IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

THE STATE OF OREGON, Plaintiff, vs. LAURENCE EDWARD NIGHTINGALE, Defendant.	Case No. 21CR30667 DEFENDANT'S MOTION TO DISMISS THE INDICTMENT DUE TO VINDICTIVE AND SELECTIVE PROSECUTION ORAL ARGUMENT REQUESTED PD No. 21-01755

Defendant requests oral argument, an evidentiary hearing, and official court reporting services on this motion. The hearing should take approximately 1 hour.

Defendant, through his attorney Caitlin Plummer, moves the Court to dismiss the indictment because it was filed as a result of vindictive and/or selective prosecution, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution, and Article I, Section 20 of the Oregon Constitution.

DATED: August 27, 2021

/s/ Caitlin Plummer
Caitlin Plummer (200858)
Attorney for Defendant
cplummer@lanepds.org

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IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

THE STATE OF OREGON, Plaintiff, vs. LAURENCE EDWARD NIGHTINGALE, Defendant.	)	Case No. 21CR30667 DECLARATION IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE INDICTMENT DUE TO VINDICTIVE & SELECTIVE PROSECUTION PD No. 21-01755

DECLARATION

I, Caitlin Plummer, do hereby declare and say that:

1. I am the attorney of the record for the Defendant in the above-entitled case.
2. Laurence Edward Nightingale was arrested on June 24, 2021 and has remained in custody since that date.
3. On June 25, 2021, he was charged by information in two cases.
4. In case 21CR30665, he was charged with Menacing constituting domestic violence, Unlawful Possession of Cocaine, and Harassment constituting domestic violence.
5. In case 21CR30667, he was charged with Assault in the Fourth Degree, and Coercion—both constituting domestic violence.
6. No offer was provided at arraignment. However, in case 21CR30667, the state provided a letter at the June 25 arraignment, which stated:
    a. "Defendant is also being arraigned on a separate incident involving the same named victim in an EPD case. Not requesting a prelim allows for global resolution between these cases." (Exhibit 101).
    b. The letter also stated, in bolded text, "Must not request preliminary hearing at arraignment for above discussions." (Exhibit 101).
7. Mr. Nightingale was arraigned on both cases on June 25, 2021. He did not request a preliminary hearing.

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8. His security was initially set at $115,000. Neither Mr. Nightingale nor his family were able to collect the $11,500 needed to post 10% of the security release amount.
9. On June 30, 2021, I contacted the Assistant District Attorney (ADA) asking for the state's position on a motion to eliminate security release. (Exhibit 102).
10. On the same day, the ADA responded with the following: "Thanks for reaching out. Absent a change in circumstance from when he was assessed by court staff, I oppose. Additionally, a search warrant was executed on your client's residence RE: drug-dealing. *I did not charge those offenses hoping to negotiate the case as pleaded*. I will likely need to file an Amended Information prior to the hearing." (Exhibit 102, emphasis added).
11. I then sought to clarify the state's position with the following response: "Thanks, Dan. Just to clarify, you are saying that you intend to file more charges if he files a motion for release? We don't even have discovery yet, *so he's certainly not saying he's unwilling to negotiate the charges as filed. He'd just like a release hearing*." (Exhibit 102, emphasis added).
12. The ADA sent the following response: "I simply want the court to know the extent of the potential charges and the fact that there was a search warrant executed in connection with the significant amount of drugs found in his vehicle. Defendants argue they should be released without consideration of un-charged conduct. Thus, I am planning on filing an Amended Info so the Court can consider all potential charges for release. I'm hopeful negotiations can occur over the normal course as they regularly would regardless of the outcome of any release motion. " (Exhibit 102).
13. I then expressed my concerns about how this meant Mr. Nightingale was receiving harsher treatment as the result of his indigent status: "This is concerning because it seems that Mr. Nightingale is being treated more harshly, and will be subject to more charges, because he is too poor to afford the bail as set. If he were a person of means and able to post $11,500, we would not be in this position. If I'm misunderstanding your emails, please excuse that. Otherwise I'll have to consult my client prior to filing the motion given the consequences." (Exhibit 102).
14. The ADA then sent a lengthy response, which is included in its entirety in Exhibit 102. He stated there was a misunderstanding and elaborated on the alleged crimes and Mr. Nightingale's prior history. He stated that Mr. Nightingale's ability to pay security was not a part of his analysis, that he worked to avoid implicit bias in his position, and cc'ed his

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direct supervisor in the event myself or my office wanted to have further discussions about the issue. (Exhibit 102).

15. I sent a response indicating that I remained concerned that Mr. Nightingale would end up "being worse off due to his inability to post bail, and his desire to request a release hearing as a result—a hearing he is constitutionally entitled to have." (Exhibit 102). I also advised the ADA that in this particular case, I would not object to the state informing the court about the uncharged allegations at the release hearing, as an alternative to the state actually filing more charges. I again asked the state to inform me if it was nonetheless their intent to pursue additional charges. (Exhibit 102).
16. All the above emails were sent on June 30, 2021. I did not hear back from the ADA regarding whether he still intended to file additional charges. I also did not file the release motion while I awaited that clarification regarding the consequences of that motion.
17. I followed up on that point by email on July 7, 2021. In response, the ADA sent the following email: "Thanks for reaching out. *Given the circumstances surrounding this case and our previous emails, I scheduled this for Grand Jury next week*. They are expected to hear all evidence in a variety of cases at that time. Please feel free to file any motions you see fit to file. They will have no bearing on charges being added, dropped, or explored by the Grand Jury." (Exhibit 102, emphasis added).
18. I then filed a release motion on July 9, 2021. A hearing was scheduled on July 16, 2021.
19. On July 15, 2021, the state presented the case to the grand jury.
20. At the release hearing on July 16, 2021, the state requested a setover of the hearing in light of the indictment so that the Pretrial Services could set a new security amount. The state would not provide defense counsel with a copy of the indictment or reveal what any of the additional charges were at the release hearing. The court held the hearing and denied the motion the same day, with leave to file a new motion after the indictment was filed.
21. Shortly after the hearing, the indictment was available in OECI.
22. The indictment includes the following charges:
    a. Count 1: Delivery of Methamphetamine within 1000 Feet of School, on or between April 1, 2021 and May 29, 2021
    b. Count 2: Misdemeanor Assault in the Fourth Degree, against Kenya Sanders, constituting domestic violence, on or about May 30, 2021

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c. Count 3: Menacing against Kenya Sanders, constituting domestic violence, on or about May 30, 2021

d. Count 4: Coercion against Kenya Sanders, constituting domestic violence, on or about June 5, 2021

e. Count 5: Menacing against Kenya Sanders, constituting domestic violence, on or about June 24, 2021

f. Count 6: Criminal Trespass in the Second Degree, at 698 W. 6th Ave., Eugene, OR, on or about June 24, 2021

g. Count 7: Harassment against Jordin Valdez, on or about June 24, 2021

h. Count 8: Unlawful Possession of Cocaine, on or about June 24, 2021

23. The two cases were effectively combined into this case, 21CR30667—and case 21CR30655 was dismissed. Counts 1, 3, 6 and 7 were not included in either of the original charging documents and therefore represent additional charges added after the email exchange regarding release.

24. Mr. Nightingale was arraigned on the indictment on July 16, 2021.

25. His security is currently set at $240,000. Mr. Nightingale remains indigent and cannot post this amount of security.

26. After the indictment was filed, an offer was extended on July 27, 2021. Among other terms, the offer included the presumptive prison gridblock on Count 1—the most serious of the offenses indicted after the email exchange regarding release.

I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY FOR PERJURY.

DATED: August 27, 2021.

/s/ Caitlin Plummer
Caitlin Plummer (200858)
Attorney for Defendant
cplummer@lanepds.org

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IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

THE STATE OF OREGON, Plaintiff, vs. LAURENCE EDWARD NIGHTINGALE, Defendant.	)	Case No. 21CR30667 MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE INDICTMENT DUE TO VINDICTIVE AND SELECTIVE PROSECUTION ORAL ARGUMENT REQUESTED PD No. 21-01755

INTRODUCTION

Mr. Nightingale was arrested on June 24, 2021 and has remained in custody since that date. His security was initially set at $115,000. The defense did not receive an offer at the outset of the case—only a letter provided at the first arraignment clearly indicating that Mr. Nightingale must not request a preliminary hearing if he wanted to discuss global resolution of all of his charges. Mr. Nightingale did not request a preliminary hearing, nor did he indicate at any other point pre-indictment that he was unwilling to negotiate on the offenses as originally charged.

When defense counsel contacted the state via email approximately 1 week after the case was filed to seek a position on a release motion, the state indicated that it had not filed additional charges in the hopes of "negotiat[ing] the case *as pleaded."* (Exhibit 102, emphasis added). However, despite the fact that no negotiations had taken place, and despite the fact that the state had not even provided an offer, the state indicated that its response to a release motion would be to file those additional charges. (Exhibit 102). After defense counsel expressed concern that this would mean Mr. Nightingale was receiving harsher treatment because of his inability to pay

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security, the state indicated it would now be taking the case to the grand jury for consideration of all charges, regardless of whether a release motion was filed or not. The stated reasons for doing so were (1) "the circumstances surrounding this case" and (2) "our previous emails." There is no indication or when or why the "circumstances" changed such that the state decided to present all charges to the grand jury, mere weeks after stating it wished to negotiate the case as originally pled. Moreover, the state provided no reason why the parties "previous emails"—in which all that happened was that defense counsel asked for a position on a release hearing and expressed concern about the state's position—would lead the state to indict the case and include considerably more serious charges.

For the reasons explained below, this sequence of events establishes a claim of vindictive and/or selective prosecution.

ARGUMENT

I. THE COURT SHOULD DISMISS THE INDICTMENT ON THE GROUNDS OF VINDICTIVE AND/OR SELECTIVE PROSECUTION UNDER FEDERAL LAW.

1. Constitutional Principles

"A prosecutor violates due process when he seeks additional charges solely to punish a defendant for exercising a constitutional or statutory right." *United States v. Gamez–Orduno,* 235 F.3d 453, 462 (9th Cir.2000) (citing *Bordenkircher v. Hayes,* 434 U.S. 357, 363, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978)). Thus, the constitutional protection against prosecutorial vindictiveness arises from the Due Process Clause of the 14th Amendment to the United States Constitution and is based on the fundamental notion that it "would be patently unconstitutional" to "chill the assertion of constitutional rights by penalizing those who choose to exercise them." *United States* v. *Jackson* 390 U.S. 570, 581 (1968). "To punish a person because he has done what the law allows is a due process violation of the most basic kind." *Bordenkircher,* 434 U.S. at 363.

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Vindictive prosecution can also be shown by demonstrating a prosecutor was motivated by animus or a personal stake in the outcome of a case. *United States v. Bullis,* 77 F.3d 1553, 1559 (7th Cir. 1996).

A similar protection exists against selective prosecution, which is drawn from the Equal Protection Clause and "arises where a defendant demonstrates that others similarly situated were treated more favorably and that the decision whether to prosecute [was] based on an unjustifiable standard such as race, religion, or other arbitrary classification." *State v. Kadderly*, 176 Or App 396, 400 (2001) (internal quotations omitted). In general, "little substantive difference can be detected between selective prosecution and vindictive prosecution." *United States v. Wilson,* 639 F.2d 500, 502 (9th Cir.1981).

2. Legal Standards of Proof

To prove a claim of vindictive prosecution, a defendant must either (1) produce "direct evidence of the prosecutor's punitive motivation . . ." *United States v. Jenkins,* 504 F.3d 694, 699 (9th Cir. 2007), or (2) show that the circumstances establish a "reasonable likelihood of vindictiveness," thus giving rise to a presumption that the Government must in turn rebut, *United States v. Goodwin,* 457 U.S. 368, 373 (1982). While "[a] prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution," *Id.* at 392, the decision to add additional charges in the pretrial context can constitute prosecutorial vindictiveness if done with an improper motive, *State v. Halling*, 66 Or App 180, 184–85 (1983).

Many cases have addressed the specific standard that applies to claims of vindictiveness arising in the pretrial setting, as opposed to conduct that occurs post-conviction. The vast majority of these cases deal with situations where more charges were filed following failed plea negotiations. These cases generally state that a presumption of vindictiveness will not arise in this

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context—meaning the defendant would have to show proof of actual vindictiveness. This principle is based in part on the fact that plea-bargaining is an accepted part of the criminal system, and one that benefits both parties. As the United States Supreme Court Stated in *Bordenkircher*, "whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned." 434 US 357 at 361-62 (quoting *Blackledge v. Allison*, 431 U.S. 63, 71). The court also distinguished earlier cases where it had found a presumption of vindictiveness in the post-trial setting (such as when the defendant receives a longer sentence following a successful appeal), because "[i]n those cases the Court was dealing with the State's unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction—a situation 'very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power.'" *Id.* at 362.

The Supreme Court also addressed the pre-trial standard in *Goodwin*. There, the defendant was initially charged only with misdemeanors, but was indicted on a felony after he ended plea negotiations and asserted his right to trial. 457 U.S. at 371. After being convicted of the felony count at a jury trial, the defendant moved to set aside that count on the basis of vindictive prosecution. *Id.* Again recognizing the value of plea negotiations, the court stated that "the mere fact that a defendant refuses to plead guilty and forces the government to prove its case is insufficient to warrant a presumption that subsequent changes in the charging decision are unjustified." *Id.* at 382–83. The court also stated, however, that "[i]n declining to apply a presumption of vindictiveness, we of course do not foreclose the possibility that a defendant in an appropriate case might prove objectively that the prosecutor's charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do." *Id.* at 384.

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In *State v. Halling,* 66 Or.App. 180 (1983), the Oregon Court of Appeals found that a defendant successfully established prosecutorial vindictiveness by offering "objective proof of actual vindictiveness" beyond the circumstances that were present in *Goodwin.* The defendant in *Halling* was initially indicted for attempted murder and the state made a six-year offer. *Id* at 182-83. The day after the defendant rejected the state's offer, the prosecutor called defense counsel and stated, "I have a brilliant idea. I have just thought of a way to cause further evil to poor Mr. Halling." *Id.* at 182. The prosecutor then informed defense counsel that she planned to charge the defendant with additional crimes unless he accepted the previous offer. *Id.* The defendant continued to insist on going to trial, and the prosecutor ultimately secured two additional indictments. The trial court granted the defendant's motion to dismiss the new indictments, concluding that this was "a case of overzealous prosecution after pretrial negotiations had ended" and that the new charges were brought "in reprisal" for the defendant's rejection of the plea bargain. *Id.* at 183. The Court of Appeals affirmed the trial court's ruling.

In *State v. Nelson*, 166 Or App 189, 198–99 (2000), the Oregon Court of Appeals interpreted the United States Supreme Court jurisprudence and *Halling* to mean that in the context of pretrial *negotiations*, the presumption of vindictiveness could not apply—meaning a defendant would need to show proof of actual vindictiveness. However, none of these cases addressed a situation where the claim arises in a pretrial setting *unrelated to negotiations,* as is the case here. Thus, while it may be true that "the mere fact that a defendant refuses to plead guilty and forces the government to prove its case is insufficient to warrant a presumption that subsequent changes in the charging decision are unjustified, " *Goodwin*, 457 US at 368, that is not the situation presented by this case.

Moreover, the Ninth Circuit recently held that direct evidence of a prosecutor's punitive motive is not necessary—even in the pretrial context—and that a vindictive prosecution claim can

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be established through a rebuttable presumption of vindictiveness created "by showing that the circumstances establish a reasonable likelihood of vindictiveness." *United States v. Brown*, 875 F3d 1235, 1240 (9th Cir 2017) (internal quotations and citations omitted).

3. This Court should apply a presumption of vindictiveness, and shift the burden to the state to demonstrate objective evidence justifying its decision to indict Mr. Nightingale when it did.

As discussed above, Oregon case law suggests that a presumption of vindictiveness will not be applied in a situation where additional charges are added in the context of pretrial negotiation. But this is not a case involving failed plea negotiations, and no Oregon case dictates the requisite standard of legal proof when a prosecutor adds additional charges in response a defendant's desire to obtain release and/or emails about the topic with defense counsel. And there are good reasons that this scenario should be treated differently than plea negotiations. The cases restricting vindictive prosecution claims in that setting highlight that plea negotiations benefit both parties, and that both parties approach that negotiation with "relatively equal bargaining power." *Bordenkircher,* 434 US at 361-62.

Mr. Nightingale did not have equal bargaining power in this situation because no bargaining ever took place prior to indictment. Instead, he merely suggested that he intended to file a motion (a motion he actually held off on filing after the state indicated it would respond with additional charges), which set off a chain of events that led to an indictment on numerous additional charges, including a class A felony. This scenario is much more akin to the "unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right," *Bordenkircher,* 434 US at 362—a situation where a presumption of vindictiveness is appropriate.

This is not a situation where plea negotiations failed—they never even began because the state proceeded to indict Mr. Nightingale on every apparent charge it could without making any offers whatsoever. This about face occurred only after defense counsel merely asked for a position

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on a motion to eliminate security, which prompted the state to indicate it would file additional charges by information as a response to Mr. Nightingale's assertion of that right. When pressed on that point—and when defense counsel pointed out how that position meant Mr. Nightingale would suffer more severe treatment based on his poverty—the state shifted its explanation and said it would press ahead with new charges at a grand jury because of the "circumstances of the case" *and because of defense counsel's email exchange with the state.*

To the extent the "circumstances" include those facts listed in the state's email regarding the charges and Mr. Nightingale's history (Exhibit 102), it appears most, if not all of those facts, would have been available to the state at the outset. More importantly, the "previous emails" between defense counsel and the prosecutor about the case could not possibly supply a valid motive for indicting Mr. Nightingale on substantially more serious charges. Those emails merely sought a position on a motion (as required by court rules) and expressed concern about the consequences of the state's position and what it meant in terms of unequal treatment of poor defendants.

The sequence of events here indicates that but for defense counsel initiating a discussion about a release motion, and her decision to question the state's response, Mr. Nightingale would not be facing an indictment with substantially more counts than initially charged. This creates a "reasonable likelihood of vindictiveness," *Goodwin,* 457 U.S. at 373, that the state should be required to rebut.

4. Even if the Court declines to apply a presumption, there is evidence of actual vindictiveness in this case.

Regardless of whether this Court finds a presumption of vindictiveness is legally applicable to this scenario, evidence of actual vindictiveness exists. A defendant can ultimately prove actual vindictiveness by showing that the charging decision was not based on the "usual determinative factors" a prosecutor would consider before bringing charges. *United States v.*

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Spears, 159 F.3d 1081, 1086 (7th Cir.1998); *United States v. School-craft,* 879 F.2d 64, 68 (3rd Cir.1989), *cert. denied,* 493 U.S. 995.

The state's initial approach to this case was to express a willingness to negotiate—stating this in a letter provided at arraignment (Exhibit 101), and stating in an email that it had not charged more offenses in hopes of negotiating the case as initially charged. (Exhibit 102). The state then dramatically changed its stance by indicting Mr. Nightingale on all possible charges, without actually attempting any negotiations, and without any statement from the defense that it did not want to negotiate.

Initially, the state said it would be filing more charges in direct response to the Mr. Nightingale pursing a release hearing—something he had a statutory and constitutional right to request. This demonstrated a clear hostility to Mr. Nightingale's exercise of that right. While the state said it wanted to do this so the court could consider all of the conduct in determining whether to reduce security, this explanation presents several problems. First, the state would have been well aware that release conditions and security would be set by court staff (via pretrial services) regardless of whether a release hearing was ever held. If the state truly wanted all the charges to be considered in making release determinations, it would have charged them from the outset. Thus, unless the state was simply assuming that Mr. Nightingale would be unable to pay his security regardless of the charges he was facing, this explanation should be viewed with skepticism. Second, when defense counsel offered a compromise where the state could discuss the uncharged conduct at the hearing—which seemingly would have satisfied the state's concerns—the state ignored that suggestion.

Regardless, the state then abandoned that explanation entirely and proceeded to offer a new explanation for its decision to indict Mr. Nightingale on every charge possible—a general reference to the circumstances of the case (which, again, would seem to have been apparent at the

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time of the initial charging decision) and the emails contained in Exhibit 102 themselves. Those emails suggested Mr. Nightingale was interested in asserting a statutory and constitutional right to a release hearing, and contained implicit criticism from defense counsel regarding the state's position. Neither is a valid basis to respond with additional charges. The state's admitted reliance on that email exchange as a basis for the for additional charges in this case—including a class A felony—shows hostility to Mr. Nightingale's assertions of his rights, and to adversarial testing of the state's position by his court appointed counsel. "To punish a person because he has done what the law allows is a due process violation of the most basic kind." *Bordenkircher,* 434 US at 363.

II. THE COURT SHOULD DISMISS THE INDICTMENT UNDER ARTICLE I, SECTION 20 OF THE OREGON CONSTITUTION.

Article I, section 20 of the Oregon constitution provides that "[n]o law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." This provision prohibits "forbidden inequality in the administration of laws under delegated authority as well as in legislative enactments * * *." *State v. Clark,* 291 Or. 231, 239, (1981).

The issue presented in this case began when the state said, in writing, that it would be filing more charges in response to Mr. Nightingale's intention to request that the court eliminate security release as a condition of his pretrial release. As defense counsel expressed to the state, the effect of this would be that Mr. Nightingale was treated more harshly because he was unable to post security—and therefore treated more harshly as a result of his socioeconomic status. If Mr. Nightingale were wealthy, he would have posted security without any need to make this request, and therefore seemingly would have avoided this entire situation. Because he is poor, he finds himself in this position. This is a clear violation of Article I, Section 20.[1]

[1] It is also worth noting that "[a]vailable jail data indicates that Black persons are incarcerated in Oregon jails at a rate of more than four times higher than the state's Black population, and that

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Though the state ultimately abandoned its initial statements regarding why it would seek more charges, its second rationale for doing so was based in part on the very emails in which the parties discussed the discriminatory effect of the state's actions. Just as defendant's socioeconomic status should not subject him to unequal treatment, neither should his defense of that very position.

CONCLUSION

For the reasons stated, Mr. Nightingale respectfully requests that the Court dismiss the indictment in this case.

DATED: August 27, 21

/s/ Caitlin M Plummer
Caitlin Plummer
Attorney for Defendant
cplummer@lanepds.org

this issue is most acute in the state's largest correctional facilities located in the I-5 corridor." Oregon Public Safety Task Force Report, December 4, 2020, available at: https://www.jrsa.org/pubs/sac-digest/vol-33/or-hb2355.pdf. Thus, if a request for a release hearing is a valid basis for new charges, the consequences of that will be felt more severely by the Black population. Mr. Nightingale is Black.

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JUN 25 2021

PATRICIA W. PERLOW
Lane County District Attorney

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FAX ONLY (541) 682-3890
(541) 682-4261

June 25, 2021

Court Case No. DA No. 039326801

STATE v. LAURENCE EDWARD NIGHTINGALE

(XX) To be served on the defendant at arraignment.

Defendant is also being arraigned on a separate incident involving the same named victim in an EPD case. Not requesting prelim allows for global discussion between these cases.

Additionally, initial indication that PCS charges are for much, much more than a "personal" amount.

(XX) Must not request preliminary hearing at arraignment for above discusisons

The Defendant must agree to pay full restitution on all counts charged and agree to the Financial Conditions of Probation. Please be prepared to agree to a specific restitution figure at the change of plea if restitution amount is known. If restitution amount is unknown, please be prepared to agree to allow 60 days for that amount to be submitted to the Court. Indigent defendants should expect to pay CAA fees. **Should the defendant fail to appear for sentencing, all sentencing concessions by the State are revoked and the length and terms of sentencing are open with the state free to make any recommendation it deems to be appropriate.**

The defendant may be sentenced, upon court approval, at the time of the change of plea if you notify this office in advance of 3-5 business days so that the victim(s) may be notified and sentencing paperwork prepared.

---

s/ Daniel D. Higgins
Daniel D. Higgins
Deputy District Attorney

Exhibit 101

Gmail

Caitlin Plummer <cplummer@lanepds.org>

Nightingale - 21CR30665 & 21CR30667

Caitlin Plummer <cplummer@lanepds.org> Wed, Jul 7, 2021 at 10:23 AM
To: HIGGINS Dan D <dan.higgins@lanecountyor.gov>

Thanks for letting me know. Do you have any information about the status of discovery?

Thanks,

Caitlin

On Wed, Jul 7, 2021 at 10:15 AM HIGGINS Dan D <dan.higgins@lanecountyor.gov> wrote:

> Thanks for reaching out.
>
> Given the circumstances surrounding this case and our previous emails, I scheduled this for Grand Jury next week. They are expected to hear all evidence in a variety of cases at that time.
>
> Please feel free to file any motions you see fit to file. They will have no bearing on charges being added, dropped, or explored by the Grand Jury.
>
> **Dan Higgins**
>
> **Assistant District Attorney**
>
> **Domestic Violence / Vehicular Homicide Teams**
>
> **Lane County District Attorney's Office**
> **125 East 8th Ave. Suite 400**
> **Eugene, OR 97401**
> **541-682-4261**
>
> ---
>
> **From:** Caitlin Plummer [mailto:cplummer@lanepds.org]
> **Sent:** Wednesday, July 7, 2021 9:56 AM
> **To:** HIGGINS Dan D <dan.higgins@lanecountyor.gov>
> **Subject:** Re: Nightingale - 21CR30665 & 21CR30667
>
> [EXTERNAL ⚠]
>
> Hi Dan -

I am following up on this. I'd appreciate it if you would let me know your position re: whether you'll be filing new charges if he files a release motion. I am also hoping that you can inquire about discovery. He has been in custody for 13 days and we have no discovery. It would also be helpful if you could provide the reports from the search of his residence.

Thank you,

Caitlin

On Wed, Jun 30, 2021 at 5:38 PM Caitlin Plummer <cplummer@lanepds.org> wrote:

> Thanks for your thoughtful response. I don't mean to suggest that you hold any personal animus or bias towards Mr. Nightingale based on his socioeconomic status. I am certain that is not the case. However, I am still concerned that the effect here is he ends up being worse off due to his inability to post bail, and his desire to request a release hearing as a result—a hearing he is constitutionally entitled to have.
>
> I don't have the benefit of the discovery, or statements from the alleged victim. And I certainly don't take issue with your opposition to a reduction in security—I anticipated that would be the state's position. I also appreciate that you may not have been aware of his financial situation beyond the fact that he qualifies for court appointed counsel. Just to elaborate on that point, he does not have any savings and or money to contribute to bail. I've also spoken with his mother, and she has spoken with other family members as well, and the family is also unable to come up with the required amount.
>
> Perhaps there is a middle ground here. In this particular instance, I would not object to you advising the court about the uncharged conduct at the hearing—as an alternative to those charges actually being filed in advance of the hearing. Hopefully that solution could satisfy both of our concerns. However, if you still plan to file additional charges if we file a motion for release, please let me know. I don't mean to belabor the point—I just want to make sure I'm doing my job well and giving my client good advice.
>
> Thanks,
>
> Caitlin
>
> On Wed, Jun 30, 2021 at 1:51 PM HIGGINS Dan D <dan.higgins@lanecountyor.gov> wrote:
>
>> Thank you for expressing your concerns.
>>
>> Clearly, there was some misunderstanding.
>>
>> My analysis is this:

Your client chased the named victim into a cannabis dispensary because he was concerned about her communicating with police. In doing so he not only committed crimes against the named victim (same named victim in 21CR30665 and 21CR30667), but also against employees of that dispensary, and perhaps the dispensary company itself.

This happened while there was a restraining order in place, as well as an active investigation into the DV previously caused by your client. As you know, your client is alleged to have committed a number of DV crimes from 3 separate dates (May 30, June 5, and June 24). Three separate and distinct allegations of domestic violence over a relatively short period of time, each time ratcheting up in seriousness.

Post arrest, your client granted consent to search a vehicle. That search yielded approximately 7.25 ounces of powder cocaine. There was also a firearm located in connection with that cocaine.

The named victim and other witnesses in this case all say the same thing, your client is more often than not in possession of firearms and she is very frightened of him. She indicates to me and Det. Seanor that she is afraid of your client and that she does not want him released pre-trial. She did not say anything about your client's ability to pay, nor did she indicate a specific amount of money for security would really make her feel safe.

In fact, she says the opposite. She says that she's felt like your client and his friend had been following her and watching her at work from a vehicle for long periods of time. She found it more than un-nerving that your client was engaged in that activity after he had been physical with her in the past.

Your client has a previous "Voluntary Manslaughter" conviction in California from 2004. I believe he spent 9 years in custody, or thereabouts. He was jailed again in 2012 for violating his parole in that case. This happened again in 2014. It appears he was charged with Murder, but perhaps pleaded to the lesser included Voluntary Manslaughter. Your client admitted to killing another person, and not with some legal justification either.

Nowhere in that analysis was your client's ability to pay a fee, security, or bail. This is because I don't think about that when I evaluate public safety and safety to a named victim in a case.

I'm hopeful this clarified the position. I have gone to great lengths to recognize my own, and evaluate cases for implicit bias. I take that seriously, and have multiple rounds of checks in place to be vigilant of those concerns.

When a defense attorney infers or implies that I treat one defendant more harshly than another because of the financial information (that I don't have at the time), I'm obligated to respond.

I'm cc'ing my direct supervisor on this email so that he knows PDS concerns. I'm confident he, or Ms. Perlow would be more than happy to discuss concerns that the DA's office, or an individual DA is making decisions based on how much money a criminal defendant has or makes.

Thank you again.

Dan Higgins

Assistant District Attorney

Domestic Violence / Vehicular Homicide Teams

Lane County District Attorney's Office
125 East 8th Ave. Suite 400
Eugene, OR 97401
541-682-4261

From: Caitlin Plummer [mailto:cplummer@lanepds.org]
Sent: Wednesday, June 30, 2021 12:26 PM
To: HIGGINS Dan D <dan.higgins@lanecountyor.gov>
Subject: Re: Nightingale - 21CR30665 & 21CR30667

[EXTERNAL ⚠]

This is concerning because it seems that Mr. Nightingale is being treated more harshly, and will be subject to more charges, because he is too poor to afford the bail as set. If he were a person of means and able to post $11,500, we would not be in this position. If I'm misunderstanding your emails, please excuse that. Otherwise I'll have to consult my client prior to filing the motion given the consequences.

On Wed, Jun 30, 2021 at 11:05 AM HIGGINS Dan D <dan.higgins@lanecountyor.gov> wrote:

> I simply want the court to know the extent of the potential charges and the fact that there was a search warrant executed in connection with the significant amount of drugs found in his vehicle.

Defendants argue they should be released without consideration of un-charged conduct. Thus, I am planning on filing an Amended Info so the Court can consider all potential charges for release.

I'm hopeful negotiations can occur over the normal course as they regularly would regardless of the outcome of any release motion.

Thanks

-Dan

From: Caitlin Plummer [mailto:cplummer@lanepds.org]
Sent: Wednesday, June 30, 2021 10:47 AM
To: HIGGINS Dan D <dan.higgins@lanecountyor.gov>
Subject: Re: Nightingale - 21CR30665 & 21CR30667

[EXTERNAL ⚠]

Thanks, Dan. Just to clarify, you are saying that you intend to file more charges if he files a motion for release? We don't even have discovery yet, so he's certainly not saying he's unwilling to negotiate the charges as filed. He'd just like a release hearing.

On Wed, Jun 30, 2021 at 10:43 AM HIGGINS Dan D <dan.higgins@lanecountyor.gov> wrote:

> Thanks for reaching out. Absent a change in circumstance from when he was assessed by court staff, I oppose.
>
> Additionally, a search warrant was executed on your client's residence RE: drug-dealing. I did not charge those offenses hoping to negotiate the case as pleaded.
>
> I will likely need to file an Amended Information prior to the hearing.
>
> Thanks
>
> **Dan Higgins**
>
> **Assistant District Attorney**
>
> **Domestic Violence / Vehicular Homicide Teams**

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From: Caitlin Plummer [mailto:cplummer@lanepds.org]
Sent: Wednesday, June 30, 2021 10:34 AM
To: HIGGINS Dan D <dan.higgins@lanecountyor.gov>
Subject: Nightingale - 21CR30665 & 21CR30667

[EXTERNAL ⚠]

Hi Dan -

Can you give me a position on a motion to eliminate security release in this case? Currently set at $115k.

Thanks,

Caitlin

--

Caitlin Plummer

Public Defender Services of Lane County
1143 Oak St.
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541-484-2611 ext. 145

cplummer@lanepds.org

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, concurrent with electronic filing of the foregoing original document, a true copy was electronically served on the Lane County District Attorney.

DATED: August 27, 2021

s/ Caitlin Plummer
Caitlin Plummer (200858)
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