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Senate Judiciary Committee
SB 40 Proponent Testimony
Office of the Ohio Public Defender
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Chairman Bacon, Vice Chair Dolan and Ranking Member Thomas, thank you for allowing me to testify in support of SB 40.

Capital cases are some of the most delicate and procedurally complicated cases that exits in the criminal justice system. These cases must contemplate extensive constitutional protections and often times morbid facts. The Supreme Court of the United States, Ohio Supreme Court, Congress, and our state legislature have all issued guidance and directives which courts must follow when contemplating the highest punishment our laws allow. These procedural laws have developed over time, as our understanding of people, punishment, the Constitution, and behaviors has developed.

If Ohio is intent on maintaining capital punishment, we must identify concerns and mitigate them. Like other states, Ohio is no stranger to challenges to the capital punishment provisions, procedures, and policies. One of those challenges is to executing a person with a serious mental illness. SB 40 is an attempt to remedy that concern and alleviate the challenges to the inhumanity created by a state sponsored execution of a person with a serious mental illness.

There may be confusion in the procedure that SB 40 creates. It is not duplicative or unnecessary, as excluding someone with one of the identified serious mental illnesses from capital punishment is not currently law in Ohio. Incompetency, NGRI, *Atkins*, and the mitigation phase of capital punishment trials exist for important and exclusive use, and do not necessarily cover the same people SB 40 will reach.

Competency to stand trial is mandatory for every criminal defendant. If a person challenges their competency, usually and hopefully through qualified counsel, they are saying that for some reason or another, they do not understand the nature of the charges against them, and cannot assist their counsel in their defense. Competency evaluations are completed by psychologists, usually in court clinics, and ultimate determinations as to the person's competency are made by the Court. If a person is found not competent, the Court has the ability to restore that person to competency through classes, coaching, and other learning tools. If the Court cannot restore the person to competency within the statutorily prescribed timeframe, then the charges are dismissed without prejudice-they can be filed again. Competency determinations are not solely based on mental health, and often are made on cognitive abilities to recall information or if the person can explain the differences between right and wrong.

Not guilty by reason of insanity is another statutorily created protection for all criminal defendants. NGRI, as it is referred to, is an affirmative defense. If a person suffers from certain mental health complications or obstacles preventing them from knowing or appreciating the wrongfulness of their acts at the time of the crime. If a person claims NGRI, they have the burden of proving by a preponderance of the evidence that they suffer from a mental disease or defect that prevented them from knowing the wrongfulness of their acts, at the time of the crime. If a person is successful, then they are not guilty of the crime, and can be committed by the trial court for a period of time up to the total sentence they could have received for the offense which they were charged with.

Though competency and NGRI apply to all criminal cases, there are some procedural protections which specifically apply to capital cases. First, the United States Supreme Court held in *Atkins* that states may not execute anyone with mental retardation, know referred to as intellectual disability. In discussing and deciding the *Atkins* litany of cases, the Court explained that those who are intellectually disabled have common characteristics lending them to increased vulnerability, making them worthy of more protections from the state. The Court has explained that, like children, those who suffer from intellectual disability are not the worst of the worse, and executing them does is disproportionate to the level of offense they are capable of committing. If a court grants an *Atkins* determination, a defendant can still be found guilty, but cannot be executed.

Capital cases include a mitigation phase, where counsel for the defendant presents the jury with information about the accused. The jury is charged with deciding if the defendant is an appropriate person to execute based on the law they are guided by and information they learn about the person. While a person's mental illness can be presented during the mitigation phase, relying on juries to protect those who suffer from serious mental illness is not effective or appropriate. If juries could bifurcate their personal concerns about those who suffer from mental illness from their civic duty to decide if the newly-convicted person in front of them deserves the death penalty, we would not have SB 40. The Death Penalty Task Force would not have discussed and passed this recommendation with a super majority. We know that average people, those who make up our juries, see mental illness as an aggravating factor. If we agree that those who suffer from the serious mental illnesses identified in SB 40 should be protected from capital punishment, then we must pass legislation excluding them.

The serious mental illnesses included in SB 40 are not ID, formerly mental retardation. They may be fully competent and aware of the process, and likely won't be found NGRI. All of these procedures are protections for people who suffer from various, but different, mental obstacles. It is highly offensive to the criminal justice system to prosecute someone who is deemed to be insane. The Courts have told us that executing children and those who are intellectually disabled offends justice, and disrupts the purpose of capital punishment, but those folks can still be prosecuted and convicted. That is where the need for SB 40 comes-for those who suffer from a serious mental illness, making their crimes less deserving of the harshest punishment our state can impose.

Thank you for the opportunity to testify in support of SB 40. I will take questions at this time.