

# A RELIC OF THE PAST

## OHIO'S DWINDLING DEATH PENALTY

OHIOANS TO  
STOP EXECUTIONS

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## DEDICATION

Terry J. Collins  
1953 - 2016

Ohioans to Stop Executions dedicates this report to the memory of our dear friend and colleague, Terry J. Collins, retired director of the Ohio Department of Rehabilitation and Correction. Terry worked closely with OTSE upon his retirement in 2010 until his untimely death in March 2016.

In his retirement, Terry began to share what he knew to be true because of his decades in corrections. Terry's voice lives on to help government leaders and the public understand that we need to more carefully examine the death penalty. In speaking out so clearly from a place he experienced first-hand, he opened the door to a more informed, more complete dialogue.

*"The reasonable course of action for state officials is to begin to have serious and thoughtful conversations about whether Ohio's death penalty remains necessary, fair and effective. My experience tells me that our justice system can be even more effective and fair without Death Rows and the death penalty."*

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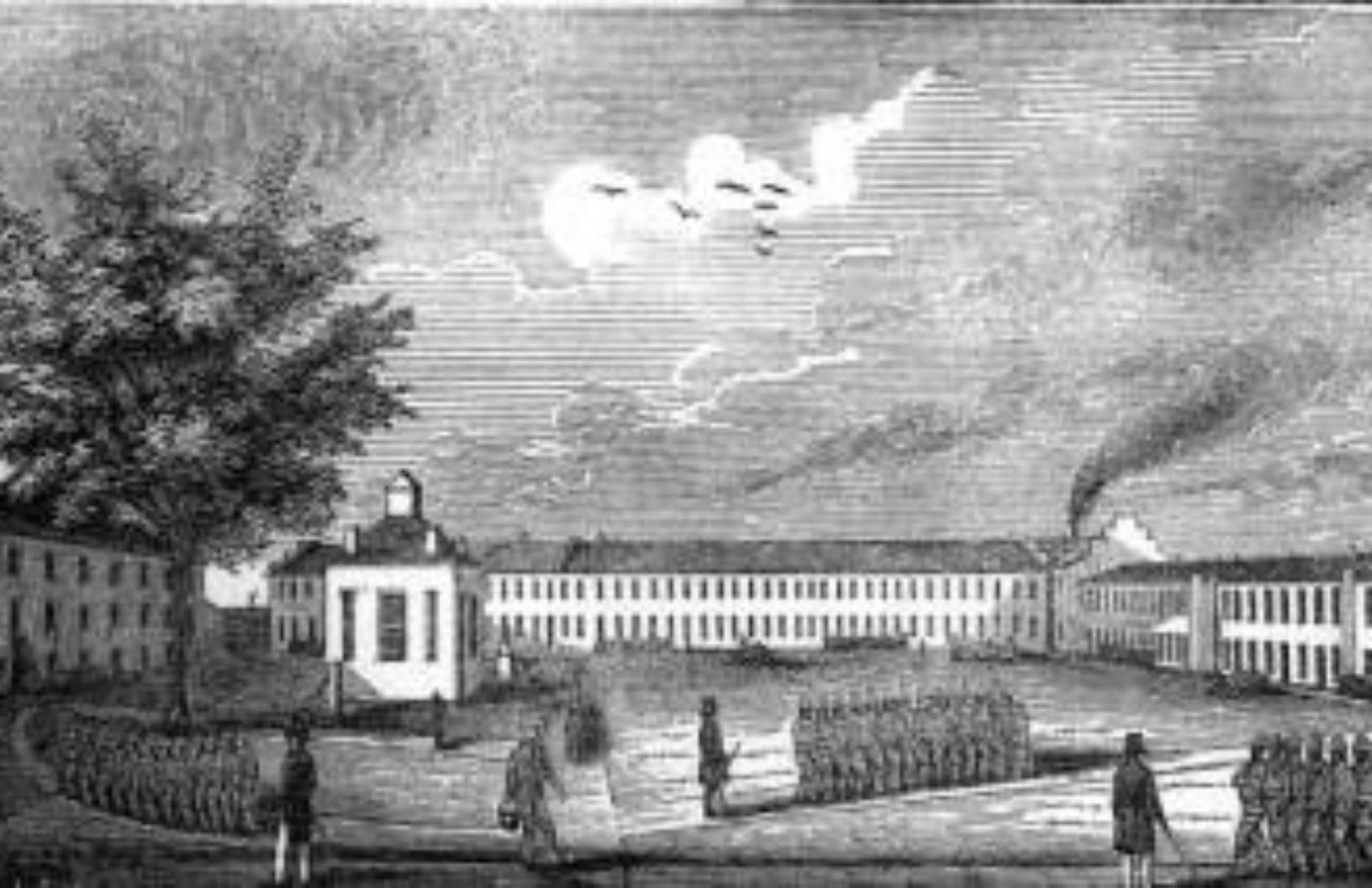


ILLUSTRATION OF THE PROPOSED OHIO PENITENTIARY 1831

## INTRODUCTION

Ohioans to Stop Executions (OTSE) releases “A Relic of the Past: Ohio’s Dwindling Death Penalty,” a report on the status of Ohio’s death penalty. This report is published around the 40th anniversary of the U.S. Supreme Court’s July 2, 1976 decision in *Gregg v. Georgia*. That landmark ruling upheld new state death penalty laws, allowing the resumption of executions in the United States.<sup>1</sup>

OTSE has been monitoring and offering perspective on the progress of the Supreme Court Joint Task Force on the Administration of Ohio’s Death Penalty, which issued its final report in April 2014. Since then, OTSE has been monitoring progress on implementation of the 56 recommendations of the Task Force.

Perspectives presented here are those of OTSE unless otherwise explicitly stated. All research done in this report has been performed and compiled by OTSE. This report was developed using information available from the following sources: United States Census Bureau, Federal Bureau of Investigation’s Supplementary Homicide Reports, the Office of the Ohio Attorney General, the Ohio Supreme Court, the Supreme Court Joint Task Force on the Administration of Ohio’s Death Penalty, the Ohio Department of Rehabilitation and Correction, the Office of the Ohio Public Defender, the Office of the Federal Public Defender, Southern Division, and the Office of the Federal Public Defender, Northern Division, the Death Penalty Information Center, FBI Supplementary Homicide Reports from 1981- 2014, US census data from 2010 and 2014, and reports by the news media.

Ohioans to Stop Executions thanks the following individuals whose collective efforts produced this report: Margery Koosed, Stacy Parker, Emily Schutz, Amy Gordiejew, Matthew Copsey, Abraham Bonowitz and Kevin Werner.



OHIO PENITENTIARY CIRCA 1900

## EXECUTIVE SUMMARY

Forty years ago, the United States Supreme Court upheld a new structure for the death penalty in the United States with its decision in *Gregg v. Georgia*. The *Gregg* decision ended a four year period of uncertainty about the death penalty in our country, following the 1972 decision in *Furman v. Georgia*. The problems with Ohio's death penalty echo those cited in the *Furman* decision, and this report highlights how more than forty years later, Ohio still struggles to fix a system plagued by unfairness and inaccuracy.

In *Furman*, the Supreme Court struck down all capital punishment laws in the country, citing many concerns including the arbitrariness of the penalty, the racial and class-based nature of the decision whether to seek and impose the death penalty in any given case, and the risk of condemning the innocent to die.<sup>2</sup> States that wanted to resume executing prisoners had to devise new statutes recognizing that "death is different" as they attempted to implement reforms that would lead to a system which attempts to ensure fairness and accuracy.

#### **1972**

Furman v. Georgia: The United States Supreme Court decision which placed a temporary hold on capital punishment in the US. The ruling required a degree of consistency with application of the death penalty.

#### **1974**

Ohio revised its death penalty statute to comply with *Furman*.

#### **1976**

Gregg v. Georgia: The United States Supreme Court decision which ended the moratorium on capital punishment established in the *Furman* decision. The Court set forth two main features capital sentencing procedures were required to employ in order to comply with the Eighth Amendment ban on cruel and unusual punishments.

#### **1978**

Lockett v. Ohio: The United States Supreme Court decision that held Ohio's 1974 death penalty law was unconstitutional. The Court held the Ohio statute did not permit individualized consideration of mitigating factors.

#### **1981**

Ohio adopted a new capital punishment law to comport with the *Gregg* decision—Ohio Revised Code 2929.04—the current death penalty law.

The death penalty in Ohio remains plagued by the very same flaws that led to its subsequent invalidation in 1978. The arbitrariness continues. The racial and geographic disparity continues. Perhaps most significant, the system's propensity to condemn the innocent to die is far worse than anyone imagined. With this historical context in mind, OTSE presents its report entitled "**A Relic of the Past: Ohio's Dwindling Death Penalty**".

More than two years since an Ohio Supreme Court Task Force offered dozens of reforms to the legislature,<sup>3</sup> OTSE notes that there seems to be little resolve to fix this undeniably broken capital punishment system. OTSE has updated the status of those reforms and note the most vital fixes to ensure a fair and accurate death penalty system are not being addressed.

There were no new Ohio death row exonerations in 2015, yet it was a record year for new exonerations nationally, begging the question of how many more current Ohio prisoners are not guilty of the crime for which they are imprisoned. This report takes a look at Ohio's capital indictments and exonerations of those who faced the death penalty, received a lesser sentence and were later exonerated. Two things are certain: When the wrong person is sent to prison, the real killer is left free to kill again. Beyond that, Ohio taxpayers are paying millions of dollars in compensation for the mistakes of police and prosecutors, a factor not normally included when assessing the high cost of the death penalty.

There was a slight rise in capital indictments in Ohio in 2015, but in some surprising places. OTSE wonders if some of that come back is in response to evidence we reported in our Death Lottery report, highlighting glaring geographic disparities in the use of the death penalty, or the threat thereof. New death sentences were down yet again, with only one new death sentence in Ohio in 2015. This compares to three new death sentences in 2014, four in 2013, and five in 2012.

OTSE provides brief updates in the cases of Rommell Broom and Anthony Apanovitch. Broom brought the focus back to Ohio's difficulties with conducting executions when the Ohio Supreme Court ruled that the state may try to execute him again. If Broom's execution goes forward, it will be only the second time since 1947 that a prisoner survived an execution attempt and was subsequently put through the execution process a second time.<sup>4</sup> Apanovitch may well become the 10th Ohio death row exoneree.

Even as the list of Ohio prisoners with pending execution dates grows, there are no answers to the question of how the Ohio Department of Rehabilitation and Correction will carry out executions.<sup>5</sup> While Ohio sorts out its difficulties procuring drugs for lethal injections, the prisoners on death row grow older. Of the 26 prisoners with execution dates, seventeen have been on death row longer than 20 years, and five longer than 30 years. This exposes the false promise of death as a source of closure or comfort for the families of murder victims.

Ohio political leaders who once championed capital punishment increasingly reverse their position to become advocates for ending the practice. Each has his or her own motivations, but conservatives are expressing concern with the death penalty as a public policy. Even stalwart supporters like the *Columbus Dispatch* have begun to articulate doubt.<sup>6</sup>

As explored in our 2013 annual report, *The Death Lottery: How Race and Geography Determine Who Goes to Ohio's Death Row*, the personal preference to seek death by some individual county prosecutors perpetuates an increasingly disparate sanction. Trends suggest that Ohio's larger and more populous counties initiate fewer death penalty cases than in previous years. We explore how smaller counties are demonstrating a slight increase in seeking the death penalty for criminal defendants.

OTSE continues to advocate for implementation of the reforms proposed by the Supreme Court Joint Task Force on the Administration of Ohio's Death Penalty. Even so, the national trend regarding the death penalty is clearly toward repeal. The Ohio legislature continues to ignore the most vital reform recommendations while instead trying to address the backlog of prisoners awaiting execution. It is time to stop trying to fix it, and just end capital punishment in Ohio once and for all.



OHIO PENITENTIARY VIEWED FROM SPRING STREET IN 1931

## REFORMS ASSESSMENT & LEGISLATION IN PROGRESS

In April 2014, after examining the death penalty system over a nearly three year period, the Supreme Court Joint Task Force on Ohio's Death Penalty issued a report detailing 56 recommendations to increase fairness and accuracy in administering Ohio's death penalty.<sup>7</sup> Ohioans to Stop Executions provided extensive analysis of the Task Force recommendations in its 2015 report, *A Crumbling Institution: Why Ohio Must Fix or End the Death Penalty*. A searchable database of all of the recommendations is available at [www.OTSE.org](http://www.OTSE.org). The following is a status update.

Only four of the 56 recommendations have been enacted via the passage of **Substitute House Bill 663** in December 2014.<sup>8</sup> This piece of legislation, which primarily created anonymity for lethal injection drug providers and others involved in the execution process, also enacted the following four task force recommendations:

- The legislature should study how to best support families of murder/homicide victims in the short and long term.
- The time frame for filing a post-conviction motion should be extended from one hundred eighty (180) days after the filing of the trial record to three hundred sixty five (365) days after the filing of the trial record.
- The Ohio statute providing for attorney-client privilege should be amended to provide that a claim of ineffective assistance waives the privilege in order to allow full litigation of ineffectiveness claims. The waiver will be limited to the issue raised.
- In capital cases, jurors shall receive written copies of "court instructions" (the judge's entire oral charge) to consult while the court is instructing them and while conducting deliberations.

The content of these recommendations suggests the legislature is only willing to make bare minimum attempts to reform the broken death penalty system.

Another six recommendations are under consideration by the legislature, but have yet to pass both the Ohio House and Senate. **Senate Bill 139**, which passed the Senate in October 2015 by a vote of 32-0 was referred to the House Judiciary Committee for hearings in April 2016. If passed, the proposal will adopt and codify the following four task force recommendations:

- The judge hearing the post-conviction proceeding must state specifically why each claim was either denied or granted in the findings of fact and conclusions of law.
- The common pleas clerk shall retain a copy of the original trial file in the common pleas clerk's office even though it sends the originals to the Supreme Court of Ohio in connection with the direct appeal.
- There shall be no page limits in post-conviction petitions for death penalty cases in either the petition filed with the common pleas court or on appeal from the denials of such petition.
- Amend R.C. §2953.21, as attached to this final report in Appendix C, to provide for depositions and subpoenas during discovery in post-conviction relief.

The final provision, amending R.C. §2953.21, was changed during hearings in the Senate Criminal Justice Committee. The changes, made at the behest of the Ohio Prosecuting Attorneys Association and the Attorney General's Office, significantly weaken the bill. The amendment places procedural bars on filing deadlines on post-conviction pleadings. It also allows prosecutors or

anyone being subpoenaed by defense lawyers to ask the judge to disallow the discovery request if “justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense...” In other words, prosecutors will not have to turn over evidence to a death-sentenced defendant if that evidence will be an annoyance, an embarrassment, is oppressive, etc. These types of amendments illustrate why Ohio courts and the judicial system take decades to discover, determine, and correct wrongful convictions. Instead of seeking ways to avoid transparency, Ohio prosecutors and elected officials should pursue the truth in all cases.

**Senate Bill 162** is currently being considered by the Senate Criminal Justice Committee. If adopted by the Senate and House, S.B. 162 will implement the recommendation which reads:

*Enact legislation to consider and exclude from eligibility for the death penalty defendants who suffered from “serious mental illness,” as defined by the legislature, at the time of the crime.*

S.B. 162 would prohibit the execution of individuals who have been diagnosed as having a serious mental illness at the time of the crime. As of June 2016, the bill has had six committee hearings. Of the two dozen or so organizations that provided testimony, only the Ohio Prosecuting Attorneys Association opposes the protection for Ohio’s most vulnerable citizens.<sup>9</sup> Organizations in support of S.B. 162 include the National Alliance on Mental Illness Ohio, the Ohio Psychological Association, the Ohio Psychiatric Physicians Association, the Ohio Association of County Behavioral Health Authorities, the Mental Health and Addiction Advocacy Coalition, Treatment Advocacy Center, the Buckeye Art Therapy Association, the Ohio Council of Behavioral Health & Family Services Providers, the Ohio Empowerment Coalition, the Catholic Conference of Ohio, the Ohio Justice & Policy Center, the Ohio Chapter of the NAACP, the National Association of Social Workers Ohio Chapter, the Ohio Public Defender, Amnesty International, the ACLU of Ohio, Unitarian Universalist Justice Ohio, and Universal Health Care Action Network Ohio. This broad coalition of supporters has come together under the umbrella of the Ohio Alliance for the Mental Illness Exemption in support of the legislation.<sup>10</sup>

In addition to the dozens of organizations calling for passage of S.B. 162, 52 law professors from Ohio law schools presented a letter to legislators<sup>11</sup>. They wrote:

*We are law professors from across Ohio teaching in the areas of Criminal Law, Criminal Procedure, Health and Disability Law, and Constitutional Law. We have dedicated ourselves to improving the criminal justice and health systems, and to training those who would become our state’s future lawyers, legislators, and judges.*

*...Persons with severe mental illness have been and will continue to be sentenced to death and executed unless this exemption is granted. The severely mentally ill often cannot meet Ohio’s highly demanding M’Naghten-type standard for acquittal by reason of insanity, see O.R.C. 2901.01 (14), and because of this are unable to present expert testimony in the trial phase regarding their impairment and are convicted of capital murder. See State v. Wilcox, 70 Ohio St.2d 182 (1980). Once convicted, their mental illness is to be considered in mitigation, see O.R.C. 2929.04(B)(3) and (7), but as often as not is treated as aggravating, a reason to impose death, instead of a grounds for mercy, as respect for human dignity, understanding of moral culpability, and judicial integrity requires.*

*...S.B. 162 devises fair procedures for reliably determining whether the severely mentally ill exemption applies in an individual case, procedures that are consistent with our existing ones for determining age and mental disability. The defense has the burden of going*

*forward and establishing a prima facie case of a diagnosis of one of five forms of severe mental illness, which if shown, creates a rebuttable presumption of exemption that can be overcome by the prosecution by a preponderance of evidence. There is ample opportunity for investigation and evaluation for both the prosecution and defense. The trial judge, and if necessary, the jury, will review the evidence and determine if the exemption applies and the defendant is ineligible for death.*

*We urge passage of S.B. 162. The fairness, reliability, and integrity of Ohio's criminal justice system demand that individuals with severe mental illness at the time of their crime be spared the ultimate sanction.*

**Senate Bill 67**, the Racial Justice Act, was introduced in March 2015 and assigned to the Senate Criminal Justice Committee, where it has remained idle. The bill proposes that individuals sentenced to death be allowed to appeal the sentence if they can demonstrate that race was a contributing factor to the sentence being sought or imposed at the trial level. This bill would implement Supreme Court Task Force recommendation 35, which reads:

*Enact legislation allowing for racial disparity claims to be raised and developed in state court through a Racial Justice Act with such a claim being independent of whether the client has any other basis for filing in that court.*

All 56 recommendations issued by the Task Force deserve serious consideration and implementation by Ohio's legislators and courts. It is unfortunate that the recommendations that will do the most to curtail unfairness and bias in Ohio's capital punishment system have yet to be discussed in any legislative forum. Some examples include:

- Based upon data showing that prosecutors and juries overwhelmingly do not find felony murder to be the worst of the worst murders, further finding that such specifications result in death verdicts 7% of the time or less when charged as a death penalty case, and further finding that removal of these specifications will reduce the race disparity of the death penalty, it should be recommended to the legislature that the following specifications be removed from the statutes: Kidnapping, Rape, Aggravated Arson, Aggravated Robbery, and Aggravated Burglary.
- To address cross jurisdictional racial disparity, it is recommended that Ohio create a death penalty charging committee at the Ohio Attorney General's Office. It is recommended that the committee be made up of former county prosecutors, appointed by the Governor, and members of the Ohio Attorney General's staff. County prosecutors would submit cases they want to charge with death as a potential punishment. The Attorney General's office would approve or disapprove of the charges, paying particular attention to the race of the victim(s) and defendant(s).
- The Joint Task Force recommends that legislation be enacted to require all crime labs in Ohio be certified by a recognized agency as defined by the Ohio General Assembly.
- Enact legislation that maintains that a death sentence cannot be considered or imposed unless the state has either: 1) biological evidence or DNA evidence that links the defendant to the act of murder; 2) a videotaped, voluntary interrogation and confession of the defendant to the murder; 3) a video recording that conclusively links the defendant to the murder; or 4) other like factors as determined by the General Assembly.
- Enact legislation that does not permit a death sentence where the State relies on jailhouse informant testimony that is not independently corroborated at the guilt/innocence phase of the death penalty trial.

- Enact legislation to require a prosecutor to present to the Grand Jury available exculpatory evidence of which the prosecutor is aware.

## Other Legislation in Process

Two death penalty repeal bills are pending in the Ohio House and Senate.

**Senate Bill 154** was introduced in April 2015 by Senator Edna Brown of Toledo. The bill has been referred to the Senate Criminal Justice Committee but has not yet been scheduled for a hearing.

**House Bill 289** was introduced in July 2015 by Republican Representative Niraj Antani of Washington Township and Democratic Representative Nicki Antonio of Lakewood. The bill was referred to the House Judiciary Committee in October 2015 but no hearings have been scheduled. The bill proposes to replace Ohio's death sentence with life without parole.



OHIO PENITENTIARY AREAL VIEW 1932

## EXONERATIONS IN OHIO DEATH PENALTY CASES



PICTURED: RICKY JACKSON, KWAME AJAMU, WILEY BRIDGEMAN, JOE D'AMBROSIO, DAVID AYERS, RANDY RESH, DERRICK JAMISON, CLARENCE ELKINS, TIMOTHY HOWARD, GARY LAMAR JAMES, DALE JOHNSTON, GARY BEEMAN

One of the core concerns people have about the death penalty, including those who support it, is the possibility of wrongful convictions and executions. Ohio has sent nine people to death row who have been exonerated and released, however that is only part of the picture. Ohio sought the death penalty in 12 cases where innocent men were exonerated.

### **Ricky Jackson, Kwame Ajamu, and Wiley Bridgeman (2014)**

Ricky Jackson, Wiley Bridgeman, and Kwame Ajamu (then known as Ronnie Bridgeman) were sentenced to death for the 1975 murder of Harold Franks outside a convenience store in Cleveland. The state's case rested on the testimony of a 12-year-old boy who identified the three men as the perpetrators of the crime. In 2014, the witness recanted his testimony and admitted to being pressured by investigators to make the false identification. In an affidavit submitted by the witness decades later, he explained that detectives threatened to arrest his parents for perjury if he didn't cooperate.<sup>12</sup>

The three men spent a combined total of nearly 105 years in prison and had impending execution dates that were fortuitously stopped when the U.S. Supreme Court ruled Ohio's death penalty unconstitutional in 1978. Nevertheless, they remained imprisoned for decades longer under life sentences before the truth finally came to light. All three have begun to receive compensation for their wrongful incarceration, and civil suits are pending.

### **Joe D'Ambrosio (2012)**

Joe D'Ambrosio was sentenced to death in 1989 for the murder of Anthony Klann. The federal district court overturned his conviction because the state had withheld evidence that pointed to his innocence. The court then barred his re-conviction trial due to further prosecutorial misconduct. Joe's charges were dismissed in 2012, twenty-three years after he was sent to Death Row for a crime he did not commit. D'Ambrosio has never received an apology or compensation for his wrongful conviction.

### **David Ayers (2011)**

David Ayers was convicted of the 1999 murder of 76-year-old Dorothy Brown in Cleveland. Three months after the murder, in March 2000, David was arrested and charged with the murder. Just as David's trial was to begin, Cuyahoga County prosecutors revealed another inmate, Donald

Hutchinson, said David confessed to him while the two were in jail. David was convicted and sentenced to life without parole. The Ohio Innocence Project represented David after his conviction and motioned the court for DNA testing. While the court considered the DNA testing motion, the Sixth Circuit Court of Appeals ordered a new trial for David. A newly appointed prosecutor tested all evidence and concluded David was not involved with the crime. He was freed in September 2011, after more than a decade of incarceration. In March 2013 a federal jury found that two detectives withheld evidence that would have shown David was innocent.<sup>13</sup> In 2014 the Sixth Circuit Court of Appeals upheld the jury's award to Ayers of more than \$13 million.<sup>14</sup>

## **Randy Resh (2007)**

Randy Resh was convicted of the 1988 murder of Connie Nardi. Portage County prosecutors sought the death penalty for Randy. He was sentenced to 15-years-to-life for murder and 5-to-15-years for rape. The Ohio Supreme Court set aside the conviction in 2006 and ordered new trials for Randy and a co-defendant. The court took issue with discrepancies between what the prosecutors alleged at trial and what the forensic evidence actually demonstrated in the case.<sup>15</sup> Randy was retried and acquitted in April 2007. Both Randy and a co-defendant, Bob Gondor,<sup>16</sup> are eligible for compensation for their wrongful convictions.<sup>17</sup> Each man was ruled factually innocent in May 2014.

## **Derrick Jamison (2005)**

Derrick Jamison was sentenced to death in 1985 for the murder of a Cincinnati bartender. Prosecutors withheld critical evidence that would have pointed to Derrick's innocence, including eyewitness descriptions and statements that contradicted the story told by Derrick's co-defendant. Charges were dismissed in 2005, twenty years after Derrick was sent to Death Row. Derrick Jamison has not received compensation for his wrongful conviction and incarceration.

## **Clarence Elkins (2005)**

Clarence Elkins was wrongfully convicted in 1998 of killing his mother-in-law, Judy Johnson. Summit County prosecutors sought the death penalty for Clarence but were unsuccessful garnering a death sentence. Melinda Dawson, the daughter of Johnson and then Elkins' wife, worked for years to prove his innocence, collecting the DNA evidence and recruiting the Ohio Innocence Project to represent Clarence. The DNA evidence proved that Earl Mann committed the crime. Prosecutors in Summit County refused to release Clarence until then-Attorney General Jim Petro intervened on behalf of Clarence and the Innocence Project. Elkins received more than \$1 million from the state of Ohio and more than \$5 million from the city of Barberton.<sup>18</sup>

## **Timothy Howard and Gary Lamar James (2003)**

Timothy Howard and Gary Lamar James were convicted and sentenced to death for a murder during the course of a bank robbery in 1976. They were released after new evidence was uncovered that had not been disclosed at the time of their trials, including contradicting witness statements and fingerprints. Their charges were dismissed in 2003. Both men received compensation from the state of Ohio.

## **Kim Hairston (1995)**

Kim Hairston was wrongfully convicted of the 1992 murder of convenience store clerk Arthur Worrix in Columbus. Franklin County prosecutors sought the death penalty. After being sentenced to 30 years to life, the Ohio Court of Appeals overturned Kim's sentence and ordered a new trial. At

the retrial, the state's key witness admitted she lied about Kim's involvement due to her past romantic relationship with him. Hairston received \$30,000 in compensation from the state.<sup>19</sup>

## Dale Johnston (1990)

Dale Johnston was sentenced to death in 1984 for the murders of his stepdaughter and her boyfriend. After undergoing hypnosis, a sole eyewitness identified Dale as the killer. The only other primary witness provided boot print evidence that was later discredited. The authorities knew of four other eyewitnesses with a completely different story of the crime, but they never disclosed them to the defense. Dale was released in 1990. It was only in 2015 that the Ohio Supreme Court ruled that he could seek compensation for his wrongful conviction.<sup>20</sup>

## Gary Beeman (1979)

Gary Beeman was sentenced to death in 1976. His conviction was based on the perjured testimony of a prison escapee who Gary's lawyers were prevented from fully cross-examining. At his retrial, five witnesses testified that this star witness was, in fact, the killer and that Beeman was not involved. Gary Beeman was acquitted in 1979.

## A Closer Look at Exonerations

The National Registry of Exonerations shows that 26 Ohioans were found guilty of murders they did not commit between 1975 and 2015.<sup>21</sup> Half (13 of 26) of these wrongfully convicted individuals faced the death penalty.<sup>22</sup>

| NAME            | COUNTY    | YEARS SERVED | EXONERATED | CAUSE OF WRONGFUL CONVICTION   |
|-----------------|-----------|--------------|------------|--|
| Ricky Jackson   | Cuyahoga  | 39           | 2014       | Perjury or False Accusation, Official Misconduct   |
| Kwame Ajamu     | Cuyahoga  | 39           | 2014       | Perjury or False Accusation, Official Misconduct   |
| Wiley Bridgeman | Cuyahoga  | 39           | 2014       | Perjury or False Accusation, Official Misconduct   |
| Joe D'Ambrosio  | Cuyahoga  | 23           | 2012       | Perjury or False Accusation, False or Misleading Forensic Evidence, Official Misconduct                                  |
| David Ayers     | Cuyahoga  | 11           | 2011       | DNA  |
| Randy Resh      | Portage   | 17           | 2007       | Perjury or False Accusation, False or Misleading Forensic Evidence, Inadequate Legal Defense                             |
| Derrick Jameson | Hamilton  | 20           | 2005       | Perjury or False Accusation, Inadequate Legal Defense  |
| Clarence Elkins | Summit    | 6            | 2005       | DNA, Mistaken Witness Identification   |
| Tim Howard      | Franklin  | 26           | 2003       | Mistaken Witness Identification, Perjury or False Accusation, False or Misleading Forensic Evidence, Official Misconduct |
| Gary James      | Franklin  | 26           | 2003       | Mistaken Witness Identification, Perjury or False Accusation, False or Misleading Forensic Evidence, Official Misconduct |
| Kim Hairston    | Franklin  | 2            | 1995       | Perjury or False Accusation, Inadequate Legal Defense  |
| Dale Johnston   | Hocking   | 6            | 1990       | Mistaken Witness Identification, False or Misleading Forensic Evidence, Official Misconduct                              |
| Gary Beeman     | Ashtabula | 3            | 1979       | Perjury or False Accusation  |

Upon examination of the root causes for the wrongful convictions, the National Registry cites perjury or false accusation and official misconduct as leading causes.<sup>23</sup> A record-setting 147 individuals were exonerated nationwide in 2015, according to the National Registry.<sup>24</sup> Two of these were from Ohio, although neither were death penalty cases.

The following chart lists Ohio Supreme Court Death Penalty Task Force reform recommendations which, if enacted by the legislature, would serve to limit wrongful convictions in Ohio. As of June 2016 none of these recommendations has been taken up by the Ohio legislature. All recommendations made by the Supreme Court Task Force dealing with innocence directly intersect with the root causes of wrongful convictions identified by the National Registry of Exonerations.

| ROOT CAUSE OF WRONGFUL CONVICTION     | OHIO TASK FORCE RECOMMENDATION TO ADDRESS<br>WRONGFUL CONVICTIONS |
|---------------------------------------|---|
| Mistaken Witness Identification       | Recommendations 1, 17, 18 & 34                                    |
| False Confession                      | Recommendations 1, 15, 17, 34, 37 & 38                            |
| Perjury or False Accusation           | Recommendations 1, 17, 18, 34, 37 & 38                            |
| False or Misleading Forensic Evidence | Recommendations 2, 3, 4, 34, 37 & 38                              |
| Official Misconduct                   | Recommendations 18, 34, 37 & 38                                   |
| Inadequate Legal Defense              | Recommendations 11, 13, 14 & 15                                   |

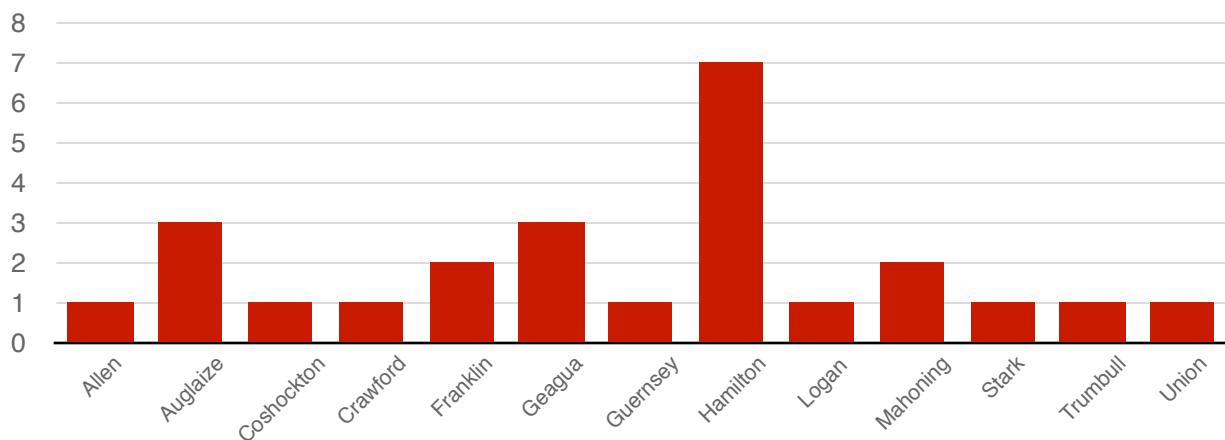


OHIO PENITENTIARY INTERIOR 1955

## NEW INDICTMENTS

The number of new death penalty cases initiated by Ohio prosecutors in 2015 was 26,<sup>25</sup> an increase of five over 2014. Nine of the cases have already been resolved or will be resolved without a sentence of death, leaving sixteen cases initiated in 2015 pending. Just over half the cases come from counties that typically seek to execute, including Hamilton, Mahoning, Trumbull, Franklin, Lake, and Stark. Hamilton County alone accounts for more than one-quarter of 2015 indictments. Counties that filed death penalty cases in 2015 that are less active in capital punishment include Allen, Auglaize, Coshocton, Union, Geauga, Guernsey, Logan and Crawford.

### 2015 Capital Indictments by Ohio Counties



**Auglaize County**, which filed three capital indictments in 2015, was an anomaly among counties seeking to execute its residents. Over the previous 34 years from 1981 to 2014, Auglaize County had pursued only one death penalty case.<sup>26</sup> That crime took place in 1993 and resulted in a life sentence. All three indictments in 2015 arose from the same crime, the 2014 murder of Charles Hicks of Uniopolis. The three death penalty cases from Auglaize County each yielded plea deals and life sentences with parole eligibility after 30 years. Auglaize County is one of 28 Ohio Counties that has never sentenced a person to death.

**Geauga County** also filed three death penalty cases in 2015. Typically Geauga County does not actively use the death penalty. All three Geauga cases were pending at the end of 2015; however, none will proceed as a death penalty case. Media reports indicate that the death penalty was removed by either amended indictments or plea bargains.<sup>27</sup> The last time Geauga County had as many death penalty cases was 2000 when three were filed. All three cases in 2000, including the murders of a 15-year old boy, 17-year old girl, and 19-year old man, resulted in sentences of life with parole after 30 years. Three death penalty cases also took place in 1988. Since 1981, Geauga County has sentenced one man to death.<sup>28</sup> Edward Edwards was sentenced to death in 2012 but died of natural causes less than one month after his sentencing. He was 77 and confessed to killing at least five people over a 21-year span.

**Allen County** filed one new death penalty case for the third year in a row. Of Allen County's previous capital cases—29 in total<sup>29</sup>—only three resulted in death sentences,<sup>30</sup> which equates to a near ten-percent success rate (3 of 29) for cases prosecutors deem most deserving of death. Allen County juries consistently choose alternative sentences rather than the death penalty.

**Coshocton County** filed one death penalty case in 2015, its 13th since 1981.<sup>31</sup> All prior death penalty cases from Coshocton County led to outcomes other than a death sentence. The 2015 death penalty case for Robert Clark resulted in a plea and sentence of life without parole. Mr. Clark's co-defendant, Jeffrey Stewart, has yet to be tried in the murders of Doyle and Lillian Chumney. Stewart does not face the death penalty. Speaking after the plea deal was negotiated, Coshocton County Prosecutor Jason Given said, "The first goal was to remove Robert Clark from society by way of life imprisonment without the possibility of parole or the death penalty. The second goal was to bring the Chumneys some semblance of justice and some semblance of closure through the judicial system."<sup>32</sup> Prosecutor Given noted that the Chumney family was in support of the life without parole sentence.<sup>33</sup>

**Union County** initiated one death penalty case in 2015, only the second time the rural central Ohio county has pursued an execution.<sup>34</sup> Joseph Maganta was indicted March 3, 2015 for the murder of Arthur Burchett. Maganta's girlfriend Amber Parish is also charged in the case but is not facing the death penalty. The death penalty case against Maganta is pending. Union County's only other death penalty case was in 1982. That case resulted in a life sentence.

**Guernsey County** also initiated a death penalty case in 2015. Like Coshocton, Guernsey County's 2015 death penalty case was its 13th since 1981.<sup>35</sup> The difference between the two counties is that Guernsey has sent three men to death row while Coshocton has not sentenced anyone to death. The trial of 36-year old Daniel Wine was scheduled to take place in April 2016 but Wine plead guilty in exchange to dismissal of the death penalty. Wine was sentenced to life without parole.<sup>36</sup>

**Logan County** is seeking the death penalty for 23-year old Brittany Pilkington of Bellefontaine. Pilkington is alleged to have killed her three infant sons over a 13-month period. Pilkington's capital case is the eighth one initiated by Logan County since 1981.<sup>37</sup> None of the previous seven death penalty cases resulted in a death sentence.

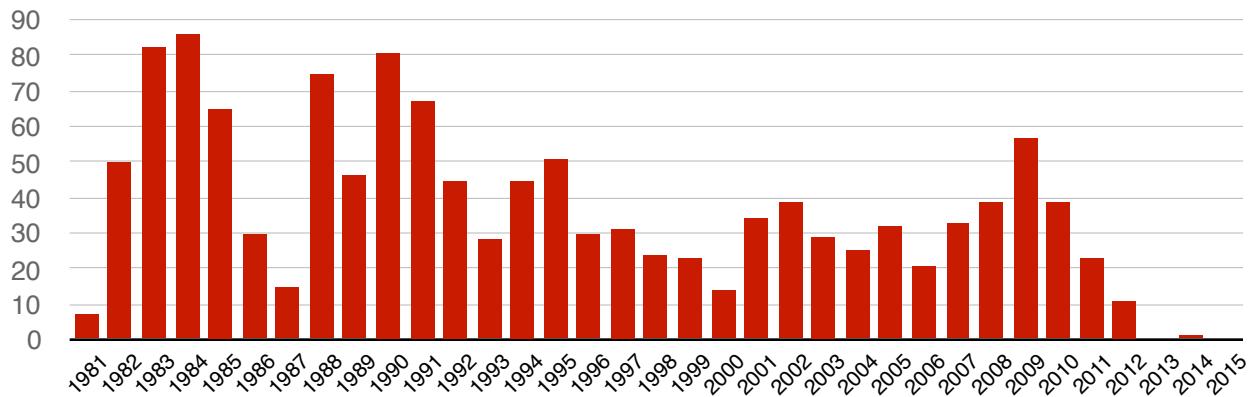
The high death penalty-use counties—Hamilton, Franklin, Stark, Lake, Mahoning and Trumbull—accounted for just over half of 2015's new death penalty cases. Hamilton County led all Ohio jurisdictions with seven indictments. Franklin and Mahoning counties filed two new death penalty cases while Lake, Stark and Trumbull each filed one new capital case.

**Cuyahoga County**, for the first time under the modern death penalty system, did not initiate a new death penalty case.<sup>38</sup> This is noteworthy for several reasons. Historically, Cuyahoga County has sought the death penalty more than any other county by astronomical margins. It also has one of the lowest death penalty indictment to death sentence conviction rates among high-use counties.<sup>39</sup> It is widely accepted that Cuyahoga County's practice was to use the death penalty as a threat to induce a plea bargain. Since 2012 and the election of a new prosecutor, trends in Cuyahoga County have changed remarkably. Another new prosecutor will take office in January 2017, and it appears likely the new prosecutor will maintain the practices of the present one when it comes to capital indictments.

Cuyahoga County had fewer capital indictments in 2015 than in any year since the death penalty was reinstated in 1981.<sup>40</sup> In 1983, Cuyahoga County filed 82 capital indictments. 32 years later, the county filed zero. Even within one county, the subjectivity of varying prosecutors demonstrates a vast discrepancy in the number of capital indictments from year to year. Cuyahoga County is an example of the difference a new prosecutor can make in the number of capital indictments. Data

from the county, which historically contributed the overwhelming majority of new capital indictments, shows the death penalty is sought much less often under the current prosecutor. The past five years further demonstrate a dramatic decline in indictments, with twenty-three in 2011, eleven in 2012, four in 2013, one in 2014 and zero in 2015.<sup>41</sup>

Cuyahoga County Capital Indictments 1981- 2015



Cuyahoga County's lack of capital indictments in 2015 highlights the fallacy that prosecutors claim they need the death penalty as a tool for plea bargaining. If the assertion that prosecutors need the death penalty for plea bargaining were true, one would expect to see a spike in murder cases going to trial in 2015. Plea bargaining data was requested from the Cuyahoga County prosecutor's office for 2015, but that request remains unmet. Cuyahoga County is demonstrating what non-death penalty jurisdictions have known for years: the threat of the death penalty is not a prerequisite for effective plea bargaining.

**Summit County**, Ohio's fourth largest jurisdiction, did not seek any new death penalty cases in 2015.<sup>42</sup> There are only three other years that Summit County did not issue any capital indictments —2011, 2002 and 1981.

## A Closer Look at Summit County

In October 2014 the *Akron Beacon Journal* editorial board raised questions about the behavior of Summit County prosecutors and unusually high numbers of death penalty cases.<sup>43</sup> In its October 26 editorial, "Life choice," the editorial board wrote about how prosecutors accused Judge Mary Margaret Rowlands of bias because she urged prosecutors to abandon pursuit of the death penalty in the case of Deshanon Haywood. The judge suggested the prosecutors to drop the death penalty because a co-defendant, Derrick Brantley, had been convicted and sentenced to life without parole for his role in the crime. Sherri Bevan Walsh, the elected prosecutor, asked the Ohio Supreme Court to remove the judge from the case. Judge Rowlands ultimately recused herself. But before Judge Rowlands recused herself, she rightly pointed out that the two co-defendants would have very different sentences for committing the same crime. The *Beacon Journal* noted that Brantley played a greater role in the murders and received a sentence of life without parole. Summit County unsuccessfully sought the death penalty from a jury in Brantley's case. Judge Rowlands reasoned that Haywood, if convicted, should receive a similar penalty.

Judge Paul Gallagher took over the trial of Deshanon Haywood, who was found guilty by a newly impaneled jury in October 2014. The guilty verdict did not last long as the *Beacon Journal* wrote:

*Defense attorneys succeeded in persuading the judge to vacate the conviction of Haywood. They pointed to misdeeds on the part of county prosecutors. One witness, in prison on a three-year sentence, testified that he did not receive any consideration from prosecutors in exchange for his cooperation. Yet shortly after his testimony, he appeared in another courtroom and was released with the remainder of his sentence suspended. Another witness for the prosecution received similarly favorable treatment.*

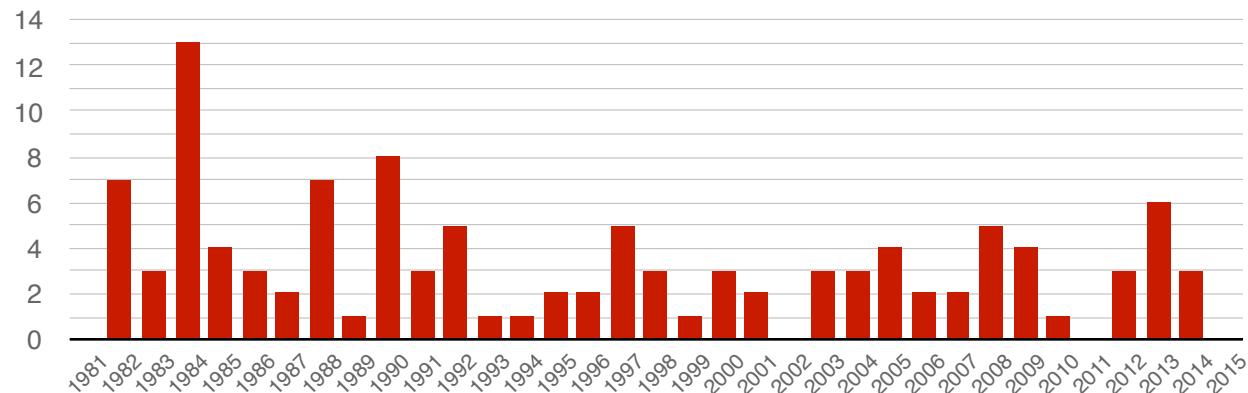
*Defense attorneys deserved the full story, which would have helped in challenging the credibility of the witnesses. Judge Gallagher had no choice but to set events in motion for assembling a third jury and trying Haywood again.*

The *Beacon Journal* also reported on the expense of death penalty cases and noted that at the beginning of 2014 Summit County had seven death penalty cases pending.<sup>44</sup>

Days after the *Beacon Journal* published its editorial, Summit County prosecutor Sherri Bevan Walsh responded with her own opinion editorial. She defended her decisions to seek death in so many cases. She recounted the gory details of murders and rhetorically asked which cases should not have been pursued as death cases? The emotional argument, which often re-traumatizes victims' families but is callously used by prosecutors, was not the only justification for seeking so many death penalty cases. Responding to cost concerns, Sherri Bevan Walsh said, "Decisions [to pursue the death penalty] of such significance cannot be made from an economic perspective but must be based on the exercise of sound discretion in the administration of justice...We cannot abandon the justice afforded by the death penalty simply because it costs more to prosecute these cases than homicide cases without a death specification. Justice should not have a price tag."<sup>45</sup>

The *Beacon Journal* published a story in January 2015 that noted Summit County overspent on indigent defense by more than \$400,000 in 2014.<sup>46</sup> Many of the overruns were directly attributed to the increase in death penalty cases. The seven pending death penalty cases from Summit County at the start of 2014 have all concluded. Six of seven received either life or life without parole sentences including Deshanon Haywood who was sentenced to 25 years to life. The only new death sentence in Ohio in 2015 came from Summit County.

Summit County Capital Indictments 1981- 2015



Not a single new death penalty case was initiated by Summit County in 2015 according to records kept by the Ohio Supreme Court. Summit County homicides did not stop in 2015. In fact, the *Beacon Journal* wrote a story on December 8, 2015 noting that homicides in Akron were on the rise at 27 compared to the previous year.<sup>47</sup> The *Beacon Journal* wrote:

*The majority of the victims this year have been black men (22). Most of the victims were in their 20s and 30s (20), but the ages of the victims range from a 17-year-old boy to a 71-year-old woman.*

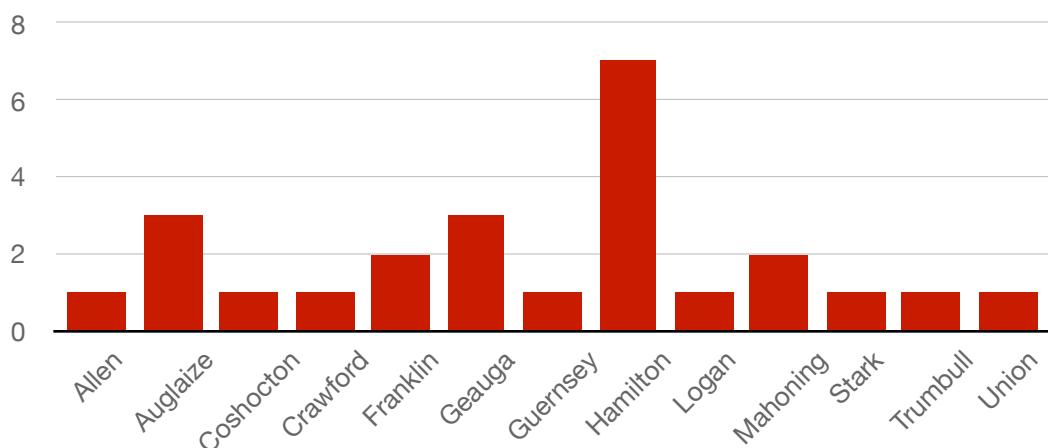
*All but six victims were killed by gunshots. The slayings occurred throughout the city and were not concentrated in any one particular side of town. They were in West Akron, East Akron, North Hill, Kenmore, Firestone Park, Goodyear Heights and downtown Akron.”*

Sherri Bevan Walsh responded that from 2001-2013 her office “averaged 1.3 death penalty cases a year with a range from zero to four in any given year.”<sup>48</sup> If we take her at her word, none of the 27+ Summit County murders were deserving of the death penalty in 2015. We know because she wrote in her *Beacon Journal* op-ed that “the facts of each case, including the age and number of victims along with the brutality involved, are considered in deciding whether a death specification is appropriate.”<sup>52</sup>

Could the budget-breaking overruns of 2014 have contributed to decisions not to seek death in 2015? Did Summit County prosecutors have their hands full handling all those death penalty cases carrying over from 2013-2014? Did the addition of four more death penalty cases in 2014 impact Summit County’s ability to prosecute capital cases? Again if we take the county prosecutor at her word, the answer is no, costs don’t factor into the equation, only the administration of justice does. So why does the administration of “justice” in 2015 look so different from justice in 2014 and 2013?

In 2015, trends held that underscore Ohio’s continued uneven use of the death penalty: a handful of counties continue using the death penalty while the vast majority no longer seek to execute. The handful of continued-use counties account for more than half of the new death penalty cases in 2015.

2015 Capital Indictments by Ohio Counties



Although the Ohio Supreme Court tracks the numbers of capital indictments from Ohio counties, no entity collects relevant data that distinguishes between cases that are eligible for the death penalty but not charged as such and those that are eligible and charged accordingly. This important distinction and data would allow a much more precise analysis than is currently possible. Collecting such data prospectively was recommended by the Supreme Court Joint Task Force, but has not yet been acted upon.<sup>49</sup>

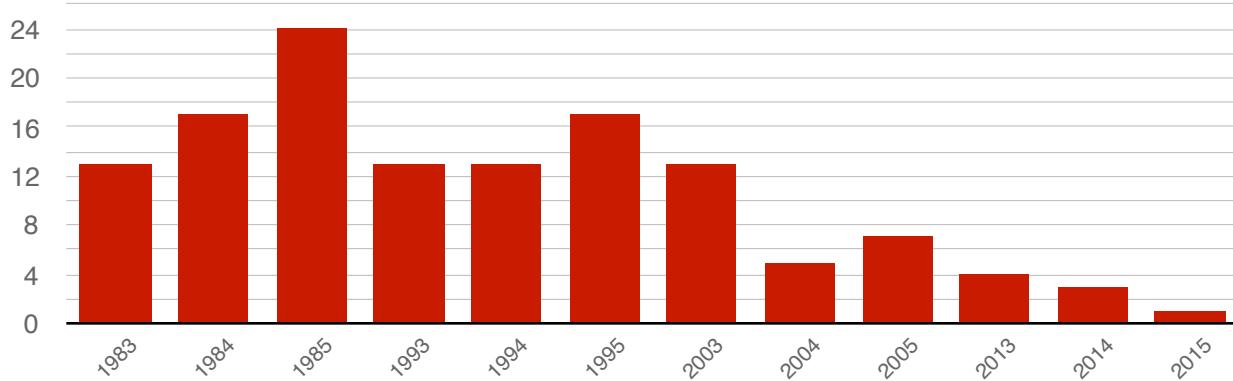


OHIO PENITENTIARY IN THE 1960'S

## NEW DEATH SENTENCES

As covered in *A Crumbling Institution: Why Ohio Must Fix or End the Death Penalty*, Ohio initiated 21 new death penalty cases in 2014. Only three death penalty cases from 2014 are still pending, the rest have been resolved. Three new death sentences resulted from pending cases from 2014. Twelve cases resulted in life without parole sentences, eight resulted in a term of years-to-life imprisonment. One case resulted in a two-year sentence and another man was acquitted.

#### Ohio Death Sentence Trends (1983-1985, 1993-1995, 2003-2005, 2013-2015)

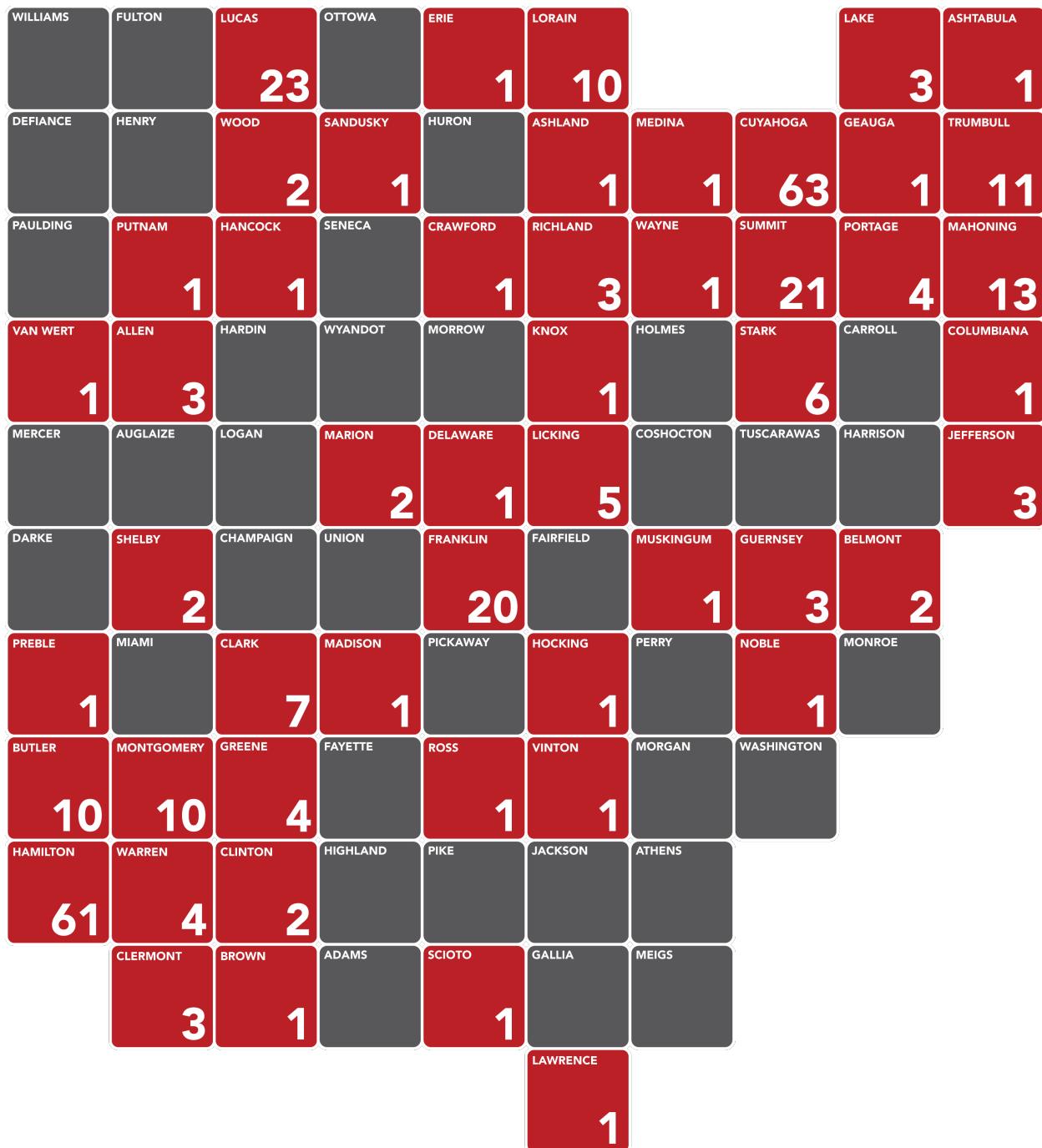


There was only one new death sentence issued in 2015. A Summit County man, Shawn Ford, was sentenced to death on June 29, 2015 for the murders of Jeffrey and Margaret Schobert. The capital case against Mr. Ford resulted from the April 2, 2013 double murder. Though the capital proceedings against Mr. Ford began in 2013, Summit County officials did not notify the Ohio Supreme Court of the capital proceedings until 2014.

Another man already sentenced to death in 1995, James Goff of Clinton County, was re-sentenced to death in 2015.

Nine death penalty cases from 2015 have concluded, resulting in six sentences of life without parole and three sentences of terms of years-to-life imprisonment. Seventeen cases from 2015 are still pending, but the death penalty was removed for three of those pending cases.<sup>50</sup>

## DEATH SENTENCES IMPOSED SINCE 1981





OHIO PENITENTIARY AFTER CLOSING IN 1984

## CASE UPDATES: APANOVICH & BROOM

## **Anthony Apanovich**

Apanovitch was convicted and sentenced to death in 1985 for the rape and murder of 33-year old Mary Anne Flynn. Mr. Apanovitch has maintained his innocence from the time he was first arrested.

In February 2015 a Cuyahoga County Common Pleas Judge vacated Apanovitch's conviction of the rape and murder of Ms. Flynn. The judge ruled that DNA evidence was found in two places on Ms. Flynn. One sample was too small to be tested and the other excluded Apanovitch. The judge wrote in his opinion, "The evidence at the hearing is substantially different than at the original trial, and the earlier decision is, at least in part, clearly erroneous and would work a manifest injustice."<sup>51</sup>

The Court set bond for Mr. Apanovitch which would have allowed him to be freed pending a retrial. However, Cuyahoga County prosecutors appealed the bail decision and prevailed temporarily. In 2016 the appeals court affirmed his right to a new trial, upholding his acquittal of two rape charges. A new trial for Mr. Apanovitch, more than 30 years after his conviction, has not yet been scheduled. Apanovitch was granted bail and is awaiting trial under house arrest.

## **Rommell Broom**

Rommell Broom was convicted of the 1984 murder of 14-year old Trina Middleton of Cleveland. In 2009, Broom's case made headlines around the world when his execution was called off after executioners tried for hours to establish access to a vein to administer the poison. A physician examined Broom several days later and documented 18 separate puncture attempts.<sup>52</sup>

Six years after the 2009 execution attempt, the Ohio Supreme Court heard arguments in the case. Broom's attorneys maintained that if Ohio is afforded a second opportunity to execute Broom that would violate the Constitution and amount to double jeopardy. Lawyers for the state of Ohio argued that double jeopardy did not attach because the execution of Broom never began.

The Ohio Supreme Court accepted the state's suggestion that the execution had not yet begun, ruling on March 16, 2016 that Ohio may try to execute Broom a second time. The 4-3 decision included a dissent from Justice Judith French, who wrote, "If the state cannot explain why the Broom execution went wrong, then the state cannot guarantee that the outcome would be different next time."<sup>53</sup>

Ohioans to Stop Executions has called on Governor Kasich to put an end to this case by commuting Broom's sentence to life imprisonment without the possibility of parole. It is disingenuous at best to suggest that execution had not begun. Romell Broom was strapped to the gurney. Execution officials punctured him to insert IV lines no fewer than 18 times.

*Cleveland Plain Dealer* reporter Peter Krause compiled the following timeline around the attempted execution of Romell Broom.

### **Monday (September 14, 2009)**

9:46 a.m.: Broom enters the holding cell 17 steps from the death chamber at the Southern Ohio Correctional Facility in Lucasville after being transported from the Ohio State Penitentiary in Youngstown.

11:49 a.m.: Medical staff find that Broom's veins appear to be accessible in his right arm but not as visible in his left.

12:17 p.m.: Broom learns that Gov. Ted Strickland has rejected a request for mercy.

4:01 p.m.: Broom eats a dinner of chicken stir fry, rice, butter, bread, pears and juice. Broom declined to order anything besides what other prison inmates were served.

7:12 p.m.: In a phone call to his brother, Broom says he "wants it to be over." According to guards observing him, Broom says he is "tired of being in prison and having people tell him what to do every day."

### **Tuesday (September 15, 2009)**

12:24 a.m.: Broom falls asleep after watching TV for about two hours.

5:08 a.m.: Broom awakens for the day.

5:51 a.m.: Broom is escorted to the shower.

6:27 a.m.: Broom eats breakfast of cereal.

8:07 a.m.: The chemicals used in Ohio executions -thiopental sodium, pancuronium bromide and potassium chloride -are delivered to the death house.

9:31 a.m.: Execution preparations put on hold while the 6th U.S. Circuit Court of Appeals weighs a last-minute appeal request.

12:28 p.m.: Broom eats a lunch of creamed chicken, biscuits, green beans, mashed potatoes, salad and grape drink.

12:48 p.m.: The 6th Circuit says it will not review the appeal. Execution scheduled to begin at 1:30 p.m.

1:24 p.m.: First round of lethal drugs is destroyed.

1:31 p.m.: Replacement drugs are delivered to the death house.

2:01 p.m.: Medical team enters holding cell and begins trying to insert IVs.

2:30 p.m.: Unable to find a usable vein, team leaves the cell to take a break.

2:42 p.m.: Team members back in cell trying again.

2:44 p.m.: Prisons director Terry Collins tells the medical team to take another break.

2:49 p.m.: Broom wipes his face with a tissue, appears to be crying.

2:57 p.m.: Broom asks that his attorney, Adele Shank, be allowed to watch. Around 3 p.m.: Tim Sweeney, a Cleveland attorney also representing Broom, sends a letter to Ohio Supreme Court Chief Justice Thomas Moyer asking the court to stop the execution on the grounds that Broom is suffering cruel and unusual punishment.

3:04 p.m.: Shank speaks with prisons lawyer Austin Stout, who informs her execution policy doesn't allow lawyers to have contact with inmates after the execution process has started.

3:11 p.m.: Execution team members say they are having problems keeping a vein open because of Broom's past drug use.

3:33 p.m.: Shank is taken to the witness viewing area.

4:07 p.m.: Collins consults with Ohio Gov. Ted Strickland and the Ohio attorney general's office.

4:24 p.m.: Strickland issues one-week reprieve.

5:59 p.m.: Broom eats a dinner of veggie nuggets, lima beans, bread, cookies and juice

(P. Krouse, "Failed execution of Romell Broom prompts efforts to block 2nd attempt," Cleveland Plain Dealer, Sept. 17, 2009).



*THE ABANDONED OHIO PENITENTIARY IN THE 1990'S*

## PENDING EXECUTIONS

As of September 2016, Ohio had 26 executions scheduled.<sup>54</sup> Ohio has not conducted an execution since the January 2014 execution of Dennis McGuire. Ohio does not currently have a viable execution protocol to conduct executions. Despite Ohio's lack of drugs to conduct executions or an execution process, the Ohio Supreme Court, at the behest of Ohio prosecutors, continues to schedule executions.

| DEATH ROW PRISONER   | COUNTY   | SENTENCE DATE | EXECUTION DATE |
|----------------------|----------|---------------|----------------|
| Ronald Phillips      | Summit   | 9/15/1993     | 1/12/2017      |
| Raymond Tibbetts     | Hamilton | 8/27/1998     | 2/15/2017      |
| Gary Otte            | Cuyahoga | 10/6/1992     | 3/15/2017      |
| Jeremiah Jackson     | Cuyahoga | 4/7/2010      | 3/22/2017      |
| Alva Campbell Jr.    | Franklin | 4/25/2001     | 5/10/2017      |
| Donald Ketterer      | Butler   | 2/4/2004      | 5/17/2017      |
| William Montgomery   | Lucas    | 11/7/1986     | 6/13/2017      |
| Mark Pickens         | Hamilton | 7/13/2010     | 7/19/2017      |
| Robert Van Hook      | Hamilton | 8/8/1985      | 7/26/2017      |
| Jeffrey Wogenstahl   | Hamilton | 3/15/1993     | 9/13/2017      |
| Melvin Bonnell       | Cuyahoga | 5/25/1988     | 10/18/2017     |
| John David Stumpf    | Guernsey | 9/27/1984     | 1/3/2018       |
| Warren K. Henness    | Franklin | 1/24/1994     | 2/13/2018      |
| Douglas Coley        | Lucas    | 6/8/1998      | 3/14/2018      |
| Stanley Fitzpatrick  | Hamilton | 2/15/2002     | 5/30/2018      |
| Angelo Fears         | Hamilton | 12/10/1997    | 6/27/2018      |
| David Sneed          | Stark    | 8/7/1986      | 8/1/2018       |
| Cleveland R. Jackson | Allen    | 8/5/2002      | 9/13/2018      |
| James Derrick O'Neal | Hamilton | 12/11/1995    | 10/10/2018     |
| Elwood Hubert Jones  | Hamilton | 1/9/1997      | 1/9/2019       |
| James Galen Hanna    | Lucas    | 11/30/1998    | 2/13/2019      |
| Archie J. Dixon      | Lucas    | 11/22/1995    | 3/20/2019      |
| Timothy J. Hoffner   | Lucas    | 6/1/1995      | 5/29/2019      |
| Kareem M. Jackson    | Franklin | 3/6/1998      | 7/10/2019      |
| Gregory Lott         | Cuyahoga | 7/29/1987     | 8/14/2019      |
| James Frazier        | Lucas    | 6/15/2005     | 10/17/2019     |
| Kenneth Smith        | Butler   | 2/16/1996     | No date set    |
| Charles Lorraine     | Trumbull | 12/9/1986     | No date set    |
| Michael Webb         | Clermont | 7/16/1991     | No date set    |
| Abdul Awkal          | Cuyahoga | 12/14/1992    | No date set    |

**Table note:** In addition to these men with executions dates pending, four other death row prisoners had execution dates in the past not yet rescheduled. Kenneth Smith was to be executed in July 2011 but was granted a stay due to a court ruling that held Ohio was not following its written rules governing executions. Charles Lorraine was to be executed in January 2012, however that execution did not take place due to similar issues as Smith's postponed execution. Michael Webb was scheduled for execution in February 2012 but his execution was postponed just like Smith's and Lorraine's. Finally, Abdul Awkal was to be executed in May 2012 but a Common Pleas Court found Awkal not competent for execution. None of these four men currently have execution dates.

Upon the Court's most recent scheduling of execution, Justice Paul Pfeifer, joined by Justice William O'Neil, wrote, "At this time, the state is incapable of properly executing the 25 people for whom execution dates have previously been set. It serves no rational purpose for this court to continue to set execution dates while significant logistical obstacles remain in place and more legal challenges are likely."<sup>55</sup>

Justice Pfeifer's opinion came in the case of James Frazier of Lucas County. Frazier will be 79 years old at the time of his scheduled execution in 2019.



OHIO PENITENTIARY DURING DEMOLITION IN 1998

## EXECUTIONS DELAYED—THE LETHAL INJECTION CHALLENGE

When drug manufacturers banned the use of their drugs for executions in the United States, access to death-causing drugs was cut off. Many drugs that were in the hands of death penalty states were nearing their expiration dates. These factors led states to look to other, untested drugs to use for executions. The use of these drugs, particularly the drug midazolam, has proven disastrous, so some states—including Ohio—have turned to compounding pharmacies to create the drugs that manufacturers will no longer supply.

According to the Food and Drug Administration (FDA), compounding pharmacies combine, mix, or alters ingredients of a drug to create a medication tailored to the needs of an individual patient. For instance, if a drug has a dye that a patient may be allergic to, a compounding pharmacy can make the medication without the dye. They can also create a liquid version of a pill that elderly or very young patients would not be able to swallow. Compounding pharmacies are not regulated by the FDA, which means the drugs created by compounding pharmacies are not FDA-approved. According to the FDA's website, "there can be health risks associated with compounded drugs that do not meet federal quality standards. Compounded drugs made using poor quality practices may be sub-or super-potent, contaminated, or otherwise adulterated. Additional health risks include the possibility that patients will use ineffective compounded drugs instead of FDA-approved drugs that have been shown to be safe and effective."<sup>56</sup>

As dangerous as compounded execution drugs may be, Ohio lawmakers passed the "secret executions" bill, which Governor John Kasich signed into law in December 2014. The law in Ohio not only permits compounding pharmacies to create execution drugs, but it keeps the identities of the compounding pharmacies secret! Accordingly, these companies could potentially create an unsafe, ineffective, or torturous mix of chemicals and will be able to hide behind the secrecy law to avoid scrutiny.

Lawyers in Ohio could challenge the legality of using compounding pharmacies to make drugs for use in executions. They could also argue that the pharmacies would be creating "new drugs" in violation of state and federal laws.<sup>57</sup> Additionally, state and federal laws prohibit using a compounding pharmacy to legally manufacture, sell, deliver, hold, or offer for sale drugs compounded for an execution.<sup>58</sup> Similar litigation occurred in Missouri after the Department of Correction sought to obtain compounded pentobarbital from a compounding pharmacy. A federal court issued a temporary restraining order preventing the compounding pharmacy from providing the drug because the action likely violated the federal Food, Drug & Cosmetic Act. That lawsuit was settled when the compounding pharmacy agreed not to provide the Missouri Department of Correction with compounded pentobarbital for the use in its executions.<sup>59</sup> Lawyers in Ohio are hopeful that federal courts here will agree that the use of compounding pharmacies in this manner is illegal.

## **Method of Execution: Back to the Future or Back to the Drawing Board?**

Given the difficulties states have had obtaining execution drugs, some have decided to change methods of execution, including returning to outdated forms or inventing a new one. According to the Death Penalty Information Center:

- In 2014, Tennessee passed legislation permitting the use of the electric chair if lethal injection drugs cannot be obtained.<sup>60</sup>
- On March 23, 2015, Utah Governor Gary Herbert signed legislation reauthorizing the state to use the firing squad in the event that the drugs required for lethal injection are unavailable.<sup>61</sup> Prior to

this, the firing squad was an option, but was only allowed for inmates who chose this method prior to its elimination in 2004.

- On April 17, 2015, Oklahoma Gov. Mary Fallin signed legislation allowing the state to use nitrogen gas as a form of execution if either the drugs for lethal injection are unavailable or if lethal injection is struck down by the courts.

Although electric chairs and firing squads have been legal methods of execution throughout much of America's history, the overwhelming majority of death penalty states abandoned those methods when what was thought to be a more humane execution method, that is, lethal injection, was made available. Only eight states now permit electrocution; just two permit firing squad; and a scant five more permit lethal gas.<sup>62</sup> The lethal gas now permitted in Oklahoma is different from the traditional gas chamber. Instead of cyanide, Oklahoma would rather use nitrogen to bring about "nitrogen hypoxia," which eventually causes death. According to The Marshall Project, this method of execution has never been attempted before anywhere in the world, and Oklahoma provides no specific information about how this method of execution would be carried out.<sup>63</sup>

Ohio politicians have not readily given up on continuing the machinery of death in Ohio. Senate President Keith Faber told the *Columbus Dispatch*, "If we can't get the drugs that our protocol calls for, either we need to change our protocols, or we need to think about other solutions."

President Faber went on to say, "There are a lot of people out there talking about other solutions. I've heard everything from using heroin, to using nitrogen, to going back to the electric chair. That's a debate we probably need to have."<sup>64</sup>

Senator Bill Seitz, a Republican from Cincinnati, quipped, "The Supreme Court of the United States has already determined that neither electric chair, nor firing squad, nor hanging are cruel and unusual punishment. All three are legally permissible to be used in the United States. There are other states that have begun to experiment with nitrogen and some suggest, many states are beginning to legalize assisted suicide."<sup>65</sup> "We've got plenty of electric and plenty of rope," he added when talking to the *Associated Press* in October 2015.<sup>66</sup>

But not everyone in Ohio's government agrees that changing execution methods is appropriate. When asked about executions and problems acquiring drugs, Governor Kasich said Ohio is not going to consider different execution methods as other states have (firing squad, nitrogen gas, electric chair). The governor told *Associated Press* in October 2015, "I don't think that's where we're headed."<sup>67</sup>

The question about how Ohio will move forward with executions remains unanswered. What has been answered is that the United States Supreme Court evaluates the death penalty by looking at "evolving standards of decency." More than 30 states moved away from electric chairs, firing squads, hanging ropes, and gas chambers as their primary execution method after lethal injection was available. These states acknowledged that those methods were no longer in keeping with the evolving standards of decency in their states. A return to these barbaric practices are not in keeping with the Supreme Court's standards. As for the never-before-tried option of nitrogen gas, no one can say with certainty that it offers any assurance of decency. States have been experimenting with various drugs in executions in recent years with horrible and excruciating results. Evolving standards of decency suggest that human experimentation with state-sponsored death is inappropriate and unconstitutional.



OHIO PENITENTIARY DURING DEMOLITION IN 1998

## CONSERVATIVES CONCERNED ABOUT THE DEATH PENALTY

## **Former Ohio Governor Bob Taft Asks if Death Penalty is Dead Man Walking**

Governor Taft reflected on his personal agony dealing with capital punishment in a December 2014 article for the University of Dayton magazine, *UDQuickly*. He was the first Ohio governor in 36 years to preside over an execution when Wilford Berry was put to death on Feb. 19, 1999. In his concluding paragraphs, he wrote,

*"Considering the cases that came to me and developments after I left office in 2007, I believe the days of the death penalty may be numbered, in Ohio and across the country. The U.S. Constitution bars "cruel and unusual punishment." In one of the last executions during my term in office, since the convicted person had been a drug user, it was extremely difficult to find a vein in which to insert the lethal injection. The execution took an agonizing 40 minutes. Federal courts have declared moratoriums on the death penalty in Ohio due to complications such as this one.*

*"Questions have been raised about whether the death penalty can be administered consistently and without discrimination across Ohio's 88 counties. Moreover, death penalty cases drag on through one appellate level after another, putting years, even decades, between the date of the crime and the date of punishment; the death sentence is certainly not swift punishment. The death penalty is very costly to administer; lengthy trial and appellate procedures put a burden on county and state governments to pay for lawyers, judges and jails.*

*"Ohio prosecutors have been seeking the death penalty less frequently since the life-without-parole option was created by the legislature in 1996 as an alternative sentencing option. In 2013, Ohio prosecutors led only nine death penalty cases, the fewest since capital punishment was reinstated in 1981; and in the last decade, death penalty cases are down by more than 40 percent compared to the previous decade. It may be time to ask the question whether the death penalty in Ohio is a "dead man walking."<sup>68</sup>*

## **Former Ohio Attorney General Jim Petro Says It Doesn't Work**

Former Attorney General Jim Petro and his wife, Nancy, spoke to the Joint Task Force to Review the Administration of Ohio's Death Penalty in August of 2013. At the meeting, the Petros raised their concerns about wrongful convictions and the possibility that innocent people are on Death Row. Jim Petro told the Task Force, "My simple standard is this: I believe society has the right to exact the ultimate punishment. I don't have any moral objection to the death penalty;" he noted his concerns are entirely practical: "It doesn't work."

Petro gave a speech on the Ohio House floor in 1980, saying the death penalty would be a deterrent for horrendous crimes and would save money, because inmates wouldn't be housed in prison the rest of their lives. He was a primary author of Ohio's current death penalty statute. The first 19 Ohio executions occurred while he was Ohio Attorney General, and after leaving office, he and his wife became advocates for uncovering wrongful convictions. Petro now believes the death penalty should never be used.

*"I think it's time to end it in Ohio. I don't think we need it. As a society, it puts us at risk of grievous error that can never be reversed. What I have learned in my work in wrongful convictions is there's too many times when there's not an absolute sure thing."<sup>69</sup>*

## **Ohio Supreme Court Justice Paul Pfeifer Says It is Time to Abolish Death Penalty**

Ohio Supreme Court Justice Paul Pfeifer has now spoken out repeatedly about his opposition to Ohio's death penalty law, which incidentally, he helped write in 1981. In 2011, he penned an opinion editorial published in the *Cleveland Plain Dealer*:

*"...I helped craft the law, and I have helped enforce it. From my rather unique perspective, I have come to the conclusion that we are not well served by our ongoing attachment to capital punishment.*

*"Why the change? In short, because the death penalty law is not being applied as we originally intended.*

*"[...]But life without parole now offers us a viable alternative to the death penalty, and it's an option that can satisfy our desire to punish killers for their crimes. There are, however, dozens of inmates on Death Row who were convicted before that option was available. How many of them would have been sentenced to death if the life-without-parole option had been available at the time? No one knows. All we know is that there are many people who will be put to death because they were convicted at the wrong time.*

*"So, I ask: Do we want our state government—and thus, by extension, all of us—to be in the business of taking lives in what amounts to a death lottery? I can't imagine that's something about which most of us feel comfortable. And, thus, I believe the time has come to abolish the death penalty in Ohio."*<sup>70</sup>

## **Lucas County Prosecutor Julia Bates on Death Penalty as Torture**

Julia Bates, the current Lucas County prosecutor, challenged the death penalty in an article in *The Toledo Blade*.<sup>71</sup> In the article, Prosecutor Bates stated, "If you've done a purposeful killing or a felony murder you can get life without parole—you can try it, plead to it—but we can get that, and we don't have to go through what is torturous really."

"Death-penalty cases are 'tortuous [sic],' " she said, "for juries and judges charged with deciding whether someone should live or die, torturous for defense lawyers and prosecutors whose work really just begins when a defendant is convicted, torturous for victims' families who must suffer through 15 to 20 years of appeals, and torturous for defendants sitting for years in solitary confinement on Death Row. It just seems there ought to be a better way."

## **Retired Ohio Supreme Court Justice Evelyn Stratton Calls Death Penalty Ineffective**

Retired Ohio Supreme Court Justice Evelyn Stratton announced her opposition to the death penalty in June 2013.<sup>72</sup> "I have evolved to where I don't think the death penalty is effective." She noted its failure as a deterrent and its inability to provide closure to victim's family members. In closing she said, "I don't have a moral inhibition... Overall, it's just not the best way to deal with it on a number of different levels."

Justice Stratton, a Republican, reviewed the cases of the 49 inmates who were executed during her time on the court from 1996 to 2011.

## **Former Director of Ohio Department of Rehabilitation and Correction Terry Collins Calls Reform No-Brainer**

The retired director of ODRC, Terry J. Collins, spoke openly about his opposition to the death penalty at a luncheon for the Cleveland City Club in December 2013. The moderator of the discussion asked the former Director, who oversaw 33 executions during his career, why he has become a public opponent of the death penalty. Mr. Collins responded: “Every time I did an execution...that question remaining, ‘did we get this right?’ and knowing we have the greatest justice system in the world but we can still make mistakes. If you make a mistake and you execute someone, that’s it.”<sup>73</sup>

Most recently, Collins was a speaker at numerous “Voices of Experience” public forums sponsored by Ohioans to Stop Executions across the state. He shared his history of how he came to head the department and why, now that he is no longer a state employee, he opposes the death penalty as a failed public policy. In discussing the reform recommendations of the Supreme Court Task Force on the Administration of Ohio’s Death Penalty, Collins said, “On the issue of executing people with severe mental illness, there does not need to be any debate. They should just pass that one right now and get it done. It’s a no-brainer.”

## **Ohio Supreme Court Justice William O’Neill Says Ohio Death Penalty is Unconstitutional**

Ohio Supreme Court Justice William O’Neill called the death penalty unconstitutional in January 2013, when he dissented in an order setting an execution date for Jeffrey Wogenstahl, a Hamilton County man convicted of the 1991 murder of Amber Garrett.

Justice O’Neill wrote, “I would hold that capital punishment violates the Eighth Amendment to the Constitution of the United States and Article I, Section 9 of the Ohio Constitution. The death penalty is inherently both cruel and unusual and therefore is unconstitutional. Capital punishment dates back to the days when decapitations, hangings, and brandings were also the norm. Surely, our society has evolved since those barbaric days.... To date, 18 states and the District of Columbia have eliminated the death penalty altogether. It is clear that the death penalty is becoming increasingly rare both around the world and in America. By definition it is unusual.” He concluded, “The time to end this outdated form of punishment in Ohio has arrived. While I recognize that capital punishment is the law of the land, I cannot participate in what I consider to be a violation of the Constitution I have sworn to uphold.”<sup>74</sup>

## **Former Director of Ohio Department of Rehabilitation and Correction Dr. Reginald Wilkinson Calls Ohio’s Death Penalty Embarrassing**

Reginald Wilkinson, Director of ODRC from 1991 to 2006, oversaw many executions. Since his retirement he has repeatedly spoken out against the death penalty, and recently was quoted in the *Dayton Daily News* citing concerns about the high cost of capital punishment. He participated in the successful effort to prevent the execution of Kevin Keith and at that time was quoted in the *Columbus Dispatch*, “I’m of the opinion that we should eliminate capital punishment,” he said. “Having been involved with justice agencies around the world, it’s been somewhat embarrassing,

quite frankly, that nations just as so-called civilized as ours think we're barbaric because we still have capital punishment.”<sup>75</sup>



NATIONWIDE ARENA DURING CONSTRUCTION IN 2000

## ONGOING COUNTY DISPARITIES IN OHIO'S DEATH PENALTY

The table below shows information pertaining to Ohio's most active death penalty counties. The information underscores established trends that indicate Ohio's death penalty is limited to a few counties. The vast majority of death sentences in Ohio —over 75%—have come from just 10 of Ohio's 88 counties.

| COUNTY                   | POPULATION        | HOMICIDES     | EXECUTIONS | DEATH SENTENCES | HOMICIDES PER 1000 POPULATION | EXECUTIONS PER 100 HOMICIDES | DEATH SENTENCES PER 100 HOMICIDES |
|--------------------------|-------------------|---------------|------------|-----------------|-------------------------------|------------------------------|-----------------------------------|
| <b>Cuyahoga</b>          | 1,280,122         | 3,726         | 9          | 63              | 2.91                          | 0.24                         | 1.69                              |
| <b>Hamilton</b>          | 802,374           | 1,838         | 11         | 60              | 2.29                          | 0.54                         | 3.26                              |
| <b>Lucas</b>             | 441,815           | 891           | 4          | 23              | 2.02                          | 0.45                         | 2.58                              |
| <b>Franklin</b>          | 1,163,414         | 2,919         | 2          | 21              | 2.51                          | 0.07                         | 0.72                              |
| <b>Summit</b>            | 541,781           | 698           | 6          | 20              | 1.29                          | 0.86                         | 2.87                              |
| <b>Mahoning</b>          | 238,823           | 1,053         | 2          | 14              | 4.41                          | 0.19                         | 1.33                              |
| <b>Trumbull</b>          | 210,312           | 182           | 3          | 14              | 0.87                          | 1.65                         | 7.69                              |
| <b>Butler</b>            | 368,130           | 282           | 1          | 12              | 0.77                          | 0.35                         | 4.26                              |
| <b>Montgomery</b>        | 535,153           | 1,385         | 3          | 12              | 2.59                          | 0.22                         | 0.87                              |
| <b>Lorain</b>            | 301,356           | 186           | 2          | 10              | 0.62                          | 1.08                         | 5.38                              |
| <b>10 Counties Above</b> | 5,883,280         | 12,878        | 43         | 249             | 2.19                          | 0.33                         | 1.93                              |
| <b>78 Other Counties</b> | 5,680,224         | 2,967         | 10         | 82              | 0.52                          | 0.34                         | 2.76                              |
| <b>TOTALS</b>            | <b>11,563,504</b> | <b>15,845</b> | <b>53</b>  | <b>331</b>      | <b>1.37</b>                   | <b>0.33</b>                  | <b>2.09</b>                       |

Opponents of the death penalty have contended for years that resource-rich counties were most likely to seek the death penalty. Data available bears that out to some extent. We continually see that over time Ohio's most populous counties are regular contributors to Ohio's death row and to executions. There is little surprise that Cuyahoga, Franklin, Hamilton, Summit, Montgomery and Lucas counties land on the high-use death penalty list. But what is surprising is that smaller counties like Trumbull, Butler and Lorain are sentencing people to death at alarming rates compared to larger Ohio counties. This raises several questions: How are these three counties distinguishing themselves in their use of the death penalty? What factors or attributes do these counties have that may provide some explanation as to why they are so active in seeking the death penalty? Why these three?

## A Closer Look at Trumbull County

Trumbull County produces more death sentences per homicide than any other county at nearly 8 death sentences per 100 homicides. Trumbull County is the smallest of Ohio's high-use death penalty counties with a population of 210,312 according to census data gathered in 2010. Among high-use death penalty counties, Trumbull County had the least number of homicides from 1990-2014 with 182. In the same period, Trumbull county had 7.28 homicides per year. Its homicide rate per 1,000 residents is 0.87, the third lowest among high-use death penalty counties.

The median household income in Trumbull county is \$42,296. Demographics show that Trumbull county has a population that is 89% White, 8.3% Black and 2.7% identified as Other.

In terms of geography, Trumbull County sits in northeast Ohio, close to metropolitan areas including Cleveland, Akron, Canton and Youngstown. Its current Democratic prosecutor has been in elected office since 1984. The prosecutor's biography page prominently reads:

*During his career Dennis Watkins has successfully prosecuted 45 murder trials, and has personally obtained convictions which resulted in nine (9) of the eleven (11) Trumbull County murderers who have been sentenced to death under the Ohio law. He has also won arguments before the Ohio Supreme Court on many of these cases, upholding various convictions and the sentences. Most recently, he successfully presented arguments along with victims' family members to the Ohio Parole Board and the Governor of Ohio against clemency for three of the Defendants that he personally tried. As a result, all three killers were denied clemency, and the sentences were carried out. Jason Getsy was executed on August 19, 2009; Kenneth Biros was executed on December 8, 2009; and Roderick Davie was executed on August 10, 2010.*

The current Trumbull prosecutor initiated 59 of 63 death penalty cases in Trumbull county since the current law went into effect thirty years ago, which averages 1.97 per year.

No other Ohio county prosecutor cites death penalty cases or executions on a biographical page to convey accomplishment in the same way. The personal preference of Trumbull county's current prosecutor suggests he places a high value on death penalty cases.

## A Closer Look at Lorain County

Lorain County produces the second highest number of death sentences per 100 homicides with 5.38 among the ten most active death penalty counties. Lorain County's 2010 census data shows a population of 301,356 and homicides from 1990-2014 totaling 186, second fewest of Ohio's ten high-use death penalty counties. On average, Lorain County had 7.44 homicides per year from 1990-2014. The homicide rate per 1,000 residents in Lorain County is 0.62, the lowest among ten high-use death penalty counties. The median household income is \$52,066. Lorain County demographics include a population that is 84.8% White, 8.6% Black and 6.6% identified as Other.

Lorain County is situated on the edge of where Northeastern and Northcentral Ohio meet, just to the West of Cuyahoga County and Cleveland. A Republican prosecutor held office from 1982 to 2005. Lorain's current Democratic prosecutor was elected in 2005. The current prosecutor initiated just 2 of 36 death penalty cases in Lorain County according to the Ohio Supreme Court capital indictment case filings. Two death penalty cases over the span of eleven years averages 0.18 per year. The Republican predecessor initiated 34 of 36 death penalty cases over a span of twenty-three years averaging 1.47 per year.

Lorain county's current prosecutor uses the death penalty system less often compared to his predecessor. Despite the dramatic decline in death penalty cases coming out of Lorain county, it remains a high-use county by virtue of its previous prosecutor's decision to seek the death penalty.

**Interesting note about Lorain County:** Ohio law requires the county clerk of courts to notify the Ohio Supreme Court of death penalty cases, but Lorain County routinely does not file required notices. Nicole Diar was sentenced to death in 2005 for the 2003 murder of her son. No record

exists for Nicole Diar in Supreme Court capital indictment records. Albert Fine pled guilty to aggravated murder in February 2016 for the 2012 murder of his girlfriend. The guilty plea was reached in order to remove death penalty specifications according to articles written by *The Morning Journal*. No record of a death penalty case for Mr. Fine exists in Supreme Court indictment records. In another article reported by *The Morning Journal*, the March 2015 headline reads, “Lorain County prosecutor to seek death penalty for Lorain man charged with delivery driver's murder.” The article names Benjamin Davis as the defendant yet there is no record of a death penalty indictment against Davis in any Ohio Supreme Court capital indictment records.

## Capital Indictment Filings

Pursuant to Ohio Revised Code § 2929.021(A) the clerk of the court in a county in which an indictment is filed that charges one or more counts of aggravated murder with aggravating circumstances shall file a notice with the Supreme Court indicating that the indictment was filed, within fifteen days after the day on which it is filed. Pursuant to Ohio Revised Code § 2929.021(B) the clerk of the court in a county filing a notice of indictment pursuant to § 2929.021(A) shall also file a notice of a plea of guilty, no contest, or dismissal of the indictment, within fifteen days after the day on which the plea or dismissal is filed. **The notices shall be in the form prescribed by the clerk of the Supreme Court.**

Even though Supreme Court records show 36 death penalty cases were initiated in Lorain County, this number is most likely incorrect and misleading. The Ohio Supreme Court or the Ohio Attorney General should request Lorain County abide by Ohio Revised Code § 2929.021(A) and file appropriate notices to the Ohio Supreme Court for all capital indictments in appropriate years.

## A Closer Look at Butler County

Butler County ranks third among high-use counties for producing the most death sentences per 100 homicides at 4.26. Census data from 2010 shows that Butler County has a population of 368,130 and had 282 murders from 1990-2014. From 1990-2014 Butler County averaged 11.28 homicides per year and had a homicide rate per 1,000 residents of 0.77. Butler County’s median household income is \$54,788 and its population demographics are 86% White, 7.3% Black and 6.7% identified as Other.

Butler County is located in Southwestern Ohio with metropolitan areas of Cincinnati and Dayton close by. The current Republican prosecutor has initiated 2 of 55 death penalty cases in the county at an average of 0.67/year over a three-year period. Prior to the current prosecutor, another Republican held office from 2001-2012 who initiated 23 of 55 death penalty cases at an average of 1.9/year over a twelve-year period. The previous thirty years, a Democratic prosecutor held office who initiated 30 of 55 death penalty cases in Butler County at an average of 1.5 per year over a twenty-year period.

Butler county’s current prosecutor, much like his colleague from Lorain county, does not seek the death penalty as often as his predecessors did. Butler county is categorized as a high-use death penalty county because of the decisions of past prosecutors.

## **Comparing Counties with Similar Homicide Rates**

Data suggests that the personal preference of a county prosecutor drives the death penalty system more than any other factor. After a review and comparison of factors, including median income information, geographic location, demographic information, political parties, crime statistics, indictments, death sentences and executions, it is virtually impossible to lay out a predictable criteria for cases in which prosecutors will seek death.

To try to understand why Trumbull, Lorain and Butler counties use the death penalty as they do, we compare them to other counties with the nearest homicide rates: Stark, Richland and Erie counties, respectively.

### **Comparing Trumbull (0.87 homicides per 1000 residents) to Stark (0.84)**

Trumbull and Stark counties are an interesting comparison. Both counties are in the same geographic region. Both counties have prosecutors of the same political party dating back over 25 years. Both Stark and Trumbull counties seek the death penalty, but how often is strikingly different. For every 100 homicides Trumbull County has almost 8 death penalty cases compared to Stark county, which has fewer than two.

Stark county has sentenced six people to death in 80 cases where it filed a capital indictment, thus 7.5% of the time that it sought the most severe punishment. Trumbull county has sentenced 14 people to death in 63 tries—better than 22% of the times it seeks death.

Another difference is that Trumbull county has executed while Stark county has not. Currently five of the six men Stark County has sentenced to death are on death row. One man, Donald Maurer, was commuted to LWOP by Governor Richard Celeste in 1991. Conversely, Trumbull County has executed three of fourteen men sentenced to death. For Stark county, that may change on August 1, 2018 with the planned execution of David Sneed. Mr. Sneed is the only prisoner from Stark county with an execution date. Neither county has ever had a death sentence overturned during post-conviction proceedings and appeals.

### **Comparing Butler (0.77) to Richland (0.72)**

Richland and Butler counties have similar homicide rates and have respectively executed two and one defendants. The two counties share comparable percentages of indictments that lead to death sentences. Butler's rate is 14.45% and the rate for Richland is 13.63%. Beyond that, the two counties are as different as can be.

Butler county borders another high-use death penalty jurisdiction—Hamilton County. Richland is nearly an hour's drive from any high-use death penalty counties. Richland County yields 3.37 death sentences per 100 homicides compared to 4.26 death sentences per 100 homicides in Butler County. Richland and Butler counties have prosecutors from different political parties. Butler county has a population about three times the size of Richland county. Butler county has had two death sentences overturned but Richland has had none overturned. Butler County's median household income is \$56,998 and ranked 10th highest, Richland county's median household income ranks significantly lower at 65th highest with just \$42,042.

## Comparing Lorain (0.62) to Erie (0.64)

When comparing Lorain to Erie county, we see both counties are in the same geographic neighborhood in north-Central Ohio, though Lorain county is situated immediately West of Cuyahoga County and Cleveland, while Erie County is a bit more remote and therefore doesn't border any high-us death penalty jurisdictions. Both have Democratic prosecutors and long track records of electing Democrats to the prosecuting attorney's office. Lorain County is over three times more populous than Erie county. 25% of death sentences from Lorain county are overturned. Erie, on the other hand, has had only one death sentence since 1981. Lorain has executed two men while Erie has not executed anyone.

Erie County yields 2.04 death sentences per 100 homicides compared to 5.38 in Lorain county. Another difference is that Lorain county averages 1.44 death penalty cases per year compared to 0.40 for Erie.

Below is a comparison of some Ohio counties that have similar homicide per 1,000 resident rates (homicide rates). One county is a high-use county while the other is not. The number in parenthesis is the actual homicide per 1,000 resident rates.

| HIGH-USE COUNTIES | POPULATION | HOMICIDES PER 1000 RESIDENTS | CAPITAL INDICTMENTS | DEATH SENTENCES / OVERTURNED | %INDICTMENTS WITH DEATH OUTCOME |
|-------------------|------------|------------------------------|---------------------|------------------------------|---------------------------------|
| Trumbull          | 210,312    | 0.87                         | 63                  | 14 / 0                       | 22.22%                          |
| Butler            | 368,130    | 0.77                         | 55                  | 10 / 2                       | 14.45%                          |
| Lorain            | 301,356    | 0.62                         | 36                  | 12 / 4                       | 22.22%                          |

| LOW-USE COUNTIES | POPULATION | HOMICIDES PER 1000 RESIDENTS | CAPITAL INDICTMENTS | DEATH SENTENCES / OVERTURNED | %INDICTMENTS WITH DEATH OUTCOME |
|------------------|------------|------------------------------|---------------------|------------------------------|---------------------------------|
| Stark            | 375,165    | 0.84                         | 80                  | 6 / 0                        | 7.5%                            |
| Richland         | 124,475    | 0.72                         | 22                  | 3 / 0                        | 13.63%                          |
| Erie             | 79,079     | 0.64                         | 15                  | 1 / 0                        | 6.67%                           |

With respect to county resources—as measured by median household income levels—these six counties are all over the map. Butler and Lorain County are among Ohio's more affluent counties at 10th and 20th highest median household incomes respectively as reported in 2014. Data for the same year show Erie ranks 35th and Stark ranks 41st. Trumbull and Richland Counties rank 57th and 65th in highest median household income for 2014 respectively.

Trumbull County is the outlier when comparing resources among these six Ohio counties with similar homicide rates per 1,000 residents. Trumbull County has a much lower median household income compared to the other counties, yet is the most active seeking death penalty county of those being compared.

When looking at median household incomes of the ten most active death penalty counties in Ohio, no clear patterns emerge. Four counties—Butler, Lorain, Franklin, and Summit—fall in the top one-

third of counties by median household income. Four other counties (Hamilton, Cuyahoga, Montgomery and Trumbull) fall in the middle one-third of counties by household income. Two counties (Lucas and Mahoning) are in the bottom one-third of counties by household income.

Trends suggest that Ohio's bigger counties are initiating fewer death penalty cases than in previous years. Smaller counties, however, are demonstrating a slightly greater propensity in seeking the death penalty for criminal defendants. These smaller outlier counties that are categorized as high-use have one key similarity in common: they employ or employed a county prosecutor who regularly uses or used the death penalty system. The personal preference to seek death by county prosecutors perpetuates an increasingly disparate sanction.



*THE ARENA DISTRICT, BUILT PARTIALLY ON THE FORMER SITE OF THE OHIO PENITENTIARY*

## CONCLUSION

Ohio, like other death penalty jurisdictions, continues to find it cannot fairly or accurately administer the death penalty. Today, Ohio's capital punishment system is mired in wrongful convictions, disproportionate application based on county geography, arbitrary outcomes based on the race of homicide victims, and no viable way of carrying out executions.

Proof of the systemic failures of Ohio's death penalty can be seen most glaringly in the cases of the exonerated men whom our state tried to execute. Their names should haunt all who want to maintain this system without even making the appearance of wanting to ensure its fairness and accuracy.

Since 2014, Ohio legislators have had the opportunity to reform the death penalty system in an attempt to address flaws identified by the Task Force. The legislature has demonstrated an inability to recognize the value of these reforms. Instead they have played politics, been swayed by prosecutor interest groups and rendered themselves incapable or unwilling to adopt meaningful changes. The inaction of legislators and court officials demonstrates to Ohio voters and citizens one thing: Ohio's death penalty system is incapable of repair. The logical conclusion is it must now be repealed once and for all.

Ohioans to Stop Executions, its members, and numerous coalition partners have engaged in a good-faith effort to work with lawmakers and elected leaders over the past two years. However, the body of work and the results produced by Ohio leaders is nothing short of abysmal. The inadequate effort put forth by the legislature to address the most serious problems with the death penalty has simply maintained the status quo. Any objective assessment of progress made to root out wrongful convictions, racial bias, disparate county outcomes and the devastating impact on the lives of murder victims' families finds the only interest served is that of Ohio prosecutors.

Ohio's death penalty system must be abandoned. Thirty-six years of administration of such a flawed public policy is more than enough. Ohio can make its criminal justice system better for victims' families, its law enforcement agencies, its courts and its citizens by removing the ultimate penalty.

## **EXONERATED**

KWAME AJAMU  
DAVID AYERS  
GARY BEEMAN  
WILEY BRIDGEMAN  
JOE D'AMBROSIO  
CLARENCE ELKINS  
TIMOTHY HOWARD  
RICKY JACKSON  
GARY LAMAR JAMES  
DERRICK JAMISON  
DALE JOHNSTON  
RANDY RESH

## APPENDIX A: CITATIONS

<sup>1</sup> *Gregg v. Georgia*, 428 U.S. 153 (1976)

<sup>2</sup> *Furman v. Georgia*, 408 U.S. 238 (1972)

<sup>3</sup> Joint Task Force to Review the Administration of Ohio's Death Penalty: Final Report and Recommendations. April 2014. Available at <http://www.supremecourt.ohio.gov/Boards/deathPenalty/resources/finalReport.pdf>

<sup>4</sup> *Francis v. Resweber*, 329 U.S. 459 (1947)

<sup>5</sup> Johnson, Alan. *The Columbus Dispatch*, "Ohio, facing January execution date, has yet to find supply of lethal-injection drugs." June 27, 2016. <http://www.dispatch.com/content/stories/local/2016/06/26/ohio-yet-to-find-supply-of-lethal-injection-drugs-facing-january-execution-date.html>

<sup>6</sup> Editorial Board. *The Columbus Dispatch*, "Worth the trouble? Problems surrounding the death penalty show no signs of abating." October 18, 2015. <http://www.dispatch.com/content/stories/editorials/2015/10/18/1-worth-the-trouble.html>

<sup>7</sup> Ibid., Footnote 3.

<sup>8</sup> Ibid., Footnote 6.

<sup>9</sup> 131st Ohio General Assembly. Ohio Senate Criminal Justice Committee Hearings re: S.B. No. 162. October 7, 2015; October 14, 2015; October 21, 2015; October 28, 2015; January 27, 2016; February 10, 2016. Available at <http://ohiosenate.gov/committee/criminal-justice/#>

<sup>10</sup> Ohio Alliance for the Mental Illness Exemption website. [www.oamie.org/about-us/](http://www.oamie.org/about-us/)

<sup>11</sup> Testimony of Professor Daniel T. Kobil, Capital University Law School. 131 st Ohio General Assembly. Senate Criminal Justice Committee re: S.B. No. 162. February 10, 2016. Available at [http://search-prod.lis.state.oh.us/cm\\_pub\\_api/api/unwrap/chamber/131st\\_ga/ready\\_for\\_publication/committee\\_docs/cmte\\_s\\_crim\\_justice\\_1/testimony/cmte\\_s\\_crim\\_justice\\_1\\_2016-02-03-1115\\_1165/sb162kobil.pdf](http://search-prod.lis.state.oh.us/cm_pub_api/api/unwrap/chamber/131st_ga/ready_for_publication/committee_docs/cmte_s_crim_justice_1/testimony/cmte_s_crim_justice_1_2016-02-03-1115_1165/sb162kobil.pdf)

<sup>12</sup> Death Penalty Information Center, "Innocence: List of Those Freed from Death Row." <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row>

<sup>13</sup> Possley, Maurice. The National Registry of Exonerations, "David Ayers: Other Ohio Cases with Perjury or False Accusations." December 2, 2014. <http://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=3868>

<sup>14</sup> Ibid.

<sup>15</sup> *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679.

<sup>16</sup> Bob Gondor did not face the death penalty.

<sup>17</sup> Meyer, Ed. *Akron Beacon Journal*, "Resh-Gondor case reaches Ohio Court of Claims for wrongful imprisonment damages in 1988 slaying. Monetary damages could be in the millions." December 28, 2015. <http://www.ohio.com/news/local/resh-gondor-case-reaches-ohio-court-of-claims-for-wrongful-imprisonment-damages-in-1988-slaying-monetary-damages-could-be-in-the-millions-1.650303#>

<sup>18</sup> Trexler, Phil. *Akron Beacon Journal*, “Wrongly convicted man gets \$5 million settlement from Barberton.” June 18, 2011. <http://www.ohio.com/news/wrongly-convicted-man-gets-5-million-settlement-from-barberton-1.189466>

<sup>19</sup> Possley, Maurice. National Registry of Exonerations, “Kim Hairston: Other Ohio Murder Exonerations.” July 27, 2015. <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4716>

<sup>20</sup> Fredrikson, Annika. *The Christian Science Monitor*, “Man freed from death row can sue Ohio for wrongful imprisonment, judge says.” October 28, 2015. <http://www.csmonitor.com/USA/Justice/2015/1028/Man-freed-from-death-row-can-sue-Ohio-for-wrongful-imprisonment-judge-says>

<sup>21</sup> The National Registry of Exonerations. Exonerations by State: Ohio. <http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx>

<sup>22</sup> The Supreme Court of Ohio. Capital Indictment Filings, Supreme Court of Ohio Capital Indictment Table 1981-2015. <http://www.supremecourt.ohio.gov/Clerk/capitallndictment/indictments/indictmentTable.xlsx>

<sup>23</sup> Ibid., see Footnote 22.

<sup>24</sup> Ibid., see Footnote 22.

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