Ohio Prosecuting Attorneys Association

Louis Tobin
Executive Director
House Bill 81
Opponent Testimony
November 27, 2018

Chairman Manning, Ranking Member Celebrezze and members of the House Criminal Justice Committee, thank you for the opportunity to provide opponent testimony on House Bill 81.

I've attached a letter that was sent to the General Assembly last March that was signed by the Ohio Prosecuting Attorneys Association, the Fraternal Order of Police of Ohio, the Ohio Patrolmen's Benevolent Association, and 67 County Prosecuting Attorneys expressing our concerns with this bill and the impact that it will have on Ohio's death penalty law. While the substitute version of the bill that was adopted last spring is an improvement two of our primary concerns with this legislation remain unaddressed.

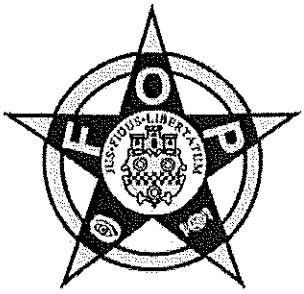
First, the bill still provides the opportunity for those currently on death row to file a motion for post-conviction relief based on a claim that they had a serious mental illness when they committed the crime for which they were convicted and sentenced to death. Many of these cases are 10 – 15 years old or older. It would be a substantial miscarriage of justice for someone convicted and sentenced to death years ago to be able to now claim that they had a serious mental illness at the time and should therefore be excluded from the death penalty. It is likely that every person on death row would file such a motion creating even more litigation and more uncertainty for the victims of Ohio's most heinous crimes. We have been clear since this bill was introduced that this provision is extremely problematic and should be removed.

Second, the bill still defines a person with serious mental illness as someone with one of five diagnosed conditions whose condition "significantly impaired the person's capacity to exercise rational judgment in relation to the person's conduct" with respect to conforming their conduct to the requirements of law or appreciating the nature, consequences, or wrongfulness of their conduct. We remain concerned with the legislature delegating authority to the American Psychiatric Association, a trade group over which the General Assembly has no oversight, to define the specified illnesses through the Diagnostic and Statistical Manual of Mental Disorders, a manual that is revised regularly by the APA. As importantly, we think that excluding application of the death penalty because a condition impaired the capacity to exercise "rational judgment" is too broad and is therefore inappropriate. Either the illness impaired a person's capacity to conform their conduct to the law or appreciate the wrongfulness of the act or it did not. The focus should be on actual impairment in direct relation to the commission of the offense. This provision should be amended to remove the language regarding rational judgment. It should simply provide that

the condition or conditions must have significantly impaired the person's ability to conform their conduct to the requirements of the law or appreciate the nature, consequences, or wrongfulness of their conduct.

Ohio prosecutors are not in favor of this legislation. We believe that appropriate safeguards already exist. If, however, the committee is to report this bill today, we respectfully request that these two changes, changes that we have requested for many months and that are patently reasonable, be adopted prior to a vote.

Thank you for your consideration of these comments. I would be happy to answer any questions.



Open Letter to the Members of the Ohio General Assembly
House Bill 81 and Senate Bill 40
Letter of Opposition
March 2018

We write to you in response to the January 2018 "Open Letter to the Members of the Ohio General Assembly in Support of House Bill 81 and Senate Bill 40" authored by a group of Ohio law professors. We also have dedicated ourselves to improving the criminal justice system in the state of Ohio and to providing practical, on the job training to our future prosecutors, judges, legislators, and law enforcement officials. We have dedicated ourselves to seeking justice for the victims of crime and to promoting public safety for Ohioans.

Our organizations remain opposed to House Bill 81 and Senate Bill 40. The legislation is not necessary to address any problem with the administration of the death penalty in Ohio, is a disservice to the victims and survivors of the most heinous crimes, and undermines public safety.

Current Law Provides Appropriate Protections

The Open Letter states that "Those who commit violent crimes while in the grip of a psychotic delusion, hallucination, or other disabling psychological condition lack the judgment, understanding, or self-control to be labeled the worst of the worst or deserving of death." Current law already protects such individuals from the death penalty.

Under current law, a person is not guilty by reason of insanity if, at the time of the commission of the offense the person did not know, as a result of a severe mental disease or defect, the wrongfulness of the person's acts. Accordingly, this legislation is not needed to address these kinds of severely-ill defendants. Instead, it addresses those defendants who have been diagnosed with a "serious mental illness" but who did understand that what they were doing was wrong. It addresses defendants who committed aggravated murder knowing that it was wrong to kill.

Current law also already allows a capital defendant to introduce evidence of a serious mental illness in the penalty phase of the case. The jury is instructed to weigh that evidence as a mitigating factor in deciding whether to impose the death penalty. If the evidence of serious mental illness is as compelling as the proponents of this legislation claim, such evidence would presumably weigh heavily against the jury returning a unanimous recommendation of death. Indeed, given the state's beyond-a-reasonable-doubt burden of proof at the penalty phase, the evidence of serious mental illness need only be strong enough to create reasonable doubt in the mind of a single juror.

In light of this, this legislation is not needed to protect the most severely mentally ill from the death penalty. They are already protected. Nor does it exclude those whose evidence of a serious mental illness is strong enough to create reasonable doubt in the mind of a single juror. Instead, this legislation is meant to exclude those offenders whose evidence of mental illness is so weak and unpersuasive that it would not create reasonable doubt in the mind of even one juror.

Jurors can be Trusted to Weigh Serious Mental Illness

The Open Letter and other proponents argue that jurors cannot be trusted to treat serious mental illness as a mitigating factor and that as often as not they treat it as an aggravating factor. We have more faith in our fellow citizens.

In proponent testimony on this legislation Dr. David Niven stated that "by a 2 to 1 margin Americans want to prevent those with a serious mental illness from being subject to a death sentence." Jurors are randomly selected to reflect this same group. It is contradictory for proponents to assert that two thirds of Americans wish to prevent those with a serious mental illness from being subject to a death sentence but that jurors treat serious mental illness as an aggravating factor. If two-thirds of the public wants to prevent those with a serious mental illness from being subject to a death sentence, then the defense should have no trouble seating jurors who disfavor such a sentence, and even less trouble creating reasonable doubt in the mind of a single juror.

The Open Letter also states that there is "ample opportunity for investigation and evaluation" of the serious mental illness claim and that the jury, if necessary, will review the evidence and determine if the defendant is *ineligible* for a death sentence. Under the legislation, the jury only gets to consider such evidence when the judge has previously found that the defendant is death penalty *eligible* despite a claim of serious mental illness. When the judge has found that the defendant is *ineligible* due to serious mental illness, the jury is not trusted to weigh the evidence of serious mental illness. So ultimately, proponents do not trust the jury to weigh the factors and make a decision regarding serious mental illness unless that decision leads to the proponents' desired outcome.

We think Ohio jurors deserve more credit than that. We trust our juries to abide by their oaths, to follow their jury instructions, and to appropriately consider all mitigating and aggravating factors in deciding whether or not to recommend a death sentence.

House Bill 81 and Senate Bill 40 are Overbroad

The Open Letter repeats nine times the mantra that the legislation is designed to exclude those with *severe* mental illness from the death penalty. In reality, the legislation casts a much wider net.

Beyond the protections provided in current law that are described above, the exemption provided in the legislation is not limited to *severe* mental illness, no matter how many times proponents say the word *severe*. There is no doubt that the mental illnesses listed in the legislation can be severe. When severe, the illnesses could even impact a person's ability to appreciate the wrongfulness of their conduct. As described above, however, such a person may already be found not guilty by reason of insanity.

The legislation cuts a swath that is far wider. It provides no nuance in determining what is truly serious. At least three of the disorders listed in the legislation have ranges of impairment from mild to severe and may include periods of partial or even full remission. Nevertheless, the legislation requires only that the offender obtain a diagnosis that he or she had one of these illnesses at the time of the offense. It is then

rebuttably presumed that the condition significantly impaired the person's capacity. It matters not whether the illness was mild, whether it was in remission, or whether it had an effect on the offender's ability to appreciate the wrongfulness of their act. Stated differently, someone with mild major depressive disorder that was in remission at the time of a bad act and who fully understood what they were doing could still be presumed ineligible for the death penalty.

Proponents point to the requirement in the legislation that the condition have significantly impaired the person's capacity to exercise rational judgment, conform their conduct to the law, or appreciate the nature, consequences, or wrongfulness of their conduct. Impairment of overall capacity is substantially different than actual impairment during the commission of an offense. It is very possible that an offender can have a deficit in his capacity to function in some respects without having a deficit that is important to culpability in the commission of an aggravated murder.

Conclusion

We believe that the death penalty still plays an important role in Ohio. It deters the worst of the worst crimes and in the words of the Supreme Court of the United States expresses "society's moral outrage at particularly offensive conduct." *Gregg v. Georgia.* House Bill 81 and Senate Bill 40 propose to preclude the death penalty in cases where the defendant might fully have understood what he or she was doing and might fully have appreciated the wrongfulness of his or her conduct. Our great concern is that this legislation is a veiled attempt to eliminate the death penalty and that it will preclude imposition of the death penalty in most cases.

We believe that current law provides appropriate protections to individuals suffering from severe mental diseases or defects. We also believe, contrary to the assertions of the proponents, that jurors are savvy enough to know when to express society's moral outrage and when not to. Perhaps most importantly, we believe that victims deserve the state's recognition that some offenders simply cannot be rehabilitated and that Ohioans deserve criminal justice policy that deters crime – particularly the worst of the worst crimes. House Bill 81 and Senate Bill 40 undermine each of these goals.

Signed:

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