



Legislative Testimony

Oregon Criminal Defense Lawyers Association

April 2, 2019

The Honorable Floyd Prozanski, Chair
Senate Judiciary Committee, Members

Re: Testimony in Support of SB 1013

Dear Chair Prozanski and Members of the Committee:

Thank you for the opportunity to submit the following comments in support of SB 1013. OCDLA strongly supports passage of SB 1013 and implores you to read the materials submitted by Capitol Defender/Expert/Professor Jeff Ellis, Professor/Expert Aliza Kaplan, Professor/Expert Steven Kanter, and Chief Justice De Muniz’ materials—all experts in this field.

SB 1013 is a carefully crafted proposal that seeks to do three things to limit the imposition of the death penalty in Oregon:

- SB 1013 narrows the applicability of aggravated murder which can receive a sentence of death to only one crime: multiple murders by a terrorist;
- SB 1013 removes the scientifically unsound and constitutionally flawed “second question” also known as the “future dangerousness” question; and
- SB 1013 imposes the standard of proof beyond a reasonable doubt for all penalty phase questions including the “fourth question” also framed as “Does the defendant deserve the death penalty.” Imposing this burden of proof on this fourth question

OCDLA strongly supports passage of SB 1013 for the following reasons:

The Death Penalty is Costly and Doesn’t Improve Public Safety

Plain and simple: aggravated murder cases in which the death penalty is imposed costs close to a million dollars more per case than similar non-death aggravated murder cases,¹ and this money can and should be spent elsewhere—helping victims through their traumatic experience, ensuring constitutionally adequate defense elsewhere in our broken system, and funneling funds into education, mental health resources, and public safety.

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¹ ALIZA B. KAPLAN ET AL., OREGON’S DEATH PENALTY COST ANALYSIS 41 (2016).

The Death Penalty is Imposed Disparately and Results in Unreliable Sentences

Our criminal justice system is inherently flawed as it is created and run by human beings with racial biases, and political and social pressures. Executions cannot and are not administered justly. For example, while only 2% of Oregon's population is Black, Black defendants make up 9% of death row and 5% of those executed.² Death row populations in Oregon reflect death row populations nationwide, which are disproportionately Black and Hispanic.³ Native Americans are also overrepresented on Oregon's death row, as they are only 1.8% of Oregon's population but make up 3% of Oregon's death row.⁴ Additionally, Oregon's death penalty has been found to be used disproportionately against persons with significant mental impairments.⁵ One study found that two-thirds of Oregon's death row inmates either (1) possess signs of serious mental illness or intellectual impairment, or (2) endured devastatingly severe childhood trauma, or (3) were not old enough to legally purchase alcohol at the time the offense occurred.⁶ When considering its disparate application, it is particularly concerning that death sentences in Oregon have been overturned at high rates, suggesting a substantial fallibility in Oregon's death sentencing.

The Death Penalty's "Second Question" is Constitutionally Unsound and without Scientific Merit

The "future dangerousness" question is unreliable and unscientific, and Oregon originally modeled this prong off of the State of Texas⁷ that fabricated this question "out of thin air" without any scientific backing for any ability of a jury to actually predict someone's "future dangerousness" accurately.⁸ There is simply no evidence to suggest that "future dangerousness" can be predicted; in fact, the American Psychiatric Association has stated that a reliable prediction of future violence cannot be made.⁹ Additionally, research has shown us what we now know: juries get this question wrong *90% of the time*.¹⁰

The Death Penalty's "Fourth Question": "Does the defendant deserve death?" Currently Holds the State to No Burden

Under the current law, Oregon *does not require any standard* for what is arguably one of the most important questions that a jury of human beings could ever answer: "Does someone deserve

² BENJAMIN SOUEDE ET AL., REPORT TO GOVERNOR KATE BROWN ON CAPITAL PUNISHMENT IN OREGON 13 (2016).

³ *Id.* at 75.

⁴ *Id.*

⁵ FAIR PUNISHMENT PROJECT, NEW REPORT: OREGON'S DEATH PENALTY DISPROPORTIONATELY USED AGAINST PERSONS WITH SIGNIFICANT MENTAL IMPAIRMENTS (2016).

⁶ *Id.*

⁷ *State v. Wagner* ("Wagner I"), 305 Or. 115 (1988) ("It is undisputed that ORS 163.150 is modeled on Texas' statutory system, which was enacted in 1973 in response to *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972). If it were disputed, a comparison of ORS 163.150 with the Texas statute, Vernon's Ann C.C.P. art. 37.071, as enacted in 1973 and as amended in 1981, would soon resolve the dispute.").

⁸ Abbie Vansickle, *A Deadly Question*, ATLANTIC (Nov. 19, 2016),

<https://www.theatlantic.com/politics/archive/2016/11/a-deadly-question/508232/> (last visited on Apr. 2, 2019).

⁹ Workgroup on Violence Risk of the Council on Psychiatry, *Position Statement on Assessing the Risk for Violence*, Retained by the Board of Trustees, December 2017; Retained by the Assembly, November 2017; Approved by the Board of Trustees, July 2012; Approved by the Assembly, May 2012.

¹⁰ Carla Edmondson, *Nothing is Certain But Death: Why Future Dangerousness Mandates Abolition of the Death Penalty*, 20 LEWIS & CLARK LAW REVIEW, 857, 909 (2016).

For questions or comments contact:
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to die?” This is painfully flawed and must change. SB 1013 seeks to impose the appropriate burden of “beyond a reasonable doubt” as is required per Constitutional Due Process.¹¹

Government Sanctioned Killing Does Not Value Human Life or Human Healing

Government sanctioned killing does not value human life or the ability for humans to heal. As mentioned previously, a substantial portion of folks on Oregon’s death row have suffered “devastatingly severe childhood trauma.”¹² There is a well-established correlation between trauma and contact with the criminal justice system, but what’s more important, is the well-established use of psychotherapy and other mental health services to reduce criminality and recidivism.¹³ Government sanctioned killing ignores this well-established ability for humans with trauma to heal and live productive lives, even after substantial interaction with the criminal justice system. Government sanctioned killing condemns the most vulnerable people in our society—disproportionately people of color and people with mental health issues—to the finality of death, regardless of their scientifically-proven¹⁴ ability to heal and become productive members of society. And lastly, as you heard during testimony at the hearing, not all victims feel the same way or speak with the same voice. Many victims fail to find closure or healing under the death penalty scheme as it is a process that necessarily lasts for decades.

For the reasons outlined above, OCDLA strongly urges a “yes” vote to SB 1013 as it is a necessary and long needed step in the right direction.

Thank you for your consideration.

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¹¹ See, UCrJI No. 1009 (“The defendant is innocent unless and until the defendant is proven guilty beyond a reasonable doubt. The burden is on the state, and the state alone, to prove the guilt of the defendant beyond a reasonable doubt. Reasonable doubt is doubt based on common sense and reason. Reasonable doubt is not an imaginary doubt. Reasonable doubt means an honest uncertainty as to the guilt of the defendant. You must return a verdict of not guilty if, after careful and impartial consideration of all the evidence in the case, you are not convinced beyond a reasonable doubt that the defendant is guilty.”)

¹² FAIR PUNISHMENT PROJECT, *supra* note 5.

¹³ Lena J. Jäggi et al., *The Relationship Between Trauma, Arrest, and Incarceration History among Black Americans: Findings from the National Survey of American Life*, SOC. MENT. HEALTH (2016); Sharyn Adams et al., *Trauma-Informed and Evidence-Based Practices and Programs to Address Trauma in Correctional Settings*, ILLINOIS CRIMINAL JUSTICE INFORMATION AUTHORITY (2017); Michael S. Martin et al., *Risk of Violence by Inmates with Childhood Trauma and Mental Health Needs*, 39 L. AND HUMAN BEHAVIOR 614–623 (2015).

¹⁴ Robert Byron, *Criminals Need Mental Health Care*, SCIENTIFIC AMERICAN (Mar. 1, 2014), <https://www.scientificamerican.com/article/criminals-need-mental-health-care/> (last visited Apr. 2, 2019); J. Steven Lamberti, *Preventing Criminal Recidivism Through Mental Health and Criminal Justice Collaboration*, 67 PSYCHIATRIC SERVICES 1207–1212 (2016); S. Hodgins & R. Müller-Isberner, *Preventing Crime by People with Schizophrenic Disorders: The Role of Psychiatric Services*, 185 BRITISH JOURNAL OF PSYCHIATRY 245–250 (2004).

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About OCDLA

The Oregon Criminal Defense Lawyers Association (OCDLA) is a private, non-partisan, non-profit bar association of attorneys who represent juveniles and adults in delinquency, dependency, criminal prosecutions, appeals, civil commitment, and post-conviction relief proceedings throughout the state of Oregon. The Oregon Criminal Defense Lawyers Association serves the defense and juvenile law communities through continuing legal education, public education, networking, and legislative action.

OCDLA promotes legislation beneficial to the criminal and juvenile justice systems that protects the constitutional and statutory rights of those accused of crime or otherwise involved in delinquency and dependency systems as well as to the lawyers and service providers who do this difficult work. We also advocate against issues that would harm our goals of reform within the criminal and juvenile justice systems.

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