Office of the Ohio Public Defender

Timothy Young, State Public Defender

Testimony in Support of HB136
Serious Mental Illness
Sponsors: Rep. Hillyer

Chairman Lang, Vice Chair Plummer, Ranking Member Leland, and members of the House Criminal Justice Committee. My name is Tim Young, I am the State Public Defender. Thank you for the opportunity to testify in support of HB136.

Like other states, Ohio is no stranger to challenges to capital punishment provisions, procedures, and policies. The Death Penalty Task Force issued a comprehensive set of recommendations to address problems with Ohio's capital punishment. HB136 implements one of those recommendations. One of the indicators of the strength of a justice system is how, as a society, we treat the infirm, the meek, and the less fortunate. People who suffer from severe mental illnesses are less fortunate; they did not ask to have an illness. They do not wish to suffer the burden of having a severe disorder. Another principle of our justice system is that the death penalty should only be used for the worst of the worst. This is both the law and a foundational moral principle on punishment in our criminal justice system. People who have a severe mental illness should not be eligible for our most severe punishment. If we are going to have a death penalty it should be reserved only for those who are the worst of the worst, not for those who are suffering from impaired judgment due to a severe mental illness

HB136 is necessary, as Ohio law does not exclude someone with one of the identified serious mental illnesses from capital punishment. I want to make sure you understand how the mental illnesses that HB136 covers will tie into our present system. For our system to work, we punish those who understand reality around them and who intend to commit a criminal act.

Incompetency, NGRI, *Atkins*, and the mitigation phase of capital punishment trials serve important and exclusive functions in our criminal justice system, but do not address the same issues HB136 would reach. I will briefly review each of these four areas to highlight how HB136 addresses a separate need.

Competency

Competency to stand trial is mandatory for every criminal defendant. If a person challenges their competency, they are saying that 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 the Court ultimately decides whether a defendant is competent to stand trial. The Court could restore an incompetent person to competency through classes, coaching, and other learning tools. To determine competency to stand trial, the Court considers the cognitive ability of the accused to recall information and whether the accused can explain the difference between right and wrong. A mentally ill person may have cognitive deficits or may not be able to explain the difference between right and wrong – but mental illness, alone, is not sufficient to find an accused incompetent person to stand trial. Once a court finds the accused incompetent person is able to stand trial, the Court

orders the accused person to treatment intended to restore him or her to competency. If the Court cannot restore the person to competency within the statutorily prescribed timeframe, then the charges are dismissed without prejudice, meaning they can be filed again. A person deemed incompetent to stand trial is subject to involuntary commitment to a secure mental health facility.

Not Guilty by Reason of Insanity

Not guilty by reason of insanity is another statutorily created protection for all criminal defendants. NGRI is an affirmative defense. 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 to a secure mental health facility by the trial court for a period of time – up to the total sentence they could have received for the offense with which they were charged.

Atkins

Though competency and NGRI apply to all criminal cases, there are some procedural protections which specifically apply to capital cases. In *Atkins, the* United States Supreme Court held that states may not execute anyone with mental retardation, now referred to as intellectual disability.[1] The Court explained that those who are intellectually disabled have common characteristics leading them to increased vulnerability, making them worthy of more protections from the state. The Court explained that, like children, those who suffer from intellectual disability are not the worst of the worst, and executing them is disproportionate to the level of offense they are capable of committing. Although a State may not execute an intellectually disabled defendant, the Court may still convict that person and sentence them to life in prison.

Mitigation Phase

Capital cases include a mitigation phase, where counsel for the defendant presents the jury with information about the accused. The jury must decide if the defendant is an appropriate person to execute based on the law and information they learn about the person. The defense may present evidence of a person's mental illness during the mitigation phase, but it is neither effective or appropriate to rely on juries to protect those who suffer from serious mental illness. If juries could separate 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, Ohio would not need HB136. The Death Penalty Task Force found that average people, those who make up our juries, see mental illness as an aggravating factor, instead of a mitigating factor, out of fear and a lack of understanding about mental illness. Accordingly, the Death Penalty Task Force passed this recommendation with a super majority.

it is important to know how narrowly the law defines the above categories. If we had 1,000 people with mental illnesses, perhaps only 100 of them would be people with severe

[1] *Atkins v. Virginia*, 536 U.S. 304 (2002).

mental illnesses: people who were not just phobic or mildly depressed, but really severely mentally ill. Of that 100 only a small handful of that group, likely less than 10, would be considered incompetent or NGRI under the law. And that is why HB136 is so important, to make sure the law is imposed with regard for the condition of those who, while not incompetent or NGRI, are severely mentally ill. Under HB136 they may still be punished, even imprisoned for the remainder of their lives, but they may not be executed. That punishment should be reserved only for those who do not have such illnesses.

How HB136 Differs

HB136 would exclude from the death penalty individuals who have mental illness that causes such distortions in their thinking that these individuals do not have a firm grasp on reality, although they may understand the wrongfulness of their actions. Individuals with schizophrenia can experience a loss of reality, delusions, hallucinations, and poor executive function. Symptoms of schizoaffective disorder may include hallucinations, delusions, mania, and clinical depression. Individuals with bipolar disorder may experience intense emotions and mood episodes ranging from elation to hopelessness. Individuals with bipolar II disorder may experience impulsivity, and individuals with bipolar I disorder may experience delusions. Major depressive disorder can manifest as feelings of worthlessness, excessive/inappropriate guilt, an inability to concentrate, and suicidal ideation. Included with my testimony is a document prepared by Dr. Bob Stinson, Psy.D., J.D., LICDC-CS, ABPP, that offers further information regarding the nature and diagnosis of bipolar II disorder and major depressive disorder. Dr. Stinson also offers insight into the diagnosis process of forensic psychologists. Finally, symptoms of delusional disorder may include an unshakable belief in a delusion: something untrue, or something not based in reality. These severe symptoms impede the individual's ability to fully appreciate the reality of the world around them.

It has been suggested that HB136 would end the death penalty in Ohio. This argument is completely without merit. When the United States Supreme Court decided *Atkins* in 2002, there was also concern that every defendant would hire an expert to testify that they could not be executed because of an intellectual disability and the death penalty would cease to be utilized. Clearly, that did not come to pass. In fact, of the individuals on death row in Ohio when *Atkins* was decided, only 9.26% pursed an *Atkins* claim for relief, and only 3.9%, or 8 individuals, were successful.

HB136 will likely result in a similarly low number of successful claims. This is because our criminal justice is equipped to filter out unfounded claims that do not meet the standard for relief under the law. First, defense counsel has an ethical obligation to investigate their client's background and determined whether they could assert a serious mental illness claim in good faith, consistent with legal ethics standards. Second, as the document prepared by Dr. Stinson discusses, psychologist have their own ethical standards they must adhere to that prevent them from making a false diagnosis. Third, the state will have ample opportunity to cross examine the defendant's expert in an effort to convince the court that the defendant's expert did not follow the scientifically accepted standards and guidelines when making their diagnosis. Finally, the state can have their own expert testify about their diagnosis and even opine on the inaccuracy or incompleteness of the defendant's expert's diagnosis and why it should not be believed by the court. Further, if a defendant is taking medication for their serious mental illness at the time of the offense, it is the defendant's burden to convince the court that, despite their

medication, their capacity was impaired by their illness. This process will ensure that relief provided under HB136 is only granted to the narrow intended class and is not abused.

Executing children and the intellectually disabled violates the constitution, offends justice, and disrupts the purpose of capital punishment. States may still prosecute, convict, and punish children and intellectually disabled people who commit crimes, but the State may not execute them. That is why Ohio needs HB136 - for those who suffer from a serious mental illness, making their crimes less deserving of the harshest punishment our state can impose. Because their serious mental illness inhibits their grasp of reality, these individuals have reduced culpability – they are not the worst of the worst. This bill will not end capital punishment in Ohio – but merely ensure Ohio's death penalty is reserved for those most culpable.

Thank you for the opportunity to testify in support of HB136. I am happy to respond to any questions the Committee may have.

House Bill 136

Comment on Major Depressive Disorder and Bipolar II Disorder

Bob Stinson, Psy.D., J.D., LICDC-CS, ABPP

- Major Depressive Disorder is a serious mental illness. The National Institute of Mental Health,[i] the Centers for Disease Control and Prevention,[ii] and the Mayo Clinic,[iii] as just a few examples, all describe Major Depressive Disorder as a serious illness. It does not matter if the Major Depressive Disorder is mild, moderate, or severe; all levels of Major Depressive Disorder are serious.

    1. First, when properly diagnosed, a mood disorder due to a general medical condition, a mood disorder due to substances or medication, an adjustment disorder with depressed mood, and sadness inherent in the human experience have all been ruled out;[iv] none of those qualify for a diagnosis of Major Depressive Disorder.

    2. Second, by definition, the symptoms of Major Depressive Disorder occur most of the day, nearly every day, and/or recurrently (this is true even for a "mild" Major Depressive Disorder).[v]

    3. Third, a diagnosis of Major Depressive Disorder (whether mild, moderate, or severe) requires that the symptoms cause clinically significant distress or impairment in social, occupational, or other important areas of functioning; thus, regardless of whether the Major Depressive Disorder is mild, moderate, or severe, by definition, it causes clinically significant distress and / or impairment in functioning.[vi]

    4. Fourth, some symptoms (e.g., a suicide attempt or a specific plan for committing suicide) are objectively more serious than other symptoms (e.g., diminished ability to think or concentrate); however, the symptoms are not "weighted" such that in determining the number or criterion symptoms for purposes of qualifying Major Depressive Disorder as mild, moderate, or severe, there is no distinction between those symptoms.[vii] However, in all forms of Major Depressive Disorder (mild, moderate, and severe), the person diagnosed with Major Depressive Disorder is going to meet at least 5 of the 9 criteria.[viii]

- Bipolar II Disorder is a serious mental illness. Bipolar II Disorder is "Major Depressive Disorder plus." That is, to qualify for a diagnosis of Bipolar II Disorder, an individual must have a current or past major depressive episode "plus" criteria for a hypomanic episode.[ix] Thus:

    1. Everything said under Major Depressive Disorder, above, applies to Bipolar II Disorder.

    2. The hypomanic episode additionally means there has been all of the following:[x]
        a) A distinct period of abnormally or persistently elevated, expansive, or irritable mood and abnormally and persistently increased activity or energy;

b) It has been present most of the day, nearly every day, for at least 4 days;
c) Other symptoms representing a noticeable change from usual behavior have been present to a significant degree;
d) There is an unequivocal change in functioning;
e) The change in functioning is observable to others; and
f) The episode is not attributable to substances, medications, or other treatment.

- Accurate diagnosing is a safeguard against the misuse of inclusion of any of the serious mental illnesses. In addition to the adversarial nature of court proceedings, including cross-examination of witnesses, there are State of Ohio licensing board rules, national ethics codes, and specialty guidelines to help hold diagnosticians accountable for accurate diagnosing.

    1. The State Board of Psychology in Ohio, for example, has competency standards that prohibit license holders from practicing in areas for which the license holder has not gained competence through education, training, and experience.[xi] The Board also holds its license holders to the standard of care in a specialty area (e.g., forensic psychology) while the license holder is practicing in that area.[xii]

    2. The American Psychological Association's *Ethical Principles of Psychologists and Code of Conduct* similarly requires psychologists to restrict their practice to areas within the boundaries of their competence based on their education, training, supervised experience, consultation, study, or professional experience.[xiii] Furthermore, the Code specifically states that when psychologists assume forensic roles, they must become reasonably familiar with judicial or administrative rules governing their roles.[xiv]

    3. The *Specialty Guidelines for Forensic Psychology* demand that forensic psychologists strive for accuracy, impartiality, fairness, and independence; and that they weigh all data, opinions, and rival hypotheses impartially.[xv] Forensic psychologists are expected to be unbiased and to avoid partisan presentation of unrepresentative, incomplete, or inaccurate evidence that might mislead finders of fact.[xvi] Among other requirements in the *Specialty Guidelines for Forensic Psychology*, forensic psychologists are expected to ordinarily avoid relying on one source of data and to corroborate important data when feasible.[xvii]

- One can be impaired by a serious mental illness without being incompetent to stand trial or not guilty by reason of insanity. Inclusion of Major Depressive Disorder and Bipolar II Disorder, like the inclusion of the other serious mental illnesses, is not to say the individual with the serious mental illness cannot understand the nature and objective of the proceedings against him or her, or assist in his or her defense (issues relevant to competence to stand trial); or that he or she did not understand the wrongfulness or his or her acts (an issue relevant to sanity). However, serious mental illnesses, including Major Depressive Disorder and Bipolar II Disorder, affect how people think, feel, act, and handle daily activities. Thus, serious mental illnesses can impact on, among other things, one's judgment, impulse control, reasoning, and decisions (even when they do not preclude the individual from being competent to stand trial and even when they do not make the person not guilty by reason of insanity).

Endnotes:

[i] https://www.nimh.nih.gov/health/topics/depression/index.shtml, retrieved 10-22-17.

[ii] https://www.cdc.gov/mentalhealth/basics/mental-illness/depression.htm, retrieved 10-22-17.
[iii] https://www.mayoclinic.org/diseases-conditions/depression/symptoms-causes/syc-20356007.
[iv] American Psychiatric Association. (2013). *Diagnostic and statistical manual of mental disorders* (5th ed.). Arlington, VA: Author.
[v] Id.
[vi] Id.
[vii] Id.
[viii] Id.
[ix] Id.
[x] Id.
[xi] Ohio Administrative Code 4732-17(H)(1) (Rules of Professional Conduct).
[xii] Ohio Administrative Code 4732-17(H)(2) (Rules of Professional Conduct).
[xiii] American Psychological Association. (2017). *Ethical principles of psychologists and code of conduct* (2002, Amended June 1, 2010 and January 1, 2017). Retrieved from http://www.apa.org/ethics/code/index.aspx
[xiv] Id.
[xv] American Psychological Association (2013). Specialty guidelines for forensic psychology, *American Psychologist, 68*, 7.19.
[xvi] Id.
[xvii] Id.