



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 testimony on behalf of the Office of the Ohio Public Defender (“OPD”) in support of House Bill 183 (“HB183”). I am Richard Cline, an Assistant Public Defender for the OPD in the Death Penalty Department.

I come before the Committee as someone who has practiced criminal defense for 40 years, including the trial of six capital cases. I also served 20 years on City Council in Powell, Ohio, so I have some understanding of the legislative decision-making process. I mention my service on City Council because, like the members of this Committee, I tried to make evidence-based decisions about the merits of each piece of legislation that came before me. When one looks at the evidence objectively, one concludes that it is time to end Ohio’s death penalty.

Death penalty proponents make three basic arguments to support it: they allege that the death penalty is necessary to deter homicides, that unnecessary appeals drive up the cost of death penalty cases, and the family members of victims need the death penalty to attain justice. The evidence does not support any of these arguments.

There is no evidence that the death penalty deters homicides.

Some proponents claim that the death penalty is a necessary deterrent; that it prevents homicides. If that premise were accurate – if the death penalty actually deterred homicides – then one would predict that the homicide rate in states without a death penalty would exceed the homicide rates in states with a death penalty. Instead, we find that states without a death penalty consistently have lower homicide rates.¹

Countless studies have attempted to validate or invalidate the claim that capital punishment laws deter homicides. The National Academy of Sciences received a National Institute of Justice Grant to review these studies, and the methodology employed in them. To do its work, the National Research Council reviewed published studies spanning a 35-year period (1976 - 2011). In 2012, the National Research Council published its review² of the methodology of scientific studies that sought to validate the claim that having a death penalty actually deters homicides. The conclusion was startling: “Having reviewed the research that the death penalty affects homicide rates, we conclude that it does not provide such evidence.”³ There is no scientific evidence to support the claim that the death penalty deters homicides.

Even the opponents who testified before this committee did not dispute the fallacy of a claim that the death penalty deters crime. Trumbull County Prosecutor Becker stated, “I don’t think any of the criminal statutes are a deterrent. And I think to think otherwise is to fool yourself. It is absolutely to fool yourself.”⁴ The opponents claim that Ohio needs to have a death penalty

statute to deter homicides is unsupported by evidence, and even their own testimony refutes that claim.

The Death Penalty is prohibitively expensive because it is so often wrongly sought.

More than 40 years ago, the United States Supreme Court held that “death is different.”⁵ Death is different both because it is a severe punishment, and because it is final punishment. Due process of law requires that we provide special protections against the possibility of wrongful conviction in capital cases. As a defense attorney who tried a half-dozen capital cases, I can attest that these special circumstances are expensive. Some of those protections include:

- 1) Every indigent capital defendant is entitled to the appointment of two specially trained attorneys.⁶
- 2) Court appointed counsel in capital cases are paid at a higher rate than the court pays those same attorneys when it appoints them to a non-capital case.
- 3) Capital defendants are entitled to the appointment of experts, at state expense, including a mitigation specialist, a fact investigator, and a defense psychologist.⁷
- 4) Jury selection is much different in a capital case than it is in a non-capital case. The defense is entitled to additional peremptory challenges.⁸
- 5) Individual voir dire is common in a capital case.
- 6) Capital cases are the only cases where we ask potential jurors to explain their views on punishment. We then intentionally and systematically exclude any potential juror who expresses qualms about imposing the death penalty – a process that skews the jury in favor of conviction.⁹
- 7) Capital juries must be sequestered during deliberations.¹⁰
- 8) Capital cases are the only cases in which we require alternate jurors to continue to serve while the actual jury is deliberating.¹¹
- 9) If the jury finds the defendant guilty of both aggravated murder and at least one aggravating circumstance, the case moves to a second trial regarding the issue of punishment.¹²

Despite statements made by the Ohio Prosecuting Attorney’s Association (OPAA) during opponent testimony, we “are not going to start litigating life without parole cases the way [we] litigate death penalty cases now if the death penalty is repealed.”¹³ All of these special trial provisions are limited to capital-charged cases, not life without parole cases. All of them add to the cost.

We provide these special procedures and protections in capital cases because death is different. It is tragic when we wrongfully convict someone, and they spend time in prison for a crime they did not commit. In those cases, we can correct the error. Death is final. There is no way to correct that error.

After a death sentence is imposed, the law requires us to provide specially trained attorneys to pursue direct appeal, postconviction relief, federal habeas relief, and clemency. The right to appointed counsel in these post-verdict cases flows from the recognition that there is no cure for a wrongful execution. Ohio taxpayers pay approximately \$3 million dollars per death penalty case¹⁴ compared to \$1 million dollars per life without parole case. Death Penalty proponents argue that the high cost of capital cases flows from too many special protections and that the way to save money is to restrict appeals and speed up the imposition of the death



sentence. That argument ignores the fact that 40% of the people sentenced to death win relief due to some form of legal error. Opponents of the bill claim proponents do not have justice in mind when we support repealing the death penalty. Despite significant mistakes in the process 40% of the time, prosecutors keep pushing towards execution, which directly contradicts their demands for justice.¹⁵ If we restrict appeals, we do nothing to change the 40% error rate – we just increase the odds that Ohio executes a person the law says should not be executed or a person that is actually innocent.

The Death Penalty system is fatally flawed.

Any error rate in capital cases is unacceptable. The system for selecting and indicting capital cases relies on humans, and humans make mistakes. Those mistakes occur in every human endeavor, including in the criminal justice system. To quote Lou Tobin from the OPAA, “This is simply a risk we accept in the criminal justice system because it is a human process. That somebody innocent could be convicted. It is terrible. It is horrendous, but it is a risk that is accepted.”¹⁶ Despite this acknowledgement, OPAA says that innocent people are not put to death in Ohio because Ohio has “super due process” for capital cases.¹⁷ Yet, OPAA also argues that there should be fewer appeals in death cases so that the case are cheaper and quicker.¹⁸ If Ohio’s super due process helps protect us from killing innocent people, an acknowledged possibility, how can anyone argue that we should eliminate those super due process protections unless you are comfortable killing innocent people? OPAA may be comfortable with wrongfully convictions that result in a death sentence, but the rest of us should not be. Ohioans should not just say “oh well” when an innocent person’s life is taken. Even so, we can attempt to fix mistakes that wrongfully imprison someone. We cannot fix mistakes that result in the execution of someone the law says should not be executed.

Further, the error rate in our current system is unacceptably high. For every case indicted with death specifications, only 7% of the cases actually result in a death verdict. Of those cases that result in a death verdict, 40% are reversed for some kind of legal error, not necessarily innocence. After years of incarceration and lengthy appeals, 18% of the death cases do not result in the person being executed because they are granted clemency. Overall, of the individuals that receive a death verdict, only one in six death sentences are imposed.¹⁹

Bill opponents argue that the death penalty is reserved for only the worst of the worst offenders – and that prosecutors do not indict cases with death specifications unless the offender is truly among the worst of the worst. Yet, 93% of the capitally indicted cases do not result in a death sentence. For every five people executed, one person has been exonerated.²⁰ Five out of six people initially sentenced to death are never executed.²¹

We cannot ignore the gross inequalities that infect our death penalty. This committee has heard testimony about how almost half of all Ohio executions come from the same three counties.²² This committee knows that the murder of a white victim is more likely to be solved than the murder of a black victim, and killing a white victim is more likely to result in the death penalty than killing a black victim.²³ Death penalty jurors are more likely to be white individuals, making it impossible for some Ohioans to have a jury of their peers.²⁴ To quote State Public Defender Tim Young, “Whether someone is sentenced to death has less to do with the crime they committed and more to do with the victim and the location of that crime.” That is not justice.



Capital Punishment Traumatizes Victims' Families, Jurors, and Corrections Staff.

Proponents of capital punishment argue that the families of victims need capital punishment to secure justice. OPD has previously testified regarding all the trauma that flows from the continued use of a flawed system that cannot be fixed. Justice for the family of victims cannot occur when we sacrifice the procedures needed to ensure that the system only executes those offenders who the law says are subject to execution. Justice is not served when the race of the victim and the county where the crime occurred are the best predictors of whether a death sentence will be imposed. Justice is not served when the system convicts the wrong person or promises a death sentence that the law does not permit.

Conclusion.

The death penalty is a flawed system that traumatizes the victims' families, attorneys, jurors, and corrections officers who participate in it, has not been shown to deter homicides, is prohibitively expensive, and is fraught with errors. There is no equal justice in the death penalty. It is time to end the death penalty in Ohio. Thank you for the opportunity to provide HB183 proponent testimony. Along with my colleagues from OPD, we are happy to answer any questions after our testimonies.

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 testimony on behalf of the Office of the Ohio Public Defender ("OPD") in support of House Bill 183 ("HB183"). I am Kim Rigby, Managing Counsel for the OPD in the Death Penalty Department.

As someone who has worked on death penalty appeals for the last 17 years, I have seen how last-minute litigation is extremely taxing on all parties involved. To make this point, I have two very different memories from death penalty cases that I'd like to share with you.

The first takes me back to 2017. At this point in my career, I had multiple clients executed, but I had never been asked to witness before. I knew that would probably happen eventually, and I quickly agreed when asked.

I arrived that day—not knowing exactly what to expect. I was escorted back to a small room where the attorneys all wait. Across the yard, you can see the execution chamber. I visited with my client, said my goodbyes, and we prayed together. Afterwards, I was taken into the small execution chamber and seated by the glass. I was prepared to watch my client die. They first tried to find a vein in his arm. They moved to the other arm. They moved to his ankles—searching for a usable vein. They made attempts and poked him multiple times. As they struggled to find a vein, my client laid there and attempted to help them—pointing out possibly better veins. After a half hour of watching DRC employees poking and prodding my client and never getting an appropriate IV, they gave up and called the execution off. Afterwards, we were allowed to talk to our client again. It was surreal—like talking to a ghost. Despite the execution not even happening, you could tell that not only was I traumatized, but the victim's family was



as well. The DRC employees who tried their hardest to do their job looked exhausted. My client died less than a year later of natural causes. He'd been very ill leading up to the execution, and I believe this experience took such a toll that he never recovered.

My next memory is of another client, who was executed in 2010. I had represented this client for several years, through federal habeas and then clemency. His case was complicated, but it boiled down to this – during the midst of an aggravated burglary, he shot a store clerk in the left shoulder one time. My client was extremely remorseful, and there was evidence that he did not intend to shoot. But he did. We presented this in clemency and had a split decision from the parole board. Governor Strickland waited until 8pm the night before the execution to decide whether my client would live or die. State Public Defender Tim Young took that call and relayed the decision to me. It was reported in the papers the following morning that the Governor said it was one of the hardest decisions he'd ever made. But, in the end, he decided to let the execution go forward.

Despite the fact that I did not witness the execution, because my client wanted to spare me of that, I still became much more than just an attorney on the case in those weeks leading up to the execution. I became a liaison with his family and a funeral director of sorts. Because my client was very religious, I promised that I would make sure that his spiritual advisor was allowed in the execution chamber and could pray over his body. I made arrangements to ensure that his body was sent to the correct cemetery, and even buried in the correct section of that cemetery. My client and I had a final call that morning, where instead of comforting my client, he comforted me. And, this was not the only time I have experienced this type of compassion from one of my clients.

Once I hung up the phone, I just sat there, and I waited in my office staring at my computer for the news that he was gone. That was how we would find out that they were gone – by monitoring the news and Twitter. I constantly hit refresh, feeling like it was taking forever, not knowing if the delay was because there were complications with the execution or if I had just chosen the wrong website to monitor. When I finally got the confirmation that he was dead, it felt very unceremonious. The State had officially taken his life, and that was simply noted in a brief update to a news story. But my work didn't end. I had to talk to media and make calls to both his close family as well as a juror and the judge who had assisted in the clemency process. The juror broke down when I told him. He told me that regretted his decision all those years ago to sentence my client to death. But there was nothing I could do to change what had occurred or to comfort him. My client's aunt also couldn't bear the news. She sobbed as I explained that he was gone. Like the victim's family in my previous story, this juror and my client's family had become victims of this process.

These aren't the only two stories I have, but they are two that have stuck with me over the years doing this work. Despite the testimony of opponents, I have several clients on death row—who have been there for years—who I believe never had a fair trial. They never received the process that should be afforded all defendants, especially those on Death Row. You might think that because of all the appeals that are built into the process the system would be fair,



beyond reproach. However, there are also so many hurdles put in place before a case is heard on the merits, and some never are.

This committee has been told that Ohio needs the death penalty for the worst of the worst offenders. Specifically, the individuals who commit multiple murders, so they don't get what has been referred to as a "free murder." However, this committee has also heard from proponents of the bill that the crime committed is not the best indicator of whether the individual will receive the death penalty. The county where the case occurred, and the race of the victim and offender are stronger indicators of whether the person will receive the death penalty. Personally, I am aware of cases where the individual received life without parole that seem much more egregious than some of my clients' cases, yet my client received death. Some of the cases to which I am referring will be familiar to this legislature, like Quentin Smith and Jake Wagner. If the death penalty is the "cure" for the wrong of multiple murders, then we would expect to see the death penalty in every multiple murder case. We don't see that. Instead, we see the death penalty in some multiple homicide cases but not in others. You cannot help but be haunted with the question, "Why?" Saying that we need the death penalty for justice ignores the reality of the death penalty. If getting the death penalty depends on your defense counsel at trial, what county the crime takes place in, who the prosecutor is, who is selected to sit on the jury, what judge or judges you randomly have at trial and throughout your appeals, and whether that particular governor is willing to grant clemency - is that really justice?

As an office, we have submitted the written testimony from other attorneys who have been a part of this process and the Death Penalty Department for many years. These attorneys have unique perspectives, so I wanted to direct your attention to that testimony as well. Thank you for the opportunity to provide HB183 proponent testimony. Along with my colleagues from OPD, we are happy to answer any questions after our testimonies.

**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 testimony on behalf of the Office of the Ohio Public Defender ("OPD") in support of House Bill 183 ("HB183"). I am Rachel Troutman, Supervising Attorney for the OPD in the Death Penalty Department.

By the time I hit my 7th year anniversary of practicing law, I had seen three men die. In 2008, Ohio started executing people on a very regular basis. Because there were so many who needed counsel, and not many attorneys at that time who handled clemency cases, all three of the men I saw executed had only been my client for a few months. We had no real time to get to know each other before I had to help them answer questions like - what they wanted done with their remains after execution, who should get their pictures and personal belongings when they were gone, how to grapple with telling their loved ones that they were going to die when there were no more appeals left.

I think about some of my colleagues who represented clients for years and then watched them die. I know how affected I am by my memories; I can't imagine theirs. But I signed up for



this. I chose this profession. I went to law school specifically to represent people on death row, and I knew that there would likely come a time that I would have to witness an execution. When there is nothing else you can do for a person, being there for them in their final moments was important to me. I needed them to know that at least one person there knew that they were not the equivalent to the worst thing they ever did.

Watching someone be put to death is surreal. One minute they are talking, moving, breathing, and very much alive. In just a span of minutes, there is no more movement at all. The stillness always struck me. What I could not prepare myself for was the rest of it. The people who just became collateral damage, and bearing witness to some of the most raw and devastating emotions.

A distinct memory of the first client I saw executed is from the morning of the execution, about an hour-and-a half before the moment he would be killed. While the condemned are at the death house, they are permitted to have access to a phone so that they could call their loved ones as much as they want. My client was on the phone with his daughter. I remember him telling her that it was time for them to get off the phone. I could hear her wailing through the extension, begging him not to hang up the phone. She knew that once he hung up, she would never again get to hear his voice. We conducted our final visit with his daughter there on the phone with him, because he could not bear to hang up.

Another of my clients had what we believed to be a very good chance at clemency. We had found some new witnesses and new evidence that changed the picture quite a bit. I remember his mother telling me about her new hope -- that she believed I was going to save her son's life. I had gotten to know his 17-year-old daughter somewhat well. I will never forget the image of her at my client's clemency hearing -- with her big white bow in her hair, having taken the bus all the way from Youngstown to Columbus so she could be there in front of the parole board on behalf of her dad. Three of the jurors who had previously voted to convict and sentence him to death were now desperately trying to convince the Governor not to go through with the execution. Two of them called me regularly and begged me to do everything I could to save him.

The day before the execution, we still had not heard from the Governor, and my client was transported to the death house. We were permitted to visit with our clients the night before the executions, as well as the morning of, so I was driving to the death house that evening when I got the call from the Governor's counsel. He would not spare my client's life. I broke the news to my client when I arrived for my client visit. There's no way to sugar coat that, and the only thing I could do was try and make it just a tiny bit easier on him. So when he asked me to tell his mother, his sister, his friend, his children that he was going to die, I made each one of those phone calls and I broke a little more each time I said the words.

Then I called the jurors. I couldn't let them find out from the news that he was going to be executed. I comforted them as best I could, but I cannot imagine the guilt they carry.

I still struggle with the fact that my clients' loved ones were left with no recognition of the fact that they, too, are victims. I struggle for those jurors who made a decision one day that



they eventually desperately wanted to undo, but once that process got put into motion, they were no longer in control. I signed up for this. I chose this job. But those jurors hadn't chosen the position they were in. The children of my clients hadn't done anything to warrant losing their fathers.

Attorneys end their representation of a client by closing the file. There is no nice neat box in which to place these memories. I would do it again in a heartbeat, because my clients and all of their loved ones deserve to have someone there with them who can make it just a tiny bit easier. But I hope I don't have to, and with the passing of this legislation, hopefully no one else will either.

Thank you for the opportunity to provide HB183 proponent testimony. My colleagues and I are happy to answer any questions at this time.

¹ *Deterrence: States Without the Death Penalty Have had Consistently Lower Murder Rates*, Death Penalty Information Center, 2014, <https://deathpenaltyinfo.org/facts-and-research/murder-rates/murder-rate-of-death-penalty-states-compared-to-non-death-penalty-states>, last accessed 11/15/2021).

² National Research Council. (2012). *Deterrence and the Death Penalty*. Committee on Deterrence and the Death Penalty, Daniel S. Nagin and John V. Pepper, Eds. Committee on Law and Justice, Division of Behavioral and Social Sciences and Education. Washington, DC: The National Academies Press. See also, *Does Capital Punishment Deter Murder? A Brief Look at the Evidence*, John Lamperti, Professor of Mathematics, emeritus, Dartmouth College, Hanover, NH (March 20210), <https://math.dartmouth.edu/~lamperti/my%20DP%20paper,%20current%20edit.htm>, (last accessed 11/15/2021).

³ *Deterrence and the Death Penalty*, Note 2, at 103.

⁴ November 10, 2021, Ohio House Criminal Justice Committee testimony of the Hon. Dennis Becker, Prosecutor, Trumbull County, at 57:46 -57:51.

⁵ *Gardner v. Florida*, 430 U.S. 349, 357 (1977).

⁶ Appt.Coun.R. 5.02.

⁷ Appt.Coun.R. 5.10(A). See also, Crim. R. 42(E), R.C. 2929.024.

⁸ Crim.R. 24(D).

⁹ *Death Qualification of Juries*, Forensic Psychology, <http://criminal-justice.iresearchnet.com/forensic-psychology/death-qualification-of-juries/> (last accessed 11/15/2021).

¹⁰ Crim.R. 24(I)(2)(c).

¹¹ Crim.R. 24(G)(2).

¹² R.C. 2923.03(D).

¹³ Lou Tobin, Ohio Prosecuting Attorney's Association, House Criminal Justice Committee, The Ohio Channel, November 10, 2021, <https://ohiochannel.org/video/ohio-house-criminal-justice-committee-11-10-2021> at 23:00.

¹⁴ See *The Cost of Ohio's Death Penalty*, Ohioans to Stop Execution, March 14, 2014, <https://otse.org/deathpenalty-cost/> (last accessed 11/15/2021).

¹⁵ Lou Tobin, Ohio Prosecuting Attorney's Association, House Criminal Justice Committee, The Ohio Channel, November 10, 2021, <https://ohiochannel.org/video/ohio-house-criminal-justice-committee-11-10-2021> at 17:13.

¹⁶ Lou Tobin, Ohio Prosecuting Attorney's Association, House Criminal Justice Committee, The Ohio Channel, November 10, 2021, <https://ohiochannel.org/video/ohio-house-criminal-justice-committee-11-10-2021> at 36:06.

¹⁷ Lou Tobin, Ohio Prosecuting Attorney's Association, House Criminal Justice Committee, The Ohio Channel, November 10, 2021, <https://ohiochannel.org/video/ohio-house-criminal-justice-committee-11-10-2021> at 24:59 and 32:01.

¹⁸ Lou Tobin, Ohio Prosecuting Attorney's Association, House Criminal Justice Committee, The Ohio Channel, November 10, 2021, <https://ohiochannel.org/video/ohio-house-criminal-justice-committee-11-10-2021> at 25:01.

¹⁹ Report: *83% of Death Sentences Have Not Resulted in Executions Under Ohio's 'Lethargic' Death Penalty*, Death Penalty Information Center, April 9, 2021.



²⁰ Report: *83% of Death Sentences Have Not Resulted in Executions Under Ohio's 'Lethargic' Death Penalty*, Death Penalty Information Center, April 9, 2021.

²¹ *Id.*

²² *Racial and Geographic Disparities in Ohio Executions*, Death Penalty Information Center, May 2014, <https://deathpenaltyinfo.org/news/racial-and-geographic-disparities-in-ohio-executions> (last accessed 11/15/2021).

²³ Radley Balko, *There's overwhelming evidence that the criminal-justice system is racist. Here's the proof.* The Washington Post, September 28, 2018, <https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/>, (last accessed 11/15/2021).

²⁴ STUDIES: Death Penalty Jury Selection "Whitewashes" Juries and is Biased Towards Death, Death Penalty Information Center, May 14, 2018, <https://deathpenaltyinfo.org/news/studies-death-penalty-jury-selection-whitewashes-juries-and-is-biased-towards-death> (last accessed 11/15/2021).

