OJPC OHIO JUSTICE & POLICY CENTER

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TO:	**Ohio House Criminal Justice Committee**, Rep. George Lang, chair
FROM:	**David Singleton**, Executive Director
DATE:	**1 May 2019**
RE:	**Safeguarding justice and human decency with House Bill 136** [Written testimony only]

Greetings Chairman Lang, Vice-Chair Plummer, Ranking Minority Member Leland, and all the members of the House Criminal Justice Committee. I am an attorney and the executive director of the Ohio Justice & Policy Center (OJPC). I am also a professor at the Salmon P. Chase College of Law at Northern Kentucky University. I am writing to urge you to support House Bill 136.

ABOUT OJPC AND WHY HB 136 IS NECESSARY

OJPC is a Cincinnati-based non-profit law office that works statewide to create fair, intelligent, and redemptive criminal justice systems. We are both litigators and criminal-justice policy experts. We are zealous advocates because we believe fair, intelligent, and redemptive criminal-justice reform is not only possible, it is urgently necessary in our state at this time.

Much can be said about why we should not execute those who were seriously mentally ill at the time they committed a capital crime. But even when we agree on this, there is a common misperception that seriously mentally ill defendants are protected from being executed by our current law. This is not the case. Although mental illness is taken into account at different stages of capital proceedings, **the current procedures will not keep seriously mentally ill people from being executed.**

"COMPETENCY TO STAND TRIAL" IS INSUFFICIENT

A seriously mentally ill defendant can be found incompetent to stand trial only if she "is incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense." Competency at the time of trial says nothing about the defendant's mental state at the time the crime was committed. Especially since defendants may be medicated to become competent, the determination has no bearing on the level of a defendant's functioning before being medicated.

The competency standard is also very low. One of the most infamous cases of a seriously mentally ill defendant being found competent is that of Scott Panetti. Mr. Panetti suffers from paranoid schizophrenia, but despite his mental illness he was allowed to represented himself at trial. Mr. Panetti wore a cowboy costume, made bizarre statements throughout the trial, and tried to call more than 200 witnesses, including Jesus Christ and John F. Kennedy. Despite the overwhelming evidence of his serious mental illness, Mr. Panetti remains on death row in Texas.

THE INSANITY DEFENSE IS INSUFFICIENT

In Ohio, in order to be found not guilty by reason of insanity, a defendant must prove "that 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." This defense is rarely used, and when it is raised, it rarely succeeds.

Although the insanity defense is related to a defendant's mental state at the time of the crime, it is not available for many defendants whose serious mental illness affected their commission of a crime. Unlike the exemption from execution proposed by SB 40, the insanity defense is not available to a person whose mental illness significantly impaired his or her capacity to exercise rational judgment in relation to the person's conduct; conform the person's conduct to the requirements of law; and/or appreciate the nature, consequences, or wrongfulness of the person's conduct.

The insanity defense is for defendants who society believes are so mentally ill that they cannot be held criminally liable for their crimes. However, for people who are significantly impaired but can still be held responsible for their actions, SB 40 would provide a middle ground. These defendants would still face life in prison, but they would not be given the ultimate punishment, the death penalty.

MENTAL-HEALTH MITIGATION EVIDENCE IS INSUFFICIENT

Ohio allows capital defendants to provide any evidence that would mitigate their sentence. This includes evidence that "at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law." R.C. 2929.04(B)(3). Often, the consideration of mental health mitigation is seen as a reason that a mental health exemption is not necessary. However, the presentation of mental health mitigation is not enough to protect the seriously mental ill from the death penalty due to the nature of mental illness and the stigma against it.

Serious mental illness can have a profound effect upon a capital defendant's ability to receive a fair trial. Seriously mentally ill defendants may not allow defense attorneys to present evidence relating to the existence of an illness, not cooperate with defense counsel, not be willing to participate in appeals, and volunteer to be executed. In addition, psychotropic medications can interfere with a capital defendant's participation in the trial and can cause changes in personality that lead the jury to perceive the defendant as remorseless.

Mental health mitigation presented to the jury can also be held against the capital defendant. The jury can see this evidence as proof of the defendant's future dangerousness. This perception makes juries more likely to sentence a defendant to death even if future dangerousness is not an explicit aggravating factor.

We must remember that the death penalty is supposed to be reserved from the worst of the worst. When such a determination cannot be reliably made, it puts the entire capital punishment system in question. Given the serious challenges that seriously mentally ill defendants face at trial and sentencing, consideration of mental health evidence in mitigation does not provide a reliable avenue for determining that a seriously mentally ill defendant is sufficiently culpable to be sentenced to death.

"COMPETENCY TO BE EXECUTED" IS INSUFFICIENT

A death row inmate cannot be executed if "the convict in question does not have the mental capacity to understand the nature of the death penalty and why it was imposed upon the convict." R.C. 2949.28(A). This standard focuses specifically on the individual's understanding of the death penalty and the reasons for its imposition. Therefore, seriously mentally ill prisoners who do not have delusions relating to the death penalty will be found competent to be executed. Like competency to stand trial, this standard means that many seriously mentally ill defendants will be executed.

CONCLUSION: VOTE FOR HB 136

Competency determinations, the insanity defense, and mitigation serve important roles in the criminal justice system, and each of these concepts demonstrate the extent to which mental illness can affect death penalty cases. Unfortunately, none of these concepts adequately protect seriously mentally ill defendants from receiving the death penalty and being executed. As a result, Senate Bill 40 is essential to ensuring that seriously mentally ill defendants will be punished but will not be given the death penalty.