



Office of the Ohio Public Defender

Timothy Young, State Public Defender

Testimony in Support of HB183 Repeal of the Death Penalty Sponsor Representatives A. Miller and Schmidt

Chair LaRe, Vice Chair Swearingen, Ranking Member Leland, and members of the House Criminal Justice Committee, thank you for the opportunity to provide written testimony on behalf of the Office of the Ohio Public Defender (“OPD”) in support of House Bill 183 (“HB183”). I am Randall Porter, an Assistant Public Defender for the OPD in the Death Penalty Department.

It has been twenty-two years since the State of Ohio started executing people again in Ohio. It began with Wilford Berry, who suffered from schizophrenia and yet was permitted to waive his appeals and volunteer for execution. Since that time, Ohio has executed 55 additional men. Although Ohioans want to believe that all of those cases were properly vetted before the men were executed, we cannot be sure this is the case despite the system of appeals we have in place.

During oral testimony, this committee heard my colleague say, that “there are also so many hurdles put in place before a case is heard on the merits, and some never are.” I wanted to explain to the committee some of hurdles to which she is referring and how Ohio’s 40-year history with the re-enacted death penalty demonstrates that our system is not set up to catch all of the mistakes before it is too late, regardless of the participants’ efforts.

When the Ohio Legislature re-enacted the death penalty it knew that mistakes will be made. It created special provisions in capital cases, such as a direct appeal process, to correct those errors. The Supreme Court of Ohio must review every death penalty case. When that Court conducts that review, it must re-examine the evidence to ensure that the prosecution proved the existence of the aggravating circumstance by proof beyond a reasonable doubt and that the aggravating circumstances outweigh the mitigating factors by proof beyond a reasonable doubt. Furthermore, the Court must determine if the death penalty in each case is both appropriate and proportional to death sentences imposed in death penalty cases.

However, the Court’s heightened review is limited to errors that occur in the courtroom as reflected in the transcript that the court reporter prepares. For instance, if the trial court admits inadmissible evidence, that will be reflected in the transcript. If one of the attorneys commits an error in the proceedings during the trial, it will be reflected in the court transcript.

Case law shows that the errors that most affect the reliability of jury’s verdicts do not show from the trial transcript. If a witness testifies inaccurately, that will not be reflected in the trial transcript. If defense counsel fails to interview and call an important witness that will not be reflected in the transcript. If the prosecution fails to give defense counsel in discovery an important document that supports the theory that someone else committed the crime, that will

also not be reflected in the transcript prepared the court reporter. These errors can occur regardless of the good faith of the participants at trial. The Supreme Court of Ohio lacks the ability to correct these errors on direct appeal simply because they do not appear in the record before that Court.

In 1965, the Legislature created a system designed to review potential constitutional errors that are not contained in the trial transcripts. It is referred to as “Ohio’s post-conviction system” and contained in R.C. 2953.21 to R.C. 2953.23. The remedy was designed to protect constitutional rights and provide an “orderly method of hearing such matters.” *Kott v. Maxwell*, 3 Ohio App.2d 337, 338 (1965). Unfortunately, a series of decisions by the Supreme Court of Ohio drastically reduced the effectiveness of this remedy. As the United States Court of Appeals for the Sixth Circuit observed concerning Ohio’s post-conviction system, “[b]ecause of the narrow limits placed on the Ohio post-conviction statute, there is no longer any effective State remedy open to the Appellant to exhaust. The *Perry* decision has rendered such process ineffective to protect the rights of the Appellant.” *Coley v. Alvis*, 381 F.2d 870, 872 (6th Cir. 1967). Recently, the Supreme Court of Ohio ruled that claims of actual innocence cannot be raised in Ohio’s post-conviction system. *State v. Apanovitch*, 155 Ohio St.3d 358, 364 (2018).

A typical post-conviction proceeding involves the following scenario. Counsel for the death-sentenced individual files a post-conviction petition that raises several constitutional errors. Counsel files the petition with the same court and judge who imposed the sentence of death. Most trial judges will not want to find an error that requires the vacation of the petitioner’s death sentence and/or conviction, which requires that the trial begin anew, especially a long trial.

Counsel must support each of the constitutional violations with exhibits or face summary dismissal. To avoid summary dismissal, the exhibits must contain information that was not before the Supreme Court of Ohio on direct appeal. Often the relevant information will be extremely difficult to obtain. A witness will rarely want to admit he or she testified inaccurately. Trial counsel, for fear of being found ineffective, will not want to sign an affidavit admitting that he or she failed to take some action at trial that could have led to a different result. Trial prosecutors will not give post-counsel access to their files to ascertain if all the required documents were provided in discovery.

After the death-sentenced individual files his post-conviction petition, the prosecutor files a response. The prosecutor in conjunction with his answer will often submit proposed findings of fact and conclusions of law that requests the petition to be dismissed without discovery or an evidentiary hearing. In most cases, trial judges rule consistent with the prosecutor’s proposed findings—often adopting them wholesale. This decision, for the most part, will be reviewed by the appellate courts under an abuse of discretion standard, which is an extremely high burden for the petitioner to meet on appeal. Until recently, the Supreme Court of Ohio rarely used its discretionary jurisdiction to hear post-conviction appeals.

I recently reviewed post-conviction decisions for the Ohio appellate courts for a ten-month period for both capital and non-capital cases. The courts issued 140 decisions during



that time period. While the petitioners prevailed in five cases on procedural issues, resulting in remands to the trial court, not one petitioner obtained relief.

This committee can probably imagine the frustration attorneys feel when they believe their client is innocent or wrongfully subjected to a death sentence, but they cannot get a court to hear the evidence demonstrating that. Opponents of this bill have claimed, without evidence, that Ohio has never executed an innocent person. However, it is not hard to imagine that there may be cases where witnesses never admit they lied, defense counsel never admits their actions were ineffective, and it is never discovered that the State withheld exculpatory evidence. Without a constitutional violation to raise on appeal or new evidence to present, innocent people are executed. Passing this bill will help ensure that never happens again.

Thank you for the opportunity to provide written proponent testimony.

