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**To: House Criminal Justice Committee**  
**From: Kevin Werner, Policy Director**  
**Date: November 18, 2021**  
**Re: Testimony for House Bill 183**

Chairman LaRe, Vice Chair Swearingen, Ranking Member Leland and members of the House Criminal Justice Committee, thank you for the opportunity to testify today on House Bill 183. My name is Kevin Werner and I am the policy director at the Ohio Justice & Policy Center, a nonprofit law firm whose mission is to promote fair, intelligent, and redemptive criminal justice systems. OJPC is a proponent of ending the death penalty.

Testimony the committee heard during opponent testimony hearing only bolsters the arguments and rationale for why Ohio should repeal the death penalty statute.

### **JURORS AS VOTER**

One opponent of the bill, the Cuyahoga County assistant prosecutor, noted during his testimony:

During my 24 years as an assistant prosecuting attorney, in individual *voir dire* process, voters, serving as jurors, questioned as to their views of the death penalty—time and time again—those jurors support the death penalty...its these same voters who should be given a say on capital punishment in Ohio...

What the witness failed to point out is that jurors on capital trials have to be what's known as "death qualified jurors." A death qualified juror is a person who must be willing to vote in favor of a sentence of death. The death qualified juror is predisposed to supporting the death penalty. The assistant prosecutor said that capital jurors (voters) consistently support the death penalty. Of course, we would expect that result because a person who does not support the death penalty may never serve on a death penalty case jury. Again, capital death qualified jurors are predisposed to supporting the death penalty. Put another way—and this is not to diminish the gravity of death penalty cases—it's akin to taking a poll of Ohio State students and ask how many of them favor the Buckeyes beating Michigan State this weekend then boasting that the results were that the students favor OSU.

The argument that says capital juries favor the death penalty loses its luster when we consider 1.) those jurors are supposed to favor the death penalty because that's the way the system was designed and 2.) those jurors are not representative of the



general population—they're just the people predisposed to vote in favor of the death penalty.

## ENORMOUS COSTS

Opponents to the bill have stated that endless appeals are to blame for the costs and that those costs are driven by death penalty repeal proponents. One opponent argued the costs are fixed and that Ohio really wouldn't save much because those costs are a tiny fraction of the overall biennial state budget. During questions from the committee OPAA indicated an explanation of the cost should come from proponents of this bill since proponents cite the costs as a reason to repeal the death penalty. In 2014, the Dayton Daily News<sup>1</sup> published an article exploring costs of Ohio's death penalty. That article noted cost study results in states like Kansas, where Supreme Court Justices spent 20-times the hours on death penalty appeals cases than non-capital case appeals; Colorado's study found that capital proceeds require six times more court days and take much longer to resolve than life without parole cases; California studied its costs and determined more than \$4 billion had been spent since 1978; Maryland found it spent \$37.2 million per execution in each of five executions during a 2008 study. That article is most likely the source of the cost figures, but the article points out that many costs it calculated are not fixed costs as opponents of this bill claim.

- \$842,000 a year for seven attorneys and two paralegals in the Ohio Attorney General's capital crimes unit;
- \$1.35 million a year for 14 attorneys and four other staff in the Ohio Public Defender's death penalty division;
- \$2.5 million a year paid to appointed defense attorneys to represent indigent Ohioans in capital cases;
- \$3.88 million budget for public defender attorneys on capital cases in federal court;
- \$8.3 million in prison costs for 138 Death Row inmates, though that figure is likely higher since they are held in single cells and under tight security protocol.

The list above, which notes the figures are incomplete, puts Ohio's death penalty costs at \$16,872,000 per year. None of these figures include trial costs, where taxpayers foot the bill for prosecution, defense and the cost of the courts. None of the figures include appeals court costs. None of the figures include Ohio Supreme Court costs in staff time or resources the justices must devote to reviewing death cases. None of the figures include executive branch costs like the time the parole board must devote to capital cases or the time a governor's office reviews a clemency application.

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<sup>1</sup> Bischoff, Laura A. and Josh Sweigart. *Dayton Daily News*, "Execution costs rising." February 22, 2014. Available at <https://www.daytondailynews.com/news/crime--law/execution-costs-rising/c1UWGYDUls1ze8Cngno5yK/>



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OJPC maintains death penalty cases cost taxpayers at least ten times more than non-death penalty aggravated murder cases.<sup>2</sup> We base our claim on actual costs accrued in Summit County when the *Akron Beacon Journal* compared two aggravated murder cases in 2016, one with death penalty specification and one without. The death penalty trial cost Summit County taxpayers \$267,875 while the non-death case cost taxpayers \$19,365.<sup>3</sup>

The Ohio Justice & Policy Center does not have the answer on how much Ohio spends on the death penalty. We have consistently said the death penalty costs at least ten times more than non-death penalty aggravated murder cases.

### **FREE MURDER**

Opponent testimony raised the concept of “free murder.” Their claim is, as I understand it, that abolishing capital punishment and not imposing the death penalty for people who have committed murder, gives them the free chance to reoffend, thereby devaluing the lives of future victims. As an example, opponents named Casey Pigge. But a closer look demonstrates the existence of the death penalty in no way contributed to or detracted from this individual’s crimes. In other words, capital punishment is wholly irrelevant in this case.

Whether or not the state of Ohio has the death penalty would not have stopped the violent acts of Mr. Pigge while incarcerated. The fact of the matter is the department of rehabilitation and correction had serious lapses in security that allowed for the violence by Mr. Pigge. Prison officials should have placed him under restrictive housing and moved him to a more secure facility, but they failed to do so between his original conviction in 2008 and 2016. During that period of time, Mr. Pigge’s institutional infraction record ran some 30 pages long.<sup>4</sup> Mr. Pigge, who is ineligible for the death penalty due to intellectual disability, falsely believed his cellmate was a member of the Aryan Brotherhood and wanted to kill him. Inexplicably, two days after pleading guilty to the murder of his cell mate, he was put on a transport bus with other prisoners when he killed another prisoner. One article written about the violence noted:

The state prisons system has not said why Pigge, with his record, was placed in a van with the ability to carry out the killing of Johnson. The state updated its prison transportation policies afterward but won’t release details.

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<sup>2</sup> *Akron Beacon Journal* “Death penalty needed for ‘worst of worst’ chief counsel for Summit County prosecutor says.” February 2017.

<sup>3</sup> Ibid.

<sup>4</sup> Welsh Huggins, Andrew. *Corrections1*, “Killer dubbed ‘a known Hannibal Lecter’ pleads guilty, gets 25 years Records show that after Casey Pigge killed cellmate Luther Wade last year, he told investigators he’d kill again if placed with another inmate,” September 27, 2017 available at <https://www.corrections1.com/products/vehicle-equipment/prisoner-transport/articles/killer-dubbed-a-known-hannibal-lecter-pleads-guilty-gets-25-years-Cui8fViGFxvKpwGC/>



"They definitely was not doing their job and monitoring us even with a known Hannibal Lecter with us," according to a letter from an inmate on the bus that day that was sent afterward to prisons director Gary Mohr, as reported by the *Dayton Daily News*.<sup>5</sup>

One can only speculate as to why opponents to this bill would want to come up with a gimmick called free murder and claim that the death penalty would prevent it. I suppose its easier than telling the whole story about where and how the prison system's security lapses enabled more violence in prison. A colleague reminded me there's a country mile's worth of punitive options between a low security prison and executing a person. Just because those punitive options weren't used doesn't mean you jump to the death penalty as the solution.

People who committed murder in prison did so at the time when the death penalty was available. The death penalty did not serve as a deterrent to prevent them from committing those subsequent crimes. Which brings me to the broader point that we know the death penalty is not a deterrent.

#### **LACK OF DETERRENCE**

Opponents to the bill argued two conflicting points about deterrence. One argument was that the death penalty was needed to deter free murder and the other argument was that criminal statutes don't deter any crime. One witness said, "I don't think any of our criminal statutes are a deterrent. And I think to think otherwise is to fool yourself. It is absolutely to fool yourself."<sup>6</sup> Opponents noted a rise in violent crime across Ohio cities and justified the need to keep the death penalty because of this recent surge in crime. But the argument and rationale falls flat for two reasons. First, the committee has heard time and again death penalty states have higher rates of violent crime. In fact the studies and literature are so overwhelming and clear the Death Penalty Information Center's page on deterrence is entitled "Deterrence: Studies show no link between the presence or absence of the death penalty and murder rates."<sup>7</sup> Second, if some connection to crime rates and use of the death penalty existed, we would surely see that nexus in the numbers of capital indictments filed by Ohio prosecutors, especially during the referenced time period. For the previous five years, Ohio prosecutors have filed 105 capital indictments:

2020: 14; 2019: 20; 2018: 24; 2017: 29; 2016: 18

There is no significant increase in the use of the death penalty (via capital indictments) that would connect the argument that Ohio needs the death penalty because of a rise in crime. Even if we included the indictments for 2021, of which

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<sup>5</sup> Ibid.

<sup>6</sup> Opponent Testimony, Trumbull County Assistant Prosecutor Christopher Becker, House Criminal Justice Committee, November 10, 2021; HB 183 (134<sup>th</sup> General Assembly).

<sup>7</sup> Death Penalty Information Center website. Available at <https://deathpenaltyinfo.org/policy-issues/deterrence>



there are currently 19, the year 2021 will end with indictment figures no different than 2016, fewer than 2017 and 2018, and pretty much the same as 2019. If opponent's arguments here were not baseless, we would see a sharp rise in capital indictments in 2020 and 2021. However, there is no rise in the numbers of capital indictments and this argument is not supported.

## RETROACTIVITY

During question and answer, a committee member asked an important question about retroactivity of the bill. When responding to the question an opponent said that the bill was not retroactive and that it was politically unpopular to repeal the death penalty but offered no evidence to support the claim. He also said making a death penalty retroactive was "really politically unpopular," and referenced the details of select cases and the names of people on death row.

He then said:

"The other thing I'll say about this...is just two more points on this because I think this point is important. This happened in Connecticut a few years ago. Connecticut repealed the death penalty and specifically had in their legislation, and specifically promised the voters, that it wasn't going to apply to the eleven people that they had on death row, which included a couple serial killers. Before the ink was dry on the bill, the death penalty repeal opponents had filed a lawsuit in the supreme court claiming that the lack of retroactivity made the death penalty unconstitutional, as it applied to the people on death row. And the supreme court subsequently said, yeah, the death penalty is unconstitutional. And I think the people in Connecticut were incensed because they felt like they had been misled by their legislature."<sup>8</sup>

There are two important points to unpack here with OPAA's assertion. First, Connecticut did repeal its death penalty statute in 2012. And in an effort to overturn the legislative process, opponents to death penalty repeal—or substituting the plaintiffs we could say the Ohio Prosecuting Attorneys Association—filed a lawsuit before the ink on the bill was dried. That lawsuit, filed by people and organizations who opposed death penalty repeal, was the impetus for what occurred in Connecticut. The committee should understand this point raised by OPAA: *Opponents* to ending the death penalty filed their lawsuit before the ink on the bill was dry, not people who wanted the bill to go farther by making it retroactive.

The second point here is OPAA linked the death penalty repeal in Connecticut with people being incensed because they had been misled by the legislature. There is absolutely zero evidence that people in Connecticut were incensed by the death penalty repeal bill *three and a half years after the ink on the bill dried* when the state supreme court ruled in 2015 on the lawsuit brought by OPAA counterparts. To

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<sup>8</sup> Opponent Testimony, Ohio Prosecuting Attorneys Association Director Louis Tobin, House Criminal Justice Committee, November 10, 2021; HB 183 (134<sup>th</sup> General Assembly)



suggest the people of Connecticut were somehow incensed because the legislature misled them after the state supreme court ruled on a case is not based in reality. One could call that fuzzy logic.

## ENDLESS APPEALS

Opponents made the argument that appeals in death penalty cases drag on while also acknowledging death penalty cases are different in that they are given “super due process.” For the benefit of the committee, there is no such thing as super due process, there is only due process. What the opponents were referring to was that because gravity of death penalty cases, there are more rights of appeal afforded to capital defendants than others who are not on death row.

Opponents argued that enormous costs and endless appeals are a self-created problem by defense attorneys and opponents to the death penalty. You may recall one witness saying a man by the name of Danny Lee Hill was on death row for 40 years. The assistant prosecutor stated:

What we need in this state is to find a way to execute people who have exhausted their appeals. People like Danny Lee Hill in my county, who has been on death row for almost 40 years for killing a young boy and impaling him with a stick afterwards. His bitemarks were found on his penis, of the victim. And Mariam Fife, the mother of that child is now 80 years old and she has been waiting 40 years...40 years she has been waiting for justice.”<sup>9</sup>

Taking a closer look at the case of Mr. Hill, and directly relevant to the point opponents are trying to make about one side gaming the system by endlessly appealing death penalty cases, a couple points the committee should know given the testimony of the assistant Trumbull County prosecutor. First, one potential explanation for the duration of Mr. Hill’s stay on death row has to do with his intellectual disability. Mr. Hill succeeded in litigation that took him off death row under an *Atkins* claim.<sup>10</sup> That case, *Virginia v. Atkins*, is the landmark ruling by the United States Supreme Court that held people with intellectual disability are not eligible for the death penalty. Both the prosecution and defense in that case agreed that Mr. Hill’s IQ was 63. But what the assistant prosecutor from Trumbull County did not mention was that his office and the state of Ohio appealed that ruling. They appealed the ruling which took Hill off death row knowing that his IQ score was 63, well below the legal limit used to establish what the courts used to call mentally retarded.

Finally, its important to note that the assistant county prosecutor from Trumbull County made misstatements during his testimony that he knew were incorrect. He told the committee that Mr. Hill’s bitemarks were on the victim, specifically on the

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<sup>9</sup> Opponent Testimony, Trumbull County Assistant Prosecutor Christopher Becker, House Criminal Justice Committee, November 10, 2021; HB 183 (134<sup>th</sup> General Assembly). Video archive, The Ohio Channel, time marker 52:35-53:01. Available at <https://ohiochannel.org/collections/ohio-house-criminal-justice-committee>

<sup>10</sup> Hill v. Shoop, 11 F.4<sup>th</sup> 373 (6<sup>th</sup> Cir. 2021)



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victim's sex organ.<sup>11</sup> This witness made the statements knowing that during litigation in the Hill case, both prosecution and defense stipulated that the markings were not bite marks.<sup>12</sup> Mr. Becker's statements during his testimony were known to him to be false but he made them regardless.

## CONCLUSION

The Ohio Justice & Policy Center urges the committee to support H.B. 183. Every argument raised by opponents of this bill actually support the position for repeal.

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<sup>11</sup> Opponent Testimony, Trumbull County Assistant Prosecutor Christopher Becker, House Criminal Justice Committee, November 10, 2021; HB 183 (134<sup>th</sup> General Assembly). Video archive, The Ohio Channel, time marker 52:35-53:01. Available at <https://ohiochannel.org/collections/ohio-house-criminal-justice-committee>.

<sup>12</sup> State v. Hill 125 NE3d 158 (2018).