Legislative Hearing Testimony of Paul J. De Muniz Supporting SB 1013

Chair Prozanski, Vice Chair Thatcher, and members of the committee my name is Paul De Muniz. I have been involved with the death penalty throughout my 40-year legal career. As a criminal defense lawyer for 15 years I defended six aggravated murder cases in which the state was seeking to impose the death penalty, and I successfully argued two death penalty appeals in the Oregon Supreme Court. As a Supreme Court Justice I authored opinions and voted on death penalty cases -- affirming some death sentences and reversing others.

Since my retirement from the Oregon Supreme Court I have studied various aspects of the administration of Oregon's death penalty. As a result, I have arrived at a number of conclusions that I believe are relevant to today's hearing. I am here to share those conclusions solely in my individual capacity with one exception. Former Chief Justice Wallace Carson, and former Chief Justice Edwin Peterson wish to have the legislative record reflect that they are in favor of a repeal of the death penalty. Here are my conclusions stated as briefly as possible.

.Deterrence and Retribution are not Served By Oregon's Death Penalty

First conclusion: deterrence and retribution are not served by Oregon's death penalty. The two penological justifications usually cited in support of the death penalty are deterrence – knowing that death is the possible punishment for

taking a person's life makes it less likely that a person will commit such a crime; and retribution – death is the only punishment commensurate with the commission of such a vile, horrible violent crime. Oregon's now more than 30-year experience with the death penalty demonstrates that it cannot be justified on the basis of deterrence or retribution. Both deterrence and retribution are undermined by the delay-lack-of-finality that results from the ten-step review process necessarily in place in an attempt to ensure that no person is wrongly executed. So long as the death penalty continues in Oregon in its present form, the ten-step review process is critical to ensure that no person is wrongly executed, and should not be truncated in any way. However, I am not aware that any defendant housed on Oregon's death row has completed the ten-step review process, and in some cases have been engaged in that review process for 30 years. Although the lengthy review process undermines or diminishes the alleged penological justifications for the death penalty, the Oregon experience also shows that the review process is indispensable because the majority of death sentences are vacated at some point in the review process.

Imposition of Oregon's Death Penalty is Unreliable

Second conclusion: the imposition of Oregon's death penalty is unreliable. Since 1984 60 percent of the death sentences imposed in Oregon have been reversed and the majority of those reversals have resulted in a negotiated sentence

of life imprisonment without the possibility of parole. A significant number of reversals have occurred at the post-conviction stage where it has been proven that defense lawyers failed to provide the defendants with a constitutionally adequate defense or a prosecutor's acts or failure to act have violated the defendant's constitutional rights. In other words, the random human variable – the competence of a defense lawyer or a prosecutor – in so many of the Oregon death penalty cases, has played a significant role in undermining any confidence in the reliability, accuracy, or fairness of Oregon's death penalty process. Within the last few years a number of death penalty defendants have obtained full or partial relief from their death sentences in post-conviction proceedings.

Here are five recent examples. Jeffery Dale Tiner was charged with murdering a man in 1994 and jury found him guilty of aggravated murder and in the penalty phase concluded that Tiner should be put to death. The Oregon Supreme Court affirmed his aggravated murder conviction and death sentence in 2007.[1] However, in 2017, in a post-conviction proceeding, concluding 23 years after the initial trial, the Oregon Court of Appeals reversed Tiner's aggravated murder conviction and ordered a new trial on that charge.[2] Tiner's new trial for aggravated murder is now pending in Lane County.

[1] *State v. Tiner*, 340 Or. 551 (2006), *cert den*, 549 U.S. 1169 (2007).
[2] Tiner v. Premo, 284 Or App 59 (2017)

In 1994 Martin Johnson was charged in Washington County with murdering a fifteen-year-old girl and throwing her body off the Astoria Bridge. A jury found Johnson guilty of aggravated murder and in the penalty-phase concluded that Johnson should be put to death. In 2006 the Oregon Supreme Court affirmed Johnson's aggravated murder conviction and death sentence.[3] However, in 2017, in a post-conviction proceeding, the Oregon Supreme Court reversed Johnson's aggravated murder conviction and death sentence, and ordered a new trial.[4]

In 1998, a Washington County jury found Billy Lee Oatney Jr. guilty of aggravated murder and determined that Oatney should be sentenced to death. Oatney's aggravated murder conviction and death sentence were affirmed by the Oregon Supreme Court in 2004.[5] However, in 2015, in a post-conviction proceeding, Oatney's aggravated murder conviction and death sentence were reversed by the Oregon Court of Appeals, and a new trial ordered.[6]

In December 2016, Gregory Bowen, on Oregon's death row for more than 14 years, obtained post-conviction relief, in which his aggravated murder conviction and death sentence were vacated. Subsequently, Bowen agreed to plead guilty to the lesser charge of felony murder, with a life sentence making him eligible for release on parole after serving 25 years in prison.

[3] *State v. Johnson*, 340 Or. 319 (2006), *cert den,* 359 U.S. 1079 (2006).
[4] Johnson v. Premo, 361 Or. 688 (2017)
[5] *State v. Oatney*, 335 Or. 276 (2004).
[6] Oatney v. Premo, 275 Or App 185 (2015)

In 1988 Randy Guzek was found guilty by a Deschutes County jury of two counts of aggravated murder, and in the penalty phase the jury concluded that Guzek deserved to be put to death. The Oregon Supreme Court affirmed those aggravated convictions in 1990, but on three occasions vacated Guzek's death sentences and ordered new penalty-phase proceedings.[7] Finally, in 2017, the Oregon Supreme Court affirmed Guzek's death sentences imposed by a jury after his fourth penalty-phase trial, that occurred in 2010. Now, nearly 30 years after his initial conviction and death sentence, Guzek is entitled to access an early phase of the ten-step review process – post-conviction relief – available to death penalty defendants. That process will likely take another decade

Legislative Action

Third conclusion: Article 1, section 40 of the Oregon Constitution expressly authorizes the legislature to define the crime of aggravated murder and to establish the jury findings necessary to support a death sentence. Article 1, Section 40 provides: "Notwithstanding sections 15 and 16 of this Article, *the penalty for aggravated murder as defined by law shall be death upon unanimous affirmative jury findings as provided by law* and otherwise shall be life imprisonment with minimum sentence provided by law." Closely read, Article 1, section 40 expressly

[7] *State v. Guzek*, 310 Or. 299 (1990) (Guzek I); *State v. Guzek*, 322 Or. 245 (1995) (Guzek II); *State v. Guzek*, 336 Or. 424 (2004) (Guzek III), vac'd and rem'd, *State v. Guzak*, 546 U.S. 517 (2006) (Guzek IV), modified, *State v. Guzak*, 342 Or. 345 (2007) (Guzek V).

reserves to the legislature the ability to define the crime of aggravated murder and the required jury finding necessary to support the imposition of a death sentence.

Currently the legislature has defined aggravated murder in ORS 163.095, as murder, under or accompanied by at least 21 different circumstances (e.g., more than one victim in the same criminal episode; in the course of intentional maiming and torture of the victim; the victim is a law enforcement, judicial, or regulatory officer in the course of official duties). Accordingly, contrary to popular wisdom, a constitutional amendment is not necessary to make its application exceedingly rare. Rather, *consistent with the voters' intent*, the legislature can redefine the crime of aggravated murder in SB1013. The definition of aggravated murder in SB 1013 appropriately narrows the cohort of murderers eligible to be put to death by the state, to the "worst of the worst," consistent with the requirements of the Eighth Amendment to the United States Consistent.

The Second Penalty Phase Question is Constitutionally Flawed and Should be Repealed

Fourth conclusion: the second penalty phase question is constitutionally flawed and should be repealed. With regard to the penalty phase, at the conclusion of the presentation of evidence in the penalty phase, a jury is asked to answer four questions. The second question is "[w]hether there is a probability that the defendant would commit criminal acts of violence that would constitute a

continuing threat to society." Oregon adopted the Texas death penalty scheme that included the second question. Recent historical research argues that the Texas legislature "made up" the second question "out of thin air" and did so contrary to the long held scientific opinion of the American Psychiatric Association that two out of three predictions of long-term future violence made by psychiatrists are wrong.

Two recent studies – one in Texas and one in Oregon – confirm what the American Psychiatric Association has long claimed – the second question requires Oregon juries to engage in a process that is without scientific validity. The Texas and Oregon studies establish that jurors are wrong 90 percent of the time in predicting which aggravated murderers will be a continuing threat to commit future criminal acts of violence. The Texas and Oregon studies establish that the second question is constitutionally flawed because it does not reliably separate those aggravated murderers that deserve death for those that do not.

As set out above, Article 1, Section 40 reserves to the legislature the authority to establish the *jury findings* necessary to impose a sentence of death. SB 1013 appropriately removes the second question from the findings that a jury must make in the penalty phase of a death penalty case.

Require the State to Prove the Fourth Question Beyond a Reasonable Doubt

Fifth conclusion: require the state to prove the fourth question beyond a reasonable doubt. Today, in the penalty phase the fourth question that the jury must answer is "[w]hether the defendant should receive the death penalty." The Oregon Supreme Court has held that unlike the preceding three questions, the state does not have to prove beyond a reasonable doubt that the answer to that question is "yes." [8] In other words, currently in the penalty phase the jury is instructed that there is no burden of proof connected to the answer to the fourth question. SB 1013 which assigns a burden of proof to the state, may also help to narrow the imposition of the death penalty to the "worst of the worst" as required by the Eighth Amendment to the United States Constitution.

Death Penalty Costs Are Too High

Sixth conclusion: the death penalty costs too much. I incorporate the previous remarks of Professor Aliza Kaplan regarding her study of Oregon death penalty costs.

Listen to the Voices of Victims

Seventh Conclusion: listen to the voices of the victims. Death penalty advocates tend to assume that all victims' families want executions, as they argue in support of the death penalty. Although family members of murder victims do

[8] State v. *Wagner*, 305 Or. 115,164 (1992).

not share a single voice regarding the imposition of the death penalty, many are now speaking out against the death penalty.[9] It is past time to listen to the voices of the loved one's of murder victims who compelling assert that the death penalty does not provide healing or closure, and that the modern administration of Oregon's death penalty actually inhibits healing and perpetuates their suffering.

Thank you for the opportunity to speak at this hearing in support of SB 1013.

[9] See e.g., *Not in Our Name, Murder Victims' Families Speak Out Against the Death Penalty*, MURDER VICTIMS' FAMILIES FOR RECONCILIATION (2009).