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To: Ohio Senate Judiciary Committee
Fr: Kevin Werner
Re: Proponent testimony, SB 101
November 15, 2023

Chair Manning, Vice-Chair Reynolds, Ranking Member Hicks-Hudson and members of the committee, thank you for the opportunity to offer proponent testimony on SB 101, a measure to repeal Ohio's death penalty law. On behalf of the Ohio Justice & Policy Center, we are grateful to Senators Huffman and Antonio for introducing this legislation. My name is Kevin Werner and I am the policy director at OJPC. We are a nonprofit law firm with offices in Cincinnati and Columbus, whose mission is to promote fair, intelligent, and redemptive criminal justice systems.

The Ohio Justice & Policy Center opposes the death penalty for a myriad of reasons that you have heard or will hear today. Wrongful convictions and the issue of innocence, the role race and geography plays, the traumatic and unending harm done to co-victims, and the lack of deterrence are just some of the reasons we oppose the death penalty. I would like to focus in on some of the figures associated with Ohio's death penalty. One disclaimer: since discretion rests with Ohio prosecutors whether or not to seek a death sentence, I will refer in very general terms to prosecutors regarding their role in the system.

Ohio has executed its citizens since the earliest days of statehood. Between 1803 and 1885, at least 84 men and one woman were hanged in counties throughout Ohio before the practice was moved to the state penitentiary in 1855.¹ The first person executed in the electric chair was a seventeen-year-old Hamilton County boy named William Haas in 1897.² There have been times in our state's history when Ohio carried out executions and long stretches of time when it did not. At times, the practice of execution was legal, and at other times it was not. Most of the figures I will touch on relate to Ohio's current death penalty system, which traces back to 1981.

According to the Ohio Supreme Court Clerk's available data, since 1981, there have been 3,287 capital indictments³, legal proceedings charging criminal defendants with conduct that meets the criteria for a death sentence. During that same period, Ohio has sentenced 336 people to death via 341 death sentences.⁴ Under the current iteration of the law, 40% of Ohio counties have never sentenced a person to death. 65% of counties have had one

¹ Welsh-Huggins, Andrew. *"No Winners Here Tonight: Race Politics, and Geography in One of the Country's Busiest Death Penalty States."* Ohio University Press. 2009.

² Ibid.

³ Figure does not include indictments in 2023.

⁴ Four individuals received more than 1 death sentence.



or fewer death sentence.⁵ Ten Ohio counties account for 74% of all death sentences in our state.⁶

Since the decision to pursue a death case rests within the discretion of prosecutors, the committee should understand how often prosecutors obtain the outcome they intend. In other words, how often does a capital indictment yield a death sentence. At first glance, the capital indictment to death sentence rate is 10.4%. Put another way, 9 out of ten times a prosecutor seeks the death penalty, the system does not achieve that goal. But this 10% success rate is wrong and here's why. Many of the 341 death sentences since 1981 were changed for a variety of reasons, most as a result of error. According to the 2022 Attorney General's Capital Crimes report, 154 death sentences⁷ will not be carried out due to sentences being vacated, commutations, exonerations, death by natural cause, or ineligibility due to mental illness or intellectual disability. Over 45% of the death sentences in Ohio will not result in execution.

The 341 death sentences, for all practical purposes, is actually 187. The more accurate capital indictment to death sentence rate is 5.7%. Put another way, 94 times out of 100, prosecutors fail to achieve the outcome they seek in the most expensive of all criminal cases. Keep in mind, 100% of these cases are already deemed to be deserving of death and the worst cases. But only five-percent result in the outcome prosecutors seek. Taxpayers, however, pay the enormous costs for *all* of them—even those that do not end with a death sentence.

Cost estimates of death penalty cases are, at best, incomplete and calculate only a fraction of actual costs. We know this because the most commonly used figures come from a 2014 cost review by the *Dayton Daily News*. In its reporting the newspaper wrote, "an investigation by this newspaper documented close to \$17 million in annual costs associated with Ohio's death penalty. And that number is a fraction of the total cost. County prosecutors, the courts and the state prison system do not specifically track expenses associated with death penalty cases in Ohio. That would be millions in expenses right there."⁸

The cost studies that have been completed in states across the country consistently show that the death penalty is much more expensive than regular homicide cases. Some noteworthy figures from the Death Penalty Information Center:

⁵ Office of the Ohio Attorney General, Capital Crimes Annual Reports (2022). Available at <https://www.ohioattorneygeneral.gov/Files/Reports/Capital-Crimes-Annual-Reports/2022CapitalCrimesAnnualReport>

⁶ Office of the Ohio Attorney General, Capital Crimes Annual Reports (2022), pg 60.

⁷ Office of the Ohio Attorney General, Capital Crimes Annual Reports (2022). N=154. Commutations (21), deceased prior to execution (38), ineligible *Atkins* (9), ineligible SMI (3), judicial action (83). Available at <https://www.ohioattorneygeneral.gov/Files/Reports/Capital-Crimes-Annual-Reports/2022CapitalCrimesAnnualReport>

⁸ Bischoff, Laura and Josh Sweigart. *Dayton Daily News* "Execution costs rising" Feb. 22, 2014. Available at <https://www.daytondailynews.com/news/crime--law/execution-costs-rising/c1UWGYDUls1ze8Cngno5yK/>



- 2014 study in Kansas: Justices spend 20-times more hours on death penalty appeals, and incarceration costs more than double (\$49,380 vs. \$24,690);
- 2013 study in Colorado: capital proceedings require six times more court days than life without parole cases;
- 2013 study in Oregon: found "the average trial-level costs defending a death penalty case was \$438,651 compared to a non-death case was \$216,693;
- 2012 study in California: more than \$4 billion spent on death cases since 1978.
- 2012 study in Nevada: 80 pending capital murder cases in Clark County (Las Vegas) will cost \$15 million more than non-death cases;
- 2010 study of federal system: government spends average of \$620,932 defending a federal death penalty case. 8 times more than non-death cases;
- 2010 study in Indiana: trial and direct appeal costs over ten times more than a life-without-parole case. \$449,887 vs. \$42,658;
- 2009 study in North Carolina: save \$11 million annually if drop the death penalty;
- 2008 study in Maryland: single death penalty cases costs \$3 million compared to \$1.1 million for a non-death penalty case.

In 2017 the *Akron Beacon Journal*⁹ examined costs of two murder trials in Summit County, one a death case and the other a non-death penalty case. The non-death penalty trial cost \$19,365 while the death penalty trial cost \$267,875. The death penalty case concluded with the defendant being sentenced to life without parole.

Death penalty cases take time and resources away from other types of cases in county prosecutor offices. Former AP writer and now-mystery crime novelist Andrew Welsh-Huggins' 2009 non-fiction book *No Winners Here Tonight* noted, "sending a person to death row can mean hundreds of thousands of dollars in legal expenses as well as untold hours of preparation. David Yost, prosecutor in suburban Delaware County in the middle of the state, said that half his office's resources were tied up for three months for the 2003 trial of Gerald Hand..."

Whether you subscribe to the \$3-million per case figure or the ten-times more expensive number per case, "that's a stunning amount of money to spend on a program that doesn't achieve its purpose," writes the Ohio Attorney General Dave Yost.¹⁰ As far as I am aware, no state factors into its cost the awards for wrongful convictions that are sometimes paid to exonerated prisoners in the millions of dollars.

⁹ Warsmith, Stephanie. *Akron Beacon Journal*, "Death penalty needed for 'worst of the worst,' chief counsel for Summit County prosecutor says." February 19, 2017. Available at <https://www.beaconjournal.com/story/news/local/2017/02/19/death-penalty-needed-for-worst/10777312007/>

¹⁰ Office of the Ohio Attorney General, Capital Crimes Annual Reports (2022). Available at <https://www.ohioattorneygeneral.gov/Files/Reports/Capital-Crimes-Annual-Reports/2022CapitalCrimesAnnualReport>



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Supporters of the death penalty will try to argue that costs should never be a factor or that you cannot put a price tag on “justice.” From the very beginning, prosecutors set up a false rubric that “justice” for victims is achieved when execution occurs. The problem here is that when you hold out finality, justice and closure being dependent on an execution taking place, you fail to acknowledge that co-victims do not want to endure 30+ years of added trauma as the case moves through layers of appeals, reversals and resentencing. The second problem is that prosecutors who say *we’ll get justice when we execute* make an impossible pledge that keeps co-victims in suspended animation until an execution which, statistically speaking, will likely never occur.

The truth of the matter is that you can and should factor in the cost when weighing what is the best public policy for all Ohioans. Let’s look at the numbers. 341 death sentences at \$3 million per case (again, just a fraction of the actual costs) bring the figures to over \$1.02 Billion. Another way to think about it is: how much did we have to spend to carry out the 56 executions that have taken place under the current law? The answer is \$18,267,857 per execution using the example above.

What if we adopted a public policy that put the needs of co-victims first? What if we prioritized access to grief counseling and psychological services for murder victims’ families? What if counties made resources available to help families whose primary income earner was killed? What if we prioritized fully funding law enforcement offices throughout the state? How many more police officers could a county hire with savings from expensive death penalty cases? How many unsolved homicides or cold cases could we take a fresh look at with the millions of dollars saved? Let’s be realistic, we know the vast, vast majority of death sentences do not result in execution. Why are we spending 10-times more on a system that gives us the same result that we could have obtained for a fraction of the cost?

The responsible thing to do is look very, very closely at the cost and weigh what is in the best interests of the citizens of Ohio. The responsible thing to do is to eliminate the death penalty.

Thank you for the opportunity to provide testimony in favor of SB 101. I welcome any questions that the committee may have.