NO. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

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DAVID RAY TAYLOR - PETITIONER

VS.

STATE OF OREGON - RESPONDENT

_____

ON PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE STATE OF OREGON

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PETITION FOR WRIT OF CERTIORARI

_____

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CAPITAL CASE
QUESTIONS PRESENTED

First Question Presented: The Eighth Amendment bars a jury from imposing a death sentence if it "has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell v Mississippi*, 472 US 320, 328-329, 105 S Ct 2633, 86 L Ed 2d 231 (1985). Throughout petitioner's trial, Oregon's governor maintained a moratorium on executions. The jury in this case would have thus been aware that it could impose a death sentence without any immediate chance of it being carried out.

May a trial court impose a sentence of death during the pendency of a statewide moratorium on carrying out executions?

Second Question Presented: After the entry of judgment and during the pendency of petitioner's direct appeal, the trial court learned that an alternate juror had sent an email before trial stating that she had obtained extrajudicial information about the case through her work as a clerk at the trial court. The alternate juror stated in the email that petitioner "needs to die." During *voir dire*, she lied to the court by denying that she had learned extrajudicial information or had formed an opinion about the case. When her misconduct came to light and the court questioned the jurors about it, some could not remember whether the alternate had spoken to them about the case.

Has the state met its constitutionally-mandated burden of proving that juror misconduct was not prejudicial, when some of the jurors could not remember whether the misconduct affected the verdicts?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

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THE SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

Petitioner, David Taylor, respectfully asks this court to issue a writ of certiorari to review the opinion and judgment in this case.

OPINION BELOW

On February 7, 2019, the Oregon Supreme Court affirmed the Lane County Circuit Court judgment convicting petitioner of aggravated murder and sentencing him to death. *State v. Taylor*, 364 Or. 364, 434 P. 3d 331 (2019). *See* opinion at Appendix A.

On May 2, 2019, the Oregon Supreme Court denied petitioner's petition for reconsideration. *See* Order Denying Reconsideration at Appendix B.

JURISDICTION

This Court has jurisdiction to review the final judgment of the Oregon Supreme Court. *See* 28 U.S.C. § 1257(a) (providing jurisdiction to this court "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.").

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const. Amend. XIV.

STATEMENT OF THE CASE

I. Trial Court Proceedings

On August 14, 2012, the state indicted petitioner for a number of crimes including the four counts of aggravated murder based on the August 3, 2012, death of Celestino Guitierrez Jr. *See* Indictment at Appendix C. Petitioner entered a plea of not guilty and tried his case before a capital jury.

Prior to petitioner's trial, an inmate on Oregon's Death Row, Gary Haugen, waived his right to further appeals and the trial court set a date for his execution. *Haugen v. Kitzhaber*, 353 Or. 715, 717, 306 P3.d 592 (2013), *cert*

den, 571 U.S. 1167, 134 S. Ct. 1009 (2014). In response, then-governor Kitzhaber granted a reprieve of Haugen's sentence. *Id.* Further, the Governor announced "that he would allow no more executions in the state during his time in office."[1] William Yardley, Oregon Governor Says He Will Block Executions, New York Times, November 22, 2011, http://www.nytimes.com/2011/11/23/us/oregon-executions-to-be-blocked-by-gov-kitzhaber.html.

In discussing its plans for introducing potential jurors to this case during *voir dire*, the trial court announced that it would "briefly address the moratorium of the Governor on executing the death penalty, and then turn [the jurors] over to [the parties] for questioning." Tr. 1025.

Later, the trial court expanded on its plans, referring to an off-the-record discussion:

> "Let's start with – last week I sent counsel a portion of the script I plan to read to the jury and ask for comments on them.

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[1] When Governor Kitzhaber resigned, he was succeeded by Kate Brown, who announced that she planned to extend the moratorium on executions. Shelby Selbens, New Oregon Governor Kate Brown to extend death penalty moratorium, Reuters, February 20, 215, http://www.reuters.com/article/us-usa-politics-oregon-idUSKBN0LO2E420150220. That decision took place after the conclusion of petitioner's trial and penalty phase.

> "The parties commented on two, perhaps three, issues * * * * *
>
> "They also commented on the description I had provided, or intend to provide, regarding the moratorium that – or what's referred to colloquially as the moratorium provided by Governor Kitzhaber – that Governor Kitzhaber is engaged in with regard to the death penalty, and they suggested that I make certain changes to that language.
>
> "Frankly, I'm not inclined to make some of those changes, or the changes you suggest, and the reason being that I did not intend this provision to be a dissertation about what the governor could or could not do. In fact, there are other things the governor could do that are not addressed by the proposed language that you suggest. I intended it rather to be an explanation of what the governor, in fact, has done.
>
> "Therefore, what I propose to read to the jury – I'm going to give each of you a chance to respond to this – is the following. '*Some of you may have heard that Governor Kitzhaber has declared a moratorium on the death penalty. In legal terms, what he has done is to grant temporary reprieves of existing death sentences. Those reprieves last only as long as he remains in office. Thus you should assume that death sentences handed down while he is Governor will ultimately be carried out.*'"

Tr. 1146-48 (italics in transcript).

The trial court asked the parties for comments on the intruction. Tr. 1148. The state had none. Tr. 1148. Defense counsel said, "None, other than what [we] had suggested in our email to the court, Your Honor." Tr. 1148.

The trial court clarified that email discussion, for the record:

> "All right. So just to be clear, Counsel, for the record, you had suggested that I add '*although the Governor has power to grant temporary reprieves he cannot repeal capital punishment,*

> *which can only be eliminated by the voters amending the Oregon Constitution*,' which I am not adding.
>
> "You also suggested I change the words '*must assume*' to '*must conclude*,' and I'm not making that change either."

Tr. 1148-49 (italics in transcript).

The trial court instructed each panel of potential jurors about the moratorium in the manner quoted above. Tr. 1186, 1514, 1666, 1810, 1995, 2132, 2255, 2394, 2498, 2619, 2740, 2876, 3002, 3117, 3276, 3395, 3547, 3685. Petitioner questioned a number of potential jurors about their familiarity with the moratorium and their reactions to it.

II. Post-trial Proceedings Relating to the Juror Misconduct Issue

While this appeal was pending, the trial court informed the parties by letter that it had "received information which is inconsistent with the statements made by one of the alternate jurors during *voir dire*." Specifically, the court had obtained an email written prior to *voir dire* by courthouse employee Holly Moser, who would later become on alternate jury in this case, containing the following comments:

> "This day is bumming me out!! I found out that my jury summons is for the murder trial for Gillette. He is the guy who (with the 2 younger black kids from Portland) killed a boy (and chopped him up in pieces and burned his body) and took his car to Florence to rob a bank. He was out of prison for a couple of years for murder in the 70's. He needs to die. There is no way I would get on that jury, and not sure I would want to hear the details after reading the search warrants. I will have to defer."

Moser email, Appendix D.

Moser's email comments were inconsistent with the answers she gave two months later in *voir dire*, when she stated that she knew "really nothing" about the case. Tr. 3467. She said, "We get so many cases in honestly, they're all just a case number to me in doing a lot of data entry." Tr. 3467. She added that "I'm not sure even what this one is and once I knew that I was – got the summons, I didn't even look up anything. I haven't done anything." Tr. 3467, She also stated, "I really, like I said, I really have no idea which case this is." Tr. 3467. She continued that, "They all kind of run together, you know" and "I know the name Taylor, that's it. That's really all I know as far as the case." *Id.*

On November 4, 2014, petitioner filed a motion asking the Oregon Supreme Court to order a limited remand and allow him to question the jurors. The Oregon Supreme Court granted petitioner's request for a remand "limited to the question whether the alternate juror engaged in juror misconduct and, if she did, whether her misconduct tainted the other jurors' consideration of the case." *See* Order Allowing Limited Remand, Appendix E. The Oregon Supreme Court declined the state's request to "impose further limits on the circuit court's discretion to conduct the hearing on remand." *Id.*

The trial court held a hearing on March 6, 2015, during which it questioned all jurors, including alternates, with the exception of Moser herself.

At that hearing, several jurors indicated that they did not remember whether or not Moser had described any knowledge of the case.

Juror Erica Marjama stated that she did not remember whether Moser mentioned allegations that petitioner had been involved in a prior home-invasion robbery. 3/6/2015 Tr. 66. When questioned whether that was something that she would remember if it came up, she stated that she had "no idea." 3/6/2015 Tr. 67. She further stated that she did not remember if Moser had told her that petitioner had been involved in uncharged bank robberies. 3/6/2015 Tr. 67. In contrast, she responded that she *would* remember if Moser had told her about an alleged confession by co-defendant A.J. Nelson. 3/6/2015 Tr. 68. She also answered "no" when questioned about whether Moser had provided information about the crimes petitioner was charged with or what she thought should happen to him. 3/6/2015 Tr. 68-69.

Juror Timothy Palmer did not remember whether Moser had described petitioner's involvement in a home-invasion robbery, but thought he would remember if she had. 3/6/2015 Tr. 71. He did not remember if she had described petitioner's involvement in other robberies. 3/6/2015 Tr. 72. He "would think I would remember her saying something about that, but it doesn't come to my mind right now that I heard her say anything like that." 3/6/2015 Tr. 72.

Other jurors also declined to state unconditionally that Moser had not provided improper information. Natalie Jenson did not "think" that Moser had told her about other acts of violence by petitioner. 3/6/2015 Tr. 77. She did not remember Moser telling her anything else about petitioner prior to deliberations and said "I think so" when asked if she would remember. 3/6/2015 Tr. 78-79. Juror Sharon Hodges stated that she could not recall Moser discussing petitioner engaging in uncharged bank robberies. 3/6/2015 Tr. 97. She said that she "probably" would remember if it had happened. 3/6/2015 Tr. 97. Similarly, Juror Destin Ranch stated several times only that Moser had not made any comments about the case to his "recollection" and said that he "imagine[d]" that he would recall such comments. 3/6/2015 Tr. 113-14.

Alternate Juror Monique Graves, when asked if Moser had disclosed a prior robbery by petitioner, said "Not that I recall." 3/6/2015 Tr. 117. She said "I'm not sure" when asked if she would remember such communication. 3/6/2015 Tr. 117. When asked about Moser commenting on other bank robberies, she stated that she did not "believe" that Moser had done so, but that she likely would not remember such a conversation. 3/6/2015 Tr. 118. She also did not recall Moser describing petitioner taking the police to the location where the victim was buried, but was not sure she would remember such a conversation. 3/6/2015 Tr. 119. She repeated that she did not "believe" that

Moser had commented on several other matters. 3/6/2015 Tr. 119-20. When asked if Moser had told her what she believed should happen to petitioner, Graves responded, "I couldn't say for certain what she said. But I imagine that's possible that she would have made a comment about that." 3/6/2015 Tr. 120.

Following the March 6, 2015, hearing, petitioner asked the trial court to question Moser herself about the alleged misconduct. By letter dated April 3, 2015, the trial denied that request.

Petitioner filed a motion for new trial on the basis of Moser's misconduct. *Motion for New Trial*, Appendix F. Petitioner argued that Moser was guilty of misconduct, and that her misconduct was prejudicial to his right to a fair trial. Petitioner asked the court to vacate the conviction and sentence and order a new trial. *Id.* at 10-20.

The trial court ruled that the Oregon Supreme Court's remand order did not give the court jurisdiction to decide the new trial motion. Alternatively, the court ruled that the motion was time-barred. For those reasons, the trial court denied the motion without reaching the merits. *Opinion and Order Denying Defendant's Motion for New Trial*, Appendix G.

III. Proceedings on Direct Review to the Oregon Supreme Court

The Oregon Supreme Court took this case on automatic and direct review arising from the judgment of conviction and sentence of death. On review, in

addition to other issues, petitioner argued that the trial court erred when it allowed the sentencing jury to impose a sentence of death during a capital moratorium, refused petitioner's requested instructions regarding that moratorium, and denied petitioner's motion for a new trial based on juror misconduct.

First, petitioner argued that the trial court erred in imposing a sentence of death during a moratorium on carrying out such sentences or, in the alternative, that the trial court should have given a stronger cautionary instruction to the jury because of the risk that the jurors would not give the question of petitioner's sentence its full due. *Taylor*, 364 Or. at 385. The Oregon Supreme addressed the former argument, holding that the trial court sufficiently cautioned the jury to disregard the moratorium. *Id.*

Second, petitioner argued that the trial court erred when it denied petitioner's motion for a new trial based on misconduct by the alternate juror, Moser. *Id.* at 387. The Oregon Supreme Court held that "although the evidence of bias by the alternate juror was significant, and indeed not seriously disputed, there is no evidence that her bias affected the jury's verdict." *Id.* at 393.

IV. Facts Material to Consideration of the Questions Presented

In June of 2012, Petitioner and Wretha Breckenridge drove around looking for banks to rob before ultimately scoping out the Siuslaw Bank branch

in the small town of Creswell. Tr. 4700-01. Petitioner's friend Toni Baker and her niece, Mercedes Crabtree, came down from the Portland area to participate in the robbery. Tr. 4702-04. At the time, Crabtree was 18 years old and about to graduate from high school. They drove down to Eugene on June 8, 2012, first going to petitioner's home on Jessen Street before decamping to Breckenridge's home the day before the robbery. Tr. 4705-06.

The next morning, petitioner, Baker, and Crabtree headed to the bank from Breckenridge's home in Baker's blue SUV and Breckenridge's red Dodge Caravan. Tr. 4710. They brought along a bicycle from Breckenridge's house. Tr. 4711. Petitioner's plan was to ride the bicycle into the bank, rob it, and then cycle back to the waiting red Caravan. Tr. 5013. Petitioner covered his face and carried a small pink revolver and a larger silver revolver. Tr. 5012.

Crabtree drove the red van, with petitioner her passenger, and Breckenridge drove her car. Tr. 5013. Crabtree parked near the bank and petitioner got out and cycled to the door. Tr. 5013.

Petitioner came in, covered from head to toe. Tr. 3892. He carried a handgun in each hand and yelled for everyone to get down and to give him their money. Tr. 3893-94. He demanded that the employees give him their wallets and purses and said that if he was given a dye bomb or a tracking device he

would know where to find them. Tr. 3896. Petitioner took about $9,000 in cash in total. Tr. 3907.

Lane County Sheriff's Deputy Charles Douglass was dispatched to the Siuslaw Bank at 10:24 a.m., arriving 10-15 minutes later. Tr. 4049. He surveyed the area looking for businesses with surveillance cameras that might have caught the participants and eventually received videos from the Cascade Home Center and the Emerald Valley Armory. Tr. 4053, 4058. Viewing those videos, Douglass observed a metallic red Chrysler van which a person approached on foot. Tr. 405. After reviewing records, the police determined that a similar vehicle was associated with address 44 Lea Avenue in Eugene, and was registered to Linda Breckenridge. Tr. 4136.

In June of 2012, petitioner became a suspect in a series of bank robberies in Oregon. Tr. 4521-23. On July 30, 2012, pursuant to a federal search warrant, the FBI placed tracking devices on two vehicles associated with petitioner – a red Dodge Caravan and a silver Dodge Intrepid. Tr. 4165-67. Thereafter, the trackers provided the authorities with information about the vehicles' whereabouts. Tr. 4170.

In June of that summer, petitioner sustained injuries to his legs. Tr. 4734-36. By late July, petitioner could walk without a medical boot, but not well– his mobility was limited. Tr. 4739. Nevertheless, Breckenridge was aware that

petitioner planned to rob another bank in early August. Tr. 4740. Petitioner and Breckenridge observed the target, another branch of the Siuslaw bank, this time in the town of Mapleton. Tr. 4740. They drove Breckenridge's Intrepid to scope it out. Tr. 4740.

There were two obstacles to the next bank robbery: Petitioner's injury was still limiting his mobility, and he was aware that surveillance cameras had captured the Dodge Caravan, the vehicle having been shown on news broadcasts. Tr. 4744, 4747.

To assist with the robbery, Crabtree would come down again, and this time would bring her friend, A.J. Nelson. Tr. 4743. Nelson was a longtime friend of Crabtree's – she had met him when she was 11. Tr. 5025. Like petitioner, Nelson was a military veteran. Tr. 5028. His role in the robbery would be to assist petitioner because petitioner, hobbled by the injury, could not go into the bank alone. Tr. 5028.

Petitioner purchased a car, but on the way to the bank it broke down. Tr. 5023, 5046. Petitioner was angry, kicking the car's tires and swearing. Tr. 5047. They went back to Breckenridge's, leaving the car behind, and petitioner told Crabtree to come up with a $1,000 so they could obtain a replacement car. Tr. 5047. She tried to do so, calling several friends, but failed. Tr. 5047-48.

They began to discuss stealing a car. Tr. 4757. Petitioner told the group that they would have to kill someone in order to obtain a car and avoid having it reported stolen before the robbery. Tr. 4757. Breckenridge suggested finding a car at a campsite. Tr. 4758. Acting on this suggestion, petitioner and Nelson left in the Intrepid. Tr. 4758. Crabtree stayed and the two women watched television before eventually falling asleep. Tr. 4760-61.

Petitioner and Nelson returned late at night, and told the women that they could not find a person who was alone and without children at the campground. Tr. 4763. Instead, petitioner said they should find a person at the nearby Brew and Cue bar and told Crabtree to get "dolled up." Tr. 4762-64. She borrowed clothes from Breckenridge and put on makeup. Tr. 5051. She gave petitioner $20 to purchase drinks and he, Crabtree, and Nelson left. Tr. 4766.

On the way to the bar, petitioner told Nelson and Crabtree to stage a fight in front of the bar in order to attract the attention of a patron and to bring that person to petitioner's house. Tr. 5053. Crabtree protested and petitioner grabbed her hair, hit her head on the car window, and asked her if she "valued [her] breath." Tr. 5053. She acquiesced. Tr. 5053. Petitioner continued that she was to tell someone that she and her "boyfriend," Nelson, had gotten in a fight and to ask for a ride home. Tr. 5054.

When they arrived, petitioner went alone into the bar. Tr. 5055. He came out after about ten minutes and Nelson and Crabtree drove him back to his house. Tr, 5056. On the way there, petitioner told them to look for a single man. Tr. 5056. Nelson drove himself and Crabtree back to the bar. Tr. 5056.

Noelle Connor had invited her friend Celestino Gutierrez, Jr., to meet her and her friends at the Brew and Cue. Tr. 4206. The bar attracted an older crowd, but it was near her home. Tr. 4214. It was not Gutierrez's typical sort of bar. Tr. 4214. Around 11:30 or 11:45 Gutierrez said that he wanted to head to a different bar – Taylor's – near the University of Oregon campus. Tr. 4237. Connor and her friends didn't want to go, so she hugged him goodbye. Tr. 4238.

Waiting in the Intrepid, Nelson told Crabtree that he thought petitioner was crazy. Tr. 5070. She nodded, and Nelson said that petitioner was going to kill someone. Tr. 5070. When Gutierrez came out, Nelson pointed him out to Crabtree. Tr. 5057. That was her cue to get out of the car, and Nelson began to yell at her and then drove off. Tr. 5057.

Crabtree walked up to Gutierrez, who had gotten into his car. Tr. 5057. She asked him for a ride home. Tr. 5057. She was shaking as she asked him. Tr. 5057. Gutierrez asked her if she was ok, not realizing she was shaking out of

fear for him, rather than herself. Tr. 5057. She asked him to give her a ride and he agreed. Tr. 5057.

Around midnight, Connor and her friends left the bar and saw Gutierrez out front in his car with a woman, Crabtree, leaning over and talking to him. Tr. 4240. Connor did not recognize the woman but did not think anything was out of the ordinary – she thought that Crabtree was probably flirting with Gutierrez. Tr. 4241.

Crabtree rode the short distance to petitioner's Jessen Street home in Gutierrez's car. Tr. 5076. He pulled into petitioner's driveway and told Crabtree that he wanted to go inside the house – believing it to be the home of Crabtree's "boyfriend." Tr. 5077. They went inside. Tr. 5077. All of the lights were off. Tr. 5077. Gutierrez asked to use the bathroom. Tr. 5077. While he was doing so, Crabtree went into the living room and petitioner emerged from around a corner and told her to sit on the couch and Nelson to hide under the kitchen table. Tr. 5078. He was carrying an assault rifle with a knife attached to it. Tr. 5078-79.

Gutierrez emerged from the bathroom and joined Crabtree on the couch. Tr. 5078. Petitioner came into the living room, placed the knife on the rifle to Gutierrez's throat, and told him to get on the floor. Tr. 5079. When Gutierrez had kneeled, petitioner had Nelson retrieve some blue wire from the kitchen. Tr.

5079. He then unspooled some wire and tied the victim's feet. Tr. 5094. Finding it too small to bind his arms, Nelson instead used his belt at petitioner's direction. Tr. 5094.

Petitioner began to ask Gutierrez seemingly strange questions, asking Gutierrez if he had some of petitioner's property. Tr. 5096. He also had Nelson go through his pockets. Tr. 5096. Nelson retrieved a white iPhone and asked Gutierrez for the unlock code, checking it for calls after getting it. Tr. 5097-98. Petitioner then told Crabtree to put the phone in some water and she submerged it in a bowl in the kitchen. Tr. 5098.

After he finished asking Gutierrez his questions, petitioner had Nelson put a sock in his mouth. Tr. 5099. Petitioner then spoke with Nelson in the kitchen, leaving Gutierrez on the floor. Tr. 5100. The two men returned and Nelson stood behind Gutierrez. Tr. 5100. Petitioner nodded and Nelson stuck an object, later determined to be a crossbow bolt, into his ear. Tr. 5100, 5291.

At some point, while Gutierrez was still alive, his phone rang. 5125. It was his mother, concerned about his whereabouts, trying to call him. Tr. 4354. Crabtree pulled the phone from the bowl of water and mistakenly answered the call. Tr. 5126. Gutierrez's mother heard someone answer and said, "Tino?" Tr. 4355. Crabtree hung up. Tr. 5126. His mother called again, but the phone was

off by that point. Tr. 4355. Crabtree smashed the phone with a hammer and, on petitioner's direction, put it back in the bowl of water. Tr. 5126.

Gutierrez fell forward onto his stomach but was still alive. Tr. 5012. Petitioner told Nelson to choke him and Nelson tried. Tr. 5012. Petitioner told him to hurry up said he thought that Nelson "had a lion in that chest." Tr. 5012. Petitioner then retrieved a railroad spike and told Nelson to hit the bolt in farther with it. Tr. 5014. Nelson did, and it went in farther, but he was still alive. Tr. 5105. He was bleeding, but only a small amount, and was still breathing. Tr. 5106. Crabtree tried to check his pulse and declared that she thought he was dead, but she was mistaken – he began to breath audibly. Tr. 5017. Petitioner left and returned with a chain, like a dog choke collar. Tr. 5107. He wrapped it around Gutierrez's neck, placed the railroad spike through the ends of the chain, placed his foot on the victim's back, and pulled third three times. Tr. 5109. After that, the victim was dead. Tr. 5110.

The three of them then carried the body to the bathroom and Crabtree got some gloves. Tr. 5112. Crabtree was afraid and thought she had to comply or petitioner might kill her and her family. Tr. 5114. Petitioner retrieved some knives and then first cut off the victim's clothes and then severed an arm at the elbow. Tr. 5112-13. After petitioner removed the forearm he threw it in the tub and handed the knife to Nelson. Tr. 5116. Nelson began to saw at the other arm

and petitioner stopped him and told him to just slice. Tr. 5116. He did so. Tr. 5116. Petitioner then cut off a lower leg at the knee and then told Nelson to do likewise. Tr. 5116. Nelson said that he could not figure out how to do so. Tr. 5116.

As petitioner attempted to explain, Nelson appeared to have a seizure. Tr. 5116. Petitioner struck him in the chest and said, "A.J." Tr. 5117. Crabtree asked Nelson if he was ok and he seemed disoriented, asking where he was. Tr. 5117. He asked Crabtree what they were doing and she said they were doing a bank job. Something seemed to click and he asked if he had done that, referring to the body. Tr. 5118. Petitioner responded that he had and told him to finish with the knee, which he did. Tr. 5118. The men then alternated cutting the legs off at the hips. Tr. 5118. They sprayed the tub with a shower house and petitioner told Crabtree to get some bags for the parts. Tr. 5120.

Petitioner put the parts into the bags and stored them in a freezer in the garage. Tr. 5120-21. Petitioner tied the victim's torso a pink chair and left it in the bathtub, explaining that he wanted the blood to drain out of it. Tr. 5122-24. They tied it with the blue wire. Tr. 5124. Petitioner then worked on cleaning blood from the carpet. 5123.

After that, the three of them then wiped down the victim's car with a rag and removed some property from it. Tr. 5127. The removed items including a

picture of the victim, which petitioner burned in a mug. Tr. 5129. They then dressed and got ready for the robbery. Tr. 5129. Crabtree went outside and smoked a cigarette with petitioner on the porch. Tr. 5130. He asked her if she was ok and told her she could only talk about what they'd done with himself, Nelson, and Breckenridge. Tr. 5131. He asked her she saw what he'd done, and she said yes. Tr. 5131. He continued that if she told anyone else he would do the same to her, and that he knew where her family lived. Tr. 5131.

The next morning petitioner, Crabtree, and Nelson left for the next bank robbery. Tr. 5132. She drove the Intrepid and petitioner and Nelson took the victim's car. Tr. 5133. They stopped at Breckenridge's house, where petitioner told her that they had killed someone and obtained a car. 4767-68. He told Breckenridge to wait to hear from them. Tr. 4768.

Kylie Quam was working as a bank teller at the Siuslaw Mapleton branch on the morning of August 3, 2012. Tr. 4247. Around 10:30 a.m., as she worked with Brenda Gray and Peggy Simington, a small white car came into the parking lot a high speed. Tr. 4249. Quam didn't recognize the car and, in a small town like Mapleton, usually recognized her customers. Tr. 4250. Two men got out of what she saw was a banged-up hatchback wearing masks. Tr. 4251. They ran into the building. Tr. 4252.

Quam realized they were being robbed, said as much to her fellow employees, and pressed her panic button. Tr. 4252. The men were wearing coveralls, like painters would, and each had a gun – one a handgun, one a rifle. Tr. 4253. One of the men came towards her, the other towards Gray, and yelled at them to get on the ground. Tr. 4254. The other man yelled at Gray to cross her hands under her chest, yelling over and over. Tr. 4256. The taller of the two men asked where she kept her overflow cash – the extra cash beyond the limit of the amount a teller is allowed to keep in their drawer. Tr. 4257-58.

Quam tried to tell petitioner that her overflow money was in the bottom drawer and then simply kicked at it with her foot. Tr. 4258. He opened the drawer, took out a cash box, and set it on a desk. Tr. 4260. From the floor she heard the sound of boxes being emptied. Tr. 4261.

While Simington was on the ground she saw a bullet fall from the man with the rifle. Tr. 4298. After the robbery, she recovered it with a handkerchief and gave it to law-enforcement. Tr. 4301.

One of the men said that the vault was open and the other said to leave it. Tr. 4262. A customer – Harley Mayfield – walked in at that point, and one of the men said, "Welcome to the party," and ordered her down. Tr. 4263. Quam heard a yelling voice say that he would kill them if they moved, then heard the mean leaving, followed by the sound of grinding gears and squealing tires. Tr.

4264. After 10 or 15 seconds, Quam got up and locked the door as May called the police. Tr. 4266.

After the robbery, Quam's overflow door was short at least $1,980. Tr. 4267. May was missing $1,690, and Simington $3,330. Tr. 4290, 4306. Included in the money taken was some "bait money," a number of bills whose serial numbers the bank had recorded. Tr. 4270.

REASONS FOR GRANTING THE PETITION

Reasons to Grant the First Question Presented

This court should grant this petition to hold that the principle outlined in *Caldwell v Mississippi*, 472 U.S. 320, 328-329, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985), applies to a jury trial during on an ongoing state moratorium. Specifically, this court should consider whether a jury can weigh the full significance of imposing a death sentence when the state executive has made clear that no person will be executed, even when a death-row occupant has sued the governor in order to allow himself to be executed. This court hold that, a juror cannot constitutionally undertake the awesome responsibility of weighing life and death when there is no indication a death sentence will be carried out.

As this court has explained, "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the

defendant's death rests elsewhere." *Id*. at 328–29. In telling a sentencing jury that the ultimate responsibility for a defendant's fate rests with a higher authority,

> "the argument offers jurors a view of their role which might frequently be highly attractive. A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion. Given such a situation, *the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role*. Indeed, one can easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in."

Id. at 332-33 (internal citations omitted, emphasis added). The prosecutor's argument, thus, "sought to give the jury a view of its role in the capital sentencing procedure that was fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Id. at* 340 (quoting *Woodson v North Carolina*, 428 U.S. 280, 305, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976).

Here, the ongoing moratorium in Oregon had the same effect as the prosecutor's improper argument in *Caldwell*. Although the trial court informed

the jury that it should assume its verdict would be carried out, the fact of the moratorium eliminated the responsibility and gravity of the jury's decision. Every member of the jury was aware that Oregon's governor had imposed a moratorium on carrying out death sentences in this state because the trial court instructed them on its existence during *voir dire* even while advising them to discount its import. A jury is placed in an impossible position when it is told to decide whether a human being should die, but that it should disregard the fact that the chief executive of the state has announced that he will not carry out such a sentence. That creates, at the very least, the danger that the jury "may wish to 'send a message' of disapproval even though it is not convinced that death is the appropriate punishment." *Id*. at 347.

Compounding the risk that the jury would believe that it need not fully grapple with the impact of its decision is the fact that jurors may have been aware of The Oregon Supreme Court's decision in *Haugen* – in which it denied Haugen's attempts to reject the governor's reprieve. That decision received substantial media attention. *See, e.g.*, Helen Jung, Oregon Supreme Court denies death row inmate Gary Haugen's bid for execution, Oregonian, June 20, 2013, https://www.oregonlive.com/pacific-northwest-news/2013/06/oregon_supreme_court_decision.html. Appendix H. Thus, the jury should have been actually aware that Haugen's attempts to force his own

execution via litigation had failed. Under those circumstances, no cautionary instruction would suffice to avert the danger that the jury would find its moral calculation to be lessened.

In the alternative, if this Court believes that it is ever permissible to allow a jury to consider and impose a death sentence during a moratorium, it should clarify that a trial court must be as clear as possible in instructing a jury that it must conclude its sentence will be carried out. Here, the court refused to give defendant's requested jury instruction that would have told the jury that it must so conclude. Rather, it advised the members of the jury only that they "should assume" their sentence would be carried out. The word "should" denotes a preferable outcome, whereas "must" conveys a mandatory obligation.

Reasons to Grant the Second Question Presented

This court should grant this petition to clarify that a presumption of prejudice exists when an unquestionably biased courthouse employee fails to disclose pertinent factual information during *voir dire* and secures a position as an alternate juror despite concrete evidence that he or she harbors an emphatic desire to see a defendant put to death. The circumstances here are as unusual as they are extreme and merit this court's attention.

As this court has explained, "[i]n the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence

developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." *Turner v. State of La.*, 379 U.S. 466, 472-73, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965).

Juror misconduct subverts that process when a juror harbors secret bias, makes untruthful statements during *voir dire*, is exposed to extrajudicial materials, or engages in private communications with third parties. Here, an employee of the court, who was also serving as an alternate juror, possessed extrajudicial information about the case, and held a preconceived bias against defendant. The record shows that she made untruthful statements during *voir dire*, and that she had the opportunity to contaminate the other jurors with both her bias and the extrajudicial information. As detailed below, the state failed to meet its burden of proving that her misconduct was not prejudicial. For that reason, the trial court's denial of defendant's new trial motion deprived defendant of his right to a fair trial.

Here, the alternate juror, Moser, was unqualified to serve as an alternate juror, for two independent reasons. First, according to her email, she possessed extrajudicial information about defendant's case as a result of having read the search warrants. *See United States v. Keating*, 147 F. 3d 895, 900 (9th Cir. 1998) ("A defendant is entitled to a new trial when the jury obtains or uses

evidence that has not been introduced during trial if there is a reasonable possibility that the extrinsic material could have affected the verdict.") (internal quotation omitted).

Second, she was biased. In that regard, the courts have identified and distinguished three forms of juror bias: (1) bias demonstrated by a juror's responses on *voir dire*; (2) "actual bias," which stems from a pre-set disposition not to decide an issue impartially; and (3) implied (or presumptive) bias, which may exist in exceptional circumstances where, for example, a prospective juror has a relationship to the crime itself or to someone involved in a trial, "or has repeatedly lied about a material fact to get on the jury." *Fields v. Brown*, 503 F. 3d 755, 766 (9th. Cir. 2007) (emphasis added).

The Oregon Supreme Court determined that, despite grave misgivings about Moser's forthrightness and bias, her presence as an alternate juror did not require a new trial because the record does not establish that she improperly influenced the outcome of this case. *Taylor*, 364 Or. at 393. This court should grant the petition so that it may clarify that prejudice is presumed in an extreme case such as this.

CONCLUSION

For the forgoing reasons, petitioner respectfully asks this court to grant his petition for a writ of certiorari on both questions presented.

Dated this 29th day of July, 2019.

Respectfully submitted,
ERNEST G. LANNET
CHIEF DEFENDER
CRIMINAL APPELLATE SECTION
OFFICE OF PUBLIC DEFENSE SERVICES

Signed
By Daniel Bennett at 10:21 am, Jul 29, 2019

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APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF OREGON

STATE OF OREGON,
Respondent on Review,
v.
DAVID RAY TAYLOR,
Appellant on Review.
(CC C201216842) (SC S062310)

On automatic and direct review of judgment of conviction and sentence of death imposed by the Lane County Circuit Court following remand from this court.

Charles M. Zennaché, Judge.

Argued and submitted March 2, 2018.

Daniel Bennett, Deputy Public Defender, Office of Public Defense Services, Salem, argued the cause and filed the briefs for the petitioner on review. Also on the briefs was Ernest G. Lannet, Chief Deputy Defender.

Timothy Sylwester, Assistant Attorney General, Salem, argued the cause and filed the brief for the respondent on review. Also on the brief were Ellen Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Joanna L. Jenkins, Assistant Attorney General.

Before Walters, Chief Justice, and Balmer, Nakamoto, Flynn, Duncan, Nelson, and Garrett, Justices.*

FLYNN, J.

The judgment of conviction and sentence of death are affirmed.

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* Kistler, J., retired December 31, 2018, and did not participate in the decision of this case.

FLYNN, J.

A jury sentenced defendant to death after convicting him of aggravated murder, kidnapping, and other crimes against Celestino Gutierrez, as well as multiple offenses arising out of two bank robberies. In this automatic and direct review of his convictions and sentence of death,[1] defendant primarily raises arguments that are contrary to controlling precedent without offering persuasive reasons to depart from that precedent, or arguments that otherwise lack merit. However, some of defendant's assignments of error raise significant issues that this court has yet to expressly address, including: whether the state must expressly allege its theory for joining multiple offenses, whether the governor's moratorium on imposing the death penalty affects the jury's ability to constitutionally consider that punishment, and whether this court should presume that the undisclosed bias of an alternate juror impaired defendant's constitutional right to trial by an impartial jury. We write to address those assignments of error as well as several other significant challenges that defendant raises to the trial court's rulings. Ultimately, having fully considered all of defendant's arguments, we conclude that none of defendant's assignments of error identifies a basis for reversing the judgment, and we affirm.

I. THE CRIMES

The crimes at issue in this appeal include the robbery of a Siuslaw Bank branch in Creswell, Oregon; the robbery of a Siuslaw Bank branch in Mapleton, Oregon, two months later; and the kidnapping and murder of a young man in order to steal his car to use in committing the Mapleton bank robbery. In addition to defendant, the participants in these crimes were Toni Baker (defendant's friend), Mercedes (Sadie) Crabtree (Baker's 18-year-old niece), A.J. Nelson (Crabtree's longtime friend), and Wretha Breckenridge (defendant's girlfriend). Both Breckenridge and Crabtree testified in detail about the crimes at

[1] ORS 138.012(1) (2013) provided, in part: "The judgment of conviction and sentence of death entered under ORS 163.150 (1)(f) is subject to automatic and direct review by the Supreme Court." The legislative counsel renumbered the direct review statute in 2017, and those provisions are now set out at ORS 138.052.

defendant's trial—Breckenridge after being given immunity and Crabtree as a condition of her agreement to plead guilty to several offenses, including murder. The facts described below are supported by the testimony of those two witnesses, as well as by other key evidence at trial.

A. *The June 8 Creswell Bank Robbery*

Defendant and Breckenridge, who both lived in Eugene, decided to rob a Siuslaw Bank branch in Creswell, a small town in Lane County. Defendant enlisted Baker and Crabtree to help with the robbery, and the four met at defendant's home in Eugene to discuss the robbery plan. The plan involved defendant using a bicycle to ride up to and away from the bank while Crabtree waited nearby in a get-away vehicle. Defendant planned to use a bicycle that he had spray painted and stored in Breckenridge's garage.

1. *The robbery*

On the morning of June 8, according to the plan, Crabtree drove defendant and the bicycle to an alley near the bank. Crabtree drove a red Dodge Caravan registered to Breckenridge's mother and waited in the van while defendant rode the bicycle to the bank to commit the robbery.

Defendant carried two guns into the bank—one a small, pink revolver that belonged to Breckenridge, and the other a larger "western style" .44 magnum revolver with a wood grip. He ordered bank employees and customers to get down on the ground. Several of the employees in the bank activated alarms, which triggered an audio recording, and surveillance video also recorded the robbery. Defendant pointed a gun at the bank employees and ordered them to give him the money from their tills. He also demanded their wallets and purses. Defendant ordered everyone in the bank to remain on the ground while he fled on the bicycle with the stolen money. When he reached the alley where Crabtree was waiting, defendant abandoned the bicycle and rode away with Crabtree in the van.

2. *The investigation*

Lane County law enforcement officers identified a red Caravan as likely involved in the robbery, and they

publicized that information. They began coordinating with an FBI bank robbery task force, which eventually connected defendant to the Creswell bank robbery, to Breckenridge, to the red Caravan registered to Breckenridge's mother, and to a silver Dodge Intrepid registered to Breckenridge. The task force used that information to obtain a warrant to place GPS tracking devices on both vehicles in late July, and the devices allowed officers to track the movements of those vehicles during the series of crimes that followed.

B. *The August 3 Crimes*

Shortly after the Creswell robbery, defendant broke both of his heels and was incapacitated until late July. When defendant was finally able to walk without crutches, he and Breckenridge drove around in Breckenridge's Intrepid looking for another bank to rob. This time they settled on a Siuslaw Bank branch located in Mapleton, Oregon, another town in Lane County. But two challenges required defendant to form a different plan for this robbery. First, defendant's injuries left him unable to ride a bike and in need of assistance inside the bank. Second, defendant knew that law enforcement officers had publicized a red Caravan's link to the Creswell robbery, so defendant did not want to use the Caravan.

1. *Planning the Mapleton robbery*

Defendant again recruited Crabtree to help with the bank robbery and arranged for her to bring from Portland an older Toyota that he wanted to use for the robbery. Crabtree also brought her friend, Nelson, to assist defendant inside the bank. The plan for the Mapleton robbery was for defendant and Nelson to drive the Toyota to the bank and then abandon it after the robbery at a location where Crabtree would pick them up in the Intrepid.

On the day planned for the robbery, however, the Toyota broke down on the way to the bank, and defendant abandoned it. He then decided to steal a car and kill the owner so that the owner could not report the theft before defendant had the opportunity to use the car for the robbery. Defendant told Nelson and Crabtree to wait outside a bar

near his house and watch for a single man to emerge. He explained that Nelson should stage a fight with Crabtree and then drive away alone. Defendant directed Crabtree to then approach the man and ask for a ride home, to lure him to defendant's house.

2. *The kidnapping and murder*[2]

As directed, Nelson and Crabtree waited outside of the bar to carry out defendant's plan. Around midnight, Gutierrez left the bar alone. Crabtree and Nelson staged their fight, Crabtree convinced Gutierrez to give her a ride, and she directed him to defendant's house. Gutierrez went inside the house to use the bathroom and, when he emerged, defendant and Nelson were waiting for him. Defendant was carrying an assault-type rifle and ordered Gutierrez to get to his knees. Defendant directed Nelson to bind Gutierrez's feet and arms and then directed him to stab and choke Gutierrez. Nelson did so, but Gutierrez remained conscious. Eventually, defendant used a chain to strangle Gutierrez until he died.

3. *The Mapleton bank robbery*

Several hours later, at about 7:00 a.m., defendant drove to Breckenridge's house and told her that they had killed someone and gotten a car, and that she should wait for him to return with the others. Defendant, Crabtree, and Nelson then carried out the Mapleton bank robbery according to their original plan but using Gutierrez's car in place of the abandoned Toyota.

Defendant and Nelson drove to the Mapleton bank in Gutierrez's car. When they entered the bank, defendant was carrying a long revolver with a wood grip—the .44 magnum—and Nelson was carrying the assault-type rifle. They yelled for the employees to get on the ground, threatened to kill anyone who did not comply, and demanded the employees' wallets. After taking money from the tills, they

[2] Because we conclude that defendant has raised no meritorious challenge to the evidence supporting his convictions or to the evidence that permitted the sentence of death, we provide only a cursory description of the horrific crimes committed against Gutierrez and the extensive evidence of defendant's responsibility for those crimes.

ordered everyone in the bank to remain on the ground and fled. As would later prove significant, Nelson dropped a bullet, which a teller noticed and collected for police, and some of the money that the tellers handed over included "bait bills"—bills that had been photocopied and had their serial numbers recorded.

Defendant and Nelson drove from the bank to a location at which Crabtree had arranged to meet them with the Intrepid. Defendant moved the robbery proceeds into the Intrepid and abandoned Gutierrez's car. The three then drove to Breckenridge's house in the Intrepid, where they divided the money, before returning to defendant's house to dispose of the murder evidence.

C. *The Investigation Ties Defendant to the Crimes*

Five days later, law enforcement officers arrested defendant on a warrant for an unrelated crime. At the time of his arrest, defendant was carrying the .44 magnum wood-grip revolver that he had used in both bank robberies. Because defendant had become a primary suspect in the Mapleton robbery and the murder by that time, he was questioned about those crimes.

Shortly after defendant's arrest, a detective also questioned Breckenridge at her home. Breckenridge provided information about both bank robberies, as well as information about Gutierrez's murder. In a search of Breckenridge's home, officers found the pink handgun that defendant had used in the Creswell robbery. They also found a wallet with defendant's identification and an envelope containing three bundles of cash, including a $20 bill that was a "bait bill" from the Mapleton bank robbery.

Searches of locations associated with Baker, Crabtree, and Nelson turned up the assault rifle that defendant had used during the murder and a backpack containing other weapons used during that crime. Forensic examination showed that the unfired bullet collected at the Mapleton robbery had been cycled through the assault rifle and that a filet knife had DNA traces consistent with Gutierrez's profile. In addition, Gutierrez's DNA was found at locations inside defendant's house.

II. PROCEDURAL BACKGROUND

The state charged defendant in a single indictment with 10 counts relating to the Creswell bank robbery, seven counts relating to the kidnapping and death of Gutierrez, 12 counts relating to the Mapleton bank robbery, and two counts of felon in possession of a firearm—one for the date of the Creswell robbery and one for the date of the other crimes. The trial began with a guilt phase, during which the state presented evidence of the crimes described above to a panel of twelve jurors and several alternate jurors. The jury found defendant guilty of all the offenses charged, except that, on one of the four aggravated murder counts, the jury found defendant guilty of the lesser-included crime of intentional murder.

The same jury heard evidence during the three days of the penalty phase. At the end of the penalty phase, the jury unanimously answered "yes" to the statutory questions that determine whether the trial court will impose a death sentence, and the trial court entered a judgment imposing that sentence. *See* ORS 163.150 (describing sentencing process for a defendant found to be guilty of aggravated murder). Among other evidence presented during the penalty phase, the jury learned that defendant had been convicted for abducting and murdering a woman in 1977 and then disposing of her corpse in a rural location; was incarcerated for those crimes until 2004; and then, in 2009, assaulted a woman, choked her, broke one of her ribs, and threatened to kill her. He had been convicted of fourth-degree assault and strangulation based on that incident.

After the jury returned its verdicts on both the guilt and penalty questions, the court held a sentencing hearing and entered the judgment. That judgment is now before this court for automatic and direct review. ORS 138.052.

III. ANALYSIS

On direct review to this court, defendant raises 131 assignments of error. We have reviewed each assignment of error and, as to each, conclude either that the court did not err or that the claimed error does not supply a basis for reversing the judgment. We write to address assignments of

error that fall into four categories: (1) pre-trial challenges to the indictment; (2) challenges to guilt-phase rulings of the trial; (3) constitutional challenges to penalty-phase rulings; and (4) a challenge to the trial court's post-judgment ruling denying a mistrial. We reject the remaining assignments of error without written discussion because the issues have already been decided adversely to defendant's position or otherwise lack merit and because further discussion of those issues will not benefit the public, the bench, or the bar.

A. *Pre-trial Challenges to the Indictment*[3]

Prior to trial, defendant raised several challenges to the indictment based on the limits that ORS 132.560(1) places on the state's ability to join more than one offense in a single charging instrument. That statute provides:

> "(1) A charging instrument must charge but one offense, and in one form only, except that:
>
> "(a) Where the offense may be committed by the use of different means, the charging instrument may allege the means in the alternative.
>
> "(b) Two or more offenses may be charged in the same charging instrument in a separate count for each offense if the offenses charged are alleged to have been committed by the same person or persons and are:
>
> "(A) Of the same or similar character;

[3] With respect to defendant's challenges to two other significant pretrial rulings that we do not address—(1) the court's denial of defendant's motion to suppress evidence as obtained in violation of his right to counsel during a custodial interrogation and (2) the trial judge's refusal to recuse himself because of an asserted appearance of partiality arising from social contact with counsel for a key witness for the state—we conclude that the issues are fully resolved by prior decisions. *See State v. Kell*, 303 Or 89, 99-100, 734 P2d 334 (1987) (no violation of defendant's right against self-incrimination when, "there was no interrogation by the police following defendant's first statement of interest in an attorney," but the "defendant just kept on talking" until he clarified that he was willing to answer some questions but not others); *State v. Langley*, 363 Or 482, 507, 424 P3d 688 (2018) (emphasizing that the only circumstances in which the United States Supreme Court has held that due process requires recusal without actual bias are circumstances in which "'the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable,'" and concluding that circumstances the defendant identified as creating an "appearance" of partiality were not "even remotely analogous" (quoting *Caperton v. A.T. Massey Coal Co.*, 556 US 868, 877, 129 S Ct 2252, 173 L Ed2d 1208 (2009)).

> "(B) Based on the same act or transaction; or
>
> "(C) Based on two or more acts or transactions connected together or constituting parts of a common scheme or plan."

Defendant contended that the indictment included multiple offenses that were not properly joined and demurred to the indictment on that basis.[4] Alternatively, defendant moved to sever some of the counts, either on the basis of improper joinder or on the basis of substantial prejudice. The trial court refused to grant the demurrer or to sever any counts, and defendant assigns errors to those rulings. We conclude that neither ruling was error.

1. *Defendant's challenge to proper joinder*

Defendant's first challenge to the indictment implicates the exception in section (1)(b) of ORS 132.560, which this court recently construed in *State v. Warren*, 364 Or 105, 430 P3d 1036 (2018). Defendant contends, as he did in the trial court, that the indictment improperly joined charges arising out of the June bank robbery incident with charges arising out of the August bank robbery, kidnapping and murder. As this court explained in *Warren*, there are two requirements for the state to charge multiple offenses in the same indictment: the state's basis for joining the offenses must be "possible, given the offenses and facts alleged," and the state's basis for joining the offenses must be alleged. 364 Or at 122. We conclude that the indictment satisfied both requirements for proper joinder.

In the trial court, defendant argued that the various offenses were not related in a way that makes joinder possible. In response, the state argued that the charges could be joined under ORS 132.560(1)(b)(A) and (C), because the two bank robberies were "of the same or similar character" and because the offenses against Gutierrez were part of a "common scheme or plan" that involved committing the

[4] In demurring to the indictment, defendant also argued that some of the counts improperly charged as a single offense conduct that actually amounts to multiple offenses of kidnapping. The trial court correctly concluded that the challenged counts merely alleged alternative means of committing a single offense of kidnapping, as permitted by ORS 132.560(1)(a).

robberies. The trial court agreed. As the court explained in its written order:

> "In the case at bar, the state's theory (supported by evidence offered at the hearing on the motion to suppress) is that the murder of Celestino Gutierrez was committed to get a vehicle to use to carry out a bank robbery and that the bank robbery was one of several committed by [defendant]. *** [T]he robberies and the murder are both logically relate[d] and have large areas of overlapping proof."

Under the circumstances of this case, we agree with the trial court that it was possible for the state to join all of the charged offenses. Indeed, on appeal, defendant does not seriously dispute that the offenses are related in ways that make joinder possible under ORS 132.560(1)(b)(A) and (C). The charges related to the Creswell bank robbery could be joined because those offenses were of "similar character"—if not the "same character" as the Mapleton bank robbery charges. Both were robberies of a Siuslaw Bank branch in Lane County and both were committed by defendant. Although there were some differences, in both robberies defendant demanded that the employees turn over wallets and purses in addition to the money in their tills; in both robberies he threatened the tellers with the gun that he was carrying at the time of his arrest; and in both robberies Crabtree served as the get-away driver, allowing defendant to abandon the transportation that he had used to approach the bank. The criminal acts against Gutierrez could be joined because they were part of a "common scheme or plan" to commit the Mapleton bank robbery—to steal a car to use to commit the robbery and to kill the owner so that the theft would not be discovered before the robbery. And finally, the charges of unlawful possession of a firearm could be joined because the firearms that defendant unlawfully possessed were the firearms that he used during each robbery, making his unlawful possession of the firearms part of the "common scheme or plan" to commit the robberies.

We also conclude that the indictment sufficiently alleges the bases for joining the offenses—the second joinder requirement that we identified in *Warren*. 364 Or at 122. Defendant emphasizes that the indictment does not

expressly allege that any of the offenses are "[o]f the same or similar character," "[b]ased on the same act or transaction," or "parts of a common scheme or plan." *See* ORS 132.560 (1)(b). The state responds, however, that the factual allegations of the indictment sufficiently identify the bases for joinder, and we agree.

This court has held that it is "sufficient for the state to allege the basis for joinder by using the language of the joinder statute." *Warren*, 364 Or at 120 (citing *State v. Huennekens*, 245 Or 150, 154, 420 P2d 384 (1966)). But that does not mean that it is *necessary* for the state to use the language of the joinder statute. As this court explained in *Warren*, the Court of Appeals has held that an indictment can allege the basis for joinder either "'in the language of the joinder statute or by alleging facts sufficient to establish compliance with the joinder statute.'" *Id.* at 109 (quoting *State v. Poston*, 277 Or App 137, 145, 370 P3d 904 (2016) (*Poston I*), *adh'd to on recons*, 285 Or App 750, 399 P3d 488 (*Poston II*), *rev den*, 361 Or 886 (2017)).

Although we did not expressly approve of that rule in *Warren*, we do so now. As we have emphasized, the purposes of requiring the state to allege the basis for joinder are to eliminate the need for a defendant "to guess the state's basis for joinder" and to make it possible for the trial court "to determine, from the face of an indictment, whether the indictment complies with the joinder statute[.]" *Warren*, 364 Or at 122, 114. Both purposes are served when the indictment alleges facts that allow the defendant to understand the state's basis for joining the offenses and allow the court to determine whether that joinder is proper. Indeed, because determining proper joinder ultimately requires the court to look beyond a bare allegation in the words of the joinder statute, alleging the factual basis for joinder may better serve the purposes that this court identified in *Warren*. *See State v. Thompson*, 328 Or 248, 257, 971 P2d 879 (1999) (whether the facts of a case satisfy the statutory test for joinder is a question of law for the court); *State v. Fitzgerald*, 267 Or 266, 273, 516 P2d 1280 (1973) (although indictment alleged that joined offenses were part of the "same act or transaction," when it later became apparent that the evidence did not support the allegation that charges were part of the

same act or transaction, trial court was required to address the improper joinder).

Here, although the indictment did not track the statutory language, it includes factual allegations and cross-references among the charges that are sufficient to establish compliance with the joinder statute. First, the allegations of the indictment connect all of defendant's August crimes to each other as part of a common scheme or plan. The indictment alleges that "on or about August 3" defendant caused the death of Gutierrez "in the course of and in the furtherance of," and "in an effort to conceal the commission of or identity of a perpetrator of," the "crimes of Kidnapping in the First Degree as alleged in Count 12 of this Indictment [kidnapping of Gutierrez] and Robbery in the First Degree as alleged in Count 13 of this Indictment [robbery of Gutierrez.]" It also alleged that defendant caused the death of Gutierrez "in an effort to conceal" the identity of "a perpetrator of the armed robbery of Siuslaw Bank in Mapleton Oregon on August 3, 2012[,] as alleged in Counts 19 through 30 []." The referenced Mapleton robbery counts—counts 19 through 30—allege all of the other robbery offenses that defendant is alleged to have committed in August. Finally, the indictment charges defendant with unlawfully possessing a firearm on the same day that it also alleges he used a firearm to commit the murder and the Mapleton bank robbery. Those allegations permitted both defendant and the trial court to determine that the state had joined the August 3 bank robbery, murder and kidnapping offenses on the basis that the acts were "parts of a common scheme or plan."

In addition, the allegations of the indictment permitted both the defendant and the trial court to determine that the June 8 robbery offenses had been joined with the August 3 robbery offense on the basis of their "similar character." As explained above, the indictment alleges numerous counts of robbery committed "on or about August 3," all of which it identifies as allegations of "the armed robbery of Siuslaw Bank in Mapleton Oregon on August 3." Those counts include allegations that defendant committed the crime of first-degree robbery in Lane County against five different victims,

> "while in the course of committing or attempting to commit theft with the intent of compelling [the victim] or another person to deliver the property and engage in conduct which might aid in the commission of the theft and with the intent of preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking and being armed with a deadly weapon a firearm use[d] or threaten[ed] the immediate use of physical force."[5]

The indictment also alleges that defendant committed the offense of second-degree robbery against each victim of the August 3 Lane County bank robbery by "us[ing] or threaten[ing] the immediate use of physical force upon [the victim] and represent[ing] by word or conduct that defendant was armed with what purported to be a deadly weapon."[6]

In nearly identical language, the indictment alleges that defendant also committed first-degree robbery and second-degree robbery against multiple victims on June 8 in Lane County. In other words, the indictment alleges that, on two different dates, defendant committed similar acts, in the same county, with the same intent, and under the same circumstance of, at a minimum, representing that he was armed with a firearm. Thus, the indictment, in effect, alleges that the June 8 and August 3 robbery offenses are "of the same or similar character."[7] Defendant was not entitled to a demurrer on the ground that the state had failed to allege the basis for joinder.

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[5] Most of the alleged facts are elements of the offense of third-degree robbery. ORS 164.395. A person commits the crime of robbery in the first degree by committing third degree robbery with one additional circumstance, including being "armed with a deadly weapon." ORS 164.415.

[6] A person commits robbery in the second degree by committing third-degree robbery with one additional circumstance, including that the person "[r]epresents by word or conduct that the person is armed with what purports to be a dangerous or deadly weapon[.]" ORS 164.405.

[7] We do not suggest that all crimes of robbery are, necessarily, of the same or similar character. But, at the demurrer stage, the question is whether the indictment sufficiently alleges the basis for joinder under ORS 132.560(1)(b). If the indictment is sufficient, a defendant who believes that joinder is improper is free to move to sever and seek a determination of that issue. *See Warren*, 364 Or at 122 (explaining that proper joinder can be challenged through a demurrer to the indictment or through a motion to sever or a motion to elect if it appears that the evidence is insufficient to support joinder).

2. *Defendant's challenge to joinder based on substantial prejudice*

Defendant argued below that, if the charges were properly joined, the court should, nevertheless, sever the charges on the basis of substantial prejudice. On appeal, he assigns error to the trial court's denial of that motion.[8] We conclude that the trial court did not err.

When multiple charges have been properly joined under ORS 132.560(1), either party may move to sever on the basis that the party will be "substantially prejudiced" by a joint trial. ORS 132.560(3). Defendant's theory of substantial prejudice is that the joint trial deprived him "of the protection of" OEC 404(3) (evidence of character not admissible to prove propensity). In other words, the "substantial prejudice" to which defendant points is the admission of evidence that, he contends, would not have been admitted had the charges been tried separately. We review for errors of law the trial court's determination that the joinder will not result in substantial prejudice. *State v. Miller,* 327 Or 622, 629, 969 P2d 1006 (1998).

The trial court rejected defendant's premise that evidence of the August crimes would have been inadmissible in a separate trial of the June, Creswell robbery counts. The court reasoned:

> "both bank robberies were conducted in very similar manners, the murder of [Gutierrez] happened in furtherance of the Mapleton bank robbery, and the state alleges Mr. Taylor committed all the crimes. Further, the facts and evidence from the Creswell bank robbery cannot be fully separated from the Mapleton bank robbery because the facts and

[8] We reject without detailed discussion defendant's argument that the joinder caused his trial to be fundamentally unfair, in violation of his rights under the Due Process Clause of the United States Constitution. Defendant identifies one decision in which the Ninth Circuit held that joinder of a weaker murder case with a stronger murder case rose to the level of a due process violation as to the weaker case. *Bean v. Calderon*, 163 F3d 1073, 1083 (9th Cir 1998). But the Ninth Circuit has since emphasized that the circumstances of *Bean* were unique and held that, "[i]n order to demonstrate actual unfairness, * * * [the defendant] must show that the jury was actually inflamed." *Park v. California*, 202 F3d 1146, 1150 (9th Cir 2000). Defendant has offered no basis to conclude that a trial on properly joined charges could be fundamentally unfair when the joinder does not cause substantial prejudice.

> evidence of both cases are what ultimately led law enforcement to identify Mr. Taylor as a suspect."

Although defendant challenges the court's conclusion that evidence of the August crimes would have been admissible in a trial solely on the June robbery charges, he identifies no prejudice apart from the generic concern that admitting other-acts evidence creates a danger "that the jurors will convict a defendant based, not upon the evidence, but upon their perception of the defendant's bad character," regardless of the court's ability to caution the jury against such a misuse of the evidence. This court rejected essentially the same prejudice argument as too general in *State v. Barone*, 329 Or 210, 217, 986 P2d 5 (1999). There, the defendant argued that it was "obvious" that the joinder of charges for separate murders was "highly inflammatory" and allowed the state to make the defendant look guilty because of other murders, rather than being "required to prove each case on its merits." *Id*. This court emphasized that "[s]uch general arguments, however, could be made in any case in which charges are joined, and we concluded that "[a]bsent an argument of prejudice related to the specific facts of this case, *** defendant has failed to demonstrate that he was prejudiced within the meaning of ORS 132.560(3)." *Id.* We reach the same conclusion here.

B. *Challenges to Guilt-Phase Rulings*

Defendant's 131 assignments of error primarily challenge rulings that affected the guilt phase of his trial, including evidentiary rulings, rulings on jury selection, rulings on jury instructions, and rulings on the sufficiency of evidence of guilt. We write to address two of the issues that those assignments of error raise: defendant's challenge to the court allowing the state to "death qualify" jurors, and defendant's challenge to the court's refusal to give a jury concurrence instruction on the robbery charges.

1. *Challenges to "death qualifying" the jury*

With respect to jury selection, defendant contends that the trial court violated his constitutional right to an unbiased and impartial jury through a series of rulings that had the effect of "death qualifying" the jury—excluding

from participation in the guilt phase of the case jurors who were unwilling to consider imposing the death penalty if the case reached that stage. Although some states have limited the practice, the federal "Constitution does not prohibit the States from 'death qualifying' juries in capital cases." *Lockhart v. McCree*, 476 US 162, 173, 106 S Ct 1758, 90 L Ed 2d 137 (1986). This court long ago reached the same conclusion under the Oregon Constitution. *State v. Leland*, 190 Or 598, 624-25, 227 P2d 785 (1951), *aff'd sub nom Leland v. Oregon,* 343 US 790, 72 S Ct 1002, 96 L Ed 1302 (1952) (rejecting argument that Article 1, section 11, was violated by former statute, which prevented jurors who would be categorically opposed to imposing the death penalty from participating in the determination of guilt).[9] This court reasoned in *Leland* that the defendant's challenge to death-qualifying the jury rested "upon the false premise that a person who believes in capital punishment, or at least one who has no conscientious scruples against it, is apt to be unfair and vindictive." *Id.* at 625. Although defendant does not ask this court to overturn *Leland*, and could not ask us to overturn *Lockhart*, he argues that studies conducted more recently have "confirmed" that "death qualification produces juries uncommonly willing to find guilt, and uncommonly willing to impose the death penalty." However, defendant did not offer those studies in the trial court or otherwise create a record to establish the factual premise of his argument. As presented, we are unwilling to reconsider our precedent on the issue of death-qualified juries.

2. *Challenges to the court's failure to give a jury concurrence instruction*

We next write to address defendant's challenge to the court's failure to instruct the jury on the need to concur on the way in which defendant committed the 23 counts of robbery. Defendant argues that he was entitled to have

[9] In a decision that this court appears to have decided only under the federal constitution, the court emphasized that, "although a trial court may not exclude a prospective juror for cause solely because he has general objections to the death penalty, *** a court may exclude a prospective juror whose views on the death penalty would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *State v. Nefstad*, 309 Or 523, 538, 789 P2d 1326 (1990) (quoting *Wainwright v. Witt*, 469 US 412, 424, 105 S Ct 844, 83 L Ed 2d 841 (1985)).

the jury instructed that "ten or more must agree" on the theory of guilt on the robbery charges, because the legislature intended "to enact two distinct ways of committing" the underlying crime of robbery in the third degree, ORS 164.395(1). *See State v. Boots*, 308 Or 371, 379, 381, 780 P2d 725 (1989) (identifying "serious constitutional doubts" when jury instructions permitted a conviction for aggravated murder even though "none of the alternative ways has been proved to the satisfaction of all jurors"); *State v. Pipkin*, 354 Or 513, 522, 316 P3d 255 (2013) (explaining that whether jurors must agree on particular theory of guilt depends on whether "the legislature intended to provide two ways of proving a single element"). We highlight defendant's argument regarding the effect of ORS 164.395(1) because it presents a question that this court has yet to resolve. But we leave that resolution for another case because, on this record, the failure to give a concurrence instruction would not provide a basis for reversing the judgment. *See* Or Const, Art VII (Amended), § 3 (specifying that a judgment shall be affirmed on appeal, "notwithstanding any error committed during the trial," if the court concludes "that the judgment of the court appealed from was such as should have been rendered in the case"); *State v. Davis*, 336 Or 19, 32, 77 P3d 1111 (2003) (describing the constitutional test as consisting of "a single inquiry: Is there little likelihood that the particular error affected the verdict?").[10]

When applying the constitutional test for affirmance despite error in the context of a trial court's failure to give a jury instruction—including a concurrence jury instruction—"the court considers the instructions as a whole and in the context of the evidence and record at trial, including the parties' theories of the case with respect to the various charges and defenses at issue." *State v. Ashkins*, 357 Or 642, 660, 357 P3d 490 (2015). In *Ashkins*, the defendant was charged with sex offenses that were alleged as a single occurrence, but there was evidence of multiple, separate

[10] The correct focus of the constitutional inquiry "is on the possible influence of the error on the verdict rendered, not whether this court, sitting as factfinder, would regard the evidence of guilt as substantial and compelling." *Davis*, 336 Or at 32. The expression "harmless" error is a shorthand reference to the constitutional standard, although it is not "an entirely accurate descriptor of the legal analysis that the constitution requires." *Id.* at 27.

occurrences that could have supplied a factual basis for the jury to find the defendant guilty. *Id.* at 643. Under those circumstances, this court held, the trial court erred in failing to instruct the jury that it needed to "agree on which factual occurrence constituted the offense." *Id.* at 659 (internal quotation marks omitted). We nevertheless concluded "that there is little likelihood that, if it had been given the concurrence instruction that defendant requested, the jury would have reached a different result" and affirmed the judgment as directed by Article VII (Amended), section 3. *Id.* at 664.

In explaining why there was no basis to reverse the judgment, this court emphasized that the defendant's theory of defense consisted of denying that any of the alleged sexual acts occurred and questioning the victim's credibility as a whole, with no challenge to the victim's description of any particular occurrence, and "no alibi defense, nor any defense that [the victim] had misidentified the perpetrator," for any of the described occurrences. *Id.* at 662. Thus, "there was nothing to indicate that, in evaluating the evidence to determine if those offenses had been committed, the jury would have reached one conclusion as to some of the occurrences but a different conclusion as to others." *Id.* at 662-63.

The record here leads us to the same conclusion. There is nothing in the record from which to conclude that, in finding defendant guilty of the robberies, some jurors could have found that defendant intended to overcome the victims' "resistance to the taking of the property" without also finding that he intended to compel the victims "to deliver the property," or *vice versa*. Defendant did not challenge any of the evidence about his actions or intent in committing the robberies. Rather, his theory of defense during the guilt phase—as counsel emphasized in opening statement and closing argument—consisted of challenging the evidence that he "personally and intentionally" caused Gutierrez's death because the jury could not rely on Crabtree or Breckenridge as a credible source of "what went on inside that residence." Indeed, defense counsel told the jury in opening statement that defendant "admitted these bank robberies and at the end of the trial, you're going to convict him of the bank robberies." Defense counsel reiterated in closing argument that "[defendant] committed the

bank robberies" and also urged the jury to find defendant guilty of the lesser-included offense of felony murder by finding that Gutierrez "lost his life as a result of this robbery of his vehicle and the commission of the other robberies."

The defense's narrow focus on the circumstances of the murder is not surprising, given the consequences for defendant if convicted of aggravated murder. But the defense's approach means that, on this record, there is no basis to suspect that the jury's finding of guilt on the robbery counts was affected by the court's refusal to give a concurrence instruction. Accordingly, we decline to resolve defendant's claim that he was entitled to a jury concurrence instruction on the robbery counts because the asserted error would not supply a basis for this court to reverse the judgment.

C. *Challenges to Penalty-Phase Rulings*

Defendant raises 11 assignments of error that challenge Oregon's death penalty or the jury's consideration of the death penalty in this case. Most present facial constitutional challenges that this court previously has rejected, and we reject those assignments of error without written discussion.[11] We write only to address two constitutional challenges that this court has not yet expressly addressed: (1) defendant's argument that Oregon unconstitutionally imposes the death penalty based on a defendant's propensity to engage in violent conduct; and (2) defendant's challenge to the imposition of the death penalty while the Governor's moratorium on that penalty is in effect. As explained below, we reject those challenges as well.

1. *Defendant's challenge to the second death penalty question*

Oregon's death penalty statute, ORS 163.150, specifies that the trial court must conduct "a separate sentencing

[11] One of defendant's assignments of error challenges Oregon's method of execution by lethal injection, rather than the sentence of death itself. (Assignment of Error # 129). His argument is indistinguishable from an argument that this court has held "is not ripe for consideration by this court, nor will it be until all direct and collateral review proceedings have concluded and a death warrant has issued." *State v. Washington*, 355 Or 612, 662, 330 P3d 596 (2014).

proceeding" after a jury has found a defendant guilty of aggravated murder. ORS 163.150(1)(a). At the conclusion of that sentencing proceeding, the trial court must instruct the jury to answer a series of questions that determine whether the defendant will be sentenced to death:

> "(b) Upon the conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:
>
> "(A) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that death of the deceased or another would result;
>
> "(B) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;
>
> "(C) If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased; and
>
> "(D) Whether the defendant should receive a death sentence."

ORS 163.150(1)(b). If the jury unanimously answers "yes" to all of the questions it considers, then the defendant is sentenced to death. ORS 163.150(1)(e), (f). Otherwise, the defendant is sentenced to life imprisonment. ORS 163.150(2)(a).

Defendant argues that, by imposing a death sentence only if "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society"—the second question—Oregon effectively punishes a defendant based on his or her propensity to engage in violent conduct. According to defendant, punishing a defendant more severely on that basis violates the Eighth Amendment prohibition on punishing a person purely on the basis of status.[12] We disagree.

The Supreme Court has held that punishment purely on the basis of status "inflicts a cruel and unusual

[12] The Eighth Amendment prohibition against "cruel and unusual punishments" is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Baze v. Rees*, 553 US 35, 47, 128 S Ct 1520, 170 L Ed 2d 420 (2008).

punishment in violation of the Fourteenth Amendment." *Robinson v. California*, 370 US 660, 667, 82 S Ct 1417, 1420–21, 8 L Ed 2d 758 (1962) (invalidating as "cruel and unusual punishment" a state law that punished the "'status' of narcotic addiction"). In *Robinson*, the Court emphasized that narcotic addiction is an illness and held "that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment[.]" *Id.* at 667.

Defendant argues that *Robinson* prohibits states from punishing the "mere propensity to commit an offense" and that it is equally impermissible to "punish one defendant more severely than another based on a mere propensity." However, the Eighth Amendment does not prohibit punishment on the basis that a person's status has lead him to commit "some act, [or] engage[] in some behavior, which society has an interest in preventing." *Powell v. State of Tex.*, 392 US 514, 533, 88 S Ct 2145, 20 L Ed 2d 1254 (1968) (rejecting argument that law punishing the act of being drunk in a public place on a specific occasion was punishment for the status of being a chronic alcoholic). Although the Supreme Court has not considered the precise challenge that defendant now raises to the second question, the Court expressly "has approved the jury's consideration of future dangerousness during the penalty phase of a capital trial, recognizing that a defendant's future dangerousness bears on all sentencing determinations made in our criminal justice system." *Simmons v. South Carolina*, 512 US 154, 162, 114 S Ct 2187, 129 L Ed 2d 133 (1994). We are not free to disregard that decision, and defendant offers no separate argument under the Oregon Constitution.

2. *Defendant's challenge to allowing the jury to vote for the death penalty during the Governor's moratorium on carrying out that penalty*

Defendant next argues that a jury cannot constitutionally vote to impose the death penalty during a time when the Governor has imposed a moratorium on the carrying out of such sentences. Defendant's challenge depends on *Caldwell v. Mississippi*, in which the United States Supreme

Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 US 320, 328-29, 105 S Ct 2633, 86 L Ed 2d 231 (1985). However, the trial court here instructed the jury in a way that eliminated the constitutional concern at issue in *Caldwell*.

The prosecutor in *Caldwell* argued to the jury that the defense "would have you believe that you're going to kill this man and they know—they know that your decision is not the final decision. *** Your job is reviewable." *Id.* at 325. The Supreme Court reversed the sentence of death, explaining that "the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." *Id.* at 333.

Unlike the jury in *Caldwell*, however, defendant's jury was expressly instructed *not* to minimize the importance of its death penalty determination. Before the jury heard any evidence, the court gave preliminary instructions, including an instruction that expressly cautioned the jury regarding the moratorium that Oregon's then-governor had imposed on carrying out the death penalty. *See generally* Helen Jung, *Gov. John Kitzhaber stops executions in Oregon, calls system "compromised and inequitable,"* The Oregonian (Nov 22, 2011), https://www.oregonlive.com/pacific-northwest-news/index.ssf/2011/11/gov_john_kitzhaber_stops_all_e.html (accessed Jan 28, 2019).[13] The court instructed the jury that, "[i]n legal terms," the Governor's moratorium granted "temporary reprieves of existing death sentences" but that the jury "should assume that death sentences handed down while he is Governor will ultimately be carried out." That instruction corrected any impression that the jurors may have had about the meaning of the moratorium and

[13] Oregon's current governor, Kate Brown, announced upon taking office in 2015 that she plans to continue the moratorium. *See generally* Tony Hernandez, *Brown to maintain death penalty moratorium*, The Oregonian (Oct 17, 2016), https://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/10/brown_to_maintain_death_penalt.html (accessed Jan 28, 2019).

reinforced that, if they voted to sentence defendant to death, that sentence would "ultimately be carried out."

D. *Challenge to Post-Judgment Ruling Denying a Mistrial*

Finally, we address defendant's challenge to the trial court's refusal to grant a mistrial on the basis of an alternate juror's undisclosed bias. After the trial court entered judgment, it became apparent that one of the alternate jurors—contrary to her answers during jury selection—had seen court-file information about defendant's crimes and had formed an opinion that defendant "needs to die." We agree with defendant that the individual harbored the kind of undisclosed bias that raises grave concerns about a defendant's right to a fair trial. In this case, however, we are persuaded that the alternate juror's bias had no effect on the jurors who actually determined defendant's guilt and penalty and, thus, conclude that defendant is not entitled to a new trial.

There is no real dispute about the facts on which defendant bases his claim that he is entitled to a new trial. While the case was pending in this court on automatic and direct review, the trial court notified the parties that it had received a copy of an email messages that one of the alternate jurors had written before jury selection, in which she had described inside knowledge about details of the crimes and an opinion that defendant "needs to die." The individual, who was in a position to have extra-judicial knowledge of defendant's case, sent the email after learning that she had been summoned for jury service in defendant's murder trial. In it, she wrote:

> "He is the guy who (with the 2 younger black kids from Portland) killed a boy (and chopped him up in pieces and burned his body) and took his car to Florence to rob a bank. He was out of prison for a couple of years for murder in the 70's. He needs to die. There is no way I would get on that jury, and not sure I would want to hear the details after reading the search warrants. I will have to defer."

Upon learning of the email, counsel for defendant asked this court to order a limited remand. This court granted the remand for the trial court to determine "whether the alternate juror engaged in juror misconduct and, if she did,

whether her misconduct tainted the other jurors' consideration of the case."[14] On remand, the trial court questioned all of the jurors and alternate jurors, except for Moser, the alternate whose conduct was at issue. The court asked each juror and alternate juror the same ten questions about whether Moser disclosed specific pieces of information about the crimes and more generally, whether Moser said "anything" about defendant or the crimes beyond what the juror heard in court and whether Moser ever mentioned other crimes or acts of violence that defendant had allegedly committed.

At the conclusion of the remand hearing, the trial court drafted an extensive report in which the court described the results of its remand investigation and made findings about the questions identified in this court's remand order. The court found that a number of Moser's answers during jury selection had been "inconsistent with the statements made in her email." Those answers primarily responded to questions that counsel had asked Moser during a *voir dire* conducted outside the presence of the other prospective jurors. In response to questions about contact that she may have had with defendant's case, Moser had insisted that she had no knowledge about the case and had not "formed any opinions about this case or what the outcome of the case should be."

The court observed that, in answering the jury selection questions, "it is clear that Ms. Moser did not accurately disclose the strength of her feelings about what punishment [defendant] deserved during *voir dire*." The court also emphasized that, if Moser had "been involved in the deliberations during either phase of this case, this lack of candor would give rise to significant concerns about the fairness of the trial."

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[14] UTCR 3.120(2) provides:

"(2) After a sufficient showing to the court and on order of the court, a party may have contact with a juror in the presence of the court and opposing parties when:

"(a) There is a reasonable ground to believe that there has been a mistake in the announcing or recording of a verdict; or

"(b) There is a reasonable ground to believe that a juror or the jury has been guilty of fraud or misconduct sufficient to justify setting aside or modifying the verdict or judgment."

The trial court explained, however, that Moser was seated as one of four alternate jurors in the case and that "none of the alternate jurors participated in deliberations during either the guilt/innocence or sentencing phases of the case." The court also reported that "[n]ot one of the jurors questioned by the court remembered Ms. Moser ever disclosing to them facts that were not in the record." Of the twelve jurors who participated in deliberations, seven "affirmatively stated that Ms. Moser had never discussed with them any facts relating to the case or to Mr. Taylor." The court also described in detail the testimony of the remaining five jurors who participated in the deliberations. None remembered Moser disclosing any information or opinions about the case. Each answered "no" to most of the ten questions asking about types of information Moser might have mentioned and, to the extent the juror simply could not remember if Moser mentioned a particular fact or an opinion about the case, the juror added that he or she probably would have remembered such a comment.

Defendant argues that the answers of the questioned jurors left open the potential that Moser's bias deprived him of his constitutional right to trial by an impartial jury and require this court to grant a new trial. We conclude that, on this record, defendant is not entitled to a new trial.[15]

Defendant first argues that Moser's email displays the kind of bias and extra-judicial knowledge that, if disclosed during jury selection, would have allowed him to exclude her from his jury. We agree that the information contained in Moser's email would be a reason to exclude her for cause from the jury. *See* ORCP 57 D(1)(g) (applying in criminal proceedings, ORS 136.210(1), and providing that a challenge for cause may be sustained if the juror "has formed or expressed an opinion upon the merits of the cause from what the juror may have heard or read" and if the court is satisfied "that the juror cannot disregard such opinion

[15] The trial court denied defendant's motion for new trial on the basis of procedural obstacles that the state raised—that granting a new trial was beyond the scope of this court's instructions on remand and that the motion was untimely. Although defendant challenges those conclusions on appeal, we decline to address the procedural arguments given our conclusion that defendant is not entitled to a new trial.

and try the issue impartially.") Both Article I, section 11, of the Oregon Constitution and the Sixth Amendment to the United States Constitution provide a criminal defendant the right to a trial "by an impartial jury." As this court has explained, the "guarantee of trial by an 'impartial jury' means trial by a jury that is not biased in favor of or against either party, but is influenced in making its decision only by evidence produced at trial and legal standards provided by the trial court." *State v. Amini,* 331 Or 384, 391, 15 P3d 541 (2000).

Here, Moser wrote in her email that defendant had "killed a boy," and "rob[bed] a bank," and that "[h]e needs to die." When a potential juror has decided to vote for the death penalty regardless of the evidence that may be presented, "the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment," allows the capital defendant to challenge the juror for cause. *Morgan v. Illinois*, 504 US 719, 729, 112 S Ct 2222, 119 L Ed 2d 492 (1992). Moreover, "[i]f even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence." *Id.*

However, the purpose of allowing lawyers to challenge a prospective juror for cause is to allow the court to excuse prospective jurors whose "ideas or opinions would impair substantially his or her performance of the duties of a juror to decide the case fairly and impartially on the evidence presented in court." *State v. McAnulty*, 356 Or 432, 462, 338 P3d 653 (2014) (internal quotation marks and citations omitted). Neither Moser nor any of the other alternate jurors participated in the jury's decisions about the case. Thus, as the trial court reasoned, Moser's failure to candidly disclose her familiarity with the case could have affected defendant's right to an impartial jury only if she somehow had influenced the jurors who decided defendant's case, such as by sharing her information or bias with them. *See State v. Pratt*, 316 Or 561, 574-75, 853 P2d 827 (1993).

In *Pratt*, the defendant moved for a mistrial when it came to light during jury deliberations that an alternate juror had made a statement to the bailiff that reflected premature judgment of an issue to be decided in the penalty

phase. *Id.* at 573-74. The trial court denied a mistrial, reasoning that the comment "did not introduce any prejudice toward the defendant" because none of the jurors overheard the comment. *Id.* at 574. This court affirmed the denial of a mistrial and expressed approval for the trial court's method of assessing possible prejudice by considering whether the views of the alternate juror had any effect on the jurors who decided the case. *Id.* at 574-75.

In this case, as in *Pratt*, the trial court observed after questioning all of the jurors that "[t]here is no evidence to suggest that Ms. Moser disclosed her knowledge or feelings to the jurors who participated in the deliberations." Defendant does not contend that there is evidence to contradict that finding.[16] Indeed, there is no evidence that Moser expressed her bias to anyone connected with the trial, making the possibility of improper influence even less likely than in *Pratt*. Thus, under the framework that this court endorsed in *Pratt*, the trial court correctly denied the motion for new trial.[17]

Defendant argues, however, that this court should recognize a presumption that the presence of a biased alternate juror taints the jurors who decided the case and requires a new trial unless the state produces affirmative evidence to rebut the presumption. In support of that proposed rule, defendant relies on federal cases that recognize a different presumption—that if the jurors who decided the case actually are exposed to improper information, then there may

[16] Defendant cites the testimony of another *alternate* juror—that it was "possible" Moser expressed an opinion about "what she thought should happen to Mr. Taylor"—as evidence "that Moser may not have adhered to" the rule against jurors discussing the case. But the alternate juror's statement about "possible" improper discussion is not evidence that Moser actually expressed her opinion to any of the jurors who decided the case, and defendant does not contend otherwise. Indeed, the alternate clarified that she had "no specific memory of [Moser] making a statement about that."

[17] Although this court will review a trial court's denial of a motion for new trial for an abuse of discretion when that ruling is based on a matter committed to the trial court's discretion, we understand defendant's argument to raise a challenge that we review for legal error: whether the undisputed facts deprived him of a fair trial before an impartial jury. *See State v. Sundberg*, 349 Or 608, 623-24, 247 P3d 1213 (2011) (explaining why court reviewed denial of new trial for legal error when defendant's challenge raised the legal argument that he was denied his constitutional right to an impartial jury).

be a presumption that the exposure tainted the verdict. For example, defendant cites *Remmer v. United States*, in which the Supreme Court held: "In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial," unless the government establishes that the improper contact was harmless. 347 US 227, 229, 74 S Ct 450, 98 L Ed 654 (1954). *See also Dickson v. Sullivan*, 849 F2d 403, 405 (9th Cir 1988) ("A defendant is entitled to a new trial when the jury obtains or uses evidence that has not been introduced during trial if there is 'a reasonable possibility that the extrinsic material *could* have affected the verdict.'" (Quoting *Marino v. Vasquez*, 812 F2d 499, 504 (9th Cir 1987) (emphasis in *Vasquez*).).

This court, similarly, has employed a standard that could be described as a "presumption of prejudice" when the jurors who decided a criminal case were exposed to an improper influence, as long as the exposure created a sufficiently "great [] risk" that the improper exposure influenced the jury's decision. *See State v. Sundberg*, 349 Or 608, 625, 247 P3d 1213 (2011). In *Sundberg*, the trial court ruled that jurors selected for the defendant's case would be anonymous, a protection that this court emphasized "can cause prejudice to a defendant by suggesting to jurors that the defendant may be dangerous and, by extension, guilty." *Id.* at 624-25. This court emphasized that specific circumstances of the case made the risk of prejudice "particularly great" and ultimately concluded that the trial court's unjustified "use of an anonymous jury created too great a risk that the jury may have believed that defendant was dangerous—and, therefore, that he was more likely to be guilty, denying defendant the right to a trial by an impartial jury." *Id.* at 625. *See also Lambert v. Srs. of St. Joseph*, 277 Or 223, 231, 560 P2d 262 (1977) (when *voir dire* answers of prospective juror revealed "substantial probability of bias," the trial court's "failure to allow the juror to be excused for cause is presumed to be prejudicial").[18]

[18] When the risk that an outside influence poses to a jury's impartiality is less extreme, this court has routinely declined to imply or assume prejudice. *See State v. Rogers*, 313 Or 356, 372, 836 P2d 1308 (1992) (defendant's claim that

However, neither the federal cases on which defendant relies nor the decisions from this court apply a presumption of prejudice when there is not even evidence that the jurors were exposed to an improper consideration. There is a significant difference between presuming that a defendant's right to an impartial jury has been impaired by improper influence when the jurors actually were exposed to improper considerations and defendant's proposal that we should presume that the jury was improperly influenced when there is no evidence that jurors were exposed to improper considerations. Defendant offers no authority, nor any persuasive rationale, for expanding the former presumption to include the latter, and we decline to do so.

In the present case, although the evidence of bias by the alternate juror was significant, and indeed not seriously disputed, there is no evidence that her bias affected the jury's verdict. As an alternate, she was excused before the jury began deliberating toward a verdict, there is no evidence that she disclosed any information about the case to the other jurors, and there is no evidence that any member of the jury disregarded the court's preliminary instruction to "not discuss this case with other jurors until you begin your deliberations at the end of this case." Under the circumstances, we will not presume that the alternate juror impaired defendant's right to an impartial jury, and we conclude that defendant is not entitled to a new trial.

IV. CONCLUSION

We have examined each of defendant's 131 assignments of error and the arguments that defendant advances in support of them. We conclude that none of defendant's challenges identifies an error that would be a basis for reversing the judgment. Accordingly, the judgment of conviction and sentence of death are affirmed.

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court should treat fact of employment with the state as indication that juror implicitly biased was not a basis for concluding "that defendant's state or federal *constitutional* rights to a fair and impartial jury were violated" (emphasis in original)).

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

DAVID RAY TAYLOR,
Defendant-Appellant.

Lane County Circuit Court
201216842

S062310

ORDER DENYING PETITION FOR RECONSIDERATION

Upon consideration by the court.

The court has considered the petition for reconsideration and orders that it be denied.

MARTHA L. WALTERS
CHIEF JUSTICE, SUPREME COURT
5/2/2019 10:25 AM

c: Timothy A Sylwester
Daniel C Bennett
Joanna L Jenkins

ms

APPENDIX C

ALEX GARDNER
Lane County District Attorney
125 E. 8th Avenue
Eugene, OR 97401
(541) 682-4261 (541) 682-3890 (fax)

In the Circuit Court of the State of Oregon for Lane County

THE STATE OF OREGON
Plaintiff,

vs.

DAVID RAY TAYLOR,

Defendant.

Case no. 201216842

INDICTMENT

The above named defendant is accused by the Lane County Grand Jury of the crimes of:

1. ROBBERY IN THE FIRST DEGREE - FIREARM
2. ROBBERY IN THE SECOND DEGREE
3. ROBBERY IN THE FIRST DEGREE - FIREARM
4. ROBBERY IN THE SECOND DEGREE
5. ROBBERY IN THE FIRST DEGREE - FIREARM
6. ROBBERY IN THE SECOND DEGREE
7. ROBBERY IN THE FIRST DEGREE - FIREARM
8. ROBBERY IN THE SECOND DEGREE
9. ROBBERY IN THE FIRST DEGREE - FIREARM
10. ROBBERY IN THE SECOND DEGREE
11. FELON IN POSSESSION OF A FIREARM
12. KIDNAPPING IN THE FIRST DEGREE
13. ROBBERY IN THE FIRST DEGREE - FIREARM
14. AGGRAVATED MURDER
15. AGGRAVATED MURDER
16. AGGRAVATED MURDER
17. AGGRAVATED MURDER
18. ABUSE OF CORPSE IN THE FIRST DEGREE
19. ROBBERY IN THE FIRST DEGREE - FIREARM
20. ROBBERY IN THE SECOND DEGREE
21. ROBBERY IN THE SECOND DEGREE
22. ROBBERY IN THE FIRST DEGREE - FIREARM
23. ROBBERY IN THE SECOND DEGREE
24. ROBBERY IN THE SECOND DEGREE
25. ROBBERY IN THE FIRST DEGREE - FIREARM
26. ROBBERY IN THE SECOND DEGREE
27. ROBBERY IN THE SECOND DEGREE
28. ROBBERY IN THE FIRST DEGREE - FIREARM
29. ROBBERY IN THE SECOND DEGREE

30. ROBBERY IN THE SECOND DEGREE
31. FELON IN POSSESSION OF A FIREARM

committed as follows:

COUNT 1

The defendant, on or about June 8, 2012, in Lane County, Oregon, did unlawfully and knowingly, while in the course of committing or attempting to commit theft, with the intent of compelling Catherine Sue Morgan or another person to deliver the property and engage in conduct which might aid in the commission of the theft, and with the intent of preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking, and being armed with a deadly weapon, a firearm, use or threaten the immediate use of physical force upon Catherine Sue Morgan;

COUNT 2

The defendant, on or about June 8, 2012, in Lane County, Oregon, did unlawfully and knowingly, while in the course of committing or attempting to commit theft, with the intent of compelling Catherine Sue Morgan or another person to deliver the property and engage in conduct which might aid in the commission of the theft, and with the intent of preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking, use or threaten the immediate use of physical force upon Catherine Sue Morgan and represent by word or conduct that defendant was armed with what purported to be a deadly weapon;

COUNT 3

The defendant, on or about June 8, 2012, in Lane County, Oregon, did unlawfully and knowingly, while in the course of committing or attempting to commit theft, with the intent of compelling Jessica A. Benner or another person to deliver the property and engage in conduct which might aid in the commission of the theft, and with the intent of preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking, and being armed with a deadly weapon, a firearm, use or threaten the immediate use of physical force upon Jessica A. Benner;

COUNT 4

The defendant, on or about June 8, 2012, in Lane County, Oregon, did unlawfully and knowingly, while in the course of committing or attempting to commit theft, with the intent of compelling Jessica A. Benner or another person to deliver the property and engage in conduct which might aid in the commission of the theft, and with the intent of preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking, use or threaten the immediate use of physical force upon Jessica A. Benner and represent by word or conduct that defendant was armed with what purported to be a deadly weapon;

COUNT 5

The defendant, on or about June 8, 2012, in Lane County, Oregon, did unlawfully and knowingly, while in the course of committing or attempting to commit theft, with the intent of compelling Donia M. Barkemeyer or another person to deliver the property and engage in conduct which might aid in the commission of the theft, and with the intent of preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking, and being armed with a deadly weapon, a firearm, use or threaten the immediate use of physical force upon Donia M. Barkemeyer;

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///
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COUNT 6

The defendant, on or about June 8, 2012, in Lane County, Oregon, did unlawfully and knowingly, while in the course of committing or attempting to commit theft, with the intent of compelling Donia M. Barkemeyer or another person to deliver the property and engage in conduct which might aid in the commission of the theft, and with the intent of preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking, use or threaten the immediate use of physical force upon Donia M. Barkemeyer and represent by word or conduct that defendant was armed with what purported to be a deadly weapon;

COUNT 7

The defendant, on or about June 8, 2012, in Lane County, Oregon, did unlawfully and knowingly, while in the course of committing or attempting to commit theft, with the intent of compelling Courtney Leeann Thompson or another person to deliver the property and engage in conduct which might aid in the commission of the theft, and with the intent of preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking, and being armed with a deadly weapon, a firearm, use or threaten the immediate use of physical force upon Courtney Leeann Thompson;

COUNT 8

The defendant, on or about June 8, 2012, in Lane County, Oregon, did unlawfully and knowingly, while in the course of committing or attempting to commit theft, with the intent of compelling Courtney Leeann Thompson or another person to deliver the property and engage in conduct which might aid in the commission of the theft, and with the intent of preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking, use or threaten the immediate use of physical force upon Courtney Leeann Thompson and represent by word or conduct that defendant was armed with what purported to be a deadly weapon;

COUNT 9

The defendant, on or about June 8, 2012, in Lane County, Oregon, did unlawfully and knowingly, while in the course of committing or attempting to commit theft, with the intent of compelling Ana Bertha Alonzo or another person to deliver the property and engage in conduct which might aid in the commission of the theft, and with the intent of preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking, and being armed with a deadly weapon, a firearm, use or threaten the immediate use of physical force upon Ana Bertha Alonzo;

COUNT 10

The defendant, on or about June 8, 2012, in Lane County, Oregon, did unlawfully and knowingly, while in the course of committing or attempting to commit theft, with the intent of compelling Ana Bertha Alonzo or another person to deliver the property and engage in conduct which might aid in the commission of the theft, and with the intent of preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking, use or threaten the immediate use of physical force upon Ana Bertha Alonzo and represent by word or conduct that defendant was armed with what purported to be a deadly weapon;

COUNT 11

The defendant, on or about June 8, 2012, in Lane County, Oregon, did unlawfully and knowingly own, possess or use a firearm, the said defendant having been previously convicted of a felony under the laws of Oregon, another state or the United States;

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COUNT 12

The defendant, on or about August 3, 2012, in Lane County, Oregon, did unlawfully and intentionally, without consent or legal authority, take Celestino Reynoso Gutierrez Jr. from one place to another or secretly confine Celestino Reynoso Gutierrez Jr. in a place where he was not likely to be found, with the intent to interfere substantially with the personal liberty of Celestino Reynoso Gutierrez Jr., and with the purpose of causing physical injury to Celestino Reynoso Gutierrez Jr.;

COUNT 13

The defendant, on or about August 3, 2012, in Lane County, Oregon, did unlawfully and intentionally, while in the course of committing theft and unauthorized use of a vehicle, with the intent of compelling Celestino Reynoso Gutierrez Jr. to deliver the property and engage in conduct which might aid in the commission of the theft and engage in conduct which might aid in the commission of the unauthorized use of a vehicle, and with the intent of preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking, and being armed with a deadly weapon, a firearm, and dangerous weapons, use physical force upon Celestino Reynoso Gutierrez Jr. and use a dangerous weapon and cause serious physical injury to Celestino Reynoso Gutierrez Jr.;

COUNT 14

The defendant, on or about August 3, 2012, in Lane County, Oregon, did unlawfully and intentionally cause the death of Celestino Reynoso Gutierrez Jr., another human being, defendant having been convicted previously of Murder on June 22, 1977 in Lane County, Oregon;

COUNT 15

The defendant, on or about August 3, 2012, in Lane County, Oregon, did unlawfully and intentionally commit the crimes of Kidnapping in the First Degree as alleged in Count 12 of this Indictment and Robbery in the First Degree Degree as alleged in Count 13 of this Indictment and in the course of and in the furtherance of the crimes that defendant was committing, defendant did personally and intentionally, alone or with one or more persons, cause the death of Celestino Reynoso Gutierrez Jr., a human being who was not a participant in the crime;

COUNT 16

The defendant, on or about August 3, 2012, in Lane County, Oregon, did unlawfully and intentionally, in an effort to conceal the commission of, or identity of a perpetrator of the crimes of Kidnapping in the First Degree as alleged in Count 12 of this Indictment and Robbery in the First Degree as alleged in Count 13 of this Indictment, or a perpetrator of the armed robbery of Siuslaw Bank in Mapleton, Oregon on August 3, 2012 as alleged in Counts 19 through 30 of this Indictment, cause the death of Celestino Reynoso Gutierrez Jr., another human being;

COUNT 17

The defendant, on or about August 3, 2012, in Lane County, Oregon, did unlawfully and intentionally cause the death of Celestino Reynoso Gutierrez Jr., another human being, in the course of or as a result of intentional maiming or torture of Celestino Reynoso Gutierrez Jr.;

COUNT 18

The defendant, on or about August 3, 2012, in Lane County, Oregon, did unlawfully and knowingly dismember, mutilate and cut a corpse;

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COUNT 19

The defendant, on or about August 3, 2012, in Lane County, Oregon, did unlawfully and knowingly, while in the course of committing or attempting to commit theft, with the intent of compelling Harley Leroy Mayfield or another person to deliver the property and engage in conduct which might aid in the commission of the theft, and with the intent of preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking, and being armed with a deadly weapon, a firearm, use or threaten the immediate use of physical force upon Harley Leroy Mayfield;

COUNT 20

The defendant, on or about August 3, 2012, in Lane County, Oregon, did unlawfully and knowingly, while in the course of committing or attempting to commit theft, with the intent of compelling Harley Leroy Mayfield or another person to deliver the property and engage in conduct which might aid in the commission of the theft, and with the intent of preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking, use or threaten the immediate use of physical force upon Harley Leroy Mayfield and represent by word or conduct that defendant was armed with what purported to be a deadly weapon;

COUNT 21

The defendant, on or about August 3, 2012, in Lane County, Oregon, did unlawfully and knowingly, while in the course of committing or attempting to commit theft, with the intent of compelling Harley Leroy Mayfield or another person to deliver the property and engage in conduct which might aid in the commission of the theft, and with the intent of preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking, and being aided by another person actually present, use or threaten the immediate use of physical force upon Harley Leroy Mayfield;

COUNT 22

The defendant, on or about August 3, 2012, in Lane County, Oregon, did unlawfully and knowingly, while in the course of committing or attempting to commit theft, with the intent of compelling Kylie Lynn Quam or another person to deliver the property and engage in conduct which might aid in the commission of the theft, and with the intent of preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking, and being armed with a deadly weapon, a firearm, use or threaten the immediate use of physical force upon Kylie Lynn Quam;

COUNT 23

The defendant, on or about August 3, 2012, in Lane County, Oregon, did unlawfully and knowingly, while in the course of committing or attempting to commit theft, with the intent of compelling Kylie Lynn Quam or another person to deliver the property and engage in conduct which might aid in the commission of the theft, and with the intent of preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking, use or threaten the immediate use of physical force upon Kylie Lynn Quam and represent by word or conduct that defendant was armed with what purported to be a deadly weapon;

COUNT 24

The defendant, on or about August 3, 2012, in Lane County, Oregon, did unlawfully and knowingly, while in the course of committing or attempting to commit theft, with the intent of compelling Kylie Lynn Quam or another person to deliver the property and engage in conduct which might aid in the commission of the theft, and with the intent of preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking, and being aided by another person actually present, use or threaten the immediate use of physical force upon Kylie Lynn Quam;

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COUNT 25

The defendant, on or about August 3, 2012, in Lane County, Oregon, did unlawfully and knowingly, while in the course of committing or attempting to commit theft, with the intent of compelling Brenda Lou Gray or another person to deliver the property and engage in conduct which might aid in the commission of the theft, and with the intent of preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking, and being armed with a deadly weapon, a firearm, use or threaten the immediate use of physical force upon Brenda Lou Gray;

COUNT 26

The defendant, on or about August 3, 2012, in Lane County, Oregon, did unlawfully and knowingly, while in the course of committing or attempting to commit theft, with the intent of compelling Brenda Lou Gray or another person to deliver the property and engage in conduct which might aid in the commission of the theft, and with the intent of preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking, use or threaten the immediate use of physical force upon Brenda Lou Gray and represent by word or conduct that defendant was armed with what purported to be a deadly weapon;

COUNT 27

The defendant, on or about August 3, 2012, in Lane County, Oregon, did unlawfully and knowingly, while in the course of committing or attempting to commit theft, with the intent of compelling Brenda Lou Gray or another person to deliver the property and engage in conduct which might aid in the commission of the theft, and with the intent of preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking, and being aided by another person actually present, use or threaten the immediate use of physical force upon Brenda Lou Gray;

COUNT 28

The defendant, on or about August 3, 2012, in Lane County, Oregon, did unlawfully and knowingly, while in the course of committing or attempting to commit theft, with the intent of compelling Peggy Lou Simington or another person to deliver the property and engage in conduct which might aid in the commission of the theft, and with the intent of preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking, and being armed with a deadly weapon, a firearm, use or threaten the immediate use of physical force upon Peggy Lou Simington;

COUNT 29

The defendant, on or about August 3, 2012, in Lane County, Oregon, did unlawfully and knowingly, while in the course of committing or attempting to commit theft, with the intent of compelling Peggy Lou Simington or another person to deliver the property and engage in conduct which might aid in the commission of the theft, and with the intent of preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking, use or threaten the immediate use of physical force upon Peggy Lou Simington and represent by word or conduct that defendant was armed with what purported to be a deadly weapon;

COUNT 30

The defendant, on or about August 3, 2012, in Lane County, Oregon, did unlawfully and knowingly, while in the course of committing or attempting to commit theft, with the intent of compelling Peggy Lou Simington or another person to deliver the property and engage in conduct which might aid in the commission of the theft, and with the intent of preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking, and being aided by another person actually present, use or threaten the immediate use of physical force upon Peggy Lou Simington;

///

COUNT 31

The defendant, on or about August 3, 2012, in Lane County, Oregon, did unlawfully and knowingly own, possess or use a firearm, the said defendant having been previously convicted of a felony under the laws of Oregon, another state or the United States;

contrary to statute and against the peace and dignity of the State of Oregon.

DATED this 14th day of August, 2012 at Eugene, Lane County, Oregon.

1. ORS 164.415/161.610/Class A Felony
2. ORS 164.405/Class B Felony
3. ORS 164.415/161.610/Class A Felony
4. ORS 164.405/Class B Felony
5. ORS 164.415/161.610/Class A Felony
6. ORS 164.405/Class B Felony
7. ORS 164.415/161.610/Class A Felony
8. ORS 164.405/Class B Felony
9. ORS 164.415/161.610/Class A Felony
10. ORS 164.405/Class B Felony
11. ORS 166.270/Class C Felony
12. ORS 163.235/Class A Felony
13. ORS 164.415/161.610/Class A Felony
14. ORS 163.095/Class U Felony
15. ORS 163.095/Class U Felony
16. ORS 163.095/Class U Felony
17. ORS 163.095/Class U Felony
18. ORS 166.087/Class B Felony
19. ORS 164.415/161.610/Class A Felony
20. ORS 164.405/Class B Felony
21. ORS 164.405/Class B Felony
22. ORS 164.415/161.610/Class A Felony
23. ORS 164.405/Class B Felony
24. ORS 164.405/Class B Felony
25. ORS 164.415/161.610/Class A Felony
26. ORS 164.405/Class B Felony
27. ORS 164.405/Class B Felony
28. ORS 164.415/161.610/Class A Felony
29. ORS 164.405/Class B Felony
30. ORS 164.405/Class B Felony
31. ORS 166.270/Class C Felony

ALEX GARDNER, District Attorney

By: _____

David J. Schwartz, OSB 00380
Assistant District Attorney
david.schwartz@co.lane.or.us

A TRUE BILL

_____
Foreman of the Grand Jury

Witnesses examined:

Ana Bertha Alonzo	Harley Leroy Mayfield
Donia M. Barkemeyer	Catherine Sue Morgan
Wretha Marie Breckenridge	Kylie Lynn Quam
Jessica A. Benner	Peggy Lou Simington
Jeffrey F. Donaca	Courtney Leeann Thompson
Brenda Lou Gray	Kathleen Korth
Benjamin Hall	Stephen Simons
Clifton G. Harrold	Dan Braziel

DOB: 12/13/1955
FPN: JLAN112031981
DA No.: 039234748

****This Indictment alleges at least one offense subject to Ballot Measure 11 sentencing minimums (ORS 137.700).****

APPENDIX D

Holly L MOSER to: Scott.MOSER 02/14/14 09:30 AM

This day is bumming me out!! I found out that my jury summons is for the murder trial for Gillette. He is the guy who (with the 2 younger black kids from Portland) killed a boy (and chopped him up in pieces and burned his body) and took his car to Florence to rob a bank. He was out of prison for a couple of years for murder in the 70's. He needs to die. There is no way I would get on that jury, and not sure I would want to hear the details after reading the search warrants. I will have to defer.

Where do you want to go for lunch? And if we go to lunch, do you still want to go out after work? EEK! What to do...

I hope you are feeling a bit better. I love you

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

DAVID RAY TAYLOR,
Defendant-Appellant.

Lane County Circuit Court
201216842

S062310

ORDER GRANTING LIMITED REMAND

Upon consideration by the court.

After the trial in this case, the circuit court became aware of an email from an alternate juror, which the court circulated to the parties. Based on that email, defendant has moved for a limited remand to permit the circuit court to inquire into whether the alternate juror engaged in juror misconduct and, if so, whether any juror misconduct tainted the other jurors. The state agrees that a remand is appropriate but asks the court to limit the scope of the remand.

Defendant's motion is granted. The scope of the remand is limited to the question whether the alternate juror engaged in juror misconduct and, if she did, whether her misconduct tainted the other jurors' consideration of the case. We decline the state's invitation to impose further limits on the circuit court's discretion to conduct the hearing on remand. Rather, we leave the conduct of the hearing, in the first instance, to the sound discretion of the circuit court.

1/7/2015
8:46:52 AM

RIVES KISTLER
PRESIDING JUSTICE, SUPREME COURT

c: Timothy A Sylwester
Daniel C Bennett

sh

APPENDIX F

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

STATE OF OREGON, Plaintiff, v. DAVID RAY TAYLOR, Defendant.	Case No. 201216842 CA S062310

DEFENDANT'S MOTION FOR NEW TRIAL

Defendant, by and through his counsel, moves this court for an order vacating the judgment of the court and granting defendant a new trial.

DATED April 30, 2015.

Respectfully submitted,

CHRISTOPHER BURRIS OSB #814787.
704 MAIN STREET, SUITE 220
OREGON CITY, OREGON 97045

BRADLEY CASCAGNETTE OSB # 022686
725 COUNTRY CLUB ROAD
EUGENE, OREGON 97405

DANIEL C. BENNETT OSB #073304
ANDREW D. ROBINSON OSB #064861
OFFICE OF PUBLIC DEFENSE SERVICES

Attorneys for Defendant
David Ray Taylor

MEMORANDUM OF LAW

Pursuant to ORCP 64(B)(2) and ORS 136.535(1) (making ORCP 64 applicable to criminal trials) defendant respectfully requests that this court vacate the judgment of conviction and grant him a new trial.

I. Nature of the current proceeding

The current proceeding arose in response to a letter from Judge Zennaché dated October 7, 2014. In the letter, Judge Zennaché informed the parties that he had "received information which is inconsistent with the statements made by one of the alternate jurors during *voir dire*."

The email, apparently written by the future alternate juror – Holly Moser – prior to *voir dire*, contains the following comments:

> "This day is bumming me out!! I found out that my jury summons is for the murder trial for Gillette. He is the guy who (with the 2 younger black kids from Portland) killed a boy (and chopped him up in pieces and burned his body) and took his car to Florence to rob a bank. He was out of prison for a couple of years for murder in the 70's. He needs to die. There is no way I would get on that jury, and sure I would want to hear the details after reading the search warrants. I will have to defer."

The comments in her email were not consistent with answers she gave two months later in *voir dire*, where when examined by defense counsel she stated that she knew "really nothing" about the case. She said, "We get so many cases in honestly, they're all just a case number to me in doing a lot of data entry." She added that "I'm not sure even that this one [case] is and once I knew that I was – got the summons, I didn't even look up anything. I haven't done anything." She also stated, "I really, like I said, I really have

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no idea which case this is." She continued that, "They all kind of run together, you know" and "I know the name Taylor, that's it. That's really all I know as far as the case."

Because this case is on automatic and direct appeal, the Oregon Supreme Court has jurisdiction. On November 4, 2014, defendant filed a motion for limited remand, asking the Supreme Court to "order a limited remand to allow the trial court to conduct a hearing pursuant to UTCR 3.120(2)[1], and to allow the defense to question the jurors."

The state filed a response in which it did not oppose defendant's request for a limited remand and a hearing to investigate potential misconduct, but requested that the Supreme Court place certain limitations upon the scope this court's authority on remand as discussed more fully below.

By order dated January 7, 2015, the Oregon Supreme Court granted defendant's request for a remand "limited to the question whether the alternate juror engaged in juror misconduct and, if she did, whether her misconduct tainted the other jurors' consideration

---

[1] UTCR 3.120(2) provides:

> "(2) After a sufficient showing to the court and on order of the court, a party may have contact with a juror in the presence of the court and opposing parties when:
>
> "(a) there is a reasonable ground to believe that there has been a mistake in the announcing or recording of a verdict; or
>
> "(b) there is a reasonable ground to believe that a juror or the jury has been guilty of fraud or misconduct sufficient to justify setting aside or modifying the verdict or judgment."

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of the case." The court declined the state's request to "impose further limits on the circuit court's discretion to conduct the hearing on remand."

This court held a hearing on March 6, 2015, at which it questioned all jurors, including alternates, with the exception of Moser herself. At that hearing, several jurors indicated that they did not remember whether or not Ms. Moser had described any knowledge of the case.

Juror Erica Marjama stated that she did not remember whether Moser ever mentioned allegations that defendant had been involved in a prior home-invasion robbery. Tr. 66.[2] When questioned whether that was something that she would remember if it came up, she stated that she had "no idea." Tr. 67. She further stated that she did not remember if Moser had told her that defendant had been involved in uncharged bank robberies. Tr. 67. In contrast, she responded that she *would* remember if Moser had told her about an alleged confession by A.J. Nelson. Tr. 68. She also answered "no" when questioned about whether Moser had provided information about the crimes defendant was charged with or what she thought should happen to him. Tr. 68-69.

Juror Timothy Palmer did not remember whether Moser had described defendant's involvement in a home-invasion robbery, but thought he would remember if she had. Tr. 71. He did not remember if she had described defendant's involvement in other robberies. Tr. 72. He "would think I would remember her saying something about that, but it doesn't come to my mind right now that I heard her say anything like that." Tr. 72.

---

[2] Unless otherwise noted, transcript citations refer to the transcript of the March 6, 2015 hearing, prepared for purposes of direct appeal. Defendant previously provided a copy of that transcript to this court and the state.

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Other jurors also declined to state unconditionally that Moser had not provided improper information. Natalie Jenson did not "think" that Moser had told her about other acts of violence by defendant. Tr. 77. She did not remember Moser telling her anything else about defendant prior to deliberations and said "I think so" when asked if she would remember. Tr. 78-79. Juror Sharon Hodges stated that she could not recall Moser discussing defendant engaging in uncharged bank robberies. Tr. 97. She said that she "probably" would remember if it had happened. Tr. 97. Similarly, Juror Destin Ranch stated several times only that Moser had not made any comments about the case to his "recollection" and said that he "imagine[d]" that he would recall such comments. Tr. 113-14.

Alternate Juror Monique Graves, when asked if Moser had disclosed a prior robbery by defendant, said "Not that I recall." Tr. 117. She said "I'm not sure" when asked if she would remember such communication. Tr. 117. When asked about Moser commenting on other bank robberies, she stated that she did not "believe" that Moser had done so, but that she likely would not remember such a conversation. Tr. 118. She also did not recall Moser describing defendant taking the police to the location where the victim was buried, but was not sure she would remember such a conversation. Tr. 119. She repeated that she did not "believe" that Moser had commented on several other matters. Tr. 119-20. When asked if Moser had told her what she believed should happen to defendant, Graves responded, "I couldn't say for certain what she said. But I imagine that's possible that she would have made a comment about that." Tr. 120.

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Following the March 6, 2015, hearing, defendant requested that this court question Moser herself about the alleged misconduct. By letter dated April 3, 2015, this court denied defendant's request.

II. This court has jurisdiction to consider defendant's motion. Further, defendant's motion is timely.

Defendant anticipates that the state may argue that this court lacks jurisdiction to consider this motion, or that the motion is untimely. Both are incorrect.

First, this court has jurisdiction to consider defendant's request for a new trial. Although the Oregon Supreme Court has general jurisdiction in this case, which is on automatic and direct review in that court pursuant to ORS 138.012(1), that court ordered this case remanded for the purpose of investigating the issue of juror misconduct. Defendant's motion seeking limited remand specifically addressed the possibility of seeking a new trial, asking that "the trial court to hold a hearing pursuant to UTCR 3.120(2) to ascertain whether a remedy for the misconduct is necessary. See ORCP 64(b)(2) (providing for a new trial when jury misconduct has materially affected the substantial rights of a party); ORS 136.535(1) (making ORCP 64 applicable to criminal trials)." D. Mot. Limited Remand at 3.

In its response to defendant's motion in the Supreme Court, the state asked that that court deny this court jurisdiction to consider a motion for new trial,

> "Because the time within which the trial court may entertain a motion for new trial has long since expired, a remand to the trial court should be limited only to fact-finding regarding the suspicions involving Ms. Moser, as outlined in defendant's motion. If defendant believes, based on the findings made by the trial court, that he is entitled to some remedy, then he can raise that claim by some appropriate pre-briefing motion in this court or in an assignment of error in his brief on review. This court should

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not grant the trial court jurisdiction to grant to defendant any form of affirmative relief."

Resp. Mot. At 3.

The Supreme Court rejected the state's request to limit this court's discretion to conduct the hearing. The court ordered,

> "Defendant's motion is granted. The scope of the remand is limited to the question whether the alternate juror engaged in juror misconduct and, if she did, whether her misconduct tainted the other jurors' consideration of the case. We decline the state's invitation to impose further limits on the circuit court's discretion to conduct the hearing on remand. Rather, we leave the conduct of the hearing, in the first instance, to the sound discretion of the trial court."

Order Granting Limited Remand.

Defendant's motion for new trial falls squarely within the scope of the Supreme Court's order on remand because it is based on Moser's misconduct. Thus, this court has jurisdiction to consider the motion.

Further, defendant's motion is not untimely. ORCP 64(F)(1) generally governs the timeliness of a motion for a new trial. That rule provides:

> "F(1) Time of motion; counteraffidavits or counterdeclarations; hearing and determination. A motion to set aside a judgment and for a new trial, with the affidavits or declarations, if any, in support thereof, shall be filed not later than 10 days after the entry of the judgment sought to be set aside, or such further time as the court may allow. When the adverse party is entitled to oppose the motion by counteraffidavits or counterdeclarations, such party shall file the same within 10 days after the filing of the motion, or such further time as the court may allow. The motion shall be heard and determined by the court within 55 days from the time of the entry of the judgment, and not thereafter, and if not so heard and determined within said time, the motion shall conclusively be deemed denied."

By its text, that rule generally requires a motion be filed within 10 days of the entry of a judgment, but that time may be extended "as the court may allow." Here, it is

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appropriate for this court to consider this motion because it is based upon information not available to defendant at the time of the entry of judgment – both Moser's email indicating her preconceived belief in defendant's guilt and the inability of several other jurors to conclusively state that she did not comment on those matters prior to deliberations. Defendant could not ascertain any information about the latter until this court conducted its hearing because he is barred from initiating contact with jurors. *See* Uniform Trial Court Rule 3.120(2).[3]

Further, although the rule appears to bar a court from considering a motion more than 55 days after the entry of judgment, that text is not dispositive in this matter for several reasons. Generally a trial court proceeding concludes upon entry of judgment. Here, however, even though more than 55 days have elapsed from the entry of judgment, this court should consider the *sui generis* nature of the instant proceeding before this

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[3] UTCR 3.120 provides:

"COMMUNICATION WITH JURORS

> "(1) Except as necessary during trial, and except as provided in subsection (2), parties, witnesses or court employees must not initiate contact with any juror concerning any case which that juror was sworn to try.
>
> "(2) After a sufficient showing to the court and on order of the court, a party may have contact with a juror in the presence of the court and opposing parties when:
>
> "(a) there is a reasonable ground to believe that there has been a mistake in the announcing or recording of a verdict; or
>
> "(b) there is a reasonable ground to believe that a juror or the jury has been guilty of fraud or misconduct sufficient to justify setting aside or modifying the verdict or judgment."

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court. The proceeding in this court is a live one, operating under the aegis of the Supreme Court's order on remand. This court has not yet disposed of its task on remand, and thus should consider its report to the Supreme Court as the relevant "judgment" for purposes of determining the timeliness of this motion.

Further, this case is in a unique posture because, as a capital case, it is on automatic and direct review in the Supreme Court. Generally, there exists a gap between the time when a trial court enters a judgment and when a defendant files a notice of appeal. ORCP 64(F)(1) acts to structure the timeline between the conclusion of the trial and the beginning of the appeal. In a capital case, the Supreme Court assumes jurisdiction automatically and immediately upon the entry of judgment. ORAP 12.10. Thus, there is no interstitial time in which a judgment has been entered but before the appeal begins. Thus, this court should not strictly apply ORCP 64(F)(1) in this case.

The Oregon Court of Appeals has recognized that the time to file a motion for new trial may be tolled. In *Alternative Realty v. Michaels*, 90 Or App 280, 287, 753 P2d 419 (1988), a party prematurely filed a notice of appeal while a motion for new trial was still pending. The Court of Appeals dismissed the appeal and then held that the 55-day filing period had not run during the pendency of the appeal,

> "Because the notice of appeal was filed 30 days after the entry of the judgment, there remain 25 days of the 55–day period during which the trial judge could rule on the motion for a new trial. When the trial court reacquires jurisdiction after issuance of the appellate judgment, it will have that period of time in which to rule. The 30–day period for filing a notice of appeal will commence after entry of the trial court's order or the expiration of the remaining 25 days, if no order is entered."

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Id. Here, defendant acknowledges that more than 55 days have elapsed since this court reacquired jurisdiction. But *Michaels* establishes that the 55-day deadline may be tolled. This court should hold that the deadline was similarly tolled while this court conducted its investigation into the matter of juror misconduct.

Finally, the Due Process Clause of the Fourteenth Amendment to the United States Constitution[4] compels this court's consideration of defendant's motion. For the reasons discussed below, Moser's acts deprived defendant of a fair trial. This court should not mechanistically apply ORCP 64(F)(1) to deny defendant relief. *See State v. Cazares-Mendez*, 350 Or 491, 520, 256 P3d 104 (2011) (finding due process violation in application of hearsay rule when doing so deprived defendant for a fair trial).

III. On the merits, defendant is entitled to a new trial

Defendant's rights to a fair and impartial jury and to be confronted with the witnesses against him were violated when the alternate juror was shown to have prejudice towards Defendant and possibly contaminated the jury. Oregon statutes and court rules provide Defendant statutory protections for juror misconduct. ORCP 64B(2) provides, in part: "A former judgment may be set aside and a new trial granted in an action where there has been a trial by jury on the motion of the party aggrieved for any of the

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[4] The Fourteenth Amendment provides, in relevant part,

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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following causes materially affecting the substantial rights of such part: * * * * * Misconduct of jury or prevailing party." Additionally, ORS 136.535 provides: "(1) Except that a new trial may not be granted on application of the state, ORS 19.430 and ORCP 64 A, B and D to G apply to and regulate new trials in criminal actions." Moreover, UTCR 3.120 provides, in part:

> "(1) Except as necessary during trial, and except as provided in subsection (2), parties, witnesses or court employees shall not initiate contact with any juror concerning any case which that juror was sworn to try.
>
> "(2) After a sufficient showing to the court and on order of the court, a party may have contact with a juror in the presence of the court and opposing parties when:
>
> "* * * * *
>
> "(b) There is a reasonable ground to believe that a juror or the jury has been guilty of fraud or misconduct sufficient to justify setting aside or modifying the verdict or judgment."

Further, Criminal defendants have the right to an impartial jury and right to confrontation guaranteed by Article I, section 11, of the Oregon Constitution, and the Sixth Amendment to the United States Constitution.[5] The U.S. Supreme Court has held that "[i]n the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the

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[5] Article I, section 11, of the Oregon Constitution provides in part that "In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury * * * and * * * to meet the witnesses face to face."

The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * [and] to be confronted with the witnesses against him[.]"

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witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." *Turner v. State of La.*, 379 US 466, 472-73, 85 S Ct 546, 550, 13 L Ed 2d 424 (1965).

Subversion of these protections can occur through jury misconduct when a juror is biased, makes untruthful statements during *voir dire*, is exposed to extrajudicial materials, or engages in private communications with third parties. Here, an employee of the court, who was also serving as an alternate juror, demonstrated bias against the defendant, made untruthful statements during *voir dire*, and had the opportunity to contaminate the other jurors. The misconduct of the alternate juror deprived defendant of his rights because the evidence developed against defendant must come from a witness in a public courtroom where there is full judicial protection of defendant's rights of confrontation, of cross-examination, and of counsel.

A. Moser was biased in fact or a bias could be imputed because of her inability to set aside any preexisting opinions or impressions and to decide the case impartially.

In situations like the one in this case three theories of bias are on the table:

> "so-called *McDonough*-style bias which turns on the truthfulness of a juror's responses on voir dire; actual bias, which stems from a pre-set disposition not to decide an issue impartially; and implied (or presumptive) bias, which may exist in exceptional circumstances where, for example, a prospective juror has a relationship to the crime itself or to someone involved in a trial, *or has repeatedly lied about a material fact to get on the jury*."

Fields v. Brown, 503 F3d 755, 766 (9th Cir 2007) (emphasis added).

Article I, section 11, of the Oregon Constitution and the Sixth Amendment to the United States Constitution guarantee the right to an impartial jury during criminal

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proceedings. "To protect that right, the trial court may excuse a prospective juror for actual bias. *See* ORCP 57 D(1)(g); ORS 136.210(1) (making ORCP 57 D(1)(g) applicable to criminal trials). *State v. McAnulty*, 356 Or 432, 462, 338 P3d 653, 673 (2014). "In assessing whether a prospective juror should be excused for actual bias, the question is whether the juror's 'ideas or opinions would impair substantially his or her performance of the duties of a juror to decide the case fairly and impartially on the evidence presented in court.'" *Id.* (quoting *State v. Fanus,* 336 Or 63, 83, 79 P3d 847 (2003)). "The touchstone of impartiality is * * * the juror's ability to decide the matter with an open mind—that is, the juror's ability to set aside any preexisting opinions or impressions and to decide the case impartially." *State v. Evans*, 344 Or 358, 362, 182 P3d 175, 177 (2008). "[A]ctual bias is 'bias in fact'-the existence of a state of mind that leads to an inference that the person will not act with entire impartiality." *United States v. Gonzalez*, 214 F3d 1109, 1112 (9th Cir 2000) (citing *United States v. Torres,* 128 F3d 38, 43 (2nd Cir 1997)).

In this case Ms. Moser's ideas or opinions would substantially impair her performance of her duties as a juror to decide the case fairly and impartially on the evidence presented in court. Two months prior to being questioned for voir dire she had already formed an opinion that Defendant "needs to die." This would substantially impair her ability to consider the full range penalties of life with the possibility of parole after 30 years, true life, or death. Furthermore, her knowledge of the case from reading the search warrants leads to an inference that she may not decide the case fairly and impartially on

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evidence presented in court. Because Ms. Moser had actual bias towards Defendant she should have never served in any capacity on the jury in this case.

Ms. Moser also exhibited implied or presumptive bias, due to exceptional circumstances. The Oregon Supreme court has found a presumption of bias exists in exceptional circumstances which are likely to compromise the jurors' impartiality. *See State v. Cavan*, 337 Or 433, 437, 98 P3d 381 (2004) (holding a defendant's trial in prison impermissible). Likewise, the Ninth Circuit has found implied or presumptive bias where a juror repeatedly lied about a material fact to get on the jury in order to secure the right to pass on a defendant's death sentence. *Dyer v. Calderon*, 151 F3d 970 (9th Cir 1998); *see also Green v. White*, 232 F3d 671 (9th Cir 2000). "A juror * * * who lies materially and repeatedly in response to legitimate inquiries about her background introduces destructive uncertainties into the process * * * [A] perjured juror is unfit to serve even in the absence of * * * vindictive bias." *Dyer v. Calderon*, 151 F3d 970, 983 (9th Cir 1998).

This case is squarely on point with *Dyer* and *Green* because it is clear that Moser's pattern of misbehavior created "destructive uncertainties" about her ability to serve as an impartial juror. In her e-mail she stated "[t]here is no way I would get on that jury, and not sure I would want to hear the details after reading the search warrants. I will have to defer." Rather than being truthful in voir dire, knowing she would have been excused, she apparently repeatedly lied to stay on the jury. Her actions, coupled with her prior statement that defendant "needs to die," support an inference that she intended to stay on the jury for the purpose of seeing him executed. Her false comments during *voir dire*

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created destructive uncertainties about her ability to serve as an impartial juror that can consider the full range of sentences.

B. Ms. Moser made untruthful statements during voir dire and a correct response would have resulted in a challenge for cause.

Knowingly making false statements during voir dire is a serious crime. ORS 162.065 provides that it is a felon when "A person commits the crime of perjury if the person makes a false sworn statement or a false unsworn declaration in regard to a material issue, knowing it to be false." And lying under oath subject the juror to criminal contempt *See* ORS 33.015 to 33.155. A defendant has two separate avenues of relief for a juror's untruthful answers during voir dire. First, to the extent that untruthful answers strongly suggest a lack of impartiality, a defendant may obtain a new trial by establishing actual or implied bias. This bias issue was discussed in the previous section. Second, a defendant can obtain a new trial under *McDonough*. "[T]o obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire,* and then further show that a correct response would have provided a valid basis for a challenge for cause." *McDonough Power Equip., Inc. v. Greenwood*, 464 US 548, 556, 104 S Ct 845, 850, 78 L Ed 2d 663 (1984).

First, defendant can show that Ms. Moser failed to answer honestly to a material question on voir dire. She was asked by both defendant and the State whether, in her capacity as a clerk at the courthouse, she had any knowledge about the case, formed any opinions about this case, or how the outcome of the case should be. She denied having any knowledge or opinions about the case. However her e-mail shows that she had knowledge about the details of the case and had formed strong opinions about the case. In

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particular she stated "He is the guy who (with the 2 younger black kids from Portland) killed a boy (and chopped him up in pieces and burned his body) and took his car to Florence to rob a bank. He was out of prison for a couple of years for murder in the 70's. He needs to die." This is affirmative proof that she intentionally gave incorrect responses during voir dire. Second, a correct response would have provided a basis for a challenge for cause because of her knowledge about the case from reading the search warrants and forming an opinion about the case prior to trial. Moser's flagrant conduct is aggravated by the fact that she worked an employee of the trial court should not be tolerated gives rise to a presumption that Defendant did not receive a fair trial.

C. Moser apparently had access to extrajudicial materials.

A jury's exposure to extra judicial information can pollute a verdict as surely as third party contacts. "A defendant is entitled to a new trial when the jury obtains or uses evidence that has not been introduced during trial if there is a reasonable possibility that the extrinsic material could have affected the verdict." *United States v. Keating*, 147 F3d 895, 900 (9th Cir 1998) (internal citations omitted). The inquiry in determining if there is reasonable possibility that juror's use of extrinsic evidence could have affected verdict, as will warrant new trial, is objective rather than subjective, and court need not ascertain whether extrinsic evidence actually influenced any specific juror. *Id.* at 901-02. The government has burden of showing beyond reasonable doubt that extrinsic evidence considered by jurors did not contribute to verdict, and thus does not warrant new trial. *Id.*

Here Moser's employment as a clerk is especially troubling because she had access to extrajudicial materials. There is a reasonable probability that the information

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she gained as an employee of the trial court via the search warrants could have affected the verdict. Because the jury was exposed to her throughout the trial the state has the burden of proving beyond a reasonable doubt that the jury was not prejudiced. *Keating*, 147 F3d 901-02. The state did not meet that burden at the March 6, 2015, hearing. A number of jurors were not able to remember whether or not Moser had communicated extrajudicial information to them. Although several believed they likely would remember, that is insufficient to affirmatively establish that such information was not shared. Tellingly, alternate juror Graves state, "I couldn't say for certain what she said. But *I imagine that's possible that she would have made a comment about that.*" Tr. 120. This response suggests that Moser may very well have discussed her thoughts about the case to other members of the jury. Of course, jurors are barred from discussing the case prior to deliberation. Graves's comment suggests that Moser did not strictly adhere to that prohibition.

D. A strong presumption of prejudice should apply because any potential prejudice of the jury, due to Moser's misconduct as a third party contact, could not be rectified by the trial court prior to the conclusion of the deliberations.

Because Moser's misconduct did not come to light until October 7, 2014, well after the jury returned their verdict on May 15, 2014, there was no chance for the trial judge to assess and to rectify the potential prejudice to Defendant until nearly five months after deliberations had concluded. Therefore, a strong presumption of prejudice should apply and a new trial should be ordered.

> "In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively

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> prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Remmer v. United States, 347 US 227, 229, 74 S Ct 450, 451, 98 L Ed 654 (1954). Thus, an ambiguous answer by jurors regarding whether they remembered Ms. Moser making any comments about Defendant five months after the verdict is not enough to overcome the strong presumption of prejudice. "A motion for mistrial is 'addressed to the sound discretion of the trial judge,' who is in the best position to *assess and to rectify the potential prejudice* to the defendant." *State v. Farrar*, 309 Or 132, 164, 786 P2d 161, 182 (1990) (quoting *State v. Jones*, 242 Or 427, 433, 410 P2d 219 (1966) (emphasis added)). Here, of course, the late discovery of Moser's misconduct deprived this court of the opportunity to timely remedy her misconduct. Because of the late hour, the only viable remedy is a new trial free of the corruptive influence of an openly biased jury.

Moser's misconduct affect defendant's substantial right to an impartial jury and to confrontation, guaranteed by Article I, section 11, of the Oregon Constitution, and the Sixth Amendment to the United States Constitution. "If there is a 'reasonable possibility' that a jury's verdict has been affected by material not properly admitted as evidence, the criminal defendant is entitled to a new trial." *United States v. Davis*, 15 F3d 1393, 1412 (7th Cir 1994). The trial court's obligation arises not only from the defendant's right to a fair trial, but also from "proper concern for protecting and preserving the integrity of our jury system," *Remmer v. United States*, 350 US 377 (1956).

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State v. Pratt is not to the contrary. In *Pratt,* one week into the guilt phase of defendant's second trial it came to the court's attention that one of the alternate jurors had made several comments about the case to other jurors and to court staff. 316 Or 561, 573, 853 P2d 827 (1993). "After the court had questioned all jurors and cautioned the alternate juror not to talk about the case any further, defendant moved for a mistrial." *Id.* at 574. "The trial court denied the motion, finding as follows:

> "Relating to the motion for mistrial that the Court has had under advisement overnight, the Court finds that the remarks of the alternate juror in question did not introduce any extraneous information into the trial and the remarks that he did make were overheard by very few of the jurors and the principal one about what happened to her suitcase did not indicate any prejudice toward the defendant.
>
> "The most damaging of the statements, that is that no one deserved to be treated like this, referring to the autopsy photographs, were made to the bailiff and were not overheard by other jurors.
>
> "The statement was a premature comment about the possible provocation which is the issue in question three in the penalty phase and they should not have been made, but it did not introduce any prejudice toward the defendant to any of the jury because they did not hear it.
>
> "The irregular event which caused each of the jurors to be interviewed in chambers I don't believe caused prejudice against the defendant.
>
> "The motion for mistrial is denied."

Id. At 574. The Oregon Supreme Court found that "the trial court carefully assessed whether the comments by the alternate juror could have caused any possible prejudice to defendant...[and] concluded that no harm had been done." *Id.* at 574-75 (emphasis added). Because the defendant did not suggest any persuasive reason why the trial court should have concluded otherwise the Supreme Court held that the trial court did not

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abuse its discretion in denying the motion for mistrial. *Id.* at 575. Here, by contrast, it is not at all clear that Moser's misconduct did not affect the verdict. As noted above, a number of the jurors were not able to conclusively state that she had not shared improper information with them. Further, unlike in *Pratt*, this court was unable to make a prompt investigation into the matter. Here, by contrast, months have passed and the juror's memories have faded, as demonstrated by those who responded that they did not remember whether or not improper communication took place. Further, unlike in *Pratt*, in this case there was no curative instruction prior to deliberations ending.

Parker v. Gladden provides the best analogue to this case. That case is illustrative of what types of third-party contacts violate a defendant's constitutional rights by impinging his right to a fair trial. 385 US 363, 87 S Ct 468, 17 L Ed 2d 420 (1966). In *Parker,* the bailiff in charge of the jury told one juror that the petitioner was "wicked" and guilty and told other jurors that, if anything was wrong with convicting the petitioner, the Supreme Court would correct it. *Id.* at 364-65. On the question whether the petitioner was deprived a fair trial, the Court considered several factors. First, the Court noted that the improper statements were made by a court official whose word "beyond question carries great weight with a jury he had been shepherding for eight days and nights." *Id.* at 365. Second, the Court considered that the jury had deliberated for 26 hours, "indicating a difference among them as to the guilt of petitioner." *Id.* Finally, the Court noted that one of the jurors who had heard the remarks testified that she was prejudiced. *Id.* The U.S. Supreme Court agreed with the trial court's finding that the unauthorized contacts with the jury were prejudicial to the petitioner. *Id.* This case is similar to *Parker* – any

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possible statements were made by a court employee, a clerk at the courthouse, whose word would likely carry great weight with the jury.

In sum, because there was no chance for the trial court to make a careful assessment or rectify any potential prejudicial effect Moser may have had on the jury until well after the deliberations had concluded, a strong presumption of prejudice should apply. This presumption is further supported by the fact that the potential prejudice came from a juror who engaged in dishonesty in order to remain on the jury panel. This is compounded further by the fact that. Moser is a clerk at the very court in which Defendant was sentenced to death and her word would likely carry great weight with the jury. In order to protect public confidence in the judicial system and defendant's right to a fair trial, defendant's conviction must be vacated.

CONCLUSION

Defendant respectfully requests that this court vacate his conviction and sentence and grant him a new trial.

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APPENDIX G

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

THE STATE OF OREGON, Plaintiff, vs. DAVID RAY TAYLOR, Defendant.	Case No. 20-12-16842 OPINION AND ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL

THIS MATTER came before the Court upon Defendant's Motion for New Trial. The Court, having reviewed Defendant's Motion, Defendant's Memorandum of Law in Support of the Motion, and the State's Response to Defendant's Motion for New Trial, rules as follows:

OPINION

Defendant moves the Court for an order vacating the judgment in this case and ordering a new trial based on allegations of wrongdoing by one of the alternate jurors. The State objects to the Motion, raising two procedural objections, and arguing that the Motion should be denied on its merits. I conclude that the State's procedural objections are well taken and deny the Motion on procedural grounds without ever reaching the merits.

The State's first procedural objection is that the Supreme Court's Order of Remand does not grant this Court jurisdiction to consider any motions, including a motion for new trial. The January 7, 2015 Order of Remand states that "[t]he scope of the remand is limited to the question whether the alternate juror engaged in juror misconduct and, if she did, whether her misconduct tainted the other jurors' consideration of the case." Order Granting Limited Remand, paragraph 2. As I read the Order, it remands this matter back to this Court to investigate and determine two things, and only two things: (1) did Ms. Moser engage in juror misconduct, and (2) if so, did that misconduct taint the other jurors? This Court has conducted that investigation and is today issuing a report to the Supreme Court setting forth its findings on those issues.

Even if the Order could be interpreted to implicitly give this Court authority to consider motions, the defendant's Motion would be untimely. ORS 126.535(1) makes ORCP 64 F applicable to criminal proceedings. ORCP 64 F(1) generally requires that motions for new trial be filed within 10 days of the entry of judgment, but does give the Court authority to set some other time for the filing of such motions. However, the rule limits the court's discretion by providing that if the motion is not heard and determined "within 55 days of the entry of the judgment," it is deemed denied. Thus, a court may not grant an extension to file such a motion that extends beyond 55 days of entry of the judgment.

The defense makes several other arguments as to why the 55-day limit should not apply in this case, all of which I reject. While it is true that this matter is on automatic review rather than on a notice of appeal filed by a party, I think that ORS 64 F(1) evidences an intent that the case's status on appeal does not prevent filing a motion within the 55 days following entry of a judgment. Likewise, while the defense makes an equitable argument that the deadline should not apply because they were not aware of the facts supporting a motion at that time, the language of ORCP 64 F(1) is absolute and the defense fails to cite any authority for the proposition that this Court may exceed the deadline in the interest of justice. Finally, while I am very mindful of the unique posture of this proceeding, I am also mindful that my authority is only as prescribed by the Supreme Court in the Order Granting Limited Remand – no more and no less. Thus, as an independently sufficient basis for denying the Motion, I find that this Court does not have discretion to allow a late filing in this case.

ORDER

IT IS HEREBY ORDERED that the DEFENDANT'S MOTION FOR NEW TRIAL is DENIED.

DATED: June 8, 2015

Charles M. Zennaché, Circuit Court Judge

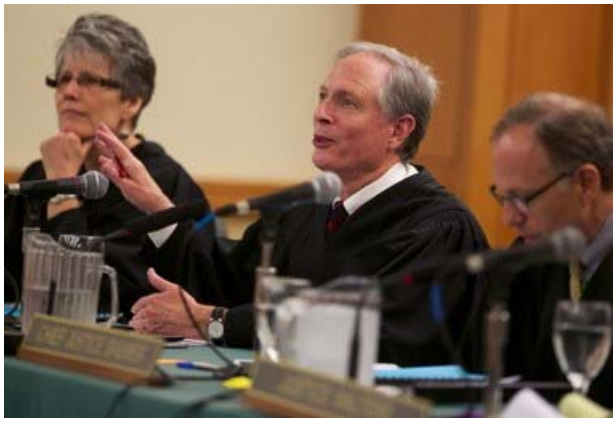
Prepared by CMZ

APPENDIX H

PACIFIC NORTHWEST

Oregon Supreme Court denies death row inmate Gary Haugen's bid for execution

Updated Jun 20, 2013;
Posted Jun 20, 2013



Justice Rives Kistler, center, asks a question during oral arguments last March in the Haugen v. Kitzhaber case. Also pictured: Justice Virginia Linder, left, and Chief Justice Thomas Balmer, right.

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By **Helen Jung | The Oregonian/OregonLive**

Death row inmate Gary Haugen cannot legally force Gov. John Kitzhaber to carry out his execution, the Oregon Supreme Court decided Thursday.

Rather, the governor has the legal authority to delay the twice-convicted killer's execution, the court said, despite the inmate's insistence that he be put to death.

"The Oregon Constitution does not provide the recipient of a Governor's act of clemency with a corresponding individual right to reject that clemency," the unanimous opinion authored by Chief Justice Thomas Balmer states. "In fact, in describing the Governor's power to grant pardons, commutations, and reprieves, the constitutional text does not refer to the recipient of the grant of clemency at all."

Gary Haugen.

The court's decision reverses a trial court judge's ruling last August that sided with arguments from Haugen and his attorney Harrison Latto that Haugen must accept the governor's reprieve for it to be valid.

In a statement, Kitzhaber said he was pleased with the court's decision.

"I renew my call for a re-evaluation of our current system that embraces capital punishment, which has devolved into an unworkable system that fails to meet the basic standards of justice," he said. "I am still convinced that we can find a better solution that holds offenders accountable and keeps society safe, supports the victims of crime and their families and reflects Oregon values."

More

Continuing coverage of Gary Haugen, an Oregon death row prisoner, who wants to initiate the execution process. Gov. John Kitzhaber blocked his execution and all others in Oregon.

The decision comes a year and a half after Kitzhaber -- who as governor allowed two other executions to proceed in 1996 and 1997 -- abruptly halted plans for Haugen's December 2011 execution and

announced a reprieve

. At the time, Kitzhaber also declared that he would not allow any executions as long as he is governor, saying that

the death penalty system is broken, arbitrary and "a perversion of justice.

"

Haugen then sued Kitzhaber, arguing that he should be able to choose whether to pursue legal appeals or allow his death sentence to be carried out. Harrison Latto, who previously worked as a state

assistant attorney general, has represented Haugen for free and won the first round in Marion County Circuit Court when Senior Judge Tim Alexander agreed that Haugen had the legal authority to reject the reprieve.

The governor appealed that ruling and the state Supreme Court heard oral arguments by Latto and by state Solicitor General Anna Joyce last March.

The Supreme Court turned back Latto's arguments that the reprieve was ineffective because it lacked an expiration date. The court also did not consider Kitzhaber's reasons for issuing the reprieve, instead focusing on what constitutes a reprieve. The justices examined historical context, constitutional provisions, legal definitions and case law to determine that the inmate does not possess a right to nullify the governor's act.

The Supreme Court said the state constitution expressly limits the governor's clemency powers in cases of treason, supporting the governor's argument that his authority in all other clemency cases is not subject to review.

The high court also rejected Latto's argument that the uncertainty of the reprieve constitutes cruel and unusual punishment.

"We do not doubt that being on death row, awaiting possible execution and facing uncertainty as to if, and when, that sentence might be carried out exacts a toll on people," the court said.

Latto said he was disappointed by the court's decision but appreciated its thorough response to nearly all the arguments he raised. He has not yet spoken with Haugen.

While there are some options for appeal or asking for a rehearing, he said, they are "not realistic" options.

Haugen was sentenced to life in prison at age 19 for murdering the mother of his former girlfriend in Northeast Portland in 1981. He was convicted of killing a fellow prisoner at the Oregon State Penitentiary and sentenced to death in 2007.

-- Helen Jung

NO. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

_____

DAVID RAY TAYLOR - PETITIONER

VS.

STATE OF OREGON - RESPONDENT

I, Daniel C. Bennett, do swear or declare that on this date, July 29th, 2019, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by personally delivering an envelope containing the above documents within 3 calendar days.

The names and addresses of those served are as follows:

TIMOTHY SYLWESTER
Senior Assistant Attorney General
1162 Court Street NE
Salem, OR 97301
Phone: (503) 378-4402
Attorney for Respondent

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 29th, 2019.

Respectfully submitted,
ERNEST G. LANNET
CHIEF DEFENDER

Signed
By Daniel Bennett at 10:23 am, Jul 29, 2019

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