Response to District Attorneys' June 5, 2019 Testimony, and Letter from DDA Katie Suver, in Opposition to A-Engrossed SB 1013

Stephen Kanter
Dean and Professor of Law Emeritus
Lewis & Clark Law School
kanter@lclark.edu, cell: 503-313-3202

Deputy District Attorney Katie Suver submitted a three-page written letter, and testified orally together with Lane County DA Patty Perlow and DDA Matt Kinnie, in opposition to SB 1013 before the House Rules Committee on June 5, 2019. The DAs argued several points in support of their position, relying especially on DDA Suver's letter. This is a brief response to aid the House in its deliberations.

1. DAs Suver, Perlow and Kinnie correctly agreed that the legislature has the power to adopt SB 1013! While they personally oppose SB 1013, and purport to speak for the DA's Association, they certainly do not speak for all of Oregon's District Attorneys. For example, District Attorney John Hummel and others strongly support SB 1013. Firm support for SB 1013 also comes from former Chief Justices Peterson, Carson and DeMuniz; law school Deans Stephen Kanter, David Frohnmayer, James Huffman, Robert Klonoff, Jennifer Johnson and Barbara Aldave; Governors Mark Hattfield, Barbara Roberts, Ted Kulongoski and John Kitzhaber; former Superintendent of Oregon State Prison Frank Thompson; most leaders of Oregon's faith based communities; members of victims' families (though others oppose); and many, many thoughtful others.

2. The District Attorneys who testified in opposition to SB 1013 acknowledged that the legislature has amended the aggravated murder statutes on many occasions since the adoption of Article I, Section 40 of the Constitution in 1984. They approve of at least three of those prior amendments that expanded the definitions of death penalty eligible aggravated murder, because in their view those amendments were "not in conflict with what Oregonians voted into law." DDA Suver's letter then opposes changes like those in SB 1013 narrowing the definitions of aggravated murder, "because it is in direct conflict with the will of the people." The District Attorneys should not logically try to have it both ways. As demonstrated in detail by the oral and written testimony and exhibits submitted to the Senate Judiciary Committee and the House Rules Committee, Article I, Section 40 gave the legislature the explicit power and responsibility to define and modify by amendments the definitions of death-eligible aggravated murder, and the sentencing processes and criteria attached thereto. The people voted to allow the death penalty, true, but they insisted that it be reserved for the narrowest class of cases, the "worst of the worst," and that there be adequate safeguards. These safeguards mandatorily include proof beyond a reasonable doubt of all factors and other protective procedures, to be sure no

innocent or otherwise inappropriate individuals would be subject to a death sentence and execution. Expanding the definitions of aggravated murder is certainly no more, and arguably much less, justifiable for the legislature than narrowing the definitions to make sure the death penalty is indeed restricted to the "worst of the worst," and to reduce the risk of error of executing inappropriate individuals. The legislature not only has the power, conceded by the District Attorneys, to consider SB 1013, it also has the constitutional responsibility to do so.

3. DDA Suver argued incorrectly in her letter that SB 1013 "is nothing other than a legislative repeal of the death penalty." This is demonstrably false. SB 1013 retains five narrow categories of offenses (and the committee is considering two additional categories by amendment today) that are death penalty eligible, including the killing of a child less than fourteen years of age that DDA Suver supported as a worthy previous expansion of aggravated murder. Narrowing the categories of aggravated murder emphatically does not repeal the death penalty.

4. DDA Suver's letter contended that *Wagner* (1988), *Guzek* (1995) and *Taylor* (2019) upheld the constitutionality of the second (future dangerousness) sentencing question. To some extent this is true as far as it goes in that those cases did uphold specific death sentences in individual cases that included the second "future dangerousness" question, and thereby explicitly or implicitly rejected the claims made by those defendants (though significantly the results of *Wagner* and *Guzek* have been reversed since). But, if she is contending that these decisions were dispositive with respect to the second sentencing question, she is in serious error. The facts that *Wagner* (1988) and *Guzek* (1995) did not dispose of the constitutional challenges to the second sentencing question, "future dangerousness," and that this question is in fact unconstitutional in the context of the current Oregon death penalty statutes was amply demonstrated in detail more than two months ago before the Senate Judiciary Committee and in the written record. See, e.g. my testimony and written statements and submitted exhibits to the Senate Judiciary Committee on April 1 and April 2, 2019; my updated written statement of April 9, 2019 after the committee amendments; my written statement to the House Rules Committee submitted on June 5, 2019; the testimony before both committees by Jeffrey Ellis; and most especially the excerpts from Stephen Kanter, Confronting Capital Punishment: A Fresh Perspective on the Constitutionality of the Death Penalty Statutes in Oregon, 36 Willamette L. R. 313, 313 – 344 and 345 – 349. The District Attorneys have made no attempt to respond seriously to these procedural or merits arguments. The bottom line is that the future dangerousness question is unconstitutional under the bedrock Oregon and Federal Constitutional requirements for proof beyond a reasonable doubt. See 36 Willamette L. R. 316 – 344. *Taylor* (2019) adds no support at all to DDA Suver's position. *Taylor* addresses only a completely unrelated future dangerousness question

issue, 434 P.3d 344 – 345, that is whether the question punishes the defendant for a mere status in violation of *Robinson v. California*, 370 U.S. 660 (1962). This may have been an interesting issue, but it has nothing to do with the proof beyond a reasonable doubt issue that makes our current death penalty statutes unconstitutional.

5. DDA Suver's letter is certainly correct that it should be hard to prove that an offender will be violent in the future while incarcerated, since so few convicted, incarcerated murderers are.

6. Despite DDA Suver's assertion that SB 1013 may or may not save money, it is abundantly clear, from the overall record and the careful scientific studies submitted to the legislative committees, that SB 1013 if enacted will indeed save Oregon tens and tens of millions of dollars that can be put to much better use on critical priorities for our State.

7. Four members of two victim's families gave heart-wrenching testimony about their losses, their pain and their position before the House Rules Committee on June 5, 2019. A different victim's family member gave equally heart-wrenching testimony in the Senate, and stated their different position on SB 1013. All victims' families deserve our support, our careful listening and our full compassion. Proponents of SB 1013 do not contend that individual DA's mislead family members; the truth though remains that the current system itself does work a cruel deception on everyone, including the public and victims' families whatever their position on the death penalty.

8. Finally, in the DA's oral testimony, the assertion was that we will never have a death penalty case under the first three categories if SB 1013 is adopted unless, "we have a Timothy McVey type situation." I am sure she did not mean it, but DDA Suver remarks could be misconstrued almost as if this would be a disappointment or problem if we did not get to have cases serious enough to qualify for one of these first three categories. But, surely that is the desire, that we never, ever have a case in Oregon like Timothy McVey, or any of the other devastating cases provided for under the five narrow categories defined by SB 1013.

I urge the Rules Committee to vote in favor of SB 1013, and I urge the House to adopt SB 1013 expeditiously and with the bi-partisan support as it deserves.

Respectfully Submitted,

Stephen Kanter