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 SUPPLEMENTAL MEMORANDUM ON MOTION FOR PRE-TRIAL RELEASE |

**Introduction**

 Defendant submits this Supplemental Memorandum in response to the Court’s request by email dated March 31, 2020 for it. The Court presents the question: Is the Court required to schedule a release hearing and consider release given that the defendant has previously waive his right to a bail hearing?

**Discussion**

 The short answer to the question presented is Yes.

 As discussed in Defendant’s pending Motion for Pre-Trial Release, Defendant may have waived a statutory right, but he has not waived his constitutional rights. (Motion at 18-20). Moreover, to the extent that a statutory limitation precludes the assertion of a constitutional right, the statutory limitation is unconstitutional.

**I. State Constitutional Argument**

 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.” 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)). Defendant has been arrested, and he is confined in jail.

 On September 5, 2017, Defendant executed a written waiver of “my right to a bail hearing.” (Exhibit 17, page 1). A copy of that written waiver is attached to this Supplemental Memorandum. Nothing in that waiver purports to waive any constitutional right or any right to anything other than a bail hearing:

“A waiver is the intentional relinquishment or abandonment of a known right or privilege, and must be made intelligently and knowingly.”

*State v. Steen*, 346 Or 143, 152, 206 P3d 614 (2009) (citations omitted).

 A waiver may not be presumed from a silent record. *State v. Langley*, 351 Or 652, 665, 273 P3d 901 (2012). Defendant’s waiver of his statutory right to a bail hearing is absolutely silent about Article I, section 13 and Defendant’s right to be free from “unnecessary rigor.” That silence precludes this court from assuming or inferring that he intentionally and knowingly gave up his right to be “protect[ed] from serious health hazards.”

 In Exhibit 16, attorney W. Keith Goody details conditions of confinement at Inverness Jail, as described to him by Defendant. Brie Williams, M.D. is the Director of the Criminal Justice and Health Program at the University of California at San Francisco. Her sworn statement is attached to this Supplemental Memorandum as Exhibit 18. Dr. Williams’s sworn statement confirms, with frightening specificity, that the conditions Defendant describes are life threatening, endangering not only him and other jail inmates, but the community at large.

 The Chief Justice of the Oregon Supreme Court has ordered this court “to identify persons housed in [local] jails who can be safely released.” CJO 20-006 (Amended), § 15(b). This court is not at liberty to disregard the Chief Justice’s order. ORS 1.002(1) provides that, “The Chief Justice shall exercise administrative authority and supervision over the courts of this state” and that the Chief Justice is authorized to “issue orders appropriate to that exercise.” A trial court “does not have discretion to ignore” directives issued to it under the authority of ORS 1.002. *Coleman v. Coleman*, 117 Or App 333, 335-36, 844 P2d 234 (1992).

 Article I, section 10, of the Oregon Constitution provides:

 “No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and *every man shall have remedy by due course of law for injury done him in his person*, property, or reputation.”

(Emphasis added).

 The fact that Defendant waived his right to a bail hearing on September 5, 2017, but he did not waive his constitutional right to be protected from “serious health hazards” while awaiting trial. Article I, section 10 guarantees that he is entitled to a “constitutionally adequate” forum within which to assert that right. *Horton v. OHSU*, 359 Or 168, 176, 376 P3d 998 (2016) (legislature cannot create remedy for “absolute right” that is not “constitutionally adequate”). To the extent that Defendant’s statutory waiver of a bail hearing could act as an insurmountable barrier to asserting his constitutional right under Article I, section 13, it violates the Due Course of Law clause in Article I, section 10. *Cf. Howell v. Boyle*, 353 Or 359, 298 P3d 1 (2013) (legislatively created remedy for asserting common-law right cannot “leave the injured party with an ‘emasculated’ version of the remedy that was available at common law”).

**II. Federal Constitutional Argument**

 In *Estelle v. Gamble*, 429 US 97, 104, 97 S Ct 285, 50 L Ed 2d 251 (1976), the United States Supreme Court declared that “deliberate indifference [by governmental official] to serious medical needs of prisoners” violates the Eighth Amendment. While that standard is not directly applicable under the Eighth Amendment to pre-trial detention, it is directly applicable to pre-trial detention under the Due Process Clause of the Fourteenth Amendment. *City of Revere v. Massachusetts General Hosp*., 463 US 239, 244, 103 S Ct 2979, 77 L Ed 2d 605 (1983).

 Waiver is “the intentional relinquishment or abandonment of a known right.” *Wood v. Milyard*, 566 US 463, 474, 132 S Ct 1826, 182 L Ed 2d 733 (2012) (citations omitted). As under the Oregon Constitution, waiver cannot be inferred from a silent record. *Gonzalez v. United States*, 553 US 242, 255 n 1, 128 S Ct 1765, 170 L Ed 2d 616 (2008) (citing *Boykin v. Alabama*, 395 US 238, 89 S Ct 1709, 23 L Ed 2d 274 (1969)). To deny Defendant a hearing would be to deny him the process he is due, which he has not waived.

**CONCLUSION**

 For the foregoing reasons, and for the reasons stated in Defendant’s Motion for Release, this court should conduct a hearing expeditiously and order Defendant to be released from conditions that constitute an ongoing violation of his state and federal constitutional rights.

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