

# Outliers and Outcomes:

*How 9 of 10 Death Cases End with a Life Sentence & Why That Matters*



2017 report on Ohio's Death Penalty

**OHIOANS TO**   
**STOP EXECUTIONS**

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## Introduction

Ohioans to Stop Executions (OTSE) releases, “Outliers and Outcomes: How 9 of 10 Death Cases End with Life Sentences & Why That Matters,” a report on the status of the death penalty in 2017.

The purpose of the report is to provide information and analysis to the media, members of the general public, legislators and state leaders.

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: The Office of the Ohio Attorney General, the Ohio Supreme Court, the Supreme Court Joint Death Penalty 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 Death Penalty Information Center, and reports by the news media.

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## Executive Summary

The death penalty system in Ohio continues to be relegated to a small number of outlier counties, to be isolated in its imposition and fundamentally driven by a tiny fraction of county prosecutors.

Capital indictments in 2017 remained at near-historic lows and only one new death sentence occurred. Ohio’s pattern of having a few high-use death penalty counties predictably continued in 2017 with the majority of new indictments concentrated in just five counties.

For the fourth consecutive year Ohio failed to address reforms to improve the fairness and accuracy of the death penalty system suggested by a joint task force of Ohio Supreme Court and Ohio State Bar Association. The Ohio courts had fully implemented rule and procedural changes noted in the joint report issued by the Supreme Court and State Bar Association. But remarkably, the general assembly again failed to act on reforms that would address bias, wrongful convictions, standard crime lab accreditation and disparate charging decisions by prosecutors.

As death cases have slowly concluded over the past four years, outcomes are showing Ohio juries seldom issue death sentences. Of the completed capital cases from 2014-2017, *nine of ten cases result in a sentence other than death.*

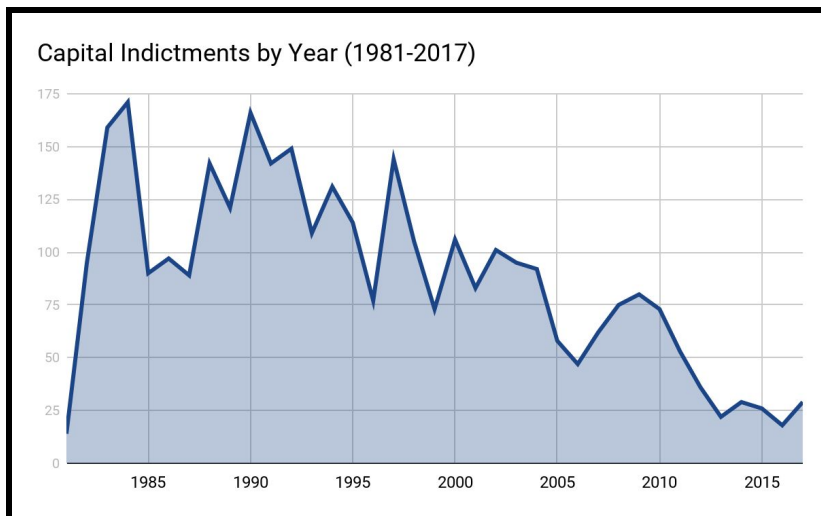
Ohio resumed executions in July after a near-four year hiatus while litigation and execution drug shortages forced a stoppage. Ohio carried out two executions in 2017 and planned for a third, however Ohio was not able to complete the execution of a Franklin county prisoner due to intravenous access problems. Alva Campbell became the second condemned Ohio prisoner since 2009 whose execution began without successful completion. The failed execution attempt of Campbell garnered national and international attention. Much of the attention was critical of carrying out an execution on a prisoner with multiple well-documented terminal illnesses.

When Ohio resumed executions it set forth a six-year prospective execution schedule. Ohio had 28 executions slated into 2023. In a relatively short period of time, Ohio is planning to execute more individuals than 22 other states and the US Government have individually done since 1976. By this metric, Ohio has become *the outlier* death penalty jurisdiction of the country.

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## Capital Indictments

In 2017 Ohio prosecutors sought the death penalty in 29 cases against 27 individuals.<sup>1</sup> As in prior years, Ohio's high-use death penalty counties<sup>2</sup> account for more than half of all 2017 capital indictments at 16 (55.2%). The balance of the indictments, 13, come from eight other counties.



Capital indictments continue to be near historic lows since Ohio brought the death penalty law back in 1981. Compared to its high water mark of 171 in 1984, Ohio's capital indictments in 2017 represent a decrease of 83%.

### ***High-use Counties***

**Cuyahoga County** initiated seven new death penalty cases in 2017. The county

has not sought as many death sentences since 2012 under prosecutor William D. Mason. The likely cause of Cuyahoga County returning to seeking the death penalty more often is the

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<sup>1</sup> Cuyahoga County and Ashtabula County filed 2 capital indictments against Joseph McAlpin and John Bovein 2017.

<sup>2</sup> Cuyahoga, Franklin, Hamilton, Montgomery, Summit and Trumbull Counties.

election of a new prosecutor, Michael O'Malley. Former prosecutor Timothy McGinty, who pledged to voters to be much more careful determining which cases were appropriate for the death penalty given the county's history of misusing the death penalty system to induce plea deals, was not re-elected. Instead, Mr. O'Malley, a high-ranking deputy in former prosecutor Mason's administration, won the prosecutor's job in November 2016. Mr. O'Malley's election may signal a return to higher numbers of capital indictments coming out of Cuyahoga County, as were common under prosecutor William D. Mason.

**Franklin County** filed two new death penalty cases last year. Brian Golsby was indicted for the murder of Ohio State student Reagan Tokes. The Franklin county jury returned a guilty verdict against Golsby but chose to sentence him to life without parole in March 2018. Michael Slager was indicted for the murder of Julie Milanowski in October 2017. Ms. Milanowski initially survived the 2015 attack but ultimately succumbed to her burn injuries. Slager was charged and sentenced to 11 years for his crimes against Milanowski, however, prosecutors sought the death penalty after she died. The case against Slager was pending at the end of 2017. Media reports noted the uniqueness of this death penalty case in that Ms. Milanowski testified in the first case against Slager before she died.

**Hamilton County** prosecutors sought the death penalty in two new cases in 2017. Margaret Kinney and Michael Stumph were charged in the aggravated murder of an 89-year old Northside man. Kinney was sentenced to life without parole in March 2018, while Stumph is scheduled for trial in July 2018.<sup>3</sup>

**Montgomery County** has initiated two new cases against Robert Ford and Claudena Helton. The last time Montgomery County prosecutors sought more than one new death sentence was in 2013. Robert Ford's case has concluded with a sentence of life without parole. Claudena Helton is facing the death penalty after she allegedly killed two of her children in May. According to police, Helton brought the children out of the home and laid them on the driveway. Helton was naked and told police she needed to save her children from the "evils of the world." The *Dayton Daily News* reported, "At the shooting scene, a neighbor who didn't want to be identified said she saw the mother wandering naked and asked another neighbor to get a sheet to cover her. 'She was just walking around in circles,' said the woman, who has lived in the neighborhood for decades. 'She wouldn't blink. She wasn't violent. She wasn't aggressive. She wasn't anything. She was ... blank.'"<sup>4</sup>

After not seeking any new death sentences in 2016, **Summit County** filed one new capital indictment in 2017. Stanley Ford faces the death penalty for the arson murders of nine people he allegedly killed by setting fire to two homes. Defense attorneys have raised claims of racial bias. Attorney for Mr. Ford, Don Malarcik, told the court the number of black defendants facing

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<sup>3</sup> Grasha, Kevin. *Cincinnati Enquirer*, "Woman sentenced to life without parole in killing of 89-year-old Northside man," March 14, 2018.

<sup>4</sup> Gokavi, Mark and Cornelius Frolik. *Dayton Daily News*, "Dayton chief after 2 kids shot in head: 'This is one of the toughest.'" May 18, 2017.

the death penalty in Summit County is disproportionate to its population. *The Akron Beacon Journal* reported eight of the last 11 defendants indicted on death penalty charges were black.<sup>5</sup> In response to the claims of racism, the judge hearing the case ordered prosecutors to turn over their emails to defense lawyers in the case.

High-use Counties	2017 indictments	1981-2017 indictments	Percentage of all indictments
Cuyahoga	7	1,290	40.4
Franklin	2	506	15.8
Hamilton	2	182	5.7
Montgomery	2	106	3.3
Summit	1	118	3.7
Trumbull	2	65	2.0
<i>High-use Totals</i>	<i>16</i>	<i>2,267</i>	<i>70.9</i>
Low-use Counties	2017 indictments	1981-2017 indictments	Percentage of all indictments
<i>Other counties (82)</i>	<i>13</i>	<i>929</i>	<i>29.1</i>
<b>STATE TOTALS</b>	<b>29</b>	<b>3,196</b>	<b>100</b>

**Trumbull County** also initiated two new death sentences in 2017. The case against Nasser Hamad has already concluded with a sentence of 36 years in prison with parole eligibility for the murders of two men. The jury in the case rejected the death penalty as punishment.<sup>6</sup> The other Trumbull County case against Sean Clemens was still pending. Clemens is accused of killing an elderly neighbor. According to reporting by the *Tribune Chronicle*, Clemens confessed to investigators after consuming 10 Xanax bars, a highly addictive drug used to treat anxiety and panic disorders.<sup>7</sup> The trial for Clemens is scheduled to begin October 1, 2018.

### **Low-use Counties**

The eight counties accounting for the minority (44%) of 2017's capital indictments seldom use the death penalty system. **Ashtabula county** filed three indictments against two men, John Bove and Joshua Gurto. The capital indictments against the men are the first issued by an Ashtabula prosecutor since 2014 when county prosecutor Nicholas Iarocci, a Democrat,

<sup>5</sup> Warsmith, Stephanie. *The Akron Beacon Journal*, "Summit judge orders prosecutors to turn over emails in murder case in response to racism claims." October 20, 2017.

<sup>6</sup> Manion, Cristen. *NBC 21 WFMJ*, "Judge sentences convicted murderer Nasser Hamad to 36 years in prison." November 16, 2017.

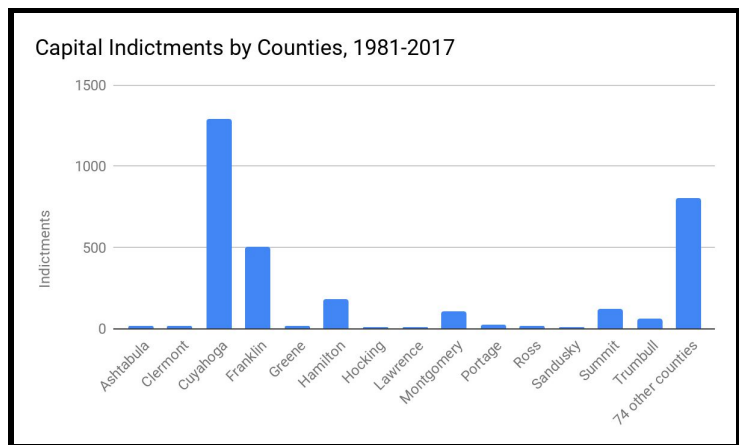
<sup>7</sup> Vogrin, Guy. *Tribune Chronicle*, "Attorneys want murder confession tossed," December 22, 2017.

charged four individuals with death penalty cases--all resulting in life sentences. Ashtabula County required the financial and personnel support of the Ohio Attorney General's capital crimes division to prosecute three of the four death penalty cases in 2014.<sup>8</sup> One case resulted in a plea deal for Joshua Million prior to trial. "The plea agreement was the idea of the family of the victim, Melanie 'Lanie' Powell, Ashtabula County Prosecutor Nicholas Iarocci said during the hearing. The prompt and quick resolution (of the case) emanated from the family's need for closure,' he said."<sup>9</sup>

In the case against John Bove, "The grand jury indicted Bove on a death penalty specification for the aggravated murder charge at [Ashtabula County Prosecutor Nicholas] Iarocci's request."<sup>10</sup> Mr. Iarocci has requested the death penalty now a total of 7 times for 6 defendants in his first term as prosecutor, though none of the cases has resulted in a death sentence. Going back the previous decade before Iarocci was appointed prosecutor, 2004-2013, Ashtabula filed a total of one death penalty case.

**Clermont County** filed one capital indictment in 2017 against Steven Mages. Prior to 2017, the county's last death penalty case was in 2011. That case resulted in a sentence of life without parole. Since 1981, Clermont prosecutors have sought the death penalty 18 times.

**Greene County** filed two capital indictments against brothers Dustin and Bret Merrick for the murders of two Yellow Springs Village residents. Those trials have yet to conclude. Greene county is one of the lowest use death penalty counties in Ohio. From 1997-2017 Greene County only pursued the death penalty six times including the cases against the Merricks.



**Hocking County** is another that rarely uses the death penalty system. It wrongfully convicted Dale Johnston in 1984 of the murders of his step-daughter and her boyfriend. The true culprits confessed and pled guilty in 2008. In 2017 Hocking County filed two new capital indictments, one resulting in a sentence of life without parole and the other in a four-year sentence. Hocking County's last death penalty cases were in 2011 when two cases resulted in life without parole sentences. Prior to that, Hocking County sought the death penalty against the two men responsible for the murders of

<sup>8</sup> West, William A. *Ashtabula Current*, "Double homicide defendant now guilty of involuntary manslaughter," July 21, 2015.

<sup>9</sup> Todd, Mark. *The Star Beacon*, "Plea means Ohio child killer will spend life in prison," June 27, 2014.

<sup>10</sup> Terry, Shelly. *The Star Beacon*, "Bove's wife sentenced Woman who lied to police about murder suspect gets 30 months," Feb. 28, 2018.

death row exoneree Dale Johnston's daughter and boyfriend in 2008. They both pled to life sentences.

**Lawrence County** is another seldom seeking jurisdiction. 2017 was the first year the county sought the death penalty since 2004 and its 10th death penalty case since 1981. Lawrence County has sent one man to death row in its ten attempts. If Aaron Lawson is convicted and sentenced to death, he would become the second from Lawrence county since 1981.

**Portage County**, with its two capital indictments in 2017, initiated its 26th and 27th death penalty cases since the current statute went into effect thirty-six years ago. One case filed will not go to trial as a result of the defendant committing suicide in the county courthouse. The other case filed has already resulted in a sentence of life without parole for David Calhoun.

**Ross County's** lone new death penalty case was pending at the end of 2017. Jeffrey Holsinger's death penalty case is the 14th in the county. The defendant's indictment stems from a crime spree over the the Fourth of July 2017. Holsinger was already sentenced to 26 years-life as part of the crime spree. Ross County prosecutor Matthew Schmidt said when asked about a plea deal, "it's 'way too early to even consider that,' and a decision will be made after consulting with victims."<sup>11</sup>

**Sandusky County** filed its seventh death penalty case overall and its first in 2017 in 14 years. The death penalty case against Daniel Myers was pending as the end of 2017 stemming from the murder of Heather Bogle in April 2015.

At the close of 2017, a total of 27 death penalty cases were still pending from the previous three years.<sup>12</sup>

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## New Death Sentences

There was one new death sentence in 2017 for Terry Froman of Warren County. Froman was indicted in 2014 for the murders of 2 people, his estranged girlfriend and her 17-year old son. This most recent death sentence came 1,014 days after the crimes were committed. Froman offered to plead guilty but Warren County prosecutor David Fornshell refused the plea which only served to extend the trial process and financial cost to secure Froman's death sentence.

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<sup>11</sup> Wright, David. *The Times-Gazette*, "Holsinger faces death penalty." December 11, 2017

<sup>12</sup> 2017 (20 pending), 2016 (4 pending), 2015 (2 pending), 2014 (1 pending).



## Trends Today

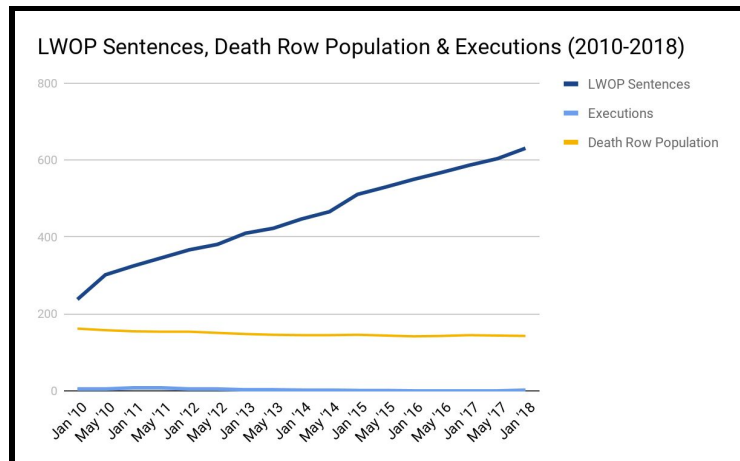
Ohio's death sentences continue to come from a handful of counties. For the 13th consecutive year, the Ohio capital punishment system was used by fewer than 25% of its 88 counties. Over the previous two decades, only in three years did Ohio counties break the threshold of more than 25% of its counties using the death penalty system (2004 with 27.2% of counties, 2000 with 31.8% of counties and in 1997 with 28.4% of counties).

In 2017, just 18.1% of Ohio counties sought the death penalty compared to 11.3% in 2016 and 15.9% in 2015. The average percentage of counties seeking death in criminal cases from 2007-2016 was 17.8%. The previous decade's average, from 1997-2006 was 23.2% of counties.

With respect to counties actually obtaining a death sentence the

outcomes show how isolated death sentences are across Ohio. In 2016, death sentences came from 2.2% of Ohio's counties compared to 1.1% of counties in 2015 and 2.2% in 2014.

As new death sentences become increasingly rare, a clear alternative sentence has emerged over the past eight years, life without parole. In January 2010 Ohio had 283 individuals serving LWOP sentences. At the start of 2018, there were 631 individuals serving this sentence, which is an increase of 160% over eight years.



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## 4-Year Outcomes and Analysis

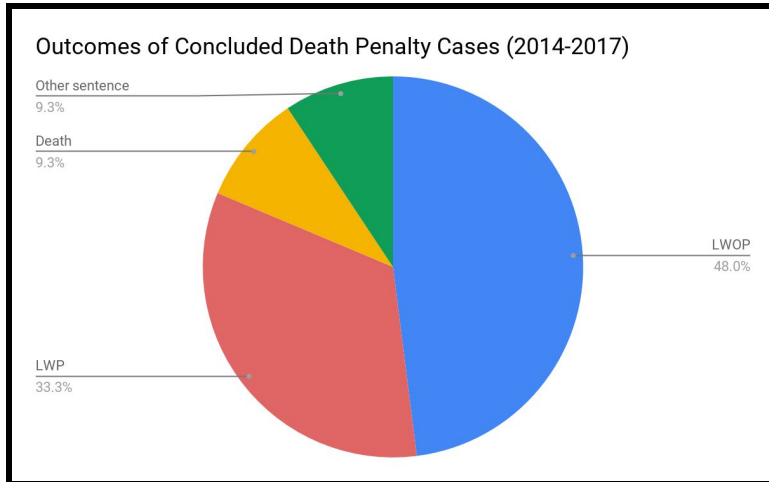
Prosecutors have sought the death penalty 101 times over the past four years.<sup>13</sup> Life without parole (LWOP) has emerged as the most common sentence with 36 cases ending with that result. Another 25 cases ended with life sentences (LWP) ranging from 15 years to 30 years or more. Seven of the cases ended with some sentence other than death, LWOP or LWP. Seven actual death sentences were awarded while 27 cases are still pending.

Looking at these recent outcomes, it is clear Ohio juries seldom choose the death penalty. In 9.3% of the cases juries selected death as the appropriate punishment. More than 80% of the

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<sup>13</sup> Supreme Court of Ohio, Capital Indictment Table, 2014-2017. "Supreme Court of Ohio Capital Indictment Table" available at <http://www.supremecourt.ohio.gov/Clerk/capitalindictment/default.asp>

cases result in life imprisonment with or without parole. The remaining 9% of death cases resulted in a sentence less than life imprisonment. While not all cases have concluded, the distribution of outcomes is unlikely to change significantly.



Using the distribution of outcomes in the 75 cases adjudicated from 2014-2017 as a baseline, a clear trend emerges. **Nine of ten capital cases ends in something other than death.** This trend is noteworthy for a variety of reasons ranging from public policy implications to a disconnect between prosecutors and the constituents who elect them.

Prosecutors are empowered to choose in which cases to pursue the death penalty. Some county prosecutors have adopted policies to indict for death whenever the death-eligible circumstances are met. Others, though, have never initiated a death penalty case even though the criteria has been met. The result is that there is virtually no uniformity from one county to the next. The justification for seeking death is therefore somewhat subjective and based more on the personal predilections of an individual prosecutor. Often Ohioans hear that a case is selected for death because it is the “worst of the worst,” but in reality this justification is problematic. What’s deemed death worthy in Cuyahoga, Franklin or Hamilton Counties is not in Henry, Williams or Harding Counties.

The outcomes above show that even in cases where prosecutors have decided a case is worthy of the death penalty because it is the “worst of the worst,” often those cases do not result with the desired outcome. Nearly 90% of the completed death cases resulted in a sentence other than death. This fact raises substantial questions that deserve close examination. For example, if prosecutors seek death ten times and fail to get that verdict nine times, should they seek the death penalty in the first place? Is Ohio’s death penalty law too broad or out of sync with Ohio juries? Put another way, why are successful death prosecutions only occurring 10% of the time when prosecutors have already determined these to be “worst of the worst” cases?

Experts who have examined these outcomes tend to agree around three specific reforms conjured from available data: oversight is needed; the statute should be narrowed; and individuals with the most debilitating mental illness should not face the death penalty.

## **Reform Area 1: Oversight**

To eliminate geographic disparity a proposal was made to establish an oversight panel within the office of the Ohio Attorney General.<sup>14</sup> The proposal was modeled on the system used by the federal government where Department of Justice officials first review facts and circumstances to authorize a death penalty case before local US attorneys may seek the death penalty. If adopted by the legislature, this proposal would change Ohio's current system so that a panel of former prosecutors would first authorize capital cases rather than county prosecutors making the determination.

The benefits of this type of reform are considerable. First, enabling a charging commission to authorize a capital case protects law enforcement agencies and prosecutors from bias, including race bias, gender bias and geographic bias. Almost four decades of death penalty data show that bias creeps into the outcomes. A 2016 study of Ohio's system highlights the depth and breadth of bias.<sup>15</sup> *The Columbus Dispatch* wrote about the study quoting its author, professor Frank Baumgartner, "the most concerning finding is that these racial and geographic disparities are quite significant, and they demonstrate that Ohio's death penalty is plagued by vast inequities which will undermine public confidence in the state's ability to carry out the death penalty in a fair and impartial manner."<sup>16</sup> This study, and others before it, show that bias is not an allegation based on some meritless claim raised by defense lawyers. Rather it is fact. The legislature has the prerogative and obligation to address this undesired fact. State senator Charletta Tavares of Columbus appropriately characterized the findings saying, "when you don't prosecute the death of black males as you do white females, you are essentially telling black males they are not worth as much, and that their lives do not matter. It is reminiscent of the darkest eras in American history, when the death of a white woman was seen as the ultimate crime that must be punished to the fullest extent of the law, but the death of a black male was not a cause for concern."

A charging commission would also protect Ohio taxpayers against unnecessary costs, trial expenses, appeals costs, attorney and expert fees, and court time. Considering that 9 of 10 death cases result in a sentence other than death, and that in each of those ten cases the excess expenditures are incurred the moment prosecutors seek death, taxpayers are saddled with costs despite non-death outcomes.

Why does this really matter? Why should Ohioans be concerned about how often prosecutors seek death and in which cases? One word. Costs. For simplicity's sake, if we value the cost of a death case at \$10 and a non-death case at \$3, we immediately see the ramifications. Using the information and outcomes of the 75 completed death cases from 2014-2017 above, we extrapolate in this scenario that Ohio spent \$750 to acquire seven death sentences. Having an oversight charging committee, we might assume that half of those cases would not continue as

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<sup>14</sup> Recommendation #34, Supreme Court of Ohio Joint Task Force on the Administration and Implementation of the Death Penalty, 2014. <https://www.supremecourt.ohio.gov/Boards/deathPenalty/resources/finalReport.pdf>

<sup>15</sup> Baumgartner, Frank, University of North Carolina at Chapel Hill. "The Impact of Race, Gender, and Geography on Ohio Executions." January 28, 2016. <https://www.unc.edu/~fbaum/articles/Baumgartner-OhioExecutions-2016.pdf>

<sup>16</sup> Johnson, Alan. *The Columbus Dispatch*, "Study finds racial, gender bias in Ohio executions," January 28, 2016.

death cases. Under a system with oversight, we spend \$375 to acquire seven death sentences. And in the best scenario possible, assuming former prosecutors are able to align possible death cases with likely outcomes, maybe ten cases are allowed to move ahead as death-eligible, costing taxpayers \$100 and an additional \$195 for the non-death cases. Under a system with oversight, not only does Ohio conserve resources, but the entire system becomes more efficient. Adjudicating these 75 cases costs \$295 instead of \$750. Ohio death penalty cases average at least \$3 Million compared to \$1 Million for life without parole.<sup>17</sup> Conserving millions of dollars in taxpayer resources is not only sound fiscal policy, it also allows state agencies to repurpose resources where they are most needed.

The *Akron Beacon Journal*, in February 2017, compared expenses between a death penalty case and a non-death penalty case. The article was entitled, “Death penalty needed for ‘worst of the worst,’ chief counsel for Summit County prosecutor says.” It appears that the comparison is based off trial records and expenses approved by the common pleas court. Put another way, the reporting on Summit County costs are incomplete and do not account for expenses like housing defendants in jail and other ancillary costs associated with adjudication of criminal cases. Even so, the figures reported are compelling and reveal that **death**

**penalty cases cost in excess of ten times the amount of non-death penalty cases.** Using the *Akron Beacon Journal* comparison example, and applying its costs to outcomes of recent Summit County cases, in 2013 and 2014 the county spent approximately \$2.68 million on ten capital trials that resulted in one death sentence. Had the county prosecutor decided against seeking death, the county’s expenses would have been under \$200,000 to resolve the cases instead of over \$2.6 Million.

**Death penalty needed for 'worst of the worst,' chief counsel for Summit County prosecutor says**

**Expense comparison of two Summit County Aggravated murder cases**

Eric Hendon expenses* (death penalty)		Deandre Baskerville expenses (not death penalty)	
Attorney fees (first)	\$24,599	Attorney fees (first)	\$11,580
Attorney fees (second)	\$98,343		
Transcript fees	\$30,157	Transcript fees	\$3,610
Expert fees	\$97,491	Investigatory fees	\$2,500
Jury summons	\$3,472	Jury summons	\$19
Jury parking	\$3,770	Jury parking	\$368
Jury bus passes	\$43	Jury view transportati	\$268
Chair rental for voir dire	\$544	Extradition	\$1,040
Juror fees	\$1,275		
Juror lodging (1 night)	\$1,591		
Juror meals/snacks	\$3,668		
Sheriff overtime (securit	\$2,922		
<b>Total</b>	<b>\$267,875</b>		<b>\$19,365</b>

Note: \*Rounded to the nearest dollar.

SOURCE: Summit County Common Pleas Court

*Akron Beacon Journal*

<sup>17</sup> Bischoff, Laura and Josh Sweigart. *Dayton Daily News*, “Execution costs rising; Keeping killers in prison for life may cost less than death penalty.” February 22, 2014.

Finally, implementing a charging committee makes Ohio's criminal justice system more efficient and effective, especially for the families of homicide victims. Two consistent needs articulated by families of homicide victims are that the justice system be swift and that it be certain. Death penalty prosecutions can last for years, as data readily shows. But if a charging committee is giving clarity at the outset as to how cases will proceed, that helps victims' families begin to heal and put their lives back together not after a period of years, but in months.

### **Reform Area 2: Narrow Definitions**

The second area of reform experts agree, except prosecutors, is that the statute is overly broad and should be narrowed. At issue is the felony-murder rule, which makes a crime death-eligible when a homicide occurs during the commission of certain felonies. The Ohio Supreme Court broadly interpreted felony murder in 1996. Dana K. Cole, a University of Akron School of Law associate professor authored a law review article published in the *Ohio State Law Journal* in 2002 which stated:

*Ohio's aggravated felony-murder rule and felony-murder death penalty specification provisions apply where a death occurs "while committing or attempting to commit" certain enumerated felonies. In a line of cases beginning in 1996, the Ohio Supreme Court broadly interpreted this statutory language to include situations where the intent to commit the underlying felony was formed subsequent to the death, as a complete afterthought. With these cases, the Ohio Supreme Court departed from the majority view that the intent to commit the underlying felony must precede or co-exist with the death. The author argues that this new statutory interpretation represents an unwarranted expansion of the felony-murder rule that disregards the statutory language, ignores the underlying purpose of the rule, and dispenses with traditional safeguards designed to ameliorate its harshness. The author further argues that applying this new statutory interpretation to the felony-murder death penalty specification potentially selects for death those who are not necessarily the most deserving of this ultimate punishment. The author suggests that the solution must be a legislative one.*

As the law review article points out, one problem with the felony-murder rule is that it is broadly interpreted by Ohio's highest court and the result of this interpretation is that cases can be selected for death that are not necessarily most deserving of the punishment. The solution can be made by the Ohio legislature. In 2014, a recommendation was made to the legislature to narrow the felony-murder rule<sup>18</sup> but the legislature has not addressed the reform. Until it does, Ohioans should expect to continue to see and pay for outcomes where nine of ten death cases result in a sentence other than death.

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<sup>18</sup> Recommendation #33, Supreme Court of Ohio Joint Task Force on the Administration and Implementation of the Death Penalty, 2014. <https://www.supremecourt.ohio.gov/Boards/deathPenalty/resources/finalReport.pdf>

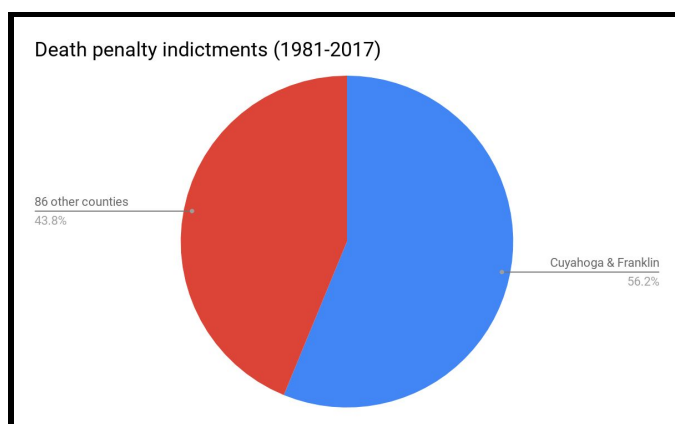
### Reform Area 3: Exclude Mental Illness

Another proposed reform that would save money, improve outcomes and ensure death sentences are more appropriately meted out would be to exclude individuals with serious mental illnesses. Under Ohio's current law, individuals with the most debilitating mental illnesses have been and continue to be sentenced to death. The legislature has had several opportunities to address this issue, but so far bills to correct this deficiency have sat without action in 2015, 2016 and 2017. Opponents to the measure incorrectly claim that this reform would end the death penalty in Ohio, while proponents conclude the reform would weed out cases not appropriate for execution. Giving the opponents (Ohio prosecutors) the benefit of the doubt, the conclusion that can be drawn from their position is *the only people on death row are individuals with serious mental illnesses*. Of course this conclusion is incorrect but it highlights the flawed argument and rationale that has been made. Proponent experts, psychiatrists and forensic psychologists reason that the bill, if enacted, may only apply to between 5-10% of individuals on death row.

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#### The 2% Problem

Ohio's use of capital punishment, historically, is driven by just two counties, or 2.2% of all jurisdictions. Cuyahoga and Franklin Counties were responsible for 56.2% of all death penalty cases initiated between 1981-2017 even though they make up just over 2% of all Ohio counties.

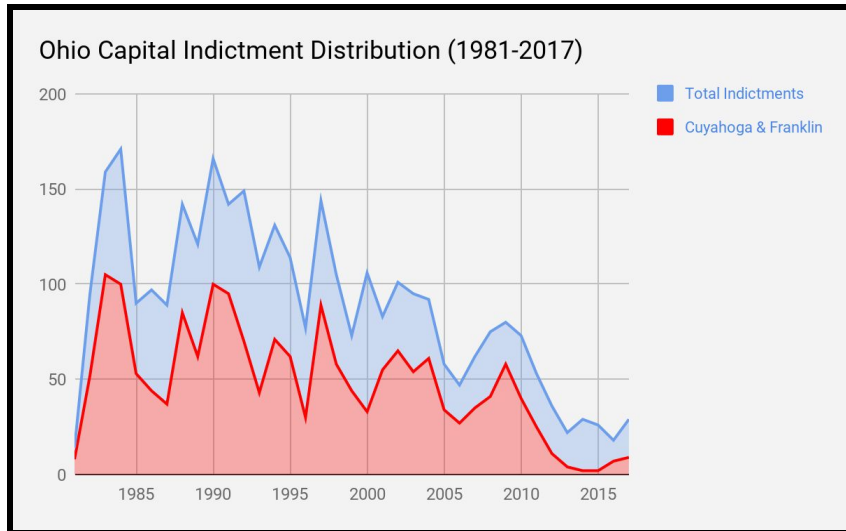


The significance of such a small percentage of counties driving the broader capital punishment system cannot be overlooked. First and foremost, Cuyahoga and Franklin Counties are not only responsible for the majority of death penalty cases, but they are also responsible for the most egregious errors. The counties account for 66% of Ohio death row exonerations since 1976. The men wrongfully convicted and sentenced to die from these two counties spent 180 years in prison for crimes they did not commit. According to data kept by the Ohio Public Defender's office,<sup>19</sup> reversal rates from Franklin and Cuyahoga counties under the 1981 law are alarming, particularly for Cuyahoga County. A total of 37 death row inmates were removed as a result of post-conviction judicial or executive action, 33 of whom were from Cuyahoga County alone. Put another way, judges or governors removed over 36.6% of inmates sentenced to death, excluding those who died of natural causes and those already executed, from these two counties alone.

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<sup>19</sup> Office of the Ohio Public Defender website, Appellate Services, "Former Residents." Available at <http://opd.ohio.gov/Portals/0/PDF/DP/Mar2018/Former%20Residents.pdf>

Hamilton County is of note here. Hamilton County is the third highest capital indictment-seeking county behind Cuyahoga and Franklin, with 182 total indictments. Although Hamilton County is not scored in the 2.2% of Ohio counties responsible for the majority of death penalty cases, its reversal rate, excluding natural death and executions, is 18.8%.



Another problem with 2% of counties driving the system is related to costs. Death penalty cases are enormously expensive compared to alternatives like LWOP. Each death penalty case winds up costing Ohio taxpayers at least \$3 million compared to less than \$1 million for LWOP according to reporting by the *Dayton Daily News*.<sup>20</sup> The effect then is that high-use death penalty jurisdictions, in this

instance two counties, are responsible for the enormous costs borne by taxpayers outside those counties. Furthermore, because every death row inmate and those facing the death penalty at trial are indigent, Ohio taxpayers pick up the tab of both local and state prosecution and defense, court costs, expert costs and incarceration expenses. In fact, Ohio taxpayers in Ohio counties that have never sought a death sentence are paying for the death penalty cases of counties where prosecutors regularly seek death sentences. The actions of a few have enormous costs to all.

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## Executions Resume

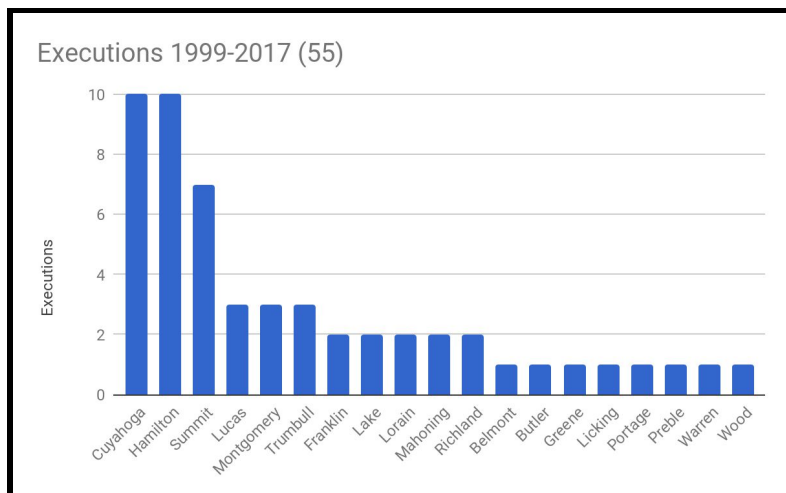
In July 2017 Ohio resumed executions for the first time since January 2014. Ohio had been embroiled in a more-than three year legal fight over its execution protocol after Dennis McGuire's troubling 2014 execution. That execution lasted more than 26 minutes and is the longest execution on record since Ohio returned to executions in 1999.

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<sup>20</sup> Bischoff, Laura and Josh Sweigart. *Dayton Daily News*, "Execution costs rising: Keeping killers in prison for life may cost less than death penalty." February 22, 2014.

Ohio carried out 2 executions in 2017, though many more were planned that had to be rescheduled due to litigation. Ronald Phillips of Summit County and Gary Otte of Cuyahoga County were executed in July and September respectively.

Franklin County prisoner Alva Campbell's execution began on November 15, 2017 but



ultimately ended when execution team members were not able to find a suitable vein to deliver the three-drug cocktail. Mr. Campbell, who was routinely called “the poster child for the death penalty” by Franklin County prosecutor Ron O’Brien, was terminally ill and too weak to walk into the execution chamber under his own power. Campbell had a well-documented history of significant medical conditions including strokes, pulmonary embolism, congestive heart

failure, COPD, removal of right lung, pulmonary hypertension, emphysema, colon cancer, lung cancer, pneumonia and MRSA. As a result of his chronic breathing issues, Ohio Department of Rehabilitation and Correction staff had to make a special accommodation for Campbell. He was issued a wedge-shaped pillow to partially prop him up so he could breathe during his execution.

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Campbell died of natural causes on March 3, 2018 before his re-scheduled execution date of June 5, 2019.

Campbell's execution attempt was the second instance where an Ohio inmate was not able to be executed since 2009 due to issues accessing veins. Romell Broom, the other man whose execution was attempted without success, awaits his second execution attempt on June 17, 2020.

### **Execution Schedule**

As of December 31, 2017 Ohio had 28 executions scheduled to take place up to January 12, 2023.<sup>22</sup>

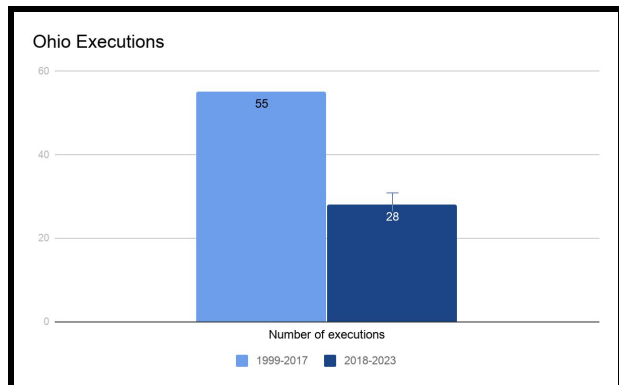
<sup>21</sup> Unattributed, *Associated Press* via *CBS News*. “Ohio inmate getting pillow to help him breathe during execution,” November 13, 2017.

<sup>22</sup> Ohio Department of Rehabilitation and Correction website, Organization, Capital Punishment Information, “Execution Schedule.” Last visited April 17, 2018.



The execution schedule is unlikely to be carried out without problems. Since 1999 when Ohio resumed executions, 55 condemned prisoners have been executed, averaging just over 3 executions per year over an 18-year period. Now, Ohio’s plan is to conduct at least 28 more executions raising the total number of executions since 1999 to 83.

This 51% increase in executions is compressed into a time frame of a about six years. Ohio’s recent use of the death penalty from 1999-2017 suggests probable different outcomes. To understand the likelihood of executions actually taking place, we look to what has occurred with scheduled executions since Ohio restarted in 1999.



From 1999-2017, 77 prisoners have been scheduled for execution one or more times. Ohio governors have granted clemency to 11 individuals during that same time period.<sup>23</sup> Four prisoners had executions scheduled, later cancelled and not yet rescheduled (Charles Lorraine, Kenneth Smith, Michael Webb, Abdul Awkal). Examining these factors suggests that not all executions scheduled will actually take place. Quite likely, some prisoners currently scheduled for execution will be commuted, while the majority of others will be executed. Although governors will change, the core problems that lead to commutations and death penalty litigation remain constant.

For every five executions that took place from 1999-2017, one commutation was issued. Given Ohio’s pending execution schedule of 28, it is possible an additional five individuals could receive commutations based on historical data available. Given that four inmates have been scheduled for execution in the past, but don’t have current execution dates, it is likely that one of the 28 currently scheduled could be similarly situated. The more likely outcome, then, of the 28 currently scheduled prisoners is that 22 may be executed, while five could receive commutations and one might remain in some legal limbo. Of course, this is speculative.

Adding to the unlikelihood all currently scheduled executions will actually occur is the drastic increase to Ohio’s execution schedule over a short period of time. At present, Ohio’s prospective schedule is a 51% increase to execution totals from 1999-2017. What’s more is this uptick is planned to occur in a compressed six-year timeframe. Time will tell whether Ohio’s nation-leading pace of executions comes to fruition.

Setting aside the probability of all Ohio’s scheduled executions taking place, one metric is alarming. Ohio’s 28 prospective executions are more than the total executions by 22 other

<sup>23</sup> Total commutations of death sentences under the current statute is 19. Governor Richard Celeste commuted 8 sentences in 1991.

states and the US Government since 1976.<sup>24</sup> Ohio has emerged as the outlier death penalty jurisdiction with respect to scheduling executions.

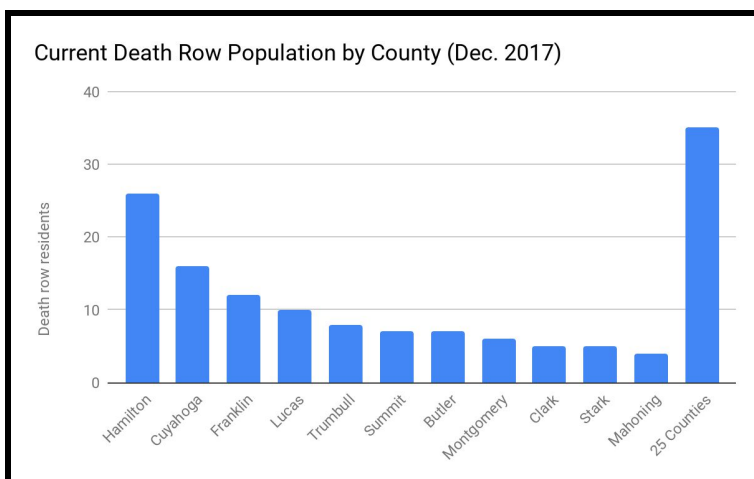
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## Current Death Row Prisoners, Executions by County

As of December 31, 2017 Ohio had 143 active death sentences for 142 prisoners from 36 counties.<sup>25</sup> More current prisoners were sentenced in Hamilton County, at 26, than any other jurisdiction. The next highest jurisdictions were Cuyahoga (16), Franklin (12), Lucas (10) and Trumbull (8). On the other end of the spectrum, 37 Ohio counties,<sup>26</sup> or 42%, have never sentenced prisoners to death.

Half of death row (50.3%) comes from just five counties.<sup>27</sup>

Delving deeper into the remaining 31 counties, the vast majority (25 of 31) have three or fewer residents on death row while 17 of 31 (54.8%) have just one resident on death row. The disparate nature of Ohio's death penalty is apparent.



From 1999-2017 Ohio has carried out 55 executions by lethal injection, most coming from a handful of counties.

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## Montgomery County: An Emerging High-Use County

Montgomery county sought the death penalty twice in 2017. The first case was resolved with a sentence of life without parole for Robert Ford. The second was still pending against Claudena Helton at the end of 2017. If Ms. Helton is convicted, it will be the first new death sentence in

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<sup>24</sup> Death Penalty Information Center, Fact Sheet, "Facts about the Death Penalty" last accessed April 9, 2018. Available at <https://deathpenaltyinfo.org/documents/FactSheet.pdf>

<sup>25</sup> James Conway has two death sentences.

<sup>26</sup> Counties with 0 death sentences: Adams, Athens, Auglaize, Carroll, Champaign, Coshocton, Darke, Defiance, Fairfield, Fayette, Fulton, Gallia, Hardin, Harrison, Henry, Highland, Holmes, Huron, Jackson, Logan, Meigs, Mercer, Miami, Monroe, Morrow, Ottawa, Paulding, Perry, Pickaway, Pike, Seneca, Tuscarawas, Union, Washington, Williams and Wyandot.

<sup>27</sup> Hamilton (26), Cuyahoga (16), Franklin (12), Lucas (10) and Trumbull (8). Sum=(72); N=143.

Montgomery county since 2006 when Duane Short was convicted of the murders of his estranged wife and her friend.

Since 2000 the county has not sought more than two new death sentences in any given year. Montgomery County's prosecutor has been criticized for his use of the death penalty system, seemingly because indictments mean death cases that take years to resolve instead of weeks or months.

In a 2013 *Dayton Daily News* article entitled, "Montgomery County is a leader in Ohio in pending capital cases," the county had five capital cases pending. The article notes that it was highly unusual for a county of its size to have as many death penalty cases. Defense attorney Dennis Lieberman said, "Traditionally, Montgomery County isn't known for what I'm going to say is abusing the death penalty or overusing it. But there's just this rash of death penalty cases. I think there has been a deviation from what used to be the general standard in Montgomery County that the death penalty is saved for the worst of the worst."

*The Dayton Daily News* article<sup>28</sup> reports that legal experts agree pursuing death penalty cases is discretionary and that decision rests with the prosecutor. The article helpfully frames the issue by drawing on data from other counties:

*Cuyahoga County, long one of the most active counties for death penalty cases under former prosecutor Bill Mason, has lowered the percentage of death penalty-eligible cases that actually seek the death penalty.*

*In 2010, Cuyahoga court officials said prosecutors got 37 of 49 eligible death penalty cases indicted. In 2011, that fell to 22 of 41 and in 2012, to nine of 55, with only one death penalty conviction in those years. Montgomery County does not track such information.*

*"It's absolute discretion with the prosecutor." [Ohio Public Defender director Timothy] Young said. "Just because a case meets the definition doesn't mean they have to bring the charge."*

*While prosecutors say the death penalty specifications rest with grand juries, [defense attorney Bobby Joe] Cox said that isn't true in practice because some rural counties never bring such cases because of cost concerns and others bring several capital cases.*

On May 30, 2017, Montgomery County prosecutor Mat Heck held a press conference in which he told the media he would be seeking the death penalty for Claudena Helton. Ms. Helton allegedly shot and killed two of her children in her Dayton home on May 18. Neighbors who

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<sup>28</sup> Gokavi, Mark. *Dayton Daily News*, "Montgomery County is a leader in Ohio in pending capital cases," May 5, 2013.

witnessed Helton bringing the bodies out and laying them in the driveway told investigators Helton was naked and said she needed to save her children from the evils of the world.<sup>29</sup> During the press conference, the prosecutor noted “time was of the essence.”

“The death penalty is not something we ask for in many cases. We use it very sparingly. We reserve it for the most horrific and shocking crimes--gut wrenching crimes. This case meets those specifications.” Mr. Heck also noted that in seeking the death penalty this was the only way to ensure justice for the children killed. He acknowledged the reports of eyewitnesses with respect to Ms. Helton’s state of mind and said, “under the law and until proven otherwise the defendant is presumed sane and competent to stand trial.”<sup>30</sup>

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## Conclusion

The death penalty in Ohio has become increasingly rare and is relegated to just a few high-use, outlier counties. Even when Ohio prosecutors bring a death penalty case, hardly any of those cases actually result in a death sentence. The outcome most likely to occur, as statistics and data in this report reveal, is a sentence other than death. Nine out of every ten death cases that has concluded from 2014 to date ends with either a life sentence (with or without parole) or some other sentence less than death. It has become clear that Ohio judges and juries no longer prefer death sentences for capital crimes. Yet a handful of county prosecutors drive a broken and inefficient system forward even though their constituents seldom vote for death.

Although Ohio has set an execution schedule unmatched by any state in the country up to the year 2023, it seems doubtful, based on its history of litigation and execution drug shortages, that Ohio will execute all those individuals. At present, the prospective execution schedule represents a 51% increase in executions carried out compared to 1999-2017. In a very real sense, Ohio has distinguished itself as a true outlier state with respect to executions. The tell-tale sign is that if Ohio maintains its execution schedule through 2023, it will have surpassed total executions of 22 other states and the federal government. Plainly, the execution schedule of tomorrow does not come close to matching the sentencing outcomes of today.

Since 2014, Ohio legislators have had the opportunity to reform the death penalty system by addressing flaws identified by the Supreme Court Joint Task Force on the Administration of Ohio’s Death Penalty. The legislature has demonstrated no willingness to adopt reforms that would prevent wrongful convictions, provide oversight and ensure Ohio no longer executes those with the most debilitating mental illnesses. Instead of making long-overdue changes, state leaders continue to kick the can down the road.

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<sup>29</sup> Unattributed. *Fox 45 WRGT*, “Dayton mom indicted in shooting death of kids, eligible for death penalty,” May 30, 2017.

<sup>30</sup> *Ibid.*

Ohio can do much more for victims' families, law enforcement agencies, the courts and local communities by abandoning the most expensive and least efficient part of its criminal justice system. Ohio's death penalty system will come to an end, but not before more innocent people are sentenced to death, millions more taxpayer dollars are squandered and the true needs of murder victims' families continue to be ignored.

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