

**Written-Only Proponent Testimony**

**Submitted By**

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**To the Finance Committee  
of the Ohio House of Representatives**

**In Support of H.B. 259**

Which would repeal Ohio's death penalty  
and appropriate significant funds for victims and family members.

Submitted October 11, 2023

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Thank you, Chairman Edwards, Vice Chairman LaRe, Ranking Member Sweeney, and members of the Committee, for the opportunity to submit this written testimony in support of H.B. 259.

My name is Margery Koosed and I am a Law Professor Emerita at the University of Akron School of Law, where I have been a faculty member since 1974. My teaching, research, and writing over these nearly fifty years has focused on Criminal Law and Constitutional Criminal Procedure, including instructing Seminars in Criminal Process, Capital Punishment Litigation and Mistaken Convictions.

I served on the Ohio State Bar Association's Criminal Justice Committee that reviewed Ohio's death penalty in the 1990's, and also served from 2003 to 2007 on the American Bar Associations' Ohio Death Penalty Assessment Team which produced the report "*Evaluating Fairness and Accuracy in State Death Penalty Systems: The Ohio Death Penalty Assessment Report, An Analysis of Ohio's Death Penalty Laws Procedures, and Practices*", in 2007. I was an informal resource person and consistent attendee at the meetings of the Ohio Supreme Court and Ohio Bar Association's Joint Task Force on Administration of the Death Penalty, from 2011 to 2014.

**Like current Attorney General Dave Yost<sup>1</sup> and former Attorneys General Jim Petro and Lee Fisher, and former Governor Bob Taft, I too am convinced that Ohio's death penalty system is broken.<sup>2</sup>**

Given this is the first opportunity for an Ohio legislative Finance Committee to address repeal, this testimony will focus on the death penalty system's utter waste of public funds and why the only fiscally responsible response to this situation is to abolish Ohio's death penalty.

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<sup>1</sup>Jeremy Pelzer "Ohio's broken death penalty system may be wasting hundreds of millions of dollars, AG warns", April 13, 2023, Reached at <https://www.cleveland.com/news/2023/04/ohios-broken-death-penalty-system-may-be-wasting-hundreds-of-millions-of-dollars-ag-warns.html>.

<sup>2</sup> Robert Taft, Jim Petro, and Lee Fisher (2021, March 9). *Former governor, attorneys general: Ohio death penalty broken, costly and unjust. it must be repealed*. The Columbus Dispatch. Reached at <https://www.dispatch.com/story/opinion/2021/03/09/repeal-ohio-death-penalty-bob-taft-lee-fisher-jim-petro/4628742001/>.

I have studied nearly all aspects of Ohio's broken death penalty system, and I would welcome the opportunity to address any facet of it with you or with your staff. I can be reached at [mkoosed@uakron.edu](mailto:mkoosed@uakron.edu).

**I.THE OHIO LEGISLATIVE SERVICE COMMISSION’S FISCAL NOTES ILLUMINATE THE INORDINATE COST OF THE DEATH PENALTY AND ASSURE COST-SAVINGS IN ABOLITION.**

The Ohio LSC’s Fiscal Note for H.B. 136, the serious mental illness exemption from death sentencing measure that was enacted in the 133rd General Assembly, dated Dec. 11, 2020, found:

**“These studies [of other states] generally support the following conclusions:**

- In some states, capital cases exceed the cost of life imprisonment cases in the range of up to between \$1 million and \$3 million per case.**
- The total amount expended in a capital case is between two and a half and five times as much as a non-capital case.”**

The Ohio Legislative Service Commission’s (LSC) Fiscal Note for H.B. 183 repealing the death penalty as introduced in the last General Assembly, dated May 26, 2020, found:

**There will be cost-savings to the State Public Defender Office, the State Attorney General’s Office, the 88 counties indigent defense system, and county prosecutors’ offices, and the Department of Rehabilitation and Corrections (the latter, by not incurring execution costs).**

**The exact amount of cost-savings is not available as no state or local agency maintains itemized bills that account for all of the time spent over the length of any given death penalty case.**

The LSC’s Fiscal Note for the current bill, H.B. 259, dated October 3, 2023, at 3-4, relates:

**...[At the county level] the abolition of the death penalty may decrease expenditures related to certain aggravated murder cases and potentially permit courts of common pleas, county prosecutors, and public defenders to allocate more time and effort to other cases and legal matters.**

**...[At the state level] ...**

**[To the Office of the Public Defender]: [T]here may be some amount of cost-savings in county reimbursement costs from not having to reimburse counties for representation provided during the penalty phase of a death penalty trial.**

**[To the Ohio Attorney General:] ... [The Capital Crimes Unit] will no longer be needed to assist prosecutors with capital litigation...**

**[To the DRC] [A]bolition of the death penalty may result in a gradual increase over time in the DRC annual incarceration costs, as people who may otherwise have been sentenced to death and executed under existing law would presumably serve longer prison terms. However, due to recent trends regarding the pursuit and imposition of the death penalty in Ohio (the number of individuals who will ultimately receive a life sentence in lieu of a death sentence ... will likely be relatively small), future inmate populations would likely only be minimally impacted.**

[Note: The H.B. 259 Fiscal Note DRC section does not directly address the cost-savings brought about by having fewer persons on death row. It references the average annual cost for DRC to house a person, and in footnote 1 acknowledges that the DRC “does not calculate death row or life without parole incarceration costs separately from the general population”, while adding that Ohio death row inmates are generally housed in a medium rather than maximum security facility. In discerning the incarceration cost of a death row prisoner as opposed to a life-sentenced person, it is necessary to recognize the significant incarceration cost differential between death row and other confinement, as readily apparent from DRC’s death row celling, segregation, and security practices:

Death row inmates have always been single-celled, not double-celled or in dormitories as others are – that differential in commitment of physical space in and of itself substantially increases the cost.

Death row prisoners are also completely segregated from the general population, requiring separate recreational, visitation, and administrative facilities/equipment.

Finally, death row security entails more physical barriers as well as higher staff-to-inmate ratios, including a separate set of guards and administrators – again increasing costs. The LSC document “Ohio Facts 2020” affirmed that “security (supervision and control of inmates) was the largest component,... 45%” of the incarceration cost.

These clear and objective criteria undeniably create greater costs for housing death row inmates, and thus a greater cost-savings when reducing the number of death row inmates.]<sup>3</sup>

**Thus, every state and local agency will experience cost-savings upon repeal.**

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<sup>3</sup> Studies in Kansas, Maryland, and California also support this vast differential in cost of incarceration and comparable cost-savings in repeal of the death penalty.

## **II. THE OHIO ATTORNEY GENERAL AGREES OHIO'S DEATH PENALTY SYSTEM IS BROKEN AND STUNNINGLY WASTEFUL.**

In the 2022 Annual Capital Crimes Report, Attorney General Yost references the LSC Fiscal Note finding capital cases elsewhere cost \$1 million to \$3 million dollars per case more than life imprisonment cases. He continues, at 5:

**If these estimates apply to Ohio, then the extra cost of imposing the death penalty on the 128 inmates currently on Death Row might range between \$128 million to \$384 million.**

**That's a stunning amount of money to spend on a program that doesn't achieve its purpose. This system satisfies nobody...**

**[T]he state goes on pointlessly burning through enormous taxpayer resources...**

**Ohio's current system...produces chum, waste, and ...nothing else....**<sup>4</sup>

The Attorney General's Report urges the legislature:

**[E]ither make capital punishment an effective tool for justice or eliminate it altogether.**<sup>5</sup>

## **III. OHIO'S DEATH PENALTY WASTES PRECIOUS FUNDS AND PROVIDES NO SOCIETAL BENEFIT.**

Beyond the facts demonstrating the vast expense involved in pursuing executions as opposed to life sentences, legislators should consider *Ohio's 'return on its investment' in capital cases.*

### ***A. Benefits Unrealized***

Deterring homicides, the asserted societal benefit of the death penalty, is not demonstrated. Early on, a 1961 study by the Ohio LSC examined the previous 50 years and found no evidence that executions have any discernible effect on homicide rates.<sup>6</sup> More recently, in 2012, the National Academy of Sciences released the report of its National Research Council, evaluating

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<sup>4</sup><https://www.ohioattorneygeneral.gov/Files/Reports/Capital-Crimes-Annual-Reports/2022CapitalCrimesAnnualReport>, at 5.

<sup>5</sup> Id., at 7.

<sup>6</sup> [Ohio Legislative Service Commission Staff Research Report No. 46 (1961), see also William Bailey, *The Deterrent Effect of the Death Penalty for Murder in Ohio: A Time Series Analysis*, 28 Clev. St. L. Rev. 51, 68 (1979).

all the deterrence studies and finding no evidence the death penalty was a better deterrent than the alternative sentence of life without parole.<sup>7</sup>

Retribution is sometimes looked to, but increasingly victim's families recognize that the death penalty system prolongs their pain and impairs their healing process.<sup>8</sup> Uncertainty and publicity inevitably surround a death sentence, while the finality of a life sentence and the obscurity into which the defendant falls allow for healing. Support services in the form of grief counselling, mental health services, and financial assistance would better meet their needs,<sup>9</sup> as would solving the crimes that damaged other victims' families.

The extension of \$10 million for the Ohio's victims of crime compensation fund is an excellent companion provision of H.B. 259, one that can actually provide a societal benefit that is utterly lacking in our broken death penalty system.

### ***B. System Ineffectiveness***

Not only are the asserted benefits not realized, Ohio's capital punishment system has a very low success rate in itself. As of early 2021, in the forty years since the death penalty law was enacted in 1981, prosecutors had sought death sentences through filing 3,365 capital indictments,<sup>10</sup> committing to pursue the state's highest punishment against thousands of criminal defendants.

Yet, just 56 of those 3,365 indictments have resulted in an execution – a 1.6% success rate.

In what universe would a system that cost millions more per case be maintained when it achieved its purpose less than 2% of the time?

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<sup>7</sup> See <https://deathpenaltyinfo.org/news/deterrence-national-research-council-concludes-deterrence-studies-should-not-influence-death-penalty-policy>. See also *Glossip v. Gross*, 135 S.Ct. 2726, 2767-2769 (2015) (Breyer, J., dissenting) (no study in the last thirty years has found deterrent benefits of the death penalty, and it does not seem likely the penalty has a significant deterrent effect). See also Death Penalty Information Center, "Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis" 22 (2009) ["Neither police chiefs, nor criminologists, nor the American public believe that the death penalty serves as a better deterrent to murder than a sentence of life in prison."], available at <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/in-depth/smart-on-crime-reconsidering-the-death-penalty-in-time-of-economic-crisis>

<sup>8</sup> Susan Bandes, "The Death Penalty and the Misleading Concept of 'Closure'" (Jan. 8, 2021), <https://thecrimereport.org/2021/01/08/the-death-penalty-and-the-misleading-concept-of-closure/>.

<sup>9</sup> In 2018, the Ohio victim compensation fund provided economic assistance to just 3.23% of the applications it accepted. Ohio ranks 46<sup>th</sup> out of the 50 states and District of Columbia in victim compensation. Matthew Richardson, "Some States Make It Easy To Pay For A Funeral After A Murder. Others Do Not", KUNC Radio (Feb. 28, 2020), <https://www.kunc.org/2020-02-28/some-states-make-it-easy-to-pay-for-a-funeral-after-a-murder-others-do-not>. See also Intercommunity Justice and Policy Center, "At All Costs: The High Cost of the Death Penalty in Hamilton County and the Extreme Disparity It Drives", <https://ijpcincinnati.org/wp-content/uploads/2020/12/12.7-At-All-Costs-Draft.pdf>, at 7 (discussing needed restorative services that will also reduce crime).

<sup>10</sup> Ohio Facts 2020, at 100.

How did this system fail, and how did it accumulate such costs?

The costs begin to mount the moment a capital indictment is issued. Resource expenditures burgeon, as much as ten times the cost of a life sentence case may be expended in the capital trial level alone.<sup>11</sup>

These hugely expensive capital indictment efforts have yielded a death verdict only 10% of the time. Nine out of ten of those 3,000+ capital indictments failed to result in a death sentence – just 341 defendants were placed on death row.<sup>12</sup>

Only 16% of those 341 death-sentenced inmates, 56 persons, have been executed in the forty-two years under this statute.<sup>13</sup>

More than twice that number, 34%, 116 death-sentenced inmates, have been removed from death row and sentenced to a lesser (or no) sentence as a consequence of serious errors in their cases engaging innocence or inappropriateness of the death sentence, through judicial action (83), ineligibility for the death penalty (12), or a Governor’s commutation of their sentence (21).<sup>14</sup>

Another 11%, 38 inmates, have died prior to execution.<sup>15</sup>

In all, 150 death-sentenced inmates, 44% of those 341 sentenced to death, have thus far been removed from death row -- and that number will continue to grow as appeals proceed and inmates age.

**In the end, just 1.6% of those 3,365 capital indictments have resulted in an execution.**

***C. This is a Fiscally Wasteful and Indefensible System that Must Be Repealed.***

**A system that fails to achieve its objective 98.4% of the time is not worth keeping, and certainly is not worth the massive investment Ohioans have made in it.**

**The only fiscally responsible action possible in these circumstances is to pass H. B. 259.**

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<sup>11</sup> Intercommunity Justice and Policy Center, “At All Costs: The High Cost of the Death Penalty in Hamilton County and the Extreme Disparity It Drives“, <https://ijpccincinnati.org/wp-content/uploads/2020/12/12.7-At-All-Costs-Draft.pdf>, at 4, citing Akron Beacon Journal study and Dayton Daily News study, and generally at 4-6.

<sup>12</sup> Ohio Attorney General Annual Capital Crimes Report (2022), at 5. <https://www.ohioattorneygeneral.gov/Files/Reports/Capital-Crimes-Annual-Reports/2022CapitalCrimesAnnualReport>.

<sup>13</sup> Id., (data source).

<sup>14</sup> Id., (combining judicial action, commutations, and death ineligibility judgments).

<sup>15</sup> Id. (data source).