September 14, 2021

An Open Letter to Governor Spencer Cox and the Utah State Legislature,

As attorneys and duly elected public prosecutors, we have sworn to support, obey, and defend the Constitution of the United States and the Constitution of Utah. We also have a statutory duty to call to the State Legislature's attention any defect in the operation of the law. In fulfillment of that oath and responsibility, we alert legislators and the people of a grave defect that creates a liability for victims of violent crime, defendants' due process rights, and for the public good. The defect which we urge the Legislature to repeal is the death penalty.

As a civilization, we have progressed since the Draconian Code of Athens in the 7th Century BC, when the penalty for every crime was death. Even the Virginia colony's Divine, Moral, and Martial Laws made death the penalty for stealing grapes or killing chickens. Under current law, only a person convicted of Aggravated Murder may be eligible for the death penalty. A court may sentence aggravated murderers to death, life in prison without parole, or an indeterminate prison term of 25 to life. And in fairness, Utah has been more hesitant to impose this most strident of sanctions than other states. Since 1854 Utah has executed 50 human souls: five by hanging, four by lethal injection, and 41 by firing squad.

Even so, the death penalty in Utah today is a permanent and irreversible sentence within an imperfect system. It fails to deter crime. It retraumatizes victims. It disproportionately applies to minorities. It is expensive. And it makes plea negotiations coercive. The Legislature would better serve Utah by replacing the death sentence with 45 years to life term so that for Aggravated Murder the possible sentences will be life without a possibility of parole, 45 years to life, or 25 years to life. We applaud Representative Snow and Senator McCay for sponsoring this legislation, and we offer six reasons in support of this change. As prosecutors from different parties, with different perspectives, and serving different people, we approach this issue for different reasons. We don't all necessarily agree on each of the reasons provided below, but we are united in our call to repeal the death penalty and replace it with a 45 to life sentencing option.

The first reason to repeal the death penalty is that it is an irreversible sentence within an imperfect criminal justice system. In 1915 Utah executed Joseph Hillstrom, aka Joe Hill, a labor organizer convicted of a grocery store robbery resulting in a double murder. In 2011, William Adler published a biography of Hill, which included an alibi never introduced at trial and evidence that tended to show Joe Hill did not murder anyone. The Innocence Project suggests that Utah's misapplication of the death penalty in Joe Hill's case was not an isolated incident. They have identified eighteen people in the United States serving time on death row who were later proven innocent and exonerated by DNA testing. Our adversarial judicial system is among the greatest in the world, but it is not perfect. Last July, Governor Spencer Cox celebrated hitting the 70% goal for vaccinations by July 4. A few days later, Governor Cox admitted that the celebration was premature because of a reporting error. Mistakes happen, both in life and in government. We should certainly try to correct mistakes, but when it comes to executions, those mistakes cannot be undone.

The second reason to repeal the death penalty is that it has failed to deter violent crime. General deterrence is the theory that some state criminal policies can discourage people from committing crimes in the first place. Available evidence shows the death penalty does not have a deterrent effect – it does not prevent people from committing murder or other violent crimes. According to the most recent FBI crime report, average crime rates for states with the death penalty were higher than the average crime rates for the 25 states which abolished or halted the death penalty. That trend persists when focusing on violent crime and specifically on murders. And among states that impose the death penalty, those who impose it more often tend to have a higher violent crime rate than those who use it less frequently. The murder rate in Texas, the leader in executions with 572 in the last 45 years, is double what it is in Utah, which has executed just seven people in the same time frame. There is no measurable deterrent effect of the death penalty on violent crime and murder rates. If anything, the evidence suggests that the death penalty correlates with higher rates of violence and murder.

A third reason to repeal the death penalty is the racial inequity with which Utah applies it. The first two people the territory of Utah executed were Native Americans. Two of the seven people Utah has executed since 1977 were Black. Of the seven Utahns currently on death row, one is Hispanic, one is Black, and one is Native American. Utah is more likely to execute racial minorities than white people for the same offense. One tragic example of this is the heinous murder of Gordon Church in 1988. Mr. Church was kidnapped, beaten, sexually assaulted, and

murdered by one white man and one Hispanic man. Mr. Church's Hispanic murderer is on death row. In contrast, a jury sentenced his white murderer to prison with a possibility of parole. Such inequities in sentencing insult the victims and tarnish the veneer of impartiality in the entire criminal justice system.

A fourth reason to repeal the death penalty is the traumatization it causes to the co-victims—family and loved ones-- of the deceased. Instead of the death penalty providing closure to victims, the constitutional appeals that follow mean that a death sentence will take decades to impose if it ever happens. Most aggravated murderers commit their crimes as young men, but the median age on Utah's death row is over 57. Since the year 2000, more men have died of old age on death row than by execution. And each appeal means another call to the family, another expectation to appear in court, another question of what will happen, and another reopening of terrible wounds.

A fifth reason to repeal the death penalty is the financial cost to taxpayers. As mentioned above, both a life sentence and a death sentence will likely include healthcare costs as the offenders age. However, a death sentence also carries the inevitable expenses of appeal. The taxpayers must pay for both the prosecution and the defense in these hearings. In 2016 Susquehannah University compared the costs of a death penalty inmate to one sentenced to life. The study concluded that each death penalty inmate cost the taxpayers $1.12 million more than an inmate sentenced to spend the rest of their lives in prison.

Finally, the death penalty is inherently coercive. In Missouri v. Frye, Supreme Court Justice Kennedy, writing for the majority, pointed out that 94% of state court convictions are products of guilty pleas. "Because ours is for the most part 'a system of pleas, not a system of trials,' it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process." 566 U.S. 134, 143-144 (2012) (citations omitted). While most cases are resolved by plea bargains, plea bargains must be voluntarily entered. A defendant's need to bargain for one's very life in today's legal culture cannot be described as anything less than inherently coercive. Accordingly, the death penalty simply gives already powerful prosecutors too much power to avoid trial by threatening death.

Doctors take the Hippocratic oath to do no harm to people when they become licensed. The promise of an attorney is one to uphold and defend the Constitution. Yet as prosecutors, our client is the public. We file our cases in the name of the state of Utah. We work to protect public safety, preserve the privacy and dignity of crime victims and to hold the guilty accountable. Then, once a defendant

is convicted, we seek to make victims whole and ensure that a defendant does not harm others again. When someone commits a violent murder, nothing can repair the damage that person has caused. No earthly court can order restored life to a murdered son or daughter or a healed heart to a crushed husband or wife. However, we can ensure that the offender goes to prison. If the Legislature repeals the death penalty, the available sentences for aggravated murder will be life without parole or 25 years to life. Twenty-five years is far too short of a time for our most violent offenders. Most people convicted of aggravated murder are young men. We believe that justice requires the third option of 45 years to life to be made available. As prosecutors, we are not seeking mercy for the murderer but justice for the people. A 45 to life sentence will mean that if an offender ever gets out, it will not be until the twilight of their lives. That will protect the public and, to the extent possible, provide a small measure of justice for what that person has taken away. Accordingly, we call on the Legislature to remedy this defect in the law by repealing the death penalty and creating a new possible alternative to life without parole of 45 years to life.

Sincerely,

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