; many others receive various advanced organ support.[[5]](#footnote-5)

 People with chronic medical conditions, no matter their age, are also at significantly greater risk from COVID-19. Slightly less than one percent of those diagnosed with coronavirus, but no other major underlying medical conditions, have died.[[6]](#footnote-6) By contrast, 6% of those with chronic respiratory disease, hypertension, or cancer died. Of those with diabetes, 7% died. And 10.5% of those with cardiovascular disease died.[[7]](#footnote-7)

 Based on this evidence, significant risk factors for progressing to more severe illness after contracting COVID-19 appear to include “older age, and underlying chronic medical conditions such as lung disease, cancer, heart failure, cerebrovascular disease, renal disease, liver disease, diabetes, immunocompromising conditions, and pregnancy.”[[8]](#footnote-8)

 That is why the CDC urges that it is “extra important” for older people and those with chronic medical conditions “to take actions to reduce [their] risk of getting sick with the disease.”[[9]](#footnote-9) The CDC has explained that people in this higher risk category must “[a]void crowds as much as possible” and “stay home as much as possible,” particularly once there a COVID-19 outbreak in their community.[[10]](#footnote-10) There is general consensus in the public health community in Oregon and in Lane County that there is one most important thing for those at risk of severe illness or death from COVID-19: staying home, away from groups of 25 or more people, and to engage in social distancing.[[11]](#footnote-11)

The dangers of COVID-19 are especially acute in jail and detention settings.  On March 13, 2020, recognizing the dangers a prison or jail setting poses to the spread of communicable diseases such as COVID-19, the Federal Bureau of Prisons declared that, for the next 30 days, inmates at all 122 federal correctional facilities across the United States will no longer be allowed visits from family, friends, or even attorneys.[[12]](#footnote-12)[3]  The BOP has good cause to be concerned:  “An outbreak of the deadly virus inside the walls of a U.S. Prison or jail is now a question of when, not if, according to health experts.”  *See* Rich Shapiro, *Coronavirus Could ‘Wreak Havoc’ on U.S. Jails, Experts Warn*, NBC News, March 12, 2020 (available at  <https://www.nbcnews.com/news/us-news/coronavirus-could-wreak-havoc-u-s-jails-experts-warn-n1156586>) (last visited Mar. 19, 2020).  According to Dr. Homer Venters, the former chief medical officer of the New York City jail system, “[w]e’re at a very perilous stage right now.”  *Id.*  Because inmates live in cramped conditions, share sinks and bathrooms, and because jails generally lack enough medical supplies to prevent the spread of the virus, and enough doctors to care for those who acquire the virus, the consequences of an outbreak in a jail could be severe.  *Id.*  Maria Morris, senior staff attorney for the ACLU states, “[m]y fear is it will be similar to the assisted living facility in Washington state where no one’s going to know until it becomes a very serious matter somewhere.”  *Id.*

Media outlets have reported positive tests for COVID-19 among either inmates or employees in correctional facilities in California, Georgia, Michigan, New Hampshire, New York City and New York state and Washington. Brian Osgood, *Worker at County Jail Tests Positive for COVID-19*, Santa Barbara Independent, March 17, 2020, available at <https://www.independent.com/2020/03/17/worker-at-county-jail-tests-positive-for-covid-19/> (last visited March 19, 2020); Christian Boone, *DOC Employee Contracts COVID-19* *Amid Calls for Prison Depopulation*, Atlanta Journal Constitution, March 18, 2020, available at <https://www.ajc.com/news/crime--law/employee-inside-prison-tests-positive-for-covid/a40bWvX7LFFERMjoeLggyH/> (last visited March 19, 2020); Steven Frye*, Two Prison Employees Diagnosed with COVID-19 in Michigan*, The Oakland Express, March 18, 2020, available at <https://www.theoaklandpress.com/news/two-prison-employees-diagnosed-with-covid--in-michigan/article_599ec29c-691c-11ea-91ab-c7e5dd4708c3.html> (last visited March 19, 2020); Nancy West, *Federal Prison Staffer in Berlin Tests Positive for COVID-19*, New Hampshire Center for Public Interest Journalism (March 18, 2020) available at <http://indepthnh.org/2020/03/18/one-staffer-at-federal-prison-in-berlin-tests-positive-for-covid-19/> (last visited March 19, 2020); Chelsia Rose Marcius, *Rikers Island Inmate has Contracted Coronavirus: Officials*, N.Y. Daily News (March 18, 2020) available at <https://www.nydailynews.com/coronavirus/ny-coronavirus-rikers-island-inmate-tests-positive-20200318-gf3r7q4cefaxzlqmwrmuevzz3y-story.html> (last visited March 19, 2020); Brian Mann, *NY Prison Guard Tests Positive for COVID-19*, North Country Public Radio (March 17, 2020) available at <https://www.northcountrypublicradio.org/news/story/40862/20200317/ny-prison-guard-tests-positive-for-covid-19> (last visited March 19, 2020); *Press Release: Third Confirmed Case of COVID-19 Reported by Corrections Employee*; Department of Corrections Washington State (March 18, 2020) available at <https://www.doc.wa.gov/news/2020/03182020p.htm> (last visited March 19, 2020).

 Like the common flu, COVID-19 can be contagious even when a person has no symptoms. *See* <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/coronavirus-disease-2019-vs-the-flu> (last visited March 19, 2020). Like all jail facilities, the Lane County Jail has a constant stream of employees who come to work and leave. Any of those employees could be carrying COVID-19 without knowing it. That risk cannot be mitigated, and is why all Americans are being asked to stay home and minimize all social contact. The court should allow Mr. xxxxx to take all steps to protect himself from this illness.

Mr. xxxxx’s continued detention raises constitutional concerns. The Eighth Amendment bars “cruel and unusual punishments,” to include deliberate indifference to unsafe, life-threatening conditions. *See generally*, *Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014).“That the Eighth Amendment protects against future harm to inmates is not a novel proposition.” *Helling v. McKinney*, 509 U.S. 25, 33 (1993). “[A] remedy for unsafe conditions need not await a tragic event.” *Id*. At bottom, the Eighth Amendment forbids placing a frail individual at risk of death in the absence of any danger to the community or serious risk of flight.

 The Fifth and Sixth Amendment rights to due process and counsel further weigh against Mr. Xxxxx’s continued detention. The Ninth Circuit has explained that “[a] prisoner’s right of access to the courts includes contact visitation with his counsel.” *Ching v.* Lewis, 895 F.2d 608, 610 (9th Cir. 1990). The Lane Cunty Jail has cancelled contact visits with clients, and is limiting noncontact visits. Ordering Mr. xxxxx’s released will allow him to meet with counsel in a safe, sanitary environment, and thus fulfill the mandates of the Fifth and Sixth Amendments.

1. **Conclusion**

In light of these considerations, this Court should release Mr. xxxxx on his own recognizance and subject to any further conditions of supervision that may reduce the risk of flight.

DATED: March 19, 2020

 Respectfully Submitted,

 Rosalind Manson Lee, LLC

By: /s/Rosalind M. Lee

Rosalind M. Lee

Of Attorneys for Defendant xxxxx

1. *See* Centers for Disease Control and Prevention, *Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVI-*19), March 7, 2020 (“CDC Interim Clinical Guidance”), available at <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html#foot09>; (last visited March 19, 2020); European Centre for Disease Prevention & Control, *Daily risk assessment on COVID-19*, 12 March 2020, available at [https://www.ecdc.europa.eu/en/current-risk-assessment-novel-coronavirus-situation](#_Hlk35511152) (“ECDPC Daily Risk Assessment”)(last visited March 19, 2020). [↑](#footnote-ref-1)
2. CDC Interim Clinical Guidance, at “Clinical Presentation.” [↑](#footnote-ref-2)
3. *Id.* at “Clinical Course.” [↑](#footnote-ref-3)
4. *Id.* [↑](#footnote-ref-4)
5. *Id.* [↑](#footnote-ref-5)
6. *Id.* at “Clinical Presentation.” [↑](#footnote-ref-6)
7. *Id.* [↑](#footnote-ref-7)
8. *Id.* at “Clinical Management and Treatment.” [↑](#footnote-ref-8)
9. Centers for Disease Control and Prevention, *People at Risk for Serious Illness from COVID-19*, available at <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html> (last visited March 19, 2020). [↑](#footnote-ref-9)
10. *Id.* [↑](#footnote-ref-10)
11. *See, e.g.*, Oregon Department of Public Health Memorandum to Local Public Health Authorities re Guidance around COVID-19 and Governor Browns Executive Order 20-07 (March 17, 2020) available at <https://www.oregon.gov/oha/PH/HEALTHYENVIRONMENTS/FOODSAFETY/Documents/covid19/Covid-19-FPL-Guidance-EO-20-07.pdf> (last visited March 19, 2020); Lane County Public Health 2019 Novel Coronavirus-COVID 19 available at <https://lanecounty.org/cms/One.aspx?portalId=3585881&pageId=16503774> (last visited March 19, 2020). [↑](#footnote-ref-11)
12. [3] *See* <https://www.bop.gov/resources/news/20200313_covid-19.jsp>. [↑](#footnote-ref-12)