IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

STATE OF OREGON, PLAINTIFF, -VS- CONAN WAYNE HALE, DEFENDANT	CASE NO. 10-96-04830 DEMURRER/MOTION TO DECLARE OREGON'S DEATH PENALTY SYSTEM UNCONSTITUTIONAL FOR FAILING TO ENSURE THAT PUNISHMENT IS PROPORTIONATE TO THE OFFENSE (Evidentiary Hearing and Oral Argument Requested)

Defendant, by and through his undersigned attorneys, demurs to the Indictment and moves this Court for entry of its Order (1) declaring that Oregon's system for imposing the death penalty, as provided by ORS 163.095, ORS 163.105, ORS 163.115, ORS 163.150, Article 1, Section 40 and (amended) Article VII, Section 3 of the Oregon Constitution, when taken as a whole, fails to genuinely narrow the class of persons eligible for the death penalty and fails to reasonably justify the imposition of this most extreme sanction on some defendants compared to others convicted of murder or aggravated murder, all in violation of the Eighth and Fourteenth Amendments of the United States Constitution and Article 1, Section 20 of the Oregon Constitution; (2) declaring that (amended) Article VII, Section 3 of the Oregon Constitution violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution by prohibiting appellate review of whether the death penalty is excessive and therefore arbitrarily imposed in any given case, including Mr. Hale's case; (3) alternatively finding that the State has denied Mr. Hale his right to equal treatment under the law as guaranteed by Article I, Section 20 of

the Oregon Constitution and the Fourteenth Amendment of the United States Constitution, by targeting him for the death penalty; and (4) prohibiting the imposition of the death penalty if Mr. Hale is convicted of aggravated murder.

This demurrer/motion is made in good faith and not for the purpose of delay. It is based on the accompanying memorandum of law incorporated herein by reference and upon such other grounds and authorities as may be developed at hearing on this matter.

MOVED this ____ day of _____, 1996.

_____
TERRI WOOD OSB 88332
Attorney for Defendant

_____
STEVEN G. MILLER OSB 92404
Attorney for Defendant

MEMORANDUM OF LAW

1. SUMMARY OF ARGUMENT

Oregon's system for the infliction of capital punishment, comprised of statutory and constitutional provisions for the prosecution, sentencing and judicial review of death penalty cases, violates the Eighth and Fourteenth Amendments of the United States Constitution and Article 1, Section 20 of the Oregon Constitution. These constitutional mandates require the State to enact laws which genuinely narrow the class of persons eligible for the death penalty and which reasonably justify the imposition of a death sentence on some defendants compared to others found guilty of aggravated murder.

Oregon's statutory and constitutional provisions which govern aggravated murder cases are deficient under an Eighth Amendment analysis in that:

(1) the statutory definition of aggravated murder is over-inclusive and does not sufficiently narrow the class of persons eligible for the death penalty;

(2) the penalty-phase questions are redundant of the statutory definition of aggravated murder or are too vague to provide objective standards which would reasonably justify the imposition of a death sentence on some defendants compared to others;

(3) the '95 amendments to ORS 163.150 give the sentencer untrammeled discretion to determine which capital defendants should receive the death penalty, based on the totality of reasons set forth in the Memorandum in support of Demurrer and Alternative Motion to Dismiss Death Penalty Proceedings Based on ORS 163.150, as Amended in 1995, filed in this cause and incorporated by reference herein;

(4) the prosecution's complete and unguided discretion to seek the death penalty against whichever defendants it chooses usurps the traditional function of the Court in sentencing and facilitates the freakish imposition of those extreme penalties; and

(5) the scope of appellate review does virtually nothing to ensure that the punishment is proportionate to the offense and evenhandedly imposed, thus compounding the aforementioned defects at the trial level.

While none of these deficiencies, standing alone, may rise to the magnitude of a constitutional violation, their combined result is a system for the imposition of capital punishment which violates the Eighth and Fourteenth Amendments and Article 1, Section 20 of the Oregon Constitution. See, e.g., *Proffit v. Florida,* 96 SCt 2960, 2967 n.11 (1976)(Court examines claims of vagueness of aggravating factor, noting that the issue is "whether there is a substantial risk that the Florida capital sentencing system, *when viewed in its entirety*, will result in the arbitrary and capricious imposition of the death penalty")(emphasis supplied); *Gregg v. Georgia,* 96 SCt 2909, 2938 n.51 (1976); *Tuilaepa v. California*, 114 SCt 2630, 2646-47 (1994)(BLACKMUN, J., dissenting)(noting the Court's decision concerning "a small slice of one component of the California [death penalty] scheme says nothing about the interaction of the various components--the statutory definition of first-degree murder, the special factors, the statutorily required weighing of aggravating and mitigating factors, and the availability of judicial review, but not appellate proportionality review--and whether their end result satisfies the Eighth Amendment's commands.")

The remedy is that the death penalty can not be lawfully imposed under Oregon's present system, even if the 1995 amendments to ORS 163.150 are not given the effect envisioned by the drafters of the amendments. This argument, based primarily on an Eighth Amendment analysis of Oregon's statutory and constitutional provisions for the infliction of the death penalty as a whole--as a "system," rather than as separate, distinct and analytically isolated provisions--has not been addressed by the Oregon Supreme Court.

2. THE EIGHTH AMENDMENT ANALYSIS

The Eighth Amendment prohibits infliction of "cruel and unusual punishments." In *Weems v. United States*, 30 SCt 544 (1910), the Court interpreted the Eighth Amendment to mean "that punishment for crime should be graduated and proportioned to offense." *Id.*, 30 SCt at 549. In *Furman v. Georgia*, 92 SCt 2726 (1972), the Court concluded that the death penalty was so irrationally imposed that any particular death sentence could be presumed excessive, i.e., disproportionate to the offense. That was because the statutes at issue in *Furman* provided no meaningful basis for distinguishing the few cases in which the death penalty was imposed from the many cases in which it was not. *Id.*, at 2764 (WHITE, J., concurring).

Defendant contends that Oregon's system for the infliction of capital punishment is equally defective, but with a different twist. The reach of Oregon's system is so broad that there is no meaningful basis for distinguishing the many cases in which the death penalty may be imposed from the few cases in which it may not. The State has failed to reserve this most irrevocable of penal sanctions for the small number of extreme cases where death may be constitutionally appropriate. *See*, *Gregg v. Georgia*, 96 SCt 2909 (1976)(decided in conjunction with *Jurek v. Texas*, *infra*).

To pass constitutional muster, a capital-punishment scheme must "genuinely narrow the class of persons eligible for the death penalty *and* must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 103 SCt 2733, 2742 (1983)(Emphasis supplied). Under the capital sentencing laws of most States, once a person is convicted of intentional murder, the jury is required during the sentencing phase to find at least one aggravating factor before it may consider imposing death. By doing so, the jury uses objective, legislative standards to narrow the class of persons eligible for the death penalty. *Lowenfield v. Phelps*, 108 SCt 546, 554 (1988).

This narrowing function may, however, be performed by legislative definition of the crime itself for which death may be imposed, as was the case in *Jurek v. Texas*, 96 SCt 2950 (1976). *Lowenfield*, 108 SCt at 554. Oregon's death penalty scheme was modeled on the Texas system

of capital punishment upheld in *Jurek*. *State v. Wagner*, 305 Or 115, 142 (1988). But as will be demonstrated, Oregon's system is not similar enough to the Texas system to claim constitutionality under *Jurek*.

In addition to narrowing the pool of defendants eligible for the death penalty, the statutory scheme "must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 103 SCt at 2742. The case law has long focused upon judicial review of death sentences to help meet this Eighth Amendment requirement.

In *Gregg v. Georgia*, *supra*, the pool of defendants eligible for death was narrowed by the use of statutory aggravating factors. To ensure that the penalty would be proportionate to the offense and the offender, the Georgia system added "an important additional safeguard against arbitrariness and caprice" in a provision for automatic appeal of a death sentence to the state supreme court. 96 SCt at 2936. The statute required that court to review each sentence to determine whether it was imposed under the influence of passion or prejudice, whether the evidence supported the jury's finding of a statutory aggravating circumstance, and whether the sentence was disproportionate to sentences imposed in generally similar murder cases. 96 SCt at 2922. Most states require this comparative proportionality review. *Pulley v. Harris*, 104 SCt 871, 876 (1984). Oregon thus far has not.

At the least, meaningful appellate review is an integral component of a State's constitutional responsibility to tailor and apply its laws in a manner that avoids the arbitrary and capricious infliction of the death penalty. *Murray v. Giarratano*, 109 SCt 2765, 2777 (1989)(Citations omitted); *cf., Stanford v. Kentucky,* 109 SCt 2969, 2981 (1989)(O'CONNOR, J., concurring)(recognizing the federal courts have a constitutional obligation to conduct proportionality analysis).

In conducting an Eighth Amendment analysis of a capital punishment system, it is important to recall that "[t]he Amendment must draw its meaning from the evolving standards of

decency that mark the progress of a maturing society," *McCleskey v. Kemp*, 107 SCt 1756, 1771 (1987)(citation omitted), and that the Supreme Court's decisions "have been informed by 'contemporary values concerning the infliction of a challenged sanction,'" *id.*, (citation omitted). Simply put, the Eighth Amendment is not a static concept. *See*, *e.g.*, *Penry v. Lynaugh*, 109 SCt 2934 (1989) *and compare State v. Wagner*, 305 Or 115 (1988). *Jurek* was decided more than a decade ago, and its viability stands in question given the *Penry* decision. *See also* , Black, Due Process for Death, 26 Catholic University Law Review 1 (1978)(describing the Texas statute as an outpost of federal constitutional law).

Lowenfield v. Phelps, decided in 1988, should be a truer guide to present-day Eighth Amendment requirements for a capital punishment system. The *Lowenfield* Court examined and approved the Louisiana system which, like Texas, sought to narrow the pool of defendants subject to the death penalty by narrowly defining the capital offense. The Louisiana system defines five types of murder where death was a possible penalty. It also requires the finding of at least one statutory aggravating circumstance during the penalty phase. If the jury returns a sentence of death, the sentence is automatically reviewable for excessiveness, i.e., a comparative proportionality review, by the Supreme Court of Louisiana. 108 SCt at 553-54. Oregon's system falls far short of the measures enacted in Louisiana to narrow the pool of defendants and justify the imposition of this most severe sanction.

3. THE STATUTORY DEFINITION OF AGGRAVATED MURDER IS OVER-INCLUSIVE

Oregon first attempts to narrow the class of persons eligible for the death penalty by way of definition of the crime of aggravated murder in ORS 163.095, as does Texas and Louisiana. See *Lowenfield v. Phelps*, *supra*. In *Jurek v. Texas*, the Court concluded that the Texas statute limited capital homicides to intentional and knowing murder committed in five situations. In *State v. Wagner*, the Court describes the Oregon statute as designating ten situations. 305 Or at 148. Simply counting the subsections of ORS 163.095 yields 18 types of aggravated murder, including

aggravated murder resulting from felony murder, which adds at least another 10 situations for a total of 28. ORS 163.115. *Cf., Tuilaepa v. California, supra ,* 114 SCt at 2646 (Justice Blackmun noting, on an issue not before the Court, that California has 20 types of capital murder, "an extraordinarily large death pool").

Briefly, Oregon's statutory definition encompasses the following additional types of murder which are not subject to capital punishment under the Texas code found constitutional in *Jurek* : 1) murders committed by individuals previously convicted of any homicide; 2) murders committed in the course of or as a result of intentional maiming or torture of the victim; 3) murders of victims who were members of classes far in excess of the few classes of victims listed in the Texas code; 4) murders committed by individuals who were incarcerated; 5) murders committed by means of an explosive; 6) murders committed in the course of numerous felonies (see ORS 163.115); and 7) murders committed to conceal commission of a crime or to conceal the identity of the perpetrator of a crime.

The point of *Jurek* is that there must be a rational narrowing process which does not occur under the Oregon statute. Analytically, examination of the Oregon statute leads one to think not, "Will this homicide fall within the provisions of the aggravated murder statute?" but rather, "What sort of homicide would *not* fall within the provisions of the aggravated murder statute?"

Very few murders would not fall within Oregon's aggravated murder statute. Among the few might be murders without apparent motive; that is, "senseless" murders. For instance, the murder of an innocent child who wouldn't stop crying or the murder of a stranger for the "thrill" of committing the ultimate violent act. But even murder resulting from child abuse can be elevated to aggravated murder by alleging the act of abuse caused "substantial pain," making it "torture." See *State v. Cornell-Pinnell*, 304 Or 27 (1987)(defining "torture"). Indeed, even manslaughter resulting from child abuse can become a capital offense if the abuse constitutes "maiming" or "torture." See ORS 163.115(1)(c) & 163.095(1)(e). And virtually any murder can be charged as aggravated murder in the course of a kidnapping if the perpetrator moves or attempts to move the living

victim, even from one room to another. The murder of a single person in the heat of passion would probably not fall within the statute, but this type of killing may in fact be manslaughter by application of the extreme emotional disturbance defense rather than murder.

What is beyond dispute is that Oregon's statutory definition of aggravated murder encompasses at least twice the number of types of murder as the Texas code approved in *Jurek* and the Louisiana code approved more recently in *Lowenfield v. Phelps*. [The full text of the Texas, Louisiana and Oregon statutes are reprinted in Appendix #1 to this memorandum]. Moreover, the Oregon statute contains the broadest definition of murder subject to capital punishment in the nation. Kanter, "Brief Against Death," 17 Willamette Law Review 629, 642 (1981). The Oregon Supreme Court sustained ORS 163.095 against an Eighth Amendment attack in its first *Wagner* decision, but did so by way of an analysis which isolated it from the other systemic defects supporting Mr. Hale's Eighth Amendment claim.

4. THE THREE QUESTIONS OF THE PENALTY PHASE ARE REDUNDANT OR VAGUE

ORS 163.150 regulates the penalty phase and requires that the jury, to impose the death penalty, must affirmatively find:

> (1)(b)(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 result; [hereinafter referred to as "Question 1"]
>
> (B) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; [hereinafter referred to as "Question 2"]
>
> (C) 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 deceased; [hereinafter referred to as "Question 3"].

These questions do not provide aggravating circumstances to genuinely narrow the ranks of those defendants who should be sentenced to death from those who should not. *But cf., State v.*

Guzek, 322 Or 245, 258 (1995)(refering to these questions as “enumerated statutory aggravating circumstance” which “narrowed the imposition of the death sentence”)(dicta).

The jury must also unanimously answer “yes” to a fourth question, “Whether the defendant should receive a death sentence,” ORS 163.150(1)(b)(D). *Guzek* held the fourth question was a pure mitigation issue, as opposed to an aggravating circumstance. Whether, given the 1995 amendments to ORS 163.150, the fourth question has also become a statutory aggravating circumstance, is the subject of a separate demurrer/motion to dismiss and memorandum. For purposes of this memorandum, the fourth question is not intended to be included when reference is made either to aggravating circumstances, or to the other “three penalty phase questions.”

An aggravating circumstance is an objective factor which serves to ensure that the death penalty is not arbitrarily imposed. *See, Zant v. Stephens,* 462 US 862, 878 (1983)(an aggravating circumstance is any finding by the sentencer which "circumscribe[s] the class of persons eligible for the death penalty); *see also, e.g., Smith v. State,* 779 SW2d 417, 420 (Tex. Crim. App. 1989)(function of the three penalty-phase questions is "to further narrow the class of death-eligible offenders to less than all those who have been found guilty of [capital murder]"; *Roney v. State,* 632 SW2d 598, 603 (Tex. Crim. App. 1982)(facts of crime alone do not provide death-eligibility; otherwise, every capital murder in the course of a robbery would warrant death, resulting in arbitrary and capricious imposition of death penalty).

"If the sentencer could fairly conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm," *Arave v. Creech*, 113 SCt 1534, 1542 (1993)(emphasis original).

Since an affirmative finding to each of the three penalty-phase questions is required before a death sentence may be imposed, each functions as an aggravating circumstance as defined by the Supreme Court in *Zant v. Stephens, supra.*, and as acknowledged by the Oregon Supreme Court in *Guzek, supra.* An aggravating circumstance which merely repeats the

elements of a lesser crime cannot perform the necessary narrowing function, *see* Kanter, Brief Against Death, 17 Willamette Law Review 629 (1981); nor can a vague aggravating circumstance, *Tuilaepa v. California, supra,* 114 SCt at 2636 (aggravating circumstance is not unconstitutionally vague if it has some "common-sense core of meaning . . . that criminal juries should be capable of understanding"). A death sentence may not be imposed by a jury relying on a vague aggravating factor unless the court cures the vagueness by applying a valid limiting construction, thereby providing the sentencer with specific and detailed guidance concerning its scope. *Maynard v. Cartwright,* 486 US 356 (1988); *Godfrey v. Georgia,* 446 US 420, 428 (1980).

> When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face. *Walton v. Arizona,* 111 LEd2d 511, 528 (1990).

> Our decision in *Walton* thus makes clear that if a State has adopted a constitutionally narrow construction of a facially vague aggravating circumstance, and if the State [court] has applied that construction to the facts of the particular case, then the 'fundamental constitutional requirement' of 'channeling and limiting . . . the sentencer's discretion in imposing the death penalty' has been satisfied. *Lewis v. Jeffers.* 111 LEd2d 606, 622 (1990)(citation omitted).

The three questions of Oregon's penalty phase infringe upon these constitutional principles, thereby contributing to the overall failure of our capital punishment system to narrow the pool of persons subject to the death penalty.

As to Question 1, the Oregon Supreme Court has found an unarticulated distinction between committing a murder "intentionally" and committing a murder "deliberately." *State v. Wagner*, 305 Or at 147-48. There is, however, no difference in common usage between "deliberate" and "intentional." Webster's New World Dictionary, for example, defines "deliberate" as "done on purpose," and "intentional" as "done purposely." (1966 ed., pp 387, 761). From a legal standpoint, the only conceivable difference between the two terms is that intent may form instantaneously, while deliberation theoretically requires some length of time for reflection;

however, the time necessary for deliberation can be compressed into a single instant. *See, e.g., State v. Ogilvie*, 180 Or 365, 374-76 (1947); *State v. Butchek*, 121 Or 141, 156-58 (1927).

As a practical matter, once jurors have determined that a murder was intentional they will decide it was deliberate. Question 1 is therefore redundant of an element of the offense of any intentional murder, and has not been given a limiting construction by the courts to cure the lack of any common-sense distinction between "deliberate" and "intentional". It thus fails as an aggravating circumstance which reasonably justifies the imposition of the death penalty under the Eighth Amendment.

More fundamentally, the statute struck down in *Furman* required deliberation for intentional murder convictions and, in *Godfrey v. Georgia*, 446 US 420, 426 (1980), the defendant was found to have committed an intentional and deliberate murder. The Court, however, reversed both death sentences because of inadequate guidance of discretion through aggravating or narrowing circumstances. Thus, whatever distinction exists between intentional and deliberation cannot satisfy the Court's criteria for an aggravating circumstance which narrows the class of death eligible defendants.

Question 3 is likewise redundant of a necessary finding by the jury during the guilt phase. It requires the jury to find that the murder was unprovoked by the victim. To find the defendant guilty of any form of homicide, the jury must find beyond a reasonable doubt that the killing was unjustified, i.e., not reasonable in response to provocation by the victim. If killing the victim would be a reasonable response to provocation by the victim, the killing would not be a criminal homicide; it would be justifiable or would be the "extreme emotional disturbance" type manslaughter.

As further evidence of the redundancy of the first and third penalty-phase questions with the issues determined during the guilt phase, is the revision of the Texas death-penalty scheme in 1991, following the *Penry* decision. The Texas legislature added a new "fourth question" strikingly similar to our legislature's first draft of the new mitigation question. It also entirely

eliminated the first and third questions dealing, respectively, with deliberation and provocation. See, e.g., *Graham v. Collins*, 950 F2d 1009, 1012 n.1 (5th Cir. 1992)(setting forth the statute and the changes discussed above)(included in the Appendix to this memorandum).

Question 2, "future dangerousness," is insufficient because it is too vague and standardless to provide a principled basis for determining which aggravated murder defendants should live or die. As explained by the Supreme Court:

> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with a kind of open-ended discretion which was held invalid in *Furman v. Georgia.*
> *Maynard v. Cartwright*, 108 SCt 1853, 1858 (1988).

Question 2 requires that the jury find beyond a reasonable doubt that there is a probability of future violence by the defendant. Neither ORS 163.150 nor the Oregon courts have explained what "probability" means in light of the requirement of "proof beyond a reasonable doubt." It is clear that Question 2 does *not* mean the jury must be convinced to a moral certainty that the defendant will commit future violent acts, which concededly would narrow the class of death-eligible defendants. If it simply means the jury must find a possibility that the defendant will commit future violent acts, it is unlikely that any person convicted of aggravated murder would escape an affirmative finding on this question, since it is a common-sense possibility that one's past conduct will be repeated in the future.

The Oregon Supreme Court has interpreted Question 2 to mean whether it is <u>more likely than not</u> that there is a <u>chance</u> of the defendant committing criminal acts of violence, thus injecting the equally vague term "chance" into the equation. *State v. Wagner,* 305 at 151. Question 2, by its terms and as construed by the Court, looks to the chance of a defendant engaging in hypothetical future conduct. Predictions of "future dangerousness" are nothing more than speculation. The American Psychiatric Association has stated that the profession cannot predict

future conduct. Brief of the American Psychiatric Association, *Barefoot v. Estelle*, 103 SCt 3383 (1983).

The various words and phrases in Question 2 and corresponding jury instructions, when considered as a whole, do not give the sentencer "clear and objective standards" that provide "specific and detailed guidance" and that "make rationally reviewable the process for imposing the sentence of death." *Jeffers* and *Walton, supra.* Nor can the vagueness of Question 2 be cured by a determination that it is "factually substantiated" in a given case. *Maynard, supra,* 486 US at 363-64 ; *Godfrey, supra,* 446 US at 432. It is not enough to say we recognize a defendant who poses a future danger when we see him, but we can't otherwise define what is meant by Question 2 with any certainty.

In *Jurek v. Texas,* 428 US 262 (1976), a plurality of the Supreme Court conditionally upheld the Texas capital punishment statute, on the assumption that the Texas courts would "define *precisely* the meanings of such terms as 'criminal acts of violence' or 'continuing threat to society'," *Id.* at 272 (emphasis supplied). Oregon has adopted the same terms in Question 2, and has failed to define them with the precision necessary to prevent the arbitrary and capricious imposition of the death penalty.

In fact, the Oregon Supreme Court has held that the word "criminal" in the phrase "criminal acts of violence" adequately informs jurors of which acts of violence it should consider without any instruction regarding which types of acts the law makes criminal; i.e., jurors are inexplicably presumed to know the legal definitions of all violent crimes. *State v. Tucker,* 315 Or 321, 336-37 (1993), *and compare, State v. Wille*, 317 Or 487, 500-01 (1993)("The terms 'intentional' and 'extreme emotional disturbance' are statutorily defined legal terms whose meanings may or may not coincide with the meanings that a medical professional or lay person otherwise would give them.").

If the meaning of Question 2 is viewed as capable of being correctly intuited by jurors, it still fails to serve the constitutionally-required narrowing function. “If the sentencer fairly could

conclude that an aggravating factor applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm," *Arave v. Creech*, 113 SCt 1534, 1542 (1993). This is because jurors could fairly find that almost every murderer is likely to commit future violent crimes, reasoning "he's done it before, he'll likely do it again."

Godfrey, supra, provides further support for the conclusion that Question 2 fails as an adequate narrowing circumstance. In *Godfrey*, the challenged circumstance required a finding that the murder was "outrageously or wantonly vile, horrible or inhuman." The Court held this could not serve as a narrowing factor because "a person of ordinary sensibility could fairly characterize almost every murder" by those terms. 446 US 420, 428-29 (1980). Oregon's Question 2 has the same constitutional defect as the Georgia standard because it does not substantially or rationally reduce the pool of murderers to those few who deserve death.

According to the Oregon Criminal Defense Attorneys Association which monitors death penalty litigation, no defendant in Oregon has been spared the death penalty because of a negative finding by the jury with respect to Question 1 (deliberateness) or Question 3 (lack of provocation). This underscores the redundancy of these questions in terms of the elements of the offense.

The vague and inherently unreliable, or over-inclusive, determination called for by Question 2 (future dangerousness) is inadequate under the Eighth Amendment to reasonably justify the imposition of the death sentence. The vagueness issue was decided against the defendant in *State v. Wagner*, but not in the context herein raised of the three questions contributing to the overall system's failure to ensure that death is imposed only in the most extreme cases.

5. THE UNGUIDED DISCRETION GIVEN THE PROSECUTION TO SEEK THE DEATH PENALTY CONTRIBUTES TO ITS IRRATIONAL IMPOSITION

Although ORS 163.150(1)(a) reads as if a penalty phase determination by a jury is an automatic feature of the Oregon death penalty system following a conviction for aggravated murder, it is not. Whether the trial proceeds into a penalty phase is totally within the discretion of the District Attorney. First, in all cases where a plea of guilty has been entered the prosecution is given statutory authority to proceed with the death penalty phase at its sole discretion. ORS 163.150(3)(a). Second, as the prosecution is not required to plead or otherwise give notice of its ability to prove any of the penalty phase aspects of an aggravated murder case, *State v. Wagner*, 305 Or at 171-72, the State can choose at any time before the initiation of the penalty phase trial not to go forward. The State cannot be forced to put on proof that it has not alleged it has.

In sum, the State has unfettered discretion to proceed or not to proceed to the penalty phase after a conviction of aggravated murder, and this discretion is exercised without objective legislative standards or judicial supervision.

In all other "enhanced penalty" statutes in Oregon, the trial judge retains the discretion to override the prosecution's request for the severest sanctions, even though the prosecution has proven the statutory criteria for the enhanced penalty. See, e.g., ORS 161.735(6)(dangerous offender statute); ORS 161.610(5)(firearm enhancement); ORS 426.675(1) and (3)(sexually dangerous offender). As judges strive for consistency in sentencing similarly-situated defendants, affording judicial discretion in enhanced penalty proceedings doubtless results in a *de facto* comparative sentence review by the trial court in each case.

That a death penalty system grants discretion for prosecutorial leniency has long been held to be a constitutionally permissible feature under the Eighth Amendment. However, the discretion to bestow leniency through plea negotiations has not been approved when extended to the decision to proceed to the sentencing phase. If persons convicted of aggravated murder can

only face the death penalty at the prosecutor's discretion, the exercise of that discretion, without legislative guidance, can lead to the wanton and freakish imposition of the penalty as condemned in *Furman v. Georgia*.

With no consistent and objective standards for the exercise of this prosecutorial discretion, there is no meaningful basis for distinguishing those persons who may be subject to the death penalty from those who are not, in violation of the Eighth Amendment. This same haphazard administration of the death penalty laws violates the right to equal protection under the state and federal constitutions.

The situation was succinctly expressed by the Oregon Supreme Court in *State v. Cory,* 204 Or 235 (1955) "In other words, the fate of all persons, even to the extent of life imprisonment [and here, the death penalty], who have committed the same acts under the same circumstances and in like situations is determined by the whim and caprice of the District Attorney." 204 Or at 240.

Cory struck down the habitual offender statute because it gave the prosecutor unbridled discretion to determine whether to file habitual offender proceedings against persons convicted of felonies not involving personal violence. It held the statute failed to deliver "a guaranty of like treatment to all persons similarly situated," 204 Or at 239. See also *State v. Freeland*, 295 Or 367 (1983)(finding denial of equal protection for persons denied a preliminary hearing because the prosecutor employed "logistical" and "tactical" criteria in choosing to use indictment versus information process).

In *State v. Buchholz*, 309 Or 442 (1990), the Supreme Court held that the Article 1, Section 20 right to equal treatment applied to the prosecutor's discretionary decision to enter into a plea bargain in a murder case. The Court upheld the prosecutor's decision to not plea bargain with the defendant because it was based on the statutory criteria established by ORS 135.415. The Court observed that a prosecutor's exercise of discretion meets the constitutional standard if

it rests on meaningful criteria consistently applied to similarly situated defendants. 309 Or at 446 n.2 and 447.

The Supreme Court addressed prosecutorial discretion in aggravated murder cases in *State v. McDonnell*, 310 Or 98 (1990)(hereafter *McDonnell* (1)) and *State v. McDonnell* (II), 313 Or 478 (1992). In *McDonnell* (I) the Court made clear that the few constraints imposed upon prosecutorial discretion in *Buchholz* would apply as well in capital cases:"If a district attorney decides to engage in plea negotiations, he or she must be guided by the statutory criteria [ORS 135.415] and other relevant considerations involving the public's interest in an effective administration of criminal justice," 310 Or at 105.

In *McDonnell* (II), the Court made clear that prosecutorial discretion regarding plea bargaining in capital cases would be subject to judicial review--but confined to the individual District Attorney's practices within his county. "Generally, a decision by the district attorney whether or not to engage in plea negotiations is subject to judicial scrutiny," 313 Or at 491(collecting cases). "In deciding whether to offer a plea bargain to a defendant, a district attorney must exercise discretion in a manner that adheres to sufficiently consistent standards to represent a coherent, systematic policy." *id*. The Court went on to approve the District Attorney's "consistent" policy to not offer plea bargains in cases charged as aggravated murder; a policy which, it should be self-evident, is not employed on a statewide basis.

In sum, the prosecutor's discretion in seeking the death penalty is totally unguided by statutory criteria apart from those which apply to plea bargaining in general, or any statewide policy adopted by all District Attorneys. *McDonnell* (II) makes clear that this discretionary decision by the prosecutor is not exempt from the requirement of Article 1, Section 20, but limits our Constitution's requirement of like treatment for capital defendants to those defendants located within the same county.

It is the defense position that to pass constitutional muster, there must be a statewide "systematic policy" followed by all prosecutors in determining which cases warrant the death

penalty. *See State v. Buchholz, supra; see also State v. Clark,* 291 Or 231, 241-42 (1981)(district attorneys are state officers applying statewide, not local law); *State v. Coleman*, 131 Or App 386, 390(1994)("throughout Oregon history, district attorneys have been regarded as state officers who act as the prosecutors for the executive branch"); Article IV, Section 23 of the Oregon Constitution (prohibiting the legislature from passing special or local laws for the punishment of crimes or regulating the practice in Courts of Justice).

Although the Oregon Supreme Court has stated that its review of prosecutorial decisions in death penalty cases will be confined to comparing the practices of the district attorney toward capital defendants in his own county, the Court noted that no authority had been cited to support the theory that all defendants in the state charged with the same crime should be the group for comparison. *State v. Cunningham*, 320 Or 47, 67 (1994). Mr. Hale cites the above authorities, and asserts that reason dictates that the imposition of the death penalty should not depend on the happenstance of venue within this state.

The defense has not conducted an exhaustive survey, but has found that courts of several of our sister states which have adopted some form of proportionality review have reached the same conclusion. *E.g., State v. Marshall*, 613 A2d 1059, 1070-73 (N.J. 1992)("we again acknowledge that disproportionality can originate in both prosecutorial and jury decisions," going on to explain why statewide standards are required); *State v. Moore,* 210 Neb. 457, 316 NW2d 33, 44 (conducting proportionality review by comparison with all other first-degree-murder convictions, whether or not death penalty imposed), *cert. denied*, 456 US 984, 102 SCt 2260 (1982); *Commonwealth v. Pursell*, 495 A2d 183, 198 (Pa. 1985)(conducting proportionality review by comparison with other first-degree-murder cases in which evidence could support an aggravating circumstance, even though prosecution did not seek death penalty); *State v. Rupe*, 743 P2d 210, 229 (1987)(concluding that for purposes of proportionality review, similar cases include cases in which defendant convicted of first-degree murder regardless of whether death penalty was sought), *cert. denied*, 486 US 1061, 108 SCt 2834 (1988).

The New Jersey Supreme Court in *Marshall, supra,* explained its conclusion by way of the following graphic example:

> The point may best be illustrated by the prior example of 100 robbery-felony-murder defendants, only one of whom is sentenced to death. Were we to assume that the remaining ninety-nine defendants were prosecuted and convicted of non-capital murder because of prosecutorial decisions not to seek the death penalty, the disproportionality of the single defendant's death sentence would arise not because of a disproportionate jury determination but because the prosecutorial decision to seek the death penalty was unique. That type of disproportionate death sentence could not be identified by a proportionality-review process that was limited to capital cases tried to a penalty phase; it could be identified, however, by a universe that included clearly death-eligible homicides that were not prosecuted as capital cases. 613 A2d at 1071.

While capital defendants may not be entitled to perfection in the process by which their fate is determined, surely our Constitution requires a greater degree of uniformity than a process which sanctions the execution of a defendant in one county because of a "no plea bargaining policy," while allowing a similarly-situated defendant in a different county to obtain a life sentence by plea bargaining. Overall, the discretion exercised by prosecutors in Oregon destroys rather than "promote[s] even-handed, rational and consistent imposition of death sentences," *State v. Wagner,* 305 Or at 144.

6. NO MEANINGFUL JUDICIAL REVIEW

Judicial review of death sentences in Oregon is constitutionally flawed in at least two respects. First, the scope of review at the trial and appellate levels is inadequate under the Eighth Amendment to safeguard against arbitrary and capricious infliction of capital punishment, given the other deficiencies in Oregon's system for imposing the death penalty. The inadequacy of judicial review, as restricted by (amended) Article VII, Section 3 of the Oregon Constitution, also violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Second, Article 1, Section 40 of the Oregon Constitution singles out death penalty cases for a narrower scope of review than any other type of criminal case, in violation of the Equal Protection

Clauses of the state and federal constitutions as well as the Eighth Amendment's demands for safeguards against arbitrariness.

ORS 163.150(g) provides that the judgment of conviction and sentence of death shall be subject to automatic and direct review by the Oregon Supreme Court. The scope of review on appeal is controlled by (amended) Article VII, Section 3. Section 3 says in pertinent part that "no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is *no evidence to support the verdict*." (Emphasis supplied).

The *Wagner* Court interpreted this constitutional provision as limiting its review to determining "whether there was evidence from which the jury could have found affirmative answers to all three questions and whether the jury acted according to law." 305 Or at 169. The Court will not conduct a substantive review of the sentence. *Id.*, at 169-70. It will not determine if the weight of the evidence supported affirmative answers to the three questions. *Cf., Robtoy v. Kincheloe*, 871 F2d 1478, 1480 (9th Cir. 1989)(standard of review in federal habeas corpus proceedings of capital case is whether there is "fair support in the record" for the state court's findings, and the federal court may give different legal weight to the state court's findings).

This shallow, "is there any evidence to support it?" inquiry runs afoul of the meaningful judicial review required by the Eighth Amendment. In *Jurek*, the Court approved the Texas system for imposing capital punishment upon finding, among other important safeguards:

> By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law. 96 SCt at 2958.

That the scope of review in Texas was greater than that authorized by Oregon law can be seen by an appellate decision discussed by the *Jurek* Court:

> In the only other case in which the Texas Court of Criminal Appeals has upheld a death sentence, *it focused on the question of whether any mitigating factors were present in the case.* See Smith v. State, No. 49,809 (Feb. 18, 1976). In that case the state appellate court examined the sufficiency of the evidence to see if a 'yes' answer to question 2 should be sustained. In doing so it examined the defendant's prior conviction on narcotics

> charges, his subsequent failure to attempt to rehabilitate himself or obtain employment, the fact that the had not acted under duress or as a result of mental or emotional pressure, his apparent willingness to kill, his lack of remorse after the killing, and the conclusion of a psychiatrist that he had a sociopathic personality and that his patterns of conduct would be the same in the future as they had been in the past. 96 SCt at 2957. (Emphasis supplied).

The Texas code did not expressly provide for the consideration of mitigating factors; thus, the court's examination of the evidence for mitigating factors and its detailed inspection of the record regarding future dangerousness is indicative of a substantive review of the jury's determination. See also, e.g., *Roney v. State*, 632 SW2d 598, 603 (Tex. Crim. App. 1982)(reviewing the aggravating factors relied on by the State against the defendant's mitigating evidence and concluding the State failed to prove the question concerning "future dangerousness" beyond a reasonable doubt).

Logic dictates that an inquiry limited to simply whether there is *any* as opposed to *no* evidence to support the jury's determination does virtually nothing to "promote the evenhanded, rational and consistent imposition of the death sentences," *Jurek*, 96 SCt at 2958. *Cf., Roberts v. Louisiana,* 428 US 325, 335-36, 96 SCt 3001 (1976)(Court struck down Louisiana's statute, in part because "there is no meaningful appellate review of the jury's decision).

Because the Eighth Amendment is not a static concept, it is instructive to examine a more recent decision by the United States Supreme Court on the scope of judicial review in death penalty cases. In *Pulley v. Harris*, 104 SCt 871 (1984), the Court reviewed the California death penalty system in evaluating the defendant's claim that the Eighth Amendment required a comparative proportionality review. Comparative proportionality review involves a substantive comparison of the facts supporting the death sentence in the case on appeal with the facts of other similar cases, to determine if the death penalty is proportionate to the instant offense and offender.

The *Pulley* Court noted that most states require comparative proportionality review, either by statute or through case law. 104 SCt at 876. The Court went on to hold that comparative

proportionality review was not constitutionally required under the California system, because the system as a whole provided two levels of substantive judicial review. The statute provided that after a jury returned a verdict of death, "the trial judge then reviews the evidence and in light of the statutory factors, *makes an independent determination as to whether the weight of the evidence supports the jury's findings and verdicts*." 104 SCt at 880 (Emphasis supplied). The sentence is then reviewed by the appellate court and "this would seem to include review of the evidence relied on by the judge." *Id.*

Oregon, quite clearly, has no such system for judicial review, as its laws are currently interpreted. The statute deliberately takes from the trial court the discretion of imposing a life or death sentence. By putting the entire sentencing decision in the hands of the jury and making the trial court's imposition of sentence a mechanical formality, Oregon's system avoids any substantive review whatever by any court. The appellate court can only "determine whether there was evidence from which the jury could have found affirmative answers to all three questions and whether the jury acted according to the law." *State v. Wagner*, 305 Or at 169; *see, e.g., State v. Duggan*, 215 Or 151,171 (1955)("[U]nder our constitution, we may not set aside the decision of the jury where it hinges on a question of fact . . . unless we can affirmatively say there was no evidence to support the verdict").

The scope of review, as interpreted by the *Wagner* Court, does not permit the appellate court to focus "on the question of whether any mitigating factors were present in the case," *Jurek*, 96 SCt at 2957, which could result in reversal of a jury's verdict for death. See also *State v. Wagner II*, 309 Or 15, 18 (1990)(there is no burden of proof on the fourth question, whether the defendant should receive a death sentence, which frames a "discretionary determination" for the jury).

The scope of judicial review under Article VII, Section 3 also violates the Due Process Clause of the Fourteenth Amendment. *See Honda Motor Co. v. Oberg,* 512 US ___, 114 SCt 2331 (1994). Oregon judges lack the power to examine a jury's decision to determine whether it

was influenced by passion or prejudice; Oregon is the only state in the nation that prohibits such review. *Id.*

Honda is a civil case where punitive damages were awarded by jury verdict. The defendant, Honda, argued that the punitive damage award violated the Due Process Clause of the Fourteenth Amendment because the award was excessive and the Oregon courts lacked the power to correct an excessive jury verdict. The issue presented to the United States Supreme Court was whether Article VII (Amended), Section 3 which prohibits review of jury verdicts "unless the court can affirmatively say there is no evidence to support the verdict" is adequate to ensure that punitive damages are not imposed in an arbitrary manner. A 7-2 majority answered that Oregon's procedure is defective because judges do not have the power to examine the jury award to determine whether the jury was influenced by passion or prejudice and, therefore, arbitrary.

Both Due Process and the Eighth Amendment require procedures which prevent the arbitrary imposition of the death penalty. *E.g., Furman v. Georgia.* Yet, if an Oregon jury sentences a defendant to death, no court may overturn it if--or even review it to determine if--the death sentence resulted from a jury influenced by passion or prejudice. A less than exhaustive survey of other jurisdictions shows that our sister courts routinely overturn death sentences, concluding that the sentencer, presumably blinded by passion or prejudice, failed to give sufficient weight to mitigating circumstances. See, e.g., *DeAngelo v. State*, 616 So2d 440 (Fla. 1993); *People v. Leger,* 597 NE2d 585 (Ill. 1992); *Evans v. State*, 598 NE2d 516 (Ind. 1992); *Wilson v. Commonwealth,* 836 SW2d 872 (Ky. 1992); *State v. Herrera*, 850 P2d 100 (Ariz. 1993); Skene, "Review of Capital Cases," 15 Stetson L. Rev. 263, 271 (1986)(in Florida, from 1974 to 1983, the supreme court affirmed only 49.2% of death sentences in the 95 cases it reviewed).

Concededly, the due process inquiry is different in a civil rather than in a criminal case. Civil cases apply a three-pronged test examining (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of that interest through the procedure used; and (3) the government's interest, including any administrative burden. *Mathews v. Eldridge*, 424 US 319,

335, 96 SCt 893 (1976). Criminal cases generally apply the *Medina v. California* , 112 SCt 2572, 2576-77 (1992) test, which is a narrower inquiry.

Under the *Medina* test the federal court is cautious when contemplating intruding on a state's administration of justice, giving latitude when reviewing a state's procedures regarding such matters as the allocation of the burden of proof on certain defenses or the test for competency. However, *Medina* requires that the federal courts intervene under the Due Process Clause when a state's procedure offends a fundamental principle of justice. Meaningful judicial review is a fundamental principle of justice; and if life and liberty interests are not more deserving of "due process" than property interests in Oregon, then something is fundamentally wrong with the principles of our justice system.

Furthermore, the United States Supreme Court relied on criminal cases concerning judicial review in parts of it *Honda Motor Co.* decision. For example, the Court noted that while it was leaving the Oregon Supreme Court the task of deciding the standard of review to apply in punitive damage cases, the various standards used by other courts throughout the land "may be rough equivalents of the standard this Court articulated in *Jackson v. Virginia,* 443 US 307, 324, 99 SCt 2781 (1979)(whether 'no rational trier of fact could have' reached the same verdict)." 114 SCt at 2339. *Jackson* addressed the appropriate standard of review in federal habeas corpus proceedings resulting from a claim of insufficient evidence to support a state criminal conviction.

There is a close analogy between punitive damage awards and the <u>punitive</u> nature of the death penalty. *E.g.,* Article I, Section 40 of the Oregon Constitution (exempting the penalty for aggravated murder from Article 1, Sections 15 and 16 which prohibit vindictive justice, disproportionate penalties and cruel and unusual punishments); *see also Honda Motor Co, supra,* 114 SCt at 2339 ("What we are concerned with is the possibility that a guilty defendant may be unjustly punished; evidence of guilt warranting some punishment is not a substitute for evidence providing at least a rational basis for the particular deprivation of property imposed by the State to deter future wrongdoing.").

The *Honda Motor Co.* opinion goes on to note that Due Process includes judicial review of deprivations of liberty, as well as property; death is the ultimate deprivation of liberty:

> The criminal cases do establish--as does our practice today--that a jury's arbitrary decision to acquit a defendant charged with a crime is completely unreviewable. There is, however, a vast difference between arbitrary grants of freedom and arbitrary deprivations of liberty or property. The Due Process Clause has nothing to say about the former, but its whole purpose is to prevent the latter.
> 114 SCt at 2342.

The rule of *Honda Motor Co.* must be extended to require our judiciary to substantively review capital cases for death sentences resulting from passion or prejudice, or otherwise "arbitrarily" imposed. "Whether or not death penalties have been subject to judicial review and modification historically, it is difficult to think of a human interest more worthy of due process protection than human life," *State v. Cunningham,* 320 Or 47, 75 (FADELEY, J., dissenting)(1994). *Cf., People v. Leger*, 597 NE2d 586, 610 (Ill. 1992)(Illinois supreme court interprets its power to review death penalty cases and the Eighth Amendment's requirement of individualized sentencing to allow it to examine each case to determine whether the death penalty is "excessive," even though no provision of Illinois law specifically authorizes proportionality review).

Article VII (amended), Section 3 does give the Oregon Supreme Court "authority to determine 'what judgment should have been entered in the court below'." *Oberg v. Honda Motor Co.*, 320 Or 544, 547 n.3 (1995)(on remand from the Supreme Court). Thus far, our Supreme Court has used that authority only "in rare instances," *id.* Thus far, the Oregon Supreme Court has not used that authority to conduct a substantive review of a death sentence; accordingly, the lack of judicial review remains a valid ground for this motion. Indeed, the defense submits that the failure of the Oregon Supreme Court to conduct a substantive review of death sentences, when authorized by state law to do so, is an independent violation of due process under the Fourteenth Amendment of the United States Constitution.

The scope of review in death penalty cases is further "circumscribed" by Article 1, Section 40 of the Oregon Constitution. *State v. Wagner*, 305 Or at 170. Section 40 may be read as

removing the protections of two provisions of Oregon's Bill of Rights, Sections 15 and 16, from persons charged with capital offenses. Section 15 prohibits vindictive justice and Section 16 requires that all penalties shall be proportioned to the offense. It is difficult to conceive of a class of defendants more in need of judicial review of jury verdicts as a safeguard against passion, prejudice, revenge, vindictiveness and excessiveness than defendants convicted of capital crimes.

To prohibit appellate inquiry as to whether a death sentence in a particular case violates Section 15 or 16 assures that the scope of review in capital cases is more restricted and thereby less meaningful than in non-capital cases. This is contrary to the Eighth Amendment's command for greater procedural protections in death penalty cases:

> The unique nature of the death penalty not only necessitates additional protections during pretrial, guilt and sentencing phases, but also enhances the importance of the appellate process. Generally there is no constitutional right to appeal a conviction. '[M]eaningful appellate review' in capital cases, however, 'serves as a check against the random or arbitrary imposition of the death penalty.' It is therefore an integral component of a State's 'constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. *Murray v. Giarratano, supra*, 109 SCt at 2777.

This discriminatory aspect of Article 1, Section 40 also violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The *Wagner I* Court has found to the contrary, but Defendant believes *Wagner* was as erroneous on this issue as it was on the mitigation issue and wishes to preserve this ground for appeal.

Defendants in capital cases, unlike all other defendants, also are denied the right of intermediate appellate review to the Court of Appeals, in violation of the equal protection guarantees of the state and federal constitutions. Under Oregon law, a citizen convicted of any other crime--even a Class C misdemeanor--can appeal to the Oregon Court of Appeals, and if unsuccessful, can again appeal to the Oregon Supreme Court. See ORS 138.040 and 138.050. Indeed, the State itself has the right to intermediate appellate review in an aggravated murder

case when the State is unsuccessful in a pretrial matter. For example, in *State v. Cornell/Pinnell*, 83 Or App 599 (1987), the Court of Appeals agreed with the trial court that sustained defendant's demurrer. Then, based on the ability of the State to twice appeal a ruling, the Court of Appeals was reversed by the Supreme Court. *State v. Cornell/Pinnell*, 304 Or 27 (1987).

A two-step appellate process affords greater judicial scrutiny of the defendant's claims and a greater opportunity for the defense to prepare and refine its arguments. It is truly perverse to deprive a person sentenced to death of those procedural rights given to a shoplifter. *Cf., State v. Freeland, supra* (finding right to a preliminary hearing an important privilege triggering an equal protection claim).

This lack of intermediate appellate review compounds the lack of meaningful judicial review of capital cases in Oregon, and denies capital defendants an important privilege accorded to all other defendants and the prosecution, in violation of Article 1, Section 20 of the Oregon Constitution and the Fourteenth Amendment of the United States Constitution. *E.g., Mayer v. City of Chicago*, 404 US 189, 92 SCt 410 (1971)(statute discriminating between felons and misdemeanants for purpose of providing free transcript on appeal struck down as "an unreasoned distinction" under the 14th Amendment); *Groppi v. Wisconsin*, 400 US 505, 91 SCt 490 (1971)(invalidating statute which permitted change of venue in felony but not misdemeanor cases); see *State v. Freeland*, 295 Or 367, 375 & n.7 (1983)(acknowledging that persons charged with different crimes are not separate "classes" for purpose of equal protection analysis); but cf., *State v. Wagner,* 305 Or at 155 (indicating that persons convicted of aggravated murder may constitute a separate "class" for purpose of analyzing some aspects of the penalty determination).

All arguments herein regarding the scope of judicial review are made in the alternative and without prejudice to Mr. Hale’s claim that comparative case review is required under Oregon law, contained in a separate motion and memorandum.

7. CONCLUSION

The United States Supreme Court examines the State's *system* for imposing capital punishment in conducting an Eighth Amendment analysis. *E.g., Gregg v. Georgia; Jurek v. Texas; Pulley v. Harris; Lowenfield v. Phelps*. The Court has sustained a broad definition of the capital offense when the legislature provided objective aggravating factors for the jury to use in narrowing the class of death-eligible defendants, combined with comparative proportionality review. *E.g., Gregg v. Georgia; Proffit v. Florida*. The Court also has sustained systems which essentially incorporate objective aggravating factors into the definition of the capital offense, narrowing the class of death-eligible defendants to those who commit intentional murder under five statutorily-defined situations, combined with substantive sentence review by the judiciary. *Jurek v. Texas; Lowenfield v. Phelps.*

The United States Supreme Court has not upheld and has not indicated it would uphold a system with a broad definition of the capital offense, redundant and vague statutory aggravating factors, and only cursory appellate review. *Cf., Tuilaepa v. California*, 114 SCt 2630, 2647 (1994)(BLACKMUN, J., dissenting)(Criticizing the court for reviewing only one isolated part of California's complex death penalty scheme in upholding the statute based on the assumption that all of the other parts of the statute are working to prevent the arbitrary application of the death penalty, where defendant only sought review of one part, the aggravating factors; "But the crucial question, and one the Court will need to face, is how the parts are working together to determine with rationality and fairness who is exposed to the death penalty and who receives it.").

Mr. Hale has addressed herein four deficiencies in Oregon's death penalty system:

(1) the statutory definition of aggravated murder is over-inclusive and does not sufficiently narrow the class of persons eligible for the death penalty;

(2) the penalty-phase questions are redundant of the statutory definition of aggravated murder or are too vague to use as objective standards which would reasonably justify the imposition of a death sentence on some defendants compared to others;

(3) the prosecution's complete and unguided discretion to seek the death penalty against whichever defendants it chooses usurps the traditional function of the Court in sentencing and facilitates the freakish imposition of those extreme penalties; and

(4) the scope of judicial review does virtually nothing to ensure that the punishment is proportionate to the offense and evenhandedly imposed, thus compounding the aforementioned defects at the trial level.

The synergistic effect of these deficiencies is a system for the imposition of capital punishment that violates the Eighth and Fourteenth Amendments of the United States Constitution and Article 1, Section 20 of the Oregon Constitution. Based upon the foregoing and the evidence and arguments presented at hearing on this motion, the Court should rule that Oregon's system for imposing the death penalty was and remains unconstitutional, and that the State may not seek the death penalty against Mr. Hale.

TERRI WOOD OSB 88332
Attorney for Defendant

CERTIFICATE OF SERVICE

I CERTIFY that on _____, 1996, I served a true, exact and full copy of the within DEMURRER/MOTION TO DECLARE OREGON'S DEATH PENALTY SYSTEM UNCONSTITUTIONAL FOR FAILING TO ENSURE THAT PUNISHMENT IS PROPORTIONATE TO THE OFFENSE and MEMORANDUM OF LAW and APPENDIXES on the Lane County District Attorney by hand delivery to his office at the Lane County Courthouse.

Dated: _____, 1996.

_____

TERRI WOOD, OSB 88332