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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

March 29, 2019

Senator Floyd Prozanski, Chair
Senate Committee on Judiciary
900 Court Street NE S413
Salem OR 97301

Re: Authority of the Legislative Assembly to change aggravated murder

Dear Senator Prozanski:

You have asked our office about the limits the Oregon Constitution places on the authority of the Legislative Assembly to make changes to the elements of, and sentencing procedures for, the crime of aggravated murder. Specifically, your question concerns Senate Bill 1013, a bill that changes the sentencing procedures, including required jury findings, for aggravated murder and redefines the crime of aggravated murder. The bill would therefore result in lesser sentences for persons who, under current law, may have been convicted of aggravated murder and sentenced to death.

I. Ballot Measures 6 and 7 (1984)

Article I, section 40, of the Oregon Constitution, was enacted by Ballot Measure 6 (1984) and 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 as provided by law.[1]

Ballot Measure 7 (1984) was a companion measure to Measure 6 and created statutory procedures for sentencing a person to death. Measure 7 established a process for holding a separate sentencing proceeding following a conviction for aggravated murder, during which a jury considers certain questions.[2] Upon a unanimous finding by the jury of "yes" on each question, the court is required to sentence the defendant to death.

[1] In 1984, Article I, section 15, of the Oregon Constitution, provided that criminal punishment must be based on the principle of "reformation, and not of vindictive justice." Article I, section 16, of the Oregon Constitution, prohibits cruel and unusual punishments.
[2] Section 3, chapter 3, Oregon Laws 1985, codified as ORS 163.150.

Measure 7 also amended ORS 163.105 to allow for sentences of death, created procedures for entering a judgment of death and delivering the death warrant,[3] and directed how death should be inflicted.[4]

II. Effect of Ballot Measure 10 (1994) on Measures 6 and 7

Article IV, section 33, of the Oregon Constitution, was enacted by Ballot Measure 10 (1994) and provides:

> Notwithstanding the provisions of section 25 of this Article, a two-thirds vote of all the members elected to each house shall be necessary to pass a bill that reduces a criminal sentence approved by the people under section 1 of this Article.[5]

As noted above, Article I, section 40, requires a sentence of death for aggravated murder "upon unanimous affirmative jury findings." The provision was enacted by Measure 6 and was therefore "approved by the people." It could therefore be argued that the death penalty is a criminal sentence approved by the people, and a bill that causes certain groups of defendants to no longer be subject to a death sentence requires a two-thirds vote in each chamber for passage.

However, Article I, section 40, uses the phrases "aggravated murder as defined by law" and "jury findings as provided by law." The provision therefore authorizes both the crime of aggravated murder and the jury findings to be defined by the Legislative Assembly. This conclusion is supported by the explanation of Measure 6 in the voters' pamphlet, which states that the crime of aggravated murder "can be changed by the legislature or by a vote of the people."[6] Because Article I, section 40, expressly reserves the ability of the Legislative Assembly to define the crime of aggravated murder and the required jury findings, we conclude that a bill that modifies the elements of aggravated murder, or the jury findings needed to sentence a person to death, does not need a two-thirds vote in each chamber for passage.

Measure 7 contained provisions requiring a sentence of death or life imprisonment upon conviction of aggravated murder and specified the jury findings required for a sentence of death to be imposed. There could be an argument that, since these provisions were approved by the people, a bill modifying these provisions requires a two-thirds vote in each chamber for passage. However, during the years following the measure's passage, the Legislative Assembly made substantial changes to the sentencing procedures, including adding life without parole as a possible sentence[7] and modifying the required jury findings[8] and the consideration of mitigation.[9]

In the recent Oregon Supreme Court case interpreting the meaning of Article IV, section 33, the court concluded that once the Legislative Assembly reduced Ballot Measure 57 (2008)

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[3] Section 5, chapter 3, Oregon Laws 1985, codified as ORS 137.463.
[4] Section 7, chapter 3, Oregon Laws 1985, codified as ORS 137.473.
[5] Article IV, section 25, of the Oregon Constitution, provides the general rule that a majority vote in each chamber is necessary to pass a bill, while Article IV, section 1, of the Oregon Constitution, describes the referendum and initiative powers of the people.
[6] Voters' Pamphlet (November 6, 1984), Book 9, at 28.
[7] Section 2, chapter 720, Oregon Laws 1989.
[8] Section 135b, chapter 790, Oregon Laws 1989; section 2, chapter 885, Oregon Laws 1991.
[9] Section 135b, chapter 790, Oregon Laws 1989; section 2, chapter 531, Oregon Laws 1995.

sentences that had been approved by the people, the sentences became a legislative creation and could be further modified by a simple majority vote.[10] Given their modifications over the years, the aggravated murder sentencing procedures seem to also be a legislative creation.

It also seems logical to draw a distinction between criminal sentences that are specific prison terms for specific crimes and the creation of procedures by which a person may be sentenced to death. With the former, it is obvious when these sentences are approved by the people or reduced by the Legislative Assembly. With the latter, it is not obvious at all. It is unclear if SB 1013 actually reduces a sentence in the way Measure 10 voters may have understood those words. In *State v. Vallin*, the court interpreted the phrase "reduce a criminal sentence" as follows:

> There can be little doubt what the voters who enacted Article IV, section 33, meant by a "bill that reduces a criminal sentence." Criminal sentences ultimately are imposed by judges, and the only way that a legislative action (such as a bill) can sensibly "reduce[] a criminal sentence" is by authorizing or requiring judges to impose a shorter period of imprisonment or probation than is authorized or required under the prevailing sentencing statutes.[11]

The provisions of Measure 7, and SB 1013's modifications of these provisions, do not seem to fit within this interpretation. It would also be impossible to determine if there remains a group of aggravated murder defendants for whom the sentencing procedures remain unchanged; i.e., a group of defendants who would have received a death sentence both in 1985 and under current law.

Finally, it is an open legal question as to whether the two-thirds vote requirement in Article IV, section 33, would even apply to Measures 6 and 7. Nothing in the text of Measure 10 indicates that it applies retroactively to criminal sentences approved by the people prior to 1994. In fact, a contrary interpretation, that the measure only applies prospectively, is supported by an "Argument in Favor" in the voters' pamphlet, written by Kevin Mannix. Mr. Mannix was the author and main proponent of both Measure 10 and Ballot Measure 11 (1994), a companion measure requiring mandatory prison sentences for certain crimes. Mr. Mannix writes that Measure 10 is needed "to protect measures such as Measure 11, and any future measures which may set tougher sanctions for crime."[12]

In summary, and although our conclusion is not free from doubt, we do not believe SB 1013 requires a two-thirds vote in each chamber for passage.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek

[10] *State v. Vallin*, 364 Or. 295 (2019).
[11] *State v. Vallin*, 364 Or. 295, 304 (2019).
[12] Voters' Pamphlet (November 8, 1994), Book 9, at 53.

and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

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