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SB 1013 A-Engrossed, Statement
Oregon House Rules Committee, June 5, 2019 Hearing

Chair Holvey, Vice-Chairs Williamson and Wilson, and Representatives.

I. Myths, Rumors, Speculation and Facts about Capital Punishment and SB 1013

Myth 1. Oregon has a functioning death penalty system.

The Facts. We do not! The most recent involuntary execution was in 1962, LeRoy Sanford McGahuey. In the last 57 years, Oregon has executed only two individuals, David Wright in 1996 and Harry Moore in 1997. Both of these men dismissed counsel and waived appeals. The death penalty is a cruel deception perpetrated upon victims' families, and on the public. Oregon is never going back to executing people on a mass or regular basis. If Oregon is to have the death penalty at all, it ought to have a narrow, carefully crafted and constitutionally improved statute. That is exactly what Senate Bill 1013 does. It is professionally and carefully drafted, and it fairly addresses the concerns of all sides. We owe at least this much to Oregon, its citizens, and especially to the families of victims.

Myth 2. SB 1013 is retroactive and disturbs prior cases.

The Facts. There is not a retroactive bone in SB 1013, not a single word. This is prospective legislation. It does not stir up any dust about prior cases in our state. It appropriately sets policy for the future, only going forward as it should do.

Myth 3. SB 1013 repeals the death penalty.

The Facts. SB 1013 is not a repealer! It retains the possibility of the death penalty for 5 narrow categories of offenses, and it improves the sentencing process and addresses a serious constitutional problem with our current statutes.

Myth 4. There is a pernicious Myth that the death penalty is cheaper fiscally than life imprisonment, and that the death penalty makes us safer than the alternative punishment of life imprisonment.

The Facts. Neither proposition is true. Cost studies forcefully debunk the notion that the death penalty saves taxpayer dollars. Professor Aliza Kaplan has performed the conclusive econometric study on the relative costs of the death penalty and non-death penalty cases and sentences in Oregon. The costs are enormously greater for having the death penalty. The main driver is that for every

30 to 50 death penalty filings, we end up with one death sentence, and a thousandth of a chance of it being actually carried out. For every possible execution, there are a large number of aggravated murder case filings, each of which gets expensive *Cadillac* treatment. With respect to public safety, despite effort for hundreds of years, the United States Supreme Court put it well in saying there's simply no, none, zero conclusive evidence that the death penalty deters better than life imprisonment, especially than true life. And, the generally open-ended death penalty that we currently have on the books wastes resources and diverts our attention from the things we could and should be doing to reduce violence and social problems in our state.

Myth 5. We must have a vote of the people on this issue.

The Facts. The voters in 1984 did vote for a constitutional amendment authorizing the death penalty as a possibility for aggravated murder, and Oregon would need another vote of the people on a constitutional amendment to eliminate the death penalty altogether. But SB 1013 does not repeal the death penalty. It is just the legislature doing its assigned job of figuring out what are the most appropriate and constitutionally defensible definitions for aggravated murder that could subject, in a rare case, an individual to the possibility of the death penalty. That is the charge the voters gave the legislature in 1984 when they adopted article 1 section 40 of the constitution. They only wanted to retain the death penalty as an option when the circumstances of the murder were truly aggravated **as defined by law**. The legislature was given a constitutional duty to define the elements of aggravated murder and the sentencing factors for the death penalty. It is clear beyond peradventure, therefore, that you have the power and responsibility under the provisions of Article I, Section 40, and its Ballot Title and Voters Pamphlet statements, to address SB 1013. This truth is fully supported by the March 29, 2019 letter opinion from Legislative Counsel:

> The provision [Article I, section 40 of the Oregon Constitution] 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** (emphasis added) or by a vote of the people."

Article 1 section 40, the 1984 constitutional amendment, made clear that while the people wanted to reserve the potential of the death penalty for aggravated murder, they stated in the official statement and proponents' arguments in favor in the voters pamphlet that they wanted it to be limited to only the absolute "worst of the worst." They asked for extensive procedural protections, both statutory and constitutional, to make sure capital punishment was reserved for only that very rare category of offender, and that it was not imposed unfairly or with risk of error. That is exactly what SB 1013 fulfills after 35 years of experience, and many imperfect prior legislative amendments along the way. Legislative responsibility to consider

and adopt SB 1013 lies at the heart of our republican form of government, so wisely created by the framers of our constitutional democracy. It is time to do the right thing and enact SB 1013.

II. SB 1013 A-Engrossed, Further Analysis

The crux of the United States Supreme Court's determination under the 8th amendment is that to have a death penalty, if a state chooses to have one, the state statutes have to do two things very precisely and well. First, even among very serious murder cases, the state has to create a statutory funnel that extremely narrowly and rationally reduces the pool of murderers to a much smaller number of well-defined individuals, the worst of the worst, who then could be considered for the death penalty. Second, once that narrowing is done and the very few individuals are in a select category of death eligibility, there has to be wide-open consideration of mitigating circumstances to see if there is some reason, any reason, for mercy.

What SB 1013 does finally is reduce aggravated murder in Oregon to that very close, narrow category demanded by the US Supreme Court. SB 1013 authorizes consideration of the death penalty for five narrow categories of offenses, and applies only where the defendant acts with premeditation and intent. The first three categories are where a person kills two or more people and the killings are for one of three additional aggravating purposes: i) To intimidate, injure or coerce a civilian population, ii) To influence the policy of a government by intimidation or coercion, or iii) To affect the conduct of a government through destruction of property, murder, kidnapping or aircraft piracy. The fourth category applies when an individual is already incarcerated for committing a serious murder, and commits another murder while in custody. The fifth category involves the premeditated and intentional killing of a child less than 14 years of age.

SB 1013's limited criteria meet the Supreme Court's narrowing standards, reflect a better policy of restricting capital cases to the people we might actually be willing to execute as a State, and perform the requisite constitutional narrowing fully and successfully. That allows, as the drafters of SB 1013 did, the removal of the most troublesome part of our death penalty, the highly problematic "future dangerousness" question.

There is an enormous body of scientific criticism of the future dangerousness question. The reason the future dangerousness determination is so problematic is that it is such a difficult question to wrestle with, and the professionals are not very good at predicting future dangerousness in individuals. Juries are even worse.

Independent of the considerable scientific problems with predictions of future dangerousness, the additional problem with Oregon's future dangerousness question is that it procedurally violates Oregon's proof beyond a reasonable doubt standard mandated by the Oregon Constitution. *See* 36 Willamette L. R. 316–344. The current statutes do not require the prosecutor to prove the ultimate decisional

fact of future dangerousness beyond a reasonable doubt. Instead they merely require the prosecution to prove a **probability** of future dangerousness. To quote Yogi Berra, that quintessential American philosopher and unintentional constitutional scholar, "90% of this game is half mental." Though Yogi was talking about baseball, his wisdom points out just what our current statutes do in death penalty cases. The statutes ask for proof beyond a reasonable doubt, not of future dangerousness, but only of a scant probability of future dangerousness. That is less than preponderance of the evidence of the ultimate factual issue. This current system is unconstitutional under the Oregon Constitution.

SB 1013 finally gets rid of this most troublesome constitutional problem with Oregon's death penalty. There might be other problems, but this is the most glaring problem and SB 1013 solves the problem.

III. History of Capital Punishment in Oregon and History of the Oregon Constitution

When Oregon became a state in 1859 we did not yet have a statutory code with a specific death penalty, but the practice was there. We did have a carefully considered constitution, the 1859 Oregon constitution. It is instructive to go back and look at what our Oregon framers thought as they were drafting this charter for our state's future. They said the Federal Bill of Rights was good, but they added, "we have seventy years of additional experience, and our proposed Oregon Bill of Rights is gold refined. It is up with the progress of the age."

As you consider SB 1013, remember the "gold standard" that our framers had in mind for Oregon. Or as President Lincoln said, call upon our best angels, not our worst, and act accordingly in crafting public policy. Let us move to burnish the gold of Oregon, rather than tarnish it. And that is the precise opportunity you have with SB 1013.

In 1914 Oregonians publicly voted to eliminate the death penalty, one of the first such public votes in the country in a state that had the death penalty. By 1920, after WWI, anti-immigrant sentiment flared, and the public voted to reinstate capital punishment. Between fifty and sixty individuals were executed in Oregon by 1962.

In 1964, Oregonians conducted a model bipartisan campaign led by Governor Hatfield together with every statewide office holder from both parties. Oregonians, given full information after an extensive campaign, overwhelmingly voted for a constitutional amendment removing the death penalty from the Oregon Constitution and repealing capital punishment, they believed permanently. United States Supreme Court Justice Thurgood Marshall said quite accurately, as social science evidence has confirmed since, the more well-informed people are about the death penalty, the more they want to narrow it or eliminate it altogether. The more you understand how defective the system is when you have a broad based death penalty, the more it makes sense to narrow it or abandon it altogether. Senate bill

1013 does the necessary narrowing in a careful, thoughtful, legally defensible manner.

From 1964, Oregon was firmly an abolitionist State. It is worth noting that Oregon's murder rate was one-third the murder rate in Texas, and that in general the murder rates in the abolitionist states were always substantially lower than the rates in states that carried out capital punishment. In 1972, the US Supreme Court declared all existing death penalty statutes unconstitutional in Furman v. Georgia. Not surprisingly, all 35 states that previously had the death penalty rushed to reinstate capital punishment statutes. The national media erroneously picked that up as a huge surge of interest in the death penalty. In fact, it was just a return to the status quo ante before Furman. California was one of the affected states. Oregon sometimes suffers from a California tsunami. This was such a case. The California vote reenergized Oregon proponents of the death penalty who came to the 1973, 1975 and 1977 legislative sessions in Oregon seeking a new death penalty. Those legislatures, after careful consideration, republican or democrat, said, "no it is not the right policy for Oregon." Unfortunately when the proponents disagreed and put the matter on the ballot by initiative petition in 1978, they got very poor legal advice. They failed to pay attention to the fact that the legislature had created aggravated murder and provided a long mandatory minimum before a convicted person could even be eligible for parole consideration. Instead, the proponents took the worst death penalty statute in the country, from Texas, adopted the sentencing questions verbatim, spliced them on to our ordinary murder statute, and ignored aggravated murder. We were left with an anomalous situation where for the most serious crime in the state, aggravated murder, you could get no more than life in prison. For the next most serious crime, murder, you could get death. That aspect of the statutes, not surprisingly, was declared unconstitutional in State v. Shumway, based upon the amicus brief I filed with the Oregon Supreme Court. Then in 1981 the Oregon Supreme Court, in State v. Quinn (a death penalty case I briefed and orally argued as amicus) unanimously declared the 1978 death penalty statutes unconstitutional on additional constitutional grounds.

In 1984, the people voted to reinstate capital punishment in Oregon yet again, by adopting through initiative petition a constitutional amendment authorizing the death penalty, together with some statutory changes to conform to the new constitutional provision. Article 1 section 40, the new constitutional amendment, made clear that the people wanted extensive procedural protections, both statutory and constitutional, to make sure capital punishment was reserved for only the "worst of the worst," and that it was not imposed unfairly or with risk of error. It is emphatically the power and the duty of this legislature to consider and adopt SB 1013, to define Aggravated Murder and the Death Penalty Questions and Procedures in a constitutional and justifiable manner as mandated by Article I, Section 40 of the Oregon Constitution. That is exactly what SB 1013 delivers. You finally have an opportunity to honor the promises made to the voters, and to satisfy the constitutional obligations upon all of us.

IV. Concluding Remarks

1. There is simply no evidence that a broad-based death penalty, like Oregon's current statutes improves public safety or prevents crime.
2. Of course, we have had many documented cases in this country of innocent or otherwise inappropriate individuals getting executed. That cannot be justified, especially when the alternative penalty of life without parole incapacitates as effectively as death.
3. Broad-based death penalty statutes are always enforced arbitrarily and discriminatorily. The single biggest factor in whether a defendant is executed or not is the quality of his counsel. That is shameful and inexcusable in a rule of law society.
4. The current death penalty system in Oregon wastes millions upon millions of dollars in taxpayer money, and diverts attention from the things we need to do and can do to address our real challenges as a society, including better funding of public defender and prosecution services and rehabilitative programs for non-homicide offenders.
5. The current death penalty statutes and the system they perpetuate brutalize our society, including most generally, the victims' families. We must end this cruel deception for them as much as for any other reason.

The human emotion of revenge is understandable. Any of us could feel those emotions if somebody killed someone close to one of us. We could feel those emotions ourselves, sure.

But, in the words of former Supreme Court Justice Arthur Goldberg, "the deliberate institutionalized taking of human life by the State is the greatest conceivable degradation to the dignity of the human personality." Killing a broad based group of human beings, even human beings that have done terrible things, by the state after we have them incapacitated with the power to hold them in prison for true life, is unimaginable and unjustifiable in 2019. Oregonians ought not to stand for it.

Oregon's current capital punishment system does not work. Despite good faith efforts of many proponents, and with recognition that their feelings are legitimate, Oregon's death penalty statutes are flawed and need fixes like those in SB 1013. Anyone who looks at our current system and at this bill carefully, and who asks themselves honestly, "Have we gotten what we thought we wanted?" "No." "Can we get closer to the kind of society we want with this bill?" "Yes." "Can we return our attention to healing, and finding solutions that will reduce violence, improve community and improve progress in Oregon?" "Yes we can." SB 1013 will not do all this by itself. But it is a good start in the right direction. The House should adopt SB 1013.