

**IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR MULTNOMAH COUNTY**

STATE OF OREGON,

Plaintiff,

vs.

NANCY LEE CRAMPTON BROPHY,

Defendant.

Case No. 18-CR59251
DA 2388144-1

STATE'S MEMORANDUM IN SUPPORT
OF A DENIAL OF BAIL UNDER ORS
135.240

1 Comes now Rod Underhill, by and through Shawn Overstreet, Deputy District Attorney,
2 respectfully submits this memorandum in support of a denial of bail for the defendant under ORS
3 135.240.

INTRODUCTION

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6 The defendant is charged by indictment with one count of Murder (ORS 163.115) with a Firearm
7 – Constituting Domestic Violence. The state has filed a motion to interlineate the charging instrument to
8 retitle the crime to Murder in the Second Degree with a Firearm – Constituting Domestic Violence in
9 response to the recent change in law reclassifying the crime of murder. That motion has not been
10 addressed by the court as of this writing. At the bail hearing scheduled to take place on April 28, 2020,
11 the state intends to call one witness, Portland Police Bureau Detective Anthony Merrill. This
12 memorandum will (1) address the legal standard and burden of proof the court must apply in deciding
13 whether to set bail in this case, (2) identify the legal basis for the state utilizing hearsay testimony in its
14 presentation of evidence at the bail hearing, and (3) outline the evidence the state expects to present at
15 the bail hearing to support the court's denial of bail in this case. Based on the evidence and law outlined
16 below, the court should find the proof evident and/or the presumption strong that Nancy Brophy is guilty
17 of Murder in the Second Degree – Constituting Domestic Violence, and deny bail in this case.

FACTS

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20 The following is a summary of the evidence the state will present at Nancy Brophy's bail hearing
21 through the testimony of Portland Police Bureau Detective Anthony Merrill:

22 On June 2, 2020 students at the Oregon Culinary Institute (OCI), located at 1701 SW Jefferson,
23 entered the school and found one of the Chef Instructors, Daniel C. Brophy, lying on his back

1 unconscious in one of the school's kitchens. One of the students started CPR and another called 911.
2 When the medics arrived, they determined that Dan Brophy was deceased and that he had suffered at
3 least one gunshot wound to the chest. Medics requested that the Portland Police Bureau respond as this
4 was a shooting. Homicide detectives were also dispatched to begin an investigation.

5 The initial investigation revealed that Dan Brophy had been shot twice – later confirmed by the
6 medical examiner – and two shell casings were found on scene. The shell casings were both 9 millimeter
7 and it was determined that they were fired from the same gun and that they were likely fired from a
8 Glock, because of a unique impression left on the primer. Based on evidence at the scene it appeared
9 Dan Brophy was having a very routine morning and that he was standing at a sink filling water and ice
10 buckets when he shot in the back, penetrating his spine and piercing his heart. Although that first shot
11 likely paralyzed Dan Brophy and rendered him immobile, lying on his back, Nancy Brophy then walked
12 over to the helpless victim and shot him again at close range, also piercing the heart and ensuring that
13 Daniel Brophy would die. Nothing at OCI appeared to be disturbed, indicating that there had not been
14 any struggle. Dan Brophy was also found to be in possession of a pocketknife that was still clipped to
15 his pants pocket and didn't appear as if he had tried to access it for defensive reasons. Dan Brophy was
16 also in possession of over \$70.00 in cash, glasses, keys, cell phone, and a wallet with ID, credit cards,
17 and debit cards. Mr. Brophy's pickup truck was also parked just outside of the door to the OCI. The
18 detectives determined that robbery did not appear to be a motive in this homicide.

19 Homicide detectives then canvassed the surrounding area for surveillance cameras as there is no
20 video surveillance inside or outside of the OCI. Numerous area business had cameras that all showed a
21 minivan that appeared to be the same minivan as the one Nancy Brophy was known to drive. When
22 Nancy Brophy responded to the scene after being notified of an incident at OCI detectives photographed
23 her vehicle and compared that to the surveillance video. It became clear to the detectives that Nancy
24 Brophy was downtown by 6:39 am that morning and she left the downtown area by 7:28 am. However,
25 when asked, Nancy Brophy stated that she was at home all morning and that she recalled Dan Brophy
26 leaving the home at 7:05. She further elaborated that she was in bed when Dan Brophy came upstairs to
27 shower before leaving for the OCI – things she could not have known since she had been downtown
28 near OCI since 6:39 am. Through surveillance footage, detectives were also able to determine that Dan
29 Brophy arrived at OCI by 7:20 am and disarmed the alarm at 7:21 am.

30 During the death notification meeting with homicide detectives on the morning of the murder,
31 Nancy Brophy revealed that she and Dan Brophy had decided to purchase a gun in February of 2018 in

1 response to the recent school shooting in Parkland Florida. Following the meeting, homicide detectives
2 accompanied Nancy Brophy back to her residence where they recovered a fully intact Glock 17 Gen 4 9
3 Millimeter handgun. Nancy Brophy stated that after they bought the gun, neither she nor Daniel Brophy
4 were interested in it and that decided to put it away having never purchased any ammunition and never
5 firing the gun. A subsequent shell casing comparison confirmed that the slide and barrel portion of the
6 firearm was not used in the homicide of Dan Brophy. Despite Nancy Brophy only revealing the
7 ownership of one firearm the detectives were able to determine that Nancy Brophy had made other
8 firearm and firearm component purchases. Detectives uncovered a google search history belonging to
9 Nancy Brophy and it revealed that Nancy Brophy used a search terms “ghost guns” on December 19,
10 2017. Detectives were also able to determine that Nancy Brophy visited the website
11 www.ghostguns.com where she purchased a Glock 19 9 Millimeter Ghost Gun Kit. Detectives would
12 later recover the Ghost Gun Kit in a storage unit rented by Nancy Brophy. The lower unit of the Ghost
13 Gun had never been assembled and the only fully intact component was the slide and barrel. Detectives
14 determined that the Ghost Gun slide and barrel would not fit on the Glock 17 Gen 4 gun that was
15 purchased at the gun show on February 17, 2018.

16 However, detectives uncovered a google search for “Glock 17 slide for sale” in Nancy Brophy’s
17 google search history. That search was made on February 19, 2018, two days after Nancy Brophy
18 purchased the Glock 17 Gen 4 at the gun show. Nancy Brophy then bid on a Glock 17 slide and barrel
19 on ebay on February 20, 2018 and won the auction when it closed on February 23, 2018. Detectives
20 determined that the slide and barrel purchased on ebay would fit on the lower unit of the firearm
21 purchased at the gun show. Detectives then suspected that Nancy Brophy removed the original slide and
22 barrel from the gun show gun that she relinquished to the police, replaced it with the ebay purchased
23 slide and barrel, shot her husband, and then replaced the ebay slide and barrel with the original, thus
24 being able to present a new, fully intact firearm to police that would not be a match to the shell casings
25 that she left at the crime scene. Detectives have *never* recovered the slide and barrel purchased on ebay.
26 Nancy Brophy deleted her ebay account just days before the murder.

27 During the course of the investigation detectives learned that Nancy Brophy was the beneficiary
28 of numerous life insurance policies taken out on Dan Brophy. Detectives also discovered that Nancy
29 Brophy made a worker’s compensation claim with the SAIF Corporation. Because Dan Brophy had
30 been killed at work, the SAIF Corporation determined that Nancy Brophy was the beneficiary of the
31 accidental death benefit. In all, Nancy Brophy was entitled to over \$1.15 million dollars between the life

1 insurance and worker's compensation policies. Detectives also learned that Nancy Brophy sold life
2 insurance and was very knowledgeable of the insurance industry. In fact, Ms. Brophy was the agent who
3 sold herself all of the life insurance policies on Dan Brophy. She was also the sole beneficiary.

4 Homicide detectives interviewed numerous associates of Nancy and Dan Brophy and learned
5 that Nancy Brophy had expressed an interest in selling their home and travelling the world. However,
6 witnesses indicated these conversations only occurred with Nancy Brophy and never with Dan Brophy.
7 Nancy Brophy has also revealed to one of her friends that she desired to sell her home and move out of
8 the country, but that Dan Brophy would not be easy to convince. It is worth noting here that the
9 Brophy's had about \$312,931.00 in equity in their home. Therefore, Nancy Brophy stood to collect
10 almost \$1.5 million dollars upon Dan Brophy's death.

11 A thorough review of Dan and Nancy Brophy's bank accounts revealed a financial hardship
12 lasting for several years. They often struggled to pay their mortgage and appeared to be operating on a
13 month to month budget. Despite a dire financial situation Nancy Brophy ensured she paid the life
14 insurance premiums leading up to the murder. In fact, she paid over \$16,000.00 in insurance premiums
15 in 2017 while the Brophy's fell over \$6,000.00 behind in mortgage payments that same year. Nancy
16 Brophy also spent over \$1,500.00 in firearms and firearm components in less than two months.

17 Throughout the investigation detectives were made aware that Nancy Brophy was also a
18 romance novelist who has written several books, although none of them appear to be a financial success.
19 Detectives also became aware that Nancy Brophy had previously written an article titled "How to
20 Murder Your Husband" in which Nancy Brophy writes about how she thinks about murder frequently
21 and her knowledge of police procedure. Detectives also located a saved article on Dan and Nancy's joint
22 iTunes account titled "10 Ways to Cover Up a Murder" which provides a guide for how to get away with
23 a homicide. Nancy Brophy touted her knowledge of police procedures and her obsession with murder.

24 25 **LEGAL STANDARD AND BURDEN OF PROOF**

26 In order to deny bail in this case, the state bears the burden to show by clear and convincing
27 evidence that the proof is evident *or* that the presumption strong that Nancy Brophy is guilty of murder.
28 ORS 135.240(2)(a); *Osvaldo Rico-Villalobos v. Bernie Guisto*, 339 Or 197, 206 (2005); *Collins v.*
29 *Foster*, 299 Or 90, 96 (1985). The court in *Villalobos* explained that:

30 "Proof is evident" when there is plain or direct evidence of the defendant's
31 guilt – evidence that, in Blackstone's words, is "positive," rather than
32 "circumstantial." In the absence of such direct evidence, the defendant's

1 likely guilt may be based on a “violent” or “strong” presumption, one
2 grounded on circumstantial evidence worthy of credit. That evidence
3 must be of circumstances that “necessarily” or “usually” would attend
4 defendant’s guilt; that is, circumstantial proof that would give rise to a
5 strong presumption. A strong presumption provides an inference that can
6 “be relied upon till the contrary be actually proved.” *Article I, section 14*,
7 thus allows a person charged with murder to be held without bail when the
8 “proof is evident” – when there is *direct* evidence of guilt – or the
9 “presumption strong” – when *circumstantial* evidence strongly indicates
10 the accused’s guilt. 339 Or at 206.
11

12 Therefore, the state must show *either* that there is direct evidence of the defendant’s guilt, i.e. the
13 “proof is evident,” or evidence of circumstances that usually would attend defendant’s guilt, i.e. the
14 “presumption strong.” In this case, the court should deny bail on both bases.
15

16 **OTHER APPLICABLE LAW**

17 **A. The State May Offer Hearsay Evidence in a Murder Bail Hearing.**

18 The Oregon Supreme Court reviewed whether the state may rely on hearsay testimony in a
19 murder bail hearing in *Oswaldo Rico-Villalobos v. Bernie Guisto*, 339 Or 197 (2005). In that case, the
20 defendant was charged by indictment with murder and requested a bail hearing. *Id.* at 199. At the bail
21 hearing, the state presented its evidence through the testimony of one witness, the police detective in
22 charge of the murder investigation. *Id.* The detective outlined a variety of evidence including his own
23 observations, witness statements, the autopsy report, and associated lab reports. *Id.* The defense
24 objected to much of the state’s evidence claiming that the state could not rely on hearsay statements at
25 the bail hearing, and without them, the state failed to meet its burden of proof. *Id.* at 200.

26 The court first analyzed the statutory basis to allow hearsay in a bail hearing, noting that OEC
27 101(4)(g) provides that with the exception of rules governing privilege, the Oregon Evidence Code does
28 not apply to “proceedings under ORS chapter 135 relating to *** security release *** [.]” *Id.* at 203.
29 The court concluded that because the murder bail hearing constituted a security release hearing under
30 ORS chapter 135, the Oregon Evidence Code did not prohibit the state from utilizing hearsay evidence.
31 *Id.* at 203-204.

1 The court then turned to the substantive provisions of ORS 135.240(2)(a)¹ and *Article I, Section*
2 *14* of the Oregon Constitution². *Id.* at 204. The court concluded that the legislature intended the statute
3 to be coextensive with *Article I, Section 14*, and that there is no substantive difference between the two
4 provisions. *Id.* at 205-206. The court then closely examined the language contained in *Article I, Section*
5 *14* of the Oregon Constitution, and concluded that the words themselves did not suggest any limit on the
6 kind of evidence that would be admissible in a proceeding to determine whether to allow bail. *Id.* at
7 208.

8 The court observed that prior Oregon case law had established that a grand jury indictment,
9 standing alone, was insufficient to support a decision to deny bail, *id.* at 210, but nevertheless held that:

10 *Article I, section 14*, and our cases interpreting that provision, place the
11 burden on the state at the pretrial release hearing to present evidence,
12 direct or circumstantial, from which the trial court can make an
13 independent determination that evidence that likely will be admissible at
14 trial shows that the proof of defendant’s guilt is “evident” or the
15 “presumption strong”; however, that provision does not preclude the state
16 from making that showing by means of hearsay evidence. *Id.* at 213.
17

18 Therefore, the Oregon Supreme Court makes clear in *Villalobos* that the state may present
19 hearsay evidence at Ms. Brophy’s bail hearing.
20

21 **B. The Proof is Evident and the Presumption Strong that Nancy Brophy is Guilty of Murder.**

22 In evaluating whether the evidence presented in this case shows that the proof is evident or the
23 presumption strong that Ms. Brophy committed the murder of her husband, Daniel Brophy, it is helpful
24 to keep in mind the purpose of a bail hearing. In *State ex rel Connall v. Roth*, 258 Or 428 (1971), the
25 Oregon Supreme Court explained that:

26 The bail hearing is not for a determination of guilt or innocence, but rather
27 a determination of the preliminary issue of the right to bail. The court
28 should confine the evidence to the issue involved and not allow the
29 accused to transform the hearing into a discovery procedure for forcing the
30 state to produce its case. *Id.* at 435-36.
31

¹ ORS 135.204(2)(a) states: 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.

² *Article I, Section 14* of the Oregon Constitution states: Offences, except murder, and treason, shall be bailable by sufficient sureties. Murder or treason, shall not be bailable, when the proof is evident, or the presumption strong.

1 The sole issue before the court is whether there is direct evidence of the defendant's guilt, i.e.
2 that the proof is evident, or whether the evidence presented is of circumstances that usually would attend
3 defendant's guilt, i.e. that the presumption is strong. Here, the state intends to present the testimony of
4 Detective Anthony Merrill of the Portland Police Bureau. He is the homicide investigator assigned to
5 Ms. Brophy's case. Detective Merrill has personally supervised the investigation in this case,
6 interviewed witnesses, and has also reviewed reports prepared by other investigators who have gathered
7 evidence related to the death of Daniel Brophy. The evidence presented will be meaningful, reliable and
8 ultimately will be presented at trial. It will establish that the proof is evident and the presumption strong
9 that Ms. Brophy is guilty of murder.

10 11 CONCLUSION

12 Dan Brophy was content in his simplistic lifestyle, but Nancy Brophy wanted something more.
13 As Nancy Brophy became more financially desperate and her writing career was floundering, she was
14 left with few options. Nancy Brophy once wrote that finances could be motivation for murdering a
15 spouse, asking the question "divorce is expensive, do you really want to split your possessions?"³ The
16 bottom line is Dan Brophy was worth almost \$1.5 million dollars to Nancy Brophy if he was dead and
17 he was worth a life of financial hardship if he stayed alive. Nancy Brophy planned and carried out what
18 she believed was the perfect murder. A murder that she believed would free her from the grips of
19 financial despair and enter a life of financial security and adventure.

20 For the reasons stated above, the state requests that the court find that the proof is evident and/or
21 that the presumption is strong and therefore deny bail in this case.

22
23 Respectfully submitted this 27th Day of April, 2020.

24
25 Regards,
26 ROD UNDERHILL
27 District Attorney
28 Multnomah County, Oregon
29

30 By: /s/ Shawn Overstreet

³ *How to Murder Your Husband*. Written by Nancy Brophy. Published on www.seejanepublish.com. November 11, 2011.

Shawn Overstreet, OSB# 114859
Deputy District Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served the within STATE'S MEMORANDUM IN SUPPORT OF A DENIAL OF BAIL UNDER ORS 135.240 on this 27th Day of April, 2020, by E-Mailing a certified true copy thereof, certified by me as such, addressed to:

Lisa Maxfield
Attorney for the Defendant
lamaxfield@pacificnwlaw.com

and

Kristen Winemiller
Attorney for Defendant
klwinemiller@pacificnwlaw.com

By: _____
/s/ Shawn Overstreet
Shawn Overstreet, OSB# 114859
Deputy District Attorney