

**OHIO HOUSE OF REPRESENTATIVES
POLICY AND LEGISLATIVE OVERSIGHT
COMMITTEE**

NOVEMBER 18, 2014

HOUSE BILL 663

OPPOSITION TESTIMONY

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OHIO ASSN. OF CRIMINAL DEFENSE LAWYERS**

Mr. Chairman Dovilla and members of the Policy and Legislative Oversight Committee. I am Barry Wilford, Public Policy Director of the Ohio Association of Criminal Defense Lawyers, those private attorneys and public defenders comprising the criminal defense bar of this state. It may surprise you to learn that our membership includes some who support capital punishment. However, none of our members favor secrecy in the manner in which the state carries out its executions of our citizens. As one, we condemn what in the aggregate appears as “legal shenanigans” in order to achieve that secrecy.

With all respect due to the Vice-Chairman and his co-sponsor of HB 663, they have come forward with a bill which responds to the purportedly stated needs of the Ohio Attorney General in order to proceed with the execution of Ronald Phillips on February 11, 2015, and more executions to follow. For a bill which contravenes so many basic notions of good government -and I would add Republican notions of good government- and which provides for no oversight at all of the execution protocols of this state, that this bill would be assigned to the Policy and Legislative Oversight Committee seems Kafkaesque in its extreme irony.

It has been stated in proponent testimony that under this bill executions will not need oversight because the execution procedures will be carried out by professionals, and we need only to enact this law to clear the way so that the professionals can do their jobs. Yet, if experience is to teach us anything then we surely know that, sooner or later, there will be an execution that does not go well, did not go the way it was scripted. We have seen it happen here, more than once, and we have seen it happen in other states as well. We have seen it happen with supposedly lethal injections of drugs not designed to kill, and we have seen it happen with its execution method forebears. All the botched executions to date have occurred despite the fact that correctional and medical professionals were involved, and so we should fully anticipate that there will be more botched executions to come, with or without this legislation.

And as surely as the days grow shorter and darker, there will be lawsuits. They will not be filed in the courts of Ohio, where Ohio law controls. These lawsuits are rarely filed there. They will be filed in the United States District Courts, under the jurisdiction of federal courts to grant relief for violations of federal constitutional rights, such as the prohibition against Cruel and Unusual Punishment (8th Amendment), and Due Process of law (14th Amendment). Right now there are at least two such federal lawsuits filed in the Southern District of Ohio. Under federal law the provisions of this bill will not control on what information is discoverable or what evidence is admissible. It is most unlikely that these provisions will restrict the rights of an inmate plaintiff under the Federal Civil

Rules of Procedure to issue subpoenas for obtaining disclosure of information regarding the execution protocol, including the producer and distributor of the execution drugs, and the medical personnel who administered the drugs. Nor will these provisions restrict inmate plaintiffs from using that information in seeking to introduce evidence in future federal court hearings.

And with the unique provisions of this bill that interfere with end-user rights of foreign manufacturers to restrict the use of their products, there will be new federal lawsuits, perhaps bringing claims under the U.S. Constitution's Commerce Clause, or under Federal Trade Commission rules and regulations. And new claims under the First Amendment are being considered specifically in response to this bill.

In the end, from a legal point of view the desired hopes of the proponents of HB 663 of finding a way to proceed with an execution in February, with more to follow, appear to ride on nothing more than a "wing and a prayer" that the federal courts will embrace the provisions of this bill with a warm deferential hug. It seems likely, however, that in considering the various notions of good government which are being sacrificed in order to ramrod this bill into law, the law will itself take on a caricature of a botched execution.

This Committee should table this bill in favor of fuller consideration and discussion of a revised bill in the next Session of the General Assembly.