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 OR ALTERNATIVE MOTION TO DECLARE OREGON'S DEATH PENALTY SCHEME UNCONSTITUTIONAL FOR FAILING TO ESTABLISH AN ADEQUATE AND UNIFORMLY APPLIED PROCEDURE BY WHICH THE JURY IS TO CONSIDER AND GIVE EFFECT TO MITIGATING EVIDENCE (Evidentiary Hearing and Oral Argument Requested)

Defendant, by and through his attorneys, moves this Court for entry of its Order declaring the Oregon death penalty sentencing scheme, now embodied in ORS 163.150 and the uniform criminal jury instructions, unconstitutional in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, and Article I, Sections 10, 11, 15, 16, 20, 21, 33, and Article III, Section I of the Oregon Constitution, and ORS 174.010, upon the grounds that it fails to establish an adequate and uniformly applied procedure by which the jury is to consider and give effect to mitigating evidence, and further ordering that death is not a sentencing option in these proceedings.

In particular, Defendant contends:

(1) The "Fourth Question, " ORS 163.150(1)(b)(D), and accompanying instructions mandated by ORS 163.150(1)(c)(B)--or the judicially created "Fourth Question" jury instructions, *State v. Wagner (II),* 309 Or 5 (1990)--and the applicable uniform penalty phase jury

instructions, are unconstitutionally vague, in violation of the Eighth and Fourteenth Amendments of the United States Constitution and Article 1, Sections 15, 16, 20 and 21 of the Oregon Constitution;

(2) The "Fourth Question, " ORS 163.150(1)(b)(D), instructions mandated by ORS 163.150(1)(c)(B)--or the judicially created "Fourth Question" jury instructions, *State v. Wagner (II),* 309 Or 5 (1990)--and the uniform penalty phase jury instructions, impermissibly shift the burden of proof and persuasion to the defendant regarding an issue on which neither side bears a burden; or alternatively, could be interpreted by a reasonable juror as shifting said burden of proof and persuasion, in violation of the Fifth, Eighth and Fourteenth Amendments of the United States Constitution and Article 1, Sections 11, 20, 21 and 33 of the Oregon Constitution;

(3) The "Fourth Question, " ORS 163.150(1)(b)(D), and accompanying instructions mandated by ORS 163.150(1)(c)(B)--or the judicially created "Fourth Question" jury instructions, *State v. Wagner (II),* 309 Or 5 (1990)--and the applicable uniform penalty phase capital jury instructions place unconstitutional restrictions on the meaning of, consideration of, and use of mitigating evidence by jurors, in violation of the Eighth and Fourteenth Amendments of the United States Constitution and Article I, Sections 15 and 16 of the Oregon Constitution;

(4) The creation, by this Court, of new jury instructions and standards of proof sufficient to establish a constitutional procedure for the jury to consider and give effect to mitigating evidence, would be judicial legislation and the *ad hoc* application of death penalty law, in violation of the Eighth and Fourteenth Amendments of the United States Constitution and Article I, Sections 20 and 21 and Article III, Section of the Oregon Constitution and ORS 174.010.

This motion is made in good faith and not for the purpose of delay. It is supported by the authorities cited above, the memorandum of law incorporated by reference herein, and by such other evidence, authorities and argument as is presented at hearing on this motion.

MOVED this ____ day of _____, 1996.

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MEMORANDUM OF LAW

Introduction

This motion and memorandum concern the procedures--and lack of procedures--by which the capital sentencing jury is to consider and give effect to mitigating evidence under Oregon statutory and case law. These procedures are of critical concern because unless they comply with the constitutional rules governing mitigating evidence, the death penalty cannot be lawfully imposed on Mr. Hale or any other defendant convicted of aggravated murder.

The United States Constitution requires the capital sentencer to consider and give effect to mitigating evidence in deciding whether death is the appropriate penalty. See, e.g., *Penry v. Lynaugh*, 109 SCt 2934 (1989). Oregon has attempted to comply with this federal constitutional mandate by creating a new process now known in our death penalty jurisprudence by the shorthand phrase: "the Fourth Question." This newly-added question the capital sentencer is required to answer, and the new process for arriving at the answer, were first articulated in *State v. Wagner II*, 309 Or 5 (1990), and are now codified in ORS 163.150 and the uniform penalty phase capital jury instructions.

The defense contends that this body of Oregon statutory and decisional law fails to establish an adequate and uniformly applied procedure by which the jury is to consider and give effect to mitigating evidence. Why Oregon's procedure--or lack of procedure--for the role of mitigating evidence in the penalty phase trial may result in a death sentence which cannot be constitutionally imposed requires a brief overview of federal death penalty jurisprudence.

While the United States Supreme Court has held that the death penalty, itself, is not *per se* prohibited by the Eighth Amendment, it has simultaneously recognized that "the penalty of death is different in kind from any other punishment imposed under our system of criminal justice." *Gregg v. Georgia,* 96 SCt 2909, 2932 (1976). "Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Id.*

Thus, Eighth Amendment jurisprudence began in the '70's to focus not on the nature of the penalty, but on the nature of the procedure for imposing the penalty. *E.g., Woodson v. North Carolina,* 96 SCt 2978, 2983 (1976)("The issue, like that explored in *Furman,* involves the procedure employed by the State to select persons for the unique and irreversible penalty of death.")(emphasis original).

The Court reasoned that the procedure for imposing sentence could result in the death penalty, itself, being "cruel and unusual punishment" under a particular statutory scheme or in a particular case, as follows:

> [T]he death sentences examined by the Court in *Furman* were 'cruel and unusual' in the same way that being struck by lightening is cruel and unusual. For, of all the people convicted of [capital crimes], many just as reprehensible as these, the petitioners [in *Furman* were] among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.' *Gregg v. Georgia, supra,* 96 SCt at 2932 (citation omitted).

Death is different. "Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina, supra,* 96 SCt at 2991-92. (emphasis supplied). This concept has come to be known as the Eighth Amendment's demand for "heightened reliability" in the penalty-phase process. See, e.g., *Caldwell v. Mississippi,* 105 SCt 2633, 2640 &n.2 (1985)(collecting cases recognizing this principle). Accordingly, "this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process

that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice or mistake," *Eddings v. Oklahoma,* 102 SCt 869, 878 (1982)(O'CONNOR, J., concurring)(emphasis supplied).

The role of mitigating evidence in capital sentencing hearings is an integral part of the process. See, e.g., *Penry, supra*. If Oregon has not provided an adequate and uniformly applied process by which the jury is to consider and give effect to mitigating evidence, its capital punishment system cannot be allowed to operate.

The Eighth Amendment requires this Court, in recognition of the gravity of the death penalty, to exert "a correspondingly greater degree of scrutiny of the capital sentencing determination,"*Caldwell v. Mississippi, supra,* 105 SCt at 2639 (citation omitted). See *State v. Guzek*, 322 Or 245, 264 (1995)(“Capital cases require our most vigilant and deliberative review.”). Thus we begin by examining Oregon's procedure for imposing the death penalty, and the role of mitigating evidence in that scheme.

1. THE EVOLUTION OF OREGON'S PENALTY-PHASE PROCEDURE

Before the creation of a fourth question to give effect to mitigating evidence, the penalty phase of a capital trial required the jury to answer three questions concerning the defendant's deliberation of the killing, the extent of provocation by the victim, and the future dangerousness of the defendant. ORS 163.150(1)(b)(A), (B) & (C)(1987). The State was required to prove each of these issues beyond a reasonable doubt, ORS 163.150(1)(c), to the satisfaction of an unanimous jury, ORS 163.150(1)(d).

On the issue of future dangerousness, only, the jury was instructed:

> [T]o consider <u>any mitigating circumstance offered in evidence, including, but not limited to</u>, the defendant's age, the extent and severity of the defendant's prior criminal conduct and the extent of the mental and emotional pressure under which the defendant was acting at the time the offense was committed;ORS 163.150(1)(b)(B)(emphasis supplied).

On remand of *Wagner I* from the United States Supreme Court, the Oregon Supreme Court considered whether ORS 163.150 (1987), which contained no question explicitly allowing the jury to vote against death based upon mitigating evidence, could be interpreted to permit the trial judge to submit to the sentencing jury a judicially-fashioned "Fourth Question" by way of a jury instruction. *Wagner II*, 309 Or at 7. The Court found that the statute did not preclude a fourth question and that it already allowed all mitigating evidence to be presented to the jury. *Id.,* at 11-13. Thus, what was needed, was a way for the jury to give full effect to mitigating evidence in determining the sentence. The Court concluded that the former statute permitted a mitigation question by way of the general power of the Court to instruct on the law. *Id.,* at 14-17. The Court went on to supply a version of the "Fourth Question" which the Court deemed comported with the Eighth Amendment to the United States Constitution:

> Should defendant receive a death sentence? You should answer this question no if you find there is any aspect of the defendant's character or background or any circumstance of the offense, that you believe would justify a sentence less than death. *Id.,* at 19.

The Court went on to reject limitations on the admissibility of mitigating evidence:

> We reject the state's dual contentions that mitigating evidence is limited under . . . ORS 163.150 to evidence causally related to the offense and that mitigating evidence may be constitutionally so limited. We do not believe that mitigation evidence can be practicably limited to items 'causally related' to the crime and we conclude that all aspects of the defendant's character are 'relevant to sentence,' i.e., the jury's exercise of a reasoned moral response to the question 'should the defendant receive a death sentence?' 309 Or at 19.

Finally, *Wagner II* provided some limited guidance concerning how the new Fourth Question--by that time codified, albeit ungrammatically, in the 1989 amendments of ORS 163.150--would fit into the existing procedure for conducting the penalty phase:

> In accordance with subsection (1)(e) of ORS 163.150 (1989), the jury must answer the fourth question unanimously in the affirmative as a prerequisite to a death sentence. The state must prove each of the first three statutory issues submitted beyond a reasonable doubt. <u>There is no burden of proof on the fourth question because it does not present an issue subject to</u>

> proof in the traditional sense, rather it frames a discretionary determination for the jury. 309 Or at 18 (Emphasis supplied).

It is unclear from this brief discussion how the *Wagner* Court viewed the operation of the Fourth Question: Did the Court mean that the burden of persuasion remained on the State to obtain the death penalty, but that State was not required to produce additional proof under the Fourth Question to meet that burden? Did the Court mean that neither party bore the burden of persuasion on this issue and that both sides could present evidence and simply argue to the jury that whatever quantum of proof each presented was enough to support its position on this "discretionary determination"? Did the Court mean what it said, that the issue is not subject to proof; and if so, what does that mean in the context of an adversarial judicial proceeding that calls for the presentation of evidence upon which the jury is to base a special verdict? These questions remain largely unanswered by the Court's subsequent opinions.

Since the time of *Wagner II,* the Supreme Court has dealt frequently with the penalty phase under ORS 163.150 (1987), although its discussions of evidentiary and procedural issues have been dicta because every case was reversed for failure to instruct on the new Fourth Question. *See, e.g.*, *State v. Smith,* 310 Or 1, 21-22 (1990)(court's comments regarding the penalty phase are dicta, but intended to provide guidance on "issues of broad application").

In *State v. Farrar,* 309 Or 132, 177 (1990), the Court approved an instruction that the defendant need not prove the existence of mitigating circumstances beyond a reasonable doubt; but, rather, if the jury reasonably believes that a mitigating circumstance exists, it may consider it as established. This in turn raises the unanswered questions: (1) does "reasonable belief" mean more or less than proof by a preponderance?; and (2) must the jury unanimously agree on the existence of a mitigating circumstance before it can use it to decide whether the defendant's life should be spared?

In *State v. Nefstad,* 309 Or 523, 562 (1990), the Court said that if any juror votes no on any question, including the Fourth Question, a death sentence cannot be imposed because a sentence of death requires a unanimous jury. This, however, falls short of saying the State has

the burden of persuasion on the Fourth Question, or that the jury must be convinced beyond a reasonable doubt on the Fourth Question, that the defendant should die.

Later, in *State v. Stevens I,* 311 Or 119, 147-148 (1991), the Court rejected the defendant's claim that he was entitled to have first and last argument at the close of the penalty phase. The court reasoned the State should have both arguments because the penalty phase is a continuation of the same trial and the State has the burden of proof beyond a reasonable doubt. *Id.* Does this suggest the State must also prove a "yes" answer to the Fourth Question, and prove it beyond a reasonable doubt? *But see Guzek*, 322 Or at 254-256 (State not required to prove fourth question beyond reasonable doubt, because it is a pure mitigation issue and intended as the mechanism by which a jury can spare the defendant's life)(pre-'95 amendments).

The 1989 and 1991 amendments to the death penalty statute added the so-called "Fourth Question" concerning mitigating evidence to the three questions traditionally posed to the jury, and made corresponding changes in the procedure for answering the statutory questions. The statute was left untouched until 1995. The 1995 amendments did not change the statutory language of the four penalty phase issues, nor the statutory provisions regarding what the court shall instruct the jury to consider in answering the questions, which are discussed below. It is unknown how our appellate courts will interpret the 1995 amendments, which are the subject of a separate motion and memorandum concerning aggravating evidence.

The Fourth Question and related provisions read as follows:

> Whether the defendant should receive a death sentence. ORS 163.150(1)(b)(D)(1996).
>
> In determining the issue in subparagraph (D) of paragraph (b) of this subsection, the court shall instruct the jury to answer the question "no" if one or more of the jurors find there is any aspect of the defendant's character or background, or any circumstances of the offense, that one or more of the jurors believe would justify a sentence less than death. ORS 163.150(1)(c)(B)(1996).

The legislature changed the procedure for arriving at a sentence to take into account the new Fourth Question. First, it retained the requirement that the State must prove each issue

contained in the first three questions beyond a reasonable doubt, ORS 163.150(1)(d); but the statute is silent as to who bears the burden of proof on the Fourth Question, and what the standard of proof is on that issue, presenting the same dilemma as ORS 163.150 (1987) as interpreted by *Wagner II.*.

Second, it extended the "mitigating circumstances" instruction previously limited to the issue of future dangerous, ORS 163.150(1)(b)(B)(1987)(set forth above), to all four questions. ORS 163.150(1)(c)(A)(1996).

Third, it extended the requirement that the jury must be unanimous to answer a question "yes" to the Fourth Question. ORS 163.150(1)(e). Fourth, it extended the requirement that the jury must answer each question "yes" for the death penalty to be imposed, ORS 163.150(1)(f), to the Fourth Question.

The combined result of these provisions is that the defendant arguably bears the burden of proving a negative, a "no" answer to the Fourth Question of whether a death sentence should be imposed; must show the existence of mitigating circumstances by some undefined standard of proof to the satisfaction of some unspecified number of jurors; and must prove that he should live to some unspecified lessor standard of proof, to the satisfaction of at least one juror.

In *Stevens (II),* the Court examined the legislative history of these statutory provisions, which have remained substantively the same since 1989, and found "it clear that the legislature intended the scope of the statutory fourth question to be co-extensive with the scope of the fourth question held in *Penry* and *Wagner II* to satisfy the the requirements of the Eighth Amendment," 319 Or at 582. Accordingly, the Court declared that cases dealing with mitigating evidence under the Eighth Amendment would be used to interpret the scope of mitigating evidence admissible under the statutory Fourth Question. *Id* ., at 582-83.

It thus appears that the Oregon Supreme Court will interpret the statutory Fourth Question and related procedures to be synonymous with the judicially-created Fourth Question and related procedures under *Wagner II* and its progeny.

In *State v. Guzek*, 322 Or 245 (1995), the Court engaged in statutory interpretation of the Fourth Question, tracing its history from its judicial creation in *Wagner II*, and found that "the issue submitted to the jury . . . is whether any *mitigating* circumstances exist that would justify a sentence of life rather than death. To conclude otherwise would allow the jury to consider a non-statutory aggravating factor beyond the three aggravating factors specifically enumerated in the statute." 322 Or at 263 (emphasis original). The Court found the legislature did not intend such a result. *Id.*

A fair reading of *Guzek* is that its holding that the Fourth Question presents a pure mitigation issue applies to all versions of the statute, at least until the 1995 amendments. See 322 Or at 270 n.10 (noting the statute was amended in 1995, and "may" now allow consideration of aggravating evidence under the Fourth Question). *Guzek* dealt with the specific question of whether aggravating evidence, in the form of victim impact evidence, would be relevant and thus admissible in answering the Fourth Question, i.e., whether "a non-statutory aggravating factor" could be weighed against mitigating evidence to determine the sentence. 322 Or at 257. The Court concluded it could not. 322 Or at 270. *Guzek* reaffirmed that there is no burden of proof on the Fourth Question, and went on to say that the State is not required to prove beyond a reasonable doubt the issue of whether the defendant should receive a death sentence. 322 Or at 254. This dicta, however, was tied to the Court's determination that the State shouldered no burden of proof on the Fourth Question because it was a pure mitigation question. 322 Or at 255.

Guzek also discussed the interplay between the first three penalty phase questions, which it called "specific [statutory] aggravating circumstances," and the Fourth Question:

> The existence of an 'aggravating circumstance' leads a jury to answer the question 'whether the sentence of death [should] be imposed' in the affirmative. The existence of a 'mitigating circumstance' weighs against the imposition of the death sentence.
> 322 Or at 253.

What *Guzek* doesn't tell us is how a jury should "weigh" the statutory aggravating circumstances against the mitigating evidence. Other Supreme Court cases have used different

terminology regarding the operation of the Fourth Question: *State v. Pinnell*, 311 Or 98, 117 (1991)(the fourth question permits the jury to spare a defendant's life if the jury believes, under all the circumstances, that it is appropriate to do so); *State v. Simonsen*, 310 Or 412, 414 (1990)(the fourth question permits a jury to spare a defendant from the death penalty); *Stevens II,* 319 Or at 585 (fourth question is a mechanism for the jury to give meaningful effect to its consideration of the entire range of mitigating evidence). All of these expressions of the operation of the Fourth Question appear in *Guzek*, 322 Or at 256.

The penalty phase statute is supplemented by the Uniform Criminal Jury Instructions on Aggravated Murder--Penalty Phase. UCrJI No. 1313 , 1314. (As amended in October 1994). These instructions incorporate both the new statutory language and language from Oregon Supreme Court decisions in an effort to explain to the jury the procedure it must follow to consider and give effect to mitigating evidence. The instructions thus simply memorialize--versus clarify--the confusing aspects of the procedure mentioned above.

The instructions also define "mitigating circumstances" as whatever "circumstances" the jury, in its "sole judgment" views "as extenuating or reducing the degree of culpability and the appropriate punishment." UCrJI No. 1314. In *State v. Tucker*, 315 Or 321 (1993), the Court advised that trial courts may not instruct the jury on specific mitigating factors jurors must consider arising from the facts of the particular case because that would violate ORCP 59E, made applicable to criminal prosecutions by ORS 136.330(1). 315 Or at 332-33.

Does *Tucker* allow sufficient guidance to jurors faced with *Penry*-type evidence, i.e., mitigating evidence such as mental retardation which is logically viewed as aggravating evidence on the issue of future dangerousness? Without special instructions, how will the jury know it is allowed to find a circumstance, such as mental illness, to be an aggravating circumstance supporting a finding of future dangerousness, and then turn around and find the same evidence to be a mitigating circumstance supporting a life sentence under the Fourth Question?

The instructions go on to advise the jury it may answer any of the four questions in any order, UCrJI No. 1314, thereby giving the jury the opportunity to mix up the process which governs the first three (aggravating circumstances) questions with the different process--or lack of process--governing the Fourth (mitigating circumstances) Question.

In sum, the process by which the jury is to consider and give effect to mitigating evidence under ORS 163.150 (1996) as interpreted by *Wagner II* and its progeny remains in a complex state of disarray. The constitutional ramifications of this procedural quagmire will be explored in this memorandum.

2. OREGON'S PROCESS FOR THE JURY TO CONSIDER AND GIVE EFFECT TO MITIGATING EVIDENCE IS UNCONSTITUTIONALLY VAGUE

A. Eighth and Fourteenth Amendment "Due Process"

States must ensure that "capital sentencing decisions rest on [an] individualized inquiry," under which the "character and record of the individual offender and the circumstances of the particular offense" are considered in mitigation of sentence. *McCleskey v. Kemp*, 481 US 279,302, 107 S.Ct.1756 (1987)(internal quotation marks omitted); *see also Clemons v. Mississippi*, 494 U.S. 738, 748, 110 S.Ct. 1441, 1448 (1990). To this end, "States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant." *McCleskey*, *supra*, 481 US at 306, 107 S.Ct., at 1774.

Within these constitutional limits, "the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished." *Blystone v. Pennsylvania*, 494 U.S. 299, 309, 110 S.Ct. 1078, 1084 (1990)(emphasis supplied). This latitude extends to evidentiary rules at sentencing proceedings. *See*, *e.g.*, *Gregg*, *supra,* at 203-204, 96 S.Ct. at 2939 (approving "the wide scope of evidence and argument allowed at presentence hearings" in

Georgia). There must, however, be a cognizable method; there must be rules which a jury can understand and follow.

As the Court observed in *California v. Ramos*, 463 U.S. 992, 999, 103 S.Ct. 3446, 3452, (1983):

> "In ensuring that the death penalty is not meted out arbitrarily or capriciously, the Court's principal concern has been more with the procedure by which the State imposes the death sentence than with the substantive factors the State lays before the jury as a basis for imposing death, once it has been determined that the defendant falls within the category of persons eligible for the death penalty."

The "controlling objective" when the Court conducts a vagueness analysis of a State's process for selecting which defendants should be put to death is "that the process is neutral and principled so as to guard against bias or caprice in the sentencing decision." *Tuilaepa v. California*, 114 SCt 2630, 2635 (1994). Thus, the process itself must not be "too vague," *id.;* the rules for selecting which defendants should die must have some "common-sense core of meaning . . . that criminal juries should be capable of understanding," *id.* at 2636; Amds. 8 & 14, U.S.Const.

The rules must provide "specific and detailed guidance" that "make rationally reviewable the process for imposing a sentence of death." *Walton v. Arizona*, 497 US 639, 660, 110 SCt 3047, 3061 (1990)(SCALIA, J., concurring in part and dissenting in part). At the same time, "[i]n providing for individualized sentencing, it must be recognized that the States may adopt capital sentencing processes that rely upon the jury, in its sound judgment, to exercise wide discretion." *Tuilaepa, supra*, 114 SCt at 2636.

The Fourth Question gives jurors wide discretion on the ultimate issue of life versus death. Given that the Fourth Question focuses on mitigating evidence, rather than aggravating evidence, wide discretion is constitutionally permissible. *See, e.g., Penry, supra,* 109 SCt at 2951. For

discretion to be properly exercised, rather than abused, it must be guided by a "neutral and principled" process. *Tuilaepa, supra* at 2635.

B. Oregon has failed to establish a comprehensible procedure for determination of the Fourth Question.

The Fourth Question asks: "Whether the defendant should receive a death sentence?" ORS 163.150(1)(b)(D); see also *Wagner II, supra.* The statute dictates only one part of the procedure to be followed by the jury in answering this question; the rest of the procedure, or lack of procedure, is contained in the uniform criminal jury instructions, derived from the Oregon Supreme Court cases discussed in section 1, *supra*. The statute provides, in pertinent part:

> [T]he court shall instruct the jury to consider any mitigating circumstances offered in evidence, including but not limited to the defendant's age, the extent and severity of the defendant's prior criminal conduct and the extent of the mental and emotional pressure under with the defendant was acting at the time the offense was committed.
> ORS 163.150(1)(c)(A)

> [T]he court shall instruct the jury to answer the question "no" if one or more of the jurors find there is any aspect of the defendant's character or background, or any circumstances of the offense, that one or more of the jurors believe would justify a sentence less than death.
> ORS 163.150(1)(c)(B).

The statutory death penalty scheme provides no additional guidance on the process for considering and giving effect to mitigating evidence, other than requiring a unanimous "yes" vote for the Fourth Question as well as the first three, for the death penalty to be imposed. *Cf.*, ORS 163.150(1)(d)(requiring State to prove first three questions beyond a reasonable doubt).

The Uniform Criminal Jury Instructions, based on the statute and case law, spell out the following rules--or lack of rules--for deciding the Fourth Question, in the following sequence:

(1) "The burden of proof beyond a reasonable doubt does not apply to this question";

(2) "[N]either side bears any burden of proof";

(3) "You must answer this question 'no' if there is any aspect of the defendant's character or background, or any circumstance of the offense, that one or more of the jurors believe justifies a sentence less than death";

(4) "You may consider any aspect of the defendant's life in your determination of the answer to these questions";

(5) "In answering these questions, you are to consider any mitigating circumstances received in evidence, including but not limited to the defendant's age and A/B "(the other two statutory mitigating circumstances, prior record and mental state, if applicable);

(6) "'Mitigating circumstances' include those circumstances that do not justify or excuse the offense but that, in your sole judgment, may be considered as extenuating or reducing the degree of culpability and the appropriate punishment";

(7) "The defendant need not establish the existence of a mitigating circumstance beyond a reasonable doubt";

(8) "If you reasonably believe that a mitigating circumstance exists, you may consider it as established";

(9) "You may answer any of the first four questions in any order".

UCrJI No. 1314.

These "rules" forming Oregon's process for deciding the Fourth Question are unconstitutionally vague under the Eighth and Fourteenth Amendments; particular problems areas will be discussed in greater detail below. This vagueness is underscored by the historical fact that many of the rules come not from the legislature, but from the courts wrestling with the meaning and role of mitigating evidence in capital proceedings. See section 1, *supra*; see also *State v. Stevens (II), supra*, (reversing because the trial court failed to recognize certain evidence as mitigating, ruling it inadmissible) and *State v. Metz,* 131 OrApp 706 (1994)(reversing because the trial court failed to recognize the purpose and scope of the Fourth Question and admitted "irrelevant" aggravating evidence).

If experienced death penalty counsel and learned trial judges do not correctly understand and cannot agree on how the Fourth Question operates, surely confusion reigns behind the closed doors of the jury's chambers.

When presented with a claim that a capital sentencing instruction is ambiguous and therefore subject to an erroneous interpretation, the relevant inquiry is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California,*494 US 370, 380 (1990). Defendant need not establish that the jury is more likely than not to be impermissibly inhibited by the instruction. *Id.*

Thus, "reasonable likelihood" is a low standard, requiring a less convincing showing by the defense than "by a preponderance." Additionally, the showing required of the defense is an objective one and does not require proof of how the jury actually interpreted the instructions. See, e.g., *Mills v. Maryland, supra.*

Accordingly, these issues are capable of resolution at the pre-trial stage. This Court need only determine if reasonable men and women might derive the meaning from the instructions argued by the defense; if a "reasonable likelihood" exists, the test is met. "In death cases doubts such as those presented here should be resolved in favor of the accused," *Mills, supra,* 108 SCt at 1866 (citations omitted).

In construing the instructions given under ORS 163.150 and UCrJI No. 1314, the question is not what a court declares the meaning of the instructions to be. *Francis v. Franklin*, 471 U.S. 307, 315 (1985). Rather, the standard in determining federal constitutionality is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the constitution." *Estelle v. McGuire*, _ U.S. _, 112 S.Ct. 475, 482 (1991)(quoting *Boyde v. California, supra*). Moreover, the fact that jurors could interpret instructions so as to make them lawful is irrelevant, for a court "cannot be certain that this is what they did do." *Sandstrom v. Montana*, 442 U.S. 510, 526 (1979).

Vague capital sentencing laws also violate Article I, sections 20 and 21 of the Oregon Constitution by inviting *ad hoc*, arbitrary, and therefore unequal application of the death penalty.

> "If arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to . . . judges, (prosecutors), and juries for resolution on an *ad hoc* and subjective basis with the attendant dangers of arbitrary and discriminatory application." *State v. Robertson*, 293 Or 402, 409 (1982), citing *Grayned v. City of Rockford*, 408 US 104, 108 (1972).

The constitutional condemnation of vagueness extends to jury instructions. As the Oregon Supreme Court has recognized, "[a]n instruction that contains a confusing phrase might be reversible error if the jury were left without guidance about the proper standard to apply in deciding the case." *State v. Williams*, 313 Or 19, 39 (1992).

Having set forth in detail Oregon's process by which the jury is to consider and give effect to mitigating evidence, and the state and federal standards used to scrutinize the constitutionality of this process, this memorandum now turns to particular problems areas under a vagueness analysis.

C. Vagueness arising from the term "justify" and burdens of proof.

> **(1) "The burden of proof beyond a reasonable doubt does not apply to [the Fourth} question";**
>
> **(2)"[N]either side bears any burden of proof."**
> UCrJI 1314.

Regardless of where the burdens of proof and persuasion on the Fourth Question are allocated, the statutes and instructions must convey to the sentencing jury (1) which party bears the burden; and(2) the nature of the burden. *Godfrey v. Georgia*, 446 U.S. 420, 427-28 (1980); U.S. Const. Amends. VIII, XIV. Oregon has elected to tell its juries that neither party bears the burden, and to tell its juries what burden of proof does NOT apply, versus what does apply. UCrJI No. 1314 (derived from *Wagner II, supra*). This is an example of the affirmative "lack of procedure" built into the death penalty scheme.

The Eighth Amendment vagueness test is facial in nature, rather than as-applied. The test is whether the capital punishment statute adequately informs the jury what it must find to impose the death penalty so that the decision is guided by objective, comprehensible standards facilitating meaningful appellate review versus open-ended discretion. *E.g.*, *Maynard v. Cartwright*, 108 SCt 1853, 1858 (1988).

Under an Eighth Amendment analysis, ORS 163.150 is severely flawed in that evidentiary standards for answering the Fourth Question are left to sheer quesswork. The most we know is the declaration by *Wagner II* : "There is no burden of proof on the fourth question because it does not present an issue subject to proof in the traditional sense, rather it frames a discretionary determination for the jury. " 309 Or at 18. This is virtually the same as saying there is no objective, comprehensible standard for guiding the jury's discretion on the ultimate issue of whether death is the appropriate sentence.

Furthermore, when read in conjunction with the following instructions, these "no burden of proof" instructions appear contradictory, compounding the degree of vagueness which infects the process:

> **(3) "You must answer this question 'no' if there is any aspect of the defendant's character or background, or any circumstance of the offense, that one or more of the jurors believe justifies a sentence less than death";**
>
> **(6) "'Mitigating circumstances' include those circumstances that do not justify or excuse the offense but that, in your sole judgment, may be considered as extenuating or reducing the degree of culpability and the appropriate punishment";**
>
> **(7) "The defendant need not establish the existence of a mitigating circumstance beyond a reasonable doubt";**
> UCrJI 1314 (emphasis supplied).

The jury is instructed it must determine whether the evidence "justifies a sentence less than death," rather than being asked to simply determine whether life is the appropriate sentence. *Cf., Pinnell, supra,* 311 Or at 117 (fourth question permits the jury to spare a defendant's life if it

believes, under all the circumstances, that it is appropriate to do so). The quoted phrase comes from *Wagner II*, 309 Or at 19, and is embodied in the statute as well as the jury instructions. ORS 163.150(1)(c)(B) Websters Third New International Dictionary defines the word "justify" as synonymous with "prove":

> "1a(1): To prove or show to be just, desirable, warranted, or useful * * * b: to prove or show to be valid, sound, or conforming to fact or reason: furnish grounds or evidence for * * * c(1): to show to have had a sufficient legal reason (as that the libel charge is true or that the trespass charged was by license of the possessor) for (an act made the subject of a charge or accusation) * * *."

Thus the common usage of the term "justify" in the context of the jury instruction conveys the notion that the defendant must "prove" or "show" something in order for his life to be spared. At the risk of belaboring the obvious, this conclusion is inescapable in a proceeding where the State is arguing for death, the defense for life: Which party must persuade the jury that a life sentence is justified, if not the defendant?

Moreover, it is the shorthand phrase "mitigating circumstances" to which everyone will look to decide whether life is "justified" in any given case. See, e.g., *Lockett* and *Penry, supra*. The uniform instructions tell the jury the defendant must establish the existence of mitigating circumstances.

These instructions impermissibly shift the burden of proof and persuasion to the defendant regarding an issue on which neither side bears a burden. This shift is contrary to *Wagner II* and ORS 163.150(1)(c)(B)(limiting burdens to first three questions), and violates Amendments. VI, VIII, XIV, US Const.; *In re Winship*, 397 U.S. 358 (1970); *Mullany v. Wilbur,* 421 U.S. 684 (1975); Or Const., Art. I, Sections 10, 11, 15, 16, 20, 33; *State v. Stockett,* 278 Or 637, 642 (1977). This issue will be discussed in greater detail in section 3, *infra.*

More than the wisdom of Solomon is needed to resolve the conflict created by telling jurors the defense has no burden of proof on the Fourth Question, and then telling them the

defense must prove the existence of mitigating circumstances, which logically must be persuasive enough to "justify" a "no" answer to the Fourth Question.

The likely result is that jurors will engage in linguistic gymnastics, trying to make sense of these instructions, and arrive at an *ad hoc* version of the rules for deciding the Fourth Question (much as the Oregon Supreme Court has done to date); or eventually and heatedly discard the rules completely in frustration at their cumbersome, incomprehensible nature. A jury frustrated over the rules it is to apply to decide whether the defendant's life should be spared, and unable to agree on that process, may well take that frustration out on the defendant, and vote for death.

The foregoing "Fourth Question" ambiguity--between the *de facto* burdens of production and persuasion on the defendant to "justify" mercy, and the instruction that there is "no burden of proof" on the issue--creates an impermissible risk that jurors will misapply the instructions. The instructions as a whole fail to clearly articulate what, if any, standards, quanta, and burdens of proof apply on the Fourth Question due to these "contradictory phrases." Contradictory phrases in the instruction render them unconstitutional. *See, State v. Williams,* 313 Or 19, 39 (1992).

In addition to the vagueness problems discussed above, many of the terms used in the instructions lack a "common-sense core of meaning . . . that criminal juries should be capable of understanding." *Tuilaepa v. California*, 114 SCt at 2636.

The phrase "burden of proof" is a term of legal art and is vague to lay persons. Even the law accords different meanings to this phrase. It may refer to burdens of production (e.g. OEC 307), or of persuasion (e.g. OEC 306). The Supreme Court's comments in *Wagner II*, that the Fourth Question is not subject to proof in the ordinary sense, suggest that the Court intended something yet entirely different by "burden of proof"; i.e., what is commonly called the "standard of proof." A "standard [or "quantum"] of proof" is the "degree of conviction [in the mind of the fact-finder] required [to be established] by the burden of persuasion." Oregon Evidence Code, 1981 Conference Committee Commentary, OEC 305 (ORS 40.105). Examples are the standards "beyond a reasonable doubt" and "by a preponderance."

Which of these three meanings are Oregon juries to use in applying the law to the facts to decide which defendants shall live, and which shall die? The Oregon Supreme Court has not shed any new enlightenment on the subject; where are the parties in the case at bar to look for guidance?

OEC 305 allocates the burden of persuasion to the party to whose case a fact is essential. Here, mitigating evidence sufficient to "justify" sparing the defendant's life is essential to the defendant's case; therefore the defense has a burden of persuasion. OEC 307 allocates the burden of production. OEC 307 allocates the burden of production on a particular issue to the party against whom a finding on the issue would be required in the absence of further evidence; this burden "is initially on the party with the burden of persuasion as to that issue."

> "As used in [OEC 305], "burden of persuasion" means the obligation of a party to produce a particular conviction in the mind of the trier of fact. If the required degree of conviction is not achieved, the trier of fact must assume that the fact does not exist."
>
> * * * * *
>
> "The degree of conviction required by the burden of persuasion (sometimes called the "standard of proof") varies according to the matter . . .
>
> * * * * *
>
> The burden of persuasion is but one of two "burdens of proof" found in the law of evidence. The other is the burden of producing evidence discussed in Rule 307. A party that has the burden of persuasion must persuade the trier of fact that the alleged fact is true. Logically prior to this, however, the same party has the burden of producing sufficient evidence for the court to find that the trier of fact would be reasonable in so finding. To carry the burden of persuasion, a party must have already satisfied the burden of producing evidence--the converse is not true." Conference Committee Commentary, supra., OEC 305.

Thus, the law supports argument by counsel that the phrase "burden of proof" means whichever of these meanings counsel selects, particularly since the only guidance to date from the Supreme Court has been to explain there is no burden of proof on the Fourth Question "because it does not present an issue subject to proof in the traditional sense," *Wagner II*, 309 Or at 18.

Wagner II's explanation of why there is "no burden of proof" is not contained in the uniform instructions, perhaps denoting that since no one, including the Supreme Court, has been able to clearly explain the meaning of that phrase in this context, the less said about it, the better.

The word "justify" is unconstitutionally vague because it fails to communicate clearly to the jury the applicable standard of proof, no matter where the burdens of production or persuasion are allocated. The jury may correctly surmise that "justify" means something less than "beyond a reasonable doubt," since it is told that particular burden of proof does not apply to Fourth Question, but from that point, the jury is on its own.

During voir dire, jurors are commonly told that the burden of proof in civil cases is a "preponderance of the evidence," which is less than reasonable doubt, and asked whether they understand the difference.. It is thus reasonable to conclude that some jurors may interpret "justify" to require proof by a preponderance, while others may have heard of the "clear and convincing" standard or the "substantial evidence" standard, and use one of those or a new standard of their own creation.

The jurors are further instructed that a mitigating circumstance is "established" if it is "reasonably believed" to "exist." UCrJI No. 1314 The jurors are also instructed that the defendant need not prove a mitigating factor "beyond a reasonable doubt." *Id.* This implies a lesser defense burden and also begs the question: What "standard of proof" or "degree of conviction" equates to a "reasonable belief" that a circumstance "exists?" Jurors are unfettered in this regard and free to apply their own, varying, *ad hoc* standards, which may be tantamount to "clear and convincing", "more likely than not," or any infinite number of such degrees of conviction above or below those standards.

This argument presupposes that jurors will be able to discern "mitigating circumstances" from all of the evidence they have heard, in order to decide if a given circumstance should be "reasonably believed" to "exist." That jurors can recognize mitigating circumstances on their own is by no means clear, see discussion under section 5, *infra.*

It is significant that the uniform jury instructions recognize the need to define the "traditional" standards of proof, rather than rely on jurors to arrive at the correct interpretation guided only by their common sense, intuition or the arguments of counsel. See, e.g., UCrJI No. 1006 (defining proof beyond a reasonable doubt); UCrJI No. 1043 (defining preponderance of the evidence); see also *Simmons v. South Carolina*, 114 SCt 2187 (1994)(rejecting claim by State that arguments of counsel sufficed in lieu of instruction by the court).

The vagueness surrounding the terms "justify," "establish" and "reasonably believe [to] exist ," allows each jury or individual jurors to manufacture *ad hoc* standards of proof. Because a reasonable likelihood of this exists, the death penalty in Oregon is applied in an arbitrary and capricious manner, with a lack of clear standards to guide juror discretion, in violation of the 8th and 14th Amendments of the United States Constitution as well as Article I, Sections 10, 11, 12, 15, 16, 20, 21 and 33 of the Oregon Constitution.

This lack of clarity concerning the process to be followed in arriving at an answer to the Fourth Question is aggravated by the previously-quoted part of the instructions which provides: "You may answer any of the first four questions in any order." UCrJI No. 1314. The defense has yet to locate the sources of this instruction in the case law or the statute. It contradicts and confounds the logical sequence and the defense interpretation of the intended process, which is:

(1) At the start of the jury's deliberations, true life is the presumptive sentence, *State v. Wille*, 317 Or 487, 503-04 (1993);

(2) The State must prove beyond a reasonable doubt to a unanimous jury that "yes" is the correct answer to the first three questions;

(3) "Yes" verdicts overcome the presumption for a true life sentence, and at that point, there is no presumption in favor of life or death; rather, the defendant is simply "death eligible" under Oregon Law, *Wagner I,* 305 Or at 233 (GILLETTE, J., dissenting), and *Wagner II, supra*; *but see also, Guzek*, 322 Or at 253 (“yes” verdicts to the first three questions “leads a jury to answer the question ‘whether the sentence of death [should] be imposed’ in the affirmative).

(4) Now the jury must address the question, Whether the defendant should receive a death sentence, ORS 163.150(1)(b)(D), upon which neither party has the burden of proof.

D. Vagueness arising from "mitigating circumstances."

The last problem areas to be discussed in this section involve vagueness in the definition of and role of "mitigating circumstances" in deciding the Fourth Question. The problem areas are summarized as follows, and some are discussed in greater detail *infra*, because the vagueness contributes to another constitutional infirmity: improper restrictions on the consideration of and effect given to mitigating evidence. Restrictions on mitigating evidence has been the most common cause of reversals by the courts. See, e.e., *Lockett, supra; Mills, supra; Penry, supra; Stevens II, supra.*

First, the definition of "mitigating circumstances" is vague, and to the extent jurors could divine from it a "common-sense core of meaning," it is likely to be erroneously interpreted as being restricted to circumstances related to the offense:

> **(6)" 'Mitigating circumstances' include those circumstances that do not justify or excuse the offense but that, in your sole judgment, may be considered as extenuating or reducing the degree of culpability and the appropriate punishment".** UCrJI No. 1314

Cf., Wagner II, 309 Or at 19 (rejecting state's claim that mitigating evidence can be constitutionally limited to evidence causally related to the offense). This conclusion follows from the language "justify or excuse the offense," "reduc[e] the degree of culpability [for the offense]," and the omitted reference to the defendant's character or background.

> **(3) "You must answer this question 'no' if there is any aspect of the defendant's character or background, or any circumstance of the offense, that one or more of the jurors believe justifies a sentence less than death"** UCrJI No. 1314.

Second, no reference is made to "mitigating circumstances" in instructing the jury what evidence could result in a "no" answer to the Fourth Question, and the previously-quoted definition of "mitigating circumstances" does not include mention of the defendant's character or background. *Cf., e.g*, *Lockett v. Ohio*, 438 US 586, 604, 98 SCt 2954, 2964-65 (1978)(defining mitigating circumstances as "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers for a sentence less than death").

> **(5) "In answering these questions (referring to the four statutory questions), you are to consider any mitigating circumstances received in evidence, including but not limited to the defendant's age and (if applicable) the extent and severity of the defendant's prior criminal conduct, and the extent of the mental and emotional pressure under which the defendant was acting at the time the murder was committed"** UCrJI No. 1314

The above-quoted instruction fails to dispel the conclusion that mitigating circumstances need not be "causally related to the offense." Age as a mitigating circumstance is causally related to the offense in that the impulsivity of youth is most often argued to ameliorate the defendant's commission of the crime. Mental and emotional pressure "at the time of the murder" speaks for itself on this point. And "prior criminal conduct" serves as a mitigating circumstance only when virtually no prior criminal conduct exists; at best it is causally related to the offense by claiming the defendant had never done anything this horrendous before.

Thus the instructions fail to make clear the primary role of mitigating circumstances in answering the Fourth Question, contrary to the specific purpose of that question. See *State v. Metz,* 131 OrApp at 716("the legislature adopted the fourth question for a specific purpose, i.e., to ensure consideration of *evidence pertaining to mitigation*")(emphasis original); *Guzek,* 322 Or at 256 (“the fourth question . . . only permits the jury to consider mitigating evidence”)(and cases cited therein).

Third, the Oregon Supreme Court has opined that trial courts may not instruct on specific mitigating circumstances the jury should consider, apart from the three circumstances of age, mental or emotion pressure and prior criminal conduct listed in the uniform instructions. *State v.*

Tucker, 315 Or at 332-33. Given the vagueness of the "mitigating circumstances" definition, the importance of further defining mitigating circumstances by examples arising from evidence received in a given case should be apparent.

All of the foregoing areas of vagueness in the sentencing process will prevent the jury from meaningfully considering mitigation evidence in determining whether death is an appropriate punishment, contrary to the Eighth and Fourteenth Amendments. *Eddings v. Oklahoma*, 455 U.S. 104 (1982); see *Stevens II*, 319 Or at 585 (fourth question is mechanism for jury to give "meaningful effect to its consideration" of all mitigating evidence).

The instructional infirmities are "structural" in nature, i.e., they affect the entire conduct of the sentencing hearing from beginning to end. Counsel must rely on these instructions to voir dire the jury, to make opening statement, to argue the admissibility of evidence and to make closing argument. Therefore the instructional infirmities cannot be subjected to "harmless error" analysis, because no capital punishment meted out under this process can be regarded as "fundamentally fair." *See, Arizona v. Fulminate,* 111 S.Ct. 1246, 1269, (1991). The effect of the erroneous instructions would not be so minimal or unimportant, as compared to the effect of the evidence, that the infirm instructions would not contribute to the jury's verdict. *Id.*.

Furthermore, the instructions by and large simply reiterate the law as set forth in ORS 163.150 and the Oregon Supreme Court opinions which first posited and later interpreted the Fourth Question. All arguments made against the instructions therefore apply with equal force to the statutory and decisional law, and, having called that point to the Court's attention, need not be repeated.

Accordingly, this Court should declare the Oregon death penalty sentencing scheme, now embodied in ORS 163.150 and the uniform instructions, unconstitutional; and (2) direct a verdict of "No" to the question posed by ORS 163.150(1)(b)(D); or (3) remove death as a verdict option for the jury in this case.

Defendant reserves the right to submit proposed penalty phase jury instructions, and to except to any failure to give such alternative instructions, without waiving these constitutional challenges.

3. OREGON'S DEATH PENALTY SCHEME IMPERMISSIBLY SHIFTS THE BURDEN OF PROOF TO THE DEFENDANT ON THE ULTIMATE ISSUE OF LIFE OR DEATH, OR COULD BE INTERPRETED BY JURORS AS SHIFTING THAT BURDEN

A. Introduction

In section 2 of this memorandum, the defense argued that Oregon's death penalty scheme was unconstitutionally vague because its process by which the jury must consider and give effect to mitigating evidence is inscrutably paradoxical: In one breath the jury is told that neither party has the burden of proof on the ultimate issue of whether the defendant should receive a death sentence; in the next breath the jury is told that it must decide whether it believes the defense has established mitigating circumstances sufficient to justify a sentence less than death. UCrJI No. 1314; ORS 163.150(1)(c)(B); *State v. Wagner II*, 309 Or at 19.

It was submitted that faced with these contradictory instructions, jurors could not arrive at a "common-sense core of meaning" regarding the process for deciding the Fourth Question, and thus the process was "too vague" under the Eighth and Fourteenth Amendments to the United States Constitution, and Article I, sections 20 and 21 of the Oregon Constitution.

This section plays "devil's advocate." It is predicated on assuming, *arguendo*, that the process is not vague in that respect. It is not vague because it clearly tells jurors they are to look to mitigating circumstances established by the defense to determine if a sentence less than death is justified; either because this is the correct interpretation of the statute or because it is reasonable that jurors would so interpret it. See also *Guzek*, *supra* (State is not required to prove beyond a reasonable doubt that a death sentence should be imposed).

In that event, Oregon's death penalty scheme is unconstitutional because it impermissibly shifts the burden of proof and persuasion to the defendant, or alternatively, could be interpreted by a reasonable juror as shifting those burdens, in violation of the Fifth, Eighth and Fourteenth Amendments of the United States Constitution and Article 1, Section 11, 20,21 and 33 of the Oregon Constitution.

B. ORS 163.150 Places on the Defendant the burden of proof on the 4th Question, "Whether the Defendant should receive a death sentence," rather than requiring the State to prove this issue beyond a reasonable doubt.

Oregon's capital punishment scheme bifurcates the trial into a guilt phase and a penalty phase. No person convicted of aggravated murder faces death as a possible penalty unless the trial proceeds into the penalty phase and the jury makes further factfindings concerning the offense and offender. See, e.g., *State v. Montez*, 309 Or 564, 604 (1990)(a penalty phase hearing is merely a continuation of the same trial), ORS 163.150, and Article I, Section 40, Oregon Constitution.

During the penalty phase, evidence is presented, arguments by counsel heard, and the jury required to answer four questions. See *Wagner II, supra*, and ORS 163.150(1)(b). If the jury unanimously answers "yes" to all four questions by way of a "special verdict," the death penalty must be imposed. See, e.g., *State v. Guzek*, 310 Or 299, 305 (1990) and ORS 163.150(1)(e)&(f).

In sum, ORS 163.150 requires that the jury engage in factfinding and reach a special verdict as to each of these questions; and that jury's findings in favor of the State will result in the special stigma of death row and the special punishment of death. Thus, all four questions are additional elements of the capital offense in Oregon. *See also, State v. Quinn*, 290 Or 383, 404-406 (1981)(holding the issue of deliberateness is the essential mental element for aggravated murder, and suggesting the issue of provocation may also be an element of the offense).

This conclusion is reinforced by acknowledging that most "mitigating circumstances," particularly those with the strongest "jury appeal," are causally related to the offense in that jurors

would tend to view them as reducing the defendant's culpability for the offense, thereby calling for less severe punishment. See UCrJI No. 1314, and discussion in section 2.D., *supra.*

In all murder cases, under Oregon law, the elements of the offense must be proven by the State to the satisfaction of a unanimous jury beyond a reasonable doubt. See, ORS 136.415 (presumption of innocence and reasonable doubt); ORS136.450 and Article 1, Section 11 (unanimous verdict for murder); and Section 40 (unanimous findings for death penalty), Oregon Constitution; see also, *In Re Winship*, 90 SCt 1068 (1970)(constitutional requirement of proof beyond reasonable doubt in all State criminal actions), and compare, *State ex rel Russell v. Jones,* 293 Or 312, 315(1982)(the term "criminal prosecution" in Article I, Section 11 includes sentencing).

Article I, section 11 of the Oregon Constitution also provides that "the existing laws and constitutional provisions relative to criminal prosecutions shall be continued and remain in effect as to all prosecutions for crimes committed before the taking effect of this statement." The burden or proof and persuasion has always been upon the State, with the exception of certain affirmative defenses authorized by specific statute.

This proposition is supported by the corollary concept that the right not to be convicted except on proof beyond a reasonable doubt is a right protected by Article I, section 33 of the Oregon Constitution.

Section 33 provides: "This enumeration of rights, and privileges shall not be construed to impair or deny others retained by the people." The defendant's right to require proof beyond a reasonable doubt was recognized to exist at the time Oregon became a State (General Laws of Oregon, Ch. 9, Section 835(5), p. 356[Deady 1845-1864]; Statute of Oregon [Territory] 1855, Ch. XXXVI, Section 1, p. 276; Statutes of Oregon [Territory] 1853, Ch. XXXVI, Section 1, p. 251).

Proof beyond a reasonable doubt is a right the people of Oregon's founding generation would have considered of constitutional magnitude between government and the people. The legislature has infringed this right by carving out an exception for the Fourth Question.

ORS 163.150(1)(d) provides, in pertinent part, that "[t]he state must prove each issue submitted under subparagraphs (A) to (C) of paragraph (b) of this subsection beyond a reasonable doubt . . . ." Subparagraphs (A) to (C) pose the first three questions. The statute is silent with regards to who bears the burden of proof and persuasion on subparagraph (D), the Fourth Question, which asks whether a sentence of death should be imposed, and what standard of proof applies.

The legislature specifically placed the burden of proof on the State for the first three questions. By not including the Fourth Question, the implication arises that the burden shifts to the defendant to prove through the presentation of mitigating evidence that he should not die rather than remaining on the State to prove that, notwithstanding all mitigating evidence, the defendant should die. *See Guzek*, 322 Or at 254 (State not required to prove “yes” answer to fourth question beyond a reasonable doubt). This interpretation is reinforced by UCrJI No. 1314, which instructs the jury to consider mitigating circumstances "established" by the defendant in deciding whether the evidence "justifies" a sentence less than death. See also section 2.B, *supra*.

The legislature has chosen to make the Fourth Question an essential "issue" or element of the penalty-phase trial and therefore may not place the burden of proof on that issue to the defendant. To do so would violate the Fifth and Fourteenth Amendments' requirement that the State prove, rather than the defendant disprove, its accusations against the defendant and that it do so beyond a reasonable doubt. *E.g., In re Winship, supra.* To require less of the State than proof beyond a reasonable doubt on the Fourth Question would be to embrace a system which judicially orders the State to take a human life despite genuine doubt over whether death is the appropriate sentence.

This conclusion is not avoided by characterizing the Fourth Question as an issue pertaining to punishment versus guilt. *See, Mullaney v. Wilbur*, 95 SCt 1881 (1975); *see also State ex rel Russell v. Jones, supra*. In *Mullaney* the Court held Maine's homicide scheme unconstitutional under the Due Process Clause. The statutory scheme required the defendant to

negate the malice element of first-degree murder by proving that he acted in the heat of passion by a preponderance of the evidence; if defendant prevailed, murder would be reduced to manslaughter with a corresponding reduction in the maximum penalty.

The State in *Mullaney* argued that since in any event the defendant would be convicted of homicide, it was constitutionally permissible to place the burden of proof on an issue which served primarily to mitigate punishment on the defendant. The Court observed that "[u]nder this burden of proof, a defendant can be given a life sentence when the evidence indicates that it is as likely as not that he deserves a significantly lesser sentence. This is an intolerable result." 95 SCt at 1892.

The *Wagner II* Court, in dicta, commented upon this issue by observing:

> In accordance with subsection (1)(e) of ORS 163.150 (1989), the jury must answer the fourth question unanimously in the affirmative as a prerequisite to a death sentence. The state must prove each of the first three statutory issues submitted beyond a reasonable doubt. <u>There is no burden of proof on the fourth question because it does not present an issue subject to proof in the traditional sense, rather it frames a discretionary determination for the jury.</u> 309 Or at 18 (Emphasis supplied).

The death penalty statute and the instructions, however, require the defense to "justify" a sentence less than death. Placing the burden on the defense does not comport with the Eighth Amendment's demand for reliability in the sentencing process:

> In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability. . . . This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different. *Ford v. Wainwright*, 106 SCt 2595, 2603 (1986)(MARSHALL, J., plurality opinion);
>
> *And compare, Speiser v. Randall*, 78 SCt 1332, 1342 (1958):
>
> There is in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value--as a criminal defendant his liberty--this margin of error is reduced as to him by the process of placing on the other party the burden . . . of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt.

When, as here, "life" is the interest at stake, and not merely "liberty," surely the risk of error should be shouldered by the State and not the defendant.

Penry holds that the Eighth Amendment requires that the jury not be restricted from considering and giving effect to *all* mitigating evidence, 109 SCt at 2951, and that the jury make a *reliable* determination that death is the appropriate sentence, *id.*, at 2947. One way by which reliability is attained is through requiring proof beyond a reasonable doubt, by the State, that death is the appropriate sentence. *See, e.g., Mullaney, supra; see also, Speiser, supra*. This the Oregon statute specifically declines to do. See *Guzek,* 322 Or at 254; *Wagner II, supra* 309 Or at 18, and ORS 163.150(1)(d) (1996).

To place the burden of proof on the Fourth Question on the defendant would likewise violate the Eighth Amendment: If a jury found the defendant did not carry his burden, it might well feel precluded from considering and giving effect to whatever evidence was presented in mitigation. *See*, *Mills v. Maryland*, 108 SCt 1860 (1988). Regardless of the standard of proof, e.g., beyond a reasonable doubt, clear and convincing, by a preponderance, the party with the burden of proof carries "the risk of nonpersuasion," Wigmore, 9 Evidence Section 2485. When the choice is between life and death, placing that risk on the defendant is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments. *See, e.g., Penry,* 109 SCt at 2952.

Indeed, Oregon's death penalty scheme, by placing the burden on the defendant to prove the existence of mitigating circumstances sufficiently substantial to merit leniency, could be viewed as creating a presumption that death is the appropriate penalty, in violation of the Eighth and Fourteenth Amendments of the United States Constitution. See also *Guzek*, 322 Or at 253 (if jury answers first three questions in affirmative, it is lead to answer the fourth question in the affirmative). So long as the defendant is then required to establish mitigating circumstances sufficient to "justify" a sentence less than death, Oregon's statute imposes an unconstitutional presumption that death is the appropriate penalty. *Cf., State v. Stevens II*, 310 Or at 585(fourth

questions asks jurors to decide whether there is any mitigating evidence "which prevents them from believing" the death penalty is appropriate).

The Oregon Supreme Court has touched briefly on these burden of proof issues. In *State v. Farrar*, 309 Or 132 (1990), the Court approved an instruction to the effect that "the defendant need not prove the existence of mitigating circumstances beyond a reasonable doubt; if you reasonably believe that a mitigating circumstance exists, you may consider it as established." *Id* at 177. *Cf., McKoy v. North Carolina*, 110 SCt 1227 (1990)(holding that each juror must be free to determine for himself if a mitigating factor is established; state cannot require jurors to reach a consensus that a mitigating factor exists before a juror may use that factor as a reason to vote against death).

In *State v. Stevens*, 311 Or 119 (1991), the Court rejected the defendant's claim that he should have first and last argument to the jury at the penalty phase of the trial. The Court determined this was the appropriate result because (1) the penalty phase is a continuation of the same trial and (2) the State has the burden of proof beyond a reasonable doubt. 311 Or at 147-148.

The purpose of the penalty phase is to determine whether the defendant should receive the death sentence. This is also the Fourth Question. Imposing the death sentence is exactly what the State urges the jury to do during its first and last argument at the penalty phase. According to *Stevens*, the State is entitled to both arguments because it must prove its penalty phase case beyond a reasonable doubt. It follows that the State must prove the defendant should receive the death sentence, the Fourth Question, beyond a reasonable doubt. *But see Guzek, supra.*

Read together, *Farrar* and *Stevens* suggest that while the defense has the burden of convincing at least one juror that it is reasonable to believe a mitigating fact or circumstance is true, the State retains the burden of proving, beyond a reasonable doubt, that notwithstanding that mitigating circumstance, death remains the appropriate penalty. The State could meet that

burden by proper rebuttal evidence, causing the juror to decide the mitigating fact was not true or did not deserve much weight, and by the strength of its evidence on the other three issues, particularly "future dangerousness."

In suggesting this construction, the defense does not concede that the jury would be required to impose the death sentence simply because the State met the burden of proof beyond a reasonable doubt on the Fourth Question. Rather, the statutory scheme would still permit a life sentence based upon any doubt or reason which at least one juror believed made life the appropriate sentence for the individual in question. *See generally, Tuilaepa, supra*, 114 SCt at 2639 (the sentencer may be given unbridled discretion in determining whether the death penalty should be imposed after it has found the defendant isa member of the class made eligible for the penalty).

The defense does not contend that by requiring the State to prove death is the appropriate sentence, the State must affirmatively prove either that no mitigating circumstances exist or that the defendant is overall a "bad person" who deserves to die. The history of the Fourth Question clearly demonstrates it was intended to be the vehicle whereby the jury could consider and give effect to all mitigating evidence offered by the defense as a reason to spare the defendant's life. *See, e.g., Guzek; Metz, supra.* The Fourth Question was never intended to be a catch-all provision for the State to introduce all aggravating "bad" character evidence that was too unreliable, too immaterial or too prejudicial to get before the jury as proof on the first three questions. *Id.*

Unless ORS 163.150 is interpreted as suggested by the defense, which the Oregon Supreme Court has thus far declined to do, it risks offending the Constitution on grounds of vagueness, unreliability, and restrictions on mitigating evidence, as well as violating the Fifth, Eighth and Fourteenth Amendments on the grounds discussed above.

C. A reasonable likelihood exists that jurors would apply the Uniform Criminal Jury Instructions to create a presumption that death

is the appropriate sentence absent proof by the defense sufficient to justify a life sentence.

Uniform Criminal Jury Instruction No. 1314 tells jurors the process by which they are to consider and give effect to mitigating evidence in answering the Fourth Question: "Shall a death sentence be imposed?" *Id.* The instruction is set forth verbatim in section 2.B., *supra*, and will be paraphrased here. The jury is told to answer this question "no" if one or more jurors believes the evidence "justifies a sentence less than death," and is told to look to "mitigating circumstances. . . established" by the defendant to "extenuat[e] or reduc[e] the degree of culpability and the appropriate punishment," i.e., to support a life sentence. *Id.*

The arguments made under section 2.B. of this memorandum regarding the reasonable likelihood that jurors would view these instructions as requiring the defendant to prove matters sufficient to justify a life sentence are incorporated herein by reference.

Before these instructions on the Fourth Question, the jury is instructed on the procedure for answering the first three questions where the State is required to prove beyond a reasonable doubt, to the satisfaction of a unanimous jury, a "yes" verdict. Given the predictable argument by the State that having met that burden, it has done all which is required of the State for the jury to sentence the defendant to death, it is even more likely that jurors will interpret the Fourth Question instructions as placing the burden on the defendant to overcome all of the evidence marshalled by the State on the first three questions to support the death penalty.

Oregon has no cautionary instruction that jurors should not engage in a weighing or a counting process where the aggravating facts and related findings of deliberateness, future dangerousness and lack of provocation are compared against the mitigating evidence to determine whether a life sentence is "justified." Compare *Guzek*, 322 Or at 253 (suggesting that jury should weigh these aggravating factors against mitigating evidence, without saying that mitigating evidence must outweigh aggravating evidence to support a life sentence). A jury which reasonably concludes the defense must prove that a life sentence is justified, and given no further instruction on what "justified" means, is likely to engage in a weighing or counting process in

which the State starts with a three or more "point" advantage which the defense must then overcome to obtain a sentence less than death.

The likelihood that jurors will understand the instructions to require the defense to prove sufficient mitigating circumstances to justify a life sentence increases yet again with the instructions which immediately follow those on the Fourth Question:

> The fifth question asked by the law is as follows:
>
> > Are there sufficient mitigating circumstances to warrant a sentence of life imprisonment with the possibility of parole or release?
> >
> > I have previously defined for you the concept of "mitigating circumstances." [including that it is the defendant who must prove the existence of mitigating circumstances]
> >
> > Ten or more of your number must agree before this question may be answered "yes."
> > UCrJI No. 1314.

Jurors will correctly conclude that the defendant, and not the State, is the party who must set out to prove "sufficient mitigating circumstances to warrant a sentence of life imprisonment with the possibility of parole." *Id.* Logic thus dictates the conclusion jurors will draw regarding the Fourth Questions: That the defendant, and not the State, is the party which must prove sufficient mitigating circumstances to warrant a sentence of life versus death.

But Oregon law purportedly does not place the burden of proof on the defense on the ultimate issue of life versus death. *Wagner II, supra,* 309 Or at 19; *Guzek*, 322 Or at 254-55. Nor does Oregon law require jurors to find that mitigating circumstances established by the defense outweigh aggravating circumstances proven by the State as to the first three questions. *Id.; see also Penry v. Lynaugh,* 109 SCt 2934 (1989). The reasonable likelihood that jurors would so interpret the instructions--and thereby reach a result inconsistent with the specific purpose of the Fourth Question and which unlawfully restricts the use of mitigating evidence--violates the Fifth, Eighth and Fourteenth Amendments of the United States Constitution.

A reasonable likelihood exists that jurors will apply the instructions in a manner violative of the state and federal constitutions. U.S. Const. Amends. VIII, XIV, Or Const. Art. I, Section 11.

The fact that jurors could interpret the instructions so as to make them lawful is irrelevant. *Francis v. Franklin*, 471 U.S. 307, 315 (1985); *Sandstrom v. Montana,* 442 U.S. 510, 526 (1976); *Estelle v. McGuire*, _ U.S. _, 112 S.Ct. 475, 482 (1991); *Boyde v. California*, 949 U.S. 370 (1990).

Even if the instructional infirmities were viewed as "trial errors" rather than "structural errors," they could not be excused as harmless beyond a reasonable doubt. The Supreme Court clarified the standard in testing unconstitutional burden-shifting presumptions in criminal cases for harmlessness in *Yates v. Evatt,* 500 U.S. _, 111 S.Ct. 1884 (1991). To be harmless under *Yates*, the effect of the erroneous instructions must be so minimal or unimportant, as compared to the effect of the evidence, that the infirm instruction *did not contribute* to the verdict obtained. *Yates*, 111 S.Ct. at 1892.

When the objectionable instructions set forth the very process by which the jury is to render a verdict for either life or death, there can be no argument but that they contribute to the verdict obtained.

4. OREGON'S DEATH PEANLTY SCHEME PLACES UNCONSTITUTIONAL RESTRICTIONS ON THE CONSIDERATION AND USE OF MITIGATING EVIDENCE

A. Mitigating evidence under the Eighth and Fourteenth Amendments

A long line of United States Supreme Court cases render it "beyond dispute that in a capital case the sentencer may not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that a defendant proffers as a basis for a sentence less than death," *Mills v. Maryland*, 108 SCt 1860, 1865 (1988)(citations omitted)(emphasis supplied).

Mitigating evidence cannot be "meaningfully considered " by lay persons unless jurors can first recognize evidence as mitigating, i.e., they must understand what the legal concept of "mitigating evidence" or "mitigating circumstances" mean. This requires clear direction from the court by way of jury instructions. *See, e.g., Proffit v. Florida,* 428 US 242, 258-59, 96 SCt 2960

(1976). Additionally, "the sentencer may not refuse to consider . . . any relevant mitigating evidence," *Mills,* 108 SCt at 1865, which may occur if "double-edged" evidence, since as mental retardation or mental illness, is not defined for jurors as mitigating evidence. *See Penry v. Lynaugh, supra.*

Mitigating circumstances cannot be meaningfully considered if limited to a standardized list of factors to be applied in every case. *E.g., Hitchcock v. Dugger*, 481 US __, 107 SCt 1821 (1987)(constitution requires consideration of nonstatutory mitigating circumstances).

Each individual juror's consideration of mitigating evidence cannot be limited by requiring agreement among jurors that certain mitigating factors have been proven or have enough value to be deemed mitigating. *See, e.g., Mills v. Maryland, supra*. Moreover, each individual juror must be able to use or "give effect to" mitigating evidence by deciding to sentence to life rather than death. *E.g., Penry v. Lynaugh, supra.; Lockett v. Ohio, supra.*

The source of any restrictions on the consideration or use of mitigating evidence is immaterial under the Eighth and Fourteenth Amendments:

> Under our decisions, it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute; by the sentencing court; or by evidentiary ruling; [or by jury instructions and verdict forms].. . . . Whatever the cause . . . the conclusion would necessarily be the same: Because the [jury's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing.
> *Mills,* 108 SCt at 1865-66.

Simply stated, restrictions on mitigating evidence create the risk of the arbitrary and capricious imposition of the death penalty, because that evidence may call for a less severe penalty. That risk "is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Mills,* 108 SCt at 1866.

Scrutinizing Oregon's death penalty scheme--a shorthand phrase which incorporates all applicable statutes, decisional law and jury instructions--finds the following ways which unconstitutional restrictions are placed on mitigating evidence:

(1) Oregon's death penalty scheme is inadequate in explaining the concept of "mitigating circumstances" and their role in the sentencing decision, such that jurors are restricted both in considering and giving effect to mitigating evidence;

(2) Oregon's death penalty scheme, particularly the uniform jury instructions and verdict form, taken as a whole, restrict each individual juror's ability to consider and give effect to mitigating evidence; and

(3) Oregon's death penalty scheme's requirement that mitigating circumstances "justify" a sentence less than death creates a presumption in favor of death which restricts the jurors ability to give effect to mitigating evidence.

B. Oregon's death penalty scheme is inadequate in explaining the concept of "mitigating circumstances" and their role in the sentencing decision

The uniform criminal jury instructions, which draw most of their language from ORS 163.150 and case law interpreting that statute, fail in several ways to adequately explain both of meaning of "mitigating circumstances" and the role of this evidence in the sentencing decision. In this respect, all of the arguments previously made in sections 2 and 3 of this memorandum are incorporated herein by reference.

The jury is told: "Shall a death sentence be imposed? . . . . You must answer this question 'no' if there is <u>any aspect of the defendant's character or background, or any circumstance of the offense</u>, that one or more of the jurors believe justifies a sentence less than death." UCrJI No. 1314. The same language appears in ORS 163.150(i)(b). The Oregon Supreme Court, in *Stevens II, supra*, noted the text of the statute "is written in very general terms. . . . The text is silent as to the meaning of any of those terms." 319 Or at 580. So are the jury instructions.

Stevens II dealt with a trial court's ruling excluding evidence proffered by the defense in mitigation, based on the trial court's interpretation of the terms "character or background." The learned trial judge gave a literal interpretation to those terms consistent with their common meaning. The Supreme Court, however, found "[t]he terms 'character' and 'background' as they

were used in *Penry,* and therefore, as they are used in ORS 163.150, have been read quite broadly and have not necessarily been linked to a defendant's culpability for the crime," 309 Or at 583.

If an experienced trial judge is incapable of correctly intuiting what is meant by "any aspect of the defendant's character or background, or any circumstance of the offense" which "justifies a sentence less than death," such that mitigating evidence is excluded from consideration, a reasonable likelihood exists that jurors will likewise misconstrue the instructions to exclude otherwise "mitigating" evidence from consideration.

That likelihood is compounded by the instructions' failure to explain that jurors are to examine the mitigating aspects of the defendant's character or background, and any circumstances of the offense proffered by the defense in determining "shall a death sentence be imposed?" Instead, the jurors are simply told to "consider any mitigating circumstances received in evidence" in answering all four questions. UCrJI No. 1314. The jury is then given the following incomplete, inadequate and confusing definition:

> 'Mitigating circumstances' include those circumstances that do not justify or excuse the offense but that, in your sole judgment, may be considered as extenuating or reducing the degree of culpability and the appropriate punishment. *Id.*

This instruction is similar to the 1989 statutory "fourth question" which *Wagner II* held to suffer from such "lack of grammatical clarity" that it required "transla[tion]into an intelligible instruction to a jury for the sentencing process to be effective." 319 Or at 18.

Explaining that mitigating circumstances "include those circumstances that do not justify or excuse the offense," is cumbersome and pointless because circumstances which would justify or excuse the offense constitute a defense; if any such circumstances were introduced in evidence, the jury has already rejected them before reaching the penalty phase. Therefore, the "circumstances that do not justify or excuse the offense" is the same as saying "all circumstances," except more circuitously.

If that language is deleted as superfluous, we are left with mitigating circumstances "include those circumstances that . . . may be considered as extenuating or reducing the degree of culpability and the appropriate punishment." UCrJI No. 1314. The only specific examples of "mitigating circumstances" permitted under Oregon law to be given to jurors via instructions are the defendant's "prior criminal conduct," which in most cases is not mitigating, and any "mental and emotional pressure" the defendant may have acted under at the time of the murder, which also in most cases is not mitigating.

Justice Gillette, in *Wagner I,* explained "mitigating circumstances" as including "any facts that might lead a [juror] to conclude that an otherwise death-eligible defendant ought to receive a sentence less than death." 305 Or at 224. He went on to explain the role of mitigating circumstances: "[W]hatever the evidence that affirmatively established that a defendant was death-eligible, they jury had to be free to spare the defendant if any other evidence satisfied [at least one juror] that sparing him would be just." *Id.* Gillette said "the jury had to be empowered to so conclude," *id.,* which can only be accomplished through jury instructions. *See Simmons v. South Carolina* , 114 SCt 2187(1994)(arguments of counsel do not suffice for instruction of the jury).

According to *Wagner II*, Oregon juries have the power articulated by Justice Gillette, but the uniform instructions fail, in miserly fashion, to tell jurors this in plain terms which do not require a trained legal mind to decipher.

The United States Supreme Court has repeatedly defined mitigating circumstances as facts about the defendant's character or background, or the circumstances of the particular offense, that may call for a penalty less than death. See cases cited in section 4.A., *supra*. Mitigating circumstances include evidence of voluntary service, kindness to others, exemplary conduct while incarcerated, or a religious devotion, any of which might demonstrate positive character traits that might in turn mitigate against the death penalty. Id.

Simply put, mitigating circumstances are whatever facts or reasons proffered by the defense in a particular case as a basis for a sentence less than death. Id. Given that constitutional requirement, and the requirement that "the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence," *Mills, supra*, 108 SCt at 1865, jurors should be instructed by examples of mitigating circumstance specific to the particular case, if there is any evidence in the record to support any specific circumstance proffered by the defense.

Explaining to jurors what evidence the law views as "mitigating evidence" is constitutionally required, and does not impose on each juror's discretion to determine what weight, if any, to give that evidence in determining the sentence. Without such instruction, the jury is deprived of "sufficiently clear and precise" directions to ensure "an informed, focused, guided and objective inquiry into the question of whether [a particular defendant] should be sentenced to death." *Proffitt v. Florida*, *supra*, 428 US at 258.

The uniform instructions fail to provide for a list of case-specific mitigating circumstances. Furthermore, in *State v. Tucker*, 315 Or 321, 332-33 (1993), the Court declared that juries can NOT be instructed on specific mitigating factors it must consider arising from the facts of the case, based on its construction of applicable civil rules of procedure and criminal statutes. This holding violates the Eighth and Fourteenth Amendments of the United States Constitution, and renders Oregon's death penalty scheme unconstitutional.

> It is folly for the court to first acknowledge a capital murder defendant's right to produce mitigating evidence, give the jury no guidance in its use, then presume these 12 laypersons know the holdings of *Lockett* and *Eddings* until the defendant affirmatively proves the contrary.
> *Stewart v. State,* 686 SW2d 118, 126 (Tex. Crim. App 1984)(Clinton, J., dissenting).

Tucker is called into question not only by the constitutional principles concerning mitigating evidence which have previously been discussed, but by the holdings in several cases. In *Jeffers v. Lewis*, 974 F2d 1075 (9th Cir. 1992), the court held the sentencer must consider

defendant's evidence of heroin addiction, and drug and alcohol intoxication at the time of the offense, as non-statutory mitigating factors. The Court notes it is "not permitted to presume that because evidence was admitted before the factfinder, it was necessarily given consideration," 974 F2d at 1079. Consideration of such evidence can be assured under Oregon's death penalty scheme only by special jury instructions, which *Tucker* forbids.

In *Lashley v. Armontrout*, 957 F2d 1495 (8th Cir. 1992), the appellate court reversed for failure to give an instruction that defendant's lack of criminal history should be considered a mitigating factor in a case where no evidence was presented by either party on that issue, i.e., the record would thus show no criminal history. The court observed the instruction was constitutionally required because "*Lockett* makes it clear that the defendant is not required to meet any particular burden of proving a mitigating factors to any specific evidentiary level before the sentencer is permitted to consider it," 957 F2d at 1501.

A more compelling argument for specific mitigating circumstances instructions derives from *Penry*. *Penry* dealt with evidence which "cut both ways," i.e., evidence of mental retardation which could logically be viewed as aggravating evidence under the future dangerousness issue, but which was proffered by the defense as a basis for a sentence less than death because, i.e., as mitigating evidence. Not surprisingly, the Texas courts have already confronted this issue and held that special instructions are required.

For example, in *Ex parte Williams*, 833 SW2d 150 (Tex. Cr. App. 1992), the court confronted mitigating evidence which was double-edged, i.e., simultaneously lessens fault and indicates future dangerousness, and determined it could not be sure that they jury gave that evidence mitigating weight. Thus, at the new trial ordered by the appellate court, the defense is "entitled to a charge instructing the jury that it could consider and give mitigating effect to evidence of his mental retardation," 833 SW2d at 152.

Not only are Oregon juries deprived of clear instructions regarding the meaning of mitigating evidence--which, *a prior*, must be recognized by jurors before it can be considered--but

the role of mitigating evidence, and the Fourth question itself, is further restricted by the gratuitous instruction: "You may answer any of the first four questions in any order." UCrJI No. 1314. As previously noted, the instructions fail to explain that jurors are to examine the mitigating aspects of the defendant's character or background, and any circumstances of the offense proffered by the defense in determining "shall a death sentence be imposed?" In fact, jurors are told to "consider any aspect of the defendant's life in your determination of the answer to these questions." *Id.*

Combined, these instructions could easily be construed by the jury to view the Fourth Question not as a "pure" mitigation issue, as the vehicle to give meaningfully effect to mitigating evidence by bestowing a life sentence, but rather as authority to say "yes," to "shall a death sentence be imposed" for any reason it chooses. While Oregon is constitutionally permitted to give its jurors "unbridled discretion" to decline to impose the death penalty, "unbridled discretion" to impose the death penalty violates the Eighth Amendment's prohibition of arbitrary and capricious punishment.

C. Oregon's death penalty scheme restricts each individual juror's ability to consider and give effect to mitigating evidence.

In *Mills v. Maryland, supra*, the Supreme Court vacated a death sentence where the jury instructions and verdict form, taken as a whole, would have likely been viewed by jurors as requiring unanimity in finding a "mitigating circumstance," before that circumstance could be used to weigh against aggravating factors to determine the sentence.

Mills holds that the States may not restrict the consideration of mitigating evidence by requiring a consensus among jurors that any given mitigating fact exists, before that fact can be used as a reason to bestow life rather than impose death. 108 SCt at 1870; see also *McKoy v. North Carolina*, 110 SCt 1227, 1232 (1990)(reaching same result in different type of death penalty statute).

There was no evidence in *Mills* of how jurors actually interpreted the instructions and verdict form. The Supreme Court observed this was not essential, and "[t]he critical question,

then, is whether [defendant's] interpretation of the sentencing process is one a reasonable jury could have drawn from the instructions given by the trial judge and from the verdict form employed in this case." 108 SCt 1866.

The uniform instructions presumably to be given by the Court in the case at bar, taken as a whole, suffer from the same constitutional defect discussed in *Mills.* The instructions use the term "you" in the plural sense of "you, the jury." See UCrJI No. 1314. The jury is correctly told to answer the Fourth Question "no" if "one or more of the jurors believe" life is the appropriate sentence. *Id.* (emphasis supplied). The instructions regarding life with parole likewise specify "ten or more of your number must agree." *Id.* The problem arises in the instructions concerning mitigating circumstances:

> 'Mitigating circumstances' include those circumstances that do not justify or excuse the offense but that, in your sole judgment, may be considered as extenuating or reducing the degree of culpability and the appropriate punishment. . . . If you reasonably believe that a mitigating circumstance exists, you may consider it established. *Id.* (emphasis supplied).

In this context, the phrase "in your sole judgment," appears intended to speak to the jury as a whole, as does the term "you" in that portion which deals with the standard of proof for mitigating circumstances. *Cf.,* UCrJI No. 1002 ("You, and you alone, are to decide the facts").

The verdict form (UCrJI No. 1314A) compounds rather than remedies the infirmity. The Fourth Question verdict issue merely asks, "Should the defendant receive a death sentence? _____yes _____no," and does not facilitate individual, rather than group, response to the "no" option. Immediately following the Fourth Question on the verdict form, unanimity is stressed: "IF YOU HAVE UNANIMOUSLY ANSWERED ALL THE PRECEDING QUESTIONS 'YES,' SIGN AND DATE THE VERDICT FORM AND NOTIFY THE BAILIFF." Nowhere on the verdict form is the jury told that only one of its members need vote "no" before that becomes the jury's response to the Fourth Question.

One can easily envision a situation where a single juror believes life is the appropriate sentence based on a mitigating circumstance rejected by the other jurors, but who is not given

access to the verdict form to cast that vote and is told by other jurors that he has "no right" to speak for the entire jury on that issue.

"An error in a verdict form, like an [i]nstructional error, is reversible if the [verdict form] probably created an erroneous impression of the law in the minds of jurors which affected the outcome of the case." *Nolan v. Mt. Bachelor, Inc.*, 317 Or 328 (1993).

Instructions, which a reasonable juror could interpret as allowing individual jurors to consider only mitigating circumstances that the jury unanimously finds, violate the Eighth Amendment. *Mills v. Maryland*, *supra*; *McKoy v. North Carolina, supra* . To the extent that only one of Defendant's jurors misunderstands the law, then the Oregon Supreme Court would be compelled to conclude that "the jury [as a whole] has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde, supra*, 494 U.S. at 380.

D. Oregon's requirement that mitigating circumstances "justify" a sentence less than death creates a presumption in favor of death and restricts the use of mitigating evidence.

The problems with the Fourth Question language that mitigating evidence "justify a sentence less than death" have been discussed throughout sections 2 and 3 of this memorandum, and those points and authorities are incorporated by reference herein The defense recognizes that a plurality of the Supreme Court has held that the Eighth Amendment allows a State to place on the defendant "the burden of proving mitigating circumstances sufficient to call for leniency," under certain statutory schemes. *Walton v. Arizona*, 497 US 639 (1990). Under Oregon's death penalty scheme, however, "[t]here is no burden of proof on the fourth question because it does not present an issue subject to proof in the traditional sense, rather it frames a discretionary determination for the jury," *Wagner II*, 309 at 18.

As a practical matter it is undeniable that jurors will look to the defense to introduce evidence or argue that evidence adduced by the State constitutes mitigating circumstances. Notwithstanding that, the defense submits there is a substantial difference between instructing

jurors to determine if mitigating circumstances "call for leniency," and instructing jurors to determine if mitigating circumstances "justify a sentence less than death."

The defense therefore contends that (1) the purpose and intent of the Fourth Question is to serve as the vehicle for giving effect to mitigating evidence and bestowing mercy upon those defendants who one or more jurors believes to deserve it, *see Wagner II; Stevens II; Guzek; Metz, supra;* (2) instructions using the term "justify" make death the presumptive sentence; and (3) those instructions operate to restrict the use of mitigating evidence in a statutory scheme where no restriction was intended, in violation of the Eighth and Fourteenth Amendments of the United States Constitution and Article 1, sections 15 and 16.

The defense does not propose to redraft the uniform jury instructions in this memorandum, but does wish to point out that drafting an instruction to clearly convey to the jury that sparing the defendant's life is a "discretionary determination," rather than one where the defendant must prove sufficient mitigating circumstances to justify leniency, is not a monumental task.

Borrowing from Justice Gillette's dissenting opinion, in *Wagner I*, 305 Or at 233, a more complete instruction would be (assuming a "yes" verdict on the first three questions):

> Even though you have found defendant to be eligible for the death penalty, you are not required to impose that sentence. Rather, you must now decide if death is the appropriate sentence for this particular defendant. Any one of you has the power and discretion to chose life imprisonment as the appropriate sentence. You must answer this question "no" if at least one of your members decides that there is mitigating evidence which in fairness and mercy makes a life sentence the appropriate sentence in this case. The defense is not required to prove to you that a life sentence is justified in this case. Neither is the State required to prove to you that a death sentence is justified in this case, if you have returned a "yes" verdict to the first three questions.

See also *State v. Moen*, 309 Or 45, 88 (1990)(mitigation means circumstances "which in fairness and mercy" may be considered as reducing the degree of culpability and appropriate punishment).

5. OREGON'S DEATH PENALTY SCHEME CANNOT BE FIXED BY JUDICIAL LEGISLATION OR *AD HOC* CREATION OF JURY INSTRUCTIONS AND STANDARDS OF PROOF CONCERNING MITIGATING EVIDENCE

The Eighth Amendment's requirements for mitigating evidence caught Oregon by surprize when *Wagner I* reached the United State's Supreme Court. The legislature's response was to draft a Fourth Question rejected by *Wagner II* as incapable of providing a constitutional process for juries to consider and give effect to mitigating evidence. *Wagner II* and subsequent Oregon Supreme Court decisions gave us the statutory Fourth Question and its bare-bones process that exists today, along with the somewhat more comprehensive process codified in the uniform jury instructions.

The purpose of this memorandum has been to demonstrate that notwithstanding these fledgling efforts, Oregon still lacks a constitutional process for juries to consider and give effect to mitigating evidence. Oregon's now well-establish practice of relying on judicial construction or, more accurately, "reconstruction" of its death penalty scheme to take proper account of mitigating evidence cannot help but result in the arbitrary application of the death penalty throughout the State. The arbitrary application of the death penalty violates the Eighth and Fourteenth Amendments of the United States Constitution.

The likelihood that *ad hoc* development of the Fourth Question process will continue appears clear from the Oregon Supreme Court's recent pronouncement that ORS 163.150 means whatever the Eighth Amendment means in terms of the role and effect of mitigating evidence in a capital sentencing scheme. *Stevens II,* 319 Or at 582.

The problems with this approach are two-fold. First, the Eighth Amendment does not dictate a particular procedure the States must use to impose the death penalty. *See, e.g., Gregg v. Georgia,* 96 SCt 2902 (1976) *and compare, Jurek v. Texas, supra; see also Romano v. Oklahoma*, 114 SCt 2004, 2011 (1994)("The Eighth Amendment does not establish a federal code of evidence to supersede state evidentiary rules in capital sentencing proceedings."). Second, the

Eighth Amendment is not a static concept, but continues to evolve as civilization progresses in its concept of "cruel and unusual punishment" in terms of the right to human dignity preserved by this constitutional provision. *See, e.g., Furman v. Georgia,* 92 SCt 2726 (1972); *Coker v. Georgia,* 433 U.S. 584 (1977).

This practice of judicial development of the death penalty scheme also violates the separation of powers clause of the Oregon Constitution, Article III, Section 1 and ORS 174.010. *See , e.g., Dilger v. School District 24CJ*, 272 Or 108, 112 (1960)(court's construction cannot supply integral part of statutory scheme omitted by legislature). The violation is more abhorrent when the statutory scheme governs a genuine matter of life or death.

This judicial "filling in all the blanks" of our capital sentencing procedure also violates Article I, sections 20 and 21 of the Oregon Constitution by inviting *ad hoc*, arbitrary, and therefore unequal application of the death penalty.

> "If arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to . . . judges, (prosecutors), and juries for resolution on an *ad hoc* and subjective basis with the attendant dangers of arbitrary and discriminatory application." *State v. Robertson*, 293 Or 402, 409 (1982), citing *Grayned v. City of Rockford*, 408 US 104, 108 (1972).

The problem is not that Oregon's Fourth Question and related procedures--or lack of procedures--cannot be fixed to comport with the constitutions. Rather, the problem is that job belongs to the legislature, not to the judiciary. It is time for the Oregon Supreme Court to stop retooling the machinery of death everytime it appears that cog called the Eighth Amendment is about to grind it to a halt.

It is time for the Oregon Supreme Court to stop chastising trial court judges--from the luxury of hindsight--for not having the foresight to correctly interpret this new and vague process known as the Fourth Question.

It is time for the Oregon Supreme Court to face the truth that it cannot keep saving our defective death penalty scheme while simultaneously fulfilling its primary duty to protect the rights of the individual guaranteed by the Oregon and United States Constitutions.

CONCLUSION

WHEREFORE, Defendant prays this Court for entry of its Order declaring the Oregon death penalty sentencing scheme, now embodied in ORS 163.150 and the uniform criminal jury instructions, unconstitutional, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, and Article I, Sections 10, 11, 15, 20, 21, 33, and Article III, Section 1 of the Oregon Constitution and ORS 174.010, and further ordering that death in not a sentencing option in these proceedings, or providing such other relief as is appropriate.

RESPECTFULLY SUBMITTED this ___ day of _____, 1996.

_____

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