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SB 1013 Testimony
Senate Judiciary Committee, April 1, 2019 Hearing

I. Introduction and Acknowledgements

Senator Prozanski and Vice Chair Thatcher. I am Steve Kanter, Dean Emeritus at Lewis & Clark Law School. The Emeritus designation means that I am getting a little older than last time I appeared on this issue before the Oregon Legislature. I want to start by sending a well-deserved bouquet to this committee. When I moved to Oregon in 1971, there were many serious issues facing our state as there are now. I came to the legislature as a citizen on one or more of these issues every session. And on most issues, you couldn't tell who was a Republican or who was a Democrat. Most of our citizen legislators would roll up their sleeves and work to come to a common sense practical solution. And I know that this committee has been working in that spirit as well. Oregonians thank you for it, and I hope that your can-do, cooperative efforts will continue even as the days of the session get a little tenser down the road.

In this bipartisan spirit, it is rare that one gets to speak on behalf of two deceased icons from Oregon, but as you know Senator Mark Hatfield was a long time opponent of the death penalty. He was Governor in 1964 when Oregon had a completely bipartisan campaign to amend the Constitution. The voters, by a vote of almost 2-1, approved the referred constitutional amendment to repeal the death penalty. Senator Hatfield continued to be involved against the death penalty for the rest of his life. He followed the issue and personally authorized me to speak on his behalf in favor of narrowing or repealing capital punishment whenever the chance came again. This is that day, and I am proud to speak for SB 1013 on behalf of Governor and Senator Mark Hatfield.

Similarly, David Frohnmayer (who served as Dean of Oregon Law School when I was Dean at Lewis & Clark, then Attorney General and President of the University of Oregon) was a long time public opponent of capital punishment. While Dave and I did not agree on everything, we completely agreed on the issue of capital punishment in Oregon. Before Dave's untimely death, there was an attempt to reconsider Oregon's death penalty again. He and I discussed the matter at length, and he told me he was fully onboard for anything that would sensibly limit and rationalize our statute or repeal the death penalty altogether.

Additionally, every Dean at Lewis & Clark Law School from 1986 to the present, 33 years in all, supports senate bill 1013. They include myself, James Huffman, my successor, who stood as Republican candidate for United States Senate, Robert

Klonoff, Jim's successor, and our current Dean Jennifer Johnson. Barbara Aldave, who is ill and cannot be here today, endowed Professor and former acting Dean at the University of Oregon and former Dean at St. Mary's Law School, strongly supports SB 1013,
I want to emphasize that most of our former Governors publically on record, Mark Hatfield, Barbara Roberts, John Kitzhaber have all staunchly opposed the death penalty. I spoke with Theodore Kulongoski the other day. Ted is the MVP of Oregon politics, having served as legislator, AG, Supreme Court Justice and Governor. I am not sure what this did to separation of powers in our state, but Oregonians were well served. Ted has looked at SB 1013 carefully and asked me to tell you he strongly supports the bill.

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

If you will indulge me, I am going to take more than the usual amount of time to discuss SB 1013 with you today. The serious issue of capital punishment and common sense reform deserves all of our time.
I want to talk initially about some **Myths, Rumors, Speculation, and Facts**, relating to capital punishment and SB 1013.
First, as Representative Williamson noted, there is a Myth among Oregonians that we have a functioning death penalty in this state. We do not! The most recent involuntary execution was way back in 1962, LeRoy Sanford McGahuey. Since then, in the last 57 years, Oregon has executed only two individuals, David Wright in 1996 and Harry Moore in 1997. Both of these men not only waived appeals, but also dismissed counsel. That is it, the sum total. For all of the effort, for all of the time, for all of the money, for all of the heartache, for all of the good faith efforts of proponents of the death penalty, Oregon has executed only two individuals, neither of them resisting the penalty. So, as Representative Jennifer Williamson so eloquently stated, in some respects this is a cruel deception on victims' families. It is a cruel deception on the public. We are not going to have the death penalty in a mass way in this state. We are not ever going back to executing people on a regular basis. If we must have the death penalty at all, we ought to have a carefully crafted, constitutionally narrow and constitutionally improved statute. We owe at least that much to Oregon and its citizens and especially to the families of victims. That is exactly what senate bill 1013 does. I did not draft SB 1013, but in my opinion it is exceedingly carefully drafted, very professionally done, and it fairly addresses the concerns of all sides.
The second Myth is that somehow SB 1013 is retroactive and disturbs prior cases., I have looked at every word in this bill. There is not a retroactive bone in SB 1013, not a single word. This is purely prospective legislation. It does not stir up any dust about any prior case that we have in our state. It appropriately sets the policy for the future, only going forward as it should do.
Third, SB 1013, obviously does not repeal the death penalty, another false Myth out there is that it does. SB 1013 is not a repealer! It retains the death penalty for a

very narrow category of offenders as a potential sentence, and it dramatically improves the sentencing process and addresses a serious constitutional problem with our current statutes.

Fourth, there's been a pernicious rumor, a Myth, for a long time, that somehow the death penalty is cheaper fiscally than life imprisonment, and that somehow the death penalty makes us safer than the alternative punishment of life imprisonment, even life without possibility of parole. Neither of those propositions are true. Frankly, even if the death penalty saved us a few dollars that would hardly be a reason to support it. But, all of the studies forcefully debunk the possibility that the death penalty saves taxpayer dollars. You are going to hear definitive testimony on this issue from my colleague, Professor Aliza Kaplan, who has performed the conclusive econometric study on the relative costs of the death penalty and non-death penalty cases and sentences. The costs are enormously greater for having the death penalty. That may sound a little bit counterintuitive, and she is going to explain it to you persuasively with data, but the main driver is that for every 30 to 50 death penalty filings, we might end up with one death sentence, and one thousandth of a chance of a death sentence actually carried out. So, we are talking about a massive number of aggravated murder case filings which get the expensive Cadillac treatment, the massively more expensive treatment, for every even possible execution.

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, when you consider that the death penalty discussion and the absorption of resources diverts our attention from the things we could and should be doing, and want to be doing to reduce violence in our state and our society, it is clear that the generally open-ended death penalty that we currently have on the books does not provide any greater safety, in fact it reduces our opportunities to come together as a community and really deal with violence and social problems in our state.

Fifth, there's a rumor, or Myth, and it's more than a rumor, the Oregonian editorialized for this view, that we should or even must have a vote of the people on this issue because the people voted for the death penalty in 1984. Well the history is more mixed. Oregonians' sentiment about the death penalty has been very fickle. I would agree that if we were talking about total repeal, we would need a vote of the people on a constitutional amendment. The voters in 1984 did vote for a constitutional amendment supporting the death penalty as a possibility for aggravated murder, and we would need a constitutional amendment to change this and eliminate the death penalty all together. On the other hand, here we are talking about the legislature doing its job. Trying to figure out after careful attention and study what are the most appropriate and constitutionally defensible definitions for aggravated murder that should 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 said, we only want to retain the death penalty as an option when the circumstances of the murder are truly aggravated as defined by law. You are the legislators. You are given the

constitutional duty to define the elements of aggravated murder and the sentencing factors for the death penalty. It is incumbent upon you, you have the power, and in my opinion you also have the responsibility under Article I, section 40, and the Ballot Title and Voters Pamphlet statements to do the right thing for all Oregonians. Proponents and opponents of the death penalty should come together and agree on the need to better and more carefully define the elements of aggravated murder and lesser homicide crimes and the appropriate sentences that we are to have in this state. You will hear a lot more about this important issue from former Oregon Chief Justice Paul DeMuniz later in the day.

I will emphasize now, it is clear beyond peradventure, it is absolutely clear you have the power to do this and adopt SB 1013. It is equally clear you have the responsibility to do so. If SB 1013 passes, as I expect and hope that it will, and if the Governor signs it, as I expect and hope she will, then I do not think it is likely there will be an initiative petition, because SB 1013 is drafted in a carefully balanced way with something credible for everybody on both side of this issue. But if there is an initiative petition effort, I would not fear the results. I imagine it would be a tough question if Oregonians were asked to vote to repeal the death penalty altogether. I do not know how that might come out. But a narrowing of the classes of cases, with a good explanation of why the elements of aggravated murder are being narrowed, and at the same time improving the process and enhancing the constitutionality, and making the system live up to its promise, I think the vast overwhelming majority of Oregonians will support that if it does come to a public vote.

I do have one, admittedly anecdotal, but in my opinion reliable survey result. I do not have a scientific study, but for what it is worth, this morning, I arrived in Salem a little early for the hearing. I had time to have breakfast at the Kitchen on Court Street, which served me a very good omelet. My server was curious about what I was doing with so many papers in front of me. So, I said, "tell me the truth, what is your position on the death penalty?" Without hesitating, she said, "Pro." "Fine, I assured her, "so then tell me a little more about your views." She did. I explained what SB 1013 bill does. She responded, "I support that, we need to narrow the death penalty to only a very, very few situations. I don't mean that I support the death penalty for every murderer, only a very few of them like those who kill many people like the terrorists and mass shooters have done, and just did in New Zealand. I believe my server represents the average Oregonian. I am convinced if we do have to go to the people for a vote, though I do not think we should spend the time or energy--we have more important things that must go to the ballot, the voters will be like my server at the Kitchen on Court Street and vote to uphold SB 1013 once it passes and is signed into law. If the proponents of a wider and in my opinion unconstitutional death penalty put SB 1013 on the ballot, I do not fear the outcome.

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

I will now give you a very brief history of the death penalty internationally, nationally and in Oregon, and the history of the Oregon Constitution. First, many human societies started out with the death penalty being the mandatory penalty for homicide and other serious crimes. Generally there were not even prisons as an alternative. Murder was later separated into murder 1 and murder 2 not to make punishments more severe, but as an ameliorative device to allow juries to take into account certain circumstances, recognizing that not everybody who commits even the serious act of murder should be considered for the death penalty.

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 brand new, carefully considered constitution, the 1859 Oregon constitution. It is instructive to go back and look at what our framers said as they were drafting this charter for our state's future. They said the Federal Bill of Rights was good, and the other State Bills of Rights were sometimes even better. But they added, "we have a hundred years of additional experience, and our proposed Oregon Bill of Rights is gold refined." That is a quote from Mr. Smith at the constitutional convention. Gold refined. "It is up with the progress of the age." The vision of Oregon's founders was that our state would continue to benefit from new scientific advances and progress of the ages, and adopt more civilized thinking about criminal justice. And in this spirit, they included Article 1 section 15 in the original constitution, which said, "Laws for the punishment of crime shall be founded on the principles of reformation, and not vindictive justice."

Now of course, reformation is not the only legitimate purpose of criminal justice sanctions in Oregon. The Oregon Supreme Court, in Tuel v. Gladden, 234 Or. 1 (1963), and many other cases, held repeatedly that all of the usual utilitarian purposes of criminal sanctions were permitted under Article I, Section 15, including protection of society, incapacitation, deterrence, etc. in addition to reformation. But vindictive justice was not allowed in Oregon, an enlightened constitutional limiting principle. One of the downsides of the broad based death penalty debate over the years is that Oregonians actually, for the first time in our history, substantively reduced one of the founders' original bill of rights protections from our 1859 Constitution. It was fine to add expressly, as we did in 1996, to article 1 section 15 these above-mentioned additional positive utilitarian sentencing purposes. They were already permitted routinely of course. But what a constitution does, what the bill of rights does that is so essential to lberty is to list the "thou shall not" limitations for government, to protect the liberties of the people. And the "thou shall not" in original article 1, section 15, is that we Oregonians are not vindictive. But because of the death penalty debate in '96, Oregonians were given a constitutional amendment that removed that prohibition from the constitution. It was a sad day, at least symbolically, when that measure passed by a narrow vote of the people. Obviously most Oregonians are not for vindictiveness.

As you consider SB 1013, I urge you to remember the "gold standard" that our framers had in mind for Oregon. Or as President Lincoln said, we should 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. This was one of the first such public votes in our country. 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. Governor Hatfield together with every statewide office holder from both parties joined every legal leader, dean, Attorney General in the campaign, and the public all unified. 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 really 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 was 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 United States Supreme Court in 1976 upheld revised statutes in Gregg, Profitt and Jurek, Georgia, Florida, and most narrowly in Texas, while striking down the North Carolina and Louisiana revised death penalty statutes in Woodson and Roberts. 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. I was at each of those sessions. At least one of you was there as well. Those legislatures, after careful consideration, republican or democrat, said, "no it is not the right policy for Oregon." Unfortunately when the proponents, who were good-hearted people, disagreed and put the matter on the ballot by initiative petition, they got very poor legal advice. They failed to pay attention to the fact that legislature had created aggravated murder and provided a long mandatory minimum before a convicted person could even be eligible for parole consideration. So 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 a situation where for the most serious crimes 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 statute, 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 a case I briefed and orally argued as amicus, unanimously declared the 1978 death penalty statute unconstitutional.
That brings us to 1984, when the people voted for a constitutional amendment and statutory changes to conform to it in order to reinstate capital punishment in Oregon yet again. As I noted before, article 1 section 40, the constitutional amendment, makes clear that while people wanted to reserve the potential of the death penalty for aggravated murder, they said in the official statement in the voters pamphlet and the proponents' statements, they meant it to be limited to only the absolute "worst of the worst." They asked for all kinds of 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. That is exactly what SB 1013 fulfills after 35 years of experience, and many imperfect prior legislative amendments along the way. You finally have an opportunity to fulfill the promises made to the voters, and the constitutional obligations upon all of us.

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.

IV. SB 1013 Analysis

I turn briefly, and I know I'm taking a lot of your time, to SB 1013 in specific.
First, it is very well crafted and balanced. The crux of the US Supreme Court's determination under the 8th amendment is that to have a death penalty, if a state chooses to have one, is that the state statutes have to do two things very precisely and well. One, 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. This narrowing function is critical to the court. It is not enough to have premeditation and deliberation, as important as those are. The court requires much more narrowing. Second, once that narrowing is done and the very few individuals are in that 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 applies to three categories of offenses, and only where the defendant acts with premeditation and intent and kills two or more people, for one of three additional aggravating purposes: a. Intimidate, injure or coerce a civilian population; b. Influence the policy

of a government by intimidation or coercion; or c. Affect the conduct of a government through destruction of property, murder, kidnapping or aircraft piracy. These limited criteria meet the Supreme Court's narrowing standards. The other important thing about this legally, beside the better policy of narrowing the people we might actually be willing to execute as a State, is that it means the requisite constitutional narrowing is fully and successfully done by SB 1013. 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. Both Chief Justice DeMuniz and Jeff Ellis are going to speak to this important benefit of SB 1013 more fully, but let me just offer some of my brief thoughts about future dangerousness. There is an enormous body scientific criticism of that question. In Texas, for example, there was the infamous Dr. Grigson, who was known as "Dr. Death," who testified in just about every capital case in Texas for many years, and always opined that the defendant would be dangerous in the future. Grigson eventually was disbarred from the American Psychological Association because of his repeated, unethical behavior in capital cases. He rarely even met the offenders. It was a sham. The reason the future dangerousness determination more generally is a sham is that it is such a difficult question to wrestle with, and the professionals are not very good at predicting future dangerous in individuals. Juries are even worse. But that is not the only problem.

My lengthy law review article written in 2000, referenced below and made a part of the record in this hearing, points out that 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 Oregpn's proof beyond a reasonable doubt standard mandated by the Oregon Constitution. *See especially*, 36 Willamette L. R. 316 – 344.

The current statute does not require the prosecutor to prove the ultimate decisional fact of future dangerousness beyond a reasonable doubt. Instead it merely requires 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 statute do in death penalty cases. The statute asks 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. I am not exaggerating, and this system is plainly unconstitutional. Whether it gets found unconstitutional in Texas or not, it is certainly unconstitutional and deficient as a narrowing factor in Oregon.

The United States Supreme Court has danced around this issue, first in 1976 in Jurek v. Texas, and has continued to do so ever since. The court essentially said, "well Texas narrows so much in its definition of capital murder, future dangerousness does not need to narrow any further and instead it can function as kind of a mitigating question. That has never been true in Oregon.

We should excise this defective and terribly inappropriate legal standard from our law books as quickly as we can. It is a disaster. Everybody on both sides of the aisle really agrees, it's a true disaster. By narrowing, as is properly done in SB 1013, you not only can remove the offending question, you should. If I were a proponent of the

death penalty in general, I would say this bill finally gets rid of the most troublesome constitutional problem with our death penalty. There might be other problems, but this is the most glaring problem and SB 1013 solves the problem.

A careful look at the 1984 Voter's Pamphlet and the text of Article I, Section 40, make clear that the legislative has both the power and the responsibility to consider and enact legislation like SB 1013. I thoroughly support SB 1013 and urge the legislature to pass it as soon as possible.

V. Concluding Remarks About The Death Penalty

Finally, my opposition to Oregon's current broad-based death penalty system and strong support for the narrowing corrections of SB 1013 comes because I have studied and seen the capital punishment system work over years and years in Oregon, or I should say, not work. Despite good faith efforts of many proponents, and with recognition that their feelings are important, are legitimate, Oregon's system is flawed and needs the fixes like those in SB 1013. The people I feel sorriest for are the families of victims. You will hear from one of them today. Of course there are diverse views among victim's family members, but people who look at this bill carefully, and who ask 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.
I conclude with the following points:

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.

In the words of former Supreme Court Justice Arthur Goldberg, paraphrasing only slightly here, "I understand the human emotion of revenge. Any of us could feel those emotions. If somebody killed someone close to me, I could feel those emotions myself. Sure."

But, "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. I applaud the committee for considering this bill and I hope you will move it forward. I fully support SB 1013. Thank you very much.

Citations

Oregon Constitution
U.S. Constitution

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