IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF DESCHUTES

STATE OF OREGON Plaintiff, vs. IAN MACKENZIE CRANSTON, Defendant.	Case No. 21CR47755 **STATE'S OPPOSITION TO PRETRIAL RELEASE AND MEMORANDUM OF LAW IN SUPPORT**

COMES NOW the State of Oregon by and through J. Michael Swart, Deputy District Attorney, for Deschutes County, and respectfully requests that the Court deny Defendant's request for pretrial release. The State can show the proof is evident or that the presumption is strong, that Ian Cranston is guilty of the intentional second degree murder of Barry Washington. ORS 135.240 (2)(a).

POINTS AND AUTHORITIES

I. INTRODUCTION

The State respectfully requests the Court to first conduct this release hearing pursuant to ORS 135.240 by way of a sealed affidavits including witness statements and sealed exhibits to preserve and protect the State and the defendant's constitutional right to a fair trial. Additionally, proof by way of affidavits and sealed exhibits avoids potential pretrial jury exposure to evidence that may not be offered or is ruled inadmissible later at trial. Second, based on the evidence submitted, the State respectfully requests the Court to deny the

John Hummel, Deschutes County District Attorney
1164 NW Bond Street, Bend, Oregon 97703
Phone: (541) 388-6520 | Fax: (541) 330-4691 | info@dcda.us

defendant's request for release as the proof is evident and the presumption is strong that the defendant is guilty of the crime of murder in the second degree.

II. LEGAL STANDARD FOR A RELEASE HEARING

ORS 135.240(2)(a) mandates that "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". The defendant here is charged with murder in the second degree. This Court "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". ORS 135.240(3). An indictment alone is not sufficient to make a determination of whether the proof is evident or the presumption is strong that the defendant committed the offense of murder. "Other competent evidence to prove the commission of murder must be offered by the State before the accused may be denied the admission to bail." *State ex rel Connall v Roth*, 258 Or 428, 435 (1971). The bail hearing is not for a determination of guilt or innocence, but rather a determination of the preliminary issue of the right to bail. The evidence adduced must only disclose that the "defendant is in danger of being convicted of murder or treason." *Roth*, 258 Or at 435. Manifestly, the issue of guilt, being the ultimate one, must await determination at the trial." *State v. Konigsberg*, 33 NJ 367, 377, 164 A2d 740, 746 (1960) (cited with approval in *Roth*, 258 Or at 433). The State must demonstrate by some competent evidence that the likelihood of conviction is more than fair: the likelihood of guilt must be shown to be at least clear and convincing:

> [I]t is whether this court can assume that the circuit court has reached an independent judgment that evidence which will be admissible at trial, unless met or explained, so strongly shows the accused guilty of murder that the law forbids [defendant's] pretrial release on adequate security conditions.

John Hummel, Deschutes County District Attorney
1164 NW Bond Street, Bend, Oregon 97703
Phone: (541) 388-6520 | Fax: (541) 330-4691 | info@dcda.us

Haynes v. Burkes, 290 Or 75, 89 (1980). *See also, Konigsberg*, 33 NJ at 377, A2d at 746; *Collins v. Foster*, 299 Or 90 (1985). In demonstrating to the court that the proof of murder and defendant's guilt is evident or presumption of guilt is strong, the State may rely on evidence that would not be admissible at trial. *Rico-Villalobos v. Guisto*, 339 Or 197, (2005). The Court in *Roth*, echoing the concerns in the Court in *Konigsberg*, delivered its strongest admonition against reaching the ultimate determination of guilt or innocence: "It is also important that the trial court avoid even the appearance of a determination of ultimate guilt or innocence so that the rights of the state or the accused will not be prejudiced in the trial on the merits." *Roth*, 258 Or at 436 (*citations omitted*).

A. Application of the Evidence Code at a Release Hearing

Because the instant issue is not for the determination of guilt or innocence, and not for discovery, this Court has broad discretion in conducting whatever evidentiary hearing is necessary to determine whether the Defendant should be held without bail. ORS 135.240(3). In demonstrating to the court that the proof of murder and defendant's guilt is evident or presumption of guilt is strong, the State may rely on evidence that would not be admissible at trial. *Rico-Villalobos v. Guisto*, 339 Or 197 (2005). The express terms of OEC 101(4)(h) specifically exempt "proceedings under ORS Chapter 135 relating to … security release" from the rules of evidence, except those relating to privilege. ORS 40.015 Rule 101, Applicability of Oregon Evidence Code states as follows:

> (4) ORS 40.010 (Rule 100. Short title) to 40.210 (Rule 412. Sex offense cases) and 40.310 (Rule 601. General rule of competency) to 40.585 (Rule 1008. Functions of court and jury) do not apply in the following situations:
>
> > (h) Proceedings under ORS chapter 135 relating to conditional release, security release, release on personal recognizance, or preliminary hearings, subject to ORS 135.173.

John Hummel, Deschutes County District Attorney
1164 NW Bond Street, Bend, Oregon 97703
Phone: (541) 388-6520 | Fax: (541) 330-4691 | info@dcda.us

Therefore, the traditional rules of evidence, such as the proscription against hearsay evidence, do not apply. The decision to deny or grant bail to a defendant charged with murder demands an evaluation of the evidence which will be presented at trial and a determination if the evidence, if uncontroverted, amounts to a strong likelihood of conviction:

> The magistrate must be shown information … from which he can make his own independent determination whether there is admissible evidence against an accused that adds up to strong or evident proof of guilt. Burkes, 290 Or at 89.

To perform this function, the court is not required to hear live testimony at a bail hearing. This fact further supports the plain meaning of OEC 101(4)(h). See also, OEC 102 (eliminating unjustifiable expense and delay is one factor a court should consider when construing Evidence Code).

Additionally, the defendant has no Constitutional right to confront witnesses at a bail hearing. The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right… to be confronted with witnesses against him. "(emphasis added). Article 1, section 11 of the Oregon Constitution provides: "In all criminal prosecutions, the accused shall have the right…to meet witnesses face-to-face." (emphasis added). Neither provision has been interpreted to extend the right of confrontation to pre-trial proceedings like bail hearings. The United States Supreme Court has specifically held that the Sixth Amendment right to confront witnesses does not apply to a pre-trial detention hearing. Gerstein v. Pugh, 420 US 103, 43 LEd2d 54, 95 S.Ct. 854 (1971). The Supreme Court has also held that the panoply of Sixth Amendment rights do not apply at other pre-trial proceedings like preliminary hearings. Cooper v. California, 386 US 58, 17 LEd2d730, 87 S.Ct. 788 (1967), McCray v. Illinois, 386 US 300, 18 LEd 62, 87 S.Ct. 1056 (1967). See also, State v. Elliott, 24 Or App 471 (1975) (holding Sixth Amendment confrontation right applies

John Hummel, Deschutes County District Attorney
1164 NW Bond Street, Bend, Oregon 97703
Phone: (541) 388-6520 | Fax: (541) 330-4691 | info@dcda.us

only to witnesses who actually testify at time of trial). In light of these precedents, it would strain logic to find that the Sixth Amendment right to confrontation applies to a pre-trial proceeding such as a bail hearing.

Courts in other states have been faced with the issue whether a defendant's confrontation rights exist at a bail hearing and have answered the question in the negative. For example, the New Jersey Supreme Court held:

> [The] right to confrontation is appropriately regarded as essentially a trial right, rather than one that attaches to ancillary hearings to determine limited questions, the resolution of which do not significantly affect the outcome of trial. See Barber v. Page (citation omitted). Neither the federal nor the state constitution grants the defendants a right to confront witnesses at a bail hearing. (citations omitted). That the right attaches at the trial itself, see *Bruton v. United States* (citation omitted) but its force does not carry over to other ancillary criminal proceedings. Thus, a defendant does not have a right per se to insist upon the opportunity for cross-examination at a bail hearing. *State v. Engle*, 493 A2d 1217, 1222 (N.J 1985).

Similarly, the Oregon courts have declined to extend the application of Article I, section 11 to pre-trial proceedings. In *State v. Rood*, 118 Or. App 480 (1993), the defendant sought to call the child victim in a pre-trial proceeding to determine whether the child would recant accusations of sexual abuse that the child had made years earlier. The trial court denied the motion and the issue on appeal was whether the denial of the motion violated defendant's Article I, section 11 rights. The court held that the right of confrontation does not extend to requiring "pre-trial testimony." *Id*. at 483. In *State ex rel Hathaway v. Hart*, 70 Or App 541 (1984) *affirmed* 300 Or 231 (1985), the issue was whether Article I, section 11 rights apply to a criminal contempt proceeding. The court held that the defendant was not entitled to a jury trial because a contempt proceeding is not a "criminal prosecution." *Id*. at 544. However, the court did hold that the defendant was entitled to the right to confront witnesses; not because the Oregon or Federal Constitutions bestowed the right, but because the right was conferred by

John Hummel, Deschutes County District Attorney
1164 NW Bond Street, Bend, Oregon 97703
Phone: (541) 388-6520 | Fax: (541) 330-4691 | info@dcda.us

statute. *Id*. at 544-545. The *Hart* court reasoned that under ORS 131.005(6), a criminal contempt proceeding is a "criminal action"; and in a criminal action a defendant has a statutory right to compel the attendance of witnesses (ORS 136.567) and to confront and cross-examine the witnesses against him (ORS 136.430, OEC 611). *Id*. at 545. Article I, section 11, by its very language, applies only to "criminal prosecutions." If a criminal contempt proceeding is not a criminal prosecution, *a fortiori*, a bail hearing, where the defendant is not being accused of or tried for an offense, is not a criminal prosecution. It follows that Article I, section 11 does not apply to bail hearings.

1. Sealed Affidavits and Sealed Exhibits

As previously stated, the State's preference and request is to present proof to the court by way of sealed affidavits and sealed exhibits to demonstrate the State has clear and convincing evidence that the proof is evident and the presumption is strong that Ian Cranston is guilty of the intentional murder of Barry Washington. Since it is not the purpose of the statute (ORS 135.240) to conduct trial before trial, and the bail hearing is not to be used as a discovery tool, and because the Court can be provided with all relevant proof by way of sealed affidavits, there is no necessity to conduct this hearing on the record. Additionally, proof by way of affidavits avoids potential pretrial jury exposure to evidence that may not be offered or is ruled inadmissible later on. This will preserve and protect the defendant's constitutional right to a fair trial. Article I, section 10 of the Oregon Constitution states: "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 [.]" Article I, section 11 states: "In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the

John Hummel, Deschutes County District Attorney
1164 NW Bond Street, Bend, Oregon 97703
Phone: (541) 388-6520 | Fax: (541) 330-4691 | info@dcda.us

offense shall have been committed[.]" *In Smothers v. Gresham Transfer, Inc*., 332 Or 83,91 (2001) the Oregon Supreme Court categorizes this provision as a prohibition on secrecy in court proceedings. However, there are several examples under Oregon Law where secrecy is warranted to preserve a defendant's and the crime victim's constitutional rights, and to guarantee a fair and impartial trial. Article I, Section 10 has been interpreted in a fashion that allows the court discretion in sealing records for this exact purpose. See generally, *Oregonian Publishing Co. v. O'Leary*, 303 Or 297 (1987); *State ex rel. Oregonian Pub. Co. v. Dietz*, 289 Or 277 (1980); *State ex rel. KOIN-TV v. Olsen*, 300 Or 392 (1985); and *State v. MacBale*, 353 Or 789 (2013).

In 2012, the Oregon Supreme Court held that a trial court acted within their discretion when they refused to make public the names of minor child abuse victims even after a jury rendered a verdict. *Jack Doe 1 v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints*, 352 Or 77 (2012). They go on to say that they "will not attempt to catalogue here the complete range of circumstances in which a court permissibly may exercise its authority to limit the disclosure of exhibits[.]" *Id*. at 101. The State is proposing this court issue a protective order for any materials presented at the release hearing pursuant to ORS 135.873. A protective order will prevent the disclosure of materials that may later be determined not relevant for trial or not admissible at trial, and will prevent media exposure that would make it difficult to later pick a fair and impartial jury, thus avoiding the potential risk of juror contamination.

III. STATEMENT OF FACTS

While it is the State's request to proceed by way of sealed affidavits and sealed exhibits, the State disputes the rendition of Defendant's account of many of the facts in his

John Hummel, Deschutes County District Attorney
1164 NW Bond Street, Bend, Oregon 97703
Phone: (541) 388-6520 | Fax: (541) 330-4691 | info@dcda.us

motion and draws the Court's attention to the following facts and witness statements which demonstrate that the evidence is strong and the presumption great that Defendant intended to kill Barry Washington[1].

On September 18, 2021 at 11:09 pm, Barry Washington and his friend Austin Herndon arrived at The Capitol, a bar located at 190 NW. Oregon Avenue in downtown Bend.

At 11:12 pm, armed with a loaded handgun, Defendant Ian Cranston entered The Capitol along with his fiancée Allison Butler and friend Tyler Smith. Both Butler and Smith knew that Defendant had armed himself with a handgun earlier that evening[2].

Inside the bar at 12:01 am (now September 19, 2021), Washington and Butler had a friendly encounter that ended with them hugging each other.

At 12:05 am, Barry Washington left The Capitol and stood on the sidewalk talking to a group of individuals. At 12:07 am, Defendant and Butler left the bar to smoke cigarettes outside and Smith followed them and the three of them stood on the sidewalk together in a semi-circle.

At 12:07:28[3] Washington walked west on Oregon Avenue and brushed into Smith and sees Butler. He began talking to her and commented "hey you're good looking". Butler told the Grand Jury that Cranston did not like it when this guy came up to her outside. (GJ Tx: 29:6-8). Defendant then stated words to the effect "she's already taken, move along, mind

---

[1] The following facts are taken from police reports, surveillance video, witness statements given to police as well as transcripts from the Grand Jury. Please note that the Wild Rose video is one minute behind in its time stamp compared to any The Capitol or City Street Cameras submitted as Exhibits.

[2] Smith acknowledged this to an officer shortly after the shooting during a recorded interview but at Grand Jury he denied knowing Defendant was armed with a handgun on that evening.

[3] The rest of the times cited include seconds and are taken from the Wild Rose Surveillance video.

John Hummel, Deschutes County District Attorney
1164 NW Bond Street, Bend, Oregon 97703
Phone: (541) 388-6520 | Fax: (541) 330-4691 | info@dcda.us

your business". While Washington kept making statements towards Butler, Defendant used expletives and told Washington "fuck off", keep walking, and according to Butler, Cranston told him to "get the fuck out of here. (GJ 29:17-19). At that point, Butler stated she was a little nervous "because Ian doesn't back down, that he's defensive over me and he's not the kind of guy to be pushed around". "If someone says something to him, he's going to respect them and respond back" (GJ 29-30: 22-3). According to Butler, more words were exchanged with Barry saying he was from California and Ian stated "I don't care where you are from" and from there it escalated quickly (GJ TX: 21:11-12).

It appears from the video more words were exchanged between the parties and at 12:08:49 am., Washington punched Defendant once and then a second time. Washington then backed away, with the effect of the punches causing Defendant to stumble backwards. It is unclear from the video if Defendant fell down, but in any event, Defendant immediately recovered to his feet and within five seconds (12: 08:56) Defendant was on his feet and produced his handgun from his waist, holding it at his side in his right hand as he walked towards Washington.

Simultaneously, at 12:08:58 am, Smith came at Washington while Butler got in between Smith and Washington, who is still visibly upset by what was said to him. Defendant then raised his gun and pointed it at Washington, committing a criminal offense pursuant to ORS 166.190 (Pointing a Firearm at Another). It is unclear if Washington saw the gun pointed at him. Of note, Butler is in between Washington and Cranston when the gun is raised. Any argument by defense that Washington did in fact see the gun being pointed at him is pure speculation as is the defense argument that Washington "was completely undeterred by the sight of Cranston's handgun". The Court should reject this speculative argument as well as the

John Hummel, Deschutes County District Attorney
1164 NW Bond Street, Bend, Oregon 97703
Phone: (541) 388-6520 | Fax: (541) 330-4691 | info@dcda.us

fact that it has no legal significance as will be shown *infra* since Cranston's response was utterly disproportionate.

The group continued to argue and at it was at that point, according to Smith and Butler, that Washington started flashing gang signs. This accusation is at issue. At the Grand Jury, Butler was asked if Barry made any threats and she stated that "he started to throw out gang signs, which I felt was a threat" (GJ TX 27: 21-24), but he did not say they were gang signs but I felt as though it was implied" (GJ TX 28:2-4) but he "did not explicitly state that he was in a gang but when he said he was from California and put his hand up like an ok sign" her "interpretation was that it was a gang sign" and that it was implied. (GJ TX 35:2-13). Butler did state that Barry never said anything about having a weapon and she did not see any weapons (referring to Washington). (GJ: 289-13).

From 12:09:10 am– 12:09:21am, surveillance video shows Washington moving to the side of the street and away from Butler with Washington, arguably leaving the fight. It was at this point the argument further unraveled caused by Butler, who had her cell phone out filming Washington and walking towards him and stating "Say hello, say hello" in what can only be described as a provocative manner. Further provoked, Washington stepped towards Butler and pushed Butler's phone away. At this time, Defendant was standing behind Butler still holding his handgun at his side. Smith intervened and called Washington a "dick-licker" and as Smith and Washington were struggling and tussling[4], Cranston then took his fatal steps at 12:09:22 am.

[4] Smith has stated that Washington hit him but it is unclear from the video if there were any blows landed by either Smith or Washington.

John Hummel, Deschutes County District Attorney
1164 NW Bond Street, Bend, Oregon 97703
Phone: (541) 388-6520 | Fax: (541) 330-4691 | info@dcda.us

At 12:09:22 am, as Washington was tussling with Smith and moving backwards and to the side, Defendant took a small step forward, positioning himself in between Smith and Butler, and pivoted with his right foot forward into a shooting stance. He then pointed and fired his handgun into Barry Washington's torso, ultimately killing Washington.

Defense in their motion states that Washington turned at and squared toward Cranston. The State disagrees with this statement and the video will demonstrate this is incorrect. As is the defense's representation that Cranston immediately rendered aid to Washington. Rather, the video time stamp shows that for seventeen seconds, Cranston looked around with his firearm still at his side and it was not until 12:09:39 am, that he walked to and leaned over a dying Barry Washington, eventually rendering aid.

At 12:11:59 am, 9-11 was called with a report of a gunshot at the intersection of Wall and Oregon and the first police officers began to arrive on scene at 12:14 am[5] and render aid to Barry Washington. No weapons were found on or near Mr. Washington. Cranston was taken into custody and eventually arrested for the homicide of Barry Washington.

A. Additional Statements Demonstrating that Cranston Was Not Facing Serious Physical Injury or Death and that His Actions Were Disproportionate.

In the aftermath of the murder of Barry Washington, Tyler Smith was interviewed by Officer Rueben Jenkins. Smith told the officer the following: that prior to the shooting there was no dialogue from anyone involved to make someone believe there could be a weapon involved; that Barry never made any comments to them that he would hurt or kill them, and Barry never mentioned anything about a weapon. Smith further stated that he was surprised that Ian shot Barry; that he (Smith) was not in fear for his life but doesn't know what Ian was

[5] These times are taken from BPD-Emergency Communications.

John Hummel, Deschutes County District Attorney
1164 NW Bond Street, Bend, Oregon 97703
Phone: (541) 388-6520 | Fax: (541) 330-4691 | info@dcda.us

thinking. He stated he did not feel like he was in fear for his life and that Barry was just a drunk dude.

IV. THE LAW OF INTENTIONAL MURDER

Intentional murder requires the State to prove, not only that the defendant intentionally engaged in conduct that caused death, but also that he did "intend that his conduct result in the death of the victim." *State v. Woodman,* 341 Or 105 (2006). The term "intentionally" or "with intent," when used with respect to a result or to conduct described by a statute defining an offense, means that a person acts with a conscious objective to cause the result or to engage in the conduct so described. ORS 161.085(7). *Woodman* further explained the required mental state for intentional murder:

> In the context of the intentional murder charge, the words "particular conduct" in the phrase "conscious objective to engage in particular conduct" means conduct intended to cause the death of another. So understood, the "engage in particular conduct" part of the instruction conveys the same meaning as the "cause a particular result" part of the instruction because both parts required the jury, to convict defendant of intentional murder, to find that defendant acted "with a conscious objective" that his actions would result in the death of Hauck. Here, the trial court first told the jury that "the State must prove beyond a reasonable doubt * * * that [defendant] intentionally caused the death of [Hauck]." The court then stated that the phrase "intentionally caused the death" of Hauck means that "the person acts with a conscious objective either to cause a particular result, or to engage in particular conduct." Those instructions correctly told the jury that the prohibited conduct to which the intent element applied was "caus[ing] the death of [Hauck]." Defendant's reading of the instructions as permitting the jury to find him guilty of murder based on a finding only that he had a conscious objective to "engage in particular conduct," such as sliding the knife to Yancey, and not a conscious objective to cause Hauck's death, is not a reasonable one, when the instructions are read as a whole.

A. The Evidence is Clear and Convincing that Defendant Acted with the Conscious Objective to Cause Barry Washington's Death.

For purposes of this defense motion, Defendant cannot dispute that he had the conscious objective to kill Barry Washington. Defendant went out drinking alcohol that

John Hummel, Deschutes County District Attorney
1164 NW Bond Street, Bend, Oregon 97703
Phone: (541) 388-6520 | Fax: (541) 330-4691 | info@dcda.us

evening armed with a loaded handgun. While this is not a crime since Cranston has a lawful conceal and carry license, it should be noted that Defendant is the type of person who does not back down. This character trait combined with Cranston carrying a loaded firearm had tragic but predictable consequences.

Once outside of The Capitol, Defendant saw Washington speaking to his fiancée. There is no evidence that Defendant knew that Washington had previously spoken to Butler while they were in the bar. Rather, according to Butler, Defendant did not like it that this guy came up to her and started talking to her so Cranston took the verbal offensive- telling Washington that "she is already taken", "move along", "mind your business". While Washington kept making statements towards Butler, Defendant used expletives and told Washington "fuck off" keep walking and "get the fuck out of here". Hearing these provocative words, Washington then wrongfully punched Cranston twice, causing Cranston to suffer a black eye[6] as well as wounding his pride.

Yet, Cranston's conscious objective after getting hit was to produce his loaded handgun and then wait for the opportunity to kill Washington at close range. Cranston stood and waited a total of 26 seconds with his handgun at his side for the right opportunity to take his vengeance on Washington. Because as Butler herself stated: "Ian doesn't back down, he's defensive over me and he's not the kind of guy to be pushed around". Thus at 12:09:22, and within close distance of Washington, Defendant took a small step forward towards Washington, pivoted his right foot to a shooting stance and fired his handgun directly into Barry Washington, killing him. These actions demonstrate not self-defense but rather the

[6] The State acknowledges that these actions constituted a misdemeanor assault IV on Mr. Cranston.

John Hummel, Deschutes County District Attorney
1164 NW Bond Street, Bend, Oregon 97703
Phone: (541) 388-6520 | Fax: (541) 330-4691 | info@dcda.us

actions of someone who is settling the score for being punched earlier in the face. As such, the proof is evident and that presumption is strong that Cranston was motivated not by self-defense but by anger, hate, and frustration with the victim's behavior. Under such circumstances it seems difficult to assert that the proof is not evident or that the presumption strong that defendant is guilty of intentional murder.

V. THE LAW OF DEADLY PHYSICAL FORCE: CRANSTON WAS NOT IN IMMINENT HARM AND HIS USE OF FORCE WAS NOT PROPORTIONAL

Defense in their pleadings raises the defense of self-defense and claim that Defendant was justified in using deadly force. The evidence belies this justification.

A person is justified in using physical force upon another person to defend himself from what he reasonably believes to be the use or imminent use of unlawful physical force. ORS 161.209. In defending, a person is justified only if the degree of force used by the person is necessary to prevent or terminate some harm or is proportional to the force either used or threatened by another person. *Brady v. Kroger* (2009), 347 Or. 331. "Deadly physical force" means physical force that, under the circumstances in which it is used, is readily capable of causing death or serious physical injury. There are certain limitations on the use of deadly physical force. ORS 161.219. The defendant is not justified in using deadly physical force on another person unless he reasonably believed that the other person was using or about to use unlawful deadly physical force against the defendant or another person. A threat of death or great bodily harm that is not imminent cannot justify use of deadly force for self-defense because use of such force may be unnecessary. *State v. Charles*, 1981, 54 Or.App. 272, *affirmed* 293 Or. 273. Even when one or more of the threatening circumstances described in ORS 161.219 are present, use of deadly force is justified only if it does not exceed "degree of

John Hummel, Deschutes County District Attorney
1164 NW Bond Street, Bend, Oregon 97703
Phone: (541) 388-6520 | Fax: (541) 330-4691 | info@dcda.us

force which person reasonably believes to be necessary." *State v. Haro*, 117 Or App 147, (1992), *Sup Ct review denied* ORS 161.219(3) (use of deadly physical force justified under certain circumstances, including reasonable belief that another person is "[u]sing or about to use unlawful deadly physical force against a person"); *Brady v. Kroger* 347 Or. 331 (2009).

The jury instructions corresponded with ORS 161.219(3) which provides that a defendant is justified in using deadly force on a victim if he reasonably believes that the victim is using or about to use unlawful deadly force on him, and with ORS 161.015(3) which defines that "deadly force" as force that can readily cause at least "serious physical injury," if not, death.

Critically, "a person's right to use force in self-defense depends on the person's own reasonable belief in the necessity for such action." *State v. Oliphant*, 347 Or. 175, 191, (2009). It does not depend on whether the force used against him was actually unlawful. *Id*. The legal standard for assessing the reasonableness of a defendant's belief about the need for force, or the extent of force necessary, is an objective one, and does not turn on the characteristics of an individual defendant. *State v. Hollingsworth*, 290 Or App 121 (2018).

Cranston's belief about the need for deadly force is fallacious since his actions were unreasonable for the following reasons: First, Cranston faced no imminent danger of suffering serious physical injury or death. Second, Cranston's response to use deadly force in response to at best a continuing misdemeanor assault was astonishingly disproportionate.

The Oxford dictionary defines imminent as "about to happen". After punching Cranston, Washington backed up and there were two people between Washington and Cranston, namely Butler and Smith. From this point on any imminent physical threat to Cranston had subsided; nor was there ever the imminent threat of serious physical injury or

John Hummel, Deschutes County District Attorney
1164 NW Bond Street, Bend, Oregon 97703
Phone: (541) 388-6520 | Fax: (541) 330-4691 | info@dcda.us

death. There is no evidence that Cranston was gravely injured or about to be killed at the hands of Washington. He received a black eye and possibly bleeding in his ear. These are minor injuries in the legal vernacular definition of serious physical injuries. But instead of distancing himself, Cranston weighed the consideration for or against shooting Washington for approximately twenty-six seconds. These twenty-six seconds, while he was safely obstructed from an unarmed Washington by Butler and Smith (who each knew that Cranston was armed and doesn't back down) provided Cranston the opportunity to weigh his options. During this time, he made a cold, calculated decision to kill an unarmed man who posed no imminent threat of death or serious physical injury to Cranston. His belief in imminent harm was categorically unreasonable. Defendant's close friend Tyler Smith contradicts Cranston's justification that Washington was using or about to use unlawful deadly physical force when he told Officer Jenkins that "he did not feel he was in fear for his life and that Barry was just a drunk dude". The proof is evident and the presumption strong that Defendant did not face immediate serious physical injury or death.

Cranston's use of deadly force was shockingly disproportionate. He was the victim of a misdemeanor assault. An assault that had subsided. ORS 161.219 does not create "an unlimited right to use deadly force." *State v. Haro*, 117 Or App at 150-51, (1992). Regardless of whether Cranston was *initially* authorized to use force—even deadly force—his self-defense claim is ultimately unavailing since his use of deadly force exceeded reasonable bounds. *See Stapp*, 266 Or App at 632 (dispositive issue was not petitioner's initial entitlement to use force in self-defense, but rather was "whether [petitioner] used 'force which [petitioner] reasonably believe[d] [was] necessary for the purpose [of self-defense]"). Not only was he under no deadly threat, he used a deadly weapon on an unarmed man who was engaged

John Hummel, Deschutes County District Attorney
1164 NW Bond Street, Bend, Oregon 97703
Phone: (541) 388-6520 | Fax: (541) 330-4691 | info@dcda.us

in a physical tussle and/or fistfight with another individual. The suggestion by defense that Washington was coming at Cranston - even if accurate - is of no legal significance since Washington was not using or about to use unlawful deadly physical force against Cranston. Cranston's reaction of shooting an unarmed man who was tussling or even fist fighting with others is objectively unreasonable. His actions exceeded reasonable bounds of what the law allows in meeting a misdemeanor assault with deadly force. The law does not take the implementation of the use of deadly force lightly. Regrettably, Mr. Cranston did and it ended in the intentional murder of Barry Washington. Here there is clear and convincing evidence that Defendant's claim of self-defense is unreasonable and that Defendant is guilty of intentional murder.

Defendant's argument analogizing Cranston's actions to that of a trained law enforcement officer is specious and contrary to law. The standard in evaluating Cranston's actions are from an objectively reasonable person standard, namely what Cranston reasonably believe, not what a trained law enforcement would or would not do in his situation. *State v. Bock*, 310 Or App 329 (2021); *State v. Hollingsworth*, 290 Or App 121 (2018) (The legal standard for assessing the reasonableness of a defendant's belief about the need for force, or the extent of force necessary, is an objective one, and does not turn on the characteristics of an individual defendant). By this argument, Defense is attempting to create an entirely different standard in assessing the reasonableness of Cranston's actions. This is a "straw man" argument and contrary to case law and should be rejected by the court. Defendant cannot dispute that he killed Barry Washington and that the issue on this case will hinge on the jury's assessment of the reasonableness of his use of force. Under such circumstances, it seems difficult to assert

John Hummel, Deschutes County District Attorney
1164 NW Bond Street, Bend, Oregon 97703
Phone: (541) 388-6520 | Fax: (541) 330-4691 | info@dcda.us

that the proof is not evident or that the presumption strong that defendant is guilty of second-degree murder.

A. Prior Bad Act Evidence Should Not Be Considered by the Court

In Defendant's Motion for Release, he mentions an encounter that the victim Barry Washington had with three police officers approximately 45 minutes before his fateful encounter with Defendant. Yet, specific prior acts of violence by the victim, which were unknown to defendant at the time of the homicide, are not admissible to bolster a defendant's self-defense claim. *State v. Whitney-Biggs*, 147 Or App 509, *rev den* 326 Or 43 (1997). In *Whitney-Biggs* the court held that testimony of the murder victim's son and of a doctor who treated victim's second wife regarding particular incidents of the victim's violent conduct was not admissible under the rule allowing evidence of person's character when it is an essential element of the defense, notwithstanding defendant's claim of self-defense, given that defendant, who was victim's wife, did not know about these incidents prior to the offense. The court further held that the defendant's reasonable belief regarding the need to use force, not the victim's alleged violent propensity, was an essential element of the self-defense claim, and evidence of prior incidents of which defendant had no knowledge could not relate to her reasonable belief in defending herself. See ORS 161.209, 163.115; Rules of Evid. Rule 404(1). There is no evidence, nor will defense be able to produce evidence that Cranston was aware of this prior encounter Washington had with the police officers earlier in the evening. As such, the State requests this Court to not consider this evidence.

VI. CONCLUSION:

The State requests this Court to allow evidence to be presented by way of sealed affidavits and sealed exhibits. The State further urges the court to review the proffered

John Hummel, Deschutes County District Attorney
1164 NW Bond Street, Bend, Oregon 97703
Phone: (541) 388-6520 | Fax: (541) 330-4691 | info@dcda.us

evidence and to then deny the defendant's motion for release by finding the proof is evident and the presumption is strong that Ian Cranston intentionally murdered Barry Washington with no legal justification.

Dated this the 25th day of January 2022.

J. Michael Swart, OSB#201635
Deputy District Attorney

John Hummel, Deschutes County District Attorney
1164 NW Bond Street, Bend, Oregon 97703
Phone: (541) 388-6520 | Fax: (541) 330-4691 | info@dcda.us

CERTIFICATE – TRUE COPY

I hereby certify that the foregoing copy of **STATE'S OPPOSITION TO PRETRIAL RELEASE AND MEMORANDUM OF LAW IN SUPPORT** is a complete and exact copy of the original.

Dated this the 25th day of January 2022.

J. Michael Swart, OSB#201635
Deputy District Attorney

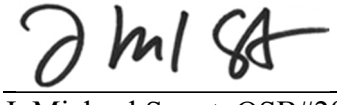
CERTIFICATE OF SERVICE

I hereby certify that the foregoing **STATE'S OPPOSITION TO PRETRIAL RELEASE AND MEMORANDUM OF LAW IN SUPPORT** was served on, Kevin Sali, attorney of record for defendant, by delivering a certified true copy via the following, previously mutually agreed upon method:

☒ **E-mail** I hereby certify that I served the foregoing document on the attorney of record for defendant by delivering a certified true copy to his/her agent, via e-mail, shawn@kollielaw.com Sender has received confirmation that the **STATE'S OPPOSITION TO PRETRIAL RELEASE AND MEMORANDUM OF LAW IN SUPPORT** has been received by the designated recipient.

☒ **Electronic** I hereby certify that an agent of this office served the foregoing document on the attorney of record for defendant by delivering a certified true copy to his/her agent, via e-mail, THROUGH THE ODYSSEY FILE AND SERVE pursuant to ORCP 9. Sender has received confirmation that the above document has been received by the designated recipient.

Dated this the 25th day of January 2022.



J. Michael Swart, OSB#201635
Deputy District Attorney

John Hummel, Deschutes County District Attorney
1164 NW Bond Street, Bend, Oregon 97703
Phone: (541) 388-6520 | Fax: (541) 330-4691 | info@dcda.us