Through the clemency power granted by the Oregon Constitution, the Governor of Oregon has the plenary power to commute the death sentences of each person on Oregon's death row and impose a sentence of life in prison without the possibility of parole. Because of the broad scope of executive clemency power, this authority exists even with respect to those inmates whose crimes were committed before the Oregon legislature passed a law establishing life without parole as a punishment for aggravated murder. In fact, there is absolutely no legal authority to the contrary.

I. The Executive's Clemency Power

Article V, section 14, of the Oregon Constitution bestows upon the Governor the "power to grant reprieves, commutations, and pardons, after conviction, for all offences except treason, subject to such regulations as may be provided by law." The text of the document reveals this power is plenary in all cases except those involving treason. *Haugen v. Kitzhaber*, 353 Or. 715, 727 (2013). Oregon's constitutional history supports this conclusion as well. While the framers of the Constitution debated adding limitations and checks upon this power, those proposals were "considered and rejected … in favor of entrusting that power to the Governor alone." *Id*. at 730.

This plenary power necessarily permits the Governor to commute a sentence and impose, in its stead, any lesser sentence, even one that was not specifically enumerated under the sentencing law at the time of the offense. The United States Supreme Court confronted this precise issue in *Schick v. Reed*, 419 U.S. 256 (1974). There, the Court rejected a prisoner's claim that President Eisenhower acted beyond the scope of his authority in commuting the prisoner's death sentence to life in prison without the possibility of parole. *Id*. at 259. Schick argued that, because the only alternative to a death

sentence contained within the Uniform Code of Military Justice at the time of his offense was life **with** the possibility of parole, the President's commutation was unlawful and he must be permitted to petition for release. *Id*. at 260. The Supreme Court firmly rejected Schick's argument, noting that the Executive power to reduce sentences and fashion remedies had long been essentially unfettered. *Id*. at 262. The Court held, "in light of the English common law from which such language was drawn, the conclusion is inescapable that the pardoning power was intended to include the power to commute sentences on conditions which do not in themselves offend the Constitution, but which are not specifically provided for by statute." *Id*. at 263-64.

Schick is instructive because the Oregon clemency power is rooted in the same common law tradition as is the federal power. *See Haugen*, 353 Or. at 729-30. Oregon Courts have repeatedly referenced federal precedent in deciding challenges to the exercise of the Governor's authority. *See*, *e.g*, *Haugen*, 353 Or. at 735 (discussing federal cases about the executive clemency power); *Fredericks v. Gladden*, 211 Or. 312 (1957); *Carpenter v. Lord*, 88 Or. 128 (1918). In addition, the Oregon Supreme Court specifically cited *Schick* with approval as recently as 2013. *Haugen*, 353 Or. at 726.

In addition, other courts directly addressing a challenge to the governor's power to impose a condition prohibiting parole have each reached an identical result. *See*, *e.g.*, *Hamilton v. Ford*, 362 F.Supp. 739 (E.D.Ky. 1973) (rejecting prisoner's challenge to life without parole sentence imposed by governor after commutation of death sentence, even though legislation did not authorize life without parole as a penalty for murder); *Green v. Gordon*, 39 Cal.2d 230 (1952)(same); *Ex Parte Collie*, 38 Cal.2d 396 (1952)(same). In *Green*,

the California Supreme Court discussed the distinction between penalties established legislatively and those conditions which may be imposed by the executive. The Court held,

> The penalties prescribed by statute, however, are the ones to be imposed by the trial court upon conviction of murder, and the statutory provisions relating to such penalties and the right to parole do not purport to limit the governor's power to impose conditions upon a commutation of sentence.

Id. at 232-33; *see also Carroll v. Rainey*, 953 S.W.2d 657 (Tenn. 1997)(governor had authority to commute death sentence and impose alternate sentence of "22 years to life," even though new sentence not authorized by statute); *State v. Fields*, 925 S.W.2d 561 (Tenn. 1996)(governor did not exceed his authority in commuting death sentence and imposing one of 99 years imprisonment, even though statute only authorized alternate sentence of life with parole); *Baston v. Robbins*, 158 Me. 128 (1957)(governor had power to impose indeterminate sentence after commutation, even though no statutory authority for indeterminate sentence existed).

II. In the Post-*Furman* Era, Numerous Governors Have Commuted Death Sentences to Life in Prison Without the Possibility of Parole, Despite the Absence of Statutory Authorization for the New Sentence

In the post-*Furman* era, six state governors have announced broad commutations of multiple death sentences.[1] In three of these instances, discussed below, the governors imposed a sentence of life without the possibility of parole, even though that punishment was not permitted under the existing state sentencing laws. Perhaps owing to the uniform authority approving such practice, discussed above, in no case was any challenge to the commuted sentences raised by the recipients of the governors' mercy.

[1] These statistics were collected by the Death Penalty Information Center and are available online at www.deathpenaltyinfo.org/clemency.

The first such example is the commutation of eight death sentences by Ohio Governor Richard Celeste in 1991. In six of the eight cases, Celeste replaced the death sentence with one of life imprisonment without the possibility of parole.[2] At the time, Ohio did not authorize life without parole as a punishment for aggravated murder. That sentencing option was not available to the courts or to juries until July 1, 1996.[3] Despite the lack of statutory authorization, in none of these cases did the inmate object to the sentence or claim that he or she was entitled to parole. In fact, each inmate at issue either remains in prison today or has died while incarcerated. [4] Similarly, in 2010 and 2012, respectively, Ohio Governor Ted Strickland commuted the death sentences of two inmates, Sidney Cornwell and Ronald Post, to life without the possibility of parole. Each of these inmates was convicted of an aggravated murder that occurred prior to July 1, 1996, the effective date of the life without parole provision.[5] Again, neither inmate lodged a challenge to either of these sentences.

In 2007, Governor Jon Corzine of New Jersey commuted the death sentences of all eight prisoners on New Jersey's death row.[6] Corzine imposed alternative sentences of life without the possibility of parole on each. Seven out of eight of these inmates had committed their crimes before the legislature had authorized the sentence of life without

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[2] *Wilkinson v. Maurer*, No. 92AP-1297, 1993 WL 114448, at *1 (Ohio Ct. App. Apr. 8, 1993).
[3] 1995 Ohio Laws File 50 (S.B.2) added life without parole as a sentencing option for aggravated murder. The law went into effect on July 1, 1996.
[4] The referenced inmates granted clemency by Governor Celeste were Donald Lee Maurer, Lee Seiber, Elizabeth Green, Willie Jester, Leonard Jenkins, and Debra Brown. The incarcerative history of each inmate is available at http://www.drc.ohio.gov/OffenderSearch/search.aspx
[5] Sidney Cornwell committed an aggravated murder on June 11, 1996, and Ronald Post was convicted of an aggravated murder that occurred in 1985.
[6] Peters, Jeremy W., "Corzine Signs Bill Ending Executions, Then Commutes Sentences of Eight," *N.Y. Times*, December 18, 2007, available at http://www.nytimes.com/2007/12/18/nyregion/18death.html?_r=0

parole for aggravated murder. [7] As with those in Ohio, none of the New Jersey inmates challenged the legality of their commuted sentences.

Lastly, in 2014, Governor Martin O'Malley commuted the sentences of all four men on Maryland's death row and sentenced each to life in prison without the possibility of parole.[8] Two of those inmates, Vernon Evans and Anthony Grandison, had committed aggravated murder in 1983, four years before the Maryland legislature authorized life without parole as a possible penalty for that crime.[9] Nevertheless, neither Evans or Grandison challenged the Governor's authority to impose this sentence.

As these examples make evident, the authority of the executive to commute a death sentence to life without the possibility of parole, even in the absence of legislative authority for that sentence, is well-established.

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[7] The inmates granted clemency and the year of their offenses were: Marko Bey (1983), David Cooper (1993), Ambrose Harris (1992), Nathaniel Harvey (1985), Sean Kenney, a.k.a. Richard Feaster (1983), John Martini (1988), Jesse Timmendequas (1994), and Brian Wakefield (2001). The New Jersey legislature added life without parole as a possible sentence for aggravated murder in the year 2000. *State v. Fortin*, 400 N.J. Super. 434, 440-41 (App. Div. 2008) *aff'd in part*, *rev'd in part*, 198 N.J. 619 (2009). Therefore, only Wakefield was statutorily eligible for the sentence.

[8] Wagner, John, "Gov. O'Malley to commute sentences of Maryland's remaining death-row inmates," *The Washington Post*, December 31, 2014, available at http://www.washingtonpost.com/local/md-politics/gov-omalley-commutes-sentences-of-marylands-remaining-death-row-inmates/2014/12/31/044b553a-90ff-11e4-a412-4b735edc7175_story.html.

[9] Life without parole became a sentencing option for aggravated murder in Maryland on July 1, 1987. *Collins v. State*, 318 Md. 269, 298 (1990).