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10 **UNITED STATES DISTRICT COURT**
11 **DISTRICT OF OREGON**

12 **UNITED STATES OF AMERICA,**

13 **Plaintiff,**

DEFENDANT'S MOTION FOR RELEASE

14 **v.**

15 **Defendant.**

16 **I. Motion**

17 Pursuant to 18 U.S.C. § 3142(f)(2)(B), accused (hereinafter,) through counsel Tara
18 Herivel, moves the court for an order granting his release. This motion is based on the
19 attached points and authorities, any testimony or evidence presented at the hearing on
20 this motion.
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22 Pursuant to the Bail Reform Act of 1984, as amended, a person charged with an
23 offense under the federal criminal laws shall be released pending trial, subject to
24 appropriate conditions, unless a "judicial officer finds that no condition or combination
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1 of conditions will reasonably assure the appearance of the person as required and the
2 safety of any other person and the community.” 18 U.S.C. § 3142(e). Only in rare cases
3 should release be denied, and doubts regarding the propriety of release are to be
4 resolved in favor of the defendant.
5

6 **II. Procedural Background**

7 Mr. XXXXXX-XXXXXX is charged by complaint with one count of Possession with
8 the Intent to Distribute Heroin (21 USC 841(a)(1) and (b)(1)(B)), and one count of
9 Conspiracy to Distribute Heroin (21 USC 846). He is “Safety Valve” eligible with no
10 criminal history (18 USC 3553(f).) Mr. XXXXXX-XXXXXX’s release hearing is scheduled
11 before Honorable John V. Acosta, on March 24, 2020.
12

13 **XXXXXX-XXXXXX’s roots in Oregon and wide circle of support**

14 Mr. XXXXXX-XXXXXX has no criminal history, maintains deep roots in the
15 community and has third-party release and employment options. Mr. XXXXXX-XXXXXX
16 has lived in Oregon for _____. He has friends and family throughout the area, including
17 his cousins, Gloria and Joel XXXXXX, with whom he has frequent contact. The XXXXXXs
18 both live in the Salem area, where they have lived for 25 years, and are both business
19 owners. Joel XXXXXX can serve as a third-party release placement for Mr. XXXXXX-
20 XXXXXX in his home. Mr. XXXXXX also was Mr. XXXXXX-XXXXXX’s employer at a bar
21 he owned in Salem, where he was a manager. Mr. XXXXXX describes Mr. Mr. XXXXXX-
22 XXXXXX as hard-working and family-centered. Mr. XXXXXX-XXXXXX has no history of
23 substance abuse.
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Gloria XXXXXX is Joel XXXXXX's sister. Ms. XXXXXX saw Mr. XXXXXX-XXXXXX weekly with her family until his arrest. She describes her family as very close and supportive of each other. Ms. XXXXXX has three adult children, all close to Mr. XXXXXX-XXXXXX, all in the area, all of whom would support and help Mr. XXXXXX-XXXXXX upon release. Gloria XXXXXX describes Mr. XXXXXX-XXXXXX a good person, who has always spent a lot of time with the family and been employed.

[More] Any health conditions?

Facts of the case

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Recognized risk of COVID-19 transmission

Mr. XXXXXX-XXXXXX is in imminent danger in the current jail conditions, where there are inadequate precautions to prevent against the public health emergency presented by the coronavirus and COVID-19 pandemic and asks this court to allow alternatives to incarceration pending resolution of his case. AUSA Ashley Codotte does not object.

On March 16, 2020, Chief Justice Walters ordered imposition of "Level Three" restrictions on court operations. In the move to limit exposure, Chief Justice Walters ordered social-distance requirements of at least three feet between each person in court settings, among other provisions. On March 16, Governor Kate Brown limited group gatherings to under 25 in Oregon, and closure of most bars and restaurants due to

1 contact risk in close spaces.¹ At the national level, President Trump recommended
2 gathering in groups no more than 10, also on March 16. The message is clear: close
3 contact without stringent precautions will likely lead to the potentially lethal infection.
4

5 The Centers for Disease Controls and Prevention designate the following groups as at
6 highest risk from severe effects of COVID-19: (1) adults over the age of 60 and (2) people
7 with serious chronic medical conditions like respiratory conditions and heart disease, and
8 diabetes, and people with compromised immune systems.²

9 Jails are acutely dangerous environments for a coronavirus outbreak, given the
10 revolving door nature of jails for prisoners and staff. Many people in jails and prisons
11 have compromised immune systems, general poor health, and chronic conditions. They
12 are vulnerable to the routine outbreaks of flu, and other epidemics that enjoy free reign in
13 this environment, in the best of times.
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15 When coronavirus erupted in China, more than 500 reported coronavirus cases spread
16 like wild fire across five facilities in three provinces. In response, countries and states are
17 releasing non-violent, low level prisons. In Iran, 85,000 prisoners were temporarily
18 released to prevent a mass outbreak.³ Ohio released more than 200 low-level, non-violent
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21 ¹ *Willamette Week*, March 16, 2020,
22 <https://www.wweek.com/news/state/2020/03/16/oregon-gov-kate-brown-will-limit-gatherings-to-25-people-and-close-bars-and-restaurants/>

23 ² Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html>

24 ³ *Business Insider*, March 17, 2020, <https://www.businessinsider.com/coronavirus-covid-19-iran-releases-eighty-five-thousand-prisoners-2020-3>
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1 prisoners from its jails on March 16, and is poised to release hundreds more.⁴ The Los
2 Angeles County jail released 600 prisoners and expects to release more, and find more
3 alternatives to incarceration.⁵ Closer to home, Washington County Jail released 60
4 prisoners on March 16, 2020 and plans to release more .⁶

6 **Oregon jails and BOP facilities**

7 Aggressive social distancing is now employed worldwide as the most effective non-
8 pharmaceutical interventions (NPI) known to mitigate and prevent spread of the
9 coronavirus. Oregon jails and BOP facilities employ no known social distancing
10 measures at present.⁷ Prisoners in overcrowded Oregon jail and BOP environments do
11 not have access to handwashing stations in the numbers needed, they are often required
12 to buy their own soap or go without, no masks are reportedly used by staff or people in
13 custody, regardless whether they are sick. Now, with attorneys and visitors unable to
14 visit our clients, there are even fewer people able to act on prisoners' behalf or sound
15 the alarm when the virus inevitably reaches these environments.
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18 In these circumstances, release for XXXXXX-XXXXXX is the only sensible and
19 humane course. With no criminal history, accused of a low-level, non-violent offense,
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21 ⁴ CNN, March 16, 2020, [https://www.cnn.com/2020/03/16/us/inmates-released-jail-](https://www.cnn.com/2020/03/16/us/inmates-released-jail-coronavirus-trnd/index.html)
22 [coronavirus-trnd/index.html](https://www.cnn.com/2020/03/16/us/inmates-released-jail-coronavirus-trnd/index.html)

23 ⁵ Los Angeles Times, March 16, 2020, [https://www.latimes.com/california/story/2020-03-](https://www.latimes.com/california/story/2020-03-16/la-jail-population-arrests-down-amid-coronavirus)
24 [16/la-jail-population-arrests-down-amid-coronavirus](https://www.latimes.com/california/story/2020-03-16/la-jail-population-arrests-down-amid-coronavirus)

25 ⁶ Oregonian, March 16, 2020, [https://www.oregonlive.com/coronavirus/2020/03/oregon-courts-](https://www.oregonlive.com/coronavirus/2020/03/oregon-courts-jails-respond-to-coronavirus-washington-county-jail-to-release-60-inmates-court-hearings-see-widespread-delays.html)
24 [jails-respond-to-coronavirus- washington-county-jail-to-release-60-inmates-court-hearings-see-](https://www.oregonlive.com/coronavirus/2020/03/oregon-courts-jails-respond-to-coronavirus-washington-county-jail-to-release-60-inmates-court-hearings-see-widespread-delays.html)
25 [widespread-delays.html](https://www.oregonlive.com/coronavirus/2020/03/oregon-courts-jails-respond-to-coronavirus-washington-county-jail-to-release-60-inmates-court-hearings-see-widespread-delays.html)

1 Mr. XXXXXX-XXXXXX requests the court grant him an order of release with all
2 necessary conditions to be determined by the court and Pretrial Services.

3 **IV. Due Process Implications of Continued Pretrial Detention**

4 The Supreme Court has long recognized constitutional limits on pretrial
5 detention. The Court has prohibited excessive bail, see *Stack v. Boyle*, 342 U.S. 1, 4-5
6 (1951), required a judicial determination of probable cause within 48 hours of arrest, see
7 *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991), barred punitive conditions of
8 pretrial confinement, see *Bell v. Wolfish*, 441 U.S. 520, 535-37 (1979), prohibited pretrial
9 detention as punishment, *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 777 (9th Cir. 2014),
10 citing see *United States v. Salerno*, 481 U.S. 739, 746-48 (1987); *Schall v. Martin*, 467 U.S.
11 253, 269-74 (1984), and held that restrictions on pretrial release of adult arrestees must
12 be carefully limited to serve a compelling governmental interest, see *Salerno*, 481 U.S. at
13 748-51.
14

15 Although liberty is the norm in our society, and "detention prior to trial or without
16 trial is the carefully limited exception," an individual charged with serious felonies may
17 be detained before trial when, after an adversary hearing, the individual is found "to
18 pose a threat to the safety of individuals or to the community which no condition of
19 release can dispel." *Salerno* at 755.
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23 ⁷ *Imperial College COVID-19 Response Team*, March 16, 2020, Attachment ____
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1 When assessing the validity of a pretrial detention, the central issue is the
2 detainee's right, in accordance with due process, to be free from punishment before the
3 adjudication of guilt. See *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). Permissible pretrial
4 detention serves a regulatory, as opposed to a punitive, purpose, but even "valid pretrial
5 detention assumes a punitive character when it is prolonged significantly." *United*
6 *States v. Theron*, 782 F.2d 1510, 1516 (10th Cir. 1986). Nevertheless, while the length of
7 detention is an important factor in a court's due process analysis, "no case has
8 established an absolute outside limit" on what comprises a constitutional period. *United*
9 *States v. Bernhardt*, No. 97-1391, 1997 U.S. App. LEXIS 35295, at *5 (10th Cir. Dec. 16,
10 1997).

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13 Courts that have considered the due process implications of a pretrial detention,
14 have typically focused on three factors: (i) the length of confinement and any non-
15 speculative expected confinement; (ii) the government's responsibility for delays in the
16 proceedings; and (iii) the strength of evidence supporting detention. See *United States*
17 *v. Millan*, 4 F.3d at 1043. In addition, some courts have added, as an additional factor, a
18 comparison between the length of the likely sentence the defendant faces and the
19 length of pretrial detention. See *United States v. Cos*, 198 Fed. Appx. 727, 2006 U.S. App.
20 LEXIS 25136, at **12-13; *United States v. Shareef*, 907 F. Supp. 1481, 1484 (D. Kan.
21 1995)("The court believes that it is also appropriate to consider the potential terms of
22 imprisonment to which the defendants may be sentenced if ultimately found guilty of
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1 the charges as compared to the prospective length of pretrial detention in determining
2 whether the due process rights of a person may be violated.").

3 As the Tenth Circuit recognized in its order and judgment remanding this case,
4 because of these due process concerns, to justify an extended detention, the
5 government must prove more than what 18 U.S.C. § 3142 requires to justify an initial
6 detention. See *United States v. Cos*, 198 Fed. Appx. 727, 2006 U.S. App. LEXIS 25136, at
7 **13-14 (quoting *United States v. Accetturo*, 783 F.2d 382, 388 (3d Cir. 1986), and citing
8 *United States v. Shareef*, 907 F.Supp. at 1483-84). The government's burden is even
9 heavier where the district court has issued an order suppressing all the government's
10 evidence. *United States v. Shareef*, 907 F.Supp. at 1485 ("[W]hen the admissibility of all
11 evidence against defendants is questionable, . . . prolonged pretrial detention must be
12 subjected to more careful scrutiny than might otherwise be required."). *United States v.*
13 *Cos*, No. CR 05-1619 JB, 2006 U.S. Dist. LEXIS 95275, at *7 (D.N.M. Nov. 15, 2006).

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17 **V. Conclusion**

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19 DATED 24 March 2020.

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22
23 /s/Tara Herivel
24 Tara Herivel, OSB No. 070418
25 Counsel for Defendant

1 CERTIFICATE OF SERVICE

2 I, Tara Herivel, hereby certify that, on _____, I made service of MOTION
3 FOR RELEASE enclosed herein with the Clerk of the U.S. District Court, District of
4 Oregon by using the CM/ECF PACER Electronic Filing System, upon the following
5 interested parties:
6

7 XXXXX, AUSA
8 1000 SW Third Avenue, Suite 600
9 Portland, OR 97204

10 Respectfully Submitted,

11 */s/Tara Herivel*
12 Tara Herivel, OSB No. 070418
13 Attorney for Defendant
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