J. Kevin Hunt LIFE MEMBER, OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION*

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Before the
COMMITTEE ON THE JUDICIARY
Hon. Frank Prozanski, Chair
Oregon State Senate
Capitol
Salem, Oregon

Re: SB 1013 (Amending Oregon Law Related to Criminal Homicide)

EXHIBIT: TESTIMONY OF J. KEVIN HUNT IN FAVOR, WITH SIX PROPOSED COMMITTEE AMENDMENTS

SUBMITTED IN LIEU OF LIVE TESTIMONY – FOR INCLUSION IN COMMITTEE RECORD OF TESTIMONY AND COMMITTEE MINUTES (*CORRECTED*)†

Hearing Date: April 1, 2019†

Honorable Chairman Prozanski and Senators Thatcher, Bentz, Dembrow, Gelser, Linthicum and Wagner, GREETINGS:

I.

Background and Introduction

My name is J. Kevin Hunt, currently residing in Missoula, Montana since June, 2018 in order to care for my elderly, widowed mother. I submit this testimony in favor of SB 1013, but strongly urge adoption of six amendments. Please allow me to first describe my intimate familiarity with this statute. From 1984 to 2014, I practiced criminal defense and constitutional law throughout Oregon, my principal office being in Oregon City, with special emphasis on representation of aggravated murder defendants facing potential death penalty. In the course of said practice, I was of counsel in several trials in the Circuit Court and lead counsel on several direct review proceedings before the Oregon Supreme Court, including in two of the longest-running capital cases in Oregon history: *State v. Dayton Leroy Rogers* (indicted in 1987 & 1988); *State v. Randy Lee Guzek* (indicted in 1987); in 2005, I appeared with attorney Richard L. Wolf before the United States Supreme Court in *Guzek*.[1] I represented Mr. Rogers for 27 years and Mr. Guzek for 23 years.

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†Original submission April 1, 2019; this URGENT CORRECTED version submitted April 3, 2019.

[1] *Oregon v. Guzek*, 546 U.S. 517 (2006).

***Witness was admitted to: Oregon State Bar (1984); United States District Court for District of Oregon (1986); United States Court of Appeals for Ninth Circuit (1987); Supreme Court of the United States (2005). Membership in Oregon State Bar and United States Court of Appeals for Ninth Circuit not currently active, by reason of reinstatement to Oregon State Bar not having yet been completed (following 90-day disciplinary suspension and suspension for delinquent Oregon State Bar dues and Professional Liability Fund premium. Disciplinary suspension was for loss of a client file and inadequate communication with client). Accordingly, witness is not at this time an Attorney at Law).**

As a result of numerous serious flaws in the Oregon death penalty statutory scheme arising from Ballot Measures 6 & 7 in 1984 and multiple bungled attempts by the Oregon Legislature to tinker with that machinery of death via patchwork amendments to the statute sought by the Oregon Attorney General, I concentrated the trial court aspect of my capital defense work on raising novel constitutional challenges to the statutory scheme and moving to require or prohibit various procedures under that scheme, and in appellate aspect of that work I focused on assigning error to the denial of those trial court motions. Every Oregon Supreme Court direct review proceeding which I handled on behalf of those two men, resulted in vacation of their death sentences and remand to the Circuit Courts, for penalty phase retrial after retrial. Mr. Guzek had already had one death sentence vacated, and Mr. Rogers had already had two vacated, prior to my commencement of representation. Mr. Rogersô latest opening brief was just filed by attorneys Ryan OôConnor and Richard L. Wolf, on direct review by the Oregon Supreme Court from Mr. Rogersô fourth trial pursuant to the same indictments under which he was originally charged ***in 1988***. Mr. Guzek is at the first level of 15 or so levels of state and federal collateral review, having for the first time not prevailed, in the most recent of four direct reviews of death sentences imposed in as many trials under the same ***1987*** indictment (an indictment issued when he was barely 18 years old). The cost to Oregon taxpayers for these multiple failed attempts ï still ongoing ī to kill Mr. Rogers and Mr. Guzek in the name of the State of Oregon has to date exceeded **three million dollars.** Many, many inmates could be imprisoned for their natural lives for far, far less than what Oregon has wasted trying to kill those two men. The likelihood, even if they were both to lose at every level of review available to them, that either will ever be executed prior to their natural deaths is becoming quite remote.

Now, you have before you yet another attempt to ñfixò the flawed Oregon statute, which is already like none other in the nation. Each time this Legislature has tinkered with this statute in the past, it has merely provided new avenues of successful challenge by my colleagues and I, as well as posing complex issues for trial judges faced with penalty phase retrials of defendants sentenced to death under a flawed procedure and remanded to the Circuit Court for penalty retrials following legislative alterations to the statute. Those attempted fixes have resulted in vacation of some death sentences imposed on remand, for violation of the *ex post facto* clause of the Oregon Constitution.

The changes proposed by SB 1013 are different from those in the past and represent a significant modernization of the statute to reflect the evolving standards of society and a reservation of the ultimate penalty for the most dangerous among us who pose an increasing threat to society: those committing terroristic acts producing mass casualties, for quasi-political purposes. It would be disingenuous not to disclose that I oppose capital punishment in all circumstances as a penalty for crime. I would, however, be foolish were I not to support this significant measure that will free millions of dollars for pressing social needs without decreasing community safety. There is no evidence to support the proposition that the Oregon death penalty deters the kind of criminal homicides to which it currently applies. *But, there are a few serious problems with the bill that can, and should, be remedied, by six committee amendments.* Those amendments are discussed below.

II.

First Recommended Amendment: Correct the Mental State Problem

For reasons explained below, SB 1013, Sections 1 and 5 should be amended by (a) striking the word ñpremeditatedò in Section 1 at p. 1, line 9, inserting in its place the word ñdeliberate;ò(b) strike the phrase ñcommitted deliberatelyò between ñdeceased wasò and ñand with, òin Section 5 at p. 6, line 38-39, and insert in its place the word ñpremeditated;ò (c) insert the word ñcommittedò between ñandò and ñwith the reasonable expectation,ò in Section 5 at p. 6, line 39. The definition of Aggravated Murder would then read:

> ñ óaggravated murderô ò means criminal homicide of two or more persons that is *deliberate* and *committed intentionally*.ò [Emphasis that of this witness];

and the first question, posing a statutory aggravating factor, the existence or non-existence of proof beyond a reasonable doubt of which sentencing jurors must determine, would then read:

> ñ(A) Whether the conduct of the defendant that caused the death of the deceased was *premeditated* and *committed* with the reasonable expectation that death of the deceased or another would resulté ò. [Emphasis that of this witness].

Without those adjustments, the resulting statute will assign meaningless decision making to capital sentencing juries that fails to serve the purpose of narrowly channeling the sentencing jurorsô exercise of discretion in determining whether to impose the death penalty. The reason for this, is that ñintentionallyò is a lesser culpable mental state than ñdeliberately,ò and ñdeliberatelyò is a lesser culpable mental state than ñpremeditated.ò Accordingly, the lesser culpable mental states should define the offense, and the higher culpable mental states should be included in the aggravating circumstances, presence or absence of which determine whether the death penalty should be imposed. This is vital because capital sentencing statutory schemes must narrowly channel the sentencerôs discretion in order to prevent the ñwanton and freakishò imposition of the death penalty that led the Supreme Court of the United States (SCOTUS) in 1972, in *Furman v. Georgia,* to strike down every state death penalty statute for violation of the Eighth Amendmentôs prohibition against cruel and unusual punishment, declaring a national moratorium on capital punishment, pending statesô redrafting of their statutes. Some states attempted to satisfy *Furman* by enacting statutes mandating capital punishment upon conviction of certain types of murder; the SCOTUS declared such mandatory death penalties violative of the Eight Amendment in 1976, in *Woodson v. North Carolina.*

As introduced, the newly-defined substantive offense of Aggravated Murder, Section 1, p. 1 of the bill, at lines 8-10, provides in relevant part that:

> ñôaggravated murderôò means criminal homicide of two or more persons that is *premeditated* and *committed intentionally*.ò [Emphasis added by this witness].

As introduced, Section 5 of the bill at p. 6, lines 38-39, retains in aggravated murder sentencing proceedings under ORS 163.150 what is colloquially known as the ñfirst questionò for jurors to answer in determining the appropriate penalty. That question asks:

> ñ(A) Whether the conduct of the defendant that caused the death of the deceased was committed *deliberately* and with the reasonable expectation that death of the deceased or another would resulté ò. [Emphasis added by this witness.]

Thus, as introduced, one of the culpable mental states required by Section 5 of SB 1013 in order for an act of criminal homicide to constitute aggravated murder (*i.e*., that the homicidal act was ñpremeditated") is a higher culpable mental state than must be proven beyond a reasonable doubt after conviction of aggravated murder, in order for a death sentence to be imposed. As introduced, this scheme implies that "premeditated" is necessarily a less culpable mental state than "deliberate." But that is not so. ñPremeditatedò is a more culpable mental state than ñdeliberate,ò consisting essentially of "deliberation plus planning." As explained below, under the Oregon Supreme Courtôs jurisprudence, "deliberation" can take place in a split second. Surely, as will be shown, "premeditation" cannot be done in less time than that.

Webster's Third New International Dictionary of the English Language Unabridged (hereafter ñWTNIDò) is deemed the official dictionary of the Oregon Supreme Court.[1] The court usually first turns to that work when seeking to define a term that is not defined by statute. ñDeliberatelyò is such a word.

ñDeliberatelyò is defined by that authority as ñin a deliberate manner **:** with deliberation.ò [2]

But in the case of defining the adjective ñdeliberate,ò the Oregon Supreme Courtôs definition and that of its official dictionary are not consistent. WTNID defines ñdeliberateò this way[3]:

> ñ**1 :** characterized by or resulting from ***slow*** careful thorough calculation and consideration of effects and consequences; ***not hasty***, ***rash*** or thoughtless.ò é **2 :** characterized by presumed or

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[1] "The court's reliance upon dictionaries has become so prominent that Judge Landau published an article naming, in mock seriousness, Daniel Webster as ñarguably, the person most influential in the recent development of Oregon law[.]ò Jack L. Landau, The Eighth Justice? Webster, His Dictionary, and Its Influence on Oregon Law, 2 OREGON APPELLATE ALMANAC 65 (2007).ò Robert M. Wilsey. Paltry, General & Eclectic: Why The Oregon Supreme Court Should Scrap PGE v. Bureau of Labor & Industries, 44 WILLAMETTE LAW REVIEW 3 (2008).

[2] Merriam-Webster. *Webster's Third New International Dictionary of the English Language Unabridged* (1981 ed.) Merriam-Webster, Springfield, Ill. (hereafter ñWTNIDò), at p. 596.

[3] *Ibid.*

> real awareness of the implications or consequences of oneôs actions or sayings or by fully conscious often willful intent é **3 :** ***Slow unhurried*** and steady as though ***allowing time for decision on each individual action involved*** é ò. [Emphasis added by this witness].

Despite that WTNID definition, the Oregon Supreme Court adheres to the definition of ñdeliberatelyò that the court adopted in *State v. Wagner ("Wagner I")* in ratifying the following jury instruction based on the courtôs earlier decision in *State v. Quinn*, 290 Or. 283 (1981):

> ñThe word ódeliberatelyô in this case means the state of mind which examines and considers whether a contemplated act should or should not be done. One acts deliberately when one acts in a cool mental state, under such circumstances, and for such a period of time as to permit a careful weighing of the proposed decision. ***The law, however, does not prescribe a particular period of time for deliberation.*****"** [Emphasis added by this witness.]

Wagner I, at n. 12.

That definition of ñdeliberatelyò is embodied in the Oregon Uniform Criminal Jury Instructions (ñUCrJIò), in the section containing instructions for use in capital murder trials, as UcRJI No. 1314.

Prosecutors in Oregon capital cases almost always drive home to jurors in closing argument in an aggravated murder penalty phase that this definition of ñdeliberateò may be satisfied in a split second. They do this by use of a questionable metaphor: driving oneôs automobile when a traffic signal for an intersection the car is about to reach turns from green to yellow. According to the prosecutors, the split-second in which a driver decides whether to step on the brake and stop, or instead to step on the accelerator and get through the intersection in the hope of beating the impending red light, exemplifies how little time and reflection is required to act ñdeliberately.ò

Thus, the Oregon Supreme Court has chosen to differentiate ñdeliberately from ñintentionallyò[4] by adding to ñintentionallyò the element of ñexamining and considering in a cool mental state, for such time as to permit careful weighing of the proposed decision, whether a contemplated act should or should not be done,ò even if that ñperiod of time permitting a careful weighingò of the decision is *a split second.* As the court said in *Quinn*:

> ñThe distinction between intentional deliberate murder and intentional nondeliberate murder may often be a fine one on the

[4] ORS 161.085 (7) defines ñintentionallyôthis way: **"'**Intentionallyô or ówith intent,ô when used with respect to a result or to conduct described by a statute defining an offense, means that a person acts with a conscious objective to cause the result or to engage in the conduct so described.ò

> facts, but the legal distinction is nevertheless a real one of long standing under Oregon law.ò[5]

Quinn, 290 Or. at 401.

ñPremeditatedò is defined in WTNID as:

> ñcharacterized by fully conscious willful *intent* and a measure of *forethought and planning*.ò [Emphasis that of this witness].

WTNID, at p. 1789.

The Cruel and Unusual Punishment prohibitory clauses of the Eighth Amendment to the United States Constitution and Article I, section 15 of the Oregon constitution, require that capital sentencing statutes operate to guide the sentencing juryôs discretion such that only a very narrow class of the most culpable defendants is sentenced to death. If a person acted with premeditation, then the person acted deliberately. The converse is not true, and "premeditation" is a more culpable mental state than what is attributed to "deliberation." Requiring a less culpable mental state for imposition of the death penalty than is required for conviction of the underlying offense obviously fails to narrowly channel the death penaltyôs imposition.

The Eight Amendment requires in a statute such as Oregonôs that (1) the definition of capital murder contain at least one statutory aggravating factor in a murder case before a sentence can be considered; (2) the opportunity to bring before the jury all mitigating circumstances to ensure that the jury will have adequate guidance to perform its function; and (3) the provision of prompt judicial review, furnishing a means to promote evenhanded, rational and consistent imposition of death sentences. *Jurek v. Texas*, 428 US 262, 274-76 (1976). Mandatory death sentences are *per se* unconstitutional under the Eighth Amendment. The ñfirst questionò as formulated here fails to channel the sentencing juryôs discretion in any manner because the answer to the first question under this formulation must *always be "Yes."*

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[5] The nuanced distinction between ñintentionallyò and ñdeliberatelyò was the basis for the Oregon Supreme Court in *Quinn* declaring unconstitutional the aggravated murder/death penalty scheme in effect prior to the votersô adoption of Ballot Measures 6 & 7 in 1984. The statute (former ORS 163.116) invalidated in *Quinn* was nearly identical to ORS 163.150, except that under the former, it was the judge, not the jury that determined whether a defendant convicted of aggravated murder had acted ñdeliberately.ò The court in *Quinn* held: ñBecause ORS 163.116 authorizes an enhanced penalty to be imposed based upon a determination by the court of the existence of the requisite culpable mental state with which the crime was committed, a mental state different and greater than that found by the jury, imposition of a greater penalty under the statute denies to the defendant his right to trial by jury embodied in Oregon Constitution Article I, section 11 of all the facts constituting the crime for which he is in jeopardy.ò

III.

Second Recommended Amendment: Truly Eliminate "Future Dangerousness" Quackery

This bill, contrary to its laudable claimed objective, does *not* ñ[r]emove[ ] future dangerousness as [a] factor for [the] jury to determine when deciding on [a] sentence of death.ò While Section 5, at p. 6, lines 40-41, deletes what is colloquially known as the ñsecond questionò for the jury to consider in deciding what sentence to impose (*i.e.*, ñ(B) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to societyò), *that deletion does not render such evidence inadmissible.* It actually is more accurate to say that while SB 1013 removes ñfuture dangerousnessò as a factor the capital sentencing jury *must determine*, unreliable paid prosecution testimony on that factor nonetheless remains as something jurors nonetheless *may (and will) consider.*

The elimination of the ñsecond questionò by SB 1013 removes Oregon as only one of two states with that special verdict question. The ñsecond questionò has been the subject of continuous constitutional challenge and it is only a matter of time before it is declared unconstitutional. Removing it is a major step forward for just sentencing, because the question lessens the burden of proof on the state to prove all sentencing elements beyond reasonable doubt. This, because the reference to ña probabilityò results in the jury being instructed to determine whether the state has proved ðbeyond a reasonable doubt that it is more likely than notô that the defendant will be violent in the future. This violates the requirement of the Eighth and Fourteenth Amendments that sentencing elements be proved beyond reasonable doubt. While the Oregon Supreme Court has rejected that specific challenge to the ñsecond question,ò[6] that challenge has a high likelihood of prevailing in one of the handful of cases now beginning their long collateral review journeys through the federal courts.

The problem remaining here is the other evil associated with the "second question" that lingers despite the question's elimination: nothing in SB 1013 actually precludes the charlatanism of "future dangerousness" predictions from being introduced in the penalty phase. Only Oregon and Texas have used this junk science sentencing element in a capital punishment statute.[7] The American Psychiatric Association (APA) position is that a reliable prediction of future violence cannot be made.[8] Such

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6 *See, State v. Montez ("Montez II")*, 324 Or. 343 (1996).

7 **"**It is undisputed that ORS 163.150 is modeled on Texas' statutory system, which was enacted in 1973 in response to Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972). If it were disputed, a comparison of ORS 163.150 with the Texas statute, Vernon's Ann C.C.P. art. 37.071, as enacted in 1973 and as amended in 1981, would soon resolve the dispute.ò *State v. Wagner ("Wagner I"*), 305 Or. 115 (1988).

8 ñDuring their careers most psychiatrists will assess the risk of violence to others. *While psychiatrists can often identify circumstances associated with an increased likelihood of violent behavior, they cannot predict dangerousness with definitive accuracy.* Over any given period some individuals assessed to be at low risk will act violently while others assessed to be at high risk will not. When deciding whether a patient is in need of intervention to prevent harm to others, psychiatrists should consider both the presence of recognized risk factors and the most likely precipitants of violence in a particular case.ò Authors: This position statement was proposed by the Workgroup on Violence Risk of the Council on

testimony by psychiatrists who have never treated the defendants ï making predictions of future violent conduct which are wrong two out of three times (being less accurate than a coin flip)[9] ï *will, as SB 1013 is currently formulated, be introduced* as *aggravating evidence* under what has colloquially been known as the ñfourth questionò (the ñthird questionò in SB 1013), as part of the stateôs effort to meet its newly mandated burden of proving beyond a reasonable doubt that a death sentence is appropriate. It is beyond any reasonable dispute that statutes utilizing a coin flip to decide whether to impose a death sentence would be contrary to the Eighth Amendment. ôFuture dangerousnessô predictions, as noted, are *less accurate than a coin flip.* As the American Psychiatric Association has stated, with what little training they do have at predicting future violent behavior, **psychiatrists "consistently err on the side of over-predicting violence."** [10]

If this Committee is committed to a fairer and more just death penalty scheme, then the quackery of so-called evidence in the form of expert testimony opining as to a capital defendant's 'future dangerousness' must be made inadmissible. I implore this committee to add such a prohibition to this bill. Otherwise, the claim that SB 1013 removes the jury's consideration of future dangerousness in deciding whether to impose death is simply not true and reliable sentencing decisions will be impossible.

Please add a sub-provision in Section 5 of SB 1013, further amending ORS 163.150 as follows:

> ñNotwithstanding the admissibility of aggravating evidence and other evidence relevant to sentence, opinion testimony purporting to predict that the defendant himself/herself personally would be likely to commit future acts of criminal violence shall not be admissible, either in the stateôs case-in-chief or in its rebuttal of the defense case, unless the defendant introduces such opinion evidence purporting to predict the likelihood of the defendant himself/herself personally committing future acts of criminal violence, in which event the state may rebut such defense opinion evidence with its own opinion testimony and evidence. This subsection does not authorize the admission of evidence and testimony that is otherwise inadmissible.ò

This amendment would not preclude admission of evidence and testimony regarding factors which tend to increase or decrease the likelihood generally of persons committing future acts of criminal violence, provided no opinion evidence was adduced opining on the likelihood of the defendant on trial committing future acts of criminal violence.

Psychiatry. *Position Statement on Assessing the Risk for Violence,* Retained by the Board of Trustees, December 2017; Retained by the Assembly, November 2017; Approved by the Board of Trustees, July 2012; Approved by the Assembly, May 2012. (Emphasis added by this witness).

[9] Lavin, Erinrose Walsh, "Psychiatric Prediction of Future Dangerousness" (2014). Law School Student Scholarship 634, at p.13, citing APA findings referenced in *Barefoot v. Estelle*, 463 U.S. 880 (1983).

[10] Brief of Amicus Curiae American Psychiatric Association, as cited in *Barefoot v. Estelle*, 463 U.S. 880 (1983), at 1002.

IV.

Third Recommended Amendment: Deny Terrorists a Forum for their Manifestos of Hate

SB 1013 retains what has been colloquially referred to as the ñthird questionò for the capital sentencing juryôs determination in deciding whether to impose death. With the elimination by SB 1013 of the sentencing element known as the ñfuture dangerousnessò inquiry, the ñthird questionò of ORS 163.150 becomes the ñsecondò question in SB 1013. For clarity, it will here be referred to as the ñprovocationò question. *See*, Section 5, at p. 6, lines 38-39 of SB 1013.

The provocation question has never been of any value in channeling a juryôs discretion as it decides whether to kill a defendant. It asks jurors to decide the following question:

> ñ(B) If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceasedé ò

The problems with this question are self-evident, and they take on a bizarre nature in light of the billôs redefinition of aggravated murder to encompass solely terrorist-type homicidal acts.

First, if killing the deceased were reasonable in response to provocation by the deceased, the killing *would not be criminal homicide*. There would be no penalty phase. The defendant would not be guilty of the offense adjudicated in the culpability phase. The actor most likely would not even be indicted.

Second, as in the case of the ñcommitted deliberatelyò ñfirst question,ò the provocation question *will always be answered "yes."*

Or, perhaps not. Suppose that a group of anti-Semitic White Nationalist defendants were convicted of aggravated murder under SB 1013 for intentionally killing, with premeditation, several Jewish victims in a synagogue, order to ñintimidate, injure or coerce a civilian population.ò

Suppose further that, in the penalty phase, the defendants demanded to put on ñevidenceò that they had been within their rights to kill the victims because the victims had, for example, ñprovoked the defendants by taking over the United States as part of their Zionist Occupation Government global conspiracy.ò Or, substitute another, more plausible hypothetical scenario.

Could the trial judge preclude the defendants from putting on such ôevidenceô in order to justify their genocidal acts? There is a very real prospect that trial judges would, under the provocation question, be compelled to permit such a defense case.

Wedding such a question to sentencing for homicidal terrorism, thereby providing a forum for the convicted to claim justification for their acts of terror, is an unintended consequence of retaining the provocation question in SB 1013, that therefore must he eliminated before an individual terrorist mass shooter, bomber, gasser, etc., or group thereof, engages in self-representation and re-victimizes survivors with a defense predicated upon the latterôs vilification.

A final concern arises from the phrase ñIf raised by the evidenceé ò. What evidence would ñraiseò the provocation question? This has not been resolved. Can a trial court interpose the question over the objection of a defendant? Can the state interpose the question over the objection of the defendant?

The provocation question invites and will produce highly undesirable, unintended consequences repugnant to contemporary standards of decency held by our society, and damaging to survivors of, and witnesses to, terrorist homicidal violence. Accordingly, it should be deleted from ORS 163.150 under the proposed new formulation of aggravated murder.

V.

Fourth Recommended Amendment: Fully Empower Jurors

A.

Genesis and Corruption of the "Fourth Question"

SB 1013 also retains what has been colloquially referred to as the ñfourth questionò for the capital sentencing juryôs determination in deciding whether to impose death. With the elimination by SB 1013 of the sentencing element known as the ñfuture dangerousnessò inquiry, the ñfourth questionò of ORS 163.150 becomes the ñthirdò question in SB 1013. For historical clarity, however, I herein continue to refer to it as the ñfourth question,ò despite its actual status as the ñthird questionò in SB 1013 as introduced. To understand why some additional language mandating a jury instruction is called for in the new version of ORS 163.150, we first must go back to basics and review what the "fourth question" was about, how it was promulgated, how it was undermined, and how it was made into a prosecution weapon by the Attorney General and Legislature, contrary to its intended purpose of bringing Oregonôs statute into compliance with a seminal decision of the Supreme Court of the United States (SCOTUS). Much of the jurisprudence and statutory evolution in that regard occurred in the *Guzek* and *Rogers* cases mentioned above.

The "fourth question" was intended to be *solely a life-saving question.*[11] It was ójudicially legislatedôby the Oregon Supreme Court (after having been the subject of defense motions to submit the statutorily non-existent question to capital sentencing juries), in the 1990 *Wagner II*[12] decision, in order to rescue Oregonôs statute from the SCOTUS ruling in *Penry v. Lynaugh* that overturned a Texas death

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[11] ñ[The fourth] question permits the jury to spare defendant's life if the jury believes, under all the circumstances, that it is appropriate to do so, *see State v. Wagner*, 309 Or. 5, 14-20, 786 P.2d 93, *cert. den.* ___ U.S. ___, 111 S. Ct. 212, 112 L. Ed. 2d 171 (1990) (*Wagner II*) (setting out reasons that a "fourth question," in addition to the three specifically provided in then-existing ORS 163.150,[30] must be given). Defendant's argument is well taken. This case was tried before our decision in *Wagner II.* The ñfourth question" was not submitted to the jury. The penalty hearing was, therefore, constitutionally flawed.ò at 122-23.

[12] Full citations to cases cited herein, whether or not fully cited in the body of this testimony, appear in the *Table of Cases Cited* at page 18 hereof.

sentence because the defendant was not permitted to present mitigating evidence, namely his ómental retardation.ô Oregonôs statute was worded nearly identically to the Texas statute. *Penry* held that a stateôs capital sentencing scheme must provide a mechanism for jurors to spare a capital defendantôs life based upon meaningful consideration of mitigating evidence, something lacking in Texasô application of its statute. Oregonôs statute did not, prior to Oregonôs judicial and legislative responses to *Penry*, permit a jury to *fully consider and give effect to all manner* of mitigating evidence. The SCOTUS signaled in a memorandum order that the Oregon statute was in its sights. *Wagner v. Oregon*, 492 U.S. ___, 109 S. Ct. 3235, 106 L. Ed. 2d 583 (1989). The death sentences of 23 Oregon capital defendants were at stake in *Wagner II*. Most legal scholars were of the view that those defendantsô death sentences could not be preserved, and that they could not, on penalty retrial, again face a potential death penalty without violating the state and federal constitutional prohibitions against *ex post facto* laws, because the statute under which the ñoriginal 23ò were sentenced to death was constitutionally deficient and accordingly, the death sentences were invalid and could not be resurrected by a retroactively-applied statutory amendment. The Legislature, rushing to apply CPR to Oregonôs statute to bring it into compliance with *Penry*, quickly passed a version of the fourth question that was purported to apply retroactively and that was ñgrammatically incomprehensible.ò The Oregon Supreme Court said as much about the amendmentôs comprehensibility, and then, in what dissenting Justice Fadely called a "100-word amendment" to the statute by the majority,[13] ruled that it could mandate an instruction without ójudicially amendingô the statute, and thereby both save the statute and remand the cases of the 23 defendants back to Circuit Court, with the death penalty remaining a sentencing option. That decision of the Oregon Supreme Court majority was strongly denounced by the dissenting Justices, and remains a ground of legal challenge made by the handful of those of the ñoriginal 23ò whose cases remain active because the state will not stop trying to kill them. The ñfourth questionò mandated by the Oregon Supreme Court was later legislatively incorporated into the statute.

The ñfourth questionò took the form of: "Should the defendant receive a death sentence?" The statute was amended to provide that jurors were to be instructed to answer that question "No" if, after considering all mitigating evidence, any aspect of the character or background of the defendant or circumstances of the offense "justified" a sentence less than death.

In *Guzek II*, the Oregon Supreme Court held that the fourth question did not authorize admission of victim impact evidence, and the defendant's death sentence was vacated on that basis. (In *Guzek I*, Mr. Guzekôs prior death sentence had been vacated due to *Penry*).

In a series of decisions, the Oregon Supreme Court hammered home what was held in *Guzek II*, that the ñfourth questionò was a mitigation-only question, which permitted jurors to spare a defendant's life if a juror had any reason for doing so, and did not open the door to aggravating evidence not material to the other three questions (ñdeliberateness,ò ñfuture dangerousness,ò and ñreasonableness of the killing as a response to provocation, if any, by the victimò).

Attacks followed on the phrasing of the ñfourth questionò and its accompanying instruction. Capital defendants maintained that the phraseology "é that would *justify* a sentence less than death" patently (and falsely) implied that there was a burden on the defendant to ñjustifyò a non-death sentence, implying a presumption that death was the appropriate punishment. The Attorney General reacted to

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13 *See, State v. Moen,* 309 Or. 45, 102-04 (1990) (Fadeley, J., dissenting, detailing what he characterized as the *Wagner II* majority's 100-word addition to ORS 163.150).

trial court challenges in that regard by again rushing to the Legislature and, specifically noting that *Guzek* (in which that challenge was raised) was again before our Supreme Court, procured a statutory amendment to ORS 163.150 eliminating the "justify" language.

In Mr. Guzek's penalty phase retrial from which *Guzek II* arose, Judge Mosgrove granted a defense motion to permit the defendant to allocute to the sentencing jury with regard to sentence, not under oath and not subject to cross examination, based upon *DeAngelo v. Schiedler, Wagner II,* and Article I, Section 11 of the Oregon Constitution.[14]

In Mr. Rogersô penalty retrial from which *Rogers II* arose, the trial court granted a defense motion to modify the ñfourth questionò jury instruction to instruct jurors that they could consider "mitigating *information*" (as opposed to "mitigating *evidence*"), because an allocution (also granted by Rogers' trial judge) is not evidence, and because *Wagner II* explained that the fourth question allowed consideration of "mitigating data" of the same sort considered by judges in non-capital sentencing. Some material otherwise deemed hearsay or non-evidence was, accordingly, admitted in mitigation.

The ñfourth questionò instruction's use of "should" rather than "shall" ("*should* the defendant receive a death sentence") was attacked and many judges began substituting "shall," in order that jurors not be separated from the mandatory death sentence to follow their unanimous "Yes" verdicts on the sentencing questions.

Capital defendants unsuccessfully moved trial courts to instruct jurors that the state had to prove beyond a reasonable doubt that the death penalty was appropriate, and requested jury instructions that there was a presumption that a non-death sentence was appropriate. The Supreme Court rejected the merits of those denied motions, ruling that the ñfourth questionò frames a "discretionary determination" by jurors whether to spare the defendant's life, and opined that, accordingly, the ñfourth questionò is "not subject to proof in the ordinary sense.ò[15]

Meanwhile, eager to tilt the playing field back its direction, the Attorney General went to the Legislature and had the statute amended to purport to make "any aggravating evidence" and ñany victim impact evidenceò admissible. The amendment did not, however, specifically make "any aggravating evidence" or victim impact evidence relevant to any of the first three questions. That omission was cured, however, by the next session of the Legislature (and the Oregon Supreme Court in the meantime rejected a death sentenced challenge predicated upon that omission).

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[14] Article I, section 11, provides, in relevant part:

"In all criminal prosecutions, the accused shall have the right * * * to be heard by himself and counsel [.]"

[15] *State v. Moore*, 324 Or. 396, 432 (1996): ñ[T]he fourth question does not carry a burden of proof, ôbecause it does not present an issue subject to proof in the traditional sense [;] rather[,] it frames a discretionary determination for the jury.ôò; quoting *Wagner II*, 309 Or. 5, 18, *cert. den*., 498 U.S. 879 (1990). ñBecause the fourth question does not involve a determination of fact [é] the state [need not] prove it beyond a reasonable doubt.ò *State v. Longo*, 341 Or. 580 (2006).

In *Rogers III*, the Oregon Supreme Court, ten years after the issue was first raised in *Guzek*, acknowledged a right of the capital defendant to an unsworn allocution to the jury and found error where the trial judge in Mr. Rogersô second penalty phase retrial (his third trial pursuant to the 1988 indictments) would not permit Mr. Rogers to turn to the judge during allocution and ask that, if the jury spared his life as to all six victims, the resulting life sentences be run consecutively to one another by the trial the trial judge. Though not ñevidence,ò Mr. Rogersô disallowed intention to so address the trial judge during allocution, was deemed by the Oregon Supreme Court to demonstrate a mitigating aspect of his character relevant to the jurorsô determination whether to impose a death sentence, and therefore denying Mr. Rogers the opportunity to thusly present that aspect of his character to the sentencing jury required vacation of his death sentences and remand to the Circuit Court for a third penalty phase retrial ī a fourth jury trial pursuant to the 1988 indictments.[16]

The ñfourth question,ò promulgated by an Oregon Supreme Court majority 30 years ago in an attempt to salvage the statute by grafting a "mitigation escape clause" onto it, instead morphed into a question to be decided on the basis of all the culpability phase evidence, plus additional sentencing data including "any aggravating evidence," and victim impact evidence, with the state having no burden of proof and the jury having no standards guiding its "discretionary determination." In that manner, the ñmitigation onlyò ñfourth questionò was weaponized as a prosecution tool for procuring death sentences.

B.

Statutory Instruction to Enforce Burden of Proof

SB 1013 does not remedy the evolutionary corruption of the ñfourth question.ò It does provide that the state must prove the affirmative of all of the verdict questions beyond a reasonable doubt. If that is to have meaningful consequence, it is essential that the statute mandate that jurors be instructed at the commencement of the penalty phase, that at that point in time, *there is a presumption that a non-death sentence shall be imposed.* That instruction must be crafted such that, to the extent possible, it *does not vitiate the impact of mitigation and instructions about mitigation.* For example, the following instruction grafted onto ORS 163.150 would meet that essential objective:

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16 ñThe question whether a defendant might qualify for any sentence less than death is one that ORS 163.150(5) requires the jury to decide. By making the statement in question, defendant sought to demonstrate to the jury that a facet of his character-his willingness to accept lifetime imprisonment-should induce them to decline to sentence him to death. * * * the second stricken sentence invited the trial judge to hold defendant to his word before the jury. By stating his condition before both the jury and the judge, defendant knew that he later would be unable to argue credibly against consecutive life sentences if the jury spared his life. * * * while defendant's é stricken sentence ordinarily would be pertinent to only the traditional sentencer, the judge, it had pertinence here to the jury, because under Oregon's death-penalty sentencing scheme, the jury is a participant in the sentencing decision. We conclude that both excluded sentences fell within the proper scope of allocution and that the court violated Article I, section 11, of the Oregon Constitution, in striking them from defendant's proposed unsworn statement.ò *Rogers III,* 352 Or. 510 (2012).

"In the courtôs instructions to the jury at the commencement of the sentencing proceeding, and in the final jury instructions, the jurors shall be instructed that:

"(a) there is a presumption that the defendant shall not receive a death sentence, and as the defendant sits before the jury, the defendant is presumed to be entitled to a sentence of life imprisonment with or without possibility of parole.

"(b) the presumption that the defendant shall not receive a death sentence is sufficient to require that you return a verdict other than death.

"(c) a verdict of death may be returned if, and only if, the state overcomes the presumption that the defendant is entitled to a non-death sentence. In order to overcome that presumption, the state must prove to each juror beyond a reasonable doubt that death is the appropriate penalty, and each juror must additionally believe that no aspect of the defendant's background or character, circumstances of the offense, or other mitigating evidence as the court will define it, makes a sentence less than death appropriate. If any juror believes that the state has proved beyond a reasonable doubt that death is an appropriate punishment, but also believes that any aspect of the background and character of the defendant, circumstances of the offense, or other mitigating evidence makes a non-death sentence appropriate, then the jury must not return a verdict of death.

"(d) the defendant has no burden of proof to establish a mitigating factor that makes a non-death sentence appropriate. A juror's belief that a mitigating factor exists, is sufficient for the mitigating factor to be established, and sufficient to return a verdict other than death."

Under SB 1013, the defendant has no burden of proof on the ñfourth question,ò whereas the state has the burden of proving appropriateness of a death sentence beyond a reasonable doubt. This parallels the dynamics of the culpability phase in which the jury decides whether the state has proved the defendant guilty of the offense beyond a reasonable doubt. In that trial proceeding in which the accusedôs guilt or innocence of the alleged offense is decided, the jurors are instructed ï in the introductory instructions, and after the conclusion of the evidence ï in a manner consistent with the proposed amendment, in order to ensure that jurors do not place any burden on the defendant, and that they weigh the sufficiency of the stateôs evidence without regard to whether the defendant puts on a defense case. Constitutional Due Process requires no less.[17] Since SB 1013 places a burden on the state

[17] *See*, UCrJI No. 1009, providing in relevant part:

ñThe defendant is innocent unless and until the defendant is proven guilty beyond a reasonable doubt. The burden is on the state, and the state alone, to prove the guilt of the defendant beyond a reasonable doubt. Reasonable doubt is doubt based on common sense and reason. Reasonable doubt is not an imaginary doubt. Reasonable doubt means an honest uncertainty as to the guilt of the defendant. You

to prove beyond a reasonable doubt that a death sentence is appropriate, it is essential that the capital sentencing jurors receive the same sort of instructions in that regard, as they receive in the culpability phase of trial.

A potential unintended consequence of imposing the beyond reasonable doubt standard on the state as to the ñfourthò question, is that by doing so, jurors are actually fettered in their ability to spare a defendantôs life if a juror believes, under all of the circumstances, that it is appropriate to do so for any reason. That ability is what the Oregon Supreme Court said the fourth question secured. Imposing a beyond reasonable doubt standard upon a ñdiscretionary determination of the juryò that is ñnot subject to proof in the ordinary sense,ò has the actual effect of attenuating the meaningfulness of mitigating evidence. The intent of the fourth question is that a juror not be required to find that any mitigating factor meet some purported objective standard of proof in order to spare a defendantôs life. In this regard, the imposition of the beyond reasonable doubt standard on the fourth question may be viewed as a regressive change. On the other hand, that change creates a presumption that death is not the appropriate penalty, a presumption that is sufficient to preclude imposition of the death penalty unless it is overcome by the state beyond reasonable doubt, and that presumption itself is a positive change.

Therefore, the foregoing instruction should be added to the newly constituted version of ORS 163.150.

VI.

Fifth Recommended Amendment: Truth in Sentencing

The fifth amendment to SB 1013 that I implore this Committee to adopt is simple: the first word of the ñfourth questionò needs to be changed from ñshouldò to ñshall,ò such that it would be: ñ*Shall* the defendant receive a death sentence?ò

The SCOTUS has held that jurors must not be insulated from the effect of their verdict. *See, Caldwell v. Mississippi,* 472 U.S. 320 (1985).[18] As applied to the Oregon statute, under which the trial judge is required to impose a death sentence determined by the jury, it is therefore important that this ultimate and irrevocable jury decision be fully understood as such up to the moment at which each juror

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must return a verdict of not guilty if, after careful and impartial consideration of all the evidence in the case, you are not convinced beyond a reasonable doubt that the defendant is guilty.ò

18 **"**The argument here urged the jurors to view themselves as taking only a preliminary step toward the actual determination of the appropriateness of death -- a determination which would eventually be made by others and for which the jury was not responsible. Creating this image in the minds of the capital sentencers is not a valid state goal * * * This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its "truly awesome responsibility." In this case, the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires. The sentence of death must therefore be vacated. Accordingly, the judgment is reversed to the extent that it sustains the imposition of the death penalty, and the case is remanded for further proceedings.ò 472 US at 341.

individually makes that decision. The word ñshallò makes clear that a unanimous jury verdict to condemn the defendant to death will, without question, be followed. While jurors are instructed that such a unanimous verdict in the affirmative on all of the sentencing questions will result in the trial judge imposing a death sentence, use of the word ñshallò on the verdict forms declares that immutable fact to each juror at the moment the juror makes the determination whether to kill the defendant.

VII.

Sixth Recommended Amendment (if necessary): Constitutionally Proportionate Sentencing

In *State v. Shumway*, the Oregon Supreme Court held that the requirement of proportionality in sentencing guaranteed by Article I, section 16 of the Oregon Constitution[19] was violated by provisions of the Oregon Criminal Code under which the minimum period of imprisonment for Intentional Murder exceeded the minimum period of imprisonment for Aggravated Intentional Murder. As I read SB 1013, a similar proportionality problem may exist.

Section 10, lines 32-35 at p. 11 of the bill, provides that the minimum sentence to be imposed on conviction of First Degree Murder (for the non-premeditated, intentional killing of one victim) is imprisonment for 360 months.

SB 1013 does not amend ORS 163.105(1)(c), which provides that the minimum period of imprisonment for Aggravated Murder is 360 likewise months, as follows:

> ñIf sentenced to life imprisonment, the court shall order that the defendant shall be confined for a minimum of 30 years without possibility of parole, release to post-prison supervision, release on work release or on any form of temporary leave or employment at a forest or work camp.ò

Turning to section 5, lines 23-26 at p. 7 of SB 1013, we see that the minimum sentence upon conviction of aggravated murder (necessarily resulting from premeditated, intentional killing of at least two victims) remains unaffected by the bill; ORS 163.150 (2) (b) continues to read as follows:

> ñIf the jury returns a negative finding on any issue under subsection (1)(b) of this section and further finds that there are sufficient mitigating circumstances to warrant life imprisonment, the trial court shall sentence the defendant to life imprisonment in the custody of the Department of Corrections as provided in ORS 163.105 (1)(c).ò

This creates a similar but not identical situation as that presented in *Shumway*, wherein the Oregon Supreme Court stated:

> ñIn the present case the defendant was convicted of intentional homicide and sentenced to life and required, as ORS 163.115 amended by the initiative provides, to serve 25 years before becoming eligible for parole. Whereas, if he had been convicted of intentional homicide, committed

[19] Article I, section 16 of the Oregon Constitution provides, in relevant part, that ñé all penalties shall be proportionate to the offense.ò

> under any of the aggravating circumstances provided in ORS 163.095, he would be eligible for parole either 20 or 15 years after sentencing, depending upon the aggravating circumstances.
>
> ñUnder this statutory scheme, a defendant receives a lesser minimum sentence to be served before being eligible for parole for aggravated intentional homicide than he does for an unaggravated intentional homicide. This is in violation of Art. I, § 16 of the Oregon Constitution and that provision in ORS 163.115(5) requiring the defendant to serve not less than 25 years before becoming eligible for parole is invalid and cannot be applied to the defendant; the statutory provision requiring a life sentence is valid.ò

Since the minimum period of incarceration for First Degree Murder under SB 1013 does not *exceed* that for Aggravated Murder, a *Shumway* violation might not actually exist, but I urge the Committee to procure opinions on this, and if a violation of Or. Const. Art. I, §16 does in fact exist, then the Committee should adjust one, or the other, minimum penalties at issue here.

VIII.

Conclusion

For all of the foregoing reasons, I urge the Committee to report SB 103 out to the full Senate with a ñDo Passò recommendation, *provided, however,* that the five recommended amendments are adopted by the Committee. I thank the drafters of SB 1013, and this Committee, for their meticulous and dutiful attention to the details of this exceedingly important measure.

Respectfully submitted,

/s/ J. Kevin Hunt

Table of Cases Cited