IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE THIRD JUDICIAL DISTRICT

GARY D. HAUGEN,

Plaintiff, **No. 12C16560**

v. **OPINION OF THE COURT**

JOHN KITZHABER, Governor o f the State of Oregon

Defendant.

This dispute comes before the court on Plaintiff's Motion for Judgment on the Pleadings pursuant to ORCP 21 B. Mr. Haugen contends that there is no dispute of material fact and that he is entitled to judgment on the basis of the pleadings. Defendant, Governor John Kitzhaber, agrees that the relevant facts are not in dispute, but contends that his reprieve is valid and not subject to attack on any theory advanced by Mr. Haugen.

Both parties are represented by counsel, and have submitted legal research and oral argument to assist the court in resolving this dispute. Considering the long but sparse history of this area of the law, each attorney involved in the case has done an exceptional job in providing references to court decisions both state and federal that have some bearing on the outcome here.

I have been personally involved with death penalty litigation for more than 40 years, acting as prosecuting attorney, defense attorney, appellate attorney, and trial judge. My decision in this declaratory judgment case is not intended to be a criticism of Governor Kitzhaber or the views he has expressed in his statement accompanying the reprieve he has offered to Mr. Haugen. In fact, I agree with many of the concerns expressed by the governor, and share his hope that the legislature will be receptive to modifying and improving Oregon laws regarding sentencing for Aggravated Murder. Many Oregon judges with experience presiding over death penalty cases would concur that the current law requires spending extraordinary sums of tax dollars that could be better used for other purposes to enforce a system that rarely if ever results in executions.

However, consistent with the resolution of every other case, I am required to set aside my personal views and decide this case on its merits and the law.

I find that there is no dispute as to the following facts:

1. Gary D. Haugen was convicted of aggravated murder and sentenced to death in May 2007;
2. The conviction and sentence were affirmed on appeal by the Oregon Supreme Court;
3. Mr. Haugen has accepted the decision of the courts and has pursued no further appeals;
4. The trial court conducted two death warrant hearings, and eventually set an execution date of December 6, 2011;
5. Prior to the execution date, Governor Kitzhaber issued a reprieve for the length of his term as governor (the terms of said reprieve and the governor's statement of explanation being incorporated by reference in these findings of fact);
6. Mr. Haugen has repeatedly and unequivocally rejected and declined the reprieve and demanded that the sentence of death be carried out.

After reviewing the authorities cited and hearing oral argument, the dispute has two critical elements. The preliminary question is whether the reprieve is valid, or fails due to the lack of a definite expiration date. If that hurdle is accomplished, the resolution of the case turns on whether a reprieve must be accepted by Mr. Haugen in order for it to be effective.

I have concluded that there is no requirement that a reprieve specify a particular date that it expires. The reprieve, on its face, limits the reprieve to the duration of the Governor's service. The reprieve is thus temporary, as is necessary to define the clemency as a reprieve. The Governor's clemency power includes the greater powers of pardon and commutation. In this case, the Governor could choose to commute Plaintiff's sentence to life in prison. This is the functional equivalent of an indefinite reprieve, and there is no question that the Governor possesses this power. It is illogical to suggest that the Governor possesses the lesser power to grant a reprieve for a set time and the greater power to commute a sentence indefinitely, but not the intermediate power to grant a reprieve for an indeterminate time fixed on the outside by his service as Governor.

Having resolved the first issue in favor of Governor Kitzhaber, I turn to the second question: whether a reprieve must be accepted in order to be effective. I have answered that question in the affirmative, and because Mr. Haugen rejected the reprieve, the reprieve is necessarily ineffective. I need not reach the remaining allegations in the complaint.

Because the timing of the cases is important, I present the relevant case law in chronological order. Plaintiff relies heavily on the doctrine of "acceptance" illustrated by Chief Justice John Marshall in *U.S. v. Wilson*, 32 US 150 (1833). I borrow from Plaintiff's statement of the facts: In *Wilson*, the defendant was charged, in part, with three offenses, all stemming from the same train robbery. The three charges were: (1) obstructing the mail; (2) robbery of the

mail; and (3) robbery of the mail and putting the carrier's life in danger. The defendant was tried and convicted of robbery of the mail and putting the carrier's life in danger. He was sentenced to death, at which time he changed his pleas to guilty on the remaining two charges. President Jackson then issued an unconditional pardon on the conviction that resulted in a death sentence, for the stated reason that the convictions on the other charges would likely result in lengthy imprisonment. The pardon stipulated that it did not extend to any of the other convictions.

Before judgment was imposed on one of the other charges, the trial court inquired regarding the effect of the pardon, since the charges were closely related. In response, the defendant stated that he "waived and declined any advantage or protection which might be supposed to arise from the pardon." *Id.* at 158.

Ultimately the Supreme Court held that the pardon could not be judicially noticed because it had to be brought before the court before it could have any effect. The Court explained that "[a] pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him." *Id.* at 161. Thus, a defendant rejecting a pardon might decline to bring it before the court.

This "acceptance" theory establishes a right to reject a pardon. Defendant argues that only conditional clemency must be accepted in order to be effective. However, nothing in the language of the case suggests that the right to reject stems from a condition of the pardon. Indeed, the pardon in *Wilson* was unconditional. Instead, the right to reject rises from the very nature of the pardon. It is an act of grace and a deed. Furthermore, nothing in *Wilson* suggests that pardons should be treated differently than any other form of clemency. Any form of clemency must be accepted in order to be effective.

Chronologically, the next case for discussion is the first relevant Oregon case, *Ex parte Houghton*, 49 Or 232 (1907). In *Houghton*, the Governor granted a prisoner a conditional commutation to time served. The prisoner was released, but was shortly after arrested pursuant to a finding by the Governor that he had violated the terms of the conditions. The Court held that "[t]he commutation was an act of grace or favor, and he was not obliged to accept it unless he so desired. He might have refused it, and served out his sentence as originally imposed, but chose to accept the conditional commutation, and in doing so stipulated that for a violation of the conditions he might be summarily arrested by order of the Governor and remanded to the penitentiary to serve the remainder of his original sentence." *Id.* at 234-235. Though the clemency in question is conditional, nothing in the language of the case indicates that the right to refuse rises out of the conditional nature of the clemency. The Court could easily have stated that *because* the clemency was conditional, the prisoner had a right to

reject it. Instead, the only indication is that the right to reject stems from the fact that the commutation "was an act of grace or favor[.]" *Id.* at 234.

Eight years later, the U.S. Supreme Court had occasion to examine *Wilson*, and in doing so the Court reaffirmed the acceptance theory. *Burdick v. U.S.*, 236 US 79 (1915). In *Burdick*, a newspaper editor invoked his right to not incriminate himself and refused to testify before a grand jury. President Wilson issued a blanket pardon to the editor, which the editor rejected and maintained his refusal to testify against himself. The Court held that *Wilson* was dispositive, and ruled again that a pardon must be accepted in order to be valid. For the purposes of this case, I refer to *Burdick* for its effect in clarifying the holding of *Wilson*:

> "That a pardon by its mere issue has automatic effect resistless by him to whom it is tendered, forcing upon him by mere executive power whatever consequences it may have or however he may regard it, which seems to be the contention of the Government in the case at bar, was rejected by the court with particularity and emphasis. The decision is unmistakable. A pardon was denominated as the 'private' act, the 'private deed,' of the executive magistrate, and the denomination was advisedly selected to mark the incompleteness of the act or deed without its acceptance."

Burdick, 236 US at 90.

Defendant argues that *Burdick* is distinguishable because accepting the pardon in that case would implicitly act as an admission of guilt. This, argues Defendant, is such an onerous condition that it transforms the unconditional pardon into a conditional pardon subject to the power of rejection. It is unclear from Defendant's argument whether other types of intrinsic conditions are sufficiently onerous to make a pardon conditional. Plaintiff argues the anxiety of not knowing when or whether he will be put to death is such a condition. However I need not address these concerns because *Burdick* provides no such distinction. The case is decided squarely on the inherent right to reject a pardon. Nothing in *Burdick* suggests that the right to reject is derived from any onerous condition the pardon might contain.

Just a few years after *Burdick*, the Oregon Supreme Court cited *Wilson* for its articulation of the acceptance theory. *Carpenter v. Lord*, 88 Or 128 (1918). In *Carpenter*, a parolee sought to avoid extradition to California. The court addressed various issues including the separation of powers between the three branches of government. On that topic, the *Carpenter* court writes:

> "Again, we remember that the government of this state is divided into three departments, the legislative, the executive, and the judicial, and that

> neither of these has any authority to interfere with the exercise of the functions of either of the others. Specifically, the executive has no right to override or annul the action of the circuit court, or to interfere with it in the execution of its own judgment. It is true that the Governor may pardon an offender by virtue of his constitutional power in that behalf, but even that is not effective, unless it is accepted by the prisoner to whom the pardon is offered. As said by Mr. Chief Justice Marshall in U. S. v. Wilson, 7 Pet. 150, 8 L. Ed. 640:
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> 'A pardon is a deed, to the validity of which, delivery is essential, and delivery is not complete, without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him.'
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> The doctrine of this case has never been disturbed by any ruling to which our attention has been directed."

Carpenter, 88 Or at 137.

The *Carpenter* court is citing *Wilson* for the proposition that a pardon must be accepted in order to be effective and to show that the Governor's pardoning power is not absolute. Nothing in *Carpenter* indicates that the Court is bound by the decision in *Wilson*. Rather the Court relies on the persuasiveness of Justice Marshall's argument. While this is the first Oregon case citing *Wilson* for such a proposition, it is merely an extension of the philosophy articulated in *Houghton* – clemency is an act of grace, and the recipient is not obliged to accept it. The Court does not cite *Burdick*, but the use of *Wilson* is consistent with the analysis in *Burdick*. Finally, like the previous cases, nothing in the language of *Carpenter* indicates that the right to reject is reserved for conditional pardons.

Ex parte Dormitzer, 119 Or 336 (1926), dealing with clemency that was framed as a reprieve, further extends the acceptance philosophy. The defendant in *Dormitzer* was convicted of possession of liquor and sentenced to six months jail. The Governor granted the defendant two consecutive reprieves from the jail sentence on the condition that he obey the laws of the land. The Governor later revoked the reprieve because the defendant violated that condition.

The Court spends some time discussing the nature of the clemency and whether it was properly framed as a reprieve, but ultimately it held that did not matter. The defendant had no ground for complaint because he accepted the favor of the Governor, and he "had the right to accept or reject the 'reprieve.'" *Id.* at 340. Nowhere in the case does the Court indicate that the power to reject the reprieve stems from its conditional nature. In fact, the Court makes almost no mention of the condition on the reprieve. The only significant mention is when it

states that "[i]f the Governor had the authority to grant the suspension of the jail sentence on condition, he had a right to revoke his merciful order which would operate to remand Edmunson to jail to serve the remainder of his sentence." *Id.* This addresses only the power of the governor to grant and revoke conditional reprieves.

In the year after *Dormitzer*, the U.S. Supreme Court significantly altered its pardon doctrine in *Biddle v. Perovich*, 274 US 480 (1927). The defendant in *Biddle* was convicted of murder in federal District Court and sentenced to death. *Perovich v. U.S.*, 205 US 86 (1907). President Taft granted a commutation reducing the defendant's sentence to life in prison. Many years later, the defendant filed a writ of habeas corpus arguing that the President did not have authority to remove him from jail to the penitentiary because he did not consent to the clemency. In an opinion by Justice Holmes, the Court addressed the question of whether the President has authority to commute a sentence over the objection of the defendant. The Court rejects the reasoning in *Burdick* – and therefore in *Wilson* – and holds that consent of the defendant is irrelevant. "[T]he public welfare, not his consent determines what shall be done." *Biddle*, 274 US at 486. A pardon is "not a private act of grace from an individual happening to possess power." *Id.*

This doctrine articulated by Justice Holmes was never adopted in Oregon. In *Ex parte Anderson*, 191 Or 409 (1951), the Oregon Supreme Court cites *Houghton* for the proposition that a pardon is "a mere act of grace[.]" *Id.* at 435-6.

Thirty years after *Biddle*, the Oregon Supreme Court is still citing favorably to *Wilson*. In *Fredericks v. Gladden*, 211 Or 312 (1957), the Court quotes *Carpenter* which in turn quotes *Wilson*. Indeed, the *Fredericks* court quotes the very language of *Carpenter* and *Wilson* in discussion here:

> "In *Carpenter v. Lord, 88 Or 128, 171 P 577*, this court said:
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> '* * * It is true that the Governor may pardon an offender by virtue of his constitutional power in that behalf, but even that is not effective unless it is accepted by the prisoner to whom the pardon is offered. As said by Mr. Chief Justice Marshall in *United States v. Wilson, 32 U.S. 150, 7 Pet. 150 (8 L. Ed. 640)*:
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> '"A pardon is a deed, to the validity of which, delivery is essential, and delivery is not complete, without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him."' And see, 67 CJS 574, Pardons, § 10b; and 39 Am Jur 546, Pardon, Reprieve and Amnesty, §§ 45, 46, 47."

Fredericks, 211 Or at 323.

Plaintiff provides very persuasive analysis of the case. Plaintiff argues that the citation to *Carpenter* and *Wilson* is not mere dicta, but rather forms part of the Supreme Court's argument rejecting the prisoner's contention that his sentence had been unconditionally pardoned. Plaintiff continues that the section is a rebuttal of the dissenting view that the Governor possessed a "complete" power of clemency, showing that the clemency power is not "complete," but instead subject to rejection by the recipient. I agree.

It appears that the Oregon Supreme Court continued to favor the Marshall theory of acceptance even some 30 years after the U.S. Supreme Court adopted the Holmes doctrine. Even without these later cases I find no reason to reject the Oregon Supreme Court's statement of the law based on the change in doctrine at the federal level. "When this court gives Oregon law an interpretation corresponding to a federal opinion, our decision remains the Oregon law even when federal doctrine later changes." State v. Caraher, 293 Or 741, 749 (1982).

Defendant can point to no Oregon case adopting the Holmes theory of clemency. Thus the balance of cases, even if some are dicta, supports Plaintiff's contention that he has a right to reject the Governor's reprieve.

The parties agree that judgment on the pleadings is appropriate. I conclude that Plaintiff has the right to reject Governor Kitzhaber's reprieve, and that absent acceptance a reprieve is ineffective. Because Plaintiff has unequivocally rejected the reprieve, it is therefore ineffective. Counsel for Plaintiff will prepare a proposed form of judgment and submit it pursuant to Oregon Rules of Civil Procedure. The parties have agreed that the ruling in this case will control the next step in the criminal case, therefore as soon as this decision is final, a hearing will be set to establish an execution date in accordance with the statutes concerning sentencing in aggravated murder cases.

August 3, 2012

Timothy P. Alexander
Senior Circuit Judge