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IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff-Adverse-Party,

v.

T.A.B ,

Defendant-Relator.

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Supreme Court No. S059925

Trial Court No. C112414CR  
(Washington County)

**MANDAMUS  
PROCEEDING**

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**RELATOR'S OPENING BRIEF AND EXCERPT OF RECORD**

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Mandamus Proceeding Relating to an Order of  
the Circuit Court for Washington County  
Honorable Janelle F. Wipper, Judge

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## TABLE OF CONTENTS

STATEMENT OF THE CASE .....	1
A. Nature of the Proceedings and the Relief Sought .....	1
B. Relator Has No Other Plain, Speedy and Adequate Remedy ....	1
C. Nature of the Judgment .....	2
D. Jurisdiction .....	2
E. Timeliness of Mandamus .....	2
F. Questions Presented by Mandamus .....	3
G. Summary of Arguments .....	3
H. Summary of Material Facts .....	4
FIRST ASSIGNMENT OF ERROR .....	5
The Circuit Court exceeded its statutory authority under ORS 135.240 and 135.245 by imposing upon Relator’s security release agreement a condition unrelated to the safety of the community, victim, or his future appearance. ....	5
SECOND ASSIGNMENT OF ERROR .....	6
The Circuit Court infringed on Relator’s constitutional right to bail, guaranteed by Article I, section 14 of the Oregon Constitution, by attaching a supervisory condition to his security release agreement. ....	6
A. Preservation of Error .....	6
B. Standard of Review .....	6
C. Argument .....	7
1. The release statutes do not authorize the court to impose upon a security release any condition unrelated to the safety of the community, victim or the defendant’s later appearance. ....	7
2. ORS 135.240(5) Violates Article I, Section 14, of the Oregon Constitution. ....	12
CONCLUSION .....	15
CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d) .....	16
CERTIFICATE OF SERVICE .....	17

## TABLE OF AUTHORITIES

### Cases

<i>Haas v. Hathaway</i> , 144 Or. App. 478, 928 P.2d 331 (1996) .....	6
<i>Owens v. Duryee</i> , 285 Or. 75, 589 P.2d 1115 (1979) .....	13
<i>Priest v. Pearce</i> , 314 Or. 411, 840 P.2d 65 (1992) .....	12
<i>Sexson v. Merten</i> , 291 Or. 441, 631 P.2d 1367 (1981) .....	2, 7-9, 14
<i>Stack v. Boyle</i> , 342 U.S. 1, 72 S.Ct. 1, 96 L.Ed. 3 (1951) .....	12, 13
<i>State ex rel Fidanque v. Paulus</i> , 297 Or. 711, 688 P.2d 1303 (1984) .....	3
<i>State ex rel Lowrey v. Merryman</i> , 296 Or. 254, 674 P.2d 1173 (1984) .....	4, 13
<i>State ex rel Redden v. Van Hoomissen</i> , 281 Or. 647, 576 P.2d 355 (1978) .....	2
<i>State v. Sutherland</i> , 329 Or. 359, 987 P.2d 501 (1999) .....	12-14
<i>State v. Tally</i> , 184 Or. App. 715, 57 P.3d 592 (2002) .....	7
<i>Tinsley v. Fulkerson</i> , 496 N.E.2d 1306 (Ind.App. 1986) .....	12
<i>Tinsley v. State</i> , 496 N.E.2d 1306 (Ind. App. 1 Dist. 1986) .....	11, 12

### **Statutory and Constitutional Authorities**

Oregon Constitution, Article I, section 14 .....	3, 4, 6, 12-14
Oregon Constitution, Article II, section 2 .....	2
Oregon Revised Statute 34.110 .....	2
Oregon Revised Statute 135.230(12) .....	10
Oregon Revised Statutes 135.230 through 135.265 .....	3
Oregon Revised Statutes 135.230 through 135.290 .....	8
Oregon Revised Statute 135.240 .....	3-5, 9, 10, 13, 14
Oregon Revised Statute 135.245 .....	3, 5, 8, 10
Oregon Revised Statute 135.250(1)(d) .....	8
Oregon Revised Statute 135.265 .....	8, 10, 11

### **Other Authorities**

ABA Standards for Criminal Justice, Pretrial Release Standard, (2d ed. 1988) .....	13
Nancy M. King, "Forfeiture of Bail for Breach of Conditions of Release Other Than That of Appearance," 68 A.L.R.4th 1082 (1989) .....	13

## **RELATOR'S OPENING BRIEF**

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### **STATEMENT OF THE CASE**

#### **A. Nature of the Proceedings and the Relief Sought**

This is a mandamus action. Defendant-Relator seeks a writ of peremptory mandamus requiring Washington County Circuit Court Judge Janelle F. Wipper to modify security release agreement to allow him contact with his father.

On February 29, 2012, the Supreme Court allowed the Relator's petition for an alternative writ of mandamus. Judge Wipper has neither modified release conditions, nor shown cause for not doing so.

is charged by indictment in Washington County Circuit Court. Count One charges first degree unlawful sexual penetration (ORS 163.411). Counts Two through Four charge first degree sexual abuse (ORS 163.427). The charges relate to alleged sexual contact between , now 24 years old, and his younger cousin six to ten years ago, when both were minor children. Only Count 4 carries Measure 11 penalties, as it relates to conduct that occurred after turned 15 years old.

#### **B. Relator Has No Other Plain, Speedy and Adequate Remedy**

seeks an immediate remedy through mandamus so that he may lean on his father for guidance with the heavy decisions he faces as this

criminal case proceeds. An appeal or any other potential remedy would not be a plain, speedy, and adequate remedy in the ordinary course of law. ORS 34.110. An appeal from a subsequent conviction cannot remedy unlawful pretrial release conditions. *Sexson v. Merten*, 291 Or. 441, 631 P.2d 1367 (1981) (holding that “mandamus is available to defendant because we find that no plain, speedy or adequate remedy at law is available to defendant” where the circuit court imposed an unlawful condition upon defendant’s security release agreement). Accordingly, \_\_\_\_\_ has no way other than through this writ to adequately challenge the unlawful condition imposed by the Circuit Court.

### **C. Nature of the Judgment**

Relator seeks review of the Washington County Circuit Court’s order that as a condition of his security release, \_\_\_\_\_ not have contact with his father.

### **D. Jurisdiction**

The Oregon Supreme Court has original jurisdiction in a mandamus proceeding under Article II, section 2 of the Oregon Constitution.

### **E. Timeliness of Mandamus**

Relator’s Petition for Mandamus was filed on the earliest practicable date following the Circuit Court’s order that \_\_\_\_\_ have no contact with his father \_\_\_\_\_ *See generally, State ex rel Redden v. Van Hoomissen,*

281 Or. 647, 576 P.2d 355 (1978); *State ex rel Fidanque v. Paulus*, 297 Or. 711, 717-18, 688 P.2d 1303 (1984).

#### **F. Questions Presented by Mandamus**

1. Whether ORS 135.240 and ORS 135.245 authorize the Circuit Court to impose upon the Relator's security release a condition unrelated to the safety of the community, victim or the Relator's future appearance.

2. Whether ORS 135.240(5) violates Article I, section 14, of the Oregon Constitution by permitting the Circuit Court to impose additional supervisory conditions on a defendant who is released on security.

#### **G. Summary of Arguments**

1. The statutes governing pretrial release, ORS 135.230 through 135.265, only authorize the court to impose conditions upon a criminal defendant's security release that relate to the safety of the community and victim, and to the defendant's later appearance. [REDACTED] secured his pretrial release by executing a security release agreement. The condition that [REDACTED] not have contact with his father, a potential state witness, does not relate to any statutorily authorized purpose. No allegation has been made, nor evidence offered, that [REDACTED] contact with his father impacts the safety of the community, victim, or [REDACTED] future appearance.

2. Article I, section 14 of the Oregon Constitution guarantees criminal defendants, not accused of murder or treason, the right to unconditioned pretrial release on bail. The only function of bail is to secure the defendant's future appearance at legal proceedings. *State ex rel Lowrey v. Merryman*, 296 Or. 254, 674 P.2d 1173 (1984). Any supervisory conditions attached to bail necessarily infringe upon the defendant's constitutional right to bail. ORS 135.240(5), therefore, offends Article I, section 14 by permitting the Circuit Court to impose supervisory conditions upon a defendant who secures his pretrial release by posting bail.

#### **H. Summary of Material Facts**

At the time set for the hearing on Motion to Reduce Bail, Washington County Circuit Court Judge Wipper imposed as a condition of security release that he have no contact with his father, who is his best friend and closest advisor. now 24 years old, faces Measure 11 penalties for conduct he allegedly committed as a child. The indictment charges one count of first degree unlawful sexual penetration and three counts of first degree sexual abuse. The charges relate to alleged sexual contact between and his younger cousin six to ten years ago, when both were minor children. With the no-contact condition in place, faces the burden of navigating his legal defense without the wisdom and emotional



support of his father.

At the hearing on Motion to Reduce Bail, the state asked the court to impose the “standard” supervisory conditions recommended by the Washington County Circuit Court Release Office in Measure 11 cases. These “standard” conditions are cookie-cutter conditions recommended without consideration of the facts presented in individual cases, and include a blanket no contact order with witnesses. During argument at the hearing, the state identified Relator’s father, , as a potential state witness. The state has not served with a subpoena. Defense counsel’s review of the state’s discovery reveals that is not a fact witness to any of the alleged abuse. The state did not argue or present any evidence that contact with his father presented a danger to the victim or the community. No matter, Judge Wipper ordered that Relator have no contact with his father.

posted bail and executed the Security Release Agreement (ER-1). Pursuant to Judge Wipper’s order, the Security Release Agreement requires that have no contact with

### **FIRST ASSIGNMENT OF ERROR**

The Circuit Court exceeded its statutory authority under ORS 135.240 and 135.245 by imposing upon Relator’s security release agreement a condition unrelated to the safety of the community, victim, or his future appearance.

## SECOND ASSIGNMENT OF ERROR

The Circuit Court infringed on Relator's constitutional right to bail, guaranteed by Article I, section 14 of the Oregon Constitution, by attaching a supervisory condition to his security release agreement.

### A. Preservation of Error

On November 22, 2011, the day after the court imposed the no-contact condition,                      submitted an affidavit setting forth his request to modify security release agreement to allow contact between father and son.

ER-4. Also on November 22, 2011, the Relator filed a Motion to Modify Conditions of Release with a request for oral argument. In his Motion, asked the court to permit unrestricted contact with his father on the basis that the condition was not necessary for the protection of the victim or the community and therefore not lawfully imposed. ER-5.

The same day, Judge Wipper denied                      request and motion without oral argument. Defendant has no further avenue of relief in Circuit Court.

### B. Standard of Review

In a mandamus action, this Court reviews the challenged Circuit Court's ruling for errors of law. *See Haas v. Hathaway*, 144 Or. App. 478, 480, 928 P.2d 331 (1996).

## C. Argument

seeks to enforce his pretrial release without the onerous and unlawful condition imposed by the Circuit Court. The condition that refrain from having contact with his father, a potential state witness, is not a statutorily or constitutionally permissible condition of a security release.

### 1. The release statutes do not authorize the court to impose upon a security release any condition unrelated to the safety of the community, victim or the defendant's later appearance.

Under Oregon law, the terms and conditions of a defendant's pretrial release from custody are governed by statute. In *State v. Tally*, 184 Or. App. 715, 718, 57 P.3d 592 (2002), the Oregon Court of Appeals observed:

“[R]elease agreements fit into an overall statutory scheme, comprising ORS 135.230 to 135.295, which provides for the pretrial release of defendants in one of three ways: (1) release upon personal recognizance; (2) conditional release; or (3) security release. ORS 135.245.”

The specific type of pretrial release selected by the court dictates the range of potential conditions that may be imposed upon a defendant pending trial. In *Sexson v. Merten*, 291 Or. 441, 631 P.2d 1367 (1981), the Oregon Supreme Court addressed a defendant's challenge to a release condition contained in a Security Release Agreement. The condition required him to submit to mental health counseling pending trial. The state argued that the special condition was lawfully imposed “both to assure defendant's future

appearance at trial and also to protect society from future crimes by defendant pending trial.” *Id.* at 444. The Court noted that ORS 135.250(1)(d) appeared to support the state’s position, as it provides that the conditions of release (without reference to a specific type of release) may broadly include “such other conditions as the court may impose.” *Id.* at 447. However, after examining all relevant statutes and the purpose of security release, the Court ruled against the state and held that ORS 135.265, governing security release agreements, “does not authorize trial courts to impose conditions other than those conditions which, under the facts and circumstances of the particular case, are reasonably necessary to assure the defendant’s appearance at trial. The statutory scheme as set forth in ORS 135.230 to 135.290 consistently emphasizes that the objective in determining what type of release to grant is that which is reasonably likely to assure the defendant’s later appearance.” *Id.* at 448.

The only relevant statutory change since the *Sexson* decision is ORS 135.245(3), which now reads as amended by the 1997 legislature:

“If the magistrate, having given priority to the primary release criteria, decides to release a defendant or to set security, the magistrate shall impose the least onerous condition reasonably likely to ensure the safety of the public and the victim and the person’s later appearance \* \* \*.”

Thus, the amended statute gives the court the authority when setting a security amount to impose the sort of supervisory condition that the court in *Sexson* did not permit, as it broadens the scope of conditions to include those “reasonably likely to ensure the safety of the public and the victim.” The statutory amendment does not affect the principle under *Sexson* that any condition imposed must be necessary to assure the explicit statutory goals – the defendant’s later appearance and the safety of the public and victim.

When a defendant is charged with a Measure 11 offense, as is the court’s release decision is further constrained by ORS 135.240(5), which states in relevant part:

“(a) Notwithstanding any other provision of law, the court shall set a security amount of not less than \$50,000 \* \* \*, and may not release the defendant on any form of release other than security release \* \* \*.

“(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. \* \* \*.”

ORS 135.240(5)(a)-(b) (emphasis added).

The statutory provisions governing pretrial release, and specifically, release of a defendant charged with a Measure 11 offense, do not authorize the court to condition a defendant’s security release upon an order that he not contact a witness. Such a condition has no bearing on the safety of the public

and the victim. It would be a different matter, of course, if the defendant were ordered not to have “offensive” contact with a witness, but a blanket “no contact” order prohibiting any sort of contact between a defendant and a witness does not reasonably relate to the safety of the community or the victim. Therefore, in setting the conditions of security release, the Circuit Court exceeded its statutory authority under ORS 135.240(5) and ORS 135.245(3), in imposing the condition that have no contact with his father.

To amplify this point, it is important to distinguish conditional releases from security releases. A conditional release is a “nonsecurity release which imposes regulations on the activities and associations of the defendant.” ORS 135.230(2) (emphasis added). Clearly, a conditional release authorizes the court to prohibit the defendant from “associating” with certain people, including witnesses. A security release, by contrast, is defined as a “a release conditioned on a promise to appear in court at all appropriate times which is secured by cash, stocks, bonds or real property.” ORS 135.230(12).

The statute directly pertaining to security release, ORS 135.265, begins as follows:

“(1) If the defendant is not released on personal recognizance under ORS 135.255, or granted conditional release under ORS 135.260, or fails to agree to the provisions of the conditional

release, the magistrate shall set a security amount that will reasonably assure the defendant's appearance."

The circumstance in which the defendant "fails to agree to the provisions of conditional release," causing the magistrate to set a security amount, further illustrates the distinction between the two forms of release. The fact that a defendant may refuse a conditional release which may include a "no contact" provision and still be released on security demonstrates that the legislature did not intend the latter form of release to include such conditions.

Other state courts considering statutes similar to ORS 135.265 require security release conditions to relate to defendant's appearance. For example, in *Tinsley v. State*, 496 N.E.2d 1306 (Ind. App. 1 Dist. 1986), the defendants were arrested and charged for engaging in allegedly obscene performance at a theater. The trial court, as a condition of bail, forbade defendants from returning to the theater. *Id.* at 1306. The relevant Indiana statute stated that "bail may not be set higher than that amount reasonably required to assure the defendant's appearance in court," but allowed the court to "impose reasonable restrictions on the activities, movements, associations, and residence of the defendant during the period of release." *Id.* at 1307-08. The defendants appealed the special condition. The appellate court explained that while the statute seems to allow the condition, all conditions "are to be imposed consistent with the basic purpose of bail, to allow an accused the opportunity to

properly prepare his defense at freedom, while it insures his presence at trial.”

*Id.* at 1308. In voiding the special condition, the appellate court concluded that it was irrelevant to assuring defendants' appearance at future court proceedings.

*Id.* at 1309.

## **2. ORS 135.240(5) Violates Article I, Section 14, of the Oregon Constitution.**

The Oregon Constitution guarantees criminal defendants, not accused of murder or treason, the right to unconditioned pretrial release on bail. *State v. Sutherland*, 329 Or. 359, 364, 987 P.2d 501 (1999). Article I, section 14 of the Oregon Constitution provides: “Offenses except murder, and treason, shall be bailable by sufficient sureties.” The right to freedom by bail pending trial “is interrelated to the Anglo-Saxon doctrine that one accused is presumed innocent until his guilt is proven beyond a reasonable doubt.” *Tinsley v. Fulkerson*, 496 N.E.2d 1306 (Ind.App. 1986); *cf. Priest v. Pearce*, 314 Or. 411, 840 P.2d 65 (1992) (applying Indiana law to Oregon's Article I, Section 14 because the bail provision is “based on an essentially identical provision of the 1851 Indiana Constitution”); and *see Stack v. Boyle*, 342 U.S. 1, 4, 72 S.Ct. 1, 4, 96 L.Ed. 3, 7 (1951) (considering federal statutory right to release pending trial and stating that “[t]his traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction”).



In turn, bail has a constitutionally limited function, to secure the accused's appearance at legal proceedings. *State ex rel Lowrey v. Merryman*, 296 Or. 254, 674 P.2d 1173 (1984), *citing Owens v. Duryee*, 285 Or 75, 589 P2d 1115 (1979); *cf. Stack v. Boyle*, 342 U.S. at 4; ABA Standards for Criminal Justice, Pretrial Release Standard, 10-5-3(b) (2d ed. 1988) ("the sole purpose of monetary conditions is to assure the defendant's appearance"); Nancy M. King, "Forfeiture of Bail for Breach of Conditions of Release Other Than That of Appearance," 68 A.L.R.4th 1082, 1084-85 (1989) ("[T]he primary reason for requiring a deposit of some security in order for a defendant to remain free pending the disposition of his case is to assure his appearance in court").

It follows that any conditions attached to bail necessarily infringe on the defendant's constitutional right to bail. In *State v. Sutherland*, *supra*, the Oregon Supreme Court struck down as unconstitutional a statute that permits bail only if "the court determines that the defendant will not commit new crimes while on release \*\*\*." 329 Or. at 364 (considering ORS 135.240(4)(e)). The Court reasoned that the statute failed because it infringed on the accused's constitutional right to bail, as guaranteed by Article I, section 14. *Id.* Likewise, when a defendant secures his pretrial release by posting bail, any supervisory conditions attached to his security release infringe on the constitutional right to bail.

In this case, \_\_\_\_\_ is constitutionally entitled to pretrial release on bail set at an amount reasonably calculated to secure his appearance at court proceedings. The trial court set bail at \$150,000, for which \_\_\_\_\_ posted \$15,000 to secure his release. The additional release condition that he not have contact with his father infringes upon his protected right to bail under the Oregon Constitution, Article I, section 14. *Compare State v. Sutherland, supra* (overturning statute conditioning bail upon the court finding defendant will not commit new crimes on release).

ORS 135.240(5) infringes upon \_\_\_\_\_ constitutionally guaranteed right to bail by permitting the trial court to require the posting of security and impose supervisory conditions deemed necessary to protect the safety of the victim and community. *See* ORS 135.240(5). No Oregon appellate court has addressed this issue. However, the Court in *Sexson*, discussed *supra*, noted the constitutional implications of imposing supervisory conditions on a defendant released on security: “We do not address the possible question whether Article I, section 14 of the Oregon Constitution prohibits the imposition of any conditions in security release agreements because defendant has made no such contention.” 291 Or. at 445, n.4.

## CONCLUSION

For the foregoing reasons, Relator                      requests that this Court issue a peremptory writ of mandamus requiring the Circuit Court to modify his release conditions to allow contact with his father.

DATED this 28<sup>th</sup> day of March, 2012.

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**CERTIFICATE OF COMPLIANCE**  
**WITH ORAP 5.05(2)(d)**

**Brief length**

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 3098 words.

**Type size**

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

DATED this 28<sup>th</sup> day of March, 2012.

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