The Hon. John Kitzhaber
Governor, State of Oregon
160 State Capitol
900 Court Street
Salem, Oregon 97301-4047

RE: PETITION FOR A REPRIEVE OF GARY HAUGEN'S EXECUTION

Dear Governor Kitzhaber:

For nearly 30 years we have been funding a death penalty that has not resulted in a single execution after full appellate court review. Put another way, Oregonians have been spending millions of dollars every year for three decades on a system that has never worked, except that it sometimes forces inmates to forfeit protections designed to ensure the system is working properly. No other government program or system still in existence has anything approaching this type of complete failure rate.

It's not about to begin working, either.

Gary Haugen's professed desire to die is not the expression of agreement with his jury's verdict, but instead is a product of our broken death penalty system. A death penalty that only executes "volunteers" does not serve any legitimate purpose. Instead, it is a pointless and cruel ritual—state sponsored suicide for those whose mental demons make death a better choice than life in prison. Yet, that is the reality of the Oregon death penalty. We execute only individuals who can no longer bear the prospect of decades of review. In fact, Mr. Haugen has made it clear that he views a life sentence as worse than a death sentence.

Through this petition, we are asking you to grant a reprieve. By granting a reprieve, we can figure out now whether it is possible to make our capital punishment system work or whether Oregonians should spend our precious resources on better priorities.

We are asking that you grant an indefinite stay of Mr. Haugen's execution until a comprehensive review has been conducted of Oregon's death penalty system—a review designed to assess whether Oregon's death penalty is working, as well as to identify problems and determine whether solutions exist. In other words, we are asking that you declare a *de facto* moratorium on executions in Oregon pending a comprehensive study of our death penalty system by a committee that you designate.

In doing so, you can make it clear that you are requiring Mr. Haugen to continue to serve, at least for now, what he views as the harshest sentence possible: life without parole. Mr. Haugen does not have the right to force Oregonians to execute him. Instead, the death penalty is administered in all of our names. Only when we are sure that it is being administered fairly and correctly should you sign off on an execution for all of us.

This letter briefly highlights some of the problems with Oregon's death penalty. Some of those problems are unique to Mr. Haugen's case; most are endemic to all capital cases. The most immediate problem is that our three-drug lethal injection protocol does not sufficiently guarantee against the needless infliction of excruciating pain. This will not be changed by the current proposed rule changes. You should not permit Mr. Haugen's execution to go forward until the Department of Corrections adopts a one-drug protocol, as other states have done. Using a three-drug protocol simply creates an unacceptable risk of a botched execution. No person, inmate or executioner, should be forced to bear that risk.

Because imposition of the death penalty is irrevocable in its finality, it is imperative that the standards by which that sentence is fixed and carried out be beyond reproach. At this juncture in our history, there is far too much evidence otherwise to permit this execution to go

forward until the capital punishment system has been reviewed and any and all serious problems identified and fixed.

Mr. Haugen's Death Warrant is the Direct Product of a Broken System.

As you know, it is not unprecedented for a person under a death sentence to give up his appeals. There have been well over 100 people who have done so—two in Oregon.

A recent study found that approximately 88% of the individuals who gave up their appeals had a history of mental illness. *See* John Blume, "Killing the Willing: 'Volunteers,' Suicide and Competency," 103 Mich. L. Rev. 939 (March 2005). Mr. Haugen has a lengthy documented history of mental illness. In fact, his sister testified at the penalty phase of his trial that their childhood home was akin to an "insane asylum."

Persons who suffer from severe mental illness often find it difficult to cope with the conditions on death row, especially the isolation. As a result, they often lose all hope. When they do, they are misleadingly called "volunteers." In fact, there is nothing voluntary about the desire to end your life because you can no longer cope. To the contrary, that is the very definition of suicide. The only difference is that in this instance the state inflicts death.

It is important to keep in mind the psychological toll that comes with living on death row for years and sometimes, decades. Life on death row is nearly impossible for someone who is mentally stable. It is much, much more difficult for someone who suffers from a mental illness, especially in light of the lack of appropriate mental health treatment available on death row. Given those circumstances, it should come as no surprise that from time to time individuals sentenced to death sometimes find it too hard to continue to cope. If Mr. Haugen is executed, it would hardly be surprising if additional individuals under a death sentence follow his lead. In fact, that is the pattern both locally and nationally.

Mr. Haugen's competence is an open question, notwithstanding the court hearing. The first psychologist to evaluate Mr. Haugen found that he was incompetent to be executed. As you may know, her testimony was never heard by a court because Mr. Haugen did not want her to testify. Mr. Haugen should not be permitted to manipulate the criminal justice system in this manner. The protection against executing someone who does not have a rational understanding of the reasons for his execution robs the system of its only justification. Executing a person who has been permitted to exclude evidence of his incompetence is no different than executing a person who was too ashamed to permit his lawyers to present evidence that he was intellectually disabled (formerly called "mental retardation").

You can correct this problem by granting a reprieve and demanding to see all of the information regarding Mr. Haugen's current mental condition. In fact, because Mr. Haugen's most recent evaluation was videotaped, if you request and obtain a copy, we would be happy to provide it to an independent psychologist who is very familiar with the legal standards governing "execution competency" and who has agreed to render an opinion about Mr. Haugen's mental condition for you.

It might provide some comfort to conclude that because Mr. Haugen has chosen, voluntarily or otherwise, to give up the protections of the law that we can work towards reforms at some later date. If Gary Haugen is executed, it is with your approval on behalf of all of us. Only if you can say the system is working for everyone should you grant that permission. History tells us something is very wrong.

The Need for a Thorough, Non-Politicized Review of the Oregon Death Penalty

When the United States Supreme Court permitted the death penalty to go forward in 1976, many distinguished legal scholars warned that the task of creating an objectively fair

system for deciding which criminals deserved to die and which should be allowed to live was impossible. Those predictions appear to have come true. Many people from many differing backgrounds have concluded that the "modern" death penalty in the United States has proven to be a failed experiment. Many of those who favored the death penalty in the abstract have come to view its practice very differently. They have reached the conclusion that if society's ultimate punishment cannot be applied fairly, it should not be applied at all.

A strong body of empirical evidence confirms that race, geography, money, politics, and other arbitrary factors exert a powerful influence on determining who is sentenced to death. This is the conclusion not only of experts, but increasingly that of the general public as well.

As the use of the death penalty has declined, the rationale for its continuation has disappeared. With defendants already facing life without parole, no one is likely to be deterred by an added punishment that is rarely imposed and even more rarely carried out many years later, and that is dependent on so many unpredictable factors. Nor does the wish for retribution justify a death penalty that is applied so sporadically. The reality is that those in society generally, and those families of murder victims in particular, who look to an execution to counter a terrible homicide will very likely be disappointed. Very few of those cases result in execution, and those that do are often not the most heinous, but merely the most unlucky, recalling Justice Stewart's comparison in 1972 that "receiving the death penalty is like being struck by lightning".

No longer looking only to the United States Supreme Court to review these issues, some states are choosing to act on their own. Four states in the past seven years have abolished the death penalty, bringing the total of states without capital punishment to sixteen. As growing costs and stark unfairness become harder to justify, more states will follow that path.

States that continue to use the death penalty have begun to study how their death penalty system operates. However, Oregon has not conducted the kind of comprehensive examination of our capital punishment system that is necessary to determine if, and to what extent, problems exist in the administration of the death penalty. The statutory authority you have to grant an indefinite reprieve allows you to declare a moratorium on executions pending an appointed committee's review of our capital punishment system.

Based on our collective knowledge of the Oregon death penalty system, and informed by studies that have been conducted in other states, the following are some of the most troubling aspects of the Oregon capital punishment system.

1. Oregon's Death Penalty is Terribly Expensive. The death penalty is far more expensive than life without parole. We should determine how much more expensive. Money spent on the death penalty would be much better spent on more police officers, drug, alcohol, and mental health treatment, as well as on victim's services. Most importantly, we could spend millions more per year on education by abolishing a penalty that does not keep us safer.

2. Oregon's Death Penalty is Overbroad. Oregon currently has 37 people under death sentences. Washington, with double the number of murders, has only eight. Oregon usually has 30-40 death penalty cases pending trial. Washington usually has fewer than five. In terms of executions, the two states are similar. Oregon could save millions of dollars every year simply by narrowing the scope of our death penalty and by investing prosecutors with clear discretion to remove the death penalty in every aggravated murder case where they conclude death is not an appropriate punishment.

3. Oregon Should Adopt Pre-Trial Practices Designed to Protect Against Convicting an Innocent Person. Oregon Law Should Permit Post-Conviction Petitioners to Raise a Claim of Innocence. Since 1976, 138 condemned individuals have been freed nationally because of actual innocence or profound doubt as to their guilt. Of the over 1,265 persons executed in that time, it is highly likely that some were innocent. During the same period, six people in Oregon have been exonerated of murder convictions. Luckily, none had been sentenced to death. Several states have adopted pre-trial procedures designed to protect against wrongful convictions, including setting standards for line-ups, requiring interrogation to be recorded, and establishing strict protocols for the collection, testing, and preservation of evidence. Oregon should review and consider adopting those safeguards. In addition, Oregon currently prohibits a post-conviction petitioner from raising a claim that he is innocent. That law should be changed.

4. Oregon Should Exempt People with Severe Intellectual and Mental Disabilities from the Death Penalty. Oregon has a significant number of people with severe mental disabilities on death row. Because there is no statute that excludes individuals with "mental retardation" from the death penalty, different judges and juries apply different standards. Oregon law should explicitly exclude individuals with "mental retardation," as well as other types of serious mental disorders, from being sentenced to death and/or executed.

5. Oregon Should Protect Against Arbitrariness in Capital Sentencing. Oregon is one of a handful of states that does not have *any* safeguards in place to review cases for proportionality. Proportionality review is the best way to protect against arbitrariness in capital sentencing. Proportionality ensures that only the worst of the worst are sentenced to death.

6. Oregon Should Collect and Analyze the Data Necessary to Determine Whether Its Death Penalty System is Fair and Accurate. Data collection is vital to assure that the death penalty is

not infected with bias and/or unfairness. There is no data collection that takes place in Oregon. We need to establish a method to collect data about costs; the similarities and differences in the aggravated murder cases that result in death and those that result in life sentences; the race of the defendant, victim, and jurors; disparities in seeking the death penalty from county to county; as well as the aggravation and mitigation evidence presented in each case.

These are just some of the obvious problems that deserve to be studies before we execute anyone. Proponents of the death penalty may argue that we have overstated the problems. However, that argument only reinforces the need for a study.

There is an Unacceptable Danger of a Botched Execution

The most pressing reason for you to issue a reprieve is because there is the real and unacceptable danger of a botched execution. You should not permit an execution to go forward until and unless Oregon switches to a one-drug protocol and adopts detailed execution procedures, which take into account all possible issues that could arise during the taking of a human life through the injection of lethal substances.

Botched executions happen with alarming regularity. You should not permit any human being to be subject to or participate in an execution under these conditions and without adequate safeguards firmly in place.

Oregon's current three-drug lethal injection protocol includes the use of pentobarbital in combination with pancuronium bromide and potassium chloride. Pentobarbital is an anesthetic intended to put the inmate to sleep. Presumably after a member of the intravenous team determines that the inmate is sufficiently unconscious, he is injected with pancuronium bromide, which paralyzes the entire muscle system and stops the inmate's breathing. Finally, potassium chloride stops his heart. In ideal circumstances, death results from anesthetic overdose and respiratory and cardiac arrest while the condemned person is unconscious.

The use of a paralytic agent, administered after the anesthetic, presents serious problems if the the inmate is not rendered unconscious or does not remain unconscious during the entire procedure. If the inmate is conscious but paralyzed, he will experience excruciating pain and suffering but be unable to cry out or even blink an eyelid to let anyone know that the barbiturate has failed. Because a paralytic agent masks the ability of a lay observer to discern whether the first drug has been properly delivered, it is impossible to know whether the lethal injection execution has been "botched." The use of a paralytic agent virtually ensures that the execution looks "peaceful" when it may have been anything but.

Moreover, the pain and suffering that an inmate will experience if not properly anesthetized is extreme. Because the paralytic agent commonly used in executions restricts the ability of the respiratory muscles to contract, it causes asphyxiation. The third drug, potassium chloride, causes excruciating pain that has been likened to the feeling of having one's veins set on fire. Experts who have testified in lethal injection cases have unanimously agreed that it would be unconscionable to inject either drug into a person who was not adequately anesthetized.

There is a second problem. As currently written, the execution rules provide no specific information as to how an execution will be carried out. The written protocols fail to direct the specific steps members of the execution team must take to carry out executions safely. The current protocols contain completely insufficient safeguards to guarantee against extreme pain and suffering of condemned prisoners.

The death penalty procedures also fail to lay out any of the requirements for membership on the execution team. Our particular concern lies with the team members responsible for inserting the inmate's IVs, setting up the IV bags and tubing, and preparing and administering

the lethal drugs. Whether a lethal injection execution will be carried out in a safe manner that ensures that the inmate will not experience grievous pain and suffering depends in large part on the competence of the execution team, but the current and proposed rule do not set forth the requirements for selection for participation in executions. As a result, it appears that membership on the execution team does not actually require any specific level of skill, experience, or knowledge.

Likewise, the rules do not require that the people who will carry out the medical aspects of the execution possess any medical qualifications. The rules reference the involvement of medically trained staff. However, that term is vague and the rule does not further define the credentials, training or experience required for participation in the process. Furthermore, the proposed rule only requires that a medically trained person be available, which does not provide adequate insurance that the medical trained person will actually perform these tasks. In an execution, particularly an execution using a three-drug protocol, the successful delivery of the barbiturate, which necessitates the setting and maintenance of a functioning IV, serves the same purpose as it does during a medical surgical procedure. It ensures that the inmate will not experience the painful stimuli from the subsequent administration of painful drugs. Entrusting this important medical procedure to someone with only minimal medical training, and perhaps none, unnecessarily risks the chance that the barbiturate will not be successfully delivered and the inmate will suffer intense pain and suffering from the administration of the second and third drugs.

The current rules fail to guide the execution team in the event that an execution by lethal injection does not proceed as planned. The omission of contingency planning is a disturbing and unacceptable deficiency in the execution procedures that places condemned inmates at great risk

of pain and suffering. Moreover, it puts the execution team in the untenable position of having responsibility for an execution, but insufficient information to perform its tasks safely and appropriately. This is unconscionable and must be changed before any execution is allowed to go forward.

Litigation on behalf of death row inmates in other jurisdictions has exposed problems at every step of the process, including the mixing of the drugs; the setting of the IV lines; the administration of the drugs; and the monitoring of their effectiveness. At each step, discovery has revealed untrained personnel working with inadequate equipment under poorly designed conditions, including the improper mixing and preparation of the anesthetic; unreliable screening of execution team members; lack of training and supervision of execution team members; inadequate and poorly designed physical facilities; and inconsistent and unreliable recordkeeping.

Because Mr. Haugen's lawyers have chosen not to try to protect Mr. Haugen from a risk of botched execution, there has not been and will not be any litigation over the execution protocols. That does not mean that you cannot act.

Before you allow an execution to go forward, Oregon should switch to a one-drug protocol and must have detailed procedures that lay out each step in a clear manner to ensure that execution team members are sufficiently guided during the process.

Oregonians Want Bold Leadership

In September, you told Oregonians, that in order to keep education as a top priority, we must act boldly:

> We will not get there if we hold tight to the status quo, set our sights low and continue to let school funding be the only statewide education debate that matters. The path forward in this new century requires innovation, requires the willingness to challenge assumptions, requires the courage to change.

Your words apply with equal force to the death penalty in Oregon. If we do not undertake this review at this juncture, we will continue to spend millions of dollars pursuing a penalty that is only imposed when an inmate can no longer cope with life on death row and gives up the review designed to ensure reliability and protect against arbitrariness.

Acting boldly means taking a step that even the condemned prisoner does not want you to take. But, as our Governor, your duty is act in the best interests of Oregonians. Granting a reprieve and declaring a *de facto* moratorium on executions pending a study of the costs and effectiveness of our death penalty is a bold and wise step—one that will pay dividends for decades to come.

Respectfully Submitted this 7th day of November, 2011.

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